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THE CUSTOMS COURTS ACT

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HEARINGS

BEFORE

SUBCOMMITTEE NO. 3

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

SECOND SESSION

ON

S. 2624

TO IMPROVE THE JUDICIAL MACHINERY IN CUSTOMS
COURTS BY AMENDING THE STATUTORY PROVISIONS
RELATING TO JUDICIAL ACTIONS AND ADMINISTRATIVE
PROCEEDINGS IN CUSTOMS MATTERS, AND FOR OTHER
PURPOSES

JANUARY 22 AND 23, 1970

Serial No. 13

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THE CUSTOMS COURTS ACT

THURSDAY, JANUARY 22, 1970

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to call, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, St. Onge, Ryan, Mikva, Poff, Hutchinson, and Biester.

Staff members present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order.

This morning, Subcommittee No. 3 begins 2 days of public hearings on S. 2624, an act to improve the judicial machinery in the Customs Courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs matters, and for other purposes, and related House bills.

A copy of S. 2624 will be inserted in the record together with a copy of H.R. 12691, introduced by Judiciary Committee Chairman Celler. (The documents referred to follow:)

(1)

91ST CONGRESS
1ST SESSION

S. 2624

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 10, 1969

Referred to the Committee on the Judiciary

AN ACT

To improve the judicial machinery in customs courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs 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 TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

4 SHORT TITLE

5 SEC. 101. This title may be cited as "The Customs
6 Courts Act of 1969".

I

1 APPEALS FROM CUSTOMS COURT DECISIONS—
2 JURISDICTION

3 SEC. 102. Section 1541 to title 28 of the United States
4 Code is amended to read as follows:

5 "§ 1541. Appeals from Customs Court decisions

6 "(a) The Court of Customs and Patent Appeals has
7 jurisdiction of appeals from all final judgments or orders of
8 the United States Customs Court.

9 "(b) When the chief judge of the Customs Court
10 issues an order under the provisions of section 256 (b)
11 of this title; or when any judge in the Customs Court, in
12 issuing any other interlocutory order, includes in the order
13 a statement that a controlling question of law is involved as
14 to which there is substantial ground for difference of opinion
15 and that an immediate appeal from its order may materially
16 advance the ultimate termination of the litigation, the Court
17 of Customs and Patent Appeals may, in its discretion, per-
18 mit an appeal to be taken from such order, if application is
19 made to it within ten days after the entry of the order: *Pro-*
20 *vided, however,* That neither the application for nor the grant-
21 ing of an appeal hereunder stays proceedings in the Customs
22 Court unless a stay is ordered by a judge of the Customs
23 Court or by the Court of Customs and Patent Appeals or a
24 judge of that court."

1 APPEALS FROM CUSTOMS COURT DECISIONS—PROCEDURE

2 SEC. 103. Section 2601 of title 28 of the United States
3 Code is amended to read as follows:

4 "§ 2601. Appeals from Customs Court decisions

5 "(a) A party may appeal to the Court of Customs and
6 Patent Appeals from a final judgment or order of the Customs
7 Court within sixty days after entry of the judgment or order.

8 "(b) An appeal is made by filing in the office of the
9 clerk of the Court of Customs and Patent Appeals a notice
10 of appeal which shall include a concise statement of the errors
11 complained of. A copy of the notice shall be served on the
12 adverse parties. When the United States is an adverse party
13 service shall be made on the Attorney General and the Sec-
14 retary of the Treasury or their designees. Thereupon, the
15 Court of Customs and Patent Appeals shall order thecus-
16 toms Court to transmit the record and evidence taken, to-
17 gether with either the findings of fact and conclusions of
18 law or the opinion, as the case may be.

19 "(c) The Court of Customs and Patent Appeals may
20 affirm, modify, vacate, set aside, or reverse any judgment or
21 order of the Customs Court lawfully brought before it for
22 review, and may remand the cause and direct the entry of
23 an appropriate judgment or order, or require such further
24 proceedings as may be just under the circumstances. The

1 judgment or order of the Court of Customs and Patent Ap-
2 peals shall be final and conclusive unless modified, vacated,
3 set aside, reversed, or remanded by the Supreme Court under
4 section 2106 of this title.”

5 PRECEDENCE OF AMERICAN MANUFACTURER, PRODUCER,
6 OR WHOLESALE CASES

7 SEC. 104. Section 2602 of title 28 of the United States
8 Code is amended to read as follows:

9 “§ 2602. Precedence of American manufacturer, producer,
10 or wholesaler cases

11 “(a) Every proceeding in the Court of Customs and
12 Patent Appeals arising under section 516 of the Tariff Act
13 of 1930, as amended, shall be given precedence over other
14 cases on the docket of such court, except as provided for in
15 paragraph (b) of this section, and shall be assigned for hear-
16 ing at the earliest practicable date and expedited in every
17 way.

18 “(b) Appeals from findings by the Secretary of Com-
19 merce provided for in headnote 6 to schedule 8, part 4, of the
20 Tariff Schedules of the United States (19 U.S.C. 1202) shall
21 receive a preference over all other matters.”

22 DUTIES OF CHIEF JUDGE; PRECEDENCE OF JUDGES

23 SEC. 105. Section 253 of title 28 of the United States
24 Code is amended to read as follows:

1 “§ 253. Duties of chief judge; precedence of judges

2 “(a) The chief judge of the Customs Court, with the ap-
3 proval of the court, shall supervise the fiscal affairs and cler-
4 ical force of the court;

5 “(b) The chief judge shall promulgate dockets.

6 “(c) The chief judge, under rules of the court, may
7 designate any judge or judges of the court to try any case
8 and, when the circumstances so warrant, reassign the case
9 to another judge or judges.

10 “(d) Whenever the chief judge is unable to perform the
11 duties of his office or the office is vacant, his powers and
12 duties shall devolve upon the judge next in precedence who
13 is able to act, until such disability is removed or another chief
14 judge is appointed and duly qualified.

15 “(e) The chief judge shall have precedence and shall
16 preside at any session which he attends. Other judges shall
17 have precedence and shall preside according to the seniority
18 of their commissions. Judges whose commissions bear the
19 same date shall have precedence according to seniority in
20 age.”

21 SINGLE-JUDGE TRIALS

22 SEC. 106. Section 254 of title 28 of the United States
23 Code is amended to read as follows:

1 **"§ 254. Single-judge trials**

2 "Except as otherwise provided in section 255 of this
3 title, the judicial power of the Customs Court with respect to
4 any action, suit or proceeding shall be exercised by a single
5 judge, who may preside alone and hold a regular or special
6 session of court at the same time other sessions are held by
7 other judges."

8 **PUBLICATION OF DECISIONS**

9 SEC. 107. Section 255 of title 28 of the United States
10 Code is redesignated as section 257 and is amended to read
11 as follows:

12 **"§ 257. Publication of decisions**

13 "All decisions of the Customs Court shall be preserved
14 and open to inspection. The court shall forward copies of
15 each decision to the Secretary of the Treasury or his designee
16 and to the appropriate customs officer for the district in
17 which the case arose. The Secretary shall publish weekly
18 such decisions as he or the court may designate and abstracts
19 of all other decisions."

20 **THREE-JUDGE TRIALS**

21 SEC. 108. There shall be a new section 255 of title 28
22 of the United States Code as follows:

23 **"§ 255. Three-judge trials**

24 "(a) Upon application of any party to a cause of action,
25 or upon his own initiative, the chief judge of the Customs

1 Court shall designate any three judges of the court to hear
2 and determine any cause of action which the chief judge
3 finds: (1) raises an issue of the constitutionality of an Act
4 of Congress, a proclamation of the President or an Executive
5 order; or (2) has broad or significant implications in the
6 administration or interpretation of the customs laws.

7 “(b) A majority of the three judges designated may
8 hear and determine the cause of action and all questions
9 pending therein.”

10 TRIALS AT PORTS OTHER THAN NEW YORK

11 SEC. 109. There shall be a new section 256 of title 28
12 of the United States Code as follows:

13 “§ 256. Trials at ports other than New York

14 “(a) The chief judge may designate any judge or judges
15 of the court to proceed, together with necessary assistants,
16 to any port or to any place within the jurisdiction of the
17 United States to preside at a trial or hearing at the port or
18 place.

19 “(b) Upon application of a party or upon his own
20 initiative, and upon a showing that the interests of economy,
21 efficiency, and justice will be served, the chief judge may
22 issue an order authorizing a judge of the court to preside
23 in an evidentiary hearing in a foreign country whose laws
24 permit such a hearing: *Provided, however,* That an inter-
25 locutory appeal may be taken from such an order pursuant

1 to the provisions of section 1541 (b) of this title, subject to
2 the discretion of the Court of Customs and Patent Appeals
3 as set forth in that section."

4 JURISDICTION OF THE CUSTOMS COURT

5 SEC. 110. Section 1582 of title 28 of the United States
6 Code is amended to read as follows:

7 "§ 1582. Jurisdiction of the Customs Court

8 "(a) The Customs Court shall have exclusive jurisdic-
9 tion of civil actions instituted by any person whose protest
10 pursuant to the Tariff Act of 1930, as amended, has been
11 denied, in whole or in part, by the appropriate customs offi-
12 cer, where the administrative decision, including the legality
13 of all orders and findings entering into the same, involves:
14 (1) the appraised value of merchandise; (2) the classifica-
15 tion and rate and amount of duties chargeable; (3) all
16 charges or exactions of whatever character within the juris-
17 diction of the Secretary of the Treasury; (4) the exclusion
18 of merchandise from entry or delivery under any provisions
19 of the customs laws; (5) the liquidation or reliquidation of
20 an entry, or a modification thereof; (6) the refusal to pay a
21 claim for drawback; or (7) the refusal to reliquidate an
22 entry under section 520 (c) of the Tariff Act of 1930, as
23 amended.

24 "(b) The Customs Court shall have exclusive jurisdic-
25 tion of civil actions brought by American manufacturers,

1 producers, or wholesalers pursuant to section 516 of the
2 Tariff Act of 1930, as amended.

3 “(c) The Customs Court shall not have jurisdiction of
4 an action unless (1) either a protest has been filed, as pre-
5 scribed by section 514 of the Tariff Act of 1930, as amended,
6 and denied in accordance with the provisions of section 515
7 of the Tariff Act of 1930, as amended, or if the action
8 relates to a decision under section 516 of the Tariff Act of
9 1930, as amended, all remedies prescribed therein have been
10 exhausted, and (2) except in the case of an action relating
11 to a decision under section 516 of the Tariff Act of 1930, as
12 amended, all liquidated duties, charges or exactions have
13 been paid at the time the action is filed.

14 “(d) Only one civil action may be brought in the Cus-
15 toms Court to contest the denial of a single protest. However,
16 any number of entries of merchandise involving common
17 issues may be included in a single civil action. Actions may
18 be consolidated by order of the court or by request of the
19 parties, with approval of the court, if there are common
20 issues.”

21 REPEAL OF SECTION 1583—REVIEW OF DECISIONS ON
22 PROTESTS

23 SEC. 111. Section 1583 of title 28 of the United States
24 Code is repealed.

1 **TIME FOR COMMENCEMENT OF ACTION**

2 SEC. 112. Section 2631 of title 28 of the United States
3 Code is amended to read as follows:

4 **"§ 2631. Time for commencement of action**

5 “(a) An action over which the court has jurisdiction
6 under section 1582 (a) of this title is barred unless com-
7 menced within one hundred and eighty days after:

8 “(1) the date of mailing of notice of denial, in
9 whole or in part, of a protest pursuant to the provisions
10 of section 515 (a) of the Tariff Act of 1930, as amended;
11 or

12 “(2) the date of denial of a protest by operation
13 of law pursuant to the provisions of section 515 (b) of
14 the Tariff Act of 1930, as amended.

15 “(b) An action over which the court has jurisdiction
16 under section 1582 (b) of this title is barred unless com-
17 menced within thirty days after the date of mailing of a
18 notice sent pursuant to section 516 (c) of the Tariff Act of
19 1930, as amended.”

20 **CUSTOMS COURT PROCEDURE AND FEES**

21 SEC. 113. Section 2632 of title 28 of the United States
22 Code is amended to read as follows:

23 **"§ 2632. Customs Court procedure and fees**

24 “(a) A party may contest denial of a protest under
25 section 515 of the Tariff Act of 1930, as amended, or the

1 decision of the Secretary of the Treasury made under sec-
2 tion 516 of the Tariff Act of 1930, as amended, by bringing
3 a civil action in the Customs Court. A civil action shall be
4 commenced by filing a summons in the form, manner, and
5 style and with the content prescribed in rules adopted by the
6 court.

7 “(b) There shall be a filing fee payable upon com-
8 mencing an action. The amount of the fee shall be fixed by
9 the Customs Court but shall be not less than \$5 nor more
10 than the filing fee for commencing a civil action in a
11 United States district court. The Customs Court may fix
12 all other fees to be charged by the clerk of the court.

13 “(c) The Customs Court shall provide by rule for
14 pleadings and other papers, for their amendment, service,
15 and filing, for consolidations, severances, and suspensions of
16 cases, and for other procedural matters.

17 “(d) The Customs Court, by rule, may consider any
18 new ground in support of a civil action if the new ground
19 (1) applies to the same merchandise that was the subject of
20 the protest; and (2) is related to the same administrative
21 decision or decisions listed in section 514 of the Tariff Act of
22 1930, as amended, that were contested in the protest.

23 “(e) All pleadings and other papers filed in the Customs
24 Court shall be served on all the adverse parties in accordance

1 with the rules of the court. When the United States is an
 2 adverse party, service of the summons shall be made on the
 3 Attorney General and the Secretary of the Treasury or their
 4 designees.

5 “(f) Upon service of the summons on the Secretary
 6 of the Treasury or his designee, the appropriate customs
 7 officer shall forthwith transmit the following items, if they
 8 exist, to the United States Customs Court as part of the
 9 official record of the civil action: (1) consumption or
 10 other entry; (2) commercial invoice; (3) special Customs
 11 invoice; (4) copy of protest; (5) copy of denial of protest in
 12 whole or in part; (6) importer's exhibits; (7) official
 13 samples; (8) any official laboratory reports; and (9) the
 14 summary sheet. If any of the aforesaid items do not exist in
 15 the particular case, an affirmative statement to that effect
 16 shall be transmitted as part of the official record.”

17 PRECEDENCE OF AMERICAN MANUFACTURER, PRODUCER,
 18 OR WHOLESALE CASES

19 SEC. 114. Section 2633 of title 28 of the United States
 20 Code is amended to read as follows:

21 “§ 2633. Precedence of American manufacturer, producer,
 22 or wholesaler cases

23 “Every proceeding in the Customs Court arising under
 24 section 516 of the Tariff Act of 1930, as amended, shall be
 25 given precedence over other cases on the docket of the court,

1 and shall be assigned for hearing and trial at the earliest
2 practicable date and expedited in every way."

3

NOTICE

4 SEC. 115. Section 2634 of title 28 of the United States
5 Code is amended to read as follows:

6 **"§ 2634. Notice**

7 "Reasonable notice of the time and place of trial before
8 a judge of the Customs Court shall be given to all parties to
9 any proceeding, under rules prescribed by the court."

10

BURDEN OF PROOF; EVIDENCE OF VALUE

11

SEC. 116. Section 2635 of title 28 of the United States
12 Code is amended to read as follows:

13 **"§ 2635. Burden of proof; evidence of value**

14

"In any matter in the Customs Court:

15

"(a) The decision of the Secretary of the Treasury, or
16 his delegate, is presumed to be correct. The burden to prove
17 otherwise shall rest upon the party challenging a decision.

18

"(b) Where the value of merchandise is in issue:

19

"(1) Reports or depositions of consuls, customs officers,
20 and other officers of the United States and depositions and
21 affidavits of other persons whose attendance cannot reason-
22 ably be had, may be admitted in evidence when served
23 upon the opposing party in accordance with the rules of the
24 court.

1 “(2) Price lists and catalogs may be admitted in
2 evidence when duly authenticated, relevant, and material.

3 “(c) The value of merchandise shall be determined
4 from the evidence in the record and that adduced at the
5 trial whether or not the merchandise or samples thereof are
6 available for examination.”

7 ANALYSIS OF IMPORTED MERCHANDISE

8 SEC. 117. Section 2636 of title 28 of the United States
9 Code is amended to read as follows:

10 “§ 2636. Analysis of imported merchandise

11 “A judge of the Customs Court may order an analysis of
12 imported merchandise and reports thereon by laboratories
13 or agencies of the United States.”

14 WITNESSES; INSPECTION OF DOCUMENTS

15 SEC. 118. Section 2637 of title 28 of the United States
16 Code is amended to read as follows:

17 “§ 2637. Witnesses; inspection of documents

18 “(a) In any proceeding in the Customs Court, under
19 rules prescribed by the court, the parties and their attorneys
20 shall have an opportunity to introduce evidence, to hear and
21 cross-examine the witnesses of the other party, and to inspect
22 all samples and all papers admitted or offered as evidence,
23 except as provided in subsection (b) of this section.

24 “(b) In an action instituted by an American manufac-
25 turer, producer, or wholesaler, the plaintiff may not inspect

1 any documents or papers of a consignee or importer dis-
 2 closing any information which the Customs Court deems
 3 unnecessary or improper to be disclosed."

4 DECISIONS; FINDINGS OF FACT AND CONCLUSIONS OF LAW;

5 EFFECT OF OPINIONS

6 SEC. 119. Section 2638 of title 28 of the United States
 7 Code is amended to read as follows:

8 "§ 2638. Decisions; findings of fact and conclusions of law;
 9 effect of opinions

10 "(a) A decision of the judge in a contested case shall
 11 be supported by either (1) a statement of findings of fact
 12 and conclusions of law, or (2) an opinion stating the reasons
 13 and facts upon which the decision is based.

14 "(b) The decision of the judge is final and conclusive,
 15 unless a retrial or rehearing is granted pursuant to section
 16 2639 of this title or an appeal is made to the Court of Cus-
 17 toms and Patent Appeals within the time and in the manner
 18 provided in section 2601 of this title."

19 RETRIAL OR REHEARING

20 SEC. 120. Section 2639 of title 28 of the United States
 21 Code is amended to read as follows:

22 "§ 2639. Retrial or rehearing

23 "The judge who has rendered a judgment or order may,
 24 upon motion of a party or up on his own motion, grant a
 25 retrial or a rehearing, as the case may be. A party's motion

1 must be made or the judge's action on his own motion must be
 2 taken, not later than thirty days after entry of the judgment
 3 or order."

4 REPEAL OF SECTIONS 2640, 2641, 2542—REHEARING OR
 5 RETRIAL; FRIVOLOUS PROTEST OR APPEAL; AMEND-
 6 MENT OF PROTESTS, APPEALS, AND PLEADINGS
 7 SEC. 121. Sections 2640, 2641, and 2642 of title 28 of
 8 the United States Code are repealed.

9 EFFECTIVE DATE

10 SEC. 122. (a) This title shall become effective on
 11 July 1, 1970, and shall thereafter apply to all actions and
 12 proceedings in the Customs Court and the Court of Customs
 13 and Patent Appeals except those involving merchandise
 14 entered before the effective date for which trial has com-
 15 menced by such effective date.

16 (b) An appeal for reappraisement timely filed with the
 17 Bureau of Customs before the effective date, but as to which
 18 trial has not commenced by such date, shall be deemed to
 19 have had a summons timely and properly filed under this
 20 title. When the judgment or order of the United States
 21 Customs Court has become final in this appeal, the papers
 22 shall be returned to the appropriate customs officer to decide
 23 any remaining matters relating to the entry in accordance
 24 with section 500 of the Tariff Act of 1930, as amended. A
 25 protest or summons filed after final decision on an appeal

1 for reappraisement shall not include issues which were
2 raised or could have been raised on the appeal for reap-
3 praisement.

4 (c) A protest timely filed with the Bureau of Customs
5 before the effective date of enactment of this Act and which
6 is disallowed, as to which trial has not commenced by such
7 date, shall be deemed to have had a summons timely and
8 properly filed under this title.

9 (d) All other provisions of this Act shall apply to ap-
10 peals and disallowed protests deemed to have had summonses
11 timely and properly filed under this section.

12 MISCELLANEOUS AMENDMENTS

13 SEC. 123. (a) The analysis of chapter 11 of title 28 of
14 the United States Code, immediately preceding section 251
15 of such title, is amended by striking the caption of section
16 254 and substituting therefor the caption, "Single-judge
17 trial.", by striking the caption of section 255 and substitut-
18 ing therefor the caption "Three-judge trials." and by adding
19 the following captions at the end of the analysis of that
20 chapter:

"256. Trials at ports other than New York.

"257. Publication of decisions."

21 (b) The analysis of chapter 93 of title 28 of the United
22 States Code, immediately preceding section 1541 of such

1 title is amended by striking the caption of section 1541 and
2 substituting the caption "Appeals from Customs Court decisions."

3 (c) The analysis of chapter 95 of title 28 of the United
4 States Code, immediately preceding section 1581 of such
5 title, is amended to read as follows:

"Sec.

"1581. Powers generally.

"1582. Jurisdiction of the Customs Court."

6 (d) The analysis of chapter 167 of title 28 of the United
7 States Code, immediately preceding section 2601, is amended
8 to read as follows:

"Sec.

"2601. Appeals from Customs Court decisions.

"2602. Precedence of American manufacturer, producer, or wholesaler
cases."

9 (e) The analysis of chapter 169 of title 28 of the United
10 States Code, immediately preceding section 2631 of such title
11 is amended to read as follows:

"Sec.

"2631. Time for commencement of action.

"2632. Customs Court procedures and fees.

"2633. Precedence of American manufacturer, producer, or wholesaler
cases.

"2634. Notice.

"2635. Burden of proof; evidence of value.

"2636. Analysis of imported merchandise.

"2637. Witnesses; inspection of documents.

"2638. Decisions; findings of fact and conclusions of law; effect of
opinions.

"2639. Retrial or rehearing."

12 TITLE II—ADMINISTRATIVE PROCEEDINGS IN 13 CUSTOMS MATTERS

14 SHORT TITLE

15 SEC. 201. Titles II and III of this Act may be cited as
16 "The Customs Administrative Act of 1969".

1 AMENDMENT OF SECTIONS

2 SEC. 202. Unless otherwise provided, whenever in this
3 Act an amendment or repeal is expressed in terms of an
4 amendment to, or repeal of, a section or provision of the
5 Tariff Act, the reference shall be considered to be made to a
6 section or provision of the Tariff Act of 1930, as amended
7 (19 U.S.C. 1202 et seq.).

8 EFFECTIVE DATE

9 SEC. 203. Titles II and III of this Act shall take effect
10 with respect to articles entered, or withdrawn from ware-
11 house for consumption, on or after July 1, 1970, and such
12 other articles entered or withdrawn from warehouse for con-
13 sumption prior to such date, the appraisement of which has
14 not become final before July 1, 1970, and for which an
15 appeal for reappraisement has not been timely filed with the
16 Bureau of Customs before July 1, 1970, or with respect to
17 which a protest has not been disallowed in whole or in part
18 before July 1, 1970.

19 APPRAISEMENT, CLASSIFICATION, AND LIQUIDATION PRO-
20 CEDURES; COLLECTIONS AND REFUNDS; LIMITATIONS

21 SEC. 204. (a) Section 500 of the Tariff Act (19 U.S.C.
22 1500) is hereby amended to read as follows:

23 "SEC. 500. APPRAISEMENT, CLASSIFICATION, AND
24 LIQUIDATION PROCEDURES.—

25 "The appropriate customs officer shall, under rules and
26 regulations prescribed by the Secretary—

1 “(a) appraise merchandise in the unit of quantity
2 in which the merchandise is usually bought and sold by
3 ascertaining or estimating the value thereof by all rea-
4 sonable ways and means in his power, any statement
5 of cost or costs of production in any invoice, affidavit,
6 declaration, or other document to the contrary notwith-
7 standing;

8 “(b) ascertain the classification and rate of duty
9 applicable to such merchandise;

10 “(c) fix the amount of duty to be paid on such mer-
11 chandise and determine any increased or additional duties
12 due or any excess of duties deposited;

13 “(d) liquidate the entry of such merchandise; and

14 “(e) give notice of such liquidation to the importer,
15 his consignee, or agent in such form and manner as the
16 Secretary shall prescribe in such regulations.”

17 (b) Section 488 of the Tariff Act (19 U.S.C. 1488) is
18 repealed.

19 (c) Section 505 of the Tariff Act (19 U.S.C. 1505) is
20 amended to read as follows:

21 “SEC. 505. PAYMENT OF DUTIES.—

22 “(a) DEPOSIT OF ESTIMATED DUTIES.—Unless mer-
23 chandise is entered for warehouse or transportation, or under
24 bond, the consignee shall deposit with the appropriate cus-
25 toms officer at the time of making entry the amount of duties
26 estimated by such customs officer to be payable thereon.

1 “(b) COLLECTION OR REFUND.—The appropriate cus-
 2 toms officer shall collect any increased or additional duties
 3 due or refund any excess of duties deposited as determined
 4 on a liquidation or reliquidation.

5 REPEAL OF SEPARATE APPRAISEMENT PROCEDURE;

6 VOLUNTARY RELIQUIDATIONS

7 SEC. 205. Section 501 of the Tariff Act (19 U.S.C.
 8 1501) is amended to read as follows:

9 “SEC. 501. VOLUNTARY RELIQUIDATIONS.—

10 “A liquidation made in accordance with section 500 or
 11 any reliquidation thereof made in accordance with this sec-
 12 tion may be reliquidated in any respect by the appropriate
 13 customs officer on his own initiative, notwithstanding the
 14 filing of a protest, within ninety days from the date on which
 15 notice of the original liquidation is given to the importer, his
 16 consignee or agent. Notice of such reliquidation shall be
 17 given in the manner prescribed with respect to original
 18 liquidations under section 500 (e).”

19 DUTIABLE VALUE

20 SEC. 206. Section 503 of the Tariff Act (19 U.S.C.
 21 1503) is amended to read as follows:

22 “SEC. 503. DUITABLE VALUE.—

23 “Except as provided in section 520 (c) (relating to re-
 24 liquidations on the basis of authorized corrections of errors)
 25 or section 562 (relating to withdrawal from manipulating

1 warehouses) of this Act, the basis for the assessment of duties
 2 on imported merchandise subject to ad valorem rates of duty
 3 or rates based upon or regulated in any manner by the value
 4 of the merchandise, shall be the appraised value determined
 5 upon liquidation, in accordance with section 500 or any ad-
 6 justment thereof made pursuant to section 501 of the Tariff
 7 Act: *Provided, however,* That if reliquidation is required
 8 pursuant to a final judgment or order of the United States
 9 Customs Court which includes a reappraisement of imported
 10 merchandise, the basis for such assessment shall be the final
 11 appraised value determined by such court."

12 PROTESTS

13 SEC. 207. Section 514 of the Tariff Act (19 U.S.C.
 14 1514) is amended to read as follows:

15 "SEC. 514. FINALITY OF DECISIONS; PROTESTS.—

16 "(a) FINALITY OF DECISIONS.—Except as provided in
 17 section 501 (relating to voluntary reliquidations), section
 18 516 (relating to petitions by American manufacturers, pro-
 19 ducers, and wholesalers), section 520 (relating to refunds
 20 and errors), and section 521 (relating to reliquidations on ac-
 21 count of fraud) of this Act, decisions of the appropriate cus-
 22 toms officer, including the legality of all orders and findings
 23 entering into the same, as to—

24 "(1) the appraised value of merchandise;

25 "(2) the classification and rate and amount of
 26 duties chargeable;

1 “(3) all charges or exactions of whatever charac-
2 ter within the jurisdiction of the Secretary of the
3 Treasury;

4 “(4) the exclusion of merchandise from entry or
5 delivery under any provision of the customs laws;

6 “(5) the liquidation or reliquidation of an entry, or
7 any modification thereof;

8 “(6) the refusal to pay a claim for drawback; and

9 “(7) the refusal to reliquidate an entry under sec-
10 tion 520 (c) of this Act,

11 shall be final and conclusive upon all persons (including the
12 United States and any officer thereof) unless a protest is filed
13 in accordance with this section, or unless a civil action con-
14 testing the denial of a protest, in whole or in part, is com-
15 menced in the United States Customs Court in accordance
16 with section 2632 of title 28 of the United States Code
17 within the time prescribed by section 2631 of that title.
18 When a judgment or order of the United States Customs
19 Court has become final, the papers transmitted shall be re-
20 turned, together with a copy of the judgment or order to the
21 appropriate customs officer, who shall take action accordingly.

22 “PROTESTS

23 “(b) (1) IN GENERAL.—A protest of a decision under
24 subsection (a) shall be filed in writing with the appropriate
25 customs officer designated in regulations prescribed by the

1 Secretary, setting forth distinctly and specifically each deci-
2 sion described in subsection (a) as to which protest is
3 made; each category of merchandise affected by each such
4 decision as to which protest is made; and the nature of each
5 objection and reasons therefor. Only one protest may be filed
6 for each entry of merchandise, except that where the entry
7 covers merchandise of different categories, separate protests
8 may be filed for each category. In addition, separate claims
9 with respect to any one category of merchandise that is the
10 subject of a protest are deemed to be part of a single protest.
11 A protest may be amended under regulations prescribed
12 by the Secretary any time prior to the expiration of the
13 ninety-day period in which the protest could have been filed
14 under section 514 of this Act. Except as otherwise provided
15 in section 557 (b) of this Act, protests may be filed by the
16 importer, consignee, or any authorized agent of the person
17 paying any charge or exaction, or filing any claim for draw-
18 back, or seeking entry or delivery, with respect to mer-
19 chandise which is the subject of a decision in subsection (a).
20 “(2) TIME FOR FILING.—A protest of a decision,
21 order, or finding described in subsection (a) shall be filed
22 with such customs officer within ninety days after but not
23 before—
24 “(A) notice of liquidation or reliquidation, or
25 “(B) in circumstances where subparagraph (A)

1 is inapplicable, the date of the decision as to which
 2 protest is made.

3 “(c) LIMITATION ON PROTEST OF RELIQUIDATIONS.—

4 The reliquidation of an entry shall not open such entry so that
 5 a protest may be filed against the decision of the customs
 6 officer upon any question not involved in such reliquidation.”

7 REVIEW OF PROTESTS

8 SEC. 208. Section 515 of the Tariff Act (19 U.S.C.
 9 1515) is amended to read as follows:

10 “SEC. 515. REVIEW OF PROTESTS.—

11 “(a) ADMINISTRATIVE REVIEW AND MODIFICATION

12 OF DECISIONS.—Unless a request for an accelerated disposi-
 13 tion of a protest is filed in accordance with subsection (b) of

14 this section the appropriate customs officer, within two years

15 from the date a protest was filed in accordance with section

16 514 of this Act, shall review the protest and shall allow or

17 deny such protest in whole or in part. Thereafter, any duties,

18 charge, or exaction found to have been assessed or collected in

19 excess shall be remitted or refunded and any drawback found

20 due shall be paid. Upon the request of the protesting party,

21 filed within the time allowed for the filing of a protest under

22 section 514 of this Act, a protest may be subject to further

23 review by another appropriate customs officer, under the cir-

24 cumstances and in the form and manner that may be pre-

1 scribed by the Secretary in regulations, but subject to the two-
 2 year limitation prescribed in the first sentence of the subsec-
 3 tion. Notice of the denial of any protest shall be mailed in the
 4 form and manner prescribed by the Secretary.

5 “(b) REQUEST FOR ACCELERATED DISPOSITION OF
 6 PROTEST.—A request for accelerated disposition of a protest
 7 filed in accordance with section 514 of this Act may be mailed
 8 by certified or registered mail to the appropriate customs
 9 officer any time after ninety days following the filing of such
 10 protest. For purposes of section 1582 of title 28 of the United
 11 States Code, a protest which has not been allowed or denied
 12 in whole or in part within thirty days following the date of
 13 mailing by certified or registered mail of a request for
 14 accelerated disposition shall be deemed denied on the
 15 thirtieth day following mailing of such request.”

16 PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS,
 17 OR WHOLESALERS

18 SEC. 209. Section 516 of the Tariff Act (19 U.S.C.
 19 1516) is amended to read as follows:

20 “SEC. 516. PETITIONS BY AMERICAN MANUFAC-
 21 TURERS, PRODUCERS, OR WHOLESALERS—VALUE AND
 22 CLASSIFICATION.—

23 “(a) The Secretary shall, upon written request by an
 24 American manufacturer, producer, or wholesaler, furnish the
 25 classification, and the rate of duty, if any, imposed upon

1 designated imported merchandise of a class or kind manu-
2 factured, produced, or sold at wholesale by him. If such
3 manufacturer, producer, or wholesaler believes that the ap-
4 praised value is too low, that the classification is not correct,
5 or that the proper rate of duty is not being assessed, he may
6 file a petition with the Secretary setting forth (1) a descrip-
7 tion of the merchandise, (2) the appraised value, the classi-
8 fication, or the rate or rates of duty that he believes proper,
9 and (3) the reasons for his belief.

10 “(b) If, after receipt and consideration of a petition
11 filed by an American manufacturer, producer, or wholesaler,
12 the Secretary decides that the appraised value of the mer-
13 chandise is too low, or that the classification of the article or
14 rate of duty assessed thereon is not correct, he shall determine
15 the proper appraised value or classification or rate of duty,
16 and notify the petitioner of his determination. All such mer-
17 chandise entered for consumption or withdrawn from ware-
18 house for consumption more than thirty days after the date
19 such notice to the petitioner is published in the weekly
20 Customs Bulletin shall be appraised or classified or assessed
21 as to rate of duty in accordance with the Secretary’s
22 determination.

23 “(c) If the Secretary decides that the appraised value
24 or classification of the articles or the rate of duty with respect
25 to which a petition was filed pursuant to subsection (a) is

1 correct, he shall so inform the petitioner. If dissatisfied with
2 the decision of the Secretary, the petitioner may file with
3 the Secretary, not later than thirty days after the date of the
4 decision, notice that he desires to contest the appraised value
5 or classification of, or rate or duty assessed upon, the mer-
6 chandise. Upon receipt of notice from the petitioner, the
7 Secretary shall cause publication to be made of his decision
8 as to the proper appraised value or classification or rate of
9 duty and of the petitioner's desire to contest, and shall there-
10 after furnish the petitioner with such information as to the
11 entries and consignees of such merchandise, entered after the
12 publication of the decision of the Secretary at such ports of
13 entry designated by the petitioner in his notice of desire to
14 contest, as will enable the petitioner to contest the appraised
15 value or classification of, or rate of duty imposed upon, such
16 merchandise in the liquidation of one such entry at such port.
17 The Secretary shall direct the appropriate customs officer at
18 such ports to notify the petitioner by mail immediately when
19 the first of such entries is liquidated.

20 “(d) Notwithstanding the filing of an action pursuant
21 to section 2632 of title 28 of the United States Code, mer-
22 chandise of the character covered by the published decision
23 of the Secretary (when entered for consumption or with-
24 drawn from warehouse for consumption on or before the
25 date of publication of a decision of the United States Customs

1 Court or of the United States Court of Customs and Patent
2 Appeals, not in harmony with the published decision of the
3 Secretary) shall be appraised or classified, or both, and the
4 entries liquidated, in accordance with the decision of the
5 Secretary and, except as otherwise provided in this chapter,
6 the final liquidations of these entries shall be conclusive upon
7 all parties.

8 “(e) The consignee or his agent shall have the right to
9 appear and to be heard as a party in interest before the
10 United States Customs Court.

11 “(f) If the cause of action is sustained in whole or in
12 part by a decision of the United States Customs Court or of
13 the United States Court of Customs and Patent Appeals,
14 merchandise of the character covered by the published de-
15 cision of the Secretary, which is entered for consumption
16 or withdrawn from warehouse for consumption after the date
17 of publication of the court decision, shall be subject to
18 appraisement, classification, and assessment of duty in ac-
19 cordance with the final judicial decision in the action, and
20 the liquidation of entries covering the merchandise so entered
21 or withdrawn shall be suspended until final disposition is
22 made of the action, whereupon the entries shall be liquidated,
23 or if necessary, reliquidated in accordance with the final
24 decision.

1 “(g) Regulations shall be prescribed by the Secretary
2 to implement the procedures required under this section.”

3 REFUNDS AND ERRORS

4 SEC. 210. Section 520 (c) of the Tariff Act (19 U.S.C.
5 1520 (c)) is amended by—

6 (a) striking the words “the Secretary of the Treas-
7 ury may authorize a collector to” and substituting the
8 words “the appropriate customs officer may, in accord-
9 ance with regulations prescribed by the Secretary,”;

10 (b) striking the word “appraisement,” wherever it
11 appears in paragraph (1) ; and

12 (c) deleting “sixty” and substituting “ninety” and
13 deleting “ten” and substituting “nine” in paragraph (1) .

14 TITLE III—MISCELLANEOUS AMENDMENTS

15 TECHNICAL AND CONFORMING AMENDMENTS

16 SEC. 301. The Tariff Act of 1930, as amended (19
17 U.S.C. ch. 4) , is further amended as follows:

18 (a) Section 305 (19 U.S.C. 1305) is amended by—

19 (1) striking the word “collector” in the first para-
20 graph and inserting in lieu thereof “appropriate customs
21 officer”; and

22 (2) striking the term “the collector” where it first
23 appears in the second paragraph and inserting in lieu
24 thereof “the appropriate customs officer” and by striking
25 the term “the collector” wherever it thereafter appears

1 in the paragraph and inserting in lieu thereof "such
2 customs officer".

3 (b) Sections 311, 315, 432, 434, 438, 441, 443-447,
4 449-450, 452-455, 457, 485, 490, 492, 496, 521, 555, 562,
5 584, 586, 609, 613, and 614 (19 U.S.C. 1311, 1315, 1432,
6 1434, 1438, 1441, 1443-1447, 1449-1450, 1452-1455,
7 1457, 1485, 1490, 1492, 1496, 1521, 1555, 1562, 1584,
8 1586, 1609, 1613, and 1614) are amended by striking the
9 word "collector" wherever it appears in the sections and
10 inserting in lieu thereof "appropriate customs officer".

11 (c) Section 401 (10 U.S.C. 1401) is amended by—

12 (1) striking subsections (h), (i), and (j);

13 (2) redesignating subsections (k), (l), (m), and

14 (n) as subsections (h), (i), (j), and (k), respectively,

15 and amending redesignated subsection (i) to read as

16 follows:

17 "(i) OFFICER OF THE CUSTOMS: CUSTOMS OFFI-
18 CER.—The terms 'officer of the customs' and 'customs officer'
19 mean any officer of the Bureau of Customs of the Treasury
20 Department (also hereinafter referred to as the 'Customs
21 Service') or any commissioned, warrant, or petty officer of
22 the Coast Guard, or any agent or other person authorized by
23 law or designated by the Secretary of the Treasury to per-
24 form any duties of an officer of the Customs Service."

1 (3) adding a new subsection (1) to read as
2 follows:

3 “(1) SECRETARY.—The term ‘Secretary’ means the
4 Secretary of the Treasury or his delegate.”

5 (d) Section 402a (19 U.S.C. 1402) is amended by—

6 (1) striking the word “appraiser” wherever it ap-
7 pears in the section and inserting in lieu thereof “appro-
8 priate customs officer”; and

9 (2) striking the word “APPRAISER’S” in the head-
10 ing of subsection (b) and inserting in lieu thereof “CUS-
11 TOMS OFFICER’S”.

12 (3) striking the words “subject to review in re-
13 appraisal proceedings under section 501” and in-
14 serting in lieu thereof “subject to protest in accordance
15 with section 514”.

16 (e) Sections 448, 493, and 608 (19 U.S.C. 1448, 1493,
17 and 1608) are amended by striking the term “the collector”
18 where it first appears in each section and inserting in lieu
19 thereof “the appropriate customs officer” and by striking the
20 term “the collector” wherever it thereafter appears in each
21 section and inserting in lieu thereof “such customs officer”.

22 (f) Section 451 (19 U.S.C. 1451) is amended by—

23 (1) striking the word “collector” where it appears
24 the first time in the section and inserting in lieu thereof
25 “appropriate customs officer”;

1 (2) striking out the word "collector" where it ap-
2 pends the second time in the section and inserting in
3 lieu thereof "such customs officer"; and

4 (3) striking the word "collector" where it appears
5 the third time in the section and inserting in lieu thereof
6 "appropriate customs officer".

7 (g) Section 467 (19 U.S.C. 1467) is amended by
8 striking the words "collector of customs" and inserting in
9 lieu thereof "appropriate customs officer".

10 (h) Section 482 (19 U.S.C. 1482) is amended as
11 follows—

12 (1) subsection (e) is amended by striking the term
13 "collector of customs" and inserting in lieu thereof
14 "appropriate customs officer"; and

15 (2) subsection (f) is amended by striking "col-
16 lector of customs or the person acting as such, or by
17 his deputy" and inserting in lieu thereof "appropriate
18 customs officer".

19 (i) Section 484 (19 U.S.C. 1484) is amended as
20 follows—

21 (1) subsection (a) is amended by striking the
22 word "collector" and inserting in lieu thereof "appro-
23 priate customs officer";

24 (2) paragraph (1) of subsection (c) is amended

1 by striking the term "the collector" where it first ap-
2 pears in the paragraph and inserting in lieu thereof "the
3 appropriate customs officer" and by striking the term
4 "the collector" where it thereafter appears in the para-
5 graph and inserting in lieu thereof "such customs
6 officer";

7 (3) paragraph (2) of subsection (c) is amended
8 by striking the term "The collector" and inserting in
9 lieu thereof "The appropriate customs officer" and by
10 striking the term "the collector" wherever it appears
11 in the paragraph and inserting in lieu thereof "such
12 customs officer";

13 (4) subsection (g) is amended by striking the
14 term "collector or the appraiser" and inserting in lieu
15 thereof "appropriate customs officer";

16 (5) the second and third sentences of subsection
17 (j) are amended by striking the word "collector" and
18 inserting in lieu thereof "customs officer"; and

19 (6) The fourth sentence of subsection (j) is
20 amended by striking the term "a collector" and insert-
21 ing in lieu thereof "a customs officer" and by striking
22 the terms "the collector" and "such collector" and in-
23 serting in lieu thereof "such customs officer".

24 (j) Section 491 (19 U.S.C. 1491) is amended by
25 striking the words "by the appraiser of merchandise and

1 sold by the collector" and inserting in lieu thereof "and sold
2 by the appropriate customs officer".

3 (k) Section 499 (19 U.S.C. 1499) is amended as
4 follows—

5 (1) the first sentence is amended by striking the
6 word "appraiser" and inserting in lieu thereof "appro-
7 priate customs officer";

8 (2) the second sentence is amended by striking
9 the term "The collector" and inserting in lieu thereof
10 "Such officer";

11 (3) the fifth sentence is amended to read: "Such
12 officer may require such additional packages or quanti-
13 ties as he may deem necessary.";

14 (4) the sixth sentence is amended to read: "If any
15 package contains any article not specified in the invoice
16 and, in the opinion of the appropriate customs officer,
17 such article was omitted from the invoice with fraudulent
18 intent on the part of the seller, shipper, owner, or agent,
19 the contents of the entire package in which such article
20 is found shall be subject to seizure, but if no such fraudu-
21 lent intent is apparent, then the value of said article shall
22 be added to the entry and the duties thereon paid ac-
23 cordingly.";

24 (5) the seventh sentence is amended by striking

1 the word "collector" and inserting in lieu thereof "ap-
2 propriate customs officer"; and

3 (6) the last sentence is amended by striking the
4 words "appraiser's return of value" and inserting in
5 lieu thereof "appraisement" and by striking the words
6 "value returned by the appraiser" and inserting in lieu
7 thereof "appraisement".

8 (l) Section 502 (19 U.S.C. 1502) is amended by strik-
9 ing the words "appraiser, deputy appraiser, assistant ap-
10 praiser, or examiner of merchandise" and inserting in lieu
11 thereof "customs officer".

12 (m) Section 506 (19 U.S.C. 1506) is amended as fol-
13 lows:

14 (1) paragraph (1) is amended by striking the
15 term "the collector" where it first appears in the para-
16 graph and inserting in lieu thereof "the appropriate
17 customs officer" and by striking the term "the collector"
18 where it thereafter appears in the paragraph and in-
19 serting in lieu thereof "such customs officer"; and

20 (2) paragraph (2) is amended by striking the
21 word "collector" and inserting in lieu thereof "appro-
22 priate customs officer".

23 (n) Section 509 (19 U.S.C. 1509) is amended by
24 striking the term "Collectors and appraisers" and inserting
25 in lieu thereof "Appropriate customs officers".

1 (o) Section 510 (19 U.S.C. 1510) is amended by—

2 (1) striking the words “or a division of such
3 court,” the first time they appear;

4 (2) striking “or an appraiser, or a collector” and
5 inserting in lieu thereof “or an appropriate customs
6 officer”;

7 (3) striking “an appraiser” and inserting in lieu
8 thereof “an appropriate customs officer, or”;

9 (4) striking the words “or a division of such court,”
10 the second and third times they appear; and

11 (5) striking “or appraiser or collector” and insert-
12 ing in lieu thereof “or appropriate customs officer”.

13 (p) Section 511 (19 U.S.C. 1511) is amended by—

14 (1) striking the words “or an appraiser, or person
15 acting as appraiser, or a collector” and inserting in lieu
16 thereof “or an appropriate customs officer”;

17 (2) striking the term “the collectors” and inserting
18 in lieu thereof “customs officers”; and

19 (3) striking the term “the collector” and inserting
20 in lieu thereof “the appropriate customs officer”.

21 (q) Section 512 (19 U.S.C. 1512) is amended by—

22 (1) striking the word “collector” and inserting in
23 lieu thereof “customs officer”; and

24 (2) striking the word “collectors” and inserting in
25 lieu thereof “customs officers”.

1 (r) Section 513 (19 U.S.C. 1513) is amended by
2 striking the word "COLLECTOR'S" in the heading thereof and
3 inserting in lieu thereof "CUSTOMS OFFICER'S" and by strik-
4 ing the words "collector or other" wherever they appear in
5 the section.

6 (s) Section 523 (19 U.S.C. 1523) is amended by
7 striking the word "collectors'" and inserting in lieu thereof
8 "customs officers'".

9 (t) The fifth sentence of section 557 (b) (19 U.S.C.
10 1557 (b)) is amended by striking the words "an appeal for
11 reappraisalment under section 501" and inserting in lieu
12 thereof "a protest contesting an appraisalment decision in
13 accordance with section 514".

14 (u) Section 560 (19 U.S.C. 1560) is amended by
15 striking the words "collector or other".

16 (v) Section 563 (19 U.S.C. 1563) is amended by—

17 (1) striking the term "collectors of customs" and
18 inserting in lieu thereof "appropriate customs officers";
19 and

20 (2) striking the word "collector" and inserting in
21 lieu thereof "customs officer".

22 (w) Section 564 (19 U.S.C. 1564) is amended by
23 striking the term "collector of customs" and inserting in lieu
24 thereof "customs officer".

25 (x) Section 565 (19 U.S.C. 1565) is amended by—

1 (1) striking the term "collector of customs" and
2 inserting in lieu thereof "appropriate customs officer";
3 and

4 (2) striking the word "collector" wherever it there-
5 after appears in the section and inserting in lieu thereof
6 "customs officer".

7 (y) Section 595 (19 U.S.C. 1595) is amended by
8 striking the words "collector of customs or other".

9 (z) Section 602 (19 U.S.C. 1602) is amended by—

10 (1) striking the word "COLLECTOR" in the head-
11 ing and inserting in lieu thereof "CUSTOMS OFFICER";
12 and

13 (2) striking the word "collector" where it first
14 appears in the section and inserting in lieu thereof
15 "appropriate customs officer" and by striking the word
16 "collector" wherever it thereafter appears in the section
17 and inserting in lieu thereof "customs officer".

18 (aa) Section 603 (19 U.S.C. 1603) is amended by—

19 (1) striking the word "COLLECTOR'S" in the head-
20 ing thereof and inserting in lieu thereof "CUSTOMS OF-
21 FICER'S"; and

22 (2) striking the words "collector or the principal
23 local officer of the Customs Agency Service" and insert-
24 ing in lieu thereof "appropriate customs officer".

25 (bb) Section 604 (19 U.S.C. 1604) is amended by

1 striking the word "collectors" and inserting in lieu thereof
2 "customs officers".

3 (cc) Section 605 (19 U.S.C. 1605) is amended by—

4 (1) striking the word "collector" and inserting in
5 lieu thereof "appropriate customs officer"; and

6 (2) striking the word "collector's" and inserting in
7 lieu thereof "customs officer's".

8 (dd) Section 606 (19 U.S.C. 1606) is amended by

9 striking the words "collector shall require the appraiser to"
10 and inserting in lieu thereof "appropriate customs officer
11 shall".

12 (ee) Sections 607 and 610 (19 U.S.C. 1607 and 1610)
13 are amended by—

14 (1) striking the words "returned by the appraiser";
15 and

16 (2) striking the word "collector" and inserting in
17 lieu thereof "appropriate customs officer".

18 (ff) Section 612 (19 U.S.C. 1612) is amended as
19 follows:

20 (1) the first sentence is amended by striking the
21 term "the collector" where it first appears and inserting
22 in lieu thereof "the appropriate customs officer"; by
23 striking the words "by the appraiser"; by striking the
24 term "the collector" where it thereafter appears and
25 inserting in lieu thereof "such officer"; and by striking

1 the words "within twenty-four hours after receipt by
2 him of the appraiser's return";

3 (2) the second sentence is amended by striking the
4 term "the collector" and inserting in lieu thereof "such
5 officer"; and

6 (3) the third sentence is amended by striking the
7 word "collector" and inserting in lieu thereof "customs
8 officer".

9 (gg) Section 617 (19 U.S.C. 1617) is amended by
10 striking the word "collector" and inserting in lieu thereof
11 "customs officer" and by striking the words "or customs
12 agent."

13 (hh) Section 618 (19 U.S.C. 1618) is amended by
14 striking the words "customs agent, collector, judge of the
15 United States Customs Court, or United States commis-
16 sioner," and inserting in lieu thereof "customs officer".

17 (ii) Section 623 (19 U.S.C. 1623) is amended by
18 striking the term "collectors of customs" and inserting in lieu
19 thereof "customs officers".

20 (jj) Section 641 (19 U.S.C. 1641) is amended by
21 striking the words "collector or chief" wherever they appear
22 and substituting therefor "appropriate".

23 (kk) Section 648 (19 U.S.C. 1648) is amended by
24 striking the term "Collectors of customs" and inserting in
25 lieu thereof "Customs officers".

1 SEC. 302. The last paragraph of so much of section 1 of
2 the Act of August 1, 1914, as relates to the Customs Service,
3 as amended (38 Stat. 623; 19 U.S.C. 2), is amended to
4 read as follows:

5 "The President is authorized from time to time, as the
6 exigencies of the service may require, to rearrange, by con-
7 solidation or otherwise, the several customs-collection dis-
8 tricts and to discontinue ports of entry by abolishing the
9 same or establishing others in their stead. The President is
10 authorized from time to time to change the location of the
11 headquarters in any customs-collection district as the needs of
12 the service may require."

13 SEC. 303. Section 2 of the Act of March 4, 1923, as
14 amended (19 U.S.C. 6), is amended by—

15 (a) striking the first and second sentences and in-
16 serting in lieu thereof the following: "Any officer of the
17 customs service designated by the Secretary of the Treas-
18 ury for foreign service, shall, through the Department of
19 State, be regularly and officially attached to the diplo-
20 matic missions of the United States in the countries in
21 which they are to be stationed, and when such officers
22 are assigned to countries in which there are no diplo-
23 matic missions of the United States, appropriate recog-
24 nition and standing with full facilities for discharging
25 their official duties shall be arranged by the Department
26 of State."; and

1 (b) striking the words "and employees" in the last
2 sentence of the section.

3 SEC. 304. Section 2619 of the Revised Statutes, as
4 amended (19 U.S.C. 31), is amended to read as follows:

5 "A bond to the United States may be required of any
6 customs officer for the true and faithful discharge of the
7 duties of his office according to law."

8 SEC. 305. Section 2620 of the Revised Statutes, as
9 amended (19 U.S.C. 32), is amended to read as follows:

10 "The amounts, conditions for filing, and procedures for
11 the approval of bonds required of customs officers shall be
12 set forth in regulations prescribed by the Secretary of the
13 Treasury."

14 SEC. 306. Section 8 of the Act of August 24, 1912, as
15 amended (19 U.S.C. 50), is amended by striking the term
16 "Collectors of customs" and inserting in lieu thereof "Cus-
17 toms officers".

18 SEC. 307. Section 2654 of the Revised Statutes, as
19 amended (19 U.S.C. 58), is amended by striking the word
20 "Collectors" and inserting in lieu thereof "Customs officers".

21 SEC. 308. Section 251 of the Revised Statutes (19
22 U.S.C. 66) is amended by striking the word "collectors"
23 and inserting in lieu thereof "customs officers".

24 SEC. 309. Section 3 of the Act of June 18, 1934, as
25 amended (19 U.S.C. 81c) is amended by—

1 (a) striking the term "collector of customs" and
2 inserting in lieu thereof "appropriate customs officer";
3 and

4 (b) striking the word "collector" and inserting in
5 lieu thereof "appropriate customs officer".

6 SEC. 310. The Act of June 28, 1916 (19 U.S.C. 151),
7 is amended by striking the term "collector of customs" and
8 inserting in lieu thereof "appropriate customs officer".

9 SEC. 311. Section 202 (a) of the Act of May 27, 1921
10 (19 U.S.C. 161 (a)), is amended by striking the word
11 "report".

12 SEC. 312. Section 208 of the Act of May 27, 1921 (19
13 U.S.C. 167), is amended by striking the term "the collector"
14 where it first appears in the section and inserting in lieu
15 thereof "appropriate customs officer" and by striking the
16 term "the collector" wherever it thereafter appears in the
17 section and inserting in lieu thereof "such customs officer".

18 SEC. 313. Section 209 of the Act of May 27, 1921, as
19 amended (19 U.S.C. 168), is amended by—

20 (a) striking the words "appraiser or person acting
21 as appraiser" where they first appear in the section and
22 inserting in lieu thereof "appropriate customs officer";

23 (b) striking the words "report to the collector"
24 where they first appear in the section;

25 (c) striking the words "each appraiser or person

1 acting as appraiser" and inserting in lieu thereof "such
2 customs officer"; and

3 (d) striking the words "and report to the collector".

4 SEC. 314. Section 210 of the Act of May 27, 1921, as
5 amended (19 U.S.C. 169), is amended by—

6 (a) striking the words "appraiser or person acting
7 as appraiser" and inserting in lieu thereof "appropriate
8 customs officer";

9 (b) striking the term "the collector" and inserting
10 in lieu thereof "such customs officer"; and

11 (c) striking the words "appeal and" and "appeals
12 and".

13 SEC. 315. Section 5 of the Act of February 13, 1911,
14 as amended (19 U.S.C. 261), is amended by striking "
15 and any customs officer who may be designated for that
16 purpose by the collector of customs,".

17 SEC. 316. Section 5 of the Act of February 13, 1911,
18 as amended (19 U.S.C. 267), is amended by—

19 (a) striking the words "inspectors, storekeepers,
20 weighers, and other"; and

21 (b) striking the term "collector of customs" wher-
22 ever it appears in the section and inserting in lieu
23 thereof "appropriate customs officer".

24 SEC. 317. Section 3111 of the Revised Statutes (19

1 U.S.C. 282) is amended by striking the words "other or"
 2 and by striking the words "a collector or other" and inserting
 3 in lieu thereof "an".

4 SEC. 318. Section 3126 of the Revised Statutes (19
 5 U.S.C. 293) is amended by striking out "collectors" and
 6 inserting in lieu thereof "appropriate customs officers".

7 SEC. 319. Sections 2863 and 3087 of the Revised
 8 Statutes, as amended (19 U.S.C. 341 and 528), are amended
 9 by striking the word "collector" and inserting in lieu thereof
 10 "appropriate customs officer".

11 SEC. 320. The Act of June 16, 1937 (19 U.S.C.
 12 1435b), is amended by—

13 (a) striking the words "collector of customs, or
 14 any deputy collector of customs designated by him"
 15 and inserting in lieu thereof "appropriate customs offi-
 16 cer"; and

17 (b) striking the words "jointly by the Secretary of
 18 Commerce and".

19 REPEALS

20 SEC. 321. The following laws are hereby repealed:

21 (a) section 2613 of the Revised Statutes, as
 22 amended (19 U.S.C. 5);

23 (b) the last paragraph of so much of section 1 of
 24 the Act of July 5, 1932, as relates to the Bureau of
 25 Customs (47 Stat. 584; 19 U.S.C. 5a);

1 (c) section 3 of the Act of March 4, 1923 (19
2 U.S.C. 7) ;

3 (d) section 2629 of the Revised Statutes, as
4 amended (19 U.S.C. 8) ;

5 (e) section 2625 of the Revised Statutes, as
6 amended (19 U.S.C. 9) ;

7 (f) section 2630 of the Revised Statutes, as
8 amended (19 U.S.C. 10) ;

9 (g) section 2632 of the Revised Statutes, as
10 amended (19 U.S.C. 11) ;

11 (h) the Act of February 6, 1907, as amended
12 (19 U.S.C. 36) ;

13 (i) section 2633 of the Revised Statutes (19
14 U.S.C. 37) ;

15 (j) section 7 of the Act of March 4, 1923 (19
16 U.S.C. 51) ; and

17 (k) sections 1 and 2 of the Act of August 28, 1890
18 (19 U.S.C. 63).

Passed the Senate December 9, 1969.

Attest:

FRANCIS R. VALEO,

Secretary.

91ST CONGRESS
1ST SESSION

H. R. 12691

IN THE HOUSE OF REPRESENTATIVES

JULY 9, 1969

Mr. CELLER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To improve the judicial machinery in customs courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs 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 TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

4 SHORT TITLE

5 SEC. 101. This title may be cited as "The Customs
6 Courts Act of 1969".

7 APPEALS FROM CUSTOMS COURT DECISIONS—JURISDICTION

8 SEC. 102. Section 1541 of title 28 of the United States
9 Code is amended to read as follows:

VI—O

1 **“§ 1541. Appeals from Customs Court decisions**

2 “(a) The Court of Customs and Patent Appeals has
3 jurisdiction of appeals from all final judgments or orders of
4 the United States Customs Court.

5 “(b) When a judge in the Customs Court, in issuing an
6 interlocutory order, includes in the order a statement that a
7 controlling question of law is involved as to which there is
8 substantial ground for difference of opinion and that an im-
9 mediate appeal from its order may materially advance the
10 ultimate termination of the litigation, the Court of Customs
11 and Patent Appeals may, in its discretion, permit an appeal
12 to be taken from such order, if application is made to it
13 within ten days after the entry of the order: *Provided, how-*
14 *ever, That* neither the application for nor the granting of an
15 appeal hereunder stays proceedings in the Customs Court
16 unless a stay is ordered by a judge of the Customs Court
17 or by the Court of Customs and Patent Appeals or a judge of
18 that court.”

19 **APPEALS FROM CUSTOMS COURT DECISIONS—PROCEDURE**

20 **SEC. 103.** Section 2601 of title 28 of the United States
21 Code is amended to read as follows:

22 **“§ 2601. Appeals from Customs Court decisions**

23 “(a) A party may appeal to the Court of Customs and
24 Patent Appeals from a final judgment or order of the Cus-

1 toms Court within sixty days after entry of the judgment or
2 order.

3 “(b) An appeal is made by filing in the office of the
4 clerk of the Court of Customs and Patent Appeals a notice
5 of appeal which shall include a concise statement of the errors
6 complained of. A copy of the notice shall be served on the
7 adverse parties. When the United States is an adverse
8 party, service shall be made on the Attorney General and
9 the Secretary of the Treasury or their designees. Thereupon,
10 the Court of Customs and Patent Appeals shall order the
11 Customs Court to transmit the record and evidence taken,
12 together with either the findings of fact and conclusions of
13 law or the opinion, as the case may be.

14 “(c) The Court of Customs and Patent Appeals may
15 affirm, modify, vacate, set aside, or reverse any judgment or
16 order of the Customs Court lawfully brought before it for re-
17 view, and may remand the cause and direct the entry of an
18 appropriate judgment or order, or require such further pro-
19 ceedings as may be just under the circumstances. The judg-
20 ment or order of the Court of Customs and Patent Appeals
21 shall be final and conclusive unless modified, vacated, set
22 aside, reversed, or remanded by the Supreme Court under
23 section 2106 of this title.”

1 PRECEDENCE OF AMERICAN MANUFACTURER, PRODUCER,
2 OR WHOLESALER CASES

3 SEC. 104. Section 2602 of title 28 of the United States
4 Code is amended to read as follows:

5 **"§ 2602. Precedence of American manufacturer, producer,**
6 **or wholesaler cases**

7 "(a) Every proceeding in the Court of Customs and
8 Patent Appeals arising under section 516 of the Tariff Act
9 of 1930, as amended, shall be given precedence over other
10 cases on the docket of such court, except as provided for in
11 paragraph (b) of this section, and shall be assigned for hear-
12 ing at the earliest practicable date and expedited in every
13 way.

14 "(b) Appeals from findings by the Secretary of Com-
15 merce provided for in headnote 6 to schedule 8, part 4, of
16 the Tariff Schedules of the United States (19 U.S.C. 1202),
17 shall receive a preference over all other matters."

18 DUTIES OF CHIEF JUDGE; PRECEDENCE OF JUDGES

19 SEC. 105. Section 253 of title 28 of the United States
20 Code is amended to read as follows:

21 **"§ Duties of chief judge; precedence of judges**

22 "(a) The chief judge of the Customs Court, with the
23 approval of the court, shall supervise the fiscal affairs and
24 clerical force of the court.

25 "(b) The chief judge shall promulgate dockets.

1 “(c) The chief judge, under rules of the court, may
2 designate any judge or judges of the court to try any case
3 and, when the circumstances so warrant, reassign the case
4 to another judge or judges.

5 “(d) Whenever the chief judge is unable to perform
6 the duties of his office or the office is vacant, his powers and
7 duties shall devolve upon the judge next in precedence who
8 is able to act, until such disability is removed or another
9 chief judge is appointed and duly qualified.

10 “(e) The chief judge shall have precedence and shall
11 preside at any session which he attends. Other judges shall
12 have precedence and shall preside according to the seniority
13 of their commissions. Judges whose commissions bear the
14 same date shall have precedence according to seniority in
15 age.”

16

SINGLE-JUDGE TRIALS

17 SEC. 106. Section 254 of title 28 of the United States
18 Code is amended to read as follows:

19 “§ 254. **Single-judge trials**

20 “Except as otherwise provided in section 255 of this title,
21 the judicial power of the Customs Court with respect to any
22 action, suit or proceeding shall be exercised by a single
23 judge, who may preside alone and hold a regular or special
24 session of court at the same time other sessions are held by
25 other judges.”

1 PUBLICATION OF DECISIONS

2 SEC. 107. Section 255 of title 28 of the United States
3 Code is redesignated as section 257 and is amended to read
4 as follows:

5 **“§ 257. Publication of decisions**

6 “All decisions of the Customs Court shall be preserved
7 and open to inspection. The court shall forward copies of
8 each decision to the Secretary of the Treasury or his designee
9 and to the appropriate customs officer for the district in which
10 the case arose. The Secretary shall publish weekly such deci-
11 sions as he or the court may designate and abstracts of all
12 other decisions.”

13 **THREE-JUDGE TRIALS**

14 SEC. 108. There shall be a new section 255 of title 28
15 of the United States Code as follows:

16 **“§ 255. Three-judge trials**

17 “(a) Upon application of any party to a cause of action,
18 or upon his own initiative, the chief judge of the Customs
19 Court shall designate any three judges of the court to hear
20 and determine any cause of action which the chief judge
21 finds: (1) raises an issue of the constitutionality of an Act of
22 Congress, a proclamation of the President or an Executive
23 order; or (2) has broad or significant implications in the
24 administration or interpretation of the customs laws.

25 “(b) A majority of the three judges designated may

1 hear and determine the cause of action and all questions
2 pending therein."

3 **TRIALS AT PORTS OTHER THAN NEW YORK**

4 **SEC. 109.** There shall be a new section 256 of title 28
5 of the United States Code as follows:

6 **"§ 256. Trials at ports other than New York**

7 " (a) The chief judge may designate any judge or judges
8 of the court to proceed, together with necessary assistants,
9 to any port or to any place within the jurisdiction of the
10 United States to preside at a trial or hearing at the port
11 or place.

12 " (b) Upon application of a party and for good cause
13 shown, or upon his own initiative, the chief judge may au-
14 thorize a judge of the court to preside at a trial or hearing
15 in a foreign country."

16 **JURISDICTION OF THE CUSTOMS COURT**

17 **SEC. 110.** Section 1582 of title 28 of the United States
18 Code is amended to read as follows:

19 **"§ 1582. Jurisdiction of the Customs Court**

20 " (a) The Customs Court shall have exclusive jurisdic-
21 tion of civil actions instituted by any person whose protest
22 pursuant to the Tariff Act of 1930, as amended, has been
23 denied, in whole or in part, by the appropriate customs offi-
24 cer, where the decision, including the legality of all orders
25 and findings entered into the same, involves: (1) the ap-

1 praised value of merchandise; (2) the classification and
2 rate and amount of duties chargeable; (3) all charges or
3 exactions of whatever character within the jurisdiction of
4 the Secretary of the Treasury; (4) the exclusion of merchan-
5 dise from entry or delivery under any provisions of the cus-
6 toms laws; (5) the liquidation or reliquidation of an entry,
7 or a modification thereof; (6) the refusal to pay a claim for
8 drawback; and (7) the refusal to reliquidate an entry under
9 section 520 (c) of the Tariff Act of 1930, as amended.

10 “(b) The Customs Court shall have exclusive jurisdic-
11 tion of civil actions brought by American manufacturers,
12 producers or wholesalers pursuant to section 516 of the Tariff
13 Act of 1930, as amended.

14 “(c) The Customs Court shall not have jurisdiction of
15 an action unless (1) either a protest has been filed, as pre-
16 scribed by section 514 of the Tariff Act of 1930, as amended,
17 and denied in accordance with the provisions of section 515
18 of the Tariff Act of 1930, as amended, or if the action relates
19 to a decision under section 516 of the Tariff Act of 1930,
20 as amended, all remedies prescribed therein have been ex-
21 hausted, and (2) except in the case of an action relating to
22 a decision under section 516 of the Tariff Act of 1930, as
23 amended, all liquidated duties, charges or exactions have
24 been paid at the time the action is filed.

25 “(d) Only one civil action may be brought in the Cus-

1 toms Court to contest the denial of a single protest. However,
2 any number of entries of merchandise involving common is-
3 sues may be included in a single civil action. Actions may be
4 consolidated by order of the court or by request of the par-
5 ties, with approval of the court, if there are common issues.”

6 REPEAL OF SECTION 1583—REVIEW OF DECISIONS ON
7 PROTESTS

8 SEC. 111. Section 1583 of title 28 of the United States
9 Code is repealed.

10 TIME FOR COMMENCEMENT OF ACTION

11 SEC. 112. Section 2631 of title 28 of the United States
12 Code is amended to read as follows:

13 “§ 2631. Time for commencement of action

14 “(a) An action over which the court has jurisdiction
15 under section 1582 (a) of this title is barred unless com-
16 menced within one hundred and eighty days after:

17 “(1) the date of mailing of notice of denial, in whole
18 or in part, of a protest pursuant to the provisions of sec-
19 tion 515 (a) of the Tariff Act of 1930, as amended; or

20 “(2) the date of denial of a protest by operation of
21 law pursuant to the provisions of sections 515 (b) or
22 515 (c) of the Tariff Act of 1930, as amended.

23 “(b) An action over which the court has jurisdiction
24 under section 1582 (b) of this title is barred unless com-

1 menced within thirty days after the date of mailing of a no-
2 tice sent pursuant to section 516 (c) of the Tariff Act of
3 1930, as amended."

4 **CUSTOMS COURT PROCEDURE AND FEES**

5 **SEC. 113.** Section 2632 of title 28 of the United States
6 Code is amended to read as follows:

7 **"§ 2632. Customs Court procedure and fees**

8 **"(a)** A party may contest denial of a protest under sec-
9 tion 515 of the Tariff Act of 1930, as amended, or the
10 decision of the Secretary of the Treasury made under sec-
11 tion 516 of the Tariff Act of 1930, as amended, by bringing
12 a civil action in the Customs Court. A civil action shall be
13 commenced by filing a summons in the form, manner and
14 style and with the content prescribed in rules adopted by
15 the court.

16 **"(b)** There may be a filing fee payable upon com-
17 mencing an action. The amount of the fee shall be fixed by
18 the Customs Court but shall not exceed the filing fee for
19 commencing a civil action in a United States district court.
20 The Customs Court may fix all other fees to be charged by
21 the clerk of the court.

22 **"(c)** The Customs Court shall provide by rule for plead-

1 ings and other papers, for their amendment, service, and
2 filing for consolidations, severances and suspensions of cases,
3 and for other procedural matters.

4 “(d) The Customs Court, by rule, may consider any
5 new ground in support of a civil action if the new ground:
6 (1) applies to the same merchandise that was the subject of
7 the protest; and (2) is related to the same administrative
8 decision contested in the protest.

9 “(e) All pleadings and other papers filed in the Customs
10 Court shall be served on all the adverse parties in accordance
11 with the rules of the court. When the United States is an
12 adverse party, service of the summons shall be made on the
13 Attorney General and the Secretary of the Treasury or their
14 designees.

15 “(f) Upon service of the summons on the Secretary of
16 the Treasury or his designee, the appropriate customs officer
17 shall forthwith transmit the following documents to the
18 United States Customs Court as an official record of the civil
19 action: (1) consumption or other entry; (2) commercial
20 invoice; (3) special Customs invoice; (4) copy of pro-
21 test; and (5) copy of denial of protest, in whole or in part,
22 if any denial has been issued.”

1 PRECEDENCE OF AMERICAN MANUFACTURER, PRODUCER
2 OR WHOLESALE CASES

3 SEC. 114. Section 2633 of title 28 of the United States
4 Code is amended to read as follows:

5 "§ 2633. Precedence of American manufacturer, producer
6 or wholesaler cases

7 "Every proceeding in the Customs Court arising under
8 section 516 of the Tariff Act of 1930, as amended, shall be
9 given precedence over other cases on the docket of the court,
10 and shall be assigned for hearing and trial at the earliest
11 practicable date and expedited in every way."

12 NOTICE

13 SEC. 115. Section 2634 of title 28 of the United States
14 Code is amended to read as follows:

15 "§ 2634. Notice

16 "Reasonable notice of the time and place of trial before
17 a judge of the Customs Court shall be given to all parties
18 to any proceeding, under rules prescribed by the court."

19 BURDEN OF PROOF; EVIDENCE OF VALUE

20 SEC. 116. Section 2635 of title 28 of the United States
21 Code is amended to read as follows:

1 **“§ 2635. Burden of proof; evidence of value**

2 **“In any matter in the Customs Court:**

3 **“(a) The decision of the Secretary of the Treasury, or**
4 **his delegate, is presumed to be correct. The burden to prove**
5 **otherwise shall rest upon the party challenging a decision.**

6 **“(b) Where the value of merchandise is in issue:**

7 **“(1) Reports or depositions of consuls, customs offi-**
8 **cers, and other officers of the United States and deposi-**
9 **tions and affidavits of other persons whose attendance**
10 **cannot reasonably be had, may be admitted in evidence**
11 **when served upon the opposing party in accordance with**
12 **the rules of the court.**

13 **“(2) Price lists and catalogs may be admitted in**
14 **evidence when duly authenticated, relevant, and material.**

15 **“(c) The value of merchandise shall be determined from**
16 **the evidence in the record and that adduced at the trial**
17 **whether or not the merchandise or samples thereof are avail-**
18 **able for examination.”**

19 **ANALYSIS OF IMPORTED MERCHANDISE**

20 **SEC. 117. Section 2636 of title 28 of the United States**
21 **Code is amended to read as follows:**

1 **“§ 2636. Analysis of imported merchandise**

2 “A judge of the Customs Court may order an analysis of
3 imported merchandise and reports thereon by laboratories or
4 agencies of the United States.”

5 **WITNESSES; INSPECTION OF DOCUMENTS**

6 SEC. 118. Section 2637 of title 28 of the United States
7 Code is amended to read as follows:

8 **“§ 2637. Witnesses; inspection of documents**

9 “(a) In any proceeding in the Customs Court, under
10 rules prescribed by the court, the parties and their attorneys
11 shall have an opportunity to introduce evidence, to hear and
12 cross-examine the witnesses of the other party and to inspect
13 all samples and all papers admitted or offered as evidence,
14 except as provided in subsection (b) of this section.

15 “(b) In an action instituted by an American manufac-
16 turer, producer or wholesaler, the plaintiff may not inspect
17 any documents or papers of a consignee or importer disclos-
18 ing any information which the Customs Court deems unneces-
19 sary or improper to be disclosed.”

20 **DECISIONS; FINDINGS OF FACT AND CONCLUSIONS OF LAW;**

21 **EFFECT OF OPINIONS**

22 SEC. 119. Section 2638 of title 28 of the United States
23 Code is amended to read as follows:

24 **“§ 2638. Decisions; findings of fact and conclusions of law;**

25 **effect of opinions**

26 “(a) A decision of the judge in a contested case shall

1 be supported by either (1) a statement of findings of fact
 2 and conclusions of law or (2) an opinion stating the rea-
 3 sons and facts upon which the decision is based.

4 “(b) The decision of the judge is final and conclusive,
 5 unless a retrial or rehearing is granted pursuant to section
 6 2639 of this title or an appeal is made to the Court of Cus-
 7 toms and Patent Appeals within the time and in the man-
 8 ner provided in section 2601 of this title.”

9 RETRIAL OR REHEARING

10 SEC. 120. Section 2639 of title 28 of the United States
 11 Code is amended to read as follows:

12 “§ 2639. Retrial or rehearing

13 “The judge who has rendered a judgment or order may,
 14 upon motion of a party or upon his own motion, grant a
 15 retrial or a rehearing, as the case may be. A party’s motion
 16 must be made, or the judge’s action on his motion must be
 17 taken, not later than thirty days after entry of the judgment
 18 or order.”

19 REPEAL OF SECTIONS 2640, 2641, 2642—REHEARING OR
 20 RETRIAL; FRIVOLOUS PROTEST OR APPEAL; AMEND-
 21 MENT OF PROTESTS, APPEALS, AND PLEADINGS

22 SEC. 121. Sections 2640, 2641, and 2642 of title 28 of
 23 the United States Code are repealed.

24 EFFECTIVE DATE

25 SEC. 122. (a) This title shall become effective on Jan-
 26 uary 1, 1970, and shall thereafter apply to all actions and

1 proceedings in the Customs Court and the Court of Customs
2 and Patent Appeals except those involving merchandise
3 entered before the effective date for which trial has com-
4 menced by such effective date.

5 (b) An appeal for reappraisalment timely filed with
6 the Bureau of Customs before the effective date, but as to
7 which trial has not commenced by such date, shall be deemed
8 to have had a summons timely and properly filed under this
9 title. When the judgement or order of the United States Cus-
10 toms Court has become final in this appeal, the papers shall
11 be returned to the appropriate customs officer to decide any
12 remaining matters relating to the entry in accordance with
13 section 500 of the Tariff Act of 1930, as amended. A pro-
14 test or summons filed after final decision on an appeal for
15 reappraisalment shall not include issues which were raised or
16 could have been raised on the appeal for reappraisalment.

17 (c) A protest timely filed with the Bureau of Customs
18 before the effective date of enactment of this Act and which
19 is disallowed, as to which trial has not commenced by such
20 date, shall be deemed to have had a summons timely and
21 properly filed under this title.

22 (d) All other provisions of this Act shall apply to

1 appeals and disallowed protests deemed to have had sum-
2 monses timely and properly filed under this section.

3

MISCELLANEOUS AMENDMENTS

4 SEC. 123. (a) The analysis of chapter 11 of title 28
5 of the United States Code, immediately preceding section
6 251 of such title, is amended by striking the caption of sec-
7 tion 254 and substituting therefor the caption, "Single-judge
8 trials", by striking the caption of section 255 and substitut-
9 ing therefor the caption "Three-judge trials" and by adding
10 the following captions at the end of the analysis of that
11 chapter:

"256. Trials at ports other than New York.

"257. Publication of decisions."

12 (b) The analysis of chapter 93 of title 28 of the United
13 States Code, immediately preceding section 1541 of such
14 title is amended by striking the caption of section 1541 and
15 substituting the caption "Appeals from Customs Court
16 decisions."

17 (c) The analysis of chapter 95 of title 28 of the United
18 States Code, immediately preceding section 1581 of such
19 title, is amended to read as follows:

"Sec.

"1581. Powers generally.

"1582. Jurisdiction of the Customs Court."

1 (d) The analysis of chapter 167 of title 28 of the United
 2 States Code, immediately preceding section 2601, is amended
 3 to read as follows:

"Sec.

"2601. Appeals from Customs Court decisions.

"2602. Precedence of American manufacturer, producer or wholesaler
 cases."

4 (e) The analysis of chapter 169 of title 28 of the United
 5 States Code, immediately preceding section 2631 of such
 6 title, is amended to read as follows:

"Sec.

"2631. Time for commencement of action.

"2632. Customs Court procedure and fees.

"2633. Precedence of American manufacturer, producer or wholesaler
 cases.

"2634. Notice.

"2635. Burden of proof; evidence of value.

"2636. Analysis of imported merchandise.

"2637. Witnesses; inspection of documents.

"2638. Decisions; findings of fact and conclusions of law; effect of
 opinions.

"2639. Retrial or rehearing."

7 TITLE II—ADMINISTRATIVE PROCEEDINGS IN 8 CUSTOMS MATTERS

9 SHORT TITLE

10 SEC. 201. Titles II and III of this Act may be cited as
 11 "The Customs Administrative Act of 1969".

12 AMENDMENT OF SECTIONS

13 SEC. 202. Unless otherwise provided, whenever in this
 14 Act an amendment or repeal is expressed in terms of an
 15 amendment to, or repeal of, a section or provision of the
 16 Tariff Act, the reference shall be considered to be made

1 to a section or provision of the Tariff Act of 1930, as
2 amended (19 U.S.C. 1202 et seq.).

3 EFFECTIVE DATE

4 SEC. 203. Titles II and III of this Act shall take effect
5 with respect to articles entered, or withdrawn from ware-
6 house for consumption, on or after January 1, 1970, and such
7 other articles entered or withdrawn from warehouse for
8 consumption prior to such date, the appraisement of which
9 has not become final before the date of enactment and for
10 which an appeal for reappraisement has not been timely
11 filed with the Bureau of Customs before January 1, 1970.

12 APPRAISEMENT, CLASSIFICATION, AND LIQUIDATION PRO-
13 CEDURES; COLLECTIONS AND REFUNDS; LIMITATIONS

14 SEC. 204. (a) Section 500 of the Tariff Act (19 U.S.C.
15 1500) is hereby amended to read as follows:

16 "SEC. 500. APPRAISEMENT, CLASSIFICATION AND
17 LIQUIDATION PROCEDURES.

18 "The appropriate customs officer shall, under rules and
19 regulations prescribed by the Secretary—

20 "(a) appraise merchandise in the unit of quantity
21 in which the merchandise is usually bought and sold by
22 ascertaining or estimating the value thereof by all rea-
23 sonable ways and means in his power, any statement of
24 cost or costs of production in any invoice, affidavit, dec-

1 lation, or other document to the contrary notwithstanding;
2

3 “(b) ascertain the classification and rate of duty
4 applicable to such merchandise;

5 “(c) fix the amount of duty to be paid on such
6 merchandise and determine any increased or additional
7 duties due or any excess of duties deposited;

8 “(d) liquidate the entry of such merchandise; and

9 “(e) give notice of such liquidation to the importer,
10 his consignee, or agent in such form and manner as the
11 Secretary shall prescribe in such regulations.”

12 (b) Section 488 of the Tariff Act (19 U.S.C. 1488) is
13 repealed.

14 (c) Section 505 of the Tariff Act (19 U.S.C. 1505) is
15 amended to read as follows:

16 “SEC. 505. PAYMENT OF DUTIES.

17 “(a) DEPOSIT OF ESTIMATED DUTIES.—Unless mer-
18 chandise is entered for warehouse or transportation, or under
19 bond, the consignee shall deposit with the appropriate cus-
20 toms officer at the time of making entry the amount of duties
21 estimated by such customs officer to be payable thereon.

22 “(b) COLLECTION OR REFUND.—The appropriate cus-
23 toms officer shall collect any increased or additional duties
24 due or refund any excess of duties deposited as determined
25 on a liquidation or reliquidation.”

21

1 REPEAL OF SEPARATE APPRAISEMENT PROCEDURE;

2 VOLUNTARY RELIQUIDATIONS

3 SEC. 205. Section 501 of the Tariff Act (19 U.S.C.
4 1501) is amended to read as follows:

5 "SEC. 501. VOLUNTARY RELIQUIDATIONS.

6 "A liquidation made in accordance with section 500
7 or any reliquidation thereof made in accordance with this
8 section may be reliquidated in any respect by the appropri-
9 ate customs officer on his own initiative, notwithstanding the
10 filing of a protest, within ninety days from the date on which
11 notice of the original liquidation is given to the importer,
12 his consignee or agent. Notice of such reliquidation shall be
13 given in the manner prescribed with respect to original
14 liquidations under section 500 (e)."

15 DUTIABLE VALUE

16 SEC. 206. Section 503 of the Tariff Act (19 U.S.C.
17 1503) is amended to read as follows:

18 "SEC. 503. DUTIABLE VALUE.

19 "Except as provided in section 520 (c) (relating to re-
20 liquidations on the basis of authorized corrections of errors)
21 or section 562 (relating to withdrawal from manipulating
22 warehouses) of this Act, the basis for the assessment of
23 duties on imported merchandise subject to ad valorem rates
24 of duty or rates based upon or regulated in any manner

1 by the value of the merchandise, shall be the appraised value
2 determined upon liquidation, in accordance with section 500
3 or any adjustment thereof made pursuant to section 501 of
4 the Tariff Act: *Provided, however,* That if reliquidation is
5 required pursuant to a final judgment or order of the United
6 States Customs Court which includes a reappraisement of
7 imported merchandise, the basis for such assessment shall be
8 the final appraised value determined by such court."

9 PROTESTS

10 SEC. 207. Section 514 of the Tariff Act (19 U.S.C.
11 1514) is amended to read as follows:

12 "SEC. 514. FINALITY OF DECISIONS; PROTESTS.

13 "(a) FINALITY OF DECISIONS.—Except as provided
14 in section 501 (relating to voluntary reliquidations), section
15 516 (relating to petitions by American manufacturers, pro-
16 ducers, and wholesalers), section 520 (relating to refunds
17 and errors), and section 521 (relating to reliquidations on
18 account of fraud) of this Act, decisions of the appropriate
19 customs officer, including the legality of all orders and find-
20 ings entering into the same, as to—

21 "(1) the appraised value of merchandise;

22 "(2) the classification and rate and amount of
23 duties chargeable;

24 "(3) all charges or exactions of whatever character
25 within the jurisdiction of the Secretary of the Treasury;

21 “(b) (1) IN GENERAL.—A protest of a decision under
22 subsection (a) shall be filed in writing with the appropriate
23 customs officer designated in regulations prescribed by the
24 Secretary, setting forth distinctly and specifically each de-
25 cision described in subsection (a) as to which protest is

1 made; each category of merchandise affected by each such
2 decision as to which protest is made; and the nature of each
3 objection and reasons therefor. Only one protest may be filed
4 for each entry of merchandise, except that where the entry
5 covers merchandise of different categories, separate protests
6 may be filed for each category. In addition, separate claims
7 with respect to any one category of merchandise that is the
8 subject of a protest are deemed to be part of a single protest.
9 A protest may be amended under regulations prescribed by
10 the Secretary any time prior to the expiration of the ninety
11 day period in which the protest could have been filed under
12 section 514 of this Act. Except as otherwise provided in sec-
13 tion 557 (b) of this Act, protests may be filed by the im-
14 porter, consignee, or any authorized agent of the person
15 paying any charge or exaction, or filing any claim for draw-
16 back, or seeking entry or delivery, with respect to merchan-
17 dise which is the subject of a decision in subsection (a).

18 “(2) TIME FOR FILING.—A protest of a decision, order,
19 or finding described in subsection (a) shall be filed with such
20 customs officer within ninety days after but not before—

21 “(A) notice of liquidation or reliquidation, or

22 “(B) in circumstances where subparagraph (A) is
23 inapplicable, the date of the decision as to which protest
24 is made.

25 “(c) LIMITATION ON PROTEST OF RELIQUIDATIONS.—

1 The reliquidation of an entry shall not open such entry so
2 that a protest may be filed against the decision of the customs
3 officer upon any question not involved in such reliquidation."

4 REVIEW OF PROTESTS

5 SEC. 208. Section 515 of the Tariff Act (19 U.S.C.
6 1515) is amended to read as follows:

7 "SEC. 515. REVIEW OF PROTESTS.

8 "(a) ADMINISTRATIVE REVIEW AND MODIFICATION
9 OF DECISIONS.—The appropriate customs officer shall review
10 a protest filed in accordance with section 514 of this Act and
11 may allow or deny such protest in whole or in part. There-
12 after, he shall remit or refund any duties, charge, or exaction
13 found to have been assessed or collected in excess, or pay any
14 drawback found due. Notice of the denial of any protest shall
15 be mailed in the form and manner prescribed by the Secre-
16 tary of the Treasury.

17 "(b) REQUEST FOR ACCELERATED DISPOSITION OF
18 PROTEST.—A request for accelerated disposition of a protest
19 filed in accordance with section 514 of this Act may be filed
20 in writing with the appropriate customs officer any time after
21 ninety days following the filing of such protest. For purposes
22 of section 1582 of title 28 of the United States Code, a pro-
23 test which has not been allowed or denied in whole or in part
24 within thirty days following receipt of a request for accel-

1 ated disposition shall be deemed denied on the thirtieth day
2 following receipt of such request."

3 " (c) CONSTRUCTIVE DENIAL OF PROTEST.—Any pro-
4 test which has not been allowed or denied in whole or in part
5 in accordance with paragraph (a) of this section and which
6 is not deemed to be denied in accordance with paragraph
7 (b) of this section, shall be deemed denied after two years
8 have elapsed from the date the protest was filed in accord-
9 ance with section 514 of this Act."

10 PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS
11 OR WHOLESALERS

12 SEC. 209. Section 516 of the Tariff Act (19 U.S.C.
13 1516) is amended to read as follows:

14 "SEC. 516. PETITIONS BY AMERICAN MANUFACTUR-
15 ERS, PRODUCERS OR WHOLESALERS—VALUE AND CLASSI-
16 FICATION.

17 " (a) The Secretary shall, upon written request by an
18 American manufacturer, producer or wholesaler, furnish the
19 classification, and the rate of duty, if any, imposed upon
20 designated imported merchandise of a class or kind manu-
21 factured, produced, or sold at wholesale by him. If such
22 manufacturer, producer or wholesaler believes that the ap-
23 praised value is too low, that the classification is not correct,
24 or that the proper rate of duty is not being assessed, he may
25 file a petition with the Secretary setting forth (1) a descrip-

1 tion of the merchandise, (2) the appraised value, the classi-
2 fication, or the rate or rates of duty that he believes proper,
3 and (3) the reasons for his belief.

4 “(b) If, after receipt and consideration of a petition
5 filed by an American manufacturer, producer or wholesaler,
6 the Secretary decides that the appraised value of the mer-
7 chandise is too low, or that the classification of the article or
8 rate of duty assessed thereon is not correct, he shall determine
9 the proper appraised value or classification or rate of duty,
10 and notify the petitioner of his determination. All such mer-
11 chandise entered for consumption or withdrawn from ware-
12 house for consumption more than thirty days after the date
13 such notice to the petitioner is published in the weekly Cus-
14 toms Bulletin shall be appraised or classified or assessed as
15 to rate of duty in accordance with the Secretary’s determina-
16 tion.

17 “(c) If the Secretary decides that the appraised value
18 or classification of the articles or the rate of duty with re-
19 spect to which a petition was filed pursuant to subsection (a)
20 is correct, he shall so inform the petitioner. If dissatisfied with
21 the decision of the Secretary, the petitioner may file with the
22 Secretary, not later than thirty days after the date of the de-
23 cision, notice that he desires to contest the appraised value
24 or classification of, or rate or duty assessed upon, the mer-
25 chandise. Upon receipt of notice from the petitioner, the

1 Secretary shall cause publication to be made of his decision
2 as to the proper appraised value or classification or rate of
3 duty and of the petitioner's desire to contest, and shall there-
4 after furnish the petitioner with such information as to the
5 entries and consignees of such merchandise, entered after
6 the publication of the decision of the Secretary at such ports
7 of entry designated by the petitioner in his notice of desire
8 to contest, as will enable the petitioner to contest the ap-
9 praised value or classification of, or rate of duty imposed
10 upon, such merchandise in the liquidation of one such entry
11 at such port. The Secretary shall direct the appropriate cus-
12 toms officer at such ports to notify the petitioner by mail
13 immediately when the first of such entries is liquidated.

14 “(d) Notwithstanding the filing of an action pursuant
15 to section 2632 of title 28 of the United States Code, mer-
16 chandise of the character covered by the published decision of
17 the Secretary (when entered for consumption or withdrawn
18 from warehouse for consumption on or before the date of
19 publication of a decision of the United States Customs Court
20 or of the United States Court of Customs and Patent Appeals,
21 not in harmony with the published decision of the Secretary)
22 shall be appraised or classified, or both, and the entries liqui-
23 dated, in accordance with the decision of the Secretary and,
24 except as otherwise provided in this chapter, the final liqui-
25 dations of these entries shall be conclusive upon all parties.

1 “(e) The consignee or his agent shall have the right to
2 appear and to be heard as a party in interest before the
3 United States Customs Court.

4 “(f) If the cause of action is sustained in whole or in
5 part by a decision of the United States Customs Court or of
6 the United States Court of Customs and Patent Appeals,
7 merchandise of the character covered by the published deci-
8 sion of the Secretary, which is entered for consumption or
9 withdrawn from warehouse for consumption after the date of
10 publication of the court decision, shall be subject to appraise-
11 ment, classification, and assessment of duty in accordance
12 with the final judicial decision in the action, and the liquida-
13 tion of entries covering the merchandise so entered or with-
14 drawn shall be suspended until final disposition is made of the
15 action, whereupon the entries shall be liquidated, or if nec-
16 essary, reliquidated in accordance with the final decision.

17 “(g) Regulations shall be prescribed by the Secretary
18 to implement the procedures required under this section.”

19 REFUNDS AND ERRORS

20 SEC. 210. Section 520 (c) of the Tariff Act (19 U.S.C.
21 1520 (c)) is amended by—

22 (a) striking the words “the Secretary of the Treas-
23 ury may authorize a collector to” and substituting the
24 words “the appropriate customs officer may, in accord-
25 ance with regulations prescribed by the Secretary,”;

1 (b) striking the word "appraisement," wherever it
2 appears in paragraph (1) ; and

3 (c) deleting "sixty" and substituting "ninety" and
4 deleting "ten" and substituting "nine" in paragraph (1) .

5 TITLE III—MISCELLANEOUS AMENDMENTS

6 TECHNICAL AND CONFORMING AMENDMENTS

7 SEC. 301. The Tariff Act of 1930, as amended (19
8 U.S.C. ch. 4) , is further amended as follows :

9 (a) Section 305 (19 U.S.C. 1305) is amended by—

10 (1) striking the word "collector" in the first para-
11 graph and inserting in lieu thereof "appropriate customs
12 officer"; and

13 (2) striking the term "the collector" where it first
14 appears in the second paragraph and inserting in lieu
15 thereof "the appropriate customs officer" and by strik-
16 ing the term "the collector" wherever it thereafter ap-
17 pears in the paragraph and inserting in lieu thereof
18 "such customs officer".

19 (b) Sections 311, 315, 432, 434, 438, 441, 443-447,
20 449-450, 452-455, 457, 485, 490, 492, 496, 521, 555,
21 562, 584, 586, 609, 613, and 614 (19 U.S.C. 1311, 1315,
22 1432, 1434, 1438, 1441, 1443-1447, 1449-1450, 1452-
23 1455, 1457, 1485, 1490, 1492, 1496, 1521, 1555, 1562,
24 1584, 1586, 1609, 1613, and 1614) are amended by strik-

1 ing the word "collector" wherever it appears in the sections
2 and inserting in lieu thereof "appropriate customs officer".

3 (c) Section 401 (19 U.S.C. 1401) is amended by—

4 (1) striking subsections (h), (i), and (j) ;

5 (2) redesignating subsections (k), (l), (m), and
6 (n) as subsections (h), (i), (j), and (k), respec-
7 tively, and amending redesignated subsection (i) to
8 read as follows:

9 " (i) OFFICER OF THE CUSTOMS: CUSTOMS OFFICER.—
10 The terms 'officer of the customs' and 'customs officer' mean
11 any officer of the Bureau of Customs of the Treasury Depart-
12 ment (also hereinafter referred to as the 'Customs Service')
13 or any commissioned, warrant, or petty officer of the Coast
14 Guard, or any agent or other person authorized by law or
15 designated by the Secretary of the Treasury to perform any
16 duties of an officer of the Customs Service."

17 (3) adding a new subsection (1) to read as
18 follows:

19 "(1) SECRETARY.—The term 'Secretary' means the
20 Secretary of the Treasury or his delegate."

21 (d) Section 402a (19 U.S.C. 1402) is amended by—

22 (1) striking the word "appraiser" whenever it ap-
23 pears in the section and inserting in lieu thereof "ap-
24 propriate customs officer"; and

1 (2) striking the word "APPRAISER'S" in the head-
2 ing of subsection (b) and inserting in lieu thereof
3 "CUSTOMS OFFICER'S".

4 (3) striking the words "subject to review in reap-
5 praisement proceedings under section 501" and insert-
6 ing in lieu thereof "subject to protest in accordance with
7 section 514".

8 (e) Sections 448, 493, and 608 (19 U.S.C. 1448, 1493,
9 and 1608) are amended by striking the term "the collector"
10 where it first appears in each section and inserting in lieu
11 thereof "the appropriate customs officer" and by striking the
12 term "the collector" wherever it thereafter appears in each
13 section and inserting in lieu thereof "such customs officer".

14 (f) Section 451 (19 U.S.C. 1451) is amended by—

15 (1) striking the word "collector" where it appears
16 the first time in the section and inserting in lieu thereof
17 "appropriate customs officer";

18 (2) striking out the word "collector" where it ap-
19 pears the second time in the section and inserting in lieu
20 thereof "such customs officer"; and

21 (3) striking the word "collector" where it appears
22 the third time in the section and inserting in lieu thereof
23 "appropriate customs officers".

24 (g) Section 467 (19 U.S.C. 1467) is amended by strik-

1 ing the words "collector of customs" and inserting in lieu
2 thereof "appropriate customs officer".

3 (h) Section 482 (19 U.S.C. 1482) is amended as
4 follows—

5 (1) subsection (e) is amended by striking the
6 term "collector of customs" and inserting in lieu thereof
7 "appropriate customs officer"; and

8 (2) subsection (f) is amended by striking "col-
9 lector of customs or the person acting as such, or by
10 his deputy" and inserting in lieu thereof "appropriate
11 customs officer".

12 (i) Section 484 (19 U.S.C. 1484) is amended as
13 follows—

14 (1) subsection (a) is amended by striking the
15 word "collector" and inserting in lieu thereof "appro-
16 priate customs officer";

17 (2) paragraph (1) of subsection (c) is amended
18 by striking the term "the collector" where it first ap-
19 pears in the paragraph and inserting in lieu thereof "the
20 appropriate customs officer" and by striking the term
21 "the collector" where it thereafter appears in the para-
22 graph and inserting in lieu thereof "such customs offi-
23 cer";

24 (3) paragraph (2) of subsection (c) is amended

1 by striking the term "The collector" and inserting in
2 lieu thereof "The appropriate customs officer" and by
3 striking the term "the collector" wherever it appears in
4 the paragraph and inserting in lieu thereof "such customs
5 officer";

6 (4) subsection (g) is amended by striking the term
7 "collector or the appraiser" and inserting in lieu thereof
8 "appropriate customs officer";

9 (5) the second and third sentences of subsection
10 (j) are amended by striking the word "collector" and
11 inserting in lieu thereof "customs officer"; and

12 (6) the fourth sentence of subsection (j) is
13 amended by striking the term "a collector" and inserting
14 in lieu thereof "a customs officer" and by striking the
15 terms "the collector" and "such collector" and inserting
16 in lieu thereof "such customs officer".

17 (j) Section 491 (19 U.S.C. 1491) is amended by strik-
18 ing the words "by the appraiser of merchandise and sold by
19 the collector" and inserting in lieu thereof "and sold by the
20 appropriate customs officer".

21 (k) Section 499 (19 U.S.C. 1499) is amended as
22 follows:

23 (1) the first sentence is amended by striking the
24 word "appraiser" and inserting in lieu thereof "appro-
25 priate customs officer";

1 (2) the second sentence is amended by striking the
2 term "The collector" and inserting in lieu thereof "Such
3 officer";

4 (3) the fifth sentence is amended to read: "Such
5 officer may require such additional packages or quanti-
6 ties as he may deem necessary.";

7 (4) the sixth sentence is amended to read: "If any
8 package contains any article not specified in the invoice
9 and, in the opinion of the appropriate customs officer,
10 such article was omitted from the invoice with fraudulent
11 intent on the part of the seller, shipper, owner, or agent,
12 the contents of the entire package in which such article is
13 found shall be subject to seizure, but if no such fraudulent
14 intent is apparent, then the value of said article shall be
15 added to the entry and the duties thereon paid
16 accordingly.";

17 (5) the seventh sentence is amended by striking
18 the word "collector" and inserting in lieu thereof "ap-
19 propriate customs officer"; and

20 (6) the last sentence is amended by striking the
21 words "appraiser's return of value" and inserting in lieu
22 thereof "appraisement" and by striking the words
23 "value returned by the appraiser" and inserting in lieu
24 thereof "appraisement".

25 (1) Section 502 (19 U.S.C. 1502) is amended by

1 striking the words "appraiser, deputy appraiser, assistant ap-
2 praiser, or examiner of merchandise" and inserting in lieu
3 thereof "customs officer".

4 (m) Section 506 (19 U.S.C. 1506) is amended as
5 follows:

6 (1) paragraph (1) is amended by striking the
7 term "the collector" where it first appears in the para-
8 graph and inserting in lieu thereof "the appropriate cus-
9 toms officer" and by striking the term "the collector"
10 where it thereafter appears in the paragraph and insert-
11 ing in lieu thereof "such customs officer"; and

12 (2) paragraph (2) is amended by striking the
13 word "collector" and inserting in lieu thereof "appropri-
14 ate customs officer".

15 (n) Section 509 (19 U.S.C. 1509) is amended by
16 striking the term "Collectors and appraisers" and inserting
17 in lieu thereof "Customs officers".

18 (o) Section 510 (19 U.S.C. 1510) is amended by—

19 (1) striking the words "or a division of such court,"
20 the first time they appear;

21 (2) striking "or an appraiser, or a collector" and
22 inserting in lieu thereof "or a customs officer";

23 (3) striking "an appraiser" and inserting in lieu
24 thereof "a customs officer, or";

1 (4) striking the words "or a division of such court,"
2 the second and third times they appear; and

3 (5) striking "or appraiser or collector" and insert-
4 ing in lieu thereof "or customs officer".

5 (p) Section 511 (19 U.S.C. 1511) is amended by—

6 (1) striking the words "or an appraiser, or person
7 acting as appraiser, or a collector" and inserting in lieu
8 thereof "or an appropriate customs officer";

9 (2) striking the term "the collectors" and inserting
10 in lieu thereof "customs officers"; and

11 (3) striking the term "the collector" and inserting
12 in lieu thereof "the appropriate customs officer".

13 (q) Section 512 (19 U.S.C. 1512) is amended by—

14 (1) striking the word "collector" and inserting in
15 lieu thereof "customs officer"; and

16 (2) striking the word "collectors" and inserting in
17 lieu thereof "customs officers".

18 (r) Section 513 (19 U.S.C. 1513) is amended by
19 striking the word "COLLECTOR'S" in the heading thereof
20 and inserting in lieu thereof "CUSTOMS OFFICER'S" and by
21 striking the words "collector or other" wherever they ap-
22 pear in the section.

23 (s) Section 523 (19 U.S.C. 1523) is amended by

1 striking the word "collectors'" and inserting in lieu thereof
2 "customs officers'".

3 (t) The fifth sentence of section 557 (b) (19 U.S.C.
4 1557 (b)) is amended by striking the words "an appeal for
5 reappraisalment under section 501" and inserting in lieu
6 thereof "a protest contesting an appraisalment decision in ac-
7 cordance with section 514".

8 (u) Section 560 (19 U.S.C. 1560) is amended by strik-
9 ing the words "collector or other".

10 (v) Section 563 (19 U.S.C. 1563) is amended by—

11 (1) striking the term "collectors of customs" and
12 inserting in lieu thereof "appropriate customs officers";
13 and

14 (2) striking the word "collector" and inserting in
15 lieu thereof "customs officer".

16 (w) Section 564 (19 U.S.C. 1564) is amended by
17 striking the term "collector of customs" and inserting in lieu
18 thereof "customs officer".

19 (x) Section 565 (19 U.S.C. 1565) is amended by—

20 (1) striking the term "collector of customs" and
21 inserting in lieu thereof "appropriate customs officer";
22 and

23 (2) striking the word "collector" wherever it there-
24 after appears in the section and inserting in lieu thereof
25 "customs officer".

1 (y) Section 595 (19 U.S.C. 1595) is amended by
2 striking the words "collector of customs or other".

3 (z) Section 602 (19 U.S.C. 1602) is amended by—

4 (1) striking the word "COLLECTOR" in the heading
5 and inserting in lieu thereof "CUSTOMS OFFICER"; and

6 (2) striking the word "collector" where it first ap-
7 pears in the section and inserting in lieu thereof "appro-
8 priate customs officer" and by striking the word "col-
9 lector" wherever it thereafter appears in the section and
10 inserting in lieu thereof "customs officer".

11 (aa) Section 603 (19 U.S.C. 1603) is amended by—

12 (1) striking the word "COLLECTOR'S" in the head-
13 ing thereof and inserting in lieu thereof "CUSTOMS OFFI-
14 CER'S"; and

15 (2) striking the words "collector or the principal
16 local officer of the Customs Agency Service" and insert-
17 ing in lieu thereof "appropriate customs officer".

18 (bb) Section 604 (19 U.S.C. 1604) is amended by
19 striking the word "collectors" and inserting in lieu thereof
20 "customs officers".

21 (cc) Section 605 (19 U.S.C. 1605) is amended by—

22 (1) striking the word "collector" and inserting in
23 lieu thereof "appropriate customs officer"; and

24 (2) striking the word "collector's" and inserting in
25 lieu thereof "customs officer's".

40

1 (dd) Section 606 (19 U.S.C. 1606) is amended by
2 striking the words "collector shall require the appraiser to"
3 and inserting in lieu thereof "appropriate customs officer
4 shall".

5 (ee) Sections 607 and 610 (19 U.S.C. 1607 and 1610)
6 are amended by—

7 (1) striking the words "returned by the appraiser";
8 and

9 (2) striking the word "collector" and inserting in
10 lieu thereof "appropriate customs officer".

11 (ff) Section 612 (19 U.S.C. 1612) is amended as
12 follows:

13 (1) The first sentence is amended by striking the
14 term "the collector" where it first appears and inserting
15 in lieu thereof "the appropriate customs officer"; by
16 striking the words "by the appraiser"; by striking the
17 term "the collector" where it thereafter appears and
18 inserting in lieu thereof "such officer"; and by striking
19 the words "within twenty-four hours after receipt by
20 him of the appraiser's return";

21 (2) The second sentence is amended by striking
22 the term "the collector" and inserting in lieu thereof
23 "such officer"; and

24 (3) The third sentence is amended by striking the

1 word "collector" and inserting in lieu thereof "customs
2 officer".

3 (gg) Section 617 (19 U.S.C. 1617) is amended by
4 striking the word "collector" and inserting in lieu thereof
5 "customs officer" and by striking the words "or customs
6 agent".

7 (hh) Section 618 (19 U.S.C. 1618) is amended by
8 striking the words "customs agent, collector, judge of the
9 United States Customs Court, or United States commis-
10 sioner," and inserting in lieu thereof "customs officer".

11 (ii) Section 623 (19 U.S.C. 1623) is amended by
12 striking the term "collectors of customs" and inserting in
13 lieu thereof "customs officers".

14 (jj) Section 641 (19 U.S.C. 1641) is amended by
15 striking the words "collector or chief" wherever they appear
16 and substituting therefor "appropriate".

17 (kk) Section 648 (19 U.S.C. 1648) is amended by
18 striking the term "Collectors of customs" and inserting in
19 lieu thereof "Customs officers".

20 SEC. 302. The last paragraph of so much of section 1
21 of the Act of August 1, 1914, as relates to the Customs
22 Service, as amended (38 Stat. 623, 19 U.S.C. 2), is
23 amended to read as follows:

24 "The President is authorized from time to time, as the

1 exigencies of the service may require, to rearrange, by con-
2 solidation or otherwise, the several customs-collection districts
3 and to discontinue ports of entry by abolishing the same or
4 establishing others in their stead. The President is authorized
5 from time to time to change the location of the headquarters
6 in any customs-collection district as the needs of the service
7 may require."

8 SEC. 303. Section 2 of the Act of March 4, 1923, as
9 amended (19 U.S.C. 6), is amended by—

10 (a) striking the first and second sentences and
11 inserting in lieu thereof the following: "Any officer of
12 the customs service designated by the Secretary of the
13 Treasury for foreign service, shall, through the Depart-
14 ment of State, be regularly and officially attached to the
15 diplomatic missions of the United States in the countries
16 in which they are to be stationed, and when such officers
17 are assigned to countries in which there are no diplo-
18 matic missions of the United States, appropriate recog-
19 nition and standing with full facilities for discharging
20 their official duties shall be arranged by the Department
21 of State."; and

22 (b) striking the words "and employees" in the last
23 sentence of the section.

24 SEC. 304. Section 2619 of the Revised Statutes, as
25 amended (19 U.S.C. 31), is amended to read as follows:

1 "A bond to the United States may be required of any
2 customs officer for the true and faithful discharge of the du-
3 ties of his office according to law."

4 SEC. 305. Section 2620 of the Revised Statutes, as
5 amended (19 U.S.C. 32), is amended to read as follows:

6 "The amounts, conditions for filing, and procedures for
7 the approval of bonds required of customs officers shall be
8 set forth in regulations prescribed by the Secretary of the
9 Treasury."

10 SEC. 306. Section 8 of the Act of August 24, 1912, as
11 amended (19 U.S.C. 50), is amended by striking the term
12 "Collectors of customs" and inserting in lieu thereof "Cus-
13 toms officers".

14 SEC. 307. Section 2654 of the Revised Statutes, as
15 amended (19 U.S.C. 58), is amended by striking the word
16 "Collectors" and inserting in lieu thereof "Customs officers".

17 SEC. 308. Section 251 of the Revised Statutes (19
18 U.S.C. 66) is amended by striking the word "collectors" and
19 inserting in lieu thereof "customs officers".

20 SEC. 309. Section 3 of the Act of June 18, 1934, as
21 amended (19 U.S.C. 81c) is amended by—

22 (a) striking the term "collector of customs" and
23 inserting in lieu thereof "appropriate customs officer";
24 and

1 (b) striking the word "collector" and inserting in
2 lieu thereof "appropriate customs officer".

3 SEC. 310. The Act of June 28, 1916 (19 U.S.C. 151)
4 is amended by striking the term "collector of customs" and
5 inserting in lieu thereof "appropriate customs officer".

6 SEC. 311. Section 202 (a) of the Act of May 27, 1921
7 (19 U.S.C. 161 (a)) is amended by striking the word
8 "report".

9 SEC. 312. Section 208 of the Act of May 27, 1921 (19
10 U.S.C. 167) is amended by striking the term "the col-
11 lector" where it first appears in the section and inserting in
12 lieu thereof "appropriate customs officer" and by striking
13 the term "the collector" wherever it thereafter appears in
14 the section and inserting in lieu thereof "such customs
15 officer".

16 SEC. 313. Section 209 of the Act of May 27, 1921, as
17 amended (19 U.S.C. 168), is amended by—

18 (a) striking the words "appraiser or person acting
19 as appraiser" where they first appear in the section and
20 inserting in lieu thereof "appropriate customs officer";

21 (b) striking the words "report to the collector"
22 where they first appear in the section;

23 (c) striking the words "each appraiser or person
24 acting as appraiser" and inserting in lieu thereof "such
25 customs officer"; and

1 (d) striking the words "and report to the collector".

2 SEC. 314. Section 210 of the Act of May 27, 1921, as
3 amended (19 U.S.C. 169), is amended by—

4 (a) striking the words "appraiser or person acting
5 as appraiser" and inserting in lieu thereof "appropriate
6 customs officer";

7 (b) striking the term "the collector" and inserting
8 in lieu thereof "such customs officer"; and

9 (c) striking the words "appeal and" and "appeals
10 and".

11 SEC. 315. Section 5 of the Act of February 13, 1911,
12 as amended (19 U.S.C. 261), is amended by striking "and
13 any customs officer who may be designated for that purpose
14 by the collector of customs,".

15 SEC. 316. Section 5 of the Act of February 13, 1911, as
16 amended (19 U.S.C. 267), is amended by—

17 (a) striking the words "inspectors, storekeepers,
18 weighers, and other"; and

19 (b) striking the term "collector of customs" wher-
20 ever it appears in the section and inserting in lieu thereof
21 "appropriate customs officer".

22 SEC. 317. Section 3111 of the Revised Statutes (19
23 U.S.C. 282) is amended by striking the words "other or"
24 and by striking the words "a collector or other" and inserting
25 in lieu thereof "an".

SEC. 318. Section 3126 of the Revised Statutes (19
U.S.C. 293) is amended by striking out "collectors" and
inserting in lieu thereof "appropriate customs officers".

4 SEC. 319. Sections 2863 and 3087 of the Revised
5 Statutes, as amended (19 U.S.C. 341 and 528), are amended
6 by striking the word "collector" and inserting in lieu thereof
7 "appropriate customs officer".

8 SEC. 320. The Act of June 16, 1937 (19 U.S.C. 1435b)
9 is amended by—

(a) striking the words "collector of customs, or any deputy collector of customs designated by him" and inserting in lieu thereof "appropriate customs officer"; and

(b) striking the words "jointly by the Secretary of
Commerce and".

15 REPEALS

16 SEC. 321. The following laws are hereby repealed:

17 (a) section 2613 of the Revised Statutes, as
18 amended (19 U.S.C. 5) ;

(b) the last paragraph of so much of section 1 of the Act of July 5, 1932, as relates to the Bureau of Customs (47 Stat. 584, 19 U.S.C. 5a) ;

(c) section 3 of the Act of March 4, 1923 (19
U.S.C. 7) ;

(d) section 2629 of the Revised Statutes, as amended (19 U.S.C. 8) ;

47

1 (e) section 2625 of the Revised Statutes, as
2 amended (19 U.S.C. 9) ;

3 (f) section 2630 of the Revised Statutes, as
4 amended (19 U.S.C. 10) ;

5 (g) section 2632 of the Revised Statutes, as
6 amended (19 U.S.C. 11) ;

7 (h) the Act of February 6, 1907, as amended (19
8 U.S.C. 36) ;

9 (i) section 2633 of the Revised Statutes (19 U.S.C.
10 37) ;

11 (j) section 7 of the Act of March 4, 1923 (19
12 U.S.C. 51) ; and

13 (k) sections 1 and 2 of the Act of August 28, 1890
14 (19 U.S.C. 63) .

Mr. KASTENMEIER. Identical House measures were also introduced by the ranking minority member of the full committee, Congressman McCulloch (H.R. 12921) and by our ranking minority subcommittee colleague, the distinguished gentleman from Virginia, Mr. Poff (H.R. 12857).

Mr. KASTENMEIER. This legislation was introduced at the request of the administration and is the product of several years of work on the part of the Customs Court, the Departments of Treasury and Justice, and the Federal Judicial Center, in consultation with representatives of importers, customs brokers, and the customs bar. It is designed to modernize procedures in the Customs Court and in the Bureau of Customs so that the court and the Bureau will be in a position more effectively to cope with their increasing caseloads.

In addition to the foregoing departmental and congressional sponsors, the legislation also has the support of the Departments of State and Commerce and of the Judicial Conference of the United States. In its passage through the Senate, S. 2624 received a number of amendments.

The subcommittee understands that the Department of the Treasury and the Department of Justice favor the Senate amendments and recommend their adoption. The Chamber of Commerce of the United States has also endorsed the legislation in the form in which it passed the Senate.

As the Chair understands it, the crux of the problem giving rise to the subject legislation is that a number of critical statutory provisions affecting Customs Court and the Bureau of Customs procedures have become outdated and tend to distort the relationship between the administrative agency and the judicial tribunal responsible for review of the agency's determinations.

The subcommittee is advised that, despite increased productivity, the Customs Court in recent years has suffered an increase in backlog of pending cases. Sponsors of the legislation say that obsolete but mandatory procedures are responsible, at least in part, for the inability of the court to keep abreast of its intake.

It is the Chair's understanding, and witnesses should correct me if I am wrong, that the legislation avoids substantive changes in customs law and relates exclusively to improvements in procedures—both administrative procedures and procedures on judicial review—for the determination of duty liability.

Before hearing witnesses from outside the Congress, the subcommittee is honored to receive the statement of the distinguished ranking Republican Member of the House Committee on the Judiciary, our friend and colleague, the Honorable William M. McCulloch.

STATEMENT OF HON. WILLIAM M. McCULLOCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. McCULLOCH. Mr. Chairman, the House Judiciary Committee has always given priority attention to the needs of our Federal courts. When we, as attorneys, refer to our Federal judiciary we do so usually in terms of 11 judicial circuits and 93 district courts. However, under article III of the U.S. Constitution, Congress was given authority to ordain and establish from time to time other inferior courts. And Congress has, at different times, created and abolished various U.S.

courts. An article III court which this committee has given very little attention to since we dubbed it a Constitutional Court in 1956 is the Customs Court. This Court has an interesting legislative history.

In 1890, Congress established what was then called a Board of General Appraisers, an administrative agency created to relieve the heavy burden that customs litigation was placing on the Federal district and circuit courts. This Board exercised quasi-judicial authority in reviewing appeals taken from decisions of the Bureau of Customs. It was this administrative tribunal that was to become, 66 years later, an article III court.

In 1926, by an act of Congress, the Board of General Appraisers, was given the name of Customs Court and became officially a court of record, composed of nine judges with offices in New York. This move involved little more than a name change and the powers, procedures and duties remained the same. For the most part, this court has continued to function as an administrative tribunal despite the fact that in 1956, Congress, through legislation processed in this committee, declared this administrative body to be an article III court.

Since the creation of the Board of General Appraisers in 1890, there has not been a successful legislative effort that would elevate, procedurally, what was once an administrative tribunal to the level of an article III court. Over the years, this committee has sought not only to improve and expedite Federal justice, but also initiate innovative procedures to assist the courts in handling their heavy caseload—and this includes the Customs Court.

The purpose of H.R. 12921, which I introduced in July 1969, is to modernize procedures in Customs Court and the related administrative processes in the Bureau of Customs so that this court can better manage its rapidly expanding workload. In December 1969, the Senate passed S. 2624, a slightly amended version of my bill, H.R. 12921. I might add that our distinguished committee chairman, Mr. Celler, introduced H.R. 12691 which is identical to the one I introduced. Also my distinguished colleague from Virginia, ranking minority member of this subcommittee, Mr. Poff, introduced identical legislation, H.R. 12857. Many people have contributed to the drafting of this proposed legislation. Former Supreme Court Justice Tom C. Clark, Chief Judge Rao of the Customs Court, Treasury, and Justice Department officials and representatives of interested groups, such as importers and members of the bar, all worked diligently to produce these much needed reforms.

I would like to make clear for the record that these bills are concerned with the procedures involved in processing the various papers arising out of the importation of goods and the payment of estimated duties. These bills in no way affect rates of duties, nor the substantive provisions of law relating to the basis of duty assessment. These bills would have no commercial or financial impact on our international trade.

The basic problems facing the Bureau of Customs and the Customs Court arise from the fact that the statutory procedures applicable to the disposition of customs matters are outmoded and inefficient. These provisions, some of which date back to 1890, hamper the court

in making maximum use of its judicial manpower and compel the court to perform unnecessary administrative tasks.

Congress with its constitutional authority to ordain and establish inferior Federal courts has the duty—indeed, the obligation—to provide these courts with the necessary tools and procedures to effectively and expeditiously handle that which Congress expects of them and thereby provide the American people with an efficient forum where legitimate interest and concerns are equitably and respectfully litigated—not frustrated.

Mr. KASTENMEIER. Thank you, Mr. McCulloch, for a very enlightening statement. Your words will make a real contribution to the work of the subcommittee on this significant legislation.

Now the subcommittee is privileged to hear from the Honorable Paul P. Rao, chief judge of the U.S. Customs Court, who has been in the forefront of the current project looking to reform legislation affecting his court.

Unfortunately, other duties prevent Mr. Justice Tom C. Clark, Director of the Federal Judicial Center, from being present today. Justice Clark, like Judge Rao, has rendered invaluable service in the cause of procedural reform. He has submitted a written statement supporting the legislation as it passed the Senate and his statement will be made part of the hearing record.

(The statement referred to follows:)

STATEMENT OF MR. JUSTICE TOM C. CLARK, DIRECTOR, FEDERAL JUDICIAL CENTER

Mr. Chairman and Members of the Committee:

As Director of the Federal Judicial Center, I am pleased to file this statement with this distinguished committee, which presents my views on S. 2624, an Act to improve the judicial machinery in Customs Courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs matters and for other purposes. I heartily endorse S. 2624 and recommend that it be enacted into law as passed by the Senate.

In late 1968, the Federal Judicial Center was requested by representatives of the United States Customs Court, the Department of the Treasury, the Department of Justice, the Association of the Customs Bar and the Customs Committee of the Administrative Law Section of the American Bar Association to organize a Task Force that would study the operation of the customs system—especially of the United States Customs Court—and make suggestions for its improvement. Subsequent to an organization luncheon at the Supreme Court, I appointed a committee chaired by the Director of Research of the Federal Judicial Center, the Honorable William Aldridge, and having representatives from the various governmental groups and the Bar. This committee had several hearings, both here and in New York, exchanged information among the agencies involved and received suggestions from importer organizations as well. A general consensus was reached that the decisional processes in the Bureau of Customs and the procedures of the Customs Court badly needed revision and modernization. While details differed in the mechanics employed, a general understanding was reached which is reflected in the general principles embodied in S. 2624 as introduced by Senators Hruska and Tydings.

The Senate Bill incorporates the material provisions agreed upon by the Eldridge Committee, the only changes [other than clarification] being: An interlocutory appeal is conditionally permitted from the order of the Chief Judge of the Customs Court authorizing a judge of that court to sit in an evidentiary hearing held in a foreign country [§ 256(b) at p. 7 of the Committee draft]; the filing fee is fixed at not less than \$5.00 nor more than the fee fixed for civil actions in the United States District Courts [§ 2632(b) at p. 11 of the draft]; the record on judicial review as transmitted by the Secretary of the Treasury to the Customs Court is enlarged to include four additional items, i.e. "(6) importers exhibits, (7) official samples, (8) any official laboratory reports and (9) the summary sheet." [§ 113(f)]

at p. 12 of the draft]; the effective date of the Bill is delayed from January 1st to July 1st 1970. [§ 122(a) at pp. 16 and 19 of the draft]; and administrative action as well as review by the Secretary of the Treasury is limited to a two year period from the date of the protest. In my view, these provisions improve the Bill and they have my complete support.

It is sufficient for me to add that the procedures of the United States Customs Court because of the outmoded requirements of the law, have been in a shameful state for years. It is an Article III Court as declared by the Supreme Court. (*Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)). Still cases are filed there without a written complaint and without the payment of any fee. The present procedure merely requires the Treasury Department to transmit to the court the customs invoices, appraisals, drawings and other papers filed with it along with the administrative denial. These papers are then given a docket number or numbers, since multiple filings are permitted. I submit that this automatic reference system—without complaint of filing fee—downgrades our only national *nisi prius* court and encourages litigation on frivolous as well as *de minimus* claims.

But automatic, free, multiple filing is not the only obstacle that presently plagues this honorable court. A case may start on the appraisement calendar before one judge. But, alas, if that judge decides adversely, then a review of the appraisal by a panel of three Customs Court judges is permitted, after which a final appeal lies to the Court of Customs and Patent Appeals. And after all this, the protest may be started all over again on the same import but on the classification calendar. However this time, a three-judge division of the court must pass on the issue. Appeal then lies again to the Court of Customs and Patent Appeals. There is no wonder that the backlog is 431,215 cases. The reason is clear: The Customs Court and its distinguished judges are encumbered by a myriad of statutory yokes. S. 2624 will loosen these nooses.

May I close by saying that time is of the essence. I hope that your Committee will find it possible to act quickly and favorably.

Respectfully submitted,

TOM C. CLARK,
Director, Federal Judicial Center.

Mr. KASTENMEIER. Before I call on Judge Rao, does the gentleman from Virginia care to make any opening observations?

Mr. POFF. I thank you, Mr. Chairman.

May I suggest, first, that the Chairman might like to include among the other documents he named the first four pages of the Senate report on S. 2624 to the end that our record might reflect the precise amendments adopted by the Senate and the brief explanation of each.

I ask unanimous consent that this be included.

Mr. KASTENMEIER. It is an excellent idea. Without objection these will be included.

(The documents follow:)

Calendar No. 571

91ST CONGRESS }
1st Session }

SENATE }

REPORT
No. 91-576AMENDING PROVISIONS OF LAW RELATING TO JUDICIAL
ACTIONS AND ADMINISTRATIVE PROCEEDINGS IN
CUSTOMS MATTERS

DECEMBER 6 (legislative day DECEMBER 5), 1969.—————

Mr. TYDINGS from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2624]

The Committee on the Judiciary, to which was referred the bill (S. 2624) to improve the judicial machinery in customs courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs matters, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

1. Page 2, lines 9 and 10; delete the words "When a judge in the Customs Court, in issuing an interlocutory order," and insert in lieu thereof the words "When the chief judge of the Customs Court issues an order under the provisions of section 256(b) of this title; or when any judge in the Customs Court, in issuing any other interlocutory order,".

2. Page 5, lines 13-15; delete the sentence "Judges whose commissions bear the same date shall have precedence according to the seniority of their commissions."

3. Page 7, lines 15-18; delete the text of subsection (b) of proposed section 256 and insert in lieu thereof the words:

Upon application of a party or upon his own initiative, and upon a showing that the interests of economy, efficiency and justice will be served, the chief judge may issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country whose laws permit such a

hearing: *Provided, however,* That an interlocutory appeal may be taken from such an order pursuant to the provisions of section 1541(b) of this title, subject to the discretion of the Court of Customs and Patent Appeals as set forth in that section.

4. Page 8, line 3; insert the word "administrative" between the word "the" and the word "decision".

5. Page 8, line 12; delete the word "and" and insert in lieu thereof the word "or".

6. Page 10, lines 5 and 6; delete the "s" on the word "sections" and delete the words "or 515(c)".

7. Page 10, line 24; delete the word "may" and insert in lieu thereof the word "shall".

Page 11, line 1; delete the words "not exceed" and insert in lieu thereof the words "be not less than five dollars nor more than".

8. Page 11, line 13; delete the words "decision contested in the protest" and insert in lieu thereof the words "decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest."

9. Page 11, lines 20-25, page 12, lines 1 and 2; delete the text of subsection (f) of proposed section 2632 and insert in lieu thereof the words:

Upon service of the summons on the Secretary of the Treasury or his designee, 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 does not exist in the particular case, an affirmative statement to that effect shall be transmitted as part of the official record.

10. Page 15, line 15; insert the word "own" between the word "his" and the word "motion".

11. Page 15, lines 24-25, page 18, line 19, page 19, line 5; delete the word "January" and insert in lieu thereof the word "July".

Page 19, line 3; delete the words "the date of enactment and" and insert in lieu thereof the words "July 1, 1970".

Page 19, line 5; delete the period at the end of the sentence and insert in lieu thereof a comma, and the words "or with respect to which a protest has not been disallowed in whole or in part before July 1, 1970."

12. Page 25, lines 6-13; delete everything after the dash in subsection (a) of proposed section 515 of the Tariff Act and insert in lieu thereof the words:

Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section, the appropriate customs officer, within two years from the date a protest was filed in accordance with section 514 of this Act, shall review the protest and shall allow or deny such protest

in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 514 of this Act, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two year limitation prescribed in the first sentence of the subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary.

13. Page 25, lines 16 and 17; delete the words "filed in writing with" and insert in lieu thereof the words "mailed by certified or registered mail to".

Page 25, line 21; delete the word "receipt" and insert in lieu thereof the words "the date of mailing by certified or registered mail".

Page 25, line 23; delete the word "receipt" and insert in lieu thereof the word "mailing".

14. Page 25, line 24, page 26, lines 1-6; delete subsection (c) of proposed section 515 of the Tariff Act.

15. Page 36, line 16; delete the word "Customs" and insert in lieu thereof the words "Appropriate customs".

16. Page 36, line 21; delete the word "a" and insert in lieu thereof the words "an appropriate".

17. Page 36, line 23; delete the word "a" and insert in lieu thereof the words "an appropriate".

18. Page 37, line 2; insert the word "appropriate" between the word "or" and the word "customs".

PURPOSE OF AMENDMENTS

Amendment No. 1 provides for an interlocutory appeal from an order authorizing the holding of an evidentiary hearing in a foreign country. This amendment corresponds to the proviso in Amendment No. 3 and is designed to assure that such orders will be issued only when clearly warranted.

Amendment No. 2 is a technical amendment.

Amendment No. 3 is designed to limit the scope of section 256(b), governing hearings in foreign countries, to *evidentiary hearings in countries whose laws permit such hearings* and to thereby avoid possible constitutional and international law problems that may have resulted from the broader language of the original provision in the bill. The amendment makes it clear that the authority for authorizing the holding of such evidentiary hearings is to be exercised only upon a finding that the interests of economy, efficiency and justice will be served. The proviso corresponds to Amendment No. 1 and authorizes an interlocutory appeal from an order issued under the provisions of the subsection.

Amendment No. 4 corresponds with Amendment No. 8 and, together with that amendment, is designed to make it clear that the bill is not intended to change the present principles governing "amendment" in the Customs Court.

Amendment No. 5 is a technical amendment.

Amendment No. 6 amends provisions governing the time for commencement of an action in the Customs Court. It corresponds with Amendment No. 14 deleting subsection (c), governing constructive denial of protest, from proposed section 515 of the Tariff Act.

Amendment No. 7 requires the Customs Court to establish a filing fee of not less than five dollars.

Amendment No. 8 corresponds with Amendment No. 4 and is designed to make it clear that the bill is intended to leave unchanged the present principles governing "amendment" in the Customs Court.

Amendment No. 9 is designed so that the minimal items required to be transmitted to the Customs Court as part of the official record in a case shall comport with present practice.

Amendment No. 10 is a technical amendment.

Amendment No. 11 changes the effective date of the Act from January 1, 1970 to July 1, 1970 in order to provide adequate time for its implementation and eliminates an inadvertent drafting inconsistency between the effective date for title I and the effective date for titles II and III.

Amendment No. 12 requires the Department of the Treasury to allow a protest or expressly deny it in whole or part within two years from the date that the protest was filed in accordance with proposed section 514 of the Tariff Act and to give notice of the denial by mail. This corresponds with Amendment No. 14, which deletes subsection (c) governing constructive denial of protest, from the proposed section 515 of the Tariff Act.

This Amendment also requires the Secretary, by regulations, to provide for a further review of protests by a customs officer other than the officer responsible for the original liquidation, in circumstances and in the form and manner that the Secretary may prescribe in regulations, subject, however, to the overall two year time limitation.

Amendment No. 13 provides that constructive denial of a protest will occur 30 days after the mailing by certified or registered mail of a request for accelerated disposition rather than 30 days after receipt of such a request by the Bureau of Customs. The Amendment is designed to enable the protestant to calculate easily the date of constructive denial.

Amendment No. 14 deletes the provisions included in the original bill that provided for the constructive denial of protests after the elapse of two years from the date of the filing of a protest.

Amendments No. 15-18 are technical amendments designed to make it clear that the power to examine importers and others under oath is to be limited to certain designated customs officials as prescribed by regulations.

PURPOSE OF LEGISLATION

The purpose of S. 2624 is to modernize procedures in the Customs Court and related administrative processes in the Bureau of Customs so that the Court and the Bureau will be better able to cope effectively and expeditiously with their rapidly expanding workload.

Mr. POFF. Mr. Chairman, my statement will be brief. I am pleased, as one of the authors of the bill, that the legislation has commanded so much support from so many quarters. I applaud the scholarship that has gone into the preparation of the legislation and I truly believe that here in this second session of the 91st Congress, we are about to do what should have been done some years ago.

There may yet linger a few minor disputes about details. But they are indeed minor in nature and I believe can be fully resolved in the subcommittee and if not in the subcommittee, in the full committee. And I hope that the fate of the legislation in the House will be that which it enjoyed in the Senate where it passed unanimously.

Now, one final word by way of apology to the next distinguished witness. I will be obliged to leave at 20 minutes after 10 to return promptly at 20 minutes until 11. I want him to know that it is a personal matter and does not show any disrespect for his testimony. Judge RAO. Thank you, Mr. Poff.

Mr. KASTENMEIER. Before introducing Judge Rao, the Chair would also like to observe there are a number of members of the judiciary in the room this morning and we welcome their attendance. I know this is an important subject affecting them.

I think Judge Watson and Judge Maletz, who ably served the Judiciary Committee, are in our audience this morning.

At this time, the Chair is privileged to welcome to the committee for his testimony, chief judge of the U.S. customs court, the Hon. Paul P. Rao.

STATEMENT OF CHIEF JUDGE PAUL P. RAO, OF THE U.S. CUSTOMS COURT; ACCOMPANIED BY JOSEPH E. LOMBARDI, CLERK OF THE COURT, U.S. CUSTOMS COURT

Judge RAO. Thank you, Mr. Chairman. On my left is the clerk of the court, Mr. Lombardi; and I am accompanied by, as you, Mr. Chairman, stated, Judge Watson and Judge Maletz.

Mr. Chairman and members of the committee. Thank you for your courtesy in affording me an opportunity to appear before your distinguished committee to speak in behalf of pending legislation to modernize procedures in the customs court and in the Customs Service.

I had the privilege of appearing before a subcommittee of the Senate Judiciary Committee on August 4, 1969, in support of S. 2624 which is before you today and is a companion bill to the several House measures which are also now being considered.

In general, these bills are designed to revise and modernize judicial procedures in the U.S. customs court and to some extent in the Court of Customs and Patent Appeals, as well as administrative procedures in the Customs Service. My role here today is to speak primarily with reference to the provisions relating to judicial proceedings before our court.

As you undoubtedly know, under its present structure, the U.S. customs court exercises both primary and appellate jurisdiction. In matters involving the value of imported merchandise, trials are held before individual judges, with the right of appeal to a division of three judges.

In matters involving classification of imported merchandise within the statutory tariff descriptions and in all other matters pending before the court, trials are held before three judges sitting en banc. All three-judge decisions are appealable to the Court of Customs and Patent Appeals.

These procedures have remained substantially unchanged since they were first adopted 80 years ago and are not geared to modern techniques or the volume of business and the complexity of issues with which the court is now faced.

Additionally, the adoption of the Customs Simplification Act of 1963, and the reorganization of the Customs Service in 1965, have resulted in the filing of an increased volume of cases in the court, thus requiring certain changes in our operations.

The new proposals would eliminate the two-sided aspects of our jurisdiction and permit the contesting of all administrative decisions—whether addressed to value or to classification, or to both—to be tried in a single action. Thus the delay now caused by requiring a final determination as to value to precede the final liquidation of entries will no longer occur. Administrative procedures would also be amended to effectuate this change.

The bill would eliminate three-judge trials except in instances where constitutional questions or other issues affecting presidential proclamations or orders, or having significant implications in the administration or interpretation of customs laws are involved, and the chief judge of the U.S. customs court, upon application of a party, so orders.

Another provision of existing law tending to delay the final determination of customs litigation is the requirement that judgments of the court must rest upon written opinions stating the facts and reasons upon which the decisions are based.

The proposed legislation would permit a decision to be predicated simply upon findings of fact and conclusions of law, at the discretion of the trial judge.

The proposed legislation would eliminate the automatic referral of protests from the customs districts to the customs court. Existing procedures have had the effect of burdening the court with vast numbers of matters which could or should be disposed of on an administrative level, or which the parties never did desire to litigate.

The new legislation would afford a period of 180 days from the date of the denial of a protest within which an action in the court could be instituted. The additional time over the present 60 days would permit an importer to reflect upon the desirability of ever going into court and the advisability of consolidating several causes of action in one suit, if he elects to do so.

I have personally given much thought to the changes needed for improving the operation of our court, and for the past several years I have conferred with various officials of the Treasury Department and the Customs Service as well as of the Department of Justice, to consider ways and means of streamlining our procedures, particularly to avoid the court processing of cases which may never actually come to trial.

I have also discussed these matters at length with Mr. Justice Tom C. Clark, in his capacity as Director of the Federal Judicial Center, in the company of representatives of the Treasury and Justice Departments.

S. 2624 which was passed by the Senate, and H.R. 12691, 12857 and 12921, which are before your committee this morning, are the results of these many discussions. It has not been an easy task to draft legislation which would meet the needs of all those whom it would affect.

We acknowledge the cooperation of Attorney General Ramsey Clark and his successor Attorney General John N. Mitchell, together with his able assistant, Assistant Attorney General William D. Ruckelshaus, in this endeavor. We believe that the changes contemplated by these bills will benefit the public and insure the expeditious administration of justice in customs cases.

All of the judges of our court exerted their utmost efforts to resolve the many problems connected with the preparation and introduction of this legislation. I believe that all concerned, including the Treasury Department, the Department of Justice, the Association of the Customs Bar, and the American Importers Association, should be pleased with this legislation and feel that its enactment will be beneficial to them and to the United States.

In its course through the Senate, S. 2624 was the subject of several amendments which constitute an improvement of the bill as introduced and originally approved by the court. These amendments would serve to enlarge the rights of importers by making mandatory the giving of notice of a denial of a protest filed with the Customs Service, by requiring additional items and/or information to be transmitted to the court when a civil action is instituted, and authorizing an interlocutory appeal from an order directing the holding of an evidentiary hearing in a foreign country.

We believe that this legislation will substantially reduce the number of cases brought before the customs courts and it will also expedite the disposition of such cases as are pending before them. Accordingly, and on behalf of the U.S. Customs Court, I respectfully recommend the enactment of this legislation which I believe will be of great benefit to our country.

In conclusion, I wish to state that the judges of the Customs Court have been working very diligently to bring the caseload of the court to a current basis. In addition to disposing of 262 test cases during the past calendar year, 60,884 other cases which had been suspended under the test cases were disposed of and the entries sent to the various ports throughout the country for final disposition in accordance with the judgments of the court.

I wish to commend the Judiciary Committees of both Houses and the Treasury Department, as well as the Department of Justice, for their time and effort in furthering this pending legislation. A special word of appreciation is due Mr. Justice Clark and the Federal Judicial Center, Mr. Rossides, Assistant Secretary of the Treasury, and Mr. Ruckelshaus, Assistant Attorney General, for their untiring efforts in helping to update and modernize the procedures in the Customs Court and the Bureau of Customs.

Thank you.

Mr. KASTENMEIER. Thank you very much, Judge Rao.

Judge, how many judges do you have on the Customs Court?

Judge RAO. Nine; and we had three senior judges until last month who are also doing very active work.

Mr. KASTENMEIER. In recent years, what has been the volume of cases appealed to the C.C.P.A.?

Judge RAO. I would say approximately about 40 a year.

Mr. KASTENMEIER. Has that risen substantially over the past 10 years or so?

Judge RAO. I wouldn't say so. It has, however, increased slightly, but at the same time, it wouldn't be fair to make a statement for this reason: that the court has been functioning with two and three vacancies for almost 6 years. And we now have some new judges who are really doing a great job.

Mr. KASTENMEIER. Are you able to say what percentage of the workload of the Court of Customs and Patent Appeals consists of customs matters as distinguished from patent matters? A small fraction?

Judge RAO. I don't know. Do you mean insofar as number of cases or their work compared with our work?

I happened to sit on the Court of Customs and Patent Appeals the first week of December because the chief judge of that court, Judge Worley, has been ill, as you undoubtedly know. I assure you I didn't sit in customs matters. I sat only in patent and trademark cases. Their work is absolutely different from our work.

Mr. KASTENMEIER. As far as you know, customs matters have not much affected the C.C.P.A. caseload?

Judge RAO. I don't think so.

Mr. KASTENMEIER. How much do you estimate would be saved in judges' time if the proposed legislation were enacted?

Judge RAO. I don't know whether they would save any time. I think they would be working harder because where they would have individual capacity to decide a case, they would have to hear the case. When they hear it, under the new legislation, they will have to decide it, which is a great improvement over what we are doing at the present time, when one judge may go out to try a case and another judge decides it.

Mr. KASTENMEIER. Then conversely, how many more matters might be disposed of, do you think, by virtue of procedural improvements?

Judge RAO. That, I couldn't say. We should increase our dispositions. We have increased them this year over 1968. In 1968 we had 176 test cases decided by the judges, disposing of 38,249 cases. This year with nine judges and three senior judges working, we decided 262 test cases disposing of 60,884 cases. Of course, one case may affect the determination of 20,000, 1,000 or perhaps only one case.

So it is going to be difficult to say now whether we will try more test cases and dispose of fewer suspended cases or try still fewer cases and dispose of more suspended cases.

Mr. KASTENMEIER. I note that in your prepared statement you made favorable reference to the amendments to S. 2624 made by the Senate. Does your approval of these amendments extend to the provision for a filing fee of not less than \$5?

Judge RAO. On filing fees, the bill, as passed by the Senate, has a mandatory provision for a filing fee payable upon the commencement of an action before the Customs Court. The provision requires that

the fee fixed by the court shall not be less than \$5, nor more than the filing fee applicable to civil actions commenced in a district court.

It would be well to leave to the Customs Court the fixing of any other fees that the court finds necessary to effectively carry out its judicial functions as the legislation presently provides. The question of whether a filing fee should be imposed for the institution of an action in any Federal court is a public policy determination within the discretion of Congress. If Congress enacts it, we have nothing else to do but comply with what Congress wants us to do.

Mr. KASTENMEIER. Am I to understand then, that you are neutral on the question, as far as your own recommendation to us is concerned?

Judge RAO. May I state this: What I am primarily concerned with is, that assuming 262 cases are tried and the filing fee is \$5, we would need more money to pay for bookkeepers to keep records than our total receipts. That is what bothers me.

But, as I said, if Congress provides for a filing fee, we will have a filing fee and we will go along with it. But I am concerned that when I appear before the Appropriations Committee of Congress, and ask for a couple of more bookkeepers to keep books for 262 cases at \$5 a case, I am going to feel a little ridiculous. That is the problem.

Mr. KASTENMEIER. Has this been your general observation on the judicial system, that filing fees are anathema to the judiciary and the system?

Judge RAO. I don't know. All I know is that many years ago, there was a filing fee of \$1 and I think Congress repealed that provision. But as I said, we are ready to comply.

Mr. KASTENMEIER. That filing fee, as I recall, was not a filing fee for filing a proceeding in court.

Judge RAO. No. it wasn't with the court. I think it was paid to the Treasury Department at that time. That is before my time.

Mr. KASTENMEIER. Would something of that sort be more palatable to you, then, if you were concerned about the court itself being the focus of the filing fee? Do you think there might better be a filing fee at some other point in the process?

Judge RAO. Again, that is up to whatever Congress wants to do. We are ready to live with anything Congress gives us.

Mr. KASTENMEIER. Do you think a filing fee in your court might affect the volume of cases before your court?

Judge RAO. It may. But I don't know, because what plaintiffs will do now is consolidate 50 cases in one and still pay a filing fee of \$5.

Mr. KASTENMEIER. Is the consolidation of 50 cases preferable from the handling standpoint?

Judge RAO. It would help the court because by consolidating parties won't be able to try their cases two, three, and four times. Of course, it will help the court eventually.

Mr. KASTENMEIER. So from that standpoint, you certainly wouldn't have objection?

Judge RAO. I wouldn't think so.

Mr. KASTENMEIER. Judge Rao, can you tell the committee what the content of the summons required to start an action in your court will be if the pending legislation were enacted?

Judge RAO. I didn't get the question, Mr. Chairman.

Mr. KASTENMEIER. Can you tell the committee what the form of the summons, which will be filed in your court, would be like?

Judge RAO. I have discussed this with the clerk of the court and some of the members of our court. We personally feel that when a summons is served, they should give us information as to the paragraph or section of the Tariff Act or item number of the Tariff Schedules of 1963, and briefly state what the merchandise is, how it was classified or appraised, and what the claim is. I think it will be important, too, that the plaintiffs file a notice of trial in sufficient time for the court to prepare its outport dockets, and, wherever possible, to assign a judge who is familiar with a particular subject matter to preserve continuity of precedent as laid down by our court for years and years.

I don't know if that will happen, but it may happen. And for that reason, I would feel that notice of trial should be at least 60 days.

We are now preparing these forms. We have been working on what should be included in the notice of trial, note of issue, and in the summons and complaint, and in other pleadings. We are preparing these forms now in anticipation so that the customs bar, the Department of Justice, and the Treasury Department may express their views before we finally determine our new procedures.

Mr. KASTENMEIER. Thank you, Judge Rao.

The gentleman from New York?

Mr. RYAN. Thank you, Mr. Chairman.

It is a real pleasure, Judge Rao, to welcome you as Chief Judge of the Customs Court to our hearing and to have the benefit of your views and to have present with you your distinguished colleagues. Judge Watson is not only a former able legislator, but I know he is making a distinguished record in your court. He happens to be a constituent of mine of whom I am very proud. I am delighted he is here. Of course, Judge Maletz was with this committee for many, many years. We are honored with your presence.

I wonder if I could ask some questions, and I must admit to a lack of familiarity with the practice in the Customs Court.

On this question of the filing fee, I have had a number of communications from people who are importers in New York who raise questions concerning whether or not the imposition of a filing fee will mean that there will be a multiplicity of fees that they will have to pay.

In other words, will they have to pay a fee on each shipment of merchandise that comes into the country and perhaps adding up to 50, maybe 100 different separate fees that would be paid?

I wonder if you could explain exactly what your understanding of a filing fee would be?

Judge RAO. After the importer, through his attorney, or its attorney, has lost all opportunities of settling his case with the Treasury Department—I say settling it, arriving at some conclusion that is satisfactory to the importer—that ends it.

But assuming he disagrees with the District Director of Customs of the Regional Commissioner of Customs in the classification or valuation of the importation, then he comes to our court. He may have 50 other cases like that all over the United States. At the present time he files a protest for each case. And he can try one case and if he loses that case, he may try a second or third case on the same issue.

The Government, which is always the defendant in these cases, also has the opportunity to try the same issue again and again.

This way, if they have to pay for a fee, they may consolidate all of these cases and you won't be trying the same issue two, three, or four times. They may put 20 or 2,000 of these cases together to pay one filing fee.

It depends on how they feel, whether they have a strong case or not. Government counsel may also take advantage of what he believes is a strong case by moving to consolidate cases. But both the Government and the plaintiff want as many bites of the apple as possible.

So that counsel will try a case, if he wins that, then he will try to consolidate the remaining cases if they can. It is just what any lawyer would do, I guess. This is not critical of the bar or the Government.

But in my opinion I think the filing fee will have its great benefit in inducing consolidations and eliminating repeated trials. The only thing I am concerned about, as I stated before, is merely is it going to pay us to put two people to work to keep our books and then have the Comptroller General's Office come in and inspect our books and waste another couple of months' time just to keep the bookkeeping and the fees. Does it pay the Government to do it?

That is the only thing I am concerned with, nothing else.

Mr. KASTENMEIER. If the gentleman would yield. Aren't there other considerations besides whether it pays?

Judge RAO. Yes sir, There certainly are. The only thing is that when you go for money before Congress, they just say, "Well, now you want two more people? You want three more people? What do you need them for?" You have got to justify it. You gentlemen know it. Congressman Rooney is a tough man to get money from.

Mr. RYAN. You shouldn't find any difficulty in that?

Judge RAO. No, I wouldn't say that.

Mr. RYAN. The bill as introduced in the Senate said that filing fees may be payable and this was changed in the Senate and as it comes to us it says "shall be payable." Would you prefer to have it read "may be payable"?

Judge RAO. Yes. I think that would be sort of leaving it to the discretion of the court.

Mr. RYAN. Could you—in consultation with the clerk—supply for us an estimate of what the additional financial burden on the court would be if there were to be imposed a filing fee requirement as set forth in section 113?

Judge RAO. We can certainly give you that. But we have already given it some thought. We feel that we will need one man definitely just to keep books, a bookkeeper, that we have not had before.

(Subsequently Chief Judge Rao submitted the following:)

On reflection I am of opinion that the foregoing answer is as detailed as is possible at the present time, since we have no way of predicting our annual receipts from filing fees. I would assume that a qualified bookkeeper would command a salary of about \$7,500 per annum, which is the equivalent of a grade GS-7.

Mr. RYAN. The proposed statute says "There shall be a filing fee payable upon commencing an action." My question is this: what does "commencing an action" mean?

Judge RAO. As soon as the summons is filed with our court.

Mr. RYAN. Do you view a summons in your court—or, as you would prescribe it, by rule—to be the same as a complaint?

Judge RAO. No, sir. A summons would not be. But in case they only serve a summons they would then have to serve a complaint and other pleadings prior to the time of the trial. Before they notice it for trial, they should serve a complaint.

A summons, they will serve a summons I assume on the Secretary of Treasury or the Department of Justice, whichever way Congress will enact this legislation. Of course, as soon as they do that, they serve the summons, they have commenced an action. Then when they file that summons with us or the complaint with us, whichever way it is going to be done, whether before or after service, they will have to pay a fee.

Mr. RYAN. That is the point I am trying to reach. At what point would the fee be payable, when the summons is served upon the Government or when the specific complaint is filed with the Customs Court?

Judge RAO. Only when it is filed with us, because we have no jurisdiction of the case until it is filed with us.

Mr. RYAN. So in addition to the summons which you would prescribe by rule, I take it, would you also prescribe the form of the complaint?

Judge RAO. You could, in a general way, because each case will be different and the contents of the complaint would have to embrace the cause of action.

Mr. RYAN. I am really trying to determine to what extent the fear expressed by importers that they will have to pay a multiplicity of fees is justified.

Judge RAO. I don't think there is any justification for that. They would be paying one fee and that is when they filed the summons or the complaint with the court.

Mr. RYAN. This is what I am trying to distinguish. Do they pay the fee when they file the summons or do they pay the fee when they file a complaint, and is it not possible that they could file a series of summonses and yet not proceed to the stage of filing a complaint later?

Judge RAO. That is true. But they would have to file a fee I would assume. As soon as any legal action comes to our court, they would have to file the fee then. The complaint, of course, they could file before the time of the trial.

Mr. RYAN. Would it make sense, alleviate some of the fear that has been expressed that there may be a multiplicity of fees, if it were specified that the fee were payable at the time of filing the complaint rather than at the time of filing the summons? In that way, you could still, I would think, consolidate actions in one complaint, after the various summonses have been filed? Do you follow me?

Judge RAO. I can understand what you mean. But I would think—I don't know—that is something that the court will have to determine, whether they are going to charge for every complaint that is filed or for every summons that is filed or whether one summons is going to embrace 50 other cases. I don't know. These are things we will have to get together to discuss and adopt rules governing after Congress passes the legislation.

Mr. RYAN. You are correct if the legislation reads "There may be a filing fee payable upon commencing," but if the legislation reads "There shall be a filing fee payable," then I think it is important that

we have some legislative history which defines what commencing an action is. Is it the service of a summons or a filing complaint?

Judge RAO. I think action would have been commenced once a summons had been served on a party. Once the summons had been served on the Department of Justice or the Treasury Department, whichever way the law is going to read, that is the commencement of an action.

Mr. KASTENMEIER. If the gentleman from New York will yield, is not the answer actually on page 9 of the legislation, line 18, "Actions may be consolidated by order of the Court or by request of the parties, with no approval of the Court, if there are common issues"? As I read this, no matter how many items are involved, if the issue is identical, there need be only one \$5 filing fee.

Mr. RYAN. No, I disagree, because the consolidation, as I read it, would take place after the summonses are filed.

Judge RAO. It could be done either or before.

Mr. RYAN. It could be done after the filing of summonses, therefore the consolidation might not result in any saving of fees?

Judge RAO. I don't know. It depends on what the attorneys will do, I suppose. That again we will have to play by ear. It depends on also what Congress is going to do with the legislation. What you give us, we will try to implement.

Mr. RYAN. Suppose we gave you permissive language, "may" instead of "shall," would you think it desirable from an administrative point of view, assuming you were going to have any fee at all, to require the fee at the time the complaint is filed; thereby giving the opportunity to the parties to consolidate actions which may have been commenced by the filing of a series of summonses, combining those actions into one complaint and requiring the fee only at the point of the complaint?

Judge RAO. I would think it isn't when the complaint is filed. I think as soon as a summons is filed and an action has been commenced, they should pay a fee and then in the complaint, if they want to consolidate 50 or 100 cases that are pending in a court, let them consolidate them and we will try to do the best we can.

Mr. RYAN. Does the proposed bill contain a time period within which there has to be consolidation?

Judge RAO. No, sir. At any time.

Mr. RYAN. Is there a time period between the filing of a summons and the filing of a complaint that you are going to impose?

Judge RAO. I would think we would give that some discussion. A complaint will have to be filed, if they have not filed one before, before the time of the notice of trial. So that the court will have a complaint and the cause of action before it.

Mr. RYAN. But how long a period would it be possible for a summons to hang before a complaint is actually filed?

Judge RAO. Under the proposed legislation, 2 years, and then if nothing is done after 2 years and the complaint is not served or the case is not noticed for trial, it is automatically terminated. It is deemed abandoned.

Mr. RYAN. Another question which has been raised pertains to the question of hearings in foreign countries.

I believe that under present law there is no provision for hearings to be held in foreign countries, is there?

Judge RAO. I understand the Senate has included it. May I state that it is the function of the U.S. Customs Court to determine questions arising as to the proper valuation and classification for customs duty purposes of merchandise imported from abroad. In carrying out this function, it becomes necessary to know not only what the merchandise is, but how it was manufactured, the component material of value, and in valuation cases how it is bought and sold abroad, whether on a freely offered basis or otherwise.

Such essential evidence is now usually presented to this court in either of two ways: As the result of the issuance of letters rogatory and the taking of such testimony by a consular officer abroad on questions propounded in writing in advance by opposing counsel or through the reception in evidence of reports prepared by customs agents abroad.

Since such evidence is not subjected to a screening abroad as to materiality, relevancy, and so forth, neither of these methods provides the court with the definite proofs needed for a fair determination of the questions presented.

Moreover, the occasion may arise where a witness being examined before a consular officer may make a claim of privilege in answer to a question propounded to him on the ground that his answer would necessitate the disclosure of a trade secret. Within the past year, I was called upon to rule on such a claim of privilege in proceedings held in New York City.

The situation could be remedied by a judge of this court being designated to preside at a hearing abroad and being present to rule on the admissibility of evidence or a question of privileged information at the time the questions and answers are being recorded.

An instance where the present system of taking testimony on written interrogatories before a consular official proved unsatisfactory was the recent case of the *United States Blanket Corporation v. United States*, reported in 58 Customs Court, page 68. The plaintiff in that case, after being granted permission by this court to take testimony on written interrogatories, through an appropriate consular officer, was not satisfied with the answers obtained and had doubts about their responsiveness.

The plaintiff believed better evidence would be produced if both counsel would go abroad and elicit the information orally from the witness. This court issued a commission to the consular officer in Florence, Italy, for the taking of testimony of the witness, counsel for the parties being authorized to propound their questions on direct and cross-examination orally rather than in writing.

Miss Strum represented the Government in that case, and Mr. Davidson, of Siegel, Mandell, and Davidson, appeared for the plaintiff.

While this was an improvement over the previous procedure, it still had its shortcomings in that even though counsel were physically present and propounded their questions orally, there was no competent party present to rule on objections to the admissibility of questionable evidence.

Although the matter of taking testimony abroad is of particular importance to the Customs Court because of the nature of its jurisdiction, it is a question which is becoming of increasing importance to other courts as well. This is evidenced by the article entitled "The

Proposed Convention on the Taking of Evidence Abroad," appearing in the July 1969 issue of the American Bar Association Journal at page 651.

I have a copy of that here and I will be delighted to include it in the record, if you so desire.

Mr. RYAN. I wonder if any analysis has been made over the past several years of the cases considered by the Customs Court and any determination made as to which and how many of those cases would have lent themselves to hearings abroad. Is there any possible way of determining at this point how many times or in how many cases hearings might be held abroad?

Judge RAO. Congressman, all I could say is that in many cases in the 22 years that I have been on the bench and my 8 years prior thereto as Assistant Attorney General in Charge of Customs, we used to have government agents from foreign countries come into the United States to testify and then go back. Half of the time that wasn't enough.

So that here, instead of having our Government officials coming over here to testify, the court could go to the country of exportation and we would be saving money and time.

It would not happen often because it is not a problem in every case, and moreover the parties must make an application for it. The Government must consent. If it doesn't consent, then the chief judge has to decide whether it is proper to send somebody there or not.

May I state that I think that you are then putting this court ahead of other courts in the country, because this concept is just being explored at the present time. I think, if I recall right, the article in the American Bar Association Journal mentions that they are having conferences and they are trying to determine where they can have these trials all over the world and send out district court judges to hold them.

But it is really bringing court procedures up to date. Today, within a few hours, you can be anywhere in the world. It is so different from years ago when it took months to get anywhere.

Mr. RYAN. Do you think it would create an added burden on the litigant to be required to appear in a foreign country?

Judge RAO. I don't think so. I don't think it would be any burden.

Mr. RYAN. An added financial burden?

Judge RAO. No, sir. Because it is to their benefit as well as to the Government's. If one opposes it, I doubt as to whether—Congressman Ryan, I am over 70 so I have no motive in mind. I say this: I think it is a good step forward for the customs court to have this legislation.

Mr. RYAN. You just said if one opposes it?

Judge RAO. If one opposed it, I doubt as to whether any judge would grant it unless there were extenuating circumstances. Usually these things are done by both sides agreeing that it is important. If the case is important enough, it is just as important to the plaintiff as it is to the Government to have a judge there to rule and pass on whatever evidence was being presented to the court.

Mr. RYAN. Do you think it would be desirable to have the legislation make foreign hearings contingent upon the consent of both parties?

Judge RAO. No, sir; because the interest of the court is to see that justice is done. I am sure that whoever would be the chief judge of the court wouldn't arbitrarily or without giving due consideration grant a motion to have testimony taken outside the confines of the United States.

Mr. RYAN. May I refer you to page 11 of the Senate bill? Proposed section 2632, subdivision (d), states that: "the Customs Court, by rule, may consider any new ground in support of a civil action," and so forth. Does that make any change in present practice?

Judge RAO. I don't think so.

Mr. RYAN. It says "The Customs Court, by rule, may consider any new ground in support of a civil action if the new ground (1) applies to the same merchandise that was subject to the protest; and (2) is related to the same administrative decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest."

Does that in any sense narrow the ground upon which the court may consider new matter when they are hearing this case? In other words, does it limit it by provision No. 2?

Judge RAO. I don't think so.

Mr. RYAN. Then I have just one other question, which goes to the burden of proof.

Section 2635 as proposed to be amended states that "The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision."

Is there presently any statute which incorporates that presumption?

Judge RAO. No, sir; it is not a statutory presumption for all cases.

Mr. RYAN. In other words, the presumption of regularity is a common law presumption or one developed through decisions of the court?

Judge RAO. Yes, sir; in valuation cases.

Mr. RYAN. What about classification cases?

Judge RAO. Excuse me. I meant in classification cases.

Mr. RYAN. Only?

Judge RAO. Only, yes, sir.

Mr. RYAN. What about valuation cases?

Judge RAO. There is a statutory presumption of correctness in valuation cases.

Mr. RYAN. Could you elaborate on that a little bit for us so we have an understanding of the difference?

Judge RAO. The court has always decided that when a Government official performs an act for Treasury, that is presumed to be correct. Naturally, it is up to the importer to come in to prove otherwise. Now you are putting it in the statute which, in my opinion, is good, because after all, the Government's actions should have a color of right until proven wrong. If it had to work otherwise, I think it would be a great handicap to the Treasury Department.

Mr. RYAN. Is it your opinion that this proposed statutory language will create any greater presumption or any higher standard of proof than presently exists under case law in your court?

Judge RAO. I don't think so.

Mr. RYAN. You simply see this as codifying your existing case law?

Judge RAO. Yes, sir.

Mr. RYAN. Thank you, Judge Rao. It is a pleasure to have you before us.

Judge RAO. It is also nice to see a Congressman from New York here.

Mr. RYAN. We are pleased to be here and we are delighted that we are the center of the Customs Court and we are very fortunate in having such distinguished jurists who adorn that bench and in having the benefit of your more than 20 years on that court and your previous experience as assistant attorney general in charge of customs.

Judge RAO. Thank you.

Mr. KASTENMEIER. The gentleman from Illinois?

Mr. MIKVA. I have no questions.

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. POFF. No, thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Michigan?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Judge Rao, do I understand that this bill would permit the chief judge of the Customs Court to issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country?

Judge RAO. I don't think we would go to any Communist country.

Mr. HUTCHINSON. But you could hold an evidentiary hearing in any foreign country that permits you to?

Judge RAO. That is right.

Mr. HUTCHINSON. The matter that troubles me is, how would the United States accept the idea of a foreign court holding court within the jurisdiction of the United States?

Judge RAO. That actually happened only last year. A group of Italian judges came to sit here and they held court here. They visited our court.

Mr. HUTCHINSON. They actually held court here?

Judge RAO. Yes.

Mr. HUTCHINSON. It doesn't require any kind of a treaty or anything?

Judge RAO. I assume that the State Department of Italy communicated with the State Department in the United States. But they were in New York, these Italian judges, and then they visited our court. They were holding court, of course, in the consul general's office on Park Avenue and 69th Street.

Mr. HUTCHINSON. Extraterritorial jurisdiction?

Judge RAO. I don't know. But today things are done differently. Take Interpol, for example. In two seconds you can contact any place in the world and cause the apprehension of a criminal. Pretty soon they are going to make it possible in my opinion to have these criminals tried in a foreign country. Otherwise they are not going to stop crime.

Mr. HUTCHINSON. They are going to make it possible to take the judge to the criminal rather than bringing the criminal to the court?

Judge RAO. No, sir; I don't say that.

Mr. HUTCHINSON. I am sorry. I misunderstood you. All I am saying is that this seems to be a very novel idea.

I don't know whether to go into this summons matter any further. A summons would be issued by your court, wouldn't it? A litigant who wanted a summons served would come in and file what we called in Michigan a precipe asking for the issuance of a summons.

Judge RAO. That is the practice in the Federal courts, yes, sir.

Mr. HUTCHINSON. That is the way you would run it probably, too, isn't it?

Judge RAO. I would think so.

Mr. HUTCHINSON. So at the time when the summons would be issued, would be the proper time to require the payment of a filing fee?

Judge RAO. Yes, sir; it would be.

Mr. HUTCHINSON. When the summons was issued, not when it was returned, but when it was originally issued?

Judge RAO. Yes, sir. The reason I said when it is filed or when the summons is filed, the reason I said that was because I was talking about the practice in New York, where the lawyer issues a summons and not the court, except in the Federal courts. In the Federal courts the courts issue the summons and complaint. But say for instance I started an action for personal injuries in New York, I issue my own summons and complaint or a summons alone.

Mr. HUTCHINSON. You are furnished, as an attorney, with a supply of summon forms and you can simply fill them out and get them served?

Judge RAO. That is right. But Congressman, what you said, that is so, as soon as a summons was issued, of course then we would have to charge a fee if Congress wants us to do it.

Mr. HUTCHINSON. Does this bill, as it is now written provide that a filing fee must be charged and this fee may be anywhere between \$5 and \$15?

Judge RAO. Yes, sir.

Mr. HUTCHINSON. So under this bill you would have discretion as to what the exact amount of the fee would be, provided a minimum of \$5 was charged?

Judge RAO. That is right.

Mr. HUTCHINSON. In your discussion with the gentleman from New York, did I understand that some suggestion was made that your court might be given the discretion as to whether or not any fee should be charged?

Judge RAO. That depends on what Congress is going to do.

Mr. HUTCHINSON. Would you favor such a discretionary power in your court?

Judge RAO. I don't think I would like it.

Mr. HUTCHINSON. I don't think you would either.

Judge RAO. But if Congress says we will charge a fee, we will charge a fee.

Mr. HUTCHINSON. I understand that. But you wouldn't want Congress to say that you may or may not charge a fee?

Judge RAO. No, sir. I would want Congress to tell us directly what they want us to do and we will do it.

Mr. HUTCHINSON. I appreciate that.

Mr. RYAN. If the gentleman will yield one moment.

Mr. HUTCHINSON. Yes.

Mr. RYAN. The bill as filed in the Senate and filed in the House made the matter discretionary, said "may" and the Senate changed it to "shall."

Mr. HUTCHINSON. I think that was an improvement. I will yield the floor.

Mr. KASTENMEIER. The gentleman from Pennsylvania?

Mr. BIESTER. I thank the chairman.

I know there are other witnesses from whom we wish to hear, therefore, I will be very brief.

As I understand this bill, its purpose is to streamline and make more efficient the operation of this court. Am I correct?

Judge RAO. Yes, sir.

Mr. BIESTER. Is part of the burden of the Customs Court at the present time its heavy caseload? In other words, do you feel that this legislation would reduce the influx of cases into your court?

Judge RAO. I would think so, yes, sir, because it gives the importer a longer time and it gives Treasury a longer time to try to get together.

Mr. BIESTER. Under those circumstances, therefore, will not this reduce the caseload of the court?

Judge RAO. Yes, sir; it should.

Mr. BIESTER. Therefore, so far as a filing fee is concerned you will be actually reducing employees as a result of a reduction in the number of cases handled?

Judge RAO. No, sir. We have at the present time 440,000 cases that must be processed. Last year alone, as I stated, we disposed of 60,884 cases. That isn't just taking a case. There are many steps in our procedures. Then judgments have to be entered. The cases have to be sent back to the ports, all over the United States, and we have enough cases already filed which will prevent reduction in personnel at the present time and at least for a few years, as far as I can see it. In addition thereto, we will have to get a higher grade and a more intellectual person in, to replace the one or two employees who are performing more or less mechanical tasks or are merely filing papers.

So actually we won't be saving any money for some time.

Mr. BIESTER. Can you distinguish in terms of reduction of caseload with respect to valuation cases and classification cases? Would you expect a reduction in caseload more in valuation or more in classification?

Judge RAO. You mean the test cases?

Mr. BIESTER. Yes.

Judge RAO. The classification cases.

Mr. BIESTER. Can you measure that at all?

Judge RAO. I haven't got the statistics here with me. Otherwise, I would be delighted. When it is a matter of valuation, they will no longer file what we now call an appeal for reappraisement which isn't an appeal at all. Now it will be joined with classification questions. In the *Macy* case, for example, a protest case, of course, we had over 70,000 cases suspended under that case.

We have just finished disposing of almost 50,000 cases on a plywood issue, so that the figures are not really significant. We may have 400 or 400,000, yet we can give anybody a trial anywhere in the United

States on 60 days' notice. Our court now with the judges working as hard as they have been working, this is not blowing our horn, but really all the judges of our court have done a tremendous job in disposing of 262,000 cases. I will say in a year and a half, we will be current. I said that to the Department of Justice several months ago.

Mr. BIESTER. Under this legislation?

Judge RAO. Yes. I would say that.

Mr. BIESTER. Thank you.

Mr. KASTENMEIER. Judge Rao, you were speaking earlier about the addition of a bookkeeper being of great concern to you and possibly to Congressman Rooney, but of these 400,000-plus cases, don't you require a great deal of docketing personnel? If these filings were accompanied by a summons and a \$5 filing fee, I should think that that would more than justify a bookkeeper, would it not? You wouldn't have 400,000 pending cases, I am sure. But the point is you would have one or the other.

Judge RAO. I would like to extend an invitation to the members of your committee, Mr. Chairman, and you, to come up to visit our court. Our operation is amazing. We can lay our hands on any one of those files, especially since we moved into our new courthouse, where some of the Senators have been holding hearings.

I think you were there, Congressman Ryan. Several Congressmen have advised us recently that they want to hold hearings there. We have a wonderful organization. The men really work hard and the judges work harder. I am very proud of every one of our judges.

Mr. KASTENMEIER. I have no doubt that that is true, Judge.

Mr. POFF. If I may. I am afraid the record may be a little unclear unless we pursue a little further the question that was asked concerning the fees. I understood the witness to say that he would rather the court not be granted discretion.

As the bill was amended in the Senate, I believe you will find that the court will be vested with discretion in the fixing of the fee in individual cases. The minimum limit would be a \$5 fee and the outer limit would be the customary fee for the filing of a civil case in Federal courts.

You would not object to that quantum of discretion?

Judge RAO. I have no objection at all. I have no objection to what Congress does.

Mr. POFF. As a matter of fact, I would suggest that it might facilitate equity in fixing the filing fee, if you had that discretion. Would you agree?

Judge RAO. Yes, sir. By saying the minimum of \$5 means that we could charge \$15 if there was a consolidation of 50 cases or more. I don't know what we will decide after Congress tells us "You are going to charge a fee."

Mr. HUTCHINSON. If the gentleman would yield there.

That would be done by court rule and I would hope that it isn't going to be a case-by-case determination as to what the filing will be.

Judge RAO. That is right.

Mr. POFF. I thank you.

Judge RAO. I want to thank you, Mr. Chairman and members of your committee.

Mr. KASTENMEIER. The Chair is very pleased to call the Honorable Eugene T. Rossides, Assistant Secretary for Enforcement and Operations of the Department of the Treasury who will be accompanied by Leonard Lehman, Deputy Chief Counsel, Bureau of Customs.

The Chair understands that the Honorable William D. Ruckelshaus, Assistant Attorney General, Civil Division of the Department of Justice, originally scheduled to present the views of the Department of Justice, cannot be here because he is involved in argument before the Supreme Court of the United States, although he wishes that his view in strong support of the administration's bill be communicated to the committee.

Representing the Department of Justice in place of Mr. Ruckelshaus, will be Mr. Andrew P. Vance, Chief of the Customs Section, Mr. Stanley D. Rose, Legislative Officer, and Mr. Meyer Scolnick, Assistant Legislative Officer. Gentlemen, you are indeed welcome.

The five of you are here en banc. I shall ask Mr. Rossides to make his statement.

STATEMENT OF HON. EUGENE T. ROSSIDES, ASSISTANT SECRETARY FOR ENFORCEMENT AND OPERATIONS, DEPARTMENT OF THE TREASURY; ACCOMPANIED BY LEONARD LEHMAN, DEPUTY CHIEF COUNSEL, BUREAU OF CUSTOMS

Mr. ROSSIDES. Our thought was that I would give my statement and then Mr. Rose will give the comments of Mr. Ruckelshaus and at that point, possibly the committee would have questions that we could take up.

I want to make a quick comment before my prepared statement. No. 1, the Treasury Department strongly supports and urges the requirement of a filing fee. It is not in my prepared statement. The statement of Mr. Ruckelshaus will deal with that more fully.

But I want to make clear that we don't want anything that is permissive. We want a mandatory filing fee. The point is to keep these cases from going to court automatically and without an affirmative action. This would help tend to prevent unnecessary cases going to the court.

Mr. HUTCHINSON. If the gentleman would yield there, would \$5 prevent it?

Mr. ROSSIDES. We believe that would be a factor, Congressman. We really do. The fact they have affirmatively put down the check and write it out is an added factor.

As to the automatic factor it automatically goes to the court and it is a horrendous situation to ease the going there. We just want to establish that principle like any other court. Mr. Ruckelshaus' statement goes into it further. It actually demeans the court not to have the requirement of a filing fee. I don't want to pursue that at the moment. I wanted to get it on the record.

The other point was on the presumption. I just refer the committee to the question of presumption that Congressman Ryan mentioned. There is a statutory presumption, page 20 of the Senate report refers to it, that the present statutory presumption contained in section 2633 of title 28, United States Code, "applies solely to appraisement

decisions that although that is the statutory, the courts have extended the presumption to classification and other areas as well as" and it lists the number of cases.

In the hearings before this Senate, on page 226, question No. 6, questions and answers, regarding that same point on presumption, that deals with this subject.

Mr. Chairman, as Assistant Secretary for Enforcement and Operations at the Treasury, my duties include supervision of the activity of the Bureau of Customs. The gentlemen that you mentioned that are here with us today, Mr. Lehman, from the Bureau of Customs, Mr. Scolnick and Andrew Vance, have done enormous work over the past years together with Assistant General Counsel of Treasury, Donald L. E. Ritger, in bringing this bill to its present state. I would be remiss if I did not mention their tremendous contribution to trying to bring frankly the administrative procedures in the Bureau of Customs and those in the Customs Court into the 20th century.

We support unequivocally the enactment of S. 2624 to improve the judicial machinery in customs courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs matters, and for other purposes, as passed by the Senate on December 9, 1969.

The original bill was prepared by the Treasury and Justice Departments, working in the closest kind of joint effort. Continuing discussions which extended over many months with all the interested groups—the U.S. Customs Court, the bar, importers, Government agencies, and, of course, the Federal Judicial Center—resulted in July 1969 in the introduction of identical bills in both the House (H.R. 12691, H.R. 12857 and H.R. 12921) and the Senate (S. 2624).

In a larger sense, these bills are a tribute to the efforts of Mr. Justice Clark, Federal Judicial Center, and Judge Rao in the Customs Court. Their support and efforts have been crucial. Without their help we would not be here today.

We would like to add that Judge Rao and his colleagues have done an outstanding job in working under an archaic statute.

The bills provided the ingredients by which, first, archaic statutory procedures for determining duty liability will be replaced by modern methods; second, fewer cases will need to come to the court and, third, those that do can be handled more efficiently and expeditiously.

The Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee held extensive hearings on the bill on August 4 and 5 and September 8, 1969. Testimony was taken from representatives of the Federal Judicial Center, the Customs Court, the Departments of Treasury and Justice, the Association of the Customs Bar, the American Bar Association, the American Importers Association, the Commerce and Industry Association and numerous local and regional trade associations and organizations of importers and customs brokers. Subsequently, the Judicial Conference endorsed the bill.

On the basis of this testimony, and after full consideration of criticism directed against various provisions of the bill, the subcommittee recommended that the bill with 18 amendments—many of them merely technical—do pass.

The Departments of Treasury and Justice believe the bill, as amended in the Senate, meets the major objections raised in the hearings and is a much improved vehicle for modernizing customs procedures in the Bureau of Customs and the Customs Court. The bill was passed by the Senate on December 9. We urge its favorable consideration by this committee.

Now, I wish to place this proposal in perspective. You mentioned in your opening remarks that this bill does not affect substantive matters. I did want to confirm that. It is a trade neutral bill. The bill's purpose is confined to revising the administrative procedures under which duty liabilities are determined and to modernizing the judicial procedures in the U.S. Customs Court and Court of Customs and Patent Appeals.

It does not affect rates of duty nor the substantive provisions of law relating to the basis of duty assessment such as the statute governing the determination of value of imported merchandise. In other words, it is not intended to have any commercial or financial impact on our international trade, favorable or unfavorable. It has been deliberately drafted to be "trade neutral".

We believe that this bill will enable the Treasury Department's Bureau of Customs, the Department of Justice and the customs courts to deal with the ever-escalating volume of import transactions far more efficiently and effectively than they have been able to in the past.

To give your committee an idea of how the volume of customs collections and transactions has been rising, even in the last 5 years—in fiscal year 1964 the customs service collected over \$1.8 billion and processed 1.7 million formal entries; in fiscal year 1969, however, customs collected over \$3¼ billion and processed over 2½ million formal entries. Each year customs handles hundreds of millions of other types of transactions.

For example, each of the more than 200 million persons who arrived in the United States in 1968 had to clear customs. I presented figures only for the formal entries because typically they cover commercial importations and, therefore, are the source of nearly all the litigation in the customs courts.

Under Reorganization Plan No. 1 of 1965, the Bureau of Customs took a giant step in the 20th century by redesigning the customs administrative organization to meet the demands of expanding international trade and travel.

Major goals achieved under that plan were the elimination of all Presidentially-appointed customs officials at the local level and the consolidation, primarily under career district directors, of the separate organizational units for which those former Presidential appointees were responsible.

The primary authority and responsibility for supervising the administrative and operating field activities of these district directors were placed in nine regional commissioners of customs, who report directly to the Commissioner of Customs.

The Treasury Department, the Bureau of Customs, and the Justice Department now seek to complete the procedural phase of the reorganization process begun (early) in the 1960's and expanded significantly in 1965 by revising the outmoded statutory procedural

requirements. We believe the bill does so in a way which balances the interest of the Government, the importing community and the domestic producers.

Before briefly describing the highlights of the bill, an outline of the history of the procedures for determining the value of imported goods is relevant and would be of interest to your committee.

In the earliest days, customs valuations of goods were not open to judicial review. The first Congress, in 1789, provided that collectors of customs would accept value stated on original invoices as the basis for assessment of duty. If original invoices were not produced, the collector would appoint a merchant appraiser familiar with the goods, the importer would also appoint a merchant and the two, under oath, would make the appraisement.

In 1823, the President was authorized to appoint U.S. appraisers for certain ports and at other ports, Collectors appointed "responsible resident merchants" to be appraisers. If an importer was dissatisfied with the Government's appraisal, he could employ, at his own expense, two "responsible resident merchants" who, together with the Government appraisers, would determine the value. Appeals could be taken to the Secretary of the Treasury but his decision was final.

During this period an importer could obtain judicial review of duty assessments by bringing an action in Federal court for a refund of duty paid and the court would decide whether the collector of customs had assessed the proper rate of duty. However, the court could not inquire into the merits of the value on which the duty was assessed.

Various changes were made in this system during the 19th century but it was not until 1890, when the Board of General Appraisers was created to review decisions of the Bureau of Customs, that a system of quasi-judicial review of value determinations was established. Nine general appraisers, three of whom sat as a Board, were appointed by the President with the consent of the Senate. The Board's decisions relating to duty assessments, including classification as well as value, were reviewable by the circuit courts of appeal.

The specialized Court of Customs Appeal was created in 1909 to have exclusive jurisdiction over decisions of the Board of General Appraisers. The court became the Court of Customs and Patent Appeals in 1929.

In 1926, the U.S. Customs Court was established replacing the Board of General Appraisers. However, the change was largely one of name. The limitations and restrictions imposed on the Board by the statute were retained for the court.

Thus, it is almost 80 years since the existing system of administrative determinations of duty liability coupled with judicial review saw its beginnings. We believe the time has come to revamp and modernize the system.

Before turning to a description of the changes we propose to bring the present procedures in the Bureau of Customs up to date, let me describe briefly the present procedures leading to judicial review.

Under Reorganization Plan No. 1 of 1965 the appraisement and classification functions were consolidated under the supervision of local district directors. Essentially the purpose of appraisement is to

determine the value of merchandise against which the statutory rate of duty is to be applied. The purpose of classification is to determine the dutiable category under the law into which the merchandise falls.

Notwithstanding this administrative amalgamation of the two functions, the applicable statute still requires separate procedures for the appraisement and classification of imported merchandise. The importer is entitled to separate judicial review of the appraisement determination and, if this is undertaken, other processes relating to the assessing of duties must be halted while the appeal is pending in court.

The classification of the merchandise and completion of other administrative processing necessary to liquidate the entry (procedures involving the fixing of the duties due, the assessment of any additional duties due, or the refunding of any overpayments of duty tentatively estimated and paid when the merchandise is initially landed) must await the final court decision on the appeal for reappraisement.

When the process is resumed, after the judicial review of the appraisement determination has been completed, and the entry is liquidated, the importer is entitled to administrative as well as a new judicial review of the liquidation. Thus, the final determination of the duty actually owed to the Government, or refund due the importer, may be delayed for years.

Moreover, under present law, which, as we have seen, was enacted substantially in the 19th century, appeals from initial customs' administrative appraisements are automatically referred to the Customs Court without opportunity for any administrative review of the appraisement.

On the other hand, the present law provides that when an entry is liquidated and the importer files a "protest" against the liquidation, Customs shall review all aspects of the liquidation which are challenged in the protest. If the protest is denied, however, the matter is automatically referred to the Customs Court. No further or separate action is needed to invoke the court's jurisdiction.

These automatic referrals demean the dignity and status of the Customs Court as a constitutional court. In addition, the procedures do not permit the importer the conscious choice normally exercised by allegedly aggrieved parties of deciding, after administrative review, whether or not to litigate. In some cases, the importer might be quite content to accept the Customs position after the original decision has been reviewed and affirmed at the administrative level.

This automatic and indiscriminate judicial review procedure, at a time when the volume of international trade is rising, has resulted in a tremendous increase in court workload. It has also caused manpower and storage facilities at the customs administrative level to be wastefully utilized in transmitting records to the court and maintaining open files on numerous cases which experience has demonstrated will be abandoned by the importer or settled through stipulated agreement between the Government and the importer.

S. 2624 provides for a single customs administrative procedure for the determination of the duty liability of imported merchandise. All decisions, including appraisement and classification, which are necessary to the final duty determination and entry liquidation, will be combined in a consolidated administrative process and subject to administrative review in a single proceeding.

In addition, the bill authorizes administrative reconsideration of the appraisement decision, thereby eliminating the archaic situation under existing law which compels a district director to appeal his own appraisement decision to the Customs Court to correct an admitted appraisement error discovered after the entry has been officially appraised.

The bill gives to importers a 90-day period from the date of liquidation in which to protest any administrative determination, and permits the importer and Customs to take up to 2 years to resolve their differences at the review level before the importer must resort to judicial review.

The extended time periods in which the importer may file his protest and the Government may review it will help to eliminate the protest filed merely as a protective measure and will insure that each protest receives the administrative consideration it deserves.

Furthermore, an amendment made by the Senate requires that the Secretary of the Treasury shall provide by regulations, in appropriate circumstances, for a further review of protests by a customs officer other than the officer who made the original liquidation.

A further Senate amendment requires affirmative action by reviewing customs officers to dispose of a protest within the 2-year period allowed for its review, and to mail a notice of the action taken to the protesting party. An importer or other protesting party who believes that he cannot obtain satisfactory action upon his claim at the administrative level will be able, under the bill, to accelerate the disposition of his protest at his own request any time after 90 days from the date the protest is filed.

While we anticipate that the vast majority of protests will have been reviewed within 90 days after they are filed, this provision affords the importer a legal tool which can effectively force action on his protest well short of the 2-year maximum, thus safeguarding his right to invoke the court's jurisdiction at an earlier date.

Finally, the bill provides that decisions made in disposing of a protest become final and conclusive unless the protesting party affirmatively initiates an action in the Customs Court by filing a summons within 6 months following the denial of a protest.

The Treasury Department believes that the bill as passed by the Senate will provide significant benefits to importers and all other segments of the public and will permit the Bureau of Customs to perform its important role more effectively and efficiently in the future at our gateways of international trade.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Rossides.

Now, speaking for the Assistant Attorney General, Mr. Rose.

Mr. ROSE. Thank you.

For your convenience, Mr. Ruckelshaus has submitted two statements. I shall read for him the oral statement and he wishes the written statement to be put in the record.

Mr. KASTENMEIER. Without objection, Mr. Ruckelshaus' written statement will be made part of the record.

(The statement referred to appears on page 136.)

**ORAL STATEMENT OF HON. WILLIAM D. RUCKELSHAUS, ASSISTANT
ATTORNEY GENERAL, DEPARTMENT OF JUSTICE**

Mr. ROSE (reading): I am the Assistant Attorney General in charge of the Civil Division, which is responsible for the conduct of the Government's litigation in customs matters. Our customs section, with 21 attorneys authorized and stationed in New York City, handles this litigation.

Andrew P. Vance, seated at my left, is the chief of the section. Meyer Scolnick, on my right, has had a substantial role in the development of this legislative program.

In my prepared statement, which I shall not read but am submitting for inclusion in the record, I have tried to describe the physical size of the problem facing the Department of Justice with respect to the work of the Customs Court, the various steps we are taking to deal with this problem, and some of the background and developments leading up to the drafting and introduction of S. 2624 in the Senate and H.R. 12691, H.R. 12857, and H.R. 12921 in the House.

I would like to center my oral testimony on a summary of the problems facing the Customs Court, those provisions of the bill designed specifically to cope with these problems, and a more detailed discussion of the provisions in title I of the bill, dealing with the Customs Court, which were changed by the subcommittee prior to its passage in the Senate. These changes were made to meet criticisms and recommendations of the various groups, organizations, and individuals who were invited by the Senate committee to submit testimony. Finally, and most importantly, I wish to evaluate these changes in the light of the overall objectives of the legislation.

The basic problem facing the Customs Court today is one of management—how to deal effectively and efficiently with the tremendous number of cases that pour into the court in an uncontrolled flow from the Bureau of Customs. New cases coming before the Customs Court increased from 35,000 in fiscal 1963 to over 75,000 in fiscal 1969. Despite valiant efforts by the court to dispose of these cases—over 48,000 were terminated in fiscal 1969—the pending caseload has increased from 186,000 at the end of fiscal 1963 to over 431,000 cases at the end of fiscal 1969.

These are very real judicial cases in every sense of the word. Each has a separate file, each engenders varying amounts of paperwork requiring the attention of attorneys and clerks, and, as a result of judicial decision, the Government must either return duties erroneously paid, or the Treasury retains the duties assessed, or, in some cases, becomes entitled to additional duties.

The present statutory procedures, some of which date back 80 years or more, are so out of date that the court cannot manage its current workload with any degree of efficiency and effectiveness.

The major defects include the following:

(1) If protests of the importer concerning decisions of the Bureau of Customs are denied by the Bureau, they must be automatically referred by the Bureau to the Customs Court for disposition, without regard to whether or not the importer actually intends to litigate the Bureau's decision.

(2) The court has no statutory authority to charge a filing fee for commencing judicial actions.

(3) Protest cases, which constitute about 60 percent of all customs cases, must be decided by a three-judge division of the court rather than by a single judge.

(4) Single-judge decisions in appraisement cases are subject to review by a three-judge division of the court, even though the Court of Customs and Patent Appeals has appellate jurisdiction over final decisions of the Customs Court in both appraisement and protest cases.

(5) All decisions in the court must be written and must contain a statement of the reasons for the decision and the facts on which it is based.

(6) Single judges trying classification cases in ports outside of New York have no power to decide a case, but must return the hearing record to New York for decision by a three-judge division, which need not necessarily include the judge who heard the case at the other port.

To remedy these defects and to give the court the modern up-to-date management powers that it requires, S. 2624, as it has passed the Senate, contains the following key provisions:

(1) The importer will have 180 days, instead of 30 or 60 days under the present time limit, in which to decide whether or not he wants to litigate a denial of a protest by the Bureau of Customs.

(2) Automatic referral to the Customs Court of all appeals for reappraisement and all denials of protest has been eliminated; if the importer wishes to obtain judicial review, he must file a summons in the Customs Court.

(3) The court will be required to fix a filing fee for commencing an action of at least \$5 and no more than the filing fee for commencing a civil action in the U.S. district court.

(4) There will be a single judicial proceeding in which all issues, including both appraisement and classification, will be considered.

(5) All cases in the Customs Court will normally be tried by a single judge.

(6) The chief judge will have the authority, on application or on his own initiative, to designate three-judge trials when he finds that a cause of action either raises a constitutional question or has broad or significant implications in the administration or interpretation of the customs laws.

(7) In contested cases, the judge will have the option of supporting his decision by either an oral or a written statement of findings of fact and conclusions of law, or by an opinion stating the reasons and facts upon which his decision is based.

(8) Cases in cities outside of New York will be tried in the same manner as other cases and the judge will have full authority to hear and decide the case.

(9) Appeals from all cases will go directly to the Court of Customs and Patent Appeals, thus eliminating intermediate appeals to three-judge divisions from single-judge decisions in appraisement cases in the Customs Court.

The Senate made four changes in title I of the proposed bill with respect to the power and authority of the Customs Court. These related to the following matters: (1) Filing fees, (2) hearings in foreign countries, (3) amendments of causes of action, and (4) items transmitted to the Customs Court as part of the official record.

I would like to discuss each of these changes in greater detail and to present the position of the Department of Justice with respect to each of these matters.

1. *Filing fee*: We have sponsored this legislation because the Department of Justice, the Department of the Treasury, and the Customs Court have a management problem of increasingly intractable proportions. The pending caseload, plus the annual increment to this volume, require the legislative changes embodied in S. 2624 as passed by the Senate.

As Mr. Rossides has pointed out, this bill in no way affects the amount of duties paid on imports or the substantive aspects of the tariff laws. The changes sought in the law are procedural and managerial. They are designed to reduce the number of new cases unnecessarily filed in the Customs Court, to encourage maximum consolidation of new cases, and to expedite their handling and disposition by the court.

These objectives underlie the amendments proposed in both titles I and II of this bill. As described by Mr. Rossides, the bill would encourage the importer to pursue and obtain a more thorough administrative review. He can leave his protest pending in the Treasury for as long as 2 years, so as to permit more extended consideration of his claim, if necessary, or to await decision in a test case already before the court.

The importer's rights to judicial review are fully protected. At any time after the initial 90 days following his protest, he can cut short Treasury proceedings and get his case into court on an expedited basis.

However, because automatic referral of a claim to the court is abolished, he has to give specific consideration to his course of action after administrative denial of his protest; he must decide whether he wishes to litigate the case.

Through the accelerated disposition procedure, he can force a final administrative denial of his protest. But if he wishes to take the matter up further and get into court, he must take specific affirmative steps; he must file a summons and pay a filing fee at the time of filing the summons.

Mr. POFF. May I interrupt? That is the equivalent of the phrase "commencement of the action."

Mr. ROSE. Right. The statute specifically says a civil action is commenced with the filing of a summons. When you file the summons, you pay the fee.

Mr. KASTENMEIER. At this point, would you cite the language in the statute?

Mr. ROSE. Page 11, line 3, "A civil action shall be commenced by filing a summons in the form, manner, and style and with the content prescribed in rules adopted by the court."

Mr. KASTENMEIER. Thank you. You may continue.

Mr. ROSE. The filing fee requirement has a twofold purpose: (1) To cause the importer to seriously consider whether he, in fact, wants to litigate his case; and (2) to induce him to consolidate as many entries as possible involving a common issue into a single case for which he will be required to pay only one filing fee.

The function of the fee is to help limit the number of cases coming into the court to those which the importer intends to contest. Its effect is lost if the fee is not required to be paid until the case is ready for trial. To delay the requirement for payment of the fee to this stage of the case would give the importers carte blanche to continue their existing practice of indiscriminately putting cases on the court calendar without any real intention to try them when they come up for trial. It is this practice that has caused so much of the court's present difficulties with an unmanageable caseload.

Establishment of a 6-month statute of limitations in which to file the summons, as contrasted with the present 60-day period in which to bring an action into court, is intended to complement this approach by giving the importer ample time to consider the advisability of judicial review.

The effect of abolishing automatic referral is that the importer will not find himself in court without being aware of it. The extension of the limitations period removes the need for haste in filing in court as a purely protective move. The requirement for a summons and a filing fee assures any such move for judicial review will be made with full consideration of its significance and its consequences.

Viewed in the perspective of the entire bill, the filing fee is an integral part of the effort to rationalize the flow of new cases into the Customs Court. It should not be to the importer's interest to create a vast stockpile of pending cases in the court.

I must say emphatically that, to the Government, the filing fee provision in S. 2624 as it passed the Senate is an essential part of the bill and I urge its retention without change.

The other side of the coin is that, in achieving the purpose of the Government, the requirement that the fee be paid at the time of filing is no real burden to the importer. If he has many repetitive entries of the same merchandise on which he wants judicial review, he can have all entries that have been made within a 6-month period consolidated into a single cause of action for which he can file with the payment of a single \$5 fee.

If the matter is not worth \$5, it should not, and probably it will not, be brought into the court. If there is only a single entry which needs testing before other shipments of an identical item are brought in, a \$5 fee is not too much to charge for securing certainty as to what the proper duty liability will be.

In most importations, where a question of proper duty payment is raised, the importer has passed on to his customers the duties assessed against him long before his case is decided. In these instances, any case in which he succeeds in recovering any overpayments of duties represents an additional gain for him and for his attorney.

The cost of this judicial effort, whether successful or not, has been borne entirely by the Government through its establishment and operation of a court for the sole and exclusive benefit of this very limited and special group of businessmen, the importers.

In every other court known to us fees are charged for various uses made of the available judicial machinery. User charges are the rule through the Government. No acceptable reason has been advanced by the opponents of a filing fee to support any exemption from this common practice for this particular court.

2. *Hearings in foreign countries:* In the Senate bill, the scope of section 109, amending 28 U.S.C. 256(b), to permit trials or hearings in a foreign country, has been limited to evidentiary hearings in countries whose laws permit such evidentiary hearings only upon a finding that the interests of economy, efficiency, and justice will be served. An interlocutory appeal is authorized from an order issued under the provisions of this subsection.

It is believed that requiring explicit findings by the chief judge and granting an aggrieved party the right to test the order through an interlocutory appeal adequately protects the interests of parties to a case. At the same time, it gives the court sufficient flexibility to authorize evidentiary hearings in a foreign country when the particular circumstances of the case make it preferable to the use of other methods, such as depositions or letters rogatory.

3. *Amendment of causes of action:* The Senate revised section 110, amending 28 U.S.C. 1582(a), and section 113, amending 28 U.S.C. 2632(d), but retained the breadth of permissible amendment of causes of action presently practiced by the court.

Under the clarifying language, the court is given the same authority as it possesses under existing law to provide by rule for consideration of any new ground in support of an action before the court if (1) it applies to the same merchandise that was the subject of the protest; and (2) it is related to the same "administrative decision" contested in the protest.

The legislative history of this provision in the bill clearly establishes that no change from the present authority of the court with respect to amendments is intended. The court's past decisions have adhered to the basic principle of administrative law concerning exhaustion of administrative remedies; a party, during judicial review of an administrative proceeding, cannot raise, for the first time, an issue which he could have contested, but failed to contest, during the administrative proceeding.

4. *Items transmitted to Customs Court as part of the official record:* The Senate revised section 113, amending 28 U.S.C. 2632(f), to add to the documents to be transmitted by the Bureau of Customs to the Customs Court for inclusion in the official record of the civil action, all of those documents and other items suggested by witnesses testifying at the hearings, such as importer's exhibits, official samples, laboratory reports and the summary sheet. The items listed now comport with present practice.

As I stated at the beginning of this statement, I am discussing here only the changes made by the Senate in our original version of S. 2624. There has been little objection voiced to most of our original proposals, such as to provide for a summons procedure or to provide for single-judge trials.

What really needs emphasizing and what Mr. Rossides and I have tried to stress is that titles I and II of this bill together provide a series of changes in the existing statutes that interlock in such fashion that each provides a point at which an importer is encouraged to seek administrative relief rather than rush into court.

He can get judicial relief if he wants it, but he has more to gain by first taking full advantage of the strengthened administrative procedures in the Treasury. We have described each of these steps and how they perform this function.

If the importer follows the procedures provided in S. 2624 most of his disputes will be resolved at the administrative level with a minimum expenditure of time and money. The court will be left with a much reduced volume of cases reflecting those issues which cannot be decided administratively and on which judicial review is truly desired and necessary.

We are satisfied that S. 2624 will assist the Government in coping with its managerial problems in dealing with customs matters. At the same time it will meet the needs of the importer for a prompt and fair decision of his customs duty liabilities.

I urge the committee's favorable action on the bill to complement the already favorable action by the Senate. Its early passage and enactment into law will be of benefit to both the importers and the Government.

This completes Mr. Rossides' and my presentation of the highlights of S. 2624 as it now appears before your committee. If you have any questions we will try to answer them.

Mr. KASTENMEIER. I thank both Mr. Rossides and Mr. Ruckelshaus through Mr. Rose for their very enlightening and helpful presentations.

The Chair would like to observe that the Members of this Committee in a short while will be called to the floor to hear the State of the Union address. Our time is therefore very limited.

I would ask that both the questions and answers be as concise as possible to enable everyone to have a chance to ask whatever questions may be necessary.

May I ask you, Mr. Rossides, do you support S. 2624 as amended, as opposed to the legislation as originally introduced?

Mr. ROSSIDES. That is correct.

Mr. KASTENMEIER. Do you, and I might ask Mr. Rose for the Justice Department, consider S. 2624 to be perfect?

Mr. ROSSIDES. I think we can agree that no bill is perfect. This bill goes a long way and close to being that ideal. It has been worked on a number of years by men who have been working in the field and have been on the firing line, Mr. Ritger, Mr. Vance, Mr. Lehman, and Mr. Scolnick.

Just as an example, this is my own personal view, not the Department's, I think we should have a \$15 mandatory filing fee, not a \$5 one. But I think the \$5 is essential, we have got a mandatory fee that has to be paid.

You have a great policy question on this issue of going overseas and holding court overseas. So that one is a policy thing and a great debate in our profession.

I don't know what effect that will have one way or other really on the operations of the court. I can't speak for the court on that. This is again a personal view but this is a very good bill, an excellent bill. Once we have explained it to various persons and then to the committee here, it is astonishing that we have been able to operate as we have in the past. It is archaic. Why we have had to delay it this long may be another long story.

But to answer very concisely, it is a very good bill and one of the best bills around and we urge prompt action, Mr. Chairman.

Mr. KASTENMEIER. Other than what you have already stated, can any of you recommend any improvements in the language of the amended Senate bill? If subsequently you find any changes that you recommend in the statutory language, I urge you to communicate them to the subcommittee forthwith.

Let me ask you this question: Insofar as you so strongly now support the fixed minimum filing fee, how is it that earlier last year in the original text of these bills, no fixed filing fee minimum was proposed?

Mr. ROSSIDES. Mr. Chairman, maybe Mr. Rose wants to answer. I think we are facing a situation that came from no filing fee, no requirements, everything automatically goes to the court, and an effort to bring together all the diverse groups and interests who are involved in the process to get an agreement and get support from many groups, possibly was the reason that there wasn't that earlier push for it, Mr. Chairman.

Mr. KASTENMEIER. What is the present U.S. district court filing fee?

Mr. ROSE. \$15.

Mr. KASTENMEIER. So the option is between \$5 and \$15?

Mr. ROSE. Or a figure within this range plus any other filing fees that the court may fix.

Mr. KASTENMEIER. You mentioned, Mr. Rossides, page 8, that a district director must appeal his own appraisal to correct an admitted appraisal error discovered. How often has that situation occurred?

Mr. ROSSIDES. I will let Mr. Lehman answer who is one of our tremendously outstanding lawyers and has been with the Bureau for many years.

Mr. LEHMAN. When you have an error in appraisal that results in too high an appraisal, there is an administrative procedure whereby the importer can petition within a given period of time to correct that error administratively. In the cases where it may have been too low as a result of a clerical type error, it would represent about 1 percent of all appeals.

Does that correspond to Justice's experience?

Mr. VANCE. Yes, there are not many of those cases, about 1 percent.

Mr. ROSSIDES. One percent of the 25,000.

Mr. LEHMAN. I would guess that on the appraisal side we would estimate the 1 percent. Whether these errors will increase or decrease as a result of automation, I don't know. Experience often varies with automation.

Mr. KASTENMEIER. I would like to ask Mr. Rose a question in view of Judge Rao's statement about his concern about the prospect of having to justify the addition of one or two bookkeepers.

At the end of page 2, you suggested that each of these filings require a separate file and so forth. There are presently 430,000 pending cases.

In view of that, would it not be your estimate that if the bill were enacted, it would reduce the personnel or at least the effort required in the Customs Court to deal with this massive filing?

Mr. ROSE. As we have said, this is a managerial problem. It is so big that this bill alone may not be enough to do the trick. Mr. Vance has been given a number of additional attorneys and we have about \$200,000 a year to put in an automatic data processing system for use in the customs section, which I believe the court is also going to use. This is described in Mr. Ruckelshaus' written statement.

The whole problem of what clerical help will be needed, it seems to me, will be resolved when that data processing system is in operation. For the time being, with individual files, it must be a fantastic paper job just going back and forth. But I think we ought to wait and see what the data processing system brings out before we decide this point.

Mr. KASTENMEIER. Thank you.

I yield to the gentleman from Connecticut.

Mr. ST. ONGE. Who has no questions, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York?

Mr. RYAN. I don't want to delay us beyond the start of the State of the Union message. So I will only ask this question going back to the fees: Can you see a distinction between charging a fee at the time of the filing of the summons and charging a fee at the time of filing a complaint?

Mr. ROSE. To serve its full purpose of encouraging an importer to think about what he is doing and to consider whether he should be satisfied with the results of administrative review, it is necessary to charge the fee at the time of filing the summons. That whole effect is lost if we wait until one or two trials come up and then the fee is charged.

Mr. RYAN. Wouldn't that be accomplished by charging it at the time of filing the complaint, thereby giving him the opportunity to decide at that point whether or not to consolidate all of these summonses that might have otherwise been filed?

Mr. ROSE. He can consolidate at the time he files the summons.

Mr. RYAN. Would he be in a position to make that decision early in the process?

Mr. ROSE. Yes. He has 6 months to make a decision whether to go into court and all the similar entries that have accumulated in that time may be consolidated for the one \$5 fee, 6 whole months rather than the present 90 days.

Mr. RYAN. On the basis of your experience with these cases, how many cases might there be pending involving the same matters scattered around the country in various ports and under various protests today? In other words, is this an exaggerated fear that the importers have, they may be required to pay 50, 75, or 100 separate fees?

Mr. ROSSIDES. In our judgment, that is exaggerated.

Mr. RYAN. Can you elaborate on that and tell me why?

Mr. SCOLNICK. Simply that the present lax practice encourages unnecessary cases to get into the Customs Court. There is no conscious decision made by the importer, or anyone else, as to whether a case should go from the Bureau of Customs to the Customs Court. As soon as the importer has disagreed with the appraisement made by the Customs Bureau and has filed an appeal for reappraisement with the Bureau of Customs the case is dumped into the court. As soon as the Customs Bureau denies a protest that the importer has made with respect to classification or any of the other matters, the case is automatically sent from the Customs Bureau to the court.

This is why there were 75,000 cases filed last year. Many of those cases involve exactly the same type of merchandise that the importer has been bringing in all over the country throughout the period of months and years.

As soon as it gets to court, it imposes a clerical and paper problem on the court, if nothing else. Files have to be opened up. Indexes have to be prepared. It has to be docketed.

There is no information that enables the court at that stage to select this case and other cases and say, "These involve the same issue, let us consolidate them."

All they have to go on regarding specific issues is the quite skimpy information that has been furnished as a result of the protest or appeal for reappraisal at the Bureau level which in effect amounts to the importer's saying, "I disagree with the decision of the Bureau." This is what the court has to go on.

We are trying to adopt for the Customs Court the same procedures that every other court now requires. If you want to come into court, you should at least state that there is a specific issue that you want tried in court. You should make a conscious decision in this case by filing of a summons and the payment of a fee, to get into court.

I think it is an imposition on, and demeaning to, the court to dump these cases there and say, "Well, when we get around to deciding which, if any, of these we want to try, we will let you know and you can try these cases and we will pay a fee at that time."

This is exactly what their proposal amounts to.

Mr. RYAN. Thank you.

Mr. KASTENMEIER. Mr. Mikva?

Mr. MIKVA. On that same line, if the importer continues to import these same items, can he amend his summons to include after-acquired claims? In other words, I think the thing that I sense as part of the objection is that somehow this is going to involve the importer in a lot of \$5 fees and you are not interested in that.

Mr. SCOLNICK. We are trying to spare him the necessity for paying numerous \$5 fees through the consolidation provision.

Mr. MIKVA. If he brings his claim—and his 6 months' period is about to expire—and he files his summons and in the meantime he is continuing to import the same item and is running into the same argument.

Mr. SCOLNICK. It would certainly be in the power of the court, under the statute, to provide by rule for any such entries that have been denied within the 6-month period to be consolidated into an action previously commenced on a common issue. The statute specifically states, on page 9, beginning on line 14, "Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action."

Then it goes on to say, "Actions may be consolidated by order of the court or by request of the parties with approval of the court, if there are common issues."

Mr. MIKVA. That would also answer my other question, I think, and that is if they ran into disputes at different ports of entry, they clearly could be consolidated in a single cause of action?

Mr. SCOLNICK. I would say that is well within the power of the court to provide by rule.

Mr. RYAN. What kind of a time limitation would you place upon the occurrence of this? Are you limited to 6 months there in which the protest must arise?

Mr. SCOLNICK. I would think 6 months, because, under the statute, he must institute an action in court with respect to any protest within 6 months. This is contrasted with the present time limit of 60 days or 30 days in some cases.

Mr. VANCE. Congressman, if I may comment: One of the reasons for the provision of a 2-year period for the Treasury to have jurisdiction over a protest is that where there are continuing importations of the same type of merchandise, an importer might ask the Bureau of Customs to delay action on his other protests, while he brings one case involving an importation on for trial in the Customs Court. Then, during this 2-year period, if the decision in the court is in his favor, it could be applied administratively by the Bureau of Customs to the other protests while the Bureau still has jurisdiction over them, thus saving filing fees in the Customs Court and unnecessary work by the court, the Government attorneys, and the private bar.

Thus, the importers would not have to keep paying filing fees if they would move their cases along. Any cases that they have within 6 months could be combined in one summons involving the same issue, whatever port it comes into. But after that 6-month period has run, they would have to file a new summons.

Mr. ROSSIDES. So in effect, the maximum necessary would be one filing fee per 6 months.

Mr. MIKVA. One last question, Mr. Rossides. I can't believe that that figure is correct. We really had 200 million people come into the United States in 1968?

Mr. ROSSIDES. It is actually more; 213 million individuals. Part of that is the Mexican border and the Canadian border; you have periodic people going across. The number of aircraft is extraordinary. This is one of the reasons we have our problem on smuggling. Thanks to the Congress and to each of you gentlemen, in at least the passage of our customs supplemental, we are going to be able to do a lot more. But it is an extraordinary workload, taking the figures of the number of formal entries that I referred to.

Mr. MIKVA. Those figures staggered me. To think about changing the whole population of the country once each year is staggering.

Mr. ROSSIDES. The 747 that went last night about 7 hours late.

Mr. RYAN. How many of those were border crossings from Mexico and Canada?

Mr. ROSSIDES. How many of the 200 million, I don't know, sir.

Mr. KASTENMEIER. The gentleman from Virginia?

Mr. POFF. I will be brief, Mr. Chairman.

The filing fees will be covered into the general fund of the Treasury?

Mr. ROSE. Yes.

Mr. POFF. It is policy in most of our States and in some respects with our Federal litigation that the losing party pays the cost of the litigation. If your purpose is to discourage frivolous, vexatious litigation, has any consideration been given to requiring the losing litigant to pay the costs that have been incurred?

Mr. ROSE. That is authorized by statute at the discretion of the court.

Mr. POFF. Is that a part of the fees to which reference is made on page 11?

Mr. ROSE. Yes. Under 28 U.S.C. 2412, costs in cases involving the Government are allowed to the prevailing party. The costs that may be assessed are listed in 28 U.S.C. 1920 and include filing fees, docket fees, and the costs of transcripts and records. Other fees may be charged, but these are the court costs that in the discretion of the court may be charged to the losing party.

Mr. POFF. Is it anticipated that those fees presently being charged will be charged under the authority of the language of page 11?

Mr. VANCE. There are no fees presently charged in the customs court for anything, and we would assume under the language on page 11 the court would be able to adopt other fee requirements.

Mr. ROSE. So the court has authority under the bill to assess costs and to charge fees.

Mr. POFF. I have several other questions that I would like to ask.

Mr. ROSSIDES. We would be happy to respond to any written questions, of course.

Mr. POFF. I will go further than that, Mr. Chairman. I think it would be appropriate now to alert witnesses that it would be helpful to the subcommittee if one of their number could abide with the committee tomorrow in the event we need additional expertise.

Mr. ROSE. We will all be here tomorrow.

Mr. HUTCHINSON. I have one question, for matters of history. Can you tell me when the Customs Court became an article 3 court?

Mr. ROSE. 1956.

Mr. KASTENMEIER. I thank the gentlemen representing both the Treasury Department and the Justice Department for their testimony this morning. We are indeed grateful.

Mr. ROSSIDES. We thank you very much, Mr. Chairman and the members of this committee.

WRITTEN STATEMENT OF HON. WILLIAM D. RUCKELSHAUS, ASSISTANT ATTORNEY GENERAL, PRESENTED BY ANDREW P. VANCE, CHIEF OF THE CUSTOMS SECTION, STANLEY D. ROSE, LEGISLATIVE OFFICER, AND MEYER SCOLNICK, ASSISTANT LEGISLATIVE OFFICER

I am the Assistant Attorney General in charge of the Civil Division. This Division is responsible for conducting the Government's litigation in customs matters. The litigation is handled by the Customs Section which has twenty-one attorneys stationed in New York.

When I entered in office in January of 1969, I was advised that the most serious managerial problem in the Civil Division existed in the Customs Section because of the very significant increase in the caseload of that section during the past few years.

New cases coming before the Customs Court have increased from 35,000 in Fiscal '63 to over 75,000 in Fiscal '69. Despite valiant efforts by the Court to dispose of these cases—over 48,000 were terminated in Fiscal '69—the pending caseload has increased from 186,000 at the end of Fiscal '63 to over 431,000 cases at the end of Fiscal '69.

These are very real judicial cases in every sense of the word. Each has a separate file, each engenders varying amounts of paper work requiring the attention of attorneys and clerks and, as a result of judicial decision, the Government must either return duties erroneously paid, or the Treasury retains the duties assessed, or, in some cases, becomes entitled to additional duties.

The Customs Court follows a practice of suspending cases pending the trial of a few test cases, but this practice does not, to any significant degree, ease the burden of administering this tremendous caseload. The test case procedure is similar to that followed in a tort proceeding involving a large number of claimants, where the liability issue is decided in one of the cases. If that issue is decided

in favor of the claimants, each of the remaining cases must still be dealt with individually to determine actual damages due. In customs cases, after a test case is decided, all the related cases which were suspended must still be examined to determine any issues which may remain and to settle the amount of duties which may be due the Government or the claimant.

Because the effect of the caseload problem has been to hamper the efficient and effective management of Government litigation in the customs field, the Department of Justice has developed an extensive and coordinated program to relieve the situation. First of all, we hope to add attorneys to the Customs Section. I have already added five attorneys in Fiscal 1970, bringing the staff of this Section to a total of 21 attorneys. Secondly, we have put into operation a computer-based information storage and retrieval system which will allow prompt and complete access to the details of all these hundreds of thousands of cases. Finally, we have drafted this legislation to improve the management of customs matters in the Bureau of Customs, the courts and the Customs Section by revising outmoded provisions in the present law which effectively prevent these agencies from operating at maximum efficiency.

The officials of the Treasury Department have indicated to you the objective causes for the increase in this type of litigation. The utmost efforts of the Customs Court and of the Government attorneys have not been sufficient to stem this growing workload. The present outmoded and inadequate statutory authority and procedures not only encourage the indiscriminate filing of new cases but also preclude truly effective use of judicial manpower to deal with these cases.

During the eight months preceding the introduction of this bill continuing discussions with all the interested groups—the courts, the bar, importers, Government agencies, and, of course, the Federal Judicial Center—produced the present bill. Many of its provisions reflect compromises of conflicting views. The Senate, after taking extensive testimony from all interested groups, introduced further changes in some of these provisions.

The present bill, S. 2624, as it passed the Senate, will permit the Bureau of Customs to employ modern, up-to-date administrative procedures and means of administrative review so that fewer cases will need to be litigated in the Customs Court to dispose of its workload more efficiently and expeditiously.

Mr. Rossides has explained to you the Treasury's plans for a single continuous procedure for deciding all issues in any entry of merchandise and for a more effective administrative review within the Treasury. These should leave the importers confident that their protests and claims have been carefully considered and adequately reviewed in the light of the existing law and regulations.

If there is a final rejection by the Treasury of a claim, the importer will have more time to file a suit, thereby enabling him to give careful consideration to whether further review through court action is warranted under the circumstances. The extended period for filing suit should eliminate further need for filing hasty protective appeals for reappraisal which produce so many unnecessary cases.

The major changes made by S. 2624, as they affect the Customs Court, revise existing law by removing impediments to the efficient functioning of the court and by providing the court with the powers it needs to deal effectively with its large caseload.

The most significant change is that, when the importer disputes the appraisal made by the Bureau of Customs, or when his protest is denied by the Bureau, there will no longer be an automatic referral of the dispute to the Customs Court. The Bureau will apply administrative principles and administrative procedures similar to those of other Government agencies. After final administrative action by the agency, if the claimant wishes judicial review, he himself must then take affirmative action. This will bring the Bureau of Customs in line with other administrative agencies which provide, within the agency, review procedures which must be exhausted before court review is available.

If an importer decides that he wants judicial review of the final decision of the Bureau of Customs, he initiates this action by filing a summons in the Customs Court. This will lead to a single judicial procedure in the Court in which all issues, including those concerning both appraisal and classification, will be considered and decided. Importers will be able to include, in one cause of action, all entries of merchandise which present common issues. However, the Court will have full authority to order actions consolidated or severed, as circumstances warrant.

A fee of at least five dollars has been fixed for commencing an action in the Customs Court. The filing fee should have two worthwhile results. First, it should induce potential litigants to give careful consideration to the advisability

of bringing suit. Second, the desire to minimize fees should encourage litigants to consolidate numerous importations involving the same issues into one cause of action; in multiple entries of the same merchandise, the importer will be filing one action for one filing fee instead of a large number of separate suits. The effect of a fee, therefore, should be to reduce substantially the number of cases brought in the Customs Court each year.

The next big step forward is that cases in the Customs Court will normally be tried by a single judge. This means that 60% of the Court's business—that relating to protests as to classification—will no longer require a three-judge decision. A three-judge panel will be reserved for cases raising constitutional issues or involving very serious issues in the administration of the customs laws.

Another significant revision will relieve the judge of the mandatory requirement, in every contested case, of writing a decision with a statement of the reasons therefor and the facts on which the decision is based. Instead, the judge will have the option of supporting his decision by either a statement of findings of fact and conclusions of law or by an opinion stating the reasons and the facts upon which his decision is based.

Judges will now be able to try cases in ports outside of New York in the same manner as cases in New York. This will eliminate the present practice where a single judge hears classification cases in ports outside New York, but the decision is made by a three-judge division, no one of whose members is necessarily the judge who heard the case.

Finally, appeals from all cases decided by the Customs Court will go directly to the Court of Customs and Patent Appeals. This will eliminate the present practice of having appeals from single-judge decisions in appraisement cases heard by three-judge divisions in the Customs Court before further appeal to the Court of Customs and Patent Appeals.

This completes a description of the size of the problem which has prompted this legislative effort, a statement of the various steps the Department of Justice is taking to cope with it, and an indication of how the various new provisions are intended to fit in the general scheme to reduce the number of new cases filed in the Customs Court and to enable that Court to handle more efficiently those cases which are filed. In my oral statement, I intend to discuss primarily those changes made in S. 2624 in the Senate. These changes were, in my opinion, improvements in the bill, and I voice the hope that your Committee will approve the Senate version and recommend favorable action by the House.

Mr. KASTENMEIER. The Chair would next like to call Mr. Vincent J. Bruno, director of the world trade department, Commerce & Industry Association of New York, Inc., for a brief statement.

Mr. Bruno, we are pleased to have you here and we are sorry we are not able to give you as much time perhaps as you might like.

STATEMENT OF VINCENT J. BRUNO, DIRECTOR, WORLD TRADE DEPARTMENT, COMMERCE & INDUSTRY ASSOCIATION OF NEW YORK, INC.

Mr. BRUNO. Thank you very much.

I am with the Commerce & Industry Association. It is the service chamber of commerce for the metropolitan area of New York and the State of New York. We have some 3,500 business members in the association and more than half of them are engaged in international trade.

Aware of the shortage of time, I will try to be very brief. Our import and customs committee, which comprises experts in this area from business, has studied the bill, S. 2624 very carefully. We submitted a number of recommendations last year when it was before the Senate, and most of them were accepted in whole or in part. So, the net result is that we are satisfied that the proposal before us now, the amended S. 2624, will inure to the benefit of the import community in general.

There are two points I would like to stress. The question of perfection arose a little while back. Of course, this bill isn't perfect. I would like to emphasize two features that should be considered and they have been touched on repeatedly this morning.

One is the filing fee. We oppose the filing fee not because of the \$5 or \$15. We oppose it in principle. An action before the Customs Court should be distinguished from one before another Federal court, since the importer is seeking the return of his own money. He is not going to the Government to ask that some dispute between himself and a third party be adjudicated. Rather, it is to recover his own money that is being held in escrow, you might say.

We feel he has a right to make this request and to obtain a refund without having to pay a filing fee. To repeat, we object to this on principle.

The bill is intended to simplify procedures. Here, as has been pointed out, you will have additional recordkeeping for small sums of money, additional receipt-giving, and more paperwork and what have you. So we object to it.

The second point to which we object has to do with section 205 of the bill, which puts into effect a new section 501. In substance, we feel this will allow multiple liquidations by customs. It means that the Government has more than one opportunity to liquidate an entry. Customs can voluntarily, on their own initiative, reliquidate two or three or, perhaps more, times.

Again this argues against the main purpose of the measure, which is to be simplification, administrative expedition, et cetera. We feel that, since Customs does not have a fixed time limit within which to liquidate, the liquidation once made should be final. If Customs has a pending issue before the Court, or under consideration, they can withhold a particular liquidation until the court has decided and they can then act finally. We feel that a liquidation should assure the importer of some degree of finality, rather than keeping the question open and uncertain for an additional period of time.

That, then, is the second point to which we would object. We should add, however, that they are not fatal defects. We support the bill in general, despite these shortcomings.

I thank you very much.

Mr. KASTENMEIER. I appreciate your testimony. Both the points you raised will be treated further tomorrow and the committee will certainly have them under consideration.

If, sir, should you want to submit to the committee a fuller statement, it will be made part of the record.

Mr. BRUNO. Thank you, indeed.

Mr. KASTENMEIER. That concludes the hearing for this morning.

The subcommittee will reconvene tomorrow morning at 10 a.m. in this room for the further consideration of S. 2624 and related House bills.

The subcommittee now stands adjourned until that time.

(Whereupon, at 12:22 p.m., the hearing adjourned, to reconvene Friday, January 23, 1970, at 10 a.m.)

There are two things I want to say. The first is that I am very glad to see you here. The second is that I am very glad to see you here.

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THE CUSTOMS COURTS ACT

FRIDAY, JANUARY 23, 1970

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier, chairman of the subcommittee, presiding.

Present: Representatives Kastenmeier, Ryan, Poff, and Hutchinson. Staff members present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order for further hearing on S. 2624, the Customs Courts Act and related House bills.

This morning, the committee is pleased to greet as its first witness Mr. Gerald H. O'Brien, who is the executive vice president of the American Importers Association.

Mr. O'Brien, please come forward and identify your colleagues. And you may proceed, sir, as you wish. You may follow your statement, or, if you do not, you might advise us as to how you would like to proceed.

**STATEMENT OF GERALD H. O'BRIEN, EXECUTIVE VICE PRESIDENT,
AMERICAN IMPORTERS ASSOCIATION; ACCOMPANIED BY SIMON
KATZ, FIRST VICE PRESIDENT, AND SAMUEL FRANKEL, COUNSEL**

Mr. O'BRIEN. I would just as soon launch right into the statement, because that includes the introduction of the gentlemen who are with me.

My name is Gerald H. O'Brien. I am executive vice president of the American Importers Association. Our organization was established in 1921 and is the only association of national scope representing the importing interests of American businessmen.

At the present time we have over 800 members throughout the United States. Most of our members are importers and domestic manufacturers who bring into this country, from almost all the other countries of the world, a wide variety of commodities, ranging from raw materials and semimanufactures to finished food products, beverages, and other consumer goods. We also have in our organization, individuals and firms which serve importers, for example, customhouse brokers, attorneys, major banks, marine-insurance companies, shipping lines, and airlines.

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Since its formation in 1921, the American Importers Association has a history of working with the Bureau of Customs. We believe that the interests of importers, as American businessmen, are not far removed from the public interest because the goods which importers bring into the United States are what the American people want and need or they would not be buying them. Our organization tries to be objective and to observe a problem from all sides. We represent the importing business, but we never lose sight of the needs of the public-at-large.

With me today are Simon Katz, who is first vice president of our organization, and our legal counsel, Samuel Frankel. Both of these gentlemen are well qualified in import matters. Mr. Katz has been an importer for 30 years and is vice president of the New York Merchandise Co. His firm was established in 1905 and is one of the largest importers of general merchandise in the United States. Its annual sales are approximately \$35 million. Mr. Frankel is a past president of AIA and was in the importing business for many years. He is also an attorney with nearly 10 years of Government service, and more recently is in private practice.

We have already appeared on this bill before the Subcommittee on Improvement in Judicial Machinery of the Senate's Judiciary Committee. I sincerely appreciate the opportunity to present to this committee now the views of the American Importers Association on S. 2624.

This legislation is undoubtedly one of the most serious proposals affecting the importing interests of the United States in many, many years, and we have given it first-priority attention. Since this legislation was first introduced in October of 1968 as S. 4194, our organization has, through a special committee and its board of directors and its staff, spent hundreds of hours studying the detailed proposals therein.

In our view, the bill as passed by the Senate is, on the whole, a good one. It brings about a great many procedural changes, long overdue, in the Bureau of Customs and in the Customs Court—changes which, we have no doubt, will simplify, speed up, and reduce the cost of customs administration, to the benefit of the importing business and the general public as well as the Government. We believe this bill will accomplish notable improvements, and we should like to indicate them to this committee.

ADMINISTRATIVE PROCEDURES

(a) Under this bill all issues regarding the dutiability of the imported merchandise, including appraisalment and classification, will be determined by customs at one time—namely, on liquidation. The present system of "separate channels"—namely, pursuing administrative and judicial remedies on appraisalment before pressing a claim, if there is one, on classification—will be abolished.

(b) Under the new bill, the importer will on request be accorded a review of a protest by an official other than the one whose decision is in question. In other words, an opportunity will be provided for a really independent administrative review of a disputed decision.

Under the existing system, "administrative review" usually means a simple rubberstamping or a perfunctory glance at the file by the

same official whose ruling is under dispute. We are gratified that the Bureau of Customs and the Senate Judiciary Committee recognized this need for truly independent review and provided for it in the amended bill.

(c) The importer will have 90 days instead of 60 days after notice of liquidation in which to file a protest. Importers will need the extra time in order to make a carefully considered decision as to whether a protest could be useful and is warranted.

(d) In appropriate cases, protested entries may be held within the jurisdiction of the Bureau of Customs for as long as 2 years. This long period of time will often make it unnecessary for importers to seek the aid of the Customs Court, because during that interval decisions may be handed down in test cases which will determine the issue at stake. At the same time, if an importer wishes to take a case to the Customs Court as soon as possible, he may do so by simply filing a request for accelerated action, and in this way the importer may dislodge the case from administrative jurisdiction in 30 days.

(e) It is important to the import trade that notices of liquidation should be sent in writing. The bill as passed by the Senate does not specifically require written notice of liquidation, but the Government is on record with the Senate Judiciary Committee—and this is part of the legislative history of the bill—that it will not discontinue its present practice of mailing notices of liquidation to the importer. Importers will, of course, place reliance on this assurance.

JUDICIAL PROCEDURE

(a) The bill eliminates the necessity for two separate court actions in cases where there are both a valuation claim and a classification claim. For any particular entry, all questions will be decided in the same court case, although the Customs Court is specifically given power to sever various issues for separate trial if this seems desirable. These provisions, considered together, give the judge great flexibility in disposing of matters in the most expeditious way.

(b) Protested cases—and this category will now include valuation as well as classification cases—will no longer be automatically referred to the Customs Court for action. Under the present procedure, unfortunately, many, if not most protests in which classification or valuation is in dispute are automatically referred by the Bureau of Customs to the Customs Court for decision. Too often, this means that the administrative officer simply passes on his responsibility to the court and, in the process, inevitably loads the court dockets with tens, if not hundreds of thousands, of cases which will never be tried.

This committee is no doubt aware of how this congestion burdens judges, lawyers, clerks, and recordkeepers, and creates additional and useless paperwork. Under the new system, an importer will be able to select one or more protests for judicial action while leaving other entries involving the same issue within the jurisdiction of the Customs Bureau for up to 2 years.

(c) Under the bill, all issues, whether on classification or valuation, will be tried by a single judge and not by a panel of three judges. The time of the Customs Court judges will be used more productively, and litigation should therefore be disposed of more quickly.

There are other positive features, of lesser importance, that may be counted in favor of the bill now being considered by this committee. Altogether, the changes and reforms produced by the bill make it desirable legislation. AIA is glad to support it, and we commend the Treasury Department, the Bureau of Customs, the Department of Justice, and the staff of the Senate Judiciary Committee for their careful work in preparing this legislation.

As we have stated, the bill makes important improvements in procedure, both in the Bureau of Customs and in the Customs Court. The bill achieves even greater importance than under ordinary circumstances when we consider that many decades have gone by without any important modernization. The present bill is therefore desirable.

But for the same reason—namely, the infrequency of change—it is important that the legislation be as nearly perfect as it can possibly be made. It should not be enacted by Congress even with small flaws. No one can guess when such defects will ever be taken up again for consideration. We therefore strongly urge this committee to consider carefully not only the many good points of the proposed legislation but the several areas in which it can be improved to make it fair to the importing business and to protect the rights of importers.

(a) At the top of the list we refer to the obligatory requirement of a court fee as a condition to filing a complaint in the Customs Court. Although other judicial tribunals require a fee, we believe that a fee should not be required in Customs cases. This is because of the nature of the typical Customs entry transaction—frequently a series of repeated individual entries, each one involving a small amount of merchandise—and of the constant need for finding answers to many questions. We believe that fees should not be required at all, but, at most, they should be exacted only on the filing of a notice of trial.

(b) The bill provides that in all types of cases, duty advances levied after an entry is made must be paid as a condition of starting a suit in the Customs Court. We submit that if the Government wishes to correct its own error and if the levy of additional duty is contested, it is the Government that should wait for the money, not the importer. We therefore recommend that the bill be amended to eliminate the requirement that advances be paid before a suit may be brought.

(c) In *appraisal* cases, under present judicial practice, the court may find that the Government's theory is wrong and that the importer's theory, or some other theory, is correct. However, if the importer has not provided facts to support his theory, the Government's appraisal will stand as presumptively correct.

We submit that such judicial decisions, which are based on the statutory presumption in favor of the Government, work an injustice on the importer. There is a simple way to achieve a just result. In such a situation the court should direct that the entry be returned, or referred, to the Bureau of Customs for reappraisal in accordance with the directions of the court.

(d) *Notice of protest allowed*: When a protest is granted by Customs, it is sent back for liquidation in due course. However, it is important for an importer to know as quickly as possible, without waiting for liquidation, that a protest has been decided in his favor, so that the importer could then file subsequent entries at the correct

value or rate. It is recommended, therefore, that the bill be amended to require written notice to the importer that this protest has been allowed. Such a provision would also be helpful to the Government.

(e) *Basis of appraisalment*: It is of great importance for the importer to know on what basis the Bureau has made its appraisalment, whether on the basis of "export value," "U.S. value," "constructed value" under sec. 402 as amended, or on the basis of "foreign value," "export value," "U.S. value," "cost of production" under sec. 402(A) (old law), or by "all reasonable ways and means" under Sec. 500.

It is recommended that Customs be required to indicate this information in the official return on the invoice.

(f) *Notice of protest denial*: The bill provides that time allowed for initiating action in the Customs Court begins to run from the date of mailing by Customs of notice of denial. Frequently an importer has moved, and the notice is returned to Customs. With our mail service as poor as it is, I think you would all agree that that is a possibility. The Court has held that notice is deemed given.

It is suggested that provision be made that when notice of denial is returned to Customs undelivered, it must be remailed to the broker who filed the entry.

(g) *Duty deposits where a ruling is requested*: Under present procedure, before an importer is permitted to file his entry, he must deposit the amount of duty determined and exacted by the commodity team in Customs. In many cases, the importer is in sharp disagreement with the opinion of the commodity team and may have, in fact, already requested a ruling on the point in question from the Commissioner of Customs, who may ultimately agree with the importer and thus reverse the commodity team.

Unfortunately, the common experience is that there is a delay of 3 to 6 months in rendering an opinion. Nevertheless, during this period the importer must pay duty at a higher rate than may be eventually determined to be correct.

We therefore believe that where an importer is waiting for an opinion from the Commissioner of Customs, he should be permitted to deposit duty at the rate he claims and liquidation should be postponed until the ruling is handed down. The bill should be amended to give such relief to the importer in order to correct what is now frequently an injustice.

In the interests of good legislation, we urge adoption of S. 2624 with the amendments we have recommended.

Mr. KASTENMEIER. Thank you very much, Mr. O'Brien, for concise and very helpful testimony.

Among the changes you recommend, the first one is, of course, elimination of the mandatory court fee. One of the reasons you suggest that this ought not to be imposed is because the typical Customs entry transaction frequently involves a series of repeated individual entries, each one involving a small amount of merchandise.

Are you not persuaded that by the consolidation of entries in a single action, the \$5 minimum fee might be imposed for a great many entries rather than imposed on each single entry?

Mr. O'BRIEN. I realize that under the consolidation procedure you wouldn't be paying for each entry. But if the system doesn't work, the

Customs lawyers are in many cases going to be forced to move it over to the court dockets almost in the old way that we have now. So then you would be having this on so many single separate entries.

If the system works, which we of course hope it will, we wouldn't have that many.

Sam, would you want to go further?

Mr. FRANKEL. No, I wouldn't enlarge on that. Of course, the Government has pointed out that you can have any number of entries on a single court suit. But customs cases aren't typically pursued that way.

Mr. KASTENMEIER. How do you see them pursued?

Mr. FRANKEL. There will be a single issue which will cover 20, 30, or 500 entries of the same merchandise. But, of course, the importer certainly has a knowledgeable customs lawyer, who will not take a risk of bringing a suit on all 500 or even 50 or 20. He may bring one or two entries, so that the risk is small to the importer, and test the point of view on that one or two entries.

So actually you wouldn't have, I think, many cases where there is a multiplicity of customs entries in one suit. It would be hazardous. So normally a test case would be of one or two. The importer would be at liberty to bring many, but it would not be a good tactic.

Mr. KASTENMEIER. What hazard precisely are you talking about?

Mr. FRANKEL. Of course, if an issue is determined on the merits, and it is not appealed or affirmed and so on, disposing of the issue, then you have a good precedent for any other cases involving the same issue. But too often a case may be lost by an importer on some side issue, inadequate evidence, or it is a poor case, or the witness wasn't available, not really testing the merits of the issue. He may have lost that case. He knows now that he has to get other evidence to persuade a court that his position is right.

This kind of thing happens frequently. When I say "danger," I mean danger that he will have lost but not on the merits.

Mr. KASTENMEIER. I have another question. Perhaps it is an unfair one to ask you, Mr. O'Brien, but it did occur to me. Perhaps I should have asked one of the witnesses yesterday.

Would you say that the interests of importers, of customshouse brokers, and of customs attorneys, are identical in their relationship to the legislation?

Mr. O'BRIEN. No, I don't think so. I think the brokers have sort of taken the position that it doesn't affect them very much. When customs under the present system doesn't agree with the importer and denies the protest, it automatically goes on the Customs Court docket, so then it is between the importer and his lawyer. Under the new system, when a controversy develops within customs, an importer wants to rely on the broker to solve the problem for him, administratively within the 2-year period. It is possible, they—the customs brokers—could be more involved.

But we rather suspect that the importers are going to continue to turn to the lawyers who have the expertise, so that the lawyer will still be the one primarily concerned and pursuing it administratively within customs, with the possibility that it may eventually have to go to court.

So the brokers have taken, to my knowledge, sort of a hands-off position.

As for the importers and the attorneys, I would say that in the process of working on this bill, our association, with the hundreds of hours we spent studying it, is more prone to believe change is desirable and necessary than the customs bar.

Mr. KASTENMEIER. Of course, I cannot anticipate what the committee may do eventually in making changes in the bill, if any. But in the event that should the committee come to the point where it would approve the Senate bill in its present form or no bill, would you recommend that we approve the present bill; that is, the Senate bill in its present form, or no bill at all?

Mr. O'BRIEN. That is an unfair question, but I anticipated it. We crossed that bridge in our executive committee, and we would like to see the amendments we have asked for. But if faced with the choice you have given us, we support the bill.

Mr. KASTENMEIER. Thank you very much.

I yield to the gentleman from Virginia.

Mr. POFF. Thank you.

I was a little concerned at one phrase you used twice. It was a parenthetical phrase by way of preface. You said "if the system works."

What fears do you have that it won't work in practice? I assume you mean the lack of experience with the procedure might create some unanticipated problems.

Mr. O'BRIEN. No. I didn't have that in mind.

I am giving everybody credit for being able to learn how the system is intended to work. We regard all the customs people and the Government people as our friends. But I think it is no secret we feel that customs is grossly understaffed.

So to the extent that this system is being redesigned to provide for administrative review within the 2-year period, which we believe is advisable, it can only work with the customs people on the firing line who are conscientious about doing it, and when a controversy does develop, we truly get the conscientious independent review that the bill calls for.

If we get a brush-through on the part of the lowest level commodity team; that is, "That is the way it is, take it or leave it," we won't like it; we will file a protest. If it gets a brushoff, a cursory review, under the so-called independent review; for example; a rubberstamping of what a subordinate did, then I say, the system isn't going to work, and we will be clogging up the court the way we did before.

Mr. POFF. Certainly the mechanism would be furnished which would provide the opportunity for administrative review, which the present system does not provide.

Mr. O'BRIEN. That is why we are supporting it. That is why I qualified my statement—if it works, we would like it.

Mr. POFF. I take your answer to mean that the cause of your concern about the functioning of the new system does not arise from anything in the bill itself, but from the procedures and the personnel and the manner in which the mandate of the statute is administered.

Mr. O'BRIEN. That is right; adequate staffing and attitude.

Mr. POFF. If I were you, I would not concern myself too much with that. I believe you will find a sympathetic Congress. This business is vital to the economic welfare of this country, indeed to its security. I simply can't believe that the Congress would allow this reform to founder, once it is made, for want of adequate financing.

Indeed, in my judgment—and my judgment in this area wouldn't be as good as yours, I concede—there will be less need for personnel, and personnel will be able to perform their duties more efficiently and more promptly under the new system than under the old system. And it will cost the taxpayers of this country less money.

I hope I am right about that. If I am in error you will always have this committee to address. We will do our best to correct the deficiencies that appear, in fairness to all concerned.

Mr. O'BRIEN. We will quote you to Mr. Rooney when the time comes.

Mr. POFF. I would be glad if you will. As a matter of fact, this will be a public record, and you can quote it to the press, if you wish to.

I want to pursue another matter.

You seemed concerned that customs would be required to furnish a formal written notice of denial after constructive denial following the expiration of the 2-year period. Why should this be the burden of the Customs Bureau? Isn't it more nearly within the province of the importer himself? He has records, and it is certainly in his economic benefit to maintain a continuing oversight of them and to calendar their expiration dates.

Mr. O'BRIEN. That viewpoint was advanced on the Senate side. We were glad that the Senate committee agreed with us. Let an importer answer it.

Mr. KATZ. Actually, an importer's concern is mostly with the importation of the merchandise, paying duty and selling it. If he has to maintain all kinds of records on hundreds of entries, whether a protest was or was not denied, he should get something official from the Government to state that the protest was denied. Then he can proceed to send on to court. Otherwise, the time lapse may exist, and he may not protect himself by sending it to court in time.

Mr. POFF. But you have a 2-year period here. It is not as if you had a 30-day period.

Mr. KATZ. It is a continuous process. We are not talking that every entry may lapse. But he should get a notice where he should know whether that entry has been terminated or whether he is to continue to send it to court.

Mr. POFF. When it is affirmatively terminated, he will receive a formal written notice.

Mr. KATZ. Right. He should also have notice when it is denied, because then he may have to set up a procedure for further protest, to send it to his attorney or to see that it gets to court, because we no longer have this automatic referral under the new legislation.

I think it is important for the importer to have that information.

Mr. POFF. You think you should have a formal written notice from the Customs Bureau at the expiration of the 2-year period?

Mr. KATZ. That is right. He should have it either of allowance or denial.

Mr. FRANKEL. This question was considered not only before the Senate but also by the Government departments involved, the question of giving notice. It is a question of convenience, balancing of convenience.

I would judge that the Government has decided that on the balance of convenience, it is better for the Government to do it.

I think they have agreed with the position that was advanced to the Senate and accepted by the Senate committee.

Mr. POFF. You didn't address yourself to the question of trials and hearings in foreign countries. Do you have a viewpoint on that?

Mr. O'BRIEN. We felt that the way it came out from the Senate was acceptable.

Mr. POFF. I believe that is all. Thank you very much for your response. I think your statement was excellent.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. HUTCHINSON. I would like simply to pursue a little bit further this question about trials in foreign countries.

I don't know of any other U.S. court that holds court outside the United States. Yesterday it was said that the depositions taken overseas in the absence of a judge were sometimes inadmissible as evidence.

Well, it seems to me that the question of admissibility could be raised at the time that the matter was presented by way of deposition over in the American court.

Is there any other court in the United States that holds court overseas?

Mr. O'BRIEN. I think Mr. Frankel could clarify this term you are using of "holding court," because that is not my understanding of what the Senate has provided.

Mr. HUTCHINSON. They are going to send a judge over there.

Mr. FRANKEL. Just to hear evidence, not to make a decision. It is not a trial.

Mr. HUTCHINSON. He does the same function as if they assign somebody to take a deposition. He does the same thing.

Mr. FRANKEL. Similar, yes. But the difference here is that this judge who hears evidence overseas will, when he gets back and resumes the trial, have the benefit of having heard the witnesses himself. This is considered in our system of law as of a great advantage to a tribunal. It is not a trial.

Mr. HUTCHINSON. Is it something unique in the law? No other kind of a Federal court would be called upon to do it, but the Customs Court should?

Mr. KASTENMEIER. If the gentleman would yield, I think the Court of Claims does that.

Mr. HUTCHINSON. Do they actually hold hearings overseas?

Mr. FUCHS. I understand the Commissioners do.

Mr. HUTCHINSON. Does anybody have any idea about how much overseas travel there would be? People keep jumping on Congressmen for going overseas, and they could very well start criticizing the customs courts or any other judges that go overseas.

Mr. FRANKEL. As the bill reads, the occasion for going overseas to only hear evidence will be limited. It is hedged in with careful consideration of the requests, from whichever side it comes, a decision that it is important or even necessary for the case, and what is more, if either party objects to a decision to go overseas, he has the right of interlocutory appeal to the next higher court.

So I suspect that it will not be used very often. I think it will be rare.

This is a proposal that came from the Government, of course, not from the importing industry or the importing trade. Hedged in as it is now, I don't think there is a serious objection to it.

Mr. HUTCHINSON. Would such procedure be costly to the litigants?

Mr. FRANKEL. I don't think the bill spells that out. I couldn't answer that question, really.

Mr. HUTCHINSON. What I mean to say is, if the judge is going to go overseas, then, of course, the parties have to go overseas with him.

Mr. FRANKEL. And the lawyers, too.

Mr. HUTCHINSON. And the lawyers, too.

Mr. FRANKEL. It could be costly.

Mr. HUTCHINSON. It might be costly in some cases. The importers would be willing to bear that, I suppose.

Mr. FRANKEL. If an importer found or believed that it was not to his benefit and believed that there wasn't enough reason for the Government to ask for it, he could holler loud and furiously. And I think his point would be considered carefully by the judge. I am confident it would be so.

Mr. HUTCHINSON. He would have the right of interlocutory appeal if he was turned down?

Mr. FRANKEL. Yes.

Mr. HUTCHINSON. How often do you suppose it would be necessary to go overseas? You said "rarely."

Mr. FRANKEL. I couldn't venture a guess. But there are in this room now customs counsel who might be better equipped to answer that question. I doubt that it would happen twice a year. That is just a sheer guess.

Mr. KASTENMEIER. If the gentleman will yield, the chief of the customs section is here, and perhaps he might venture a guess.

Mr. VANCE. I think what Mr. Frankel said is absolutely accurate. It would not be more than two or three times a year. It would only be in cases where we were able to show either side that it was feasible both financially and because of the importance of the case.

I don't think it would be frequently used. I think there are instances where the questions involved and the necessity of taking testimony abroad are of such importance that it would be better if it were done with oral testimony instead of written depositions, or bringing the witnesses to this country.

Mr. HUTCHINSON. Would you care to speculate as to what parts of the world it is more likely that they would be sending judges to?

Mr. VANCE. I actually think the cases that I have in mind where this probably would have been necessary recently, Congressman, have been in the Far East.

Mr. HUTCHINSON. Warm climate in the wintertime?

Mr. VANCE. I am not really familiar with all the climates in those countries over there.

Mr. FRANKEL. I can answer that, sir. It is not warm in the wintertime. It is cold.

Mr. HUTCHINSON. Where?

Mr. FRANKEL. In Japan.

Mr. VANCE. Again, I think a showing has to be made that would satisfy both the Customs Court and, on appeal, the CCPA; that is, an exercise of the judicial function to have a hearing over there.

Mr. HUTCHINSON. I guess I have got enough of a response to my questions.

Mr. KASTENMEIER. The committee is indebted to the gentlemen for their testimony this morning. We appreciate it.

Next, the committee would like to welcome, representing the Association of the Customs Bar, Mr. J. Bradley Colburn and Mr. Joseph Schwartz.

STATEMENT OF J. BRADLEY COLBURN, ESQ., ASSOCIATION OF THE CUSTOMS BAR; ACCOMPANIED BY JOSEPH SCHWARTZ, ESQ.

Mr. COLBURN. Mr. Chairman and members of the committee, I would like, if I may, to follow my prepared statement interpolating remarks as I go.

Mr. KASTENMEIER. You may proceed, sir.

Mr. COLBURN. I am the senior partner of the law firm of Barnes, Richardson & Colburn with offices in New York and Washington, D.C. Our firm specializes primarily in the practice of customs and tariff laws.

I am a member of the board of directors of the Association of the Customs Bar and the past president of that association. I was also, for a period of 10 years, chairman of the committees on the customs law, American Bar Association, in all of which capacities I have had the privilege of appearing from time to time before various committees of the Congress.

I am accompanied here today by Mr. Joseph Schwartz, who is chairman of the committee on practice procedure and legislation of the Association of the Customs Bar and I ask the privilege, if I may, of deferring questions from time to time, that may be asked, for him to answer.

Perhaps I should note at the outset that while the views which I shall express are, I believe, those of the Association of the Customs Bar, as endorsed by its members and the board of directors, there are some individual members of that association who hold some divergent views. And they, of course, are privileged to appear in their own behalf and I think one of them may even be following me today.

The Association of the Customs Bar was formally organized on May 24, 1917, and existed as a voluntary association until May 25, 1926, when its membership was merged in the Association of the Customs Bar, incorporated by chapter 210 of the Laws of the State of New York, approved April 2, 1926.

The said act incorporating the association states its purpose to be—

To maintain and improve the standards and methods of practice under the federal laws relating to the customs and revenue, before the United States Court of Customs Appeals, the Board of United States General Appraisers, the Treasury Department and all departments, commissions, bureaus and officials charged with the interpretation or administration of honor and courtesy in the legal profession engaged in such practice, to cultivate the science of jurisprudence, to promote reforms in the law, to facilitate the administration of justice and to cherish the spirit of brotherhood among its members.

The Association of the Customs Bar is composed of lawyers located throughout the United States who devote a major part of their practice to customs and tariff matters. The comments herein reflect a careful study of the provisions of the bill by members of said association, including a special committee and the board of directors.

I have had the privilege over the past 2 or 3 years of serving as a member of the ad hoc committee appointed by Mr. Justice Clark to study this matter as well as working very closely with members of the Customs Court and particularly its committee on legislation, Judges Watson and Maletz.

The bill before you is presented as a compromise measure, which has been worked out in the course of the past several years primarily by the Treasury Department, the Department of Justice, and the Customs Court, in collaboration with various interested parties from time to time. I wish to acknowledge my personal appreciation for being permitted to participate therein and to make clear on the record that as a spokesman for the bar association, I have been given opportunity to present the views of that association throughout the consideration of this matter.

And, a number of the provisions of the bill now before you represent compromise. Some were indeed, I believe, inserted at the request of the bar association. A number, however, unhappily, are included over very strenuous protests of the bar as well as other importing interests. It is to some of those provisions which I shall seek to direct myself primarily to this morning.

The bar association is in accord with the announced goal to make the review of customs decisions more efficient. We support major provisions of the proposed bill such as single judge trials and the separation of administrative and judicial functions, which we believe would improve and modernize procedures in the Customs Court in hearing customs matters and enable the court better to meet its statutory responsibilities. We also recognize that a number of improvements are indicated in the administration of the tariff statutes by customs officers. The bill will fail of its stated purposes, however, and particularly to achieve the desired expedition in settling customs controversies, unless certain important changes are made in the version as passed by the Senate.

I would like now, if I may, to pass directly, Mr. Chairman, to a discussion of these amendments which we believe to be important and essential to carry out the stated purposes.

I would like first to refer to the matter of hearings in foreign countries. Section 109 of this bill, which you will find at page 7 of the Senate draft, would amend present section 256, title 28 of the United States Code, by adding a new subdivision (b) which would authorize the chief judge of the Customs Court, on his own initiative, to authorize a judge of that court to preside in an evidentiary hearing in a foreign country.

I would interpolate here, if I may, I am not sure what evidentiary hearing is actually. It may mean sitting as a commissioner to have people come forward and present evidence they have. I doubt sincerely if it encompasses a trial. I doubt if a representative of this court, if he went abroad, would carry with him the full mantle of judicial power. I doubt if he could have the power to summons witnesses, subpoena witnesses, or to cite for contempt or to conduct the hearing, whatever that means again, in a regular controlled judicial manner that he might do in the United States. That is an aside.

Our primary objection to it, however, is that these hearings would involve considerable time and expense, and while they may be indi-

cated to be desirable on some occasions, we don't believe they should be permitted or allowed or set without the full concurrence of the interested parties.

We object, therefore, primarily to the provision in the bill—this of course has nothing to do with any individual who now is on the court or who may later be on the court—that the chief judge, on his own initiative, set these hearings.

On this matter of the interlocutory appeal, which is provided, I say that is a small and ineffective way to deal with this thing. It simply adds another burden and another step, another costly step, time-consuming step intervening in the judicial process of review for an ultimate determination of an importer's duty liability, which is what we are seeking to achieve expeditiously, I believe.

We know of no precedent for this. While I don't mind leading the parade on occasion, I really hold back a bit as to whether the Customs Court should be selected to drive the van in the front of this whole procedure.

Therefore, Mr. Chairman, if this provision is to be retained, we recommend that there be deleted the words—

"Upon application of a party or upon his own initiative," and there be substituted a provision that—

"Upon consent of the parties and for good cause shown" as limitation, a necessary limitation we believe, to this provision.

Mr. RYAN. May I, Mr. Chairman, make a comment on the question the witness raised?

Mr. KASTENMEIER. I would urge the gentleman to withhold his questions and permit the witness to conclude, because I think we can make better progress that way, unless it is something urgent.

Mr. RYAN. I will raise it later.

Mr. KASTENMEIER. Thank you.

Mr. COLBURN. I would pass now to the matter of the filing fee, which is perhaps the most important single objection we have to this bill that you will find in section 113(b) of page 11 of the Senate version of the bill. Section 113(b) of this bill, as it was originally introduced in the Senate, and as it is contained in the several corresponding House measures, which have been offered, including one I believe by Mr. Poff, and others, provided simply that there may be a filing fee payable upon commencing an action. The matter was left open and to the discretion of the court.

Imposition of any filing fee was vigorously opposed in the hearings before the Senate and in filings made to that committee by, I believe, substantially all importers, attorneys, and brokers. Chief Judge Rao, at the time of his appearance before the Senate committee, expressed the view in the record that a filing fee, if any, was under consideration and study by the court and that he would advance the opinion that if any were imposed, it should be by court rule and after further study of the matter.

Representatives of the Departments of Justice and Treasury, while supporting the filing fee, took the position over there that the matter should also be left in the discretion of the court.

We know the provision was amended and the bill was passed by the Senate, after conclusion of the hearings, and there was no debate on the floor, to make the filing fee mandatory upon the commencement of an action.

This provision has now apparently been supported by Judge Rao and by representatives of the Treasury and Justice Departments.

We think this is another provision that unnecessarily and heavily loads this bill in favor of the Government and against the importer. We think it is going to erode a large part of the free right of an importer to obtain full review of illegal and unfair assessments of duty which the Congress has always been very liberal in affording and has been very jealous in preserving, and we don't think that this fee should be made mandatory.

The requirement, as it now sets, when it is added to the many other heavy and new burdens imposed upon importers by this bill—and they are very sweeping changes made throughout this bill in the whole setup—not only disregards the unique procedures applicable to judicial review of customs matters, but will sharply curtail the historic grant by Congress of broad, readily available means to judicial review and will permit to stand unchallenged, wrongful, and illegal rulings of administrative customs officials.

This fee is required in the Senate version to be paid upon commencement of an action. "Commencement of an action" is intimately tied to the requirement that an importer, if he wishes to preserve his rights, must file separate protests against each and every entry of merchandise as it is liquidated, and then to commence action by filing a summons in the Customs Court as such protests may be denied at the administrative level. This results in the filing of hundreds and sometimes thousands of separate protests, and, in turn, requirement of commencement of a corresponding large number of actions. Each separate importation covered by a separate protest or action in most instances involves a small amount of claimed difference in duty. Individually, it is frequently not worthwhile to contest the assessment. In the aggregate, however, the matter may be important to the importer. This objection is only partially met, Mr. Chairman, by the fact that an importer is permitted a period of 180 days after denial of a protest within which to file a summons and may thereby consolidate protests to some extent. At best, he may, by this method, lessen the number of actions commenced.

We think that the burden would still be heavy, and I notice here, also, the reference to a \$5 fee which has been used throughout, and yet it was developed in the course of the questioning by the members of the committee of witnesses on yesterday, that if a certain number, x number were consolidated, then perhaps we would hike the fee up to a higher figure. So, we start with nothing and then we have a fee here and this can steadily progress and also on the ascending scale. We think it is unfair and it would burden the importer unfairly.

In most types of litigation, of which we are familiar, a litigant may commence one action and thereby protect his interests. To obtain corresponding protection, an importer is required to commence numerous separate actions as his entries of merchandise are liquidated and his protest denied. He has no choice. He must commence action piecemeal.

It may be agreed, as has been suggested in the report of the Senate committee, that no litigant should expect to use the facilities of a judicial system without bearing some of the costs.

We recognize, therefore, that some justification may exist for imposition of some fee in the Customs Court: as for example, upon

filing of a complaint in connection with an action in that court. We believe it is manifestly unfair, however, to assess any filing fee upon the commencement of an action by filing a summons, and at the same time require an importer to commence repeated actions involving the same claim and the same merchandise in order to adequately protect his interests.

Filing fees in customs matters were once imposed by the Congress under the Tariff Act of 1913. After a 9-year experience, such fees were abolished based upon investigation and finding by the Congress that such requirement imposed a hardship upon small business concerns, discouraged them from contesting illegal assessment of duties, and permitted to stand in effect such illegal assessments, to the ultimate detriment not only to the importer and foreign trader in the United States, but also to the consuming public in the United States. One result of discouraging challenges of alleged illegal duty assessments left in effect rates and amounts of duties higher than those intended by the Congress so that the consuming public continued to pay a greater price than otherwise would have been charged.

We believe that the factors which entered into the determination by the Congress to abolish the filing fees in 1922 are equally valid today and we therefore suggest, Mr. Chairman, that the word "shall" be deleted and there be interpolated at the appropriate place in the amendment as set forth in my statement that there "may" be a fee payable upon the filing of a complaint in any action instituted in the Customs Court.

There is another matter of amendments of court actions which we regard as almost as important in degree as the matter of filing fees.

Section 113(d), which you will find at pages 10 and 11 of this bill, would, in our judgment, amend and sharply limit the scope of existing law as set forth in 2642, title 28 of the United States Code. That said provision provides the Customs Court under its rules and in its discretion may permit amendment of protests, and so forth.

This section is implemented by rule 6(c) of the Customs Court rules to provide "a party may amend his protest," and so forth, "at any time by leave of court, and such leave shall be freely given when justice so requires."

This right of amendment is an exceedingly valuable one to importers and has been exercised very liberally by the Customs Court and the Court of Customs and Patent Appeals to serve the ends of justice.

Section 113 of this bill provides, however, that the Customs Court, by rule, may consider new grounds in support of a civil action if the new ground, first, applies to the same merchandise that was the subject of the protest; and secondly, is related to the same administrative decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest. This latter provision, too, we believe is contrary to existing law and practice.

In the landmark case of *United States v. Macksood Importing Company*, the citation to which is in my statement, the rule is clearly laid down that the Customs Court may permit amendments to protests provided the amendment applies to the same merchandise that was the subject of the protest.

There is no requirement that the amendment must be "related to the same administrative decision" that was contested in the protest. Thus, in the *Macksood* case, the original protest was against the rate of duty

assessed; but the court allowed an amendment which claimed that the collector of customs converted the Mexican dollars of the invoice at the wrong value. Obviously, this was not the "same administrative decision" contested in the original protest, yet the amendment was granted.

If I may, I will read in part from what the court had to say in that case:

Accordingly, we are of opinion that claims permitted to be introduced by amendment were not intended by the Congress to be considered new and separate causes of action, which, under the decisions hereinbefore referred to, would be barred by the statute of limitations.

It was suggested in oral argument in this court that such a construction of the provisions in question would permit protestants to deliberately circumvent the provisions of section 514, which require them to state their objections to the collector's decision definitely and specifically, the purpose being to give the collector an opportunity to review his decision and to revise it if he deems it proper to do so, and thus avoid litigation.

We are not impressed with that suggestion, because the Congress has provided that amendments to protests might be made only in the discretion of the trial court, and under such rules as it might prescribe, evidently relying upon that court to prevent any deliberate circumvention of the law.

Other examples of liberal application of the present law are found in a large number of cases where the original protest involved a claim against the customs-reported gage on imported liquor, which protest was allowed to be amended by the customs court to add a claim relating to shortage of the said liquor. This liquor example was followed in hundreds of similar protests on the same question.

Then I cite two other instances in my prepared statement, three of them, Mr. Chairman, which I will not take the time of the committee to elaborate on at this time and ask that they be included along with my statement.

Mr. KASTENMEIER. Without objection, your statement will be included in the record.

Mr. COLBURN. I also ask the privilege of filing with the committee at this point a memorandum which expands upon present state of the law and in our judgment demonstrates that the proposals of section 113 of S. 2624 are contrary to existing law and procedure.

Mr. KASTENMEIER. Without objection, that memorandum will be accepted and filed.

(The documents referred to appear at p. 170.)

Mr. COLBURN. Maintenance of this right of amendment is of critical importance. It is true that under existing practice, a claim involving the dutiable value of merchandise may not be amended to make any other claim, for example, classification, and vice versa. This is entirely due, however, to the existing statutory and administrative procedures under which the dutiable value is first determined by an appeal for reappraisal, after which the entry is liquidated and then only can a protest be filed against the liquidation. Since the remedy to determine value is distinct from that involving classification, the existing rule is that an importer who has failed to file an appeal for reappraisal, or has filed it and exhausted it, is not allowed to raise a value question by protest against the liquidation of the entry.

Under the scheme of S. 2624 there will be a single liquidation into which all administrative decisions are merged, and against which the importer will be allowed to file a protest or protests, whether they deal with value or classification or any other reviewable decision. The

avowed objective of section 113 is to preclude an action relating to classification from being amended to make a claim relating to value, and vice versa. There is no justifiable reason for such a rule. Since all administrative actions would be merged into a single liquidation, it seems only fair that the importer should have the right to amend his action provided it deals with the same merchandise and the same liquidation against which protest was originally filed.

We have an appropriate amendment there, Mr. Chairman, which we are suggesting.

I would now like to refer to section 113(f) which is found at page 10 on the bill relating to the items to be forwarded to the Customs Court as a part of the official record of civil actions. The Senate additions to the items to be included in such record are strongly endorsed.

If I may pass to title II of this bill, that completes our comments on the judicial sections. Title II deals primarily, and I believe exclusively, with administrative proceedings in customs matters.

I would like to refer to section 207, which you will find at page 24. We had some doubt as to the clarity or what may be the intention as fully carried out. The provision of that section at lines 5 to 10, provided that only one protest may be filed for each entry, and in addition, goes on to say, separate claims are deemed to be part of a single protest.

The meaning of "separate claims," as opposed to a "protest," we think should be spelled out.

I don't know just what is meant by it. We think of a claim as being part of a protest. This separate mention of claims as against the protest, I am afraid may lead to some confusion. If the provision for "separate claims" is intended to relate to a situation where a broker might file a protest relating to a clerical error or shortage and subsequent thereto, the importer filed a protest against value, and an attorney on behalf of the importer filed a protest against the rate of duty, and that such filings will be considered at that stage as claims and merged as part of a single protest, then the importer will be protected in his right to challenge administrative actions.

The suggested prohibition against more than one protest for each entry, however, seems to require clarification. We respectfully suggest that no doubt should be permitted to remain in this area.

Additionally, no real reason seems to exist as to why more than one protest may not be filed against a particular entry or category of merchandise, provided only, if desired, that for administrative purposes of review, all protests relating to a single entry or category be consolidated and treated together.

We have appropriate language to carry out and implement that suggestion, Mr. Chairman, which appears immediately following my comment.

Further, with regard to section 207, I would like to direct your attention to page 24, lines 11 to 14, if I may. These deal with amendment of protests.

Provision is made here for amendment of protests under regulations prescribed by the Secretary, at any time prior to the expiration of the 90-day period in which the protest could have been filed under section 514 of the Tariff Act. The right purported to be granted by the bill is a very narrow one, we believe, and would not permit any amend-

ments relating to the situations not only which may not have occurred to the importer or his attorney during the initial 90-day period, but which may also relate to judicial or administrative constructions or legislation which might take place during the period of time that a particular protest remains within the jurisdiction of such authorities.

To fully serve the ends of justice, no valid reasons seem to exist why a protest may not be amended at any time while it remains under the jurisdiction of the administrative authorities.

Here again, we have implementing suggested amendments, Mr. Chairman, which are contained in my prepared statement.

I would like to refer to the matter of the administrative review, section 208, which appears at pages 25 and 26, was amended by the Senate to require mail notice of denial of any protest. We endorse that Senate change. We think it is highly important.

This section retains, however, a provision for a 2-year period in which a protest may be subject to administrative review. Existing law permits administrative review of protests against classification limited to a period of 90 days. There is no provision for review of any kind of value or other type of questions. Expansion of the administrative review to cover these additional matters seems appropriate and desirable.

Any review, however, should be made within the earliest possible time in order to apprise the importer of his ultimate duty liability. We take note here of the statement in the report of the Committee on Finance on S. 2624 at page 28 of that report:

Treasury Department witnesses have testified that in the most recent 12-month period for which statistics are available, all protests were processed in an average period of 58 days from the date of receipt, and more than 97 percent were actually processed within 90 days of the date of their receipt.

In the light of this experience, it would seem that a period of 2 years is wholly unnecessary. We would be agreeable to some extension of the present 90 days, but we certainly urge, Mr. Chairman, that a period of not more than 1 year is more than ample for this.

We submit there is a particular and important public interest in the expeditious disposition of customs litigation. For so long, as an erroneous administrative determination is allowed to stand, a higher tariff is, in effect, established in derogation of the congressional intent. Hence, to the extent that there is delay in the adjudication of such a case, the ultimate consumer and public are deprived of the benefit of the lower tariff intended by the Congress.

Delay has the further adverse effect of preventing the domestic and foreign economy from making these competitive adjustments until the proper tariff is judicially determined.

These considerations are applicable also, of course, to the final determination by administrative authorities of the amount of duties due and payable by an importer upon a particular importation. It seems very much in the public interest that importers be apprised within the shortest possible time of their ultimate liability in duties due the United States, and that any controversy arising in connection with such determination be settled at the earliest practicable date.

That completes my prepared statement, Mr. Chairman.

I would like to add, if I may, one further comment in the light of some of the questions and statements that were offered to the committee yesterday.

This relates back to, I believe, the questions asked by various members of the committee relative to the filing fee. The questions raised, it was necessary that the importer had to make a conscious, I think was the word, determination to go to court. The importer makes that conscious determination today when his attorney files a protest for him or an appeal to reappraisal for him. He knows then the appeal to reappraisal is actually lodged directly with the court.

When he files an appeal, he has made that determination of "I am in court by filing this," and he knows that today when he files a protest—and you can put in your eye the number that are allowed at the administrative level—he knows he is on the way to court and he has made that determination when he or his attorney acting in his behalf has filed the protest.

So the consciousness of determination is made. He doesn't need anybody to stick a spear in him today, any added costs or some impediment put in his way to stop, back up, and take another look at it. He takes that hard look at it today.

About discouraging frivolous cases, there is a statute, you know, that is on the books today, which this bill would repeal, which provides for penalties in case of filing of frivolous protests or appeals. It has been rarely invoked, to my knowledge, perhaps once or twice throughout its history. But it is there. This takes care of this frivolous character. I am speaking, I believe, for most of the members of the bar who specialize in this particular area and for their clients who represent substantially all of the importers in this field.

We think it is a considered, conscious decision that is made and it is not a frivolous matter. It costs money to be carried forward.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you very much, Mr. Colburn, for a very fine presentation.

The last point you made is a valid one. A \$5 fee may perhaps not be so important, but really it costs the importer money to proceed with these cases. I assume he has to pay fees to the attorney who represents him in some form.

Mr. COLBURN. He has to, of course. As attorneys, we have got to make our living the same as anyone else. But he also has many other costs connected with it. He has to maintain the records. He has to maintain samples. He has to reserve and make available the necessary witnesses. This again enters into the expedition of these matters, because, as all the members of committees who are lawyers and have had legal background experience know, you lose witnesses. You lose availability of proof in matters when it is too protracted and takes too long a time.

Mr. KASTENMEIER. What is the customary practice with respect to fees? What is the customary practice in the customs bar for the assessment of legal fees?

Mr. COLBURN. I suppose it roams all over the map. I can say in my own office, we have arrangements ranging from a flat fee to a retainer, plus a contingent to a full contingent. It roams all over the map. You make an individual arrangement with an importer or group of importers depending upon the character of the matter.

Mr. KASTENMEIER. The customs bar does not have a schedule largely adhered to?

Mr. COLBURN. No, we don't. It has been discussed but never put into effect at all in the customs bar.

Mr. KASTENMEIER. In that connection, Mr. Colburn, how many lawyers would you estimate are engaged in the customs practice in the United States?

Mr. COLBURN. I really don't have a figure. There are not too many who devote substantially all their time to it.

Mr. KASTENMEIER. That is what I mean.

Mr. COLBURN. The numbers are rather small. I really can't give you a figure. Of course, there are lots of attorneys who appear in and out, and they have cases and go in, although I am happy to say a large part of my own practice is by referral by general law firms who are looking for specialists.

Mr. KASTENMEIER. Would those lawyers for whom the majority of their practice is made up of customs be members of your association?

Mr. COLBURN. I think we include in our membership a large percentage of lawyers who devote their full time to this field; yes, sir.

Mr. KASTENMEIER. And as a gage to determine how many may be practicing, how many members do you have in your association?

Mr. COLBURN. I am not sure of the precise figure. I was president a few years ago. It is less than 100. Some firms may have only one representative acting in this particular bar.

Mr. KASTENMEIER. Your association is the only national association in connection with the customs practice?

Mr. COLBURN. Of course, there is a customs committee of the American bar, standing committee on the customs bar, of which I was chairman for 10 years, and then they put in the 3-year rule, so I got thrown out. But there is a customs subcommittee of the section on administrative law of the American Bar Association. And I think there is some kind of a customs-law association, whose membership I believe is comprised of lawyers in the Government service. I believe that is so. Then there is the Federal Bar Association, which has a customs committee.

Mr. KASTENMEIER. The preceding witness, Mr. O'Brien, spent the early part of his testimony suggesting a number of reasons in detail why the legislation would be advantageous to importers. Would you subscribe to the statement he made in behalf of the legislation?

Mr. COLBURN. I cannot subscribe to all of them, sir, no. I think this is a case where perhaps a client might be better advised to listen to some of his lawyers. But Mr. O'Brien is very knowledgeable in this area.

Mr. KASTENMEIER. In the administrative section, on page 24, you drew our attention to this meaning of "separate claims," and then suggested on page 12 of your statement some language which might be substituted.

Was such language brought to the attention of the people with whom you worked last year or the year before in the Treasury Department?

Mr. COLBURN. No, sir. I am frank to profess that we learn as we go along—I think there are probably some things which we have not yet ferreted out or discovered. This is a matter that has only recently been developed. They are conclusions with respect to this matter of amendment of protests.

To complete my answer, I have since discussed it informally with members of the Customs Court, but not otherwise. I didn't present it to the Senate committee when I appeared over there.

Mr. KASTENMEIER. The point is, you don't necessarily know the reaction of, let's say, the Treasury Department, Justice Department, the Customs Court?

Mr. COLBURN. No. But I would guess right off the bat that Treasury and Justice do not agree. We are always disagreeing. That is what promotes customs litigation.

Mr. POFF. Will the chairman yield?

Mr. KASTENMEIER. Yes; I yield.

Mr. POFF. I apologize for interrupting the dialog. But since it is pertinent at this point, I am sure the witness would agree that it would be appropriate for me to interrupt at this point.

On page 27 of the Senate report on S. 2624, I quote the following:

Although normally only one protest may be filed for each entry of merchandise, if the entry covers merchandise of different categories, separate protests may be filed for each category.

In addition, if separate claims are filed with respect to any one decision, they are all deemed to be part of a single protest.

That language is remarkably related to the language you suggest as an amendment to the bill.

Mr. COLBURN. I am sorry, sir. I don't feel it is. We have suggested language. We don't suggest any language in this particular connection. I do not believe, sir. We suggest that there be changes, that this whole thing which you have been reading be stricken and there be substituted for it a provision that more than one protest may be filed.

Mr. POFF. I am sorry. I misunderstood the dialog.

Mr. COLBURN. I am sorry I didn't make myself clear.

Mr. POFF. It was not your fault. It was mine. I was at the moment reading elsewhere in the record.

Then, the fact that this language appears in the Senate report is no comfort to you, is it?

Mr. COLBURN. Not at all. Actually, sir, if you will place it alongside the bill, it is substantially word for word repeating what the bill says. It is no explanation to me.

Mr. POFF. I thank you.

Mr. KASTENMEIER. As far as the 2-year administrative review is concerned, as I recall, the bill does provide within 30 days you can get a "deemed denial."

Mr. COLBURN. We recognize that. This, however, imposes another burden on the importer to keep records. Most importers are not affluent enough to add to their already heavy burden of records, and the Government has computerized systems and everything else. In effect, they can readily do this. This is no great burden. In fact, I think they have agreed to this notice that we have asked for.

But the accelerated thing, it may be used, but that is no protection against the 2 years for us. We want expedition, sir, and we think jumping from 90 days, when they say they have done 97 percent of the cases within 90 days, we say, "Why do you need 2 years? Take less. We will go less, but please don't make it 2 years."

Mr. KASTENMEIER. On the earlier point of hearings in foreign countries, it is your position that considering costs to importers in having

representation abroad, you want a more stringent determination of the conditions under which these hearings may be held. In short, you would require consent?

Mr. COLBURN. Exactly, sir. Actually, I have some serious doubts, and now I speak personally and not on behalf of the bar. I think the procedures available today are rather satisfactory. Letters rogatory and depositions and in value cases in customs matters, as you know, you can use foreign affidavits.

Mr. Vance said there are a couple of cases in a year. I think there might be more than that. But there are not too many, I would agree. But we are fearful. This bill is loaded with new and additional burdens on the importers. We are fearful of any more creeping in that we cannot see now and speak out against.

Mr. KASTENMEIER. Thank you very much.

I yield to my colleague from New York.

Mr. RYAN. Thank you, Mr. Chairman. Mr. Colburn, I think you have presented a very concise and a very thorough statement of your position with respect to the bill. And I appreciate the fact that you have outlined proposed language which you would find more to your liking and that you have analyzed it section by section, inasmuch as I am not familiar with the practice in the Customs Court.

Just going over your statement, let me make a few comments and ask questions.

In the first instance, regarding the hearing, you said that you weren't sure what an evidentiary hearing was, whether or not the judge would have power to do more than simply act as a master or commissioner or whether he could compel the attendance of witnesses.

In the report of the Senate, it states at page 16:

Customs Court judges assigned to an evidentiary hearing in a foreign country would function as a commissioner or special master to take testimony.

That is really what is intended here, unless I misunderstand. It is not the purpose of this bill to provide that a full trial should take place in a foreign country.

Do you agree?

Mr. COLBURN. I recognize that provision, yes, sir, I would think that was clear.

Mr. RYAN. So then the question is really whether or not the bill expedites the establishment of an evidentiary record by permitting the judge to go abroad to take testimony.

Can't you conceive of instances when the court would obtain evidence through the presence of witnesses and the opportunity to conduct an examination to see the demeanor of the witnesses, where you would have a better understanding of the issues, than on the basis of affidavits or letters interrogatory?

Mr. COLBURN. This could well arise, yes.

Again, our thrust in that connection is against being loaded with it without a full and equal opportunity as against the Government to be considered. We want a chance to oppose it, the requisite that we agreed to, on the same ground as the Government.

Mr. RYAN. The bill does give a chance to oppose it through the interlocutory appeal?

Mr. COLBURN. There is no provision there for a stay, I don't believe, either, stay of the proceeding. I suppose the court would

automatically do that as a matter of course. This is the time-consuming and another expensive step injected into the whole judicial proceeding.

Mr. RYAN. I would assume that if you have appealed a determination to hold a hearing overseas that that appeal would stay the sitting.

Mr. COLBURN. I suppose it would.

Mr. RYAN. Could that not be done by rule?

Mr. COLBURN. I suppose the court might well do that, if this thing were adopted.

Mr. RYAN. Assume that the bill contained the language which you recommend, to wit, that the consent of the parties be required. Do you believe that the hearing would ever be held overseas?

Mr. COLBURN. I think it might be. Do you think so, Mr. Schwartz?

Mr. SCHWARTZ. I can conceive of the possibility in some few cases, yes. I think we like to travel as much as anybody else does. Where it becomes important, and where our client would not be unduly burdened, where we think it is a fair request and assuming that there is legality about all of this, as to which there may be some doubt, I certainly can conceive of cases where there would be consent, Mr. Ryan.

Mr. RYAN. So the question you really raise is whether or not it is a substantial burden upon the importer and the attorneys to go to a foreign court or foreign place for the conduct of this hearing?

Mr. COLBURN. Yes.

Mr. RYAN. I take it that not you individually but the position of the customs bar is that it is unwilling to leave that determination to the court.

Mr. COLBURN. Yes.

Mr. RYAN. As far as the filing fees are concerned, I think your statement on page 5:

It is manifestly unfair to assess any filing fee upon the commencement of an action by filing a summons and at the same time requiring an importer to commence repeated actions involving the same claim and the same merchandise in order to adequately protect his interests.

Mr. COLBURN. Yes.

Mr. RYAN. I would say that is the crux of the issue. You have stated it right there, and the real question is whether the second part of your sentence is valid. And I don't think the record before us to date substantiates that proposition either way.

In other words, I raised the question yesterday as to whether or not there would be a proliferation of summonses filed which would later result in a comparatively small number of complaints.

I wonder if you could tell us how you foresee this bill, if enacted, operating in terms of the protest and the summons and then the complaint.

Do you believe that there will inevitably be a summons filed for each protest and that at a later stage there will be a consolidation of those summonses into comparatively few complaints? Or do you believe that this legislation on the other hand would eliminate the filing of a number of summonses equal or equivalent or comparable to the filing of the number of protests?

The theory of the bill is that we are going to eliminate from the customs court a great deal of the filing and administrative detail that it has had to assume before and that it would only result in the trial of very clear-cut issues through the development of complaints.

Mr. COLBURN. I think the number of summonses filed would most certainly be less than the number of protests that were filed originally at the administrative level. Each individual attorney—and they all have different clients, and many of us may be filing identical protests or directed to the same issue and the same merchandise, you see. Of necessity we act independently and on our own for our own individual clients.

But take an individual attorney, I am sure that if he had a series, which is common in this practice, of protests with one particular issue or on one particular kind of merchandise, he would seek to embody as many of those into one summons as seemed practical. We are limited here by the flow of protests from the administrative level and the 6-month period of time within which you must file a summons in the court after final action at the administrative level.

The consolidation of cases, as I am sure members of the committee recognize from their own legal experience, is not always practicable, however. You have different issues. It may not be identical merchandise. It may be similar merchandise, or you may have a basic issue of law that would affect more than one category or type or kind of merchandise. These are all factors, plus the number of importers filing these cases represented by diverse attorneys, that would militate against reducing the number of summonses filed.

I repeat, however, as to the number of summonses, there certainly would be a conscious effort. I am sure my own office would, if this were adopted, seek to include as many protests as we thought might be matched together, live together in the same bed, into one summons within the period, subject to the restrictions of time.

When you pass that stage, when you file a summons, you have commenced an action, and under the terms of the bill that is commencing an action in the Customs Court. Then you go on the docket of the court. And thereafter you would select a case or cases with which to proceed to trial. You would file a notice of trial with an accompanying complaint or bill of particulars, or whatnot. You might have pretrial conferences and all the rest of it.

It is at this stage that it is important to have as many records before the court as practicable, because I would believe this would be of importance to the Government as well as to the importer's attorney to have available a number of records to examine in order to select a particular record or records which contain the best proof available and which could be related to the proof available in the best manner of which you have samples, and so forth, that can be matched up. This takes a careful weeding out and cultivating and going through a large number of records before you determine which one is best suited for trial purposes.

It is at this stage, which I have confessed here, we would have to agree that some fee might be appropriate and serve the ends of justice at the time of filing, when he proceeds to actually use the processes of the court by filing a complaint. All you have done by the filing of the summons is to get your foot in the door. You have given notice. You have moved yourself into the jurisdiction of the court, but you might

not ever go beyond that because many cases are disposed of following the trial of so-called test cases. If the importer is successful, frequently the following cases involving the same or similar merchandise may be stipulated.

Mr. RYAN. On that point, if there is a stipulation entered into on the basis of the test case, then will that require a judicial function?

Mr. COLBURN. Yes; that would involve a judicial function in my judgment, sir. I think the court would have to examine.

Normally, there would be a stipulation entered into between the importer's attorney and the counsel for the Government, agreeing that certain cases were involved, the same merchandise or the same legal issue, as had been decided in "X" case, and submit the record involved in that test case. And then the court would render its judgment based upon that.

The court frequently examines the record itself.

Mr. RYAN. Have you any way of estimating how many or what percentage of the summonses would result in complaints? Is that just too speculative?

Mr. COLBURN. I would like to be able to respond affirmatively to that. I don't know where I would start, really. You see, cases are disposed of, once they get into court by trial, actual trial, which, if successful, is followed by stipulations.

From time to time there may be retrials, of course. Or if a case is lost and the importer decides he has had it and no other proof available, then he will abandon or submit his cases for dismissal without any further trial action.

This may not be related itself to the same merchandise as involved in a particular test case. But there might be decided a rule of law that was so basic that it would control the questions on which other protests or summonses were based.

You might come to a legal conclusion that in the light of the holding in a particular case, you had lost your chances to move ahead in another case that involved unrelated merchandise.

Mr. RYAN. On page 6, you suggest substitute language for the filing-fee provision, that relates to a fee at the time of filing the complaint. Do you have any objection to having your language read? "There shall be a fee payable upon filing of the complaint."

Mr. COLBURN. No; I couldn't object to that. I agree, actually with the statement that the court made through Judge Rao initially, that this is such a brand new procedure that is being proposed; it involves many things. I don't think that anyone, in all due deference, is competent to judge the full impact. I think it was the opinion of the court, as I understood it expressed at that time, that we should have experience in the operation of all of these many new provisions.

In the light of that developed experience, take action. I would rather have it that way, sir. But if the committee, in its wisdom, felt it shall be so, if it is joined with the complaint and not the commencement, then I would agree.

Mr. RYAN. That is all at this time.

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. POFF. Thank you, Mr. Chairman. I will be brief.

I must say I think the witness has greatly illuminated the subject. I am grateful for his testimony.

Mr. COLBURN. Thank you, sir.

Mr. POFF. The chairman has largely preempted the questions I was going to ask. If I may, I would like to pursue one line he opened with reference to the constituency of the bar.

I understood you to say in response to his question that probably their membership was something less than 100.

Mr. COLBURN. Yes, of the Association of the Customs Bar. It is more than that. Excuse me. This is actually active members of the bar.

Mr. POFF. When you gave that figure, I suppose you intended it to pertain to members of the bar who gave a substantial, if not the entire, part of their legal practice to this specialty.

Mr. COLBURN. That is correct, sir. Excuse me. The number, of course, would be considerably, in large part, unknown to an extent, if you take those who do practice customs law and have an expertise in the field and come in from time to time but don't devote, as I say, a major part of their legal practice to that specialty.

Mr. POFF. But you are articulating the viewpoint of the specialists?

Mr. COLBURN. I am, sir.

Mr. POFF. With reference to that figure, how many firms do you suppose actively practice regularly, as distinguished from the total number of lawyers?

Mr. COLBURN. They are scattered around. There is a concentration in New York. But there are firms all throughout the country, mostly at the larger ports of customs entry, which may not be at the seaport. They could be interior ports, such as Chicago or New Orleans. I don't know—30 or so—I am not sure. This is a pure off-the-top-of-the-head guesstimate. I would have no real idea on that, sir.

Mr. POFF. Those 30 firms would account for a substantial portion of all the litigation?

Mr. COLBURN. Of those who devote substantially all of their time to this specialized field of law. This is not including an unknown number who do practice from time to time. I am sure the Customs Court can tell you. They have thousands and thousands of lawyers who are admitted to practice before that court, and there is hardly a week that goes by when someone is not being admitted to practice. They may have a case from time to time, not day in and day out the way the members of the association for whom I appear do.

Mr. POFF. You spoke a moment ago of a comment made yesterday which characterized the automatic operation of the present system as the "filing of frivolous or vexatious"——

Mr. COLBURN. May I interrupt you, sir?

Mr. POFF. Yes.

Mr. COLBURN. I did not mean to say or to give the impression that I was quoting or making that statement. The mention was made yesterday that this automatic referral did involve perhaps some frivolous cases, not that it caused that or this was a large part of it. I think the reference was that they might have some frivolous cases as a result of some frivolous cases going to the court.

Mr. POFF. Yes. The fact of the matter is, of course, that the present system almost compels the importer in a large portion of the cases to take this action as a matter of self-defense. The operation requires him really to make the disputation in order that he can move into the jurisdiction of the court, as you say.

Mr. COLBURN. By filing a protest, he knows he is going to end up in court if his protest is not allowed. This is the way it operates today. So he is committed, knowing he is going to be in court one of these days.

Mr. POFF. But he almost has to, does he not, in order to pursue that course?

Mr. COLBURN. Yes; filing the protest within a prescribed time to protect his right to any review. The administrative authorities have 90 days today in which to review, at the end of which time, or at any time they deny it or at the expiration of that time, if they have not acted, they are supposed to forward the protest with the record to the court. So it goes in that manner and gets on the court's docket in that fashion.

Then the court processes it. And, believe me, they wield a club in policing their dockets.

Mr. POFF. To what extent do you think that the requirement of a fee is likely to be an economic burden in the case of an individual importer?

Mr. COLBURN. I think it is very likely, sir, to be particularly in the case of the small importer. I would say there are literally thousands. I wouldn't begin to know the number. But there are many of them throughout the country.

You have a big importer, a very large business, and there are a number of those, it wouldn't be any particular hardship to do it. He is used to paying them. But I am talking particularly about the small businessman.

We represent, I suppose, if I may, in my own office, hundreds, at least, of them. And you don't represent them every day. But they do have claims or cases that arise from time to time.

I think it would be a burden. The amount of those small importers particularly, the amount of claim difference and duty per entry is frequently quite small.

As I attempted to show you, if he had to handle each one separately, forget it. It is just too much trouble. It is only in the aggregate that it becomes important to him, and in the prospect of being able to adjust his business to the lower rate of duty, which the Congress had intended, that he carries it through.

Mr. POFF. If he anticipates, however, that he is going to have multiple entries over the 6-month period, would it be possible for him to wait until near the expiration of that 6-month period and consolidate his effort?

Mr. COLBURN. It would involve a lot of recordkeeping, and this, again, is more of a burden on the little fellow than the big fellow. You run a risk always of missing a lot of them in that fashion and your best protection is to file the summons as the case comes up. Don't try to shave it too close. You get into trouble.

Mr. POFF. If no fee is required, do you anticipate that the summons filed would be larger in number and more frequently filed?

Mr. COLBURN. Than if there were a fee? Unquestionably. I think the requirement of a fee will sharply reduce the number of summonses and the supposed burden on the court of this larger number of cases will dissipate itself into thin air.

Mr. POFF. I understand, however, that you support the major thrust of the bill.

Mr. COLBURN. I do, sir.

May I inject one other thought?

Mr. POFF. Yes.

Mr. COLBURN. The chairman made a statement at the outset. If I may, Mr. Chairman, refer back, suppose this committee in its wisdom came to the judgment that there should be no change made in this bill, just accept the bill as it stands. I certainly hope that is not going to be the conclusion of this committee. There is nothing of such an emergency character, I respectfully submit, about this situation that would make it less desirable in anywise to take a good, hard look at this bill and, if the changes are desirable or needed, to make them, whatever additional time that may require consideration by the Congress.

Mr. POFF. I appreciate that attitude. I was about to pursue that very question. I would like for you to answer the question that Mr. O'Brien did.

Mr. KASTENMEIER. If you will yield to me first, that statement was not made to characterize my own position, but merely to present a hypothetical.

Mr. COLBURN. I understood that, sir.

Mr. POFF. I would like the witness, if he will, to answer the question that was put to Mr. O'Brien.

Mr. COLBURN. Which one.

Mr. POFF. The one you have just articulated.

Mr. COLBURN. I am sorry. I want to answer you. But I am not clear as to just what question you wanted me to answer.

Mr. POFF. The question is, if the committee in its wisdom decides to accept the legislation in the form it was reported and passed in the Senate, do you think it would be wise to pass that legislation without further change even though you might feel it would improve the legislation to make the changes you have inventoried?

Mr. COLBURN. That is a very difficult question, sir. The bill makes many changes which we think are constructive and are helpful. I haven't attempted to put them on a scale and match them up weightwise to see if they are outweighed by these other matters or not. I think I would have to say, with considerable reservation, yes. I would agree the bill should be adopted. I would sincerely deplore it, because I think the committee certainly in its wisdom will want to turn out the best bill it can. And we sincerely believe we have given this very deep study, sir, and we think some of the points we make are really important and should be made in the bill.

Mr. POFF. Like my chairman, I hope you won't assume that my question indicates any disposition on my part to disregard any suggestion you made.

Mr. COLBURN. I had no such thought.

Mr. POFF. On the contrary, we expect to be just as equitable as we can possibly be in the disposition of this matter. I thank you.

Mr. COLBURN. Thank you.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. HUTCHINSON. Thank you.

If we provided no filing fee, then is it fair to assume that there would be as many summonses filed as there are presently under the system of automatic referral of protests?

Mr. COLBURN. I think under any circumstances, sir, there would be fewer summonses. To begin with, if this administrative review works, there are going to be a number of them weeded out at that level. Hopefully, sometime, we are not going to be wrong all the time. They are going to agree with us sometime. It doesn't happen very often today. But we hope that will weed out some and there will be some consolidations.

So I would say with some assurance there would, I believe, assuredly be fewer summonses than protests.

Mr. HUTCHINSON. The figure of 264 decisions of the Customs Court in a year sticks in my mind. That was the number of cases that actually went to trial in the Customs Court.

Based upon those 264 decisions, literally thousands of cases were settled by stipulation, I take it.

Mr. COLBURN. The answer, I think, is yes. But let me, if I may, hasten to add a comment. This ranges all over the map. You have some cases which involve just one single importation, or just a few. You have two or three cases decided by the court in the last year, one of which I believe Mr. Chief Judge Rao referred to, involving plywood that disposed of 51,000 cases.

The *Macy* case had a very wide range of applications involved. I believe the figure was something like 70,000. So there were about three cases which would be dispositive of about 150,000 or well over 100,000 cases. But you don't get those big issues very often.

Let me right there call your attention to the fact that the last report of the Customs Court, for the fiscal year ended June 30, 1969, shows that the cases filed during the year ending then, new cases filed, were 75,655, as compared with the prior year of 108,173. In other words, there were 32,518 fewer cases filed in the Customs Court in the fiscal year ended June 30, 1969, than in the immediately preceding year.

A large part of this backlog, this heavy load of cases that is there, which isn't really so horrible, is caused by the decision on the part of the Treasury Department to get up to date in its review procedures. And they dumped about 75,000 cases in one shot on the Customs Court about a year ago.

They weeded out all the files, and they dumped them up there. This, as the fellow said, swelled up the total that was before the court.

Mr. HUTCHINSON. The idea that is going through my mind may add up to a distinction without much of a difference. But keeping in mind the use of the word "demeaning" in the testimony yesterday, it was demeaning to this what is now an article III constitutional court to have literally all of these hundreds of thousands of matters automatically administratively poured in on them.

I was wondering if a procedure could be worked out whereby the importer who filed a protest, might have it handled in the administrative agency and protect himself so far as court review is concerned, and he would take to the court only those cases that he really wanted to test or to try. Then these matters back in the agency would be settled by stipulation, just as they are now in the court.

Mr. COLBURN. This has been mentioned, sir, in the Senate report as being possible under the provisions of this bill. That is to say, within the period of 2 years that this bill proposes be allowed for administrative review, cases could be held and accruing. But as the 2-year period expired, they would begin to get chopped off.

I don't think it is demeaning to this court or any other court to have a large number of cases go before it. If they are legitimate proposals, I think they should be. I don't think it demeans the court to have these cases there. I disagree with that completely.

Mr. HUTCHINSON. Thank you.

Mr. KASTENMEIER. The gentleman from New York.

Mr. RYAN. Let me raise a question regarding the proposed amended version of subsection (d)(2) of section 2632 of title 28.

You state on page 7 of your testimony:

"This latter provision"—referring to (d)(2)—"is contrary to existing law and practice."

And then you cite several cases to substantiate your statement.

Mr. COLBURN. Yes, sir.

Mr. RYAN. I assume that you are familiar with the Senate report on the bill.

Mr. COLBURN. Yes, sir.

Mr. RYAN. I call your attention to page 18 of the Senate report, beginning at the last paragraph, which says:

"This requirement in section 2632(d)(2) is in accord with prevailing decisions of the Customs Court."

Mr. COLBURN. I don't agree with that statement. I don't think it is premised on a fair construction of even the cited authorities which I have examined in a memorandum I filed with the committee.

Mr. RYAN. That was my next question. You have anticipated by saying you have filed a memorandum?

Mr. COLBURN. Yes. It discusses these cases.

Mr. RYAN. The cases which the Senate committee refers to?

Mr. COLBURN. Yes, sir.

Mr. RYAN. Thank you.

Mr. KASTENMEIER. The subcommittee is grateful for your appearance this morning. You have been very helpful. We are always pleased to have testimony where alternatives are offered by those who oppose provisions of a particular proposal. This, indeed, you have done in a most professional and scholarly way.

Thank you both, Mr. Colburn and Mr. Schwartz.

(Mr. Colburn's statement and memorandum follow:)

STATEMENT ON BEHALF OF THE ASSOCIATION OF THE CUSTOMS BAR

The Association of the Customs Bar ¹ is composed of lawyers located throughout the United States who devote a major part of their practice to customs and tariff matters. The comments herein reflect a careful study of the provisions of the bill by members of said Association, including a Special Committee and the Board of Directors.

The said act incorporating the Association states its purpose to be—"to maintain and improve the standards and methods of practice under the federal laws relating to the customs and revenue, before the United States Court of Customs Appeals,

¹ The Association of the Customs Bar was formally organized on May 24, 1917, and existed as a voluntary association until May 25, 1926, when its membership was merged in the Association of the Customs Bar, incorporated by Chapter 210 of the Laws of the State of New York, approved April 2, 1926.

the Board of United States General Appraisers, the Treasury Department and all departments, commissions, bureaus and officials charged with the interpretation or administration of honor and courtesy in the legal profession engaged in such practice, to cultivate the science of jurisprudence, to promote reforms in the law, to facilitate the administration of justice and to cherish the spirit of brotherhood among its members."

The Bar Association is in accord with the announced goal to make the review of customs decisions more efficient. We support major provisions of the proposed bill such as single judge trials and the separation of administrative and judicial functions, which we believe would improve and modernize procedures in the Customs Court in hearing customs matters and enable the court better to meet its statutory responsibilities. We also recognize that a number of improvements are indicated in the administration of the tariff statutes by customs officers. The bill will fail of its stated purposes, however, and particularly to achieve the desired expedition in settling customs controversies, unless amendments be made thereto.

These suggested amendments and the reasons therefor are set forth in the order in which they appear in the Senate bill. Specific language to effectuate suggested changes is included.

SECTION 109(b), PAGE 7—HEARINGS IN FOREIGN COUNTRIES

Section 109 would amend present Section 256, Title 28 of the United States Code, by adding a new subdivision (b) which would empower the Chief Judge of the Customs Court, on his own initiative, to authorize a judge of the court to preside in an evidentiary hearing in a foreign country. Hearings outside of the United States would involve considerable time and expense and should not be set without the concurrence of all interested parties. The proposal involves, as well, serious questions as to the power of a United States Customs Court judge or other judge to exercise subpoena powers or control witnesses and otherwise utilize full judicial authority in the course of a hearing in a foreign jurisdiction.

Section 109(b), page 7, lines 19 and 20, should be amended as follows:

Delete the words:

"(b) Upon application of a party or upon his own initiative, and upon"
and substitute therefor the following—

"(b) Upon consent of the parties and for good cause shown, including".

Section 113(b), page 11—Filing Fee

Section 113(b) of S. 2624, as originally introduced in the Senate, and as set forth in H.R. 12691, introduced in the House of Representatives by Mr. Celler, provided that—

"(b) There may be a filing fee payable upon commencing an action."

Imposition of any filing fee whatever was vigorously opposed by substantially all importers, attorneys and brokers who appeared in the Senate hearings. Chief Judge Rao, on behalf of the Customs Court, expressed the view of the court that a filing fee, if any, should be imposed by court rule and after further study of the matter. Representatives of the Department of Justice and of the Treasury Department, while supporting a filing fee, took the position that the matter should be left to the discretion of the court.

Said provision was amended in the bill as passed by the Senate, however, to make a filing fee mandatory upon the commencement of every action. This requirement, particularly when added to the many other new and heavy burdens imposed upon importers by the bill, not only disregards the unique procedures applicable to judicial review of customs matters, but will sharply curtail the historic grant by Congress of broad, readily available judicial review of customs decisions, and thereby permit to stand unchallenged, wrongful and illegal rulings of administrative customs officials.

"Commencement of an action" is intimately tied to the requirement that an importer, if he wishes to preserve his rights, must file separate protests against each and every entry of merchandise as it is liquidated, and then to "commence" action by filing a summons in the Customs Court as such protests are denied. This results in the filing of hundreds and sometimes thousands of separate protests, and, in turn, commencement of a corresponding large number of actions. Each separate importation covered by a separate protest or action in most instances involves a small amount of claimed difference in duty. Individually, it is frequently not worthwhile to contest assessment. In the aggregate, however, the matter becomes important to the importer. This objection is only partially met by

the fact that an importer is permitted a period of 180 days after denial of the protest within which to file a summons and may thereby consolidate protests to some extent. At best, he may, by this method, lessen the number of actions "commenced".

In most types of litigation, a litigant may "commence" one action and protect himself thereby. To obtain corresponding protection, however, an importer is required to commence numerous separate actions as his entries of merchandise are liquidated, and his protest denied. He has no choice. He must "commence" action piece-meal.

It may be agreed, as has been suggested in the report of the Senate, that no litigant should expect to use the facilities of a judicial system, without bearing some of the cost. Some justification may exist, therefore, for imposition of some fee in the Customs Court; as for example, upon filing of a complaint in connection with an action in such court. It is manifestly unfair, however, to assess any filing fee upon the "commencement" of an action by filing a summons, and at the same time require an importer to commence repeated actions involving the same claim and the same merchandise in order to adequately protect his interests.

Filing fees in customs matters were once imposed by the Congress under the Tariff Act of 1913. After a nine year experience, such fees were abolished based upon investigation and finding by the Congress that such requirement imposed a hardship upon small business concerns, discouraged them from contesting illegal assessment of duty, and permitted to stand in effect such illegal assessments, to the ultimate detriment not only to the importer and foreign trader in the United States, but also to the consuming public of the United States. One result of discouraging challenges of alleged illegal duty assessments left in effect rates and amounts of duties higher than those intended by the Congress so that the consuming public continued to pay a greater price than otherwise would have been charged.

The foregoing factors which entered into the determination by the Congress to abolish filing fees in 1922 are equally valid today.

It is accordingly suggested that Section 113(b) at page 11 be amended by deleting the first sentence thereof, at lines 7 and 8, and inserting in lieu thereof, the following:

"(b) There may be a fee payable upon the filing of a complaint in any action instituted in the Customs Court."

Section 113(d), pages 10, 11—Amendments to Court Actions

Section 113(d) would amend and sharply limit the scope of Section 2642, Title 28 of the United States Code. Said Section 2642 provides:

"§2642. Amendment of protests, appeals and pleadings

"The Customs Court under its rules and in its discretion may permit amendment of protests, appeals for reappraisal, applications for review, petitions for remission and pleadings."

Said Section is implemented by Rule 6(c) of the Customs Court providing:

"(c) Amendment of pleadings.—A party may amend his protest, petition, appeal, application for review, or other pleadings or process, at any time by leave of court, and such leave shall be freely given when justice so requires."

This right of amendment is an exceedingly valuable one to importers and has been exercised very liberally by the United States Customs Court and the Court of Customs and Patent Appeals to serve the ends of justice.

Section 113 of the bill provides that the Customs Court, by rule, may consider new grounds in support of a civil action if the new ground (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision or decisions listed in Section 514 of the Tariff Act of 1930, as amended, that were contested in the protest. This latter provision (2) is contrary to existing law and practice.

In the landmark case of *United States v. Macksoud Importing Co., et al*, 25 CCPA 44, T.D. 49041 (1937), the rule is clearly laid down at pages 53-54 that the United States Customs Court may permit amendments to protests provided the amendment *applies to the same merchandise that was the subject of the protest*. There is no requirement that the amendment must be "related to the same administrative decision" that was contested in the protest. Thus, in the Macksoud Importing case, the original protest was against the *rate of duty* assessed; but the court allowed an amendment which claimed that the Collector of Customs converted the Mexican dollars of the invoice at the wrong value. Obviously, this was not "the same administrative decision" contested in the original protest, yet the amendment was granted.

The court, in that case, said in part:

"Accordingly, we are of opinion that claims permitted to be introduced by amendment were not intended by the Congress to be considered new and separate causes of action, which, under the decisions hereinbefore referred to, would be barred by the statute of limitations.

"It was suggested in oral argument in this court that such a construction of the provisions in question would permit protestants to deliberately circumvent the provisions of section 514, which require them to state their objections to the collector's decision definitely and specifically, the purpose being to give the collector an opportunity to review his decision and to revise it if he deems it proper to do so, and thus avoid litigation.

"We are not impressed with that suggestion, because the Congress has provided that amendments to protests might be made only in the discretion of the trial court, and under such rules as it might prescribe, evidently relying upon that court to prevent any deliberate circumvention of the law."

Other examples of liberal application of the present law are found in a large number of cases where the original protest involved a claim against the Customs reported gauge on imported liquor, which protest was allowed to be amended by the Customs Court to add a claim relating to shortage of the said liquor. This liquor example was followed in hundreds of similar protests on the same question.

In *Olavarria & Co. Inc. v. United States*, 20 Cust. Ct. 197, C.D. 1110 (1948) the protest originally claimed that Cuban sugar syrup was dutiable under the appropriate paragraph as modified by the Cuban Trade Agreement. Amendment was permitted to include a claim that the importer was entitled to a 20% reduction from the compensating tax assessed under the Internal Revenue Code.

In *Alfred Hart Distilleries, Inc. v. United States*, 33 Cust. Ct. 332, Abs. 58300 (1954) the original protest was against the basis upon which the internal revenue tax on the imported brandy was assessed and the rate of such tax. The protest was amended to include a claim that the dutiable quantity should be that quantity subject to internal revenue tax by reason of retroactive nature of the amendment of paragraph 813 of the Tariff Act of 1930 by Public Law 612.

In *Josebra Company v. United States*, 24 Cust. Ct. 334, Abs. 53914 (1950), an amendment was granted which made a new claim on the distilled spirits in question upon the ground that it covered the same merchandise as the original protest.

We ask the privilege of filing with the Committee at this point a memorandum which expands upon the state of the present law, and demonstrates conclusively that the proposals of Section 113 of S. 2624 are contrary to the existing law and practice thereunder.

Maintenance of this right of amendment is of critical importance. It is true that under existing practice, a claim involving the dutiable value of merchandise may not be amended to make any other claim (e.g., classification of the merchandise), and vice versa. This is entirely due to existing statutory and administrative procedures under which the dutiable value is first determined by an "appeal for reappraisement", after which the entry is "liquidated", and then only can a "protest" be filed against the liquidation. Since the remedy for determining "value" is separate and distinct from that involving "classification", the existing rule is that an importer who has failed to file an appeal for reappraisement, or has filed it and exhausted it, is not allowed to raise a value question by protest against the liquidation of the entry.

Under the scheme of S. 2624 there will be a single "liquidation" into which all administrative decisions are merged, and against which the importer will be allowed to file a protest or protests, whether they deal with value or classification or any other reviewable decision. The avowed objective of Section 113 is to preclude an action relating to classification from being amended to make a claim relating to value, and vice versa. There is no justifiable reason for such a rule. Since all administrative actions would be merged into a single liquidation, it seems only fair that the importer should have the right to amend his action provided it deals with the same merchandise and the same liquidation against which protest was originally filed.

It is suggested accordingly, that Section 113(d) be deleted and that there be inserted in lieu thereof a new subdivision (d) to read as follows:

"(d) The Customs Court, under its rules and in its discretion, may consider any new ground in support of a civil action, if the new ground applies to the same merchandise and the same liquidation or liquidations, the subject of the protest."

Section 113(f), page 10—Official Record in Court Actions

This section relates to the items to be forwarded to the Customs Court as a part of the official record of civil actions. The Senate additions to the items to be included in such record are strongly endorsed.

TITLE II.—ADMINISTRATIVE PROCEEDINGS IN CUSTOMS MATTERS

Section 207, pages 22-25, inclusive—Protest—Administrative Decisions

The provisions of Section 207, page 24, lines 5 to 10, inclusive, are not clear. They provide that only one protest may be filed for each entry, and in addition, separate claims are deemed to be part of a single protest. The meaning of "separate claims" as opposed to a "protest" should be spelled out. If the provision for "separate claims" is intended to relate to a situation where a broker might file a protest relating to a clerical error or shortage claim and subsequent thereto, the importer filed a protest against the value, and an attorney filed a protest against a rate, and that such filings would be considered at that stage as claims and merged as part of a "single protest", then the importer will be protected in his right to challenge administrative actions. The suggested prohibition against more than one protest for each entry, however, seems to require clarification. No doubt should be permitted to remain.

Additionally, no real reason seems to exist as to why more than one protest may not be filed against a particular entry or category of merchandise, provided only that for administrative purposes of review, all protests relating to a single entry or category be consolidated and treated together.

It is suggested accordingly, that the following amendment be made:

Page 24—lines 5 to 10, inclusive, delete the following:

"Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, separate protests may be filed for each category. In addition, separate claims with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest."

and substitute the following:

"More than one protest may be filed with respect to each category of merchandise. However, all protests filed in connection with each category shall be deemed merged and treated as a single protest."

Section 207, page 24, lines 11-14—Amendment of Protests

Provision is made for amendment of protests under regulations prescribed by the Secretary, at any time prior to the expiration of the 90-day period in which the protest could have been filed under Section 514 of the Tariff Act. The right purported to be granted by the bill is a very narrow one and would not permit any amendments relating to situations not only which may not have occurred to the importer or his attorney during the initial 90-day period, but which may also relate to judicial or administrative constructions or legislation which might take place during the period of time that a particular protest remains within the jurisdiction of such authorities. To fully serve the ends of justice, no valid reason seems to exist why a protest may not be amended at any time while it remains under the jurisdiction of the administrative authorities.

It is suggested that Section 207 be amended as follows:

Page 24, lines 12-14, inclusive, delete the following:

"any time prior to the expiration of the ninety-day period in which the protest could have been filed under section 514 of this Act."

and substitute therefor the following:

"within the time allowed for administrative review under the provisions of Section 515 of the Tariff Act of 1930, as amended,".

Section 208, pages 25, 26—Two-Year Administrative Review

Section 208 was amended by the Senate to require mail notice of denial of any protest. Such change is endorsed.

This section retains, however, a provision for a two-year period in which a protest may be subject to administrative review. Existing law permits administrative review of protests against classification limited to a period of 90 days. There is no provision for review of any kind of value or other types of questions. Expansion of such review to cover these additional matters seems appropriate and desirable. Any review, however, should be made within the earliest possible time in order to apprise the importer of his ultimate duty liability. Note is taken of the statement in the report of the Committee on Finance on S. 2624 at page

28 that "Treasury Department witnesses have testified that in the most recent 12 month period for which statistics are available all protests were processed in an average period of 58 days from the date of receipt, and more than 97 percent were fully processed within 90 days of the date of their receipt."

In the light of this experience it would seem that a period of two years is wholly unnecessary. A period of not more than one year would seem to be ample.

There is a particular and important public interest in the expeditious disposition of customs litigation. For so long as an erroneous administrative determination is allowed to stand, a higher tariff is, in effect, established in derogation of Congressional intent. Hence, to the extent that there is delay in the adjudication of such a case, the ultimate consumer and public are deprived of the benefits of the lower tariff intended by Congress. Delay has the further adverse effect of preventing the domestic and foreign economy from making necessary competitive adjustments until the proper tariff is judicially determined.

These considerations are applicable also, of course, to the final determination by administrative authorities of the amount of duties due and payable by an importer upon a particular importation. It seems very much in the public interest that importers be apprised within the shortest possible time of their ultimate liability in duties due the United States, and that any controversy arising in connection with such determination be settled at the earliest practicable date.

For the foregoing reasons, it is suggested that Section 208 be amended as follows:

Page 25, line 14, Delete the words "two years" and insert in lieu thereof "one year".

Page 26, line 1, Delete the word "two" and insert in lieu thereof "one".

MEMORANDUM CONCERNING "AMENDMENTS" IN ACTIONS BEFORE THE UNITED STATES CUSTOMS COURT

Section 113 of the bill provides that the Customs Court, by rule, may consider new ground in support of a civil action if the new ground (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest. This is contrary to existing practice.

In the landmark case of *United States v. Macksoud Importing Co., et al.*, 25 CCPA 44, T.D. 49041 (1937), the rule is clearly laid down at pages 53-54 that the United States Customs Court may permit amendments to protests provided the amendment *applies to the same merchandise that was the subject of the protest*. There is no requirement that the amendment must be "related to the same administrative decision" that was contested in the protest. Thus, in the *Macksoud Importing* case, the original protest was against the *rate of duty* assessed; but the court allowed an amendment which claimed that the Collector of Customs converted the Mexican dollars of the invoice at the wrong value. Obviously, this was not "the same administrative decision" contested in the original protest, yet the amendment was granted.

In Report No. 91-576 on this bill, the Senate Committee on the Judiciary, at pages 18-19, states that the requirement as to "the same administrative decision" is "in accord with prevailing decisions of the Customs Court"; and cites several decisions which allegedly support such statement. A careful examination of these decisions shows that they do not stand for that proposition at all. For ready reference, we briefly discuss the cases cited by the Committee.

Verona Dyestuffs Div. of Verona Pharma Chemical Corp. v. United States, 62 Cust. Ct. _____, C.D. 3643 (1968), involved no amendment. The merchandise was liquid dye packed in reusable drums, and the court held that appeal, not protest, was the proper remedy where the value of the drums was included in the value of the dye. The time for appeal had run, and the protest was dismissed.

Jacob Lunitz & Son v. United States, 48 Cust. Ct. 155, C.D. 2329 (1962), again was not a decision on an amended protest. The case involved 110 bales of jute webbing, entered at \$4,238.00 and appraised at \$4,776.00. An appeal was filed and abandoned. The protest claimed clerical error (in the appraisement) under section 520(c)(1), and the court held that this was properly a value matter and not subject to protest. The court discussed "clerical error" and concluded that this was not such a mistake as to come within that phrase. (The court implied that this might have possibly been a "mistake of fact" under section 520(c)(1), but that the issue of "mistake of fact" had not been raised by protest or amendment.)

In *United States v. Tampa Box Co.*, 15 Ct. Cust. Appls. 360, T.D. 42561 (1928), the merchandise was cedar logs from Mexico. They were entered at varying values per running foot depending upon the size, and appraised at an average value. Although the contract made allowance for defects, measurement by the inspector took no account of these defects and found a greater quantity than entered. Although there was an advance, no notice of appraisement was given. The protest claimed (1) that the liquidation was not based upon the correct value and was void; (2) that the quantity found was in error; and (3) that there were other defects in the liquidation. The court held that the protest on the quantity was valid, as liquidation, even if defective, had been had. As to the value, the proper remedy was appeal after the appraiser had found a value and given a notice of appraisal.

United States v. E. H. Bailey & Co., 32 CCPA 89, C.A.D. 291 (1944), involved wet steer hides. The original protest claimed classification under a provision of a Reciprocal Trade Agreement, and was amended to claim the wrong weight. The court found that the actual error by the collector was in using the wrong unit value, and protestant had not amended his protest to include this claim. There was no holding that protestant *could not* amend his protest, but only that he *had not*.

International Grocery Co. v. United States, 43 Cust. Ct. 422, Abs. 63573 (1959), turned on the question of whether the amendment related to the same merchandise which was reasonably within the consideration of both parties as the subject of the original protest. The amendment claimed 17½% under paragraph 775 and T.D. 52373 and T.D. 52476 for preserved turnips, while the original protest had covered vegetables preserved other than by pickling, identified in the protest as "merchandise identified . . . in the sixth recital of proclamation 2784, T.D. 51909 . . ." The court held that the original protest covered the same merchandise as the amendment, and granted the motion to amend.

It is clear that the cases just cited, far from laying down any rule that the amendment must relate to "the same administrative decision", in reality are consistent with the rule of *Macksoud Importing* that an amendment is proper if it applies to the same merchandise that was the subject of the protest.

The second group of cases cited in Report No. 91-576, at the top of page 19, only reinforce the theory that a protest must contain an identification of the merchandise and a claimed error specific enough to identify some controversy to a reasonable collector. The theory that the basis of the protest must have been in the mind of the protestant at the time of filing, and made known to the collector so that he could have an opportunity to correct his mistake, was raised in *United States v. M. Rice & Company, et al.*, 257 U.S. 536 (1922). That case was on imortelles, and the question was whether the protest (there was no amendment) was sufficient to state a claim based on similitude where paragraph 386 was not referred to in the protest. The court held that it was, and used language similar to that used in the first paragraph on page 19 of the Senate Report. Note that the act of 1913, under which the *Rice* case arose, had no provision for amendments. The requirement that the customs officer should "have had an opportunity to correct his mistake" was specifically rejected in *Macksoud, supra*, on the basis that the newly enacted section 518 on amendments would be meaningless if such an interpretation were followed.

Castelazo & Associates and International Purchasing Co. v. United States, 59 Cust. Ct. 165, C.D. 3106 (1967), was not based on an amendment (none was made or attempted), but on the sufficiency of the protest. The court held that the language used in the protest did not meet a minimum objective standard so that a collector could identify the claim. Entry of the dolls, subject of this protest, was made at 17% ad valorem under paragraph 31 by virtue of the similitude provisions of paragraph 1559. The protest claimed 31% by virtue of paragraph 1559, and was obviously not specific enough, without more, to identify the claim.

Amity Fabrics, Inc. v. United States, 58 Cust. Ct. 439, C.D. 3012 (1967), held the original protest was specific enough to include the waterproof velvet, subject of the amendment. The original protest was on "Meteor first quality plain and other similar merchandise". The court said that this case adheres to the letter as well as the spirit of the law, stating on page 441:

"An amendment may clarify the identity of the merchandise, or state new claims with regard thereto, but it may not add merchandise, the classification of which was not originally protested." (Emphasis added.)

It is true that under existing practice, a claim involving the dutiable value of merchandise may not be amended to make a claim as to classification of the merchandise, and vice versa. This is entirely due to existing administrative procedure under which the dutiable value is first determined by an "appeal for reappraisal", after which the entry is "liquidated", and then only can a "protest" be filed against the liquidation. Since the remedy for determining

"value" is separate and distinct from that involving "classification", the existing rule is that an importer who has failed to file an appeal for reappraisalment, or has filed it and exhausted it, is not allowed to raise a value question by protest against the liquidation of the entry.

Under the scheme of S. 2624 there will be a single "liquidation" into which all administrative decisions are merged, and against which the importer will be allowed to file a protest or protests, whether they deal with value or classification or any other reviewable subject. The avowed objective of section 113 is to preclude an action relating to classification from being amended to make a claim relating to value, and vice versa. There is no justifiable reason for such a rule. Since all administrative acts would be merged into a single liquidation, it seems only fair that the importer should have the right to amend his action provided it deals with the same merchandise and the same liquidation against which protest was originally filed.

Coming now to section 207 of the bill, we find that it permits the amendment of a protest, under regulations, prior to the expiration of the 90-day period for filing protest. This 90-day period should be extended to the same period during which the District Director retains jurisdiction of the protest. The amended claim may not have occurred to the importer until after the expiration of the 90-day period. In such case it appears that the District Director would have to reject the protest even where the amended claim would concededly be valid. Thus, the protest would have to be taken to the Customs Court for amendment and adjudication.

Therefore, section 113 of the bill should be changed so as to provide that the Customs Court may consider any new ground in support of a civil action if the new ground applies to the same merchandise and the same liquidation that was the subject of the protest; and section 207 should be changed so as to provide that a protest may be amended within the time allowed for administrative review under section 515, Tariff Act of 1930, as amended.

The Chair wishes to observe that the hour is late. We will proceed as far as we can.

To those witnesses who come hereafter, I apologize for reaching you so late. I would urge that the committee and perhaps the witnesses confine their remarks to those matters which are most urgent.

I would now like to call Mr. Robert D. Kleist and Miss Marjorie M. Shostak, Mr. Kleist being chairman of the World Trade Committee and, I believe, Miss Shostak, vice chairman of the Los Angeles Area Chamber of Commerce.

You have come a long way and you are most welcome.

**STATEMENT OF MISS MARJORIE M. SHOSTAK, VICE CHAIRMAN,
WORLD TRADE COMMITTEE OF THE LOS ANGELES AREA CHAM-
BER OF COMMERCE, ACCOMPANIED BY VINCENT A. BORDELON,
WASHINGTON REPRESENTATIVE AND HEAD OF FEDERAL
AFFAIRS DIVISION**

Miss SHOSTAK. Thank you, Mr. Chairman.

I would like to inform the chairman and the committee that Mr. Kleist was unable to come. And accompanying me today is Mr. Vincent A. Bordelon, Washington representative, and head of the federal affairs division of the Los Angeles Area Chamber of Commerce.

From Los Angeles, present yesterday was Mr. Edward M. Glad of the customs law firm of Glad & Tuttle, who had also wanted to stay and present testimony. But, unfortunately, Mr. Glad was engaged in another matter before the Tariff Commission the first of the week and had to return to Los Angeles to interrogate witnesses for trials in the Customs Court beginning Monday. He asked me to inform the committee that the views expressed on behalf of the Los Angeles Area Chamber of Commerce World Trade Committee and the Foreign

Trade Association of Southern California be considered also as the views of the West Coast Metal Importers Association, whom he would have represented, could he have remained.

Mr. KASTENMEIER. His views, then, are compatible with those you would express. His statement, if he submits it to the committee, will certainly be made part of the record.

Miss SHOSTAK. I would like to inquire whether additional written views will be acceptable to the committee following the conclusion of the hearings today? Is there a time that the committee desires to fix for the presentation?

Mr. KASTENMEIER. Views received within a week will be accepted.

If there are any who wish to communicate views to the committee, I would urge them to do so within the next week.

You may proceed.

Miss SHOSTAK. Thank you.

My name is Miss Marjorie M. Shostak. I am vice chairman of the World Trade Committee of the Los Angeles Area Chamber of Commerce and formerly a director and officer of the Foreign Trade Association of Southern California. By profession, I am senior partner of the firm of Stein and Shostak, and, since 1935, I have been associated with the same office which specializes in the practice of customs law at ports outside of New York, principally the West Coast, Mexican border ports, and New Orleans.

I think in this respect I differ in the background from which I come from many of the witnesses who have been heard by either the Senate committee or this committee. And I feel regretful that the hour is so late, since I think that the views of those persons having business before the customs court who are located in other parts of the country than the eastern seaboard, and particularly New York and Washington, have different problems of an urgent nature about which they are greatly concerned and which they would like to have the opportunity to express to this committee and to answer any questions that the committee may have as to the effect of this proposed legislation with respect to that portion of the work of the customs court which is done outside of the New York-Washington area.

It was of interest in this connection that 60 percent of the trial work of that court in the year 1968 was outside of New York. So it is this segment of the work of the court to which I will try to address myself.

In addition to the other facts that I have stated, which I will not read again, I did want to submit for the committee a brochure entitled "The U.S. Customs Court," published in 1949 by the founder of our firm, who is now deceased, and which I participated in the preparation. While it is out of print, and I don't have 15 copies to supply, I would like to leave this brochure, if I may, with the files of the committee. Because it may be of interest for the history of the development of judicial review and customs matters and its description of the customs court and the types of litigation over which it has jurisdiction.

While this was prepared in 1949, except for one phase of Customs Court litigation which has been eliminated in 1953 by act of Congress, I believe it still has a dissertation of those provisions which affect the two remaining types of litigation now handled in the Customs Court. That may be of some assistance to the committee in considering this legislation.

Mr. KASTENMEIER. The committee will be pleased to receive the brochure.

Miss SHOSTAK. The Foreign Trade Association of Southern California and the World Trade Committee of the Los Angeles Area Chamber of Commerce express their appreciation to the subcommittee for this opportunity to present their views on S. 2624. I have brought with me, because I thought it might be of interest to the committee, a copy of the current edition of its roster, which indicates its purpose and lists its members. I will leave this with the committee, if I may, not to be made a part of the record, but for the information of the committee as to the parties represented by the statement I filed in behalf of this organization.

Mr. KASTENMEIER. It will be so received.

Miss SHOSTAK. It also contains some statistics which are of interest to show that the Los Angeles Customs District is now second in collection of customs duties in the United States. I believe, as indicated in the reports of the U.S. Customs Court, that it is second also in the number of protests and appeals filed in the U.S. Customs Court. And, of the 60 percent of the trial work outside of New York in 1968, approximately half of it was done on the West Coast, a large part in Southern California.

S. 2624 undoubtedly presents the most serious and controversial proposals affecting administrative and judicial review in customs matters which Congress has considered for many years. The proposed bill includes:

(1) Proposals relating to legal procedures in the customs court, which would affect the legal rights of the parties litigant to judicial review; and

(2) proposals relating to customs administrative procedures, including not only administrative review, but also provisions affecting the collection of duties.

Because of the anticipated major impact of these proposals on international trade, we desire to comment and express our views, with respect to this proposed legislation, which we believe warrants the most careful and complete consideration of this subcommittee, and also of the Committee on Ways and Means, consistent with the consideration given to earlier Customs Simplification and Administrative Acts of 1938, 1953, 1954, and 1956, which also had major impact on customs procedures.

The proposed legislation would bring about far-reaching change in administrative processing and judicial review of customs rulings, which would vitally affect the interests of the importing public. No adequate opportunity has been afforded for presentation and consideration of the views of parties litigant, whose rights will be affected, located throughout the country, where most of the trial work is done.

None of the changes proposed are, in the views of importers in the West and Southwest, of such an urgent nature as to warrant

hasty passage of this controversial legislation without thorough consideration of its effects. Many of the changes proposed appear unwarranted and basically unsound, and when previously proposed, to my personal recollection in 1937, were rejected by industry and also by the Department of Justice. It was for that reason and because of the similarity of many of the proposals that we submit herewith excerpts from a "Report to the Attorney General on the Alleged Congestion of Cases in the U.S. Customs Court," prepared by the late Joseph R. Jackson—then Assistant Attorney General, customs division, in opposition to similar proposals made in 1937. Judge Jackson later became a judge of the U.S. Court of Customs and Patent Appeals, was a highly respected member of the bar, and we commend his report as pointing up some of the many problems which we feel this legislation presents.

We ask that it be included in the record of these hearings, for these reasons, because we feel it clarifies perhaps and presents the other side of the coin from the information which has been submitted to the committee up to this point.

We note that the principal argument which has been advanced for this legislation is the existence of an allegedly huge backlog of unresolved cases before the Customs Court. We note also that the reference to the number of cases pending as really being misleading is acknowledged in the remarks made in the Senate when this measure was considered, and in the Senate Report, wherein it was stated at pages 7 and 8:

It must be noted, however, that these figures are somewhat deceptive since, in customs matters, a single decision may frequently affect a large number of cases that have been suspended during the trial of a test case.

The disposition of the pending test cases, which vary from time to time from approximately 200 to 400 or slightly more, would dispose of many of the pending cases, the great majority of which are being held in suspension, awaiting the outcome of a relatively small number of test cases. We state here approximately 53,000 cases on plywood previously suspended, which have not all been decided but are still, some of them, pending and are in the process of being disposed of under the test cases decided in favor of the importers and an agreement of the Government and importers' counsel to resolve them.

Over 42,000 cases have been suspended under a test case dealing with the classification of the synthetic textile articles. I believe, as Mr. Colburn noted, this number needs to be updated and is approximately over 70,000 now.

Over 46,000 cases have been suspended under a test case on the proper basis of appraisement of Japanese exports subject to MITI floor prices. Perhaps this has also been increased since the last count which was available to us on the west coast.

These three issues alone represented approximately 37 percent of the cases pending before the Customs Court in 1968.

I wanted to comment on the fact that the Senate report accompanying S. 2624 indicated at page 8 that there were 116,997 protest cases and 82,513 reappraisal cases pending before the Customs Court in 1969 which had not been suspended, and to comment that it does not necessarily follow that these almost 200,000 cases are not related to any test case.

Appropriate test cases involving the same issues may not yet have been initiated. In fact, some of them may be tried at the Customs Court session which is now in progress on the west coast, and then will become suspensible or, in many instances, the plaintiffs may have requested suspension and suspension has not yet been ordered by the court, because the position of the Government counsel with respect to the suspension may not have been indicated. This is due in part to a lack of sufficient personnel perhaps in that department, and the shortness of time before calendaring to process and review all of these matters.

The lack of any actual congestion in the Customs Court is apparent, we believe, from the fact that, unlike most courts in the United States, cases can be set for trial before the Customs Court with practically no delay. A plaintiff whose case is ready for trial can obtain a hearing within as little as 60 days after filing his protest or appeal at the port of entry. This would not be possible under the proposed bills which preclude the forwarding of cases to the Customs Court for a minimum of 120 days, and we feel more than likely it is rare that an importer would ever be able to file a protest the day that the entry was liquidated. So in reality it would be much longer than 120 days as a matter of practice before one could get into the Customs Court under the proposed procedures.

To the importer outside of New York, away from the headquarters of the court, the most objectionable provisions of the proposed legislation include the following:

The proposed provision for additional administrative review prior to court action would serve no useful purpose, in our view, and would only delay relief to the importer. Most cases fall into the categories of these actions filed by all importers of specific commodities against assessments based on bureau policy, which the customs field officers must follow, and which will not be changed except pursuant to court decisions rarely final within 2 years.

The representation that there is need for, or any possibility of more meaningful administrative review by the agency which made the assessment is really without foundation. This is commented on in the Senate report, which I will not read.

I feel that at this point it would be most important for the committee to know that the Bureau of Customs has in fact a quite elaborate and adequate system of administrative review, which, however, occurs prior to liquidation rather than thereafter. So far as the material I have read, I have not seen that the committee has been advised of this aspect of administrative review in customs.

Actually, there have been two places in the importation of merchandise in the processing of entries by customs where administrative review has already occurred before an entry reaches liquidation. Under customs reorganization, which went into effect in 1965, and which improved many of the procedures that had at that time been very archaic, an entry is now reviewed when it is presented before the merchandise is released, and a quick review by the customs officers at the port of entry is made to determine whether customs agrees with the value and the rate of duty. If the value and the rate of duty at which the importer proposes to enter his merchandise is shown at a figure which the customs commodity specialists at the port of entry

believe to be inadequate, he will not accept the entry and will return it to the importer's customs house broker with directions to increase the value or the rate, as the case may be, and to require the importer to deposit at that time that amount which, in view of all the information available to the Government at that time, appears to be the proper amount of duty.

The importer may not agree with the higher assessment made, but he has no choice, if he wants his merchandise, but to revise his entry accordingly. This is really a very summary type of administrative review.

Thereafter, however, the import specialist will review the entry documents, which include a number of other documents, and if he finds that there will be a change of \$15 or more, it is a practice not written into the law, but a practice which the Bureau of Customs has adopted, which is most valuable to importers, a notice is sent on a customs form now called customs form 5561, and this says to the importer, "We contemplate making an advance in value from X dollars at which you entered to a unit price which is higher. If you disagree, please advise us within 20 days." Or this notice may say, "You entered your merchandise at 17 percent, and we think that is a wrong rate under the item under which you entered. Here is a notice that we are going to change the classification of that merchandise." If it was plastic flowers, it would be 28 percent under another item, because that is a provision that says it is for plastic flowers.

The importer then has an opportunity at this point in the processing of the entry to respond to this notice in writing or in person to the officer who made the change, and discuss with him whether or not the change is proper. If that commodity specialist believes that it is proper, the importer then has available a long process, not long in terms of time necessarily, but there are these other levels of administrative review of which an importer may avail himself now under the administrative procedures.

He may ask to discuss the matter with the district director of customs at the port of entry. There is also a supervisory level, but these are all within the office of the district director in charge of the operational aspects of any port of entry.

If unsatisfied with the decision at that level, he may ask to confer with the regional commissioner of customs, and in most districts there is a counsel present also, counsel to the regional commissioner. So here is an opportunity for an importer with or without his broker and/or his attorney to approach these officials—there are nine regions in the United States established by reorganization—and discuss with a higher level administrative official the propriety of the proposed higher assessment which has not yet been finalized.

If unsatisfied at this level, an importer may go to the Bureau of Customs in Washington, D.C., to the Division of Appraisement, or to the Division of Classification, if it is a classification matter, and seek to present even legal briefs which we call petitions at that level to obtain administrative review.

If at that level he has not been able to resolve his problem, the entry will then proceed to appraisement or liquidation, as the case may be, and he then has his legal remedy to go to Customs Court.

In our experience over the many years that I have been associated with this type of specialized practice to which our office limits its

work, we have found that this is a very adequate type of remedy. And it is the practice among customs attorneys generally throughout the United States that if we have a problem of this nature, in which we feel there is any opportunity of resolving it without availing ourselves of the facilities of the Customs Court, it is common practice for an importer's counsel to request the Bureau of Customs to authorize the administrative officials at the port of entry to withhold finalizing their action until there has been an opportunity for a ruling to be made by the Bureau of Customs.

To us, this seems very adequate, very competent. The officials at the Bureau of the Customs are departmentalized to handle these specific questions. However, once a ruling by top level Bureau of Customs personnel on any question has been made, any further administrative review is really meaningless, unless the court orders these officials or overrules the Bureau of Customs in the determination that has been made.

So, since all of this procedure has already been available before point of liquidation, it seems needless to create some other body, not specified in this bill, to make some other kind of superior administrative review which would seem to put between the Bureau of Customs, who are the top officials in the administrative chain, and the court, some other body which seems to be something like perhaps the board of general appraisers.

We see no need for any other administrative review than that which is available at present.

This procedure that I have described also indicates why we feel that there should be automatic referral of the protests to the court, because the importer already knows, having had available to him all of these other channels, that when he protests, that protest is not going to be allowed, because there was a Bureau ruling that sustained the action of the customs official at the port of entry who made that assessment.

Therefore, he has an intention—and I agree with the views expressed by Mr. Colburn that he has a conscious determination at the time that he files his appeal or his protest in most cases that it is his intention to litigate. He has exhausted every other channel. There is no place else for him to go. We see no point even in retention in the field.

I wanted to also point out to the committee one other thing that might not have been apparent. That is, that when these protests and appeals are filed, at present we have a procedure where we have what in other practice would be hardly recognized as an initial complaint. We have simple initial pleadings, of which I have brought two blank forms, such as our office uses. One is an appeal for reappraisement. This is the initial pleading in valuation cases. It is filed in sextuplicate so that there are copies for the various Government agencies that have any relation to this litigation.

I have also another document which has no title, which is the form used by our office for classification cases. This is the initial pleading which is filed after liquidation, also in numerous copies, so that the district director of customs at the port of entry can then associate the entry documents to which it relates and forward them to the court, at the same time forwarding a copy of this pleading to the Government counsel and to such other offices as may require them in the Government chain.

The bill would provide this difference in the procedure at this level. This initial protest—and appeals would be eliminated because there would be liquidation and one protest, in place of these documents by which cases now go to Customs Court, with an intention to go to Customs Court—there would be a protest which would then be reviewed within a period of 90 days, and then the importer has 180 days to file a second document which we do not need to file now, a summons. Then a complaint. We feel that this is imposing on the importing public who are primarily engaged in international trade, which is to the benefit of the economy of our country, unduly burdening them with two other documents, two other filings, not only to be filed, but also served upon two individuals in addition at present, which would be a tremendous paperwork burden.

Of course, it could be done. But it imposes two additional arguments which we feel should not be imposed, because an importer knows when he files this document, and I would say in 90 percent of the cases, that he is not going to get any change in his assessment pursuant to his protest, and that he is intending to go to Customs Court.

We feel also, returning to my statement, that the proposed bills would inject more formal procedures than have heretofore been existent in the Customs Court. We often on the importer's side refer to it as a businessman's court or an importers' court. This doesn't intend to indicate any proprietary interest. It is just that Congress, in its wisdom, created a special tribunal for the handling of these cases, with the view to giving an importer an opportunity to get a ruling as quickly as possible, which in customs matters is so essential for the reason that, depending upon the determination ultimately made, the importer may either continue to import that product or he may find that it is not economically feasible to continue in the business in which he is engaged. Therefore, the speed with which he obtains a determination is most essential.

We feel, as expressed by Mr. Colburn—and I will not repeat his views—but we concur with the views he expressed with respect to the additional formalities and the real loss of rights of an importer that he has under the present law. I referred in the statement to really a fundamental idea, logical difference between the proponents and the opponents of this legislation. This was commented on in a communication of which I received a copy from the Federal Judicial Center. I did not have an opportunity to make a copy for the committee. But if it desires to have one, I would be pleased to supply it. It was a communication addressed to the ad hoc committee on the Customs Court in February 1969, in which observations are made with respect to the ideological differences about what the functions and the work of this court involves.

In filing it, however, I would like to take exception to statements made therein by someone on behalf of lawyers handling customs matters outside of New York, a gentleman, Mr. McCauley, who is a Washington lawyer, and in talking with other customs lawyers outside of New York, I have not been able to find one who agrees with the views that he expressed on our behalf without our permission or knowledge, that attorneys outside of New York would favor some of the changes that are proposed therein.

Mr. KASTENMEIER. We would like to have that.

Miss SHOSTAK. The proposed legislation, S. 2624, with respect to the filing fee, would require the Customs Court to fix the filing fee of not less than \$5 for commencing an action in that court, and would empower the court to impose other fees. Filing fees are not required under present law because of the unique feature of custom litigation in which each entry often represents a separate cause of action.

I should say at this point that in ports where there are numerous importations, a customs attorney now follows a practice of joining causes of action of entries processed at approximately the same time wherever possible, because customs attorneys, like the court, don't want to handle any more pieces of paper than absolutely necessary.

Because of the nature of the importing business, filing fees required to obtain judicial review could be prohibitive in the case of numerous importations at different times and at different ports, each involving relatively small amounts of duty. This is particularly true at ports outside of New York.

Very large importers in New York City may be able to import in such quantities as to be able to stand some of these charges. But at other ports, which we call outports, other than New York, very often we find that the total duty paid on a shipment may be \$100, and yet the importer disagrees with the rate or value and desires to have a ruling. If he is endeavoring to obtain a ruling, he necessarily must cover every shipment if the commodity in order to obtain a reclassification or reevaluation of each shipment. This is what results in numerous cases he has pending before the court.

With respect to the suspension, however, as recognized in the Senate report, the test case often involves a threshold issue, and the cases suspended thereunder involve other issues of fact and law. Consolidation of all suspended cases with the test case, we feel, therefore, is impracticable because of the voluminous evidence that would be required to sustain the importer's burden in each case. If filing fees are authorized, they should accordingly be required only in test cases which are actually brought to trial. But, as pointed out by Judge Rao this would only be 252 or 264 cases per year, and it hardly seems worthwhile to fix a fee at that level. The importers outside of New York for whom I speak feel that the power to impose other fees which is included in the bill, being a grant not given to the district court, should not be given to the Customs Court.

There is a fear in the areas from which I come that the fees could preclude an importer from proceeding with his right to judicial review. We have accordingly attached to this presentation, language which would amend section 115 to eliminate the filing fee or to have it imposed at that level of notice of trial.

S. 2624 would also require payment of all customs duties claimed due on the Government's theory of dutiable value, before that value can be contested in the Customs Court. This is not required under present law, and would work an extreme hardship upon importers due to the fact that it is the uniform practice of Customs to apply the highest value and rate which would appear to be applicable based upon available information at the time of appraisement, which information may be incomplete or inaccurate. In making this statement, I am not critical of the Bureau of Customs. They have a very difficult job to do, and this is, I think, proper governmental policy

for any agency, that on all of the information available at the time, the highest rate and value must be assessed to protect the Government in its assessments.

However, payment of increased duties is particularly burdensome to the importer where merchandise is appraised at an advanced value some months or years after entry, as frequently occurs. If an importer is immediately advised of a value advance at the point that I mentioned, when his entry is presented or at the time that he gets a preliminary notice, he then has an opportunity to decide not to import further or to plan ahead to cover his duty costs, or cease importation of the commodity. But if appraisement is delayed—and I think it should be of interest to this committee that there is no statutory time limit within which Customs is required to appraise or to liquidate—the importer may be subjected to a demand for payment of substantial sums for which he has had no opportunity to plan his financing.

Whether or not such a provision is adopted, it is the feeling of importers in California—and we find no difference of opinion in our state with anyone with whom we have spoken as to these provisions—that a provision should be written into law requiring the Government to pay interest on over-assessments which were erroneously collected. Interest is paid on Internal Revenue tax refunds, and there is no reason why the Government should be able to require importers to pay customs duties in excess of those legally due, without payment of interest on such over-assessments. We have therefore attached language which would add a new section 204 to provide for the payment of interest.

These two provisions for payment of interest and for filing fees, we feel, are closely related. This is one reason that filing fees are not assessed: An importer must deposit at the time of entry whatever the Government says is due. He then has his opportunity to dispute that assessment. But the money is held for an indefinite period without any time limitation on the customs officials within which they must act. They cannot always act immediately. Value questions often require foreign investigations. So in the nature of the procedures there is necessarily a period of time. If an importer was paid interest on the funds that were over-assessed, he would be far ahead of the game, and the Government would be far behind. But to pay filing fees, in addition, to get your own money back without interest, is a little bit too much, we feel.

Mr. RYAN (presiding). At that point, has any serious effort been made in the Congress to your knowledge heretofore to require payment of interest?

Miss SHOSTAK. I am not aware that it has ever been presented, although I think in import circles it may have been discussed.

The proposed bills would require another change in procedures which we feel is not well advised. It would require that value and classification issues involving the same goods be presented in the single protest. This has never occurred before, because the filing of a reappraisement case on value occurred at a different point in the scheme of things in customs than questions of classification.

Present law, accordingly, provides separate procedures for each type of case. We feel that even though liquidation is made before any action is filed, that is, instead of an entry being made, appraised and

then an interruption of the customs processing by reappraisal proceedings, that the entry would immediately go to liquidation. This is good, because an importer would then know when his entry is liquidated how much is involved. When an importer gets a value advance, the value advance says, "Your merchandise has been appraised at a value higher than that which you entered." And then, either he or his attorney has to compute what the difference is.

Sometimes appeals are filed, because in the computation the importer doesn't realize because they are stated in different terms that there may not be much of a difference involved. So sometimes appeals are filed under these circumstances which might not have been filed, had the entry been liquidated and the importer would get a bill for x dollars. If it is less than \$100, he might not file a claim. But at present he only gets a notice saying that his value was advanced.

So in this area there is an area of possible filings because of the short period of time which causes some filings that might not be filed if an extended period of time were given as this bill proposes, extending the time for filing an appeal from 30 days and for filing of protest 60 days, to the period of 90 days, which we think is desirable and would reduce some filings which are due to this situation I have mentioned, among others.

However, to combine the presentation of a value case with the presentation of a classification case in the Customs Court, we think, is ill advised. The subject matter of each issue is divergent. Different witnesses are required. The reason for that is, in a value case we need to establish the market value in the country of exportation. In a classification case, we usually have witnesses in the United States either as to the use or the composition or other factors in which witnesses in the United States are available.

We also have different periods of time required to assemble evidence and, basically, there are different rules of evidence applicable. As Mr. Colburn mentioned, in reappraisal matters, there is a relaxation of the rules of evidence to permit the importer to submit evidence in the form of affidavits, price lists, catalogs and so on, and on the other side for the Government's benefit, it can submit evidence in the form of reports of customs agents.

In the scheme of things in customs, there are agents stationed in various countries and throughout the United States. They periodically make investigations at the request of the customs officials or the Department of Justice, perhaps, to obtain information needed for appraisal cases.

So that we feel the present procedures are ordinarily sufficient and this deals with another question, which I will cover later. But in any event, in protest matters, an importer can not present evidence in the form of affidavits, nor is a report of a customs agent admissible. If these two causes of action, one on value and one on rate, are combined, we would have a very confused type of proceeding in the customs court, which really presents two entirely different issues, even though they relate to the same merchandise.

As a matter of actual practice, I think it rarely occurs that the same merchandise is involved in value and protest. In my own experience, I can only recall in 35 years perhaps three instances where we had both a value and a classification on the same merchandise. Usually—and there

is no reason why it couldn't occur—but usually it seems not to have occurred. If you have a value question, usually the rate of duty is not at issue. If you have a classification question, of which there are many more, often there has been no value problem.

So it may be an academic thing. But it seems to impose another restriction on the proper handling, if you will, of a case by a customs attorney to say that "You must present these together unless the court agrees to sever them."

It is interesting to me, because I have been in this field so long, that this proposal to force all issues to be in one protest, that this was a procedure that we ceased to follow sometime in the thirties at the request of the court. It was a common practice when I first worked as a law clerk in this office, to include all of the claims that an importer might have on one entry in one claim. He might have, on the west coast, what we have had at times, a lot of commodities such as a junior department store might have, an entry that covered a shipload of merchandise, there might be 100 items on his entry. We might have claims which the importer has asked us to file in his behalf on six or seven kinds of merchandise. It was common practice in the thirties to include all of those claims in one protest, which this proposed bill would not require. It would at least permit us to separate the merchandise.

But we were asked to not follow that system because it was very difficult to administer, because one issue would resolve itself and the others would remain. So over the period of years, the procedure has developed of separating the issues in our filings which serves to really expedite the work of the court. Because, if we have separation of issues, we can take one issue and present it and get a ruling, and then the suspended cases involving that issue can be eliminated from the court by processing on a summary judgment procedure.

We have accordingly prepared some suggested language for consideration of the committee for amendment of section 110(d) to provide for retention of separate trials of at least value and classification issues which we feel would expedite the work of the court.

The proposed bill would provide that all cases be heard and decided by a single judge, with no appeal or review in the Customs Court. Appeals from the decision of the single judge would be directly to the Court of Customs and Patent Appeals. At present, under present law, only value cases are heard and decided by a single judge, with right of appeal to a division of three judges without court costs and without incurring printing expense. All other cases are now decided by the appropriate division of three judges, according to the assignment of subjects provided by rule of the court.

The change in procedure would not only cause importers added expense, but the increased number of appeals to the Court of Customs and Patent Appeals would greatly increase the burden on that court. The change in procedure could also lead to additional lack of uniformity, because any different judges could conceivably be deciding cases involving the same type of merchandise, regardless of subject, even at the same time at different ports. Possibly the court could control this, if the notices of trial were observed to represent the same cases. But it does represent an area of some concern. And importers are concerned about different rulings on the same commodity, because an importer wants to know what his duty liability is in order to judge his business in the future accordingly.

We have, therefore, suggested that appellate review be retained within the framework of the Customs Court, and that an appellate division, which is different from the present appellate division, be created composed of the chief judge and two other judges designated by him to hear appeals from single judge decisions on value and classification.

We are attaching to this presentation suggested amendments to sections 102, 108, and 119, which would so provide. And I would like to mention that in drafting these provisions, Theodore B. Audett, who is of counsel to our firm and was formerly Deputy Assistant Commissioner of Customs in the Division of Appraisalment in the Bureau of Customs from 1951 to 1963, assisted us and advised on the drafting of this language so as to make it something that possibly the committee might consider.

I have already dealt with the automatic referral which we feel should be retained and which would, we feel, expedite the work of the court. This matter of the retention of papers in the field presents some practical problems that I don't believe have been mentioned to the committee. This also is affected to some extent by the problems with respect to amendment to which Mr. Colburn addressed himself. The law at present provides that a protest retained in the field may be amended within the period of 90 days. Thereafter, it may be retained in the field for 2 years, but it may not be further amended.

We find frequently in actual practice that a test case may result in a decision holding that a particular rate is applicable, and that rate may not be included in the protest retained in the field. So how practical it may be to retain protests in the field, which the administrative office cannot act upon, because it does not have the right claim, is something that we seriously question.

We question also how this would actually be handled in the field, because the Customs Service is a dedicated and very hard-working service which never seems to have enough people to process the work, at least through the Port of Los Angeles and many other ports with which I am familiar, where the volume of trade is constantly increasing. This would impose an additional burden on them, require additional personnel at each port of entry, and perhaps storage space, which is presently available in the customs court, where trained personnel retain these papers.

With respect to the papers sent to the court, there was an amendment to section 113 of the bill as amended by the Senate, which has corrected some of the omissions which were present in the bills as originally introduced. These are the provisions that direct the number of papers that shall be sent to the U.S. Customs Court when a case is filed. In classification cases, it is important to have, and in valuation also, the documents to which the importers' claims relate, without which it would be meaningless to try to consider the importer's claim. And, while the section has been amended to include most of the essential documents now sent to the court by the customs officials at the port of entry, it does not include this advisory form which I mentioned, Customs Form 5561, which is a successor to Customs Form 5555 which is essential to the customs court consideration, nor does it include affidavits and certain other special documents and special classes of cases.

It is therefore our view on behalf of the west coast members of the bar, who specialize in this practice, that the language that is in the present law requiring the transmittal of "the entry and accompanying papers, and all exhibits connected therewith," seems more inclusive than to endeavor to specify a list of documents which may not be inclusive in all cases.

The bill would unduly broaden the statutory provisions relating to examination of importers and others, and inspection of their books, which is granted under section 509 by changing the designation, "the collector and appraiser," who were the principal administrative officers before reorganization, to "the appropriate customs officer." We feel that since this is a power which should be exercised by the principal administrative officer, that instead of using the terminology "appropriate customs officer" which certainly, to the uninitiated in the custom jurisprudence and administration, would be very meaningless, that the names of the officials, collector and appraiser, should be updated to refer to the regional commissioner at New York, where they have no district director, and the district director at all other ports, who is the successor and principal administrative officer to the collector and appraisers.

With respect to the hearings in foreign countries, we feel that this authorization should not be included in the bill; that aside from the questions raised on which the other witnesses have commented today, that this could very well in many cases, especially where the businesses are smaller, prohibit an importer from getting his day in court, if exercised. And if it is not to be exercised, why should it be in the law?

It is our feeling, based on our experience at least in the matters which we have handled before the court over many years, that the present law permitting the production of evidence is really not shown to have been inadequate in most cases. There might be a rare instance. But in addition to the relaxation of the rules of evidence to which I have referred, which make it possible for an importer and the Government to present facts to the court in forms other than evidence of a witness in open court, if a case is important enough, certainly an importer or the Government could fly a witness to this country. And if it is the importer's witness, then the expense should be on the importer and not on the taxpayer. So it is our feeling that if it is necessary to have a witness from a foreign country, he should be brought to this country rather than to put the expense on the taxpayer to send the judge and the court reporter and Government counsel to another country to hold evidentiary hearings, which is really what we hold when we go around the United States, which we consider trials. I don't differentiate between an evidentiary hearing and a trial. We often have partial trials on circuit in the area in which I practice. These are perhaps evidentiary hearings, but they seem pretty legal to us.

So we recommend that this provision in section 109 permitting the holding of hearings abroad be deleted or, if the language is to be retained, that it should be amended as suggested by Mr. Colburn; that it should at least be with the consent of the parties.

The matter of amendment has been fully dealt with. I would be happy to answer any questions, if any of the members have any questions on that.

Importers on the west coast, and their counsel, are experiencing under present procedures, and will experience under the proposals in S. 2624 and related bills, many problems in handling litigation before the Customs Court, because of the unavailability of the Customs Court papers which are retained at the court's headquarters in New York City, except periodically when they are forwarded to outports pursuant to special requests of counsel.

Because of the ever-expanding volume of international trade in southern California, and the large number of filings—I think the last annual report showed 7,000 filings last year at Los Angeles alone—some of our congressional delegation have heretofore filed bills with the Congress for the establishment of an Office of the Clerk of the U.S. Customs Court at Los Angeles. We feel this would greatly facilitate the disposition of pending cases which arose in the West and would save transportation costs in shipping court papers, by permitting retention of west coast filings at a more approximate location.

Because of the problems heretofore encountered, and the drain on the staff of the district director in maintaining custody of papers at present, while personnel really is needed to clear merchandise, that the legislation heretofore introduced in the 90th Congress by Senator Kuchel and in the present Congress by Congressmen Corman and Roybal in California should be included in any provisions such as this bill, since such a facility would be even more essential under the proposed procedures, if this bill is to be adopted, than at present.

We greatly appreciate this opportunity which the subcommittee has afforded us to appear before it, and I am sorry that Mr. Bellamy, who was also here and had to return to Los Angeles, and Mr. Glad, are not present with me, because the importers on the west coast, some of whom are members of the American Importers Association and who disagree violently with the views expressed today, were very anxious to have the committee aware of the fact that, like the customs bar, as Mr. Colburn states, there is vast dissension among members as to the advisability of this legislation.

I am a member of the American Importers Association and a member of its customs committee and participated in some of the meetings to which Mr. O'Brien referred. And I can only say to you that the views expressed today are not the consensus of opinion of the members of that association in many other parts of the country. I feel the committee should be aware of that.

We therefore urge that the bills not be enacted in their present form in view of the serious defects which we feel they contain. We feel they require further careful study and consideration, with a view to adopting amendments to prevent the erosion and restriction of the processes heretofore provided for administrative and judicial review in customs matters, and to avoid what we feel would be far-reaching adverse reactions involving international trade.

(The prepared statement of Miss Shostak follows:)

STATEMENT OF FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA AND
WORLD TRADE COMMITTEE, LOS ANGELES AREA CHAMBER OF COMMERCE,
LOS ANGELES, CALIFORNIA 90054

My name is Marjorie M. Shostak. I am Vice-Chairman of the World Trade Committee of the Los Angeles Area Chamber of Commerce, and formerly a Director and Officer of the Foreign Trade Association of Southern California. I am senior partner of the firm of Stein and Shostak, and, since 1935, have been with the same office which specializes in the practice of Customs law at ports outside of

New York, principally the West Coast, Mexican Border ports, and New Orleans. I am a member of the bar of the State of California, and admitted to practice before the United States Customs Court, the Court of Customs and Patent Appeals, and The Supreme Court of the United States. I was an Instructor of classes on Customs Administration and Procedure at the University of Southern California, University College, during the years 1946-1953, and assisted in the preparation of a textbook for that course, and in the preparation of a brochure entitled the United States Customs Court, published in 1949, a copy of which I am pleased to submit for the files of the Committee, which may be of interest for its history of the development of judicial review in Customs matters, and its description of the Customs Court and the types of litigation over which it has jurisdiction.

The Foreign Trade Association of Southern California and the World Trade Committee of the Los Angeles Area Chamber of Commerce express their appreciation to the Subcommittee for this opportunity to present their views on S. 2624.

The Foreign Trade Association of Southern California is an organization of over 300 firms engaged in international trade. It was organized in 1919, for the purpose, among others, of promoting, fostering and encouraging commerce between foreign countries and the United States, particularly Southern California. A copy of the 1969-1970 Anniversary Edition of its Roster, indicating its purposes (at page 4) and listing its members, is filed with this Statement. Its members include importers, exporters, custom house brokers, attorneys, and others engaged in international trade and related pursuits. Statistics on the volume of international trade transacted through the West Coast ports are included in its Roster (at page 16), indicating that Southern California accounts for 46% of the total West Coast trade in imports, and over 33% of the total West Coast trade in exports. In 1968, imports and exports flowing through California ports were valued over 6 billion dollars. The Los Angeles Customs District collected over \$236,035,000 in Customs duties in 1968, ranking second only to New York Seaport.

The Los Angeles Area Chamber of Commerce is a five-county organization having over 4,000 member-firms. Its World Trade Committee is composed of representatives of major firms engaged in various phases of international trade.

S. 2624 undoubtedly presents the most serious and controversial proposals affecting administrative and judicial review in Customs matters, which Congress has considered in many years. The proposed Bill includes:

(1) Proposals relating to legal procedures in the Customs Courts, which would affect the legal rights of parties litigant to judicial review; and

(2) Proposals relating to customs administrative procedures, including not only administrative review, but also provisions affecting the collection of duties, *et cetera*.

Because of the anticipated major impact of these proposals on international trade, we desire to comment and express our views, with respect to this proposed legislation, which we believe warrants the most careful and complete consideration of this Subcommittee, and also of the Committee on Ways and Means, consistent with the consideration given to earlier Customs Simplification and Administrative Acts of 1938, 1953, 1954, and 1956.

The proposed legislation would bring about far-reaching changes in administrative processing and judicial review of Customs rulings, which would vitally affect the interests of the importing public. No adequate opportunity has been afforded for presentation and consideration of the views of parties litigant, whose rights will be affected, located throughout the country, where most of the trial work is done. In 1968, 60% of the trial work of the Court was done outside of New York, of which almost one-half was on the West Coast.

None of the changes proposed are of such an urgent nature as to warrant hasty passage of this controversial legislation without thorough consideration of its effects. Many of the changes proposed appear unwarranted and basically unsound, and when previously proposed, were rejected by industry and by the Department of Justice. We are submitting herewith excerpts from a "Report to the Attorney General on the Alleged Congestion of Cases in the United States Customs Court," prepared by the late Joseph R. Jackson (then Assistant Attorney General, Customs Division), in opposition to similar proposals made in 1937. We ask that it be included in the record of these hearings, because this Report, which refuted the representations made in support of the legislation in 1937, is equally applicable in 1969, to the present Bills.

The principal argument advanced for this legislation is the existence of an allegedly huge backlog of unresolved cases before the United States Customs Court. The reference to the number of "cases" pending is misleading, however, as

is acknowledged in the remarks made in the Senate on December 9, 1969 (at page S16134) and in Senate Report No. 91-576 dated December 6, 1969 (at pages 7-8):

"It must be noted, however, that these figures are somewhat deceptive since, in customs matters, a single decision may frequently affect a large number of cases that have been suspended during the trial of a 'test' case. * * *"

The disposition of the pending test cases (which vary from 200 to 400 at any given time) would dispose of many of the pending cases, the great majority of which are being held in suspension, awaiting the outcome of a relatively small number of test cases. For example: In excess of 53,000 cases on plywood, previously suspended, are now being processed under a test case decided in favor of the importers. Over 42,000 cases have been suspended under a test case dealing with classification of articles of man-made fibers (synthetic textiles), recently decided by the Customs Court and now pending on appeal before the Court of Customs and Patent Appeals. Over 46,000 cases have been suspended under a test case as to the proper basis of appraisement of Japanese exports subject to MITI floor prices, decided in favor of the importers and now pending on application for review before the Appellate Term of the Customs Court. These three issues, alone, represented approximately 37% of the cases pending before the Customs Court in 1968.

While the Senate Report accompanying S. 2624 further indicates (at page 8) that there were 116,997 protest cases and 82,513 reappraisement cases pending before the Customs Court in 1969 which had not been suspended, it does not necessarily follow that these 199,510 cases are not related to any test case. Appropriate test cases may not yet have been initiated, or, plaintiffs may have requested suspension and suspension may not as yet have been ordered, because the position of government counsel with respect to the suspension has not yet been stated.

The lack of any actual congestion in the Customs Court is apparent from the fact that cases can be set for trial before the United States Customs Court with practically no delay. A plaintiff whose case is ready for trial can usually obtain a hearing promptly, within as little as 60 days after filing his protest or appeal at the port of entry. This would not be possible under the proposed Bills, which preclude the forwarding of cases to the Customs Court for a minimum of 120 days after the protest is filed at the port of entry.

The more objectionable provisions of the proposed legislation include the following:

1. The proposed provision for additional administrative review prior to Court action would serve no useful purpose and would only delay relief to the importer. Most cases fall into categories of actions filed by all importers of specific commodities, against assessments based on Bureau of Customs policy, which field officers must follow, and which will not be changed except pursuant to Court decisions, rarely final within 2 years. The representation that there is need for, or any possibility of meaningful administrative review by the agency which made the assessment, is without foundation. The additional administrative review is completely undefined in the pending Bills, and will not be extensively utilized, as acknowledged in the Senate Report (page 28):

Section 515(a), as amended by your Committee also requires the Secretary, by regulations, to provide for a further review of protests by a customs officer other than the officer responsible for the decisions involved in the liquidation, in circumstances and in the form and manner that the Secretary may prescribe in regulations, if a request for such further review is formally submitted within the time allowed for the filing of a protest. It is contemplated that resort to such protest review procedures will not be extensive, in view of the opportunity for review of an entry of merchandise presently available to an importer prior to liquidation, mentioned earlier in this report, and in view of the fact that a very significant number of protested entries involve the same merchandise and the same issue that has been previously contested by the protesting party in connection with the liquidation of an earlier entry.

In any event, the creation of a reviewing body of sufficient knowledge and background to overrule established Bureau policies would not only be of great expense to taxpayers, but would in effect duplicate the functions of the Customs Court, and further delay effective relief to importers. Such a far-reaching change, if adopted, should be carefully defined by Congress.

2. The proposed Bills would inject formal procedures never previously required in Customs Court, which was created by Congress as a "Business Man's Court" and has always operated with a minimum of formality, because of the unique nature of the litigation, and to avoid prejudice to the rights of the many small importers by technical pleading and procedural requirements. This reflects the

fundamental ideological distinction between the view of the importing public and the Treasury and Justice Departments, recognized by the Federal Judicial Center in its study, as to the function the Customs Court is to perform.

3. S. 2624 would require the Customs Court to fix a filing fee of not less than \$5.00 for commencing an action in that court and would empower the Court to impose other fees. Filing fees are not required under present law because of the unique nature of customs litigation in which each entry represents a separate cause of action. Because of this, the filing fees required to obtain judicial review could be prohibitive in the case of numerous importations at different times and at different ports, each of which involves a relatively small amount of duty. It has been the practice to decide such issues on the basis of a test case. However, as recognized in the Senate Report (at page 7) the test case often involves a threshold issue and the cases suspended thereunder involve other issues of fact and law. Consolidation of all suspended cases with a test case is therefore impracticable because of the voluminous evidence which would be required to sustain the importers' burden in each case. If filing fees are authorized, they should accordingly be required only in test cases which are actually brought to trial. The power to impose other fees, also included in the Bill, is not granted to any District Court and should not be given to the Customs Court. Suggested amendatory language for Sec. 113 is accordingly attached hereto.

4. S. 2624 would require payment of all Customs duties claimed due on the Government's theory of dutiable value, before that value can be contested in the Customs Court. *This is not required under present law*, and would work an extreme hardship upon importers due to the fact that it is the uniform practice of Customs to apply the highest value and rate of duty which would appear to be applicable, based upon available information at the time of appraisement, which information may be incomplete or inaccurate. Payment of increased duties is particularly burdensome to the importer where merchandise is appraised at advanced values some months or years after entry, as frequently occurs. If an importer is immediately advised of a value advance, he can plan ahead to cover his duty costs, or cease importation of the commodity. But if appraisement is delayed—and there is no statutory time limit within which Customs is required to appraise—the importer may be subjected to a demand for payment of substantial sums for which he has had no opportunity to plan his financing. Whether or not such a provision is adopted, a provision should be written into the law requiring the Government to pay interest on over-assessments which were erroneously collected. Interest is paid on internal revenue tax refunds, and there is no reason why the Government should be able to require importers to pay customs duties in excess of those legally due, without payment of interest on such over-assessments. Suggested language to include a provision for payment of interest, as Sec. 204, is submitted with this statement.

5. The proposed Bills would require that value and classification issues involving the same goods be presented in a single protest. Present law provides separate procedures for each type of case. Since the subject matter for each issue is divergent, different witnesses are required, different periods of time for preparation are required to obtain evidence for value and classification cases, and different rules of evidence are applicable, the proposal would tend to complicate and delay, rather than simplify or expedite, disposition of cases. Consolidation of cases would make this procedure even more unworkable. Importers should not have to rely on severance of issues, at the discretion of the Court, and not as a matter of right. The inclusion of divergent issues in one protest would restore a procedure followed and discarded in the 1930's at the request of the Court. Suggested language for amendment of Sec. 110(d), to provide for retention of separate trials of value and classification issues is attached.

6. The proposed Bills would provide that all cases be heard and decided by a single judge, with no appellate review in the Customs Court. Appeals from the decision of the single judge would be directly to the Court of Customs and Patent Appeals. Under present law, only value cases are heard and decided by a single judge, with the right of appeal to a Division of three judges without court costs and without incurring printing expense. All other cases are decided by the appropriate Division of three judges according to the assignment of subjects provided by rule of the Court.

The change in procedure would not only cause importers added expense, but the increased number of appeals which would have to be considered and decided by the Court of Customs and Patent Appeals would greatly increase the burden on that Court. The change in procedure could also lead to additional lack of

uniformity because nine different judges would be deciding all types of cases, regardless of subject, including, conceivably, cases involving the same merchandise and issues arising at different ports at the same time, which could also cause an increase in the number of appeals reaching the Court of Customs and Patent Appeals.

It is accordingly suggested that appellate review be retained within the framework of the Customs Court, and that an Appellate Division, composed of the Chief Judge and two other judges designated by him, be created, to hear appeals from single judge decisions on value and classification. Suggested amendments to Secs. 102, 108, and 119, so providing, are respectfully submitted for consideration.

7. The proposed Bills would eliminate the present automatic referral to the Customs Court of protests and reappraisement appeals, now transmitted 90 days after filing. Instead, to have a case referred to the Customs Court, a summons would have to be filed with the Customs Court in New York within 180 days after denial of a protest, with the added burden of serving papers on the Secretary of the Treasury and the Department of Justice. At present, multiple copies of pleadings are filed with the District Director, who transmits the original pleading with the accompanying entry papers to the Court, and distributes copies of the pleadings to the other Governmental agencies concerned. The vast majority of cases filed with the Court involve actions initiated for importers by their counsel against assessments desired to be contested. The alleged incidence of filing of "protective" appeals and protests due to lack of time to determine whether or not to litigate, is believed to be minimal, and could in any event be remedied by merely extending the time for filing such pleadings. The requirement for filing a summons to have the protest or appeal sent to Customs Court results in duplication of the paper work of filing the protests and appeals initially, in probably over 90% of the cases filed, unduly burdening the importer and constituting another factor discouraging the pursuit of the right to judicial review of erroneous assessments.

8. The Bills, as originally introduced, unduly restricted, to the disadvantage of the importer and the Court, the documents sent to the Court with a protest or an appeal. Sec. 113 of the Bill, S. 2624, as amended by the Senate, has corrected some of the omissions, and now specifies additional documents now customarily sent to the Court with pleadings (protest or appeal), in Sec. 2632(f) of Title 28, United States Code, as amended. The Section as amended still does not include, however, some of the essential documents now sent to Court by the Customs officials at the port of entry, such as the preliminary notices sent to the importer on Customs Form 5555 and 5561, which often reflect the action taken by the Customs officials; affidavits required to be filed with entries of art works, American goods returned, and other special classes of merchandise, and other special documents related to various commodities. The language of present law, Sec. 515 of the Tariff Act (19 USCA § 1515) requiring the transmittal of "the entry and the accompanying papers, and all the exhibits connected therewith" seems more inclusive and therefore preferable to the enumeration in Sec. 2632(f) as amended by S. 2624.

9. The Bills would unduly broaden the statutory provisions relating to examination of importers and others, and inspection of their books, papers, records, correspondence, etc. (Sec. 509, 510, and 511 of the Tariff Act of 1930, 19 USCA §§ 1509, 1510 and 1511), to permit these activities by an "appropriate customs officer" instead of continuing the safeguards now contained in the law, which restrict this power to the responsible officials (Collector and Appraiser) who appraise and classify imported merchandise. This power should be vested by statute only in the Regional Commissioner of Customs at New York and the District Directors at other ports, as the successors, under Customs Reorganization, to the Collectors and Appraisers.

10. The Bills would authorize the holding of Customs Court hearings in foreign countries, "in the interest of economy, efficiency and justice." This would not only raise constitutional and practical questions, but would deny the importer his day in court because the prohibitive expense would in most cases prevent the attendance of the importer and his attorney at such hearings. In addition, the present procedures for production of evidence now applicable in Customs litigation have not been shown to be inadequate. It is therefore suggested that Sec. 109 of S. 2624 be amended by deleting Subsection (b) of Sec. 256 of Title 28, United States Code; or that the language thereof be changed as suggested in the amendment to Sec. 109, proposed herewith.

11. The Bills unduly restrict the right of importers to amend their claims administratively and in Customs Court. The present rules on amendment in the

Customs Court should not be changed. The object should be to permit recovery of duties paid erroneously, when the error is reasonably pointed out within the prescribed time.

The importers on the West Coast and their counsel are experiencing, under present procedures, and will experience under the proposals in S. 2624 and related bills, many problems in handling litigation before the Customs Court, because of the unavailability of the Court papers, which are retained at the Court's headquarters at New York City, except when forwarded to out-ports pursuant to special requests of counsel. In view of the ever-expanding volume of international trade in Southern California, and the volume of filings of actions at Los Angeles particularly, establishment of an office of the Clerk of the Court at Los Angeles would greatly facilitate the disposition of pending cases, and would save transportation costs in shipping court papers, by permitting retention of West Coast filings at a more proximate location. Because of problems heretofore encountered, and the drain on the staff of the District Director in maintaining custody of papers at present, while personnel are hard-pressed to handle the entry and clearance of merchandise, legislation has been introduced in the 91st Congress, and in the 90th Congress also, to provide for establishment of an office of the Clerk of the Court at Los Angeles. Since such a facility will become even more essential under the procedures provided in S. 2624, we strongly advocate the inclusion of a provision therefor in S. 2624. To that end, suggested language for proposed Sec. 104A is attached hereto, for consideration.

We greatly appreciate this opportunity afforded to us by the Subcommittee to appear before it and to submit our written statement, and to express our views and our concern regarding the changes proposed in administrative and judicial procedures in Customs matters. We urge that the Bills not be enacted in their present form, in view of the serious defects referred to herein. Further careful study and consideration of the proposals is advocated, with a view to adopting amendments to prevent the erosion and restriction of the processes heretofore provided for administrative and judicial review in Customs matters, and to avoid far-reaching adverse reactions involving international trade.

Respectfully submitted,

FOREIGN TRADE ASSOCIATION OF SOUTHERN CALIFORNIA,
WORLD TRADE COMMITTEE, LOS ANGELES AREA CHAMBER OF COMMERCE.

SUGGESTED CHANGES—S. 2624

RETENTION OF AN APPELLATE DIVISION IN THE CUSTOMS COURT

TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

Section 102, page 2, lines 9-24:

Delete subsection (b) of proposed Section 1541 and substitute the following:

"(b) When a judge in the Customs Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation, the Appellate Division of the Customs Court may, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, that if the party resides west of the Mississippi River or beyond the continental limits of the United States, there shall be allowed ten days additional time for filing said application; and Provided further, that neither the application for nor the granting of an appeal hereunder stays proceedings in the Customs Court unless a stay is ordered by a judge of the Customs Court or by the Appellate Division of the Customs Court."

Section 108, page 7, lines 23-25, and page 8, lines 1-9:

Delete proposed new Section 255 of title 28, United States Code, and substitute the following:

"Section 255. Appellate Division.

(a) The chief judge of the Customs Court and two other judges of the court whom he shall designate shall constitute the Appellate Division of the Customs Court and shall hear and determine applications for the review of decisions by single judges of the Customs Court.

(b) A majority of the three judges of the Appellate Division may hear and determine an application for review and all questions pending therein.

Section 119, page 15, lines 14-18:

Amend proposed Section 2638 of title 28 of the United States Code by deleting subsection (b) and substituting the following:

"(b) The decision of the judge is final and conclusive unless a retrial or rehearing is granted pursuant to Section 2639 of this title or an application for its review is filed with or mailed to the Customs Court by the District Director or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the District Director, by whom the same shall be forwarded promptly to such court."

Further amend proposed Section 2638 by adding the following new subsections (c) and (d) immediately following line 18:

"(c) The Appellate Division of the Customs Court shall consider each application for review upon the samples of the merchandise, if any, and the record made before the single judge. The Appellate Division shall, after hearing argument on the part of any of the interested parties requesting to be heard, affirm, reverse, or modify the decision of the single judge or remand the case to such judge for further proceedings, and shall render its decision in writing, together with a statement of the reasons therefor and of the facts on which the decision is based, and shall forward it to the District Director.

(d) The decision of the Appellate Division of the Customs Court shall be final and conclusive upon all parties, unless an appeal is made to the Court of Customs and Patent Appeals within the time and in the manner provided in Section 2601 of this title."

COMMENT

The Customs Court was created by Congress to reduce delays and promote uniformity in Customs litigation. Although we are generally in agreement with the concept of single judge trials as a means of making maximum use of judicial manpower, it must be recognized that this procedure will inevitably lead to an increase in lack of uniformity in application of the law and resulting uncertainty as to the extent of judicial relief available to importers under given circumstances. Direct appeals to the Court of Customs and Patent Appeals are expensive and time consuming and would greatly add to the burden of that court.

The proposed amendments would extend the principle of single judge trials to all issues, as proposed by the Bills, while retaining appellate review within the framework of the Customs Court to promote uniformity, keep down the costs of litigation and reduce the burden on the Court of Customs and Patent Appeals.

OFFICE OF THE CLERK OF THE COURT AT LOS ANGELES

TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

Appointment and number of judges; offices

Page 4, preceding line 22:

Section 104A should be inserted immediately following Section 104, following line 21 on page 4, and immediately preceding line 22, reading as follows:

"Sec. 104A. Section 251 of title 28 of the United States Code is amended by adding to the last paragraph thereof the following new sentence:

"The court shall also maintain an office at the city of Los Angeles.'"

COMMENT

This suggestion incorporates the language of H.R. 7350 introduced by Mr. Roybal (for himself and Mr. Corman) on February 20, 1969.

Establishment of an office of the clerk of the Court at Los Angeles has long been a needed facility, even under present procedures of the Customs Court, to facilitate the availability of pertinent documents to parties litigant on the West Coast, and would greatly reduce the burden on Customs Field personnel, who must be responsible for Court documents shipped to the West Coast from the office of the Court at New York under present cumbersome procedures, which have required the time of one or two local field officials for two and three week periods at least three times a year at Los Angeles. Establishment of an office of the clerk of the Court at Los Angeles for retention of court papers, after they have been processed by the Clerk of the Court at New York and examined by the

Customs Section of the Department of Justice, would result in a saving of freight for shipment of papers across country periodically, as well as a major saving of time of Customs field personnel at Los Angeles. In addition, parties litigant on the West Coast and their counsel would be afforded the same privileges of examination of papers for preparation of trials and proposed Submissions on Agreed Statements of Fact as are extended to parties litigant and their counsel at New York.

Opposition of the Treasury Department heretofore expressed to the Chairman of the Committee on the Judiciary is believed to have been based on a misunderstanding of the procedures contemplated. An explanation thereof is submitted herewith (see letter of January 25, 1968, to Hon. Thomas H. Kuchel with respect to S. 1707, a predecessor proposed Bill, in the 90th Congress letter of January 8, 1970, to Hon. Edward R. Roybal, with respect to H.R. 7350; and letter of January 10, 1970, to Hon. James C. Corman with respect to H.R. 7350).

Under the proposed procedures of S. 2624, an office of the Clerk of the Court at Los Angeles will be essential, to process cases presently pending in Court, as well as cases which will arise under the proposed procedures. Revisions to the Rules of the Court, now being made, many of which have already been implemented, make access to the court documents essential to proper processing of pending litigation.

Inclusion of the proposed Sec. 104A is therefore strongly advocated, to make it possible for counsel not resident in New York City to continue to effectively handle Customs Court litigation arising on the West Coast.

ELIMINATION OF PROPOSED PROVISION FOR EVIDENTIARY HEARINGS IN FOREIGN COUNTRIES

TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

Trials at Ports Other Than New York

Section 109, page 7:

Delete subsection (b) of the proposed new Sec. 256 of Title 28, United States Code (page 7, lines 19–25, and page 8, lines 1–3).

Or, if Sec. 256(b) is to be retained, it should be amended to read as follows:

“(b) Upon consent of both parties and for good cause shown, the chief judge may authorize a judge of the court to preside at an evidentiary hearing in a foreign country whose laws permit such a hearing.”

COMMENT

The provision as presently drafted could make it financially impossible in many cases for an importer to pursue his legal rights in Customs cases. Unless very large amounts of duty are involved, the expense to the importer of attending such a hearing, accompanied by counsel, would be greater than any possible recovery. The result of the scheduling of a foreign hearing could therefore be the abandonment by the importer of his claim.

RETENTION OF IMPORTERS' EXISTING RIGHT TO SEPARATELY PRESENT VALUE AND CLASSIFICATION ISSUES

TITLE I—JUDICIAL ACTIONS IN CUSTOMS CASES

Section 110, page 9, lines 14–20:

Delete Subsection (d) of proposed new Section 1582 of title 28 and substitute the following:

“(d) Two or more separate civil actions may be brought to contest the denial of a single protest, if such protest involves two or more of the various types of administrative decisions enumerated in subsection (a) of this section. However, upon consent of both parties, the court may consolidate any number of entries involving common issues in a single civil action.”

COMMENT

A single protest may include several administrative decisions involving entirely different issues and requiring completely different types of evidence. For example, issues relating to value usually involve the obtaining of evidence abroad, usually a difficult and time-consuming task, whereas evidence concerning classification and other issues can usually be obtained locally in a relatively short time. Consequently, the arbitrary inclusion of all issues in a single civil action would not

only lead to problems of coordinating many widely different types of proof, which are subject to different rules of evidence, but would unnecessarily delay the resolution of relatively simple issues, while endeavoring to gather evidence on value and other more complex issues.

FILING FEES—MODIFICATION OF PROPOSED NEW PROVISION FOR TITLE I—
JUDICIAL ACTIONS IN CUSTOMS CASES

Section 113, pages 10-11

Page 11, lines 7-8: Delete the words "upon commencing an action." and insert in lieu thereof the words "at the time notice of trial is given."

Page 11, lines 11-12: Delete the last sentence of subsection (b) of Section 2632 of title 23 of the United States Code as amended.

The proposed new Section 2632(b) of title 28, United States Code should thereby be changed to read as follows:

"(b) There shall be a filing fee payable at the time notice of trial is given. The amount of the fee shall be fixed by the Customs Court but shall be not less than \$5 nor more than the filing fee for commencing a civil action in a United States district court."

COMMENT

The imposition of a filing fee in connection with every action commenced in the Customs Court would place an intolerable burden upon importers who bring in at various ports throughout the country frequent shipments, each of which often involves a relatively small amount of duty. Every importation represents a separate cause of action, and consolidation is usually impracticable, due to entry at different ports and the difficulties resulting from differences in the evidence required to sustain the importer's burden of proof with respect to varying facts applicable to each shipment. It is the usual practice to select one or more importations to establish a test case as a means of minimizing the time factor and the cost to all parties, including the Government and the Court. As the precedent established by the test case is used as a basis for disposing of other cases involving the same issue, the imposition of a fee only in connection with each such test case would be more equitable.

The sentence authorizing the Customs Court to fix other fees should be deleted, as being a grant of power to the Customs Court which the District Courts do not have.

PAYMENT OF INTEREST ON OVERPAYMENTS OF CUSTOMS DUTIES

TITLE II—ADMINISTRATIVE PROCEEDINGS IN CUSTOMS MATTERS APPRAISEMENT,
CLASSIFICATION, AND LIQUIDATION PROCEDURES; COLLECTIONS AND REFUNDS;
LIMITATIONS

Section 204, pages 19-21:

The following new subsection should be added to proposed Sec. 505 entitled "Payment of Duties", following *line 4 on page 21*:

"(c) Interest.—Interest shall be allowed and paid upon any excess deposit of duties refunded more than 90 days after the date of deposit, at the rate of 6 percent per annum from the date of deposit to a date (to be determined by the Secretary or his delegate) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted. The acceptance of such check by the payee shall be without prejudice to any right to claim any additional excess deposit and interest thereon."

COMMENT

It is the practice of Customs to require the deposit of customs duties in accordance with the value and rate of duty considered by Customs to be the highest which could be applicable. This decision by Customs may be based upon incomplete or inaccurate information, and may be highly arbitrary, particularly in value cases. Nevertheless, there is no provision for payment of interest on overpayments, even though there is no time limitation on which the Customs Service must appraise and liquidate entries, and many years may elapse before the importer is able to obtain a refund through court action.

The proposed amendment is based upon a similar provision in the Internal Revenue Code providing for payment of interest on overpayments of internal revenue taxes (Section 6611 of Title 26 of the United States Code).

DEPARTMENT OF JUSTICE

Assistant Attorney General, Division of Customs
New York City

REPORT NO. 1

REPORT TO THE ATTORNEY GENERAL ON
THE ALLEGED CONGESTION OF CASES IN THE
UNITED STATES CUSTOMS COURT.

For convenient reference this report follows the mechanical arrangement of the "Report to the Secretary of the Treasury on the study of certain phases of the congestion of cases in the United States Customs Court", by Hon. Herman Oliphant, dated May 24, 1937, which is hereinafter referred to as the "Treasury report".

PRELIMINARY OBSERVATIONS

The Treasury report purports to be based upon surveys and studies begun in August, 1935, including a report by Mr. Charles U. Samenow to the New York Law Society and Yale Law School Committee, a study of said report by that committee and certain named officials, also a comprehensive report by the last mentioned committee and study and development thereof by Treasury officials. At the outset of the above work it was stated that a necessary qualification of the investigating agency was "a thorough practical knowledge of our legal practice and procedural mechanics."

Bearing in mind that the practice and procedure of the United States Customs Court are sui generis, it would be interesting to learn to what extent the individuals and groups responsible for the Treasury report possess the qualifications of experience which it premised as necessary to an adequate investigation of the subject matter. The Yale Law School Committee and the New York Law Society are not well known in New York and it has not been possible, in the time available, to ascertain how they are constituted or function. The personnel of the active customs bar is well known, and it is safe to assert that no person or group of persons mentioned as the sources of the ideas presented in the Treasury report has had any extended practice before the United States Customs Court and that few, if any of them, have ever appeared before that court.

Investigations do disclose, however that neither the problem involved, nor any of the proposed solutions, have been, by any of the agencies responsible for the Treasury report, submitted to or discussed with any of the lawyers whose names were supplied to the Treasury as those most familiar with the practice, from an experience of 25 years or more. The more prominent and representative law organizations were not consulted, such as the American Bar Association and the Bar Association of the City of New York, which has been making an intensive study of the relations of customhouse brokers and attorneys. It is stated to me that the Association of the Customs Bar, which includes in its membership every active practitioner before the Customs Court, except government attorneys, caused a special committee to wait upon the Treasury and volunteered its services in connection with the investigation but was not consulted on the subject matter.

In the only conference the writer had with any representative of the Treasury Department in reference to this matter in January, 1935, I suggested an inquiry be made as to the possible delays caused by functions within the jurisdiction of the Treasury Department and offered my full cooperation. Until the receipt of this letter and report, this is the only communication of any sort I have received in connection therewith.

The above comments are beside the discussion of the merits, but if what they indicate is true, that practical knowledge and experience were lacking in the compilers of the Treasury report, it goes far toward explaining some of its surprising assertions, conclusions and recommendations.

1. CONDITIONS EXISTING IN PROTEST
LITIGATION IN THE CUSTOMS COURT.

The Treasury report points out as evidence of "intolerable" congestion in the Customs Court the number of "protest cases" pending at the end of each of the six fiscal years, 1931-1936, ranging from 237,441 at the end of 1931 to 167,851 at the end of 1936. The large totals of these

figures appear to have been accepted as conclusive evidence of congestion. Certainly there is no other evidence of congestion in the Treasury report.

To one familiar with the practice of the Customs Court, however, the presence of 200,000 or even more protests pending undisposed of on the files of the court would not ordinarily be evidence of congestion or of any condition seriously interfering with the orderly and speedy despatch of court business susceptible of disposition.

To cite, as evidence of congestion, statistics regarding the number of protests pending at any given time is misleading, because the greater number of such protests is not susceptible of immediate disposition, except by effort so wasteful as to be economically prohibitive.

It is definitely not true in practice that each protest represents a distinctly litigated issue. Customs cases are pre-eminently "class cases." The determination of the issue or issues presented by one protest, litigated as a "test case", may settle the issues presented in thousands and sometimes tens of thousands of other protests.

The number of protests filed is necessarily large because important issues brought before the Customs Court, and usually taken to the United States Court of Customs and Patent Appeals, often affect large numbers of importations. The collector's decision as to the rate and amount of duty assessed upon any importation becomes final and conclusive unless the importer files a protest within the time fixed by law. Hence, the importer of any commodity, the dutiable status of which is involved in litigation, must protest every customs entry covering that commodity or lose his rights should the courts hold a lower duty to be applicable. The filing of protests, therefore, does not so much reflect a litigious disposition on the part of importers as it does the effort of prudent business men to save their rights to the

same duties as their competitors, pending final adjudication of customs issues.

While, therefore, the number of protests filed, has, in the nature of things been large, the number of issues presented by these protests has been relatively small. It is safe to say that at no one time during the six year period covered by the report were there pending before the customs tribunals more than 300 issues represented by "test cases". It is believed that this estimate is excessive and that the average actual number of issues pending at any one time would be considerably less than 300. The task of disposing of them has been well within the capacity of two courts operating through fourteen judges.

In a report of a committee of the Association of the Customs Bar, rendered February 18, 1932, this subject is dealt with in the following language:

It is impossible to stigmatize as evil the judicial clarification of our tariff statutes, the equal protection of all importers paying customs taxes and the performance of their legal duty to their clients by customhouse brokers and customs attorneys.

Customs litigation has been the subject of much disingenuous misrepresentation regarding its volume, based upon the number of protests and appeals to reappraisement filed, which is large, rather than the number of issues presented which is relatively small. The number of issues presented has never embarrassed the courts or threatened the revenue. The number of protests and appeals filed has been significant principally as showing that customhouse brokers and customs attorneys have performed their duty and protected their clients on individual importations affected by pending issues. If the remedial system did not facilitate and invite such protection it would be an unjust system. The volume of customs litigation has never approached the proportions of a social menace or even of serious inconvenience.

Moreover, the number of possible claimants is fixed by the government when it imposes the alleged illegal tax and it is unthinkable that it does not invite all such claimants to present their claims.

In view of the characteristic of customs litigation outlined above, the United States Customs Court (formerly the Board of United States General Appraisers) very early in its existence adopted a policy of inaction on groups of protests represented by test cases. As such groups usually involve important questions of fact and law, the determination of which, in a test case, is essential to the disposition of the remaining protests of the same class, the court, usually with the consent of the government and the importers, defers action upon them until the issues involved in the test case are settled. For this purpose they are placed upon the so-called Suspended File of the court. Such disposition does not place the protests beyond the control of the court or the reach of the parties, but is merely in the nature of an indefinite continuance. The court may at any time order any protest or group of protests to be removed from the Suspended File and placed upon the trial calendar and either the government or the importer may move for a similar disposition.

It will be obvious that the purpose of thus suspending action in class cases is economy of effort and expense. It is comparatively easy to determine, for purposes of suspension, the similarity in principle between a test case and other protests, but if each protest susceptible under a test case had to be tried upon the facts, then decided and perhaps appealed, as it came along, it would involve, in the majority of cases, a useless waste of money and would impose an impossible task upon the court and the attorneys for the government and importers.

Under the suspension system, however, when the test case is decided, if the result favors the importer, the remaining protests are disposed of in large groups, with great saving of time and expense to the court and

both parties. After the issue is settled the work of preparation, trial and decision is usually greatly simplified and has to be done but once. Much unnecessary work and duplication is thus avoided. On the other hand, if the importer loses in the test case, he usually abandons his suspended protests or submits them for unfavorable decision and all preparation and trial is avoided. It is not going too far to assert that it is only the economy of time and effort resulting from this system which has made possible the handling of these large customs claims by the machinery provided for that purpose. The Suspended File represents protests segregated from those under active consideration for trial and decision and it in no way interferes with the current work of the court.

It proves nothing regarding congestion or delay in the Customs Court to assert, as the Treasury report does, that only 30% of the protests decided in 1934 and 1935 were disposed of within a year after filing, while 70% were disposed of after a lapse of one to five or more years. There is no analysis of these figures from which the conclusion can be drawn that they are evidence of avoidable delay on the part of the Customs Court or litigants. If, as seems probable, the 30% of the protests decided within one year represents practically all of the protests susceptible of decision within that time, the record is a creditable one for any court. If, as seems probable, the 70% of the protests decided within the two years mentioned, but after the lapse of one to five years from the time they were filed, represent principally suspended cases upon which action was necessarily deferred pending the outcome of litigation, it proves nothing regarding avoidable delay in the Customs Court. Most customs issues can be and are decided by the court of last resort within two years. The exceptional case which, owing to its difficulty or ramifications may take longer for final adjudication does not alter the general rule.

Nor does it prove, or tend to prove, congestion or delay in the handling of protests, but quite the contrary, to assert

as the Treasury report does, that 80% of the protests filed were eventually abandoned by the importer. The abandonment of protests is the simplest and speediest way of disposing of them, involving merely a scheduling of the protests and a few lines of an order dismissing or overruling them. It is not to the discredit of the importer that, after receiving an adverse decision in a test case, he is usually willing to abandon other protests in the same class, and thus relieve the court and the government of any further consideration of the merits. It is hardly an impeachment of the office of the Assistant Attorney General that it wins enough cases to bring about this large percentage of abandonment. While, in the retrospect, it may seem regrettable to have incurred the administrative costs of handling these protests, the law requires that they be sent to the court, and few cases come under observation of which it can be said that the importer has not prosecuted in good faith or in which his contentions are not given serious consideration by the courts. The administrative costs are probably largely neutralized by the interest saved by the government in other cases where refunds are adjudged of the taxpayer's money of which the government has had the use for several years without interest.

Since the protests suspensible under test cases at all times account for a large numerical preponderance of the protests pending before the Customs Court, since judicial inaction in such cases, pending decision of test cases, represents economically efficient functioning of the court, and since suspended or suspensible protests represent the greater portion of those included in the figures of the Treasury report, it would clearly appear that the Treasury statistics neither prove nor tend to prove congestion.

The contention of the report that, as the result of congestion, there is intolerable delay would seem to fall with the allegation of congestion.

It is of course recognized that delays may result from other causes than the congestion of business in an overworked court and that customs litigation has not been entirely free from delay, but the Treasury report does not specify other causes of delay than a non-existent congestion.

There are delays due to the inherent problems of a case, the necessity of obtaining evidence from abroad and other causes which within reasonable limits operate in furtherance and not in denial of justice. The difficulty of the questions presented sometimes occasions protracted study and consideration by the courts, with resultant delay in decision. It is doubtful if these are delays which should be made subject of statutory regulation.

Suspension of action in class cases to permit issues to be settled by appeal in test cases is a positive financial advantage to the government, which holds the taxpayer's money without interest and is saved the expense of duplication of the defense of innumerable protests. Similar advantages accrue to the importer upon whom would fall the burden of prosecution of such claims. There is no denial of justice to either party to litigation in the suspension system.

It must of course be recognized that delays may arise from procrastination, neglect and loose practices, but the Treasury report does not categorically charge any impairment of the judicial processes from such delays. The efforts of the Customs Court and of the Assistant Attorney General have been directed to the prevention of delays in litigation arising from these causes and it can be asserted with confidence that such delays are approaching the irreducible minimum.

The Treasury report admits that if an importer presses his case a hearing may be had within approximately six months, and it must be remembered that for three months of that time the collector, who is a subordinate of the Secretary of the Treasury, is allowed by law to, and usually does, retain the protest without transmission to the court. No specific instances of delay and no specific complaints are mentioned in the Treasury report. The main premise of the report is the sweeping assertion that intolerable congestion resulting in substantial denial of justice to the government and the public exists in the Customs Court, in support of which statistics which wholly fail to prove congestion are offered.

What are the actual facts? The observation of those intimately and continuously in touch with the practice indicates that the calendars of the Customs Court have not for years been in better condition, that no litigant will be denied a reasonably prompt hearing of his case and that as there is no ground for complaint no valid complaints are being received. Investigation among importers, American manufacturers and their attorneys has failed to elicit such complaints and the whole machinery of the court appears to be functioning with a minimum of friction.

A fair analysis of the statistical record, of which the Treasury report quotes only a part, indicated that this condition has prevailed throughout the whole six years covered by that report. The complete status of the court's business at the close of each of the fiscal years 1931-1936 is given below:

<u>Fiscal Year</u>	<u>Protests</u>		<u>Pending</u>	
	<u>Received</u>	<u>Decided</u>	<u>in Process</u>	<u>Suspended</u>
1931	80,073	53,705	171,284	66,157
1932	79,241	94,557	113,284	108,841
1933	65,407	66,955	87,718	132,859
1934	56,230	71,764	88,996	116,047
1935	59,287	82,678	69,373	112,279
1936	<u>57,691</u>	<u>71,492</u>	<u>88,605</u>	<u>79,246</u>
	397,929	441,151	619,260	615,429

The captions "Protests Received" and "Decided" need no explanation.

The protests "In Process" are those under consideration for trial, decision or suspension. This group would include large numbers of class protests awaiting the trial of test cases, after which they would go on the suspended file; it would include large numbers of class protests removed from the suspended file and awaiting decision or dismissal, and it would include miscellaneous protests susceptible of individual consideration and not affected by the suspension principle.

The caption "Suspended" indicates the protests on the Suspended File. This file is

in a constant state of flux, receiving each year large accessions from the protests "In Process" as test cases are tried, and discharging each year large numbers of protests into that class, as test cases are decided. The Suspended File expands or decreases depending upon the scope of pending test litigation. It might grow conceivably to half a million protests during the pendency of a test case affecting nearly every importation, such, for example, as litigation challenging the constitutionality of a tariff act, the decision of which might and probably would determine all of the protests thus suspended. The size of this file, as already explained, is no hindrance to the dispatch of current business.

The protests in the Suspended File are different nearly every year, and there are periods of litigation when the files go very fast.

As an illustration of the workings of the suspended docket, let me call to your attention the case of *United States v. Amberg Schwab & Co., Inc. et al.*, 21 CCPA 617. Under this case, more than 20,000 protests were suspended. The trial of the case consumed four full days. There is no reason to suppose that the trial of any of the protests under the same issue would have consumed any less time. A trial of each of the 20,000 protests would, therefore, have involved, approximately 80,000 days, thereby increasing the work of the court beyond all reason. It will, thus, be seen that one of the recommendations of the letter, far from creating a condition characterized as "tolerable" would create a situation which would effectively destroy its usefulness.

Many other test cases could be cited where from 5 to 20,000 protests have been suspended pending a final determination of the issue.

The Customs Court has always carefully considered whether or not cases which are asked to be suspended involve the same issue as that litigated in the test case.

It is also to be noted that as far as my office is concerned, when a request for suspension of a protest is received, careful consideration of it is given and objection made to the suspension unless the issue in the test case is the same as that in the cases proposed to be suspended.

The figures under the captions "Protests Received" and "Decided" are especially significant as they demonstrate conclusively that the Customs Court has kept abreast of its work and has decided, over the six year period, more than 43,000 protests in excess of the number received. Obviously there has been no backing up of court business.

Under this heading, the report also states that the consuming public receives no benefit where protests have been sustained and refunds paid by the Government.

Tariff Acts last from four to twelve years. Tariff phraseology remains much the same from one Act to another. It is disingenuous, therefore, to state that the consuming public receives no benefit of customs reductions. Usually a customs case is decided in three years or less, and that decision establishes the tariff classification during the life of that Act, and probably during the life of subsequent Acts. Under such circumstances, for the first three years the importer receives a refund (without interest) of the excess duty he has paid. During the remaining years the public gets the benefit of the reduced rate.

II. CAUSES OF UNDUE VOLUME OF PROTEST LITIGATION IN THE CUSTOMS COURT.

The Treasury report undertakes to enumerate the causes of what it calls the "undue volume" of protest litigation, understood to refer to the alleged "intolerable congestion", which is the basis of its whole argument. If, as anyone familiar with the practice could testify without statistics, there is no congestion which impairs the functioning of the Customs Court, it would seem that discussion of the alleged causes of non-existent congestion would be superfluous.

Nevertheless, as some of the alleged causes are not causative, as in the enumeration of some there is, more by innuendo than by direct

charge, a reflection upon the administration of the court, the office of the Assistant Attorney General and the bar, and as they are made the basis for proposals of fundamental statutory changes, some examination of them seems advisable.

1. It is charged that protest litigation is concentrated in the hands of relatively few brokers and attorneys, that 88 brokers filed 60% of all entries and 10 attorneys (understood to mean 10 firms of attorneys) filed 90% of all protests. Whether the alleged congestion would be reduced if twice as many brokers and attorneys participated is not made clear. Customs practice naturally drifts to the specialists but will not support a large bar and the consensus of opinion seems to be that the ranks of attorneys and brokers are now overcrowded.

2. It is charged that protest litigation is speculative, unfounded and irresponsible to a far greater extent than ordinary litigation. There is radical disagreement with this sweeping conclusion on the part of many leading customs experts. The conclusion that protest litigation is speculative and the proposal to discourage it by protest fees is discussed below in connection with the proposed legislation.

3. It is charged that the prosecution of protests is delayed or protracted by importers' attorneys and brokers in order to pile up claims. This charge, made without stating the supporting facts, has been, I am told, more or less continuously repeated for forty years or more. It reflects, of course, upon the integrity of the bar, which, in fairness, should be heard before any action is taken upon the assumption that the charge is correct. So far as the charge may involve the implication that such practices would be tolerated by the court or the office of the Assistant Attorney General it may be stated that, while there is nothing to indicate that such abuse exists to any great extent or would be sanctioned by reputable members of the bar, the unremitting efforts to prevent such practices by the court and government counsel would be effective if the attempt were made.

It is my experience that attorneys in this practice promptly prosecute their

cases and do not seek unduly to prolong litigation. It has been the practice of my office to insist upon prompt trials and litigation is less delayed in this court than in many of the courts of the various states and the federal courts.

I do not know of any issue where test cases have been deliberately lost, in order to extend the time during which the issue would be pending. On the other hand, the making of new test cases has been largely the result of indications by the courts of a wrong theory of law, or a wrong trial procedure in the case adversely decided, whether it be for the Government or for the importer. The Assistant Attorney General and the court can be relied upon to prevent any undue accumulation of protests by attorneys or brokers seeking to keep an issue alive as long as possible.

4. It is charged that at least 7% of all protests filed are duplicates or multiples. High authority estimates the number of duplicate protests filed as nearer 2%. The practice of filing duplicate protests is unnecessary and should be stopped. It has been receiving attention at the hands of the Customs Court and the Association of the Customs Bar. The number of duplicate protests is steadily diminishing as the result of action taken by the Customs Court with reference thereto, and it is believed that it would entirely disappear if the collector of customs would follow the recommendations which have been made by the Association of the Customs Bar. The subject is of slight relative importance and can be remedied by administrative measures now in effect or under consideration.

5. It is charged that the importer rarely handles his own customs business and that not infrequently the entire protest process is completed without the knowledge of the importer. The intentment of these statements is not clear, but if they are to be taken as implying that attorneys proceed without the importer's sanction in prosecuting claims they may require qualification. It is stated to me to be the practice of many of the law firms to notify importers by mail of each and every protest which they file for the importer's account. Of course when an attorney has been retained to protect an importer in customs matters, he does not find it necessary

to burden his client with every detail of procedure. Upon the question of this expert service, the Committee of the Association of the Customs Bar made the following observations in its report of February 18, 1932:

The *raison d'être* of the customhouse broker and the customs lawyer is that they are experts in tariff law, or administration, or both, and are willing and ready to give to their clients a service which includes protection against illegal assessments, appraisements and other official acts under the tariff laws. Having been retained generally, neither the customhouse broker nor the customs attorney waits for his client to bring him an issue. In such a technical field comparatively few clients could know that any question existed, and it is this situation which leads them to place their interests in the hands of customhouse brokers and customs attorneys.

* * * * *

Both customhouse broker and customs attorney must maintain organizations to give this protection and as all but very few importers are represented by brokers or attorneys or both, it probably results from this organized protection that all but a small proportion of illegally assessed duties are refunded. It is only by such measures that the most efficient protection can be given to importers and indeed that customs law can be practiced as a specialty. Importers would not patronize a broker or attorney who did not give such service. It does not seem to fall under the tests of efficiency, dignity, self-respect, honor or duty. Indeed it appears to come within the exceptions which are recognized by all of the ethical authorities to the rule against voluntary disclosure of litigable matters, in that it is a case where trust relationship and moral duty places upon the broker and the lawyer, undertaking to render the service described, the obligation to give their clients the benefit of all matters known to them affecting the substantial rights of the client.

6. It is charged that protests are superficial, stereotyped and multifarious. Here again there is no relation of cause and effect between the alleged defects in the protests and the congestion sought to be

proved. The subject is apparently introduced as a basis for the proposal that the Secretary of the Treasury be authorized by legislation to prescribe the form, contents and authorization of protests and is more fully treated in the discussion below, dealing with that proposal.

The allegation that protests are superficial, stereotyped, and multifarious conveys more to the lay mind than is justified by the facts. If they are superficial they will fail of producing the result sought; that they are stereotyped is a necessary feature of the repetition through many protests involving subsequent shipments subject to the same claim of fact or law. To that extent printed forms of various claims form the most efficient method for handling what might be termed the initial pleading in a thousand identical cases. That the claims therein are frequently contradictory is perhaps a matter for decision of the court. The number of rates claimed in any protest is somewhat akin to the statement of different causes of action in a civil action. Such causes of action may even be contradictory in that they are alternative, but that has never, in my experience, rendered a pleading void. It must not be lost sight of that in a protest case the importer must not only prove the Collector's assessment to be incorrect, but he must also claim in his protest the proper rate of duty and the paragraph under which the merchandise is claimed to be dutiable. If this latter is not done, the courts overrule the protests without affirming the action of the Collector. Hence the necessity for alternative claims is apparent. In the last analysis the question of superficiality and multifariousness is for the court, and if the Collector of Customs does not understand the claim in the protest he always has the right to call the protestants before him for an explanation. I am informed that considerably less than 1% of all protests filed are actually acted upon by the Collector of Customs under the authority given to him by law. With the legal machinery already set up to handle these questions perhaps any further effort on the part of the Collector to review his own action, or the action of the Appraiser, is a work of supererogation.

I have been informed on many occasions that the Appraiser and the Collector give great consideration to classifications and to values before official action is taken. The contents of a protest, as of a complaint, is a matter of law for the courts and is seemingly outside the ordinary administrative function. This machinery for the independent review of administrative action should not be delayed or crippled by an intervening administrative review.

It cannot properly be said that protest litigation develops and matures without the knowledge of the customs officials charged with the functions it challenges. It is not until liquidation is complete that there arises any reason for litigation. There seems to be no room for operation of the suggestion that the customs authorities be apprised of the existence of a dispute before litigation. It would seem that the proper function of the Treasury Department was to be certain of its classifications and values before final administrative action is taken, and that once such final official action is taken to leave to the Department of Justice and the Courts the legality of such administrative action.

7. It is charged as a fault in the existing system that the collector is not apprised of the existence of a dispute until after the entry is liquidated and the protest is filed. If this be a fault, which is strenuously denied by those in a position to know, it is not easy to see how it can be enumerated as one of the causes of an undue volume of litigation. The proposition and the remedy suggested are so novel, however, as to call for some analysis, which is hereinafter attempted in the discussion of the proposed legislation.

III. RECOMMENDATIONS

* * * * *

B. Require protests to comply with regulations of the Secretary of the Treasury with respect to their form, contents and authorization.

The recommendation that the Secretary of the Treasury be authorized to prescribe the form and contents of protests is based upon

an unsupported conclusion of fact, embodied in the charge mentioned above that protests are superficial, stereotyped and multifarious, that they handicap the government and permit the protestant to initiate litigation without having a definite claim in mind. The charge is as old as protest litigation and the courts have been considering it for the best part of 100 years and have given an answer upon all of its phases.

If a protest is so superficial as to omit a distinct and specific statement of the objection made by the importer it will be overruled for insufficiency, but it is not objectionably superficial because expressed in brief and simple rather than complex and verbose terms.

There is absolutely no objection to stereotyped protests in class cases and they are preferable to variant language because more easily identified and placed in the class where they belong.

Protests which are objectionably multifarious will be overruled, but a protest is not objectionably multifarious because it contains a reasonable number of alternative claims.

There is probably no customs subject upon which the law has been more exhaustively litigated and settled than the sufficiency of protest and the decided cases answer all of the questions suggested in the Treasury report.

So far as that report states as facts that the reasons for claims are seldom if ever stated with any precision in protests, and that the real nature of the claims is not disclosed but concealed by the typical protest, it is not borne out by the experience of the court itself and the staff of the Assistant Attorney General which must examine and interpret thousands of protests every month. Such protests would be clearly bad and would never survive the objection of the government attorney.

The law as to the sufficiency of protests has so nearly reached the stage of equilibrium that it would be unfortunate to authorize the Secretary of the Treasury to prescribe their form and contents, thus injecting a

new element of uncertainty into the whole subject which it might require decades of litigation to clear up.

The most that the Secretary of the Treasury could effectively do by regulation would be to prescribe a blank form, calling for formal particulars. He could not and should not attempt by regulation to prescribe the contents, so far as they relate to substantive claims, which depend upon innumerable and widely differing states of fact.

The opinion of the best authority is that an attempt to prescribe a form would be to place an unnecessary burden on approach to the Customs Court because of the inelastic character of forms and the difficulty of adapting them to the widely variant facts of individual cases. It is said that the proposed requirement that protests must identify protested items by invoice number and state the paragraph claimed to be applicable to each item with the reasons for such claim would be highly oppressive and practically deny remedy as to consular invoices covering hundreds of items. The present law requires and permits identification of items in general terms in protests and permits detailed identification at the trial.

The Customs Court has little difficulty with the average protest. If it has serious difficulty the protest is apt to be thrown out. Of course it can not always be determined upon inspection of a protest which of several alternative claims is valid, and it sometimes requires litigation to a court of last resort to determine this point. Upon the trial, however, the issues generally become formulated and the competition between alternative claims resolves itself into a question or questions of law.

It has been suggested as a reason for the proposed change that the collector, in reviewing his own action under protest, has difficulty in determining the applicable claim. This difficulty would disappear if the collector could and did require development of the facts at a hearing before him. It is very doubtful, however, whether it was the intention of Congress that the collector, under his power of reviewing his own action under protest, should duplicate the whole

procedure of the Customs Court. His practice, with few exceptional cases, has been to follow the advisory classification of the appraiser, leaving the judicial process to the courts.

It is also claimed, on behalf of the importing community that, where protests are filed by agents, the proposed requirement of the filing of a power of attorney, as a condition precedent to the validity of the protest places a further unnecessary and serious burden upon approach to the Customs tribunals. It would unduly lengthen this report to repeat the arguments advanced on this point, but they would seem to be entitled to serious consideration.

C. Provide a Protest Fee.

The Treasury report recommends the enactment of a statute providing for a fee of \$1.00 for each protest, plus \$1.00 for each alternative claim stated in such protest, all fees to be returned if the protest is sustained.

The recommendation is based upon the charge that protest litigation is speculative and unfounded and the assertion that such litigation is encouraged by the absence of a fee.

Responsible members of the bar say that the charge that protest litigation is speculative and unfounded is an old one in which the adjective "speculative" has been very much overworked. They claim that many assessments of duty are "speculative" in the same sense that the protests against them are said to be; that it is naturally and properly the practice of customs officials, who often have only a meagre knowledge of the facts and are without professional advice as to the construction of the law, in cases where there is doubt, to take a higher of two or more possible rates of duty upon the chance that it will stand the test of litigation. The importer may have doubts, if not absolute conviction, that the assessment is illegal and must protest within sixty days or his rights are gone. It may take him many months to get at the facts. Lawyers of experience deny the accuracy of the assumption that the importer knows all about his goods and ought to be able to decide at once whether he has grounds for protest. They say that in many if not most instances the importer does not know and has great difficulty

in ascertaining the vital facts of his case, which must often be wrung from reluctant manufacturers in foreign countries who cannot be reached by the process of the court, and who guard jealously their manufacturing secrets. These attorneys insist that the filing of a protest by the importer to protect his rights in a doubtful case should not be stigmatized as speculation.

The protest fee would probably average, in important issues, upon the assumption of one principal claim and four alternative claims, as much as \$5. per protest and it is proposed that a separate protest be required for each entry. To this, of course, would have to be added the fee for so-called "duress" entries, also proposed by the Treasury report, which might amount to \$5. or several hundred dollars, depending upon how that provision might be formulated and construed.

Confining the discussion at this point to the proposed protest fee alone, it is claimed by customs lawyers that the proposal to charge the specified fee for every protest filed would make litigation before the Customs Court more expensive than before any court in this country, if not in the world.

The raising of a single question may necessitate the filing of hundreds, perhaps thousands, of protests, as under the proposed practice a separate protest would have to be filed to cover each entry upon which the assessment is challenged. Customs issues are not infrequent in which 1,000, 5,000, or even 20,000 protests are necessary to protect the rights of importers. At an average of \$5. per protest, the aggregate cost of importers would be \$5,000., \$25,000., or \$100,000 for the privilege of trying the issue. In an internal revenue matter a test case which would settle the law and the facts could be carried through all the United States courts to and including the Supreme Court, for aggregate costs of only a small fraction of the above amounts. There would be no fee or charge for filing the individual claims. The statement in the Treasury report that a fee of \$10. is required for income tax claims is believed to be based upon a misapprehension and probably refers

to appeals from reassessments to the Board of Tax Appeals, which are not in the same class as ordinary claims. In the United States courts cases involving the same questions of law and the same parties can be consolidated and treated as one case for the purpose of imposing costs.

The refunding of the costs deposited to the importer who wins does not remedy the wrong done to the importer who loses. The real injustice is the burden upon the latter. No system of remedial justice should require litigants to risk such enormous stakes as the price of litigating doubtful questions of law. Under the proposed system only importers of wealth could afford to litigate important issues which nearly always involve filing a large number of protests. Important questions are sometimes litigated where the aggregate amount is substantial, but where the numbers of protests involve only \$2. or \$3. each, on which the importer would have to deposit from one-half to double the amount involved for the right to litigate the question.

D. Bind the importer to his entered rate.

As already stated, the Treasury report claims that the collector is not apprised of the existence of a dispute until after the entry is liquidated and the protest is filed and that this situation "deprives the government of the opportunities for the special treatment of disputed items which is essential for their fair and efficient handling."

The present law provides that the liquidation of an entry by a collector is final and conclusive upon the importer, unless within 60 days after, "but not before" such liquidation the importer files a protest setting forth his reason for objection to the collector's action. In the nature of things, until the collector liquidates the entry, the importer can not know whether he has any dispute with the collector because not until liquidation will he know what rate of duty the collector will assess. Furthermore the law expressly forbids the filing of a protest before that time, and it allows the collector 90 days after the protest is filed, and before he is required to transmit it to the court, for the "special treatment of disputed items" which is said to be essential.

The Treasury report complains that this procedure does not give the collector his information soon enough. It suggests that the importer should anticipate a dispute that may never arise and inform the collector at the time the entry is made, by a cumbersome and expensive system, what items will be disputed if the collector assesses them at the tentative rate which he compels the importer to deposit with his entry.

To accomplish the objective it is proposed to bind the importer to the rate at which the collector compels him to deposit duty, unless the entry at such rate is made under "duress", and the enactment of a statute is suggested providing that protests shall be valid only if made on items (a) entered under a duress notation stating the rate and paragraph claimed to be applicable, or (b) on which the liquidated rate is greater than the entered rate. For the privilege of making this duress notation the importer is to be required to pay a fee of \$1.00 as to each item so entered.

The binding of an importer to an entered rate would mean that between the comparatively short time after a shipment is landed and its entry, and when probably no samples of the merchandise are available, the importer must, without the possibility of proper legal advice, determine the rate of duty. If the Collector thinks he is wrong, his entry will be rejected. If the Collector thinks he is right, he will be precluded from litigating the question of the classification, although he thereafter ascertains that his own classification, acceded to by the Collector, was incorrect. This would seem to be the equivalent of a statutory enactment that the Government shall draw the contract, that the importer must sign it, and that by signing it he loses his right to litigate. The present practice is, I am informed, that no entry will be accepted by the collector unless it agrees with his own judgment.

What is thus proposed appears to be in effect a protest in anticipation of the regular protest required by law, and for this anticipatory protest the importer must pay most generously when it is recalled that consular invoices often consist of hundreds of items of protested merchandise, not to

speak of the fact that the plan also contemplates a fee of \$1.00 for the regular protest with an additional fee of \$1.00 for each alternative claim.

It is rather remarkable that in the comprehensive criticism of the workings of the Customs Court in so far as protest litigation is concerned, no mention has been made of the other classes of litigation in the court.

In these three classes, reappraisements, review of reappraisements and petitions for remission of additional duties, the dockets are always practically clear and have been for more than ten years. In those years, there have been received from 2500 to 12,000 appeals to reappraisement. On a test case on reappraisement there are often as many as 10,000 so-called duress entries suspended, but they constitute no obstruction whatever to the immediate hearing of new appeals, which are docketed and received from the Collector of Customs and can be heard within the next thirty days. Applications for review of reappraisement decisions by a single judge have always been substantially up to date, and on July 1, 1936, there were pending undisposed of only 121 cases. In that year there were received 274 applications for review and 365 cases decided.

The docket for the trial of petitions for remissions of additional duties is also substantially up to date.

Joseph R. Jackson
Assistant Attorney General

Mr. KASTENMEIER. In view of the lateness of the hour, I will forego questioning and yield to my colleague from Michigan.

Mr. HUTCHINSON. I don't propose to question the lady. I think that she has made an excellent presentation and presents a point of view which I think the record really needed. It is helpful to know that there is not complete unanimity on this bill. However, would you not agree that in view of the fact that the whole Customs Bureau service was reorganized in 1965, and the Collector of Customs was done away with and they formed one agency out of two and so on, in effect, that the procedures before the Customs Court ought to be revised?

Miss SHOSTAK. I think some revision may be desirable. It is not essential, by reason of Customs reorganization. I think there is a common misconception perhaps that something different is done than was done before 1965. Some procedural things are different, but there still are two decisions. There is an appraisalment and there is a liquidation and classification. These two decisions are now made by a team which varies in different ports from one, two, to three people. But they are under one head, District Director, instead of Collector, and Appraiser separately. But there are still two decisions under two different provisions of law.

So I don't share the view that this legislation is urgent, as some believe. I feel that the provisions for judicial review are adequate, at least that they are tried; that they are the result of an evolutionary process which has been changed from time to time, and that they insure a right of judicial review relatively speedily within the physical capacity of the people who handled the cases. And that, while there are some very desirable things in this bill, like the extension of the time for filing claims from 30 and 60 to 90 days, which is very desirable, like the liquidation of the entry so that an importer knows what he owes without having to make perhaps an erroneous computation and think he has \$1,000 involved and it turns out he has 10 cents, which can occur sometimes.

So there are some things that are very good. But if the question were posed to me that was posed by Mr. Poff to the other two witnesses, I would say I do not believe this bill in its present form should be enacted. I think it has some major defects that need to be thought out and revised, and that we are better off to maintain our present system.

I would like to also say that I think the Customs Court, by means of rules, is doing many things which are going to be helpful, which can provide for a complaint without a change in the law, and that by reason of these things which are being done within the framework of the present law, that we are accomplishing many improvements over the procedure formerly in existence.

With respect to one-judge trials, we in the field always have one-judge trials. We see no need for a three-judge trial. We think there is some advantage to a three-judge decision, because it entails also assignment of subjects, which Judge Rao commented on as being desirable because this makes then the Customs Court divided into divisions, whose decisions are then uniform with respect to particular categories of merchandise.

We think that this bill would make New York like the outports; that is, they would have one-judge trials like we do. As a matter of actual practice, I am sure they do have less than three-judge trials

many times, because when one member of a division is on circuit, obviously his colleagues in New York are continuing with their trials and it may be one-judge trials now.

So the matter of one-judge trials to conserve manpower would seem to be possible under present law, unless the case were of such a magnitude that the parties desired to have all three judges seated on the bench when the case was presented.

So we feel that within the present framework of the present law and by means of changes in the rules, which the court is working on, that many improvements are being afforded and that there is no urgent need to rush in with another bill which has many problems that would be created, and then have to come back and bother Congress again to correct some of the things that were done improvidently, like was done with the Tariff Classification Schedules in 1963, which were adopted without full congressional consideration and then required a Technical Amendments Act 2 years later, which Congress had to enact in order to correct those errors which should have been eliminated before the schedules were put into effect.

So our feeling in the West is similar with respect to this legislation, that we should think it through and make the best bill we can before we start some major change, such as is proposed.

Mr. HUTCHINSON. I thank the lady.

Mr. KASTENMEIER. I thank you, Miss Shostak, for your appearance this morning.

Miss SHOSTAK. I thank the committee for permitting me to speak so extensively at this late hour, which I and those in the West deeply appreciate.

Mr. KASTENMEIER. I would like to now call Mr. Derek A. Lee, president of the British-American Chamber of Commerce, who may be accompanied, as I understand, by David G. Pacy, chairman of the executive committee of that organization.

I believe Mr. Lee was not originally scheduled but has prepared his testimony and has the approval of the committee to appear this morning. But I do understand he expects it to be brief.

I apologize for keeping you so late before your appearance.

STATEMENT OF DEREK A. LEE, PRESIDENT, THE BRITISH-AMERICAN CHAMBER OF COMMERCE; ACCOMPANIED BY DAVID G. PACY, CHAIRMAN OF THE EXECUTIVE COMMITTEE

Mr. LEE. Mr. Chairman, we are most grateful to you. We will be very short and give the substance you have in the record of our testimony.

I would like to introduce myself, Mr. Chairman and members of the committee.

My name is Derek A. Lee, president of the British-American Chamber of Commerce and chairman of the board and president of an 80-year-old textile importing and exporting company handling things which are not and cannot be manufactured in the United States, from all of the major European trading countries. The British Government is considering a gift to the John F. Kennedy Center here and to the American Government of needlework tapestry panels which can only be made by our English factory and nowhere else in the world.

I have fought similar textiles like this in the courts for 30 years, to get a duty rate down from 90 percent, which took me 30 years to do it. So I have been mixed up in that sort of thing and met with aggravation.

I am an American by birth, and I am accompanied by Mr. David G. Pacy, chairman of our executive committee and vice president of the British Chamber of Commerce and executive vice president of Ferranti Electric, Inc.

We feel that S. 2624 is of such importance to American and British importers that we have taken the time out of our busy schedule to appear before you, and we are most grateful for the time of this committee.

Our testimony has been carefully reviewed by Allerton Tompkins, a specialist in customs law, who has been closely associated with the importers' problems in promoting international trade for over 40 years. Mr. Tompkins is chairman of the customs and tariff committee of the chamber.

We, the British-American Chamber of Commerce, comprise 1,200 member firms, 80 percent of which are American-oriented, and heartily concur in principle with bill, S. 2624, which we feel is very timely, and appreciate the time, the thought, and the care that has been put into this bill by Government, importers, and lawyers alike, to improve the judicial machinery in the Customs Courts.

However, we strongly recommend further modifications, which in our opinion are fair and just, that will simplify and make the bill more effective and at the same time will not evoke retaliation of other world trading partners as the bill is now worded. We heartily concur with what has been said by Mr. O'Brien, Mr. Colburn, and our colleague from California. This covers a great deal of our testimony, with a few additions, which we have put into our testimony which has been filed with you.

I am not an attorney and therefore cannot claim knowledge of the mechanics within the Customs Courts. However, I am a multi-million-dollar importer and exporter of 38 years' standing. I have appeared before Senate committees and congressional committees on matters of trade and tariff. And I fully recognize the hardships, time, and money placed upon the importer whose responsibility it is to promote international trade in the world's marketplaces to maintain a healthy world trade between nations.

It seems to me sometimes that the poor importers are on trial when it is we, who have the responsibility of maintaining a good sound world economy to the benefit of all.

It stands to reason that the burden already shouldered by the responsibilities for two-way trade should be lightened by providing the importer with legislation that advances and not hinders the process of vitally important trade. I would like to go on record and state publicly that our long relations with the U.S. Bureau of Customs has been a very pleasant and congenial one.

While S. 2624 solves a number of the problems, there are a few inconspicuous but important loopholes to be filled to maintain certain rights which will be taken away from the importers, and there are certain needs that should be embodied in this bill to give equitable balance between the importer and the judicial body.

We have submitted to you, gentlemen, our brief and testimony. I am not going to go through that in detail because of the lateness of the hour. A great deal of it is similar to that testimony which you have already received with the exceptions that you'll note.

As I say, I am not an attorney, but I am an importer. And I feel very much on trial. To expedite and to keep world trade and economy sound, I do recommend that you gentlemen give very careful thought and wisdom, which I know you will do, to the suggestions which have been made in good faith in trying to make this a good bill at this time, so that we don't have to come back at a further time and take up the time of Congress.

Thank you.

Mr. KASTENMEIER. Thank you very much, Mr. Lee. Your statement in its entirety will be placed in the record.

(The statement follows:)

TESTIMONY OF THE BRITISH-AMERICAN CHAMBER OF COMMERCE (RE BILL S2624)
PRESENTED BY DEREK A. LEE, JANUARY 22, 1970

Mr. Chairman and gentlemen, my name is Derek A. Lee, President of The British-American Chamber of Commerce and Chairman of the Board, and President of an 80 year old textile importing and exporting company handling things which are not, and cannot be manufactured in the United States, from all the major European trading countries. I am an American citizen by birth. I am accompanied by Mr. David G. Pacy, Chairman of the Executive Committee and Vice President of The British-American Chamber of Commerce, and Executive Vice President of Ferranti Electric, Inc. We feel that Bill S2624 is of such importance to American and British importers that we have taken the time out of our busy schedule to appear before you in person. Our testimony has been carefully reviewed by Allerton deC. Tompkins, Esq., a specialist in customs law, who has been closely associated with importers' problems and promoting international trade for over 40 years. Mr. Tompkins is Chairman of the Customs and Tariff Committee of the Chamber.

We, The British-American Chamber of Commerce, comprising 1,200 member firms, 80% of which are American oriented, heartily concur in principle with Bill S2624, and appreciate the time, the thought, and the care that has been put into this bill by Government, importers and lawyers alike, to improve the judicial machinery in the Customs Court. However, we strongly recommend further modifications which, in our opinion, are fair and just. This will simplify and make the bill more effective and, at the same time, it will not evoke retaliation of our world trading partners as the bill is now worded.

I am not an attorney and, therefore, cannot claim knowledge of the mechanics within the Customs Courts. However, I am a multi-million dollar importer of 38 years standing. I have appeared before Senate Committees and Congressional Committees on matters of trade and tariffs, and fully recognize the hardships, in time and money, placed upon the importer whose responsibility it is to promote international trade in the world's market places to maintain a healthy trade between nations.

It stands to reason that the burden already shouldered by this responsibility for two-way trade should be lightened by providing the importer with legislation that advances, and not hinders, the process of vitally important trade. I would like to go on record in stating publicly that our long relations with the United States Bureau of Customs has been a pleasant and congenial one.

While Bill S2624 solves a number of the problems, there are a few inconspicuous, but important, loopholes to be filled to maintain certain rights which will be taken away from the importers, and there are certain needs that should be embodied in this bill to give equitable balance between the importer and the judicial bodies.

We respectfully submit recommendations for your very careful consideration and action.

While there is much in this legislation which BACC supports, it believes that in considering ways and means of improving the efficiency of the Customs Court, and relieving the case load upon it, insufficient attention has been paid in certain respects to the consequent burdens placed on the importers.

BACC submits that the effect of certain provisions of this legislation is such as to impose costs and obstacles to doing business upon importers which constitute non-tariff barriers to trade. These are undesirable, and at variance with expressions of government policy elsewhere advocating the reduction of such barriers in the United States, and in foreign countries.

These undesirable provisions contribute nothing to the efficiency or effectiveness of either the Bureau of Customs, or the Customs Court, and appear to be only bureaucratic devices to benefit the bureaucracy. They produce no compensatory benefits for the importers and invite retaliation by foreign governments.

The bill is not intended to raise revenue but it produces nuisance taxes which are an obstacle to foreign trade.

The bill tends to discourage challenges to arbitrary rulings of the Bureau of Customs, which may be contrary to the will of Congress. Specifically:

I. SECTION 113

When a protest is disallowed, and there is no longer an automatic referral to the Customs Court, the importer is faced with substantial additional burdens because the actions he must take are:

1. A formal complaint must be filed within a limited time period. An attorney will be required to do this. This entails costs.

2. Copies of the complaint must be formally served by the importer on the Treasury and Justice Departments. This involves costs and is particularly burdensome for importers away from New York.

3. The complaint will require a filing fee of at least \$5.00, but probably much more.

4. The complaint must contain evidence that all duties demanded by the Treasury have already been paid. This is not currently required in valuation litigation.

II. SECTION 112

Where a trader imports merchandise on a continuing basis—which is the usual rather than the exceptional case—a single complaint will not suffice. He must continue to have his attorney file successive complaints—with all of their attendant costs—every few months in relation to every subsequent shipment on which the Treasury has disallowed a protest. If, in error, a shipment is omitted, no relief will be obtainable with respect to it.

III. SECTION 113

The statute authorizes the court to charge fees for whatever it wishes and at whatever rate it chooses.

Having in mind the wide range of activities for which the court may decide to impose a fee, and the considerable frequency which other provisions may cause the importer to come before the court the burden upon him can become very significant.

IV. SECTION 106

The trial of a complaint will be before a single judge court.

Because of the very special, technical and complex nature of the issues before the court, it is particularly difficult for new judges to quickly acquire the necessary skills to deal with them.

While a strictly arithmetical approach suggests that the available manpower will be better utilized in a larger number of single judge courts, this may be an over-simplification if there is an additional result of a much larger number of cases going to the 5 judge U.S. Court of Customs and Patent Appeals.

The expenses of taking cases to the U.S. Court of Customs and Patent Appeals escalate sharply, and are exorbitant—a minimum of \$300 and frequently in the thousands of dollars.

During 1969, only 39 out of 314 cases were appealed from a 3 judge to the U.S. Court of Customs and Patent Appeals panel.

If the new procedure with its attendant possibility of errors by new judges, makes the frequency of appeal to the 5 judge panel much greater, as we believe it may, then the courts will not obtain the benefit desired and the importer will be faced with sharply increased appeal costs.

An alternative is suggested in the "Recommendations" below.

V.

The holding of court hearings in a foreign country operates only to the benefit of the government. Importers normally, due to their atrocious costs, do not desire such hearings.

VI. SEC. 205

The government, after forcing the importer to enter merchandise at the rate and value it decided upon and, after liquidating the entry which it has found after due investigation to be correct, is given further opportunities to find new and higher rates within 90 days after liquidation, and again, within 90 days after re-liquidations.

There is no reason why the government should not correct an erroneous liquidation, but this should be done only with the court's approval in the event that increased duties result.

This discrimination against the importer, and in favor of the government, is inequitable. It exposes the importer to the substantial and continuing hazard that a demand for additional duties—which must be paid before he can protest them—can upset his calculations as to the costs to him of the goods which are the foundation of his business. He may indeed be committed to a business situation in which he cannot recover such increased duty costs by an increase on his selling price, so long after their importation. This produces an unreasonable business uncertainty.

RECOMMENDATIONS

If customs review procedures are to be revised, the changes should be in the direction of simplification, and the minimizing of procedural delays so as to promote rather than to impede foreign trade, and increase the cost to the U.S. consumer.

The desired benefits of more efficient court operations will more readily be obtained in this way. It is not reasonable to attempt to solve problems in customs court procedures at the expense of the importer who must use them, and who must pass his charge on to the consuming public.

The history of reform of customs court procedures in the last several decades seems to have been proceeding as if increase in formality would somehow, by increasing the stature of the Court, cause it to function better. This is not necessarily the case.

We submit that:

1. Importers having complaints whether individuals, partnerships or corporations, should be allowed to present their problems to the court without employing attorneys in matters that only require simple adjustments, shortages, uncorrected errors by Customs, defaults resulting from non-compliance with a Treasury regulation.

2. The courts should not be bound by the regulations of the Treasury Department, but should look to the merits of each case and a just settlement.

3. We favor trials and decisions by a single judge court, but there must be an adequate appellate procedure. This should take the form of an appellate division within the Customs Court, to which appeals from the decisions of the single judge court could be taken before three experienced judges.

This should all be without cost to the aggrieved importer who has already been forced to pay duties he believes to be excessive.

Appeals to the United States Court of Customs and Patent Appeals should be authorized only where important Constitutional or Presidential, political or international questions are raised.

4. There should be no requirements for printing in any appellate courts. This is an expensive mechanism in days when other accurate and highly legible reproducing systems are readily available at much lower costs.

5. Court hearings in a foreign country should not be authorized without the consent of both parties.

6. Once an importer goes into court with a complaint, future imports of the same article should be allowed to receive the benefit of a favorable court decision, without the necessity and cost burden of having attorneys file periodically a series of supplemental court complaints.

7. A liquidation should bind the government, and there should be a court procedure required of the government similar to that required of an importer before any higher rate or value can be imposed. After liquidation, the burden of establishing the higher duty rate should be on the government.

8. Where a protest is filed on the basis of a test case before the Bureau, it should be held by the Regional Headquarters as a pending matter for as long as it takes for a final decision to be reached by the Court. The proposed two year time limit is arbitrary, and unrealistic in terms of typical times taken to obtain final decisions. Neither party should be bound by a decision in a pending test case.

Where there is a decision adverse to the government, the Regional Commissioner should be allowed to recompute, and reliquidate all pertinent deferred action entries in the file, without further reference to other government agencies or the courts.

9. The importer in a dutiable value proceeding should not have the double burden of proving that the appraisement is wrong, and also determining what the correct dutiable value should be. The latter is often an impossible task for him, because he does not have, and cannot obtain, the necessary evidence from his competitors about their sales practices. This is usually available to the government.

The customs officials should be directed to re-appraise along the lines approved by the court.

10. Where an appraisement is made by an official on the basis of ways and means he considers "reasonable" (Sec. 204(a) Sec. 500(a)) he should disclose these so that the importer will have the opportunity to produce bases which he considers more reasonable.

11. Currently the Bureau of Customs provides, voluntarily, a notification to an importer prior to liquidation of an increase on duties exceeding \$15.00. This provides the opportunity for the importer to appeal administratively within the Bureau. This notification should be made a statutory requirement and liquidation without such notice subject, upon timely complaint, to cancellation as void.

12. Relief should be given to the importer from the requirement to pay all duties claimed at the time of entry, when the Commissioner confirms that a meritorious dispute on value, or classification, is pending in the Bureau. Payment of the lower amount of duty claimed by the importer should be sufficient to allow the entry to proceed.

(NOTE: The present testimony has been filed with the Department of Justice, Washington, D.C., where there is available for inspection the registration statement of The British-American Chamber of Commerce, 655 Madison Avenue, New York, New York 10021, under 22 U.S.C. Secs. 611-621 as agent of British National Export Council and Confederation of British Industry, in London, The Scottish Council, Development and Industry, in Edinburgh, and The Development Corporation for Wales, in Cardiff. Registration does not imply approval of this material by the United States Government.)

Mr. KASTENMEIER. I would only ask you one question. Do members of your organization have a problem different in any respect from other importers with respect to customs?

Mr. LEE. I would not say that they do, sir. In principle, I think they are very much the same. Differences arise in presenting our testimony as we argue for importers alone.

Mr. KASTENMEIER. But it does appear to take a somewhat less sympathetic view to the legislation than that expressed by Mr. O'Brien in behalf of his organization, doesn't it?

Mr. LEE. We put in a few other things which we feel are very important. Some of them are the same. But we do add additional ones important directly to the importers case.

Mr. KASTENMEIER. Thank you.

The gentleman from Michigan?

Mr. HUTCHINSON. I have no questions of the gentleman. I appreciate his testimony.

Mr. KASTENMEIER. We appreciate your appearance this morning, Mr. Lee.

Now we will hear Mr. M. Barry Levy, national secretary for the national committee on customs law, Federal Bar Association.

**STATEMENT OF M. BARRY LEVY, NATIONAL SECRETARY,
NATIONAL COMMITTEE ON CUSTOMS LAW, FEDERAL BAR
ASSOCIATION**

Mr. LEVY. Our committee wishes to raise at this point only two technical points with respect to the language.

Section 514(b)(1) of the Senate bill provides as follows:

Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, separate protests may be filed for each category.

This language is particularly confusing and inappropriate. If an importer filed a timely protest challenging the value with respect to a particular category of merchandise, and subsequent thereto filed another timely protest challenging the rate with respect to the same item of merchandise, said second protest under this language would be unauthorized.

Frequently, a broker, an importer, and the attorney file protests with respect to the same merchandise. Even though these protests may each challenge a different action, which forms part of the same liquidation, only the first protest is authorized under section 514(b)(1), since only one protest may be filed.

The committee feels that all protests which are timely filed within 90 days from the date of liquidation should be considered as part of a single protest, or should be converged and treated as a single protest.

As for the second objection, section 514(b)(1) provides that a protest may be amended at any time prior to the expiration of the 90-day period in which the protest could have been filed under section 514 of the act. It is clearly in the interest of the Bureau of Customs, the Department of Justice, and the U.S. Customs Court, importers and their attorneys if additional claims could be added to the original claim at the administrative level.

Although we agree that new objections to a liquidation cannot and ought not be permitted after the expiration of 90 days from the date of liquidation of an entry, certainly there would be no objection to permitting claims to the original protest. By permitting importers to add claims to their protest, the Department of Justice and the importers would be spared the unnecessary work involved in bringing the case to court for the sole purpose of adding a claim to a protest.

We feel that no Government agency or other interested person would oppose the addition of the language which we have suggested.

Thank you.

Mr. KASTENMEIER. Have you tried your language on either the Treasury or Justice Department as to its acceptability?

Mr. LEVY. Informally and unofficially. There seems to be complete agreement as to the concept here. But it seems that the language is too confusing.

Under today's law if any number of letters raising objections are received timely, within 60 days of the liquidations, these letters are treated as a single protest. So the only real problem in connection with the statutory language is the fact that they used the expression, "only one protest"—and that it is limited to one category of merchandise—where it is frequent that more than one protest would be filed against the same category.

It doesn't appear that anyone would object to that.

So it just seems that the language is unclear. It raises an ambiguity.

Mr. KASTENMEIER. Thank you for calling it to our attention. I would invite a response perhaps in writing from the Treasury people.

(Subsequently Hon. Eugene T. Rossides, Assistant Secretary for Enforcement and Operations, Department of the Treasury, submitted the following:)

THE DEPARTMENT OF THE TREASURY,
ASSISTANT SECRETARY,
Washington, D.C., January 28, 1970.

ROBERT W. KASTENMEIER,
*Chairman, Subcommittee No. 3, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: In accordance with your suggestion at the conclusion of the hearings held by your subcommittee on the above bill, I am submitting for subcommittee files, in the form of a memorandum, a series of comments on amendments proposed by public witnesses in their oral presentations, insofar as they would affect title II and III, the customs administrative provisions.

In addition, I want to take this opportunity to reaffirm that all provisions with substantive trade or revenue impact have been carefully avoided, both in the preparation of S. 2624 as introduced and in the course of its amendment in the Senate. Like bills in previous Congresses that have been concerned with substantive matters under the customs laws, such provisions have been reserved for separate consideration.

The long-overdue procedural reforms proposed in S. 2624 as amended by the Senate reflect three basic principles:

1. Litigation in the Customs Court should not be more lightly undertaken or available than in any other Federal court, regardless of the special nature of its jurisdiction. A plaintiff wishing to challenge a final administrative decision should be faced with the same choices of risks and burdens, including filing costs, that confront any other party instituting civil proceedings in the Federal courts, not only in private litigation, but in opposition to final decisions of other Government agencies.

2. No importer should be entitled to initiate an action in the Customs Court with respect to a customs administrative decision affecting his importation until he has fully exhausted his administrative remedies, within reasonable time periods and in accordance with reasonable procedures. But the importer should also be given the opportunity, after final administrative action upon his challenge has been taken at the administrative level, to accept that final action and choose not to invoke the court's jurisdiction if he believes that course to be in his best interest at that time.

3. Every importer should have the right to meaningful administrative remedies and an adequate period of time to support protests against initial customs administrative decisions, provided that such decisions are properly protested within the time allowed to file a protest under the bill.

The Treasury Department urges the approval of S. 2624 without further amendment, other than for the purpose of making necessary clerical or grammatical corrections in the bill as passed in the Senate.

Thank you again for the courtesy and consideration extended by your subcommittee to the Treasury Department in its presentation at the hearings.

Sincerely yours,

EUGENE T. ROSSIDES.

MEMORANDUM—RE: AMENDMENTS PROPOSED BY PUBLIC WITNESSES IN ORAL TESTIMONY BEFORE SUBCOMMITTEE NO. 3, HOUSE JUDICIARY COMMITTEE WITH RESPECT TO S. 2624

I. American Importers Association

It should be noted that all of the amendments to Titles II and III proposed by Mr. O'Brien in his testimony on January 23, 1970, were included in his testimony before the subcommittee of the Senate Judiciary Committee on September 8, 1969. None of these proposals are included in the bill as passed by the Senate. The most important recommendations made by the American Importers Association before the Senate, such as the mandatory provision for "independent" ad-

ministrative review of protests in certain circumstances and the requirement for actual notice of the denial of a protest (except in instances where accelerated disposition has been requested) were included among Senate amendments, without opposition by the Treasury Department.

The Treasury Department continues to urge rejection of the amendments proposed before the House Subcommittee:

(a) The AIA presentation states that in cases where additional duty is determined to be due at the time of liquidation, following the original deposit of estimated duty with the entry papers, the Government "should wait for the money" until the termination of all judicial proceedings. These additional duties are characterized as being due because of the need of the Government to "correct its own error", presumably in connection with the original estimated duty liability at the time of entry. The bill would make payment of all duties a precondition to the commencement of an action in the Customs Court.

The Senate retained the requirement in the original bill that a case may not be initiated in the Customs Court unless all liquidated duties, charges, or exactions have been paid at the time the action is filed (section 110 of the bill). Before rejecting the AIA recommendation, the Senate Committee was made aware of the fact that although the initial deposit of estimated duties at the time of entry is based on the Bureau of Customs preliminary estimate of duty liability, that estimate is based on entry documents submitted by the importer which are generally taken at face value for this purpose. Subsequent determinations of increased duty liability reflect the first investigation and evaluation by the Bureau of Customs of value figures, merchandise descriptions, and other information contained in the documents as well as examination of samples of the merchandise itself. The relatively few instances in which the required deposit of duty at the time of entry would depart from the importer's own estimate (other than in clear disputes as to the applicable law, which would ultimately go to court in any event) would arise in circumstances such as computational errors on the face of the entry documents or some change in applicable law which may have gone into effect between the time of exportation of the merchandise and the time of its arrival in this country.

If the entry procedure on which the preliminary estimate of duty liability is based were in fact a full-scale examination and processing by customs, all entries could be liquidated at the time of entry, and no subsequent processing would be necessary. Such processing would, of course, cause substantial delay in the release of the merchandise and create intolerable obstacles to the flow of trade.

In addition, the Senate Committee apparently found no reason why the importer should be entitled to retain, throughout a possible lengthy court procedure, the use of additional duties that are determined to be due. The Committee may well have concluded that any further delay in the collection of duty, solely because of the commencement of a court action, would actually encourage litigation and would thus clearly conflict with the primary purpose of this bill, which is designed to cut down on the tremendous volume of customs court litigation under existing law.

(b) The AIA recommends that a written notice should be required to inform an importer that his protest has been allowed. Under the bill, such a notice would be sent only when a protest is denied.

As under existing law, the allowance of a protest under S. 2624 would result in the reliquidation of the entry, and notice of that reliquidation is required to be given to the importer. The allowance of the protest would, in many instances, result in a refund of duties collected, as well.

The Administrative Procedure Act (5 U.S.C., section 555(e)) also reflects a concern for protection of interested parties by requiring notice of the *denial* of their written petitions, but not of their allowance.

The requirement of an additional notice of allowance of protest would be redundant, wasteful, and unnecessarily burdensome to the Government in these circumstances.

(c) AIA recommends that at the time of "the official return on the invoice", Customs should be required to indicate the legal basis of its appraisalment, *i.e.*, the statutory method used in arriving at any change in the value of the merchandise originally claimed by the importer.

As indicated on Page 24 of Senate Report No. 91-576 accompanying S. 2624, however, the importer may avail himself of the opportunity, *before* liquidation, to determine the basis for *any* change made in the processing of his entry which leads to a proposed increase in his duty liability of \$15 or more (which, as a

practical matter, would apply to virtually all commercial shipments affected by the bill). Existing regulatory procedures for giving notice to the importer of any such proposed change will continue to be available under the bill.

(d) AIA suggests that when a mailed notice of denial of a protest is returned to Customs undelivered, it should be remailed to the broker who filed the entry.

It is a well-accepted rule, particularly in circumstances where persons such as importers or their agents have continuing relationships with a Government agency, that the person affected by the Government decision and who is entitled to notice thereof may reasonably be expected to keep that agency informed of his most current address and any changes therein, and that the agency is obligated only to mail required notices to the last known address of the affected party. The AIA proposal would not only shift a reasonable obligation of the importer to the Government, but would create additional uncertainty in individual cases as to whether an importer has invoked the jurisdiction of the Customs Court within the time that would be allowed under the bill.

(e) Finally, AIA proposes that an importer who has a request for a ruling pending with the Commissioner of Customs that would affect his duty liability should be permitted to estimate and deposit preliminary duties at the time of entry on the basis of his own allegation, rather than the "opinion" of the administering customs official, and no liquidation of the entry should take place until the Bureau ruling is issued.

We strongly oppose such a self-serving opportunity for avoidance of duty liability properly determined by customs administering officials under existing procedures. All importers have ample opportunity to obtain advisory rulings in advance of any specific importation of merchandise. If no such ruling has been obtained, the bill, and the anticipated regulations thereunder, will afford ample opportunity for an importer to protest the liquidation of his entry and to seek further review outside the district level that may result in a reversal of the original interpretation of law and the allowance of his protest, with appropriate refund of duty.

II. Association of the Customs Bar

(a) On Page 4 of his statement, Mr. Colburn erroneously asserts that an importer seeking to preserve his rights to ultimate judicial review "must file separate protests against each and every entry of merchandise as it is liquidated * * *".

Section 207 of the proposed bill in fact provides that "only one protest may be filed for each entry of merchandise", with specified exceptions, but in no way precludes the consolidation of multiple entries raising the same issue in a single protest. In fact, such consolidation, at the protest level before the Bureau of Customs and at the time of filing a summons before the Customs Court, is one of the primary objectives of S. 2624. The general rule of not more than one protest per entry is designed to eliminate the filing of multiple protests and the constant reconsideration of the same issue.

(b) On Page 5 of his presentation, Mr. Colburn refers to a filing fee imposed under the Tariff Act of 1913. That fee was required as a condition for filing a protest required for administrative review with the Bureau of Customs. Such a fee is not contemplated by S. 2624, which is designed to enlarge the opportunities for administrative settlement of disputes without resort to the Customs Court.

(c) Mr. Colburn strongly urges an unlimited right to amend a protest while it is under consideration in the Bureau of Customs, as well as the right to raise objections to any administrative decision for the first time before the Customs Court, without regard to whether it was the subject of administrative review, as long as the "res", i.e., the specific merchandise involved in the liquidation, is also involved in the administrative or judicial review process.

Such a proposition flies in the face of any modern concept of exhaustion of administrative remedies. S. 2624 is clearly intended to expand the scope of administrative review. Many provisions designed to implement that objective were strongly opposed by Mr. Colburn before the Senate subcommittee, including the "independent" review concept and the two-year period for protest review which will permit more meaningful evaluation of importer claims.

S. 2624 will give to importers, for the first time, an opportunity for administrative review of *appraisal* claims. In addition, it will lengthen from 30 to 90 days the period within which importers may evaluate their justification for such claims, and from 60 to 90 days the period within which the importer may determine whether he wishes to seek administrative review of all other customs administrative decisions affecting his entry of merchandise. Finally, as under

existing law, the importer who has properly protested a specific decision during the statutory period for filing a protest may present any claims or argument that he believes to be appropriate both at the administrative review stage and in the course of any subsequent court action, in continuing his objection to the protested administrative decision.

The orderly process of administrative and judicial review would be completely undermined, and the opportunity for bypassing rather than exhausting administrative remedies would be substantially enhanced, if the proposed statutory period of 90 days for filing a protest did not apply equally with respect to all administrative decisions. The fact that an importer has protested one decision, such as classification of merchandise, within that period should not entitle him to challenge any other decision (whether with respect to appraisement, a shortage of merchandise, or any other decision specified under section 514 of the Tariff Act) after the protest period has expired and while his initial protest is being considered or, as Mr. Colburn further proposes, for the first time in the Customs Court, after his initial protest has been administratively denied without consideration of this further protest. Such a wide-open amendment procedure would completely vitiate the 90-day limitation on filing of protests, encouraging pro forma and dilatory filings and defeat the administrative exhaustion principle.

(d) On Page 11 of his statement, Mr. Colburn is concerned about the scope of the exception to the "one protest per entry" provision which would permit the filing of separate "claims" and the treating of such claims as part of a single protest.

Mr. Colburn is correct that this amendment was intended to cover protests with regard to the same merchandise which are currently acceptable not only from the importer himself, but from such agents as his broker and his attorney, as well, as long as they are all timely filed. Although the Department recognizes some lack of coordination among the parties when such multiple filings occur, it has never sought to penalize the importer in these circumstances. There is no intention of accepting only the first of such claims to the exclusion of the others which are also timely filed. Consequently, the bill would permit the consolidation of the separate documents and their treatment as a single protest, and the Bureau of Customs will undertake their consolidation in such circumstances.

If the subcommittee believes it to be necessary or helpful for purposes of clarification, the Committee Report might indicate that the "claims" exception to the one protest per entry rule is intended to cover protests timely filed by different authorized parties representing the importer and dealing with different administrative decisions affecting the same merchandise. In these circumstances, the Department, in the interests of equity, will undertake their consolidation and treatment as a single protest without penalizing the importer.

The Department strongly objects, however, to the undertaking of such a burden on behalf of the importer where, as in the past, he chooses to file separate documents with respect to the same merchandise. The importer or his agent should undertake the responsibility for such consolidation during the extended 90-day period that will be authorized by this bill, and section 207 is designed to require the importer to take that initiative where the exceptions do not apply. Mr. Colburn's proposed language would merely shift this consolidation burden to the Government.

(d) Mr. Colburn continues his opposition to the two-year period for administrative review (despite the endorsement of that time period by most importers, and specifically by the American Importers Association in these hearings). He now urges the substitution of a one-year period for such review, and argues that (1) customs itself expects to process most protests within such a period and (2) delays in the administrative process are an impediment to "expeditious disposition of customs litigation."

The Department is strongly opposed to any reduction in this two-year period for administrative review. Limitations of time on the administrative review process are in direct conflict with one of the primary objectives of this bill, *i.e.*, the development of meaningful administrative procedures that will afford increased opportunity for settling controversy between the Government and the importer without resort to the courts. The focus of this approach is on the avoidance, rather than the "disposition" of litigation. The importer clearly shares this objective with the Government.

The Department expects the overwhelming majority of protests to be processed well within the two-year period. But the more difficult protest cases, the protests accompanied by applications for review at higher levels, and the cases involving repetitive importations of identical merchandise in which a single clear-cut issue

is involved, where a test case already at trial before the court may dispose of the issue to the satisfaction of both parties, are significant instances in which reduction of the two-year review period must certainly work against the importer's effort to bring about an administrative reversal of the original customs decision.

As has been stated many times, the simplified acceleration procedure provided under the bill on the initiative of the importer any time after the first 90 days of the review period was designed to protect importers who would not be benefited by the longer review period and who seek expeditious resort to the courts.

III. Testimony of Miss Shostak

(a) Miss Shostak asserted that in view of the impact of S. 2624 on "duty collections", this bill should be considered by the Ways and Means Committee.

As previously indicated, the Treasury Department and the Department of Justice have been extremely careful to exclude from this bill any provisions with substantive trade or revenue impact. Rather, the focus has been on procedural reform, and the Customs administrative provisions are concerned only with the procedures for processing importations and for the review of contested administrative decisions that parallel or are interrelated with the Customs Court procedures that are amended by the bill. In addition, Titles II and III formally repeal or revise nomenclature in a large number of obsolescent provisions that have already been superseded, as a matter of law, by Reorganization Plan No. 26 of 1950 and Reorganization Plan No. 1 of 1965. S. 2624 and the companion bills introduced in the House of Representatives were referred to the respective Judiciary Committees.

In addition, several amendments proposed before the subcommittee of the Senate Judiciary Committee were opposed by the Department, because they went beyond the limited procedural scope of S. 2624. For that reason, the Senate subcommittee agreed not to consider such proposals on their merits.

(b) Miss Shostak proposed an amendment to the bill to permit the payment of interest by the Government on overassessments determined to have been collected by the port.

The Department opposes consideration of such an amendment as part of this bill as not germane to the procedural scope of S. 2624.

Parenthetically, it may be observed that such a proposal has been considered from time to time within the Department, as part of a broader package which would also charge importers interest with respect to deficiencies and which would in addition, preclude the payment of any refunds of duty, whether determined to be allowable administratively or judicially, unless the claimant can establish that the burden of the overassessment has been borne by him and has not been passed along to a third party. Such an "anti-windfall" provision has precedent under the excise tax provisions of the Internal Revenue Code.

(c) Miss Shostak's assertion that additional administrative review procedures for protests serves no purpose clearly conflicts with testimony given by other importer representatives, as well as Government witnesses.

(d) In opposing protest review procedures, Miss Shostak refers to available procedures preceding liquidation which she alleged had not been disclosed to the Congress. Reference to Page 24 of the Senate Report on S. 2624 will reveal a detailed analysis of these procedures.

In the course of this portion of her presentations, Miss Shostak referred to a "practice" of sending out a notice on customs Form 5561, before liquidation, and before formal appraisement, in connection with advances in value. This procedure is in fact required by section 8.29(c) of the Customs Regulations, and thus is binding on the Bureau of Customs. It could not be modified without compliance with the formal rulemaking procedures of the Administrative Procedure Act.

(e) With regard to Miss Shostak's urging of a continuation of the procedures for automatic referral of protests to the Customs Court, we believe that the Government position in this matter is already clear in the record. This archaic vestige of the administrative status of the former Board of General Appraisers has no place in the Customs Court, and prevents the giving of meaningful finality to decisions in the Bureau of Customs. Indeed, under present procedures, Customs Court calendars cannot be pruned of litigation *unwanted by any party* without the assumption of some burdensome action by the importer (by abandonment), the Government (by motion to dismiss) and by the Court (by dismissal) with concurrent wasteful and burdensome paper work and file shuffling.

(f) Miss Shostak objects to the loss by the importer of his "right" to contest appraisal decisions in court before being required to pay duty.

This result is one of the clear intentions of S. 2624. This "right", historically rooted in the adversary roles of the political appraisers and political collectors of customs, has no modern justification. The Bureau of Customs now makes all administrative decisions in the course of a single process, and no one decision can be justifiably segregated for purposes of judicial review, at the cost of a totally wasteful duplication of procedure and delays in completion of the administrative process.

The predictability and certainty that the importer will derive from a modernized procedure will outweigh any alleged hardship in these cases. In addition, the new opportunity for administrative reviews of a protest of the appraisement decision will afford him a further level of consideration before payment of additional duty attributable to any increased valuation becomes mandatory.

(g) Miss Shostak alleged that importers' lack of knowledge of the basis of appraisement utilized to increase the valuation administratively compels the filing of many protective appeals. Government and private witnesses, including Miss Shostak, however, offered explanations at the hearing, of preliquidation review practices and the issuance of customs Form 5561, which affords importers the opportunity to obtain information such as the basis of appraisement prior to the liquidation. As previously indicated, such opportunities continue to be available under the bill.

(h) Miss Shostak argues for the right to amend protests after the 90-day period allowed for filing, so that the importer may not be denied the opportunity to present different *claims* in the course of administrative review which might become relevant. She gives as an example the publication of a court decision in classification matters handed down while a protest is under review which might permit the presentation of a new argument for a different rate of duty in the classification case.

As indicated in response to Mr. Colburn's presentation, the submission of additional claims with respect to a decision that has been properly protested within the 90-day period is permissible under the bill: only the protesting of different decisions is precluded after the 90-day period. This distinction is discussed on Page 27 of the Senate Committee Report.

(i) Miss Shostak recommends that the provisions regarding the inspection of books and records, now within the authority of collectors and appraisers, should not be amended to provide for an "appropriate customs officer", as provided in the bill, but that the district director of customs should be specified. Miss Shostak is concerned that under such a broad authorization, perhaps even clerks could be given quasi-judicial powers.

The designation of "appropriate customs officer", with ultimate authority in administrative officers to fix responsibility in regulations, where public notice is required, is in accordance with procedures approved by Congress in such matters. For example, under Reorganization Plan No. 26 of 1950, approved by the Congress, the functions of all customs officers and employees were vested in the Secretary of the Treasury, who was then authorized to reassign these functions, or to redelegate the authority to reassign, completely within his discretion. In effect, at that point, all provisions of law designating named Treasury Department employees to perform customs functions were rendered obsolescent.

Titles II and III will modify or formally remove from the statute books many statutory provisions of this nature, and in addition, conform to the approach of Reorganization Plan No. 26 of 1950 by leaving to regulations the assignment of administrative responsibility.

IV. Derek A. Lee—British-American Chamber of Commerce

In addition to proposals recommended by other witnesses and discussed elsewhere in this memorandum, the following customs administrative recommendations by Mr. Lee should be commented upon:

(a) Mr. Lee objects to section 205 of the bill, which would permit the Government, within the 90-day period following liquidation, to reliquidate the entry voluntarily, on its own initiative. The objection is directed primarily to the possibility that such a reliquidation would result in a higher rate of duty for the importer.

As indicated on Page 25 of the Senate Committee Report, this provision is designed to permit the correction of technical errors, primarily in appraisement, without the need to resort to more formal procedures (including litigation). Under existing law, the district director would be in the anomalous position of having to bring an action against himself in order to correct a computational

error, if the correction would result in a higher value for the merchandise (presumably, the importer would not hesitate to avail himself of the provisions of section 520(c) of the Tariff Act of 1930, unchanged by the bill, to correct such an error where the correction would decrease the value). As further pointed out by the Senate Report, "to the extent that this provision authorizes adjustment of rates of duty or other matters embraced by a liquidation under existing law, it is merely declaratory of existing law" (except for an extension of time from 60 days to 90 days, corresponding to the increased time for filing a protest).

The Treasury Department continues to maintain, as it did before the Senate, that the purpose of the administrative process is and should be to determine the true duty liability of the importer on the basis of all available information. To the extent that section 205 of the bill extends existing authority to make voluntary adjustments to appraisement decisions, whether resulting in higher or lower duty liability, such an extension is in keeping with the purpose of the bill and of the administrative process, as we construe it.

(b) The Senate Report, beginning at the bottom of Page 27 through the first full paragraph on Page 28, indicates the circumstances in which the Department would consider the retention of protests involving an issue identical with that in a test case before the Customs Court. We do not, however, contemplate a universal replacement of the Customs Court suspension procedure, in view of the many instances in which other issues are involved in protests and administrative suspension would merely result in additional delay in their ultimate disposition.

It is worth noting that Mr. Lee, unlike Mr. Colburn, believes that a two-year period for administrative review is *not sufficient* for adequate administrative processing of a protest.

V. Mr. M. Barry Levy—Customs Committee, Federal Bar Association

(a) Mr. Levy's first concern is similar to a concern expressed by Mr. Colburn for the Customs Bar. He interprets the language of the proposed amendment to section 514(b)(1) to require the filing of one protest against each entry in all circumstances, so that any protest filed by an equally authorized agent within the 90 days, but subsequent to another protest with respect to the same merchandise, would be rejected as untimely.

As indicated above, the Department believes that the proposed language in the bill immediately following the language quoted by Mr. Levy ("In addition, separate claims with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest") clearly authorizes different parties to file separate claims, where each party is properly authorized to do so, and all such claims will be consolidated by the Government and considered to be one proper protest within the meaning of the bill. We believe that an example illustrating the problem concerning Mr. Colburn and Mr. Levy should be inserted in the committee report to illustrate this application.

As previously indicated, the Department opposes any amendment of the bill that would permit repetitious filings of protests, raising separate issues with respect to the same merchandise, in any circumstances other than those intended to be covered by the exception in the bill's present language, where different filing parties are involved. Such an amendment would conflict directly with the objective of promoting consolidation of claims in single protests wherever possible.

(b) Mr. Levy asserts that the restriction on amendments of protests to the 90-day period in which the original protest may be filed would interfere with the most efficient settlement of cases at the administrative level. Like Miss Shostak, he interprets the bill to prevent the importer from asserting additional *claims* in the course of the review process. He states, however, in contrast to the position of Mr. Colburn that "we agree that *new objections to a liquidation* cannot and ought now be permitted after the expiration of 90 days from the date of liquidation of entry * * *" (emphasis added).

As indicated in the course of the hearings, and, as clearly stated on Page 27 of the Senate Report, "the bill will not prevent the assertion of additional claims or grounds of consideration either in connection with the review of a protest or in subsequent litigation provided that these claims or grounds pertain to an administrative decision (within the meaning of section 514 of the Tariff Act) that has been properly protested within the 90-day period allowed by this bill."

In the light of the foregoing passage from the Senate Committee Report, we cannot see the necessity for further amendment of the bill in this respect.

Mr. LEHMAN. It was our understanding that in the Senate committee report, the legislative history would indicate that where different parties representing the same importer, such as a broker and an attorney, filed within a 90-day period different claims, one with respect to value and another with respect to classification, the intention of the proposed statutory language is to permit the consolidation of those claims into a single protest and not to bar the subsequent ones, that the purpose of dealing with them as a single protest is to give them all equal status and to consolidate them.

In the interest of clarity, it may be desirable to include in the House report the language, for example, utilized by Mr. Colburn, whereby he illustrated one claim filed with respect to value by a broker perhaps, another with respect to classification by an attorney. We have no objection to using this illustration to highlight our interpretation of this language that these would constitute different claims, which would, in fact, be deemed a single protest.

All of these claims would be consolidated, and none of them would be barred.

With respect to the second point, this was with regard to consideration of additional arguments or claims after the 90-day period, I believe here again the Senate report goes into this in some detail and indicates that whereas no new decision may be challenged after the 90-day period, additional arguments may be presented. And, to refer to Miss Shostak's example, if there were to be a later court case, indicating that a different tariff rate should be applicable, this would be an additional argument that could be considered during that 2-year period and during the administrative process.

I believe on page 27 of the committee report in the Senate, there is language, if I may summarize it:

An importer who has properly protested an administrative decision such as the classification of his merchandise within that 90-day period might thereafter contest the appraisalment of the same merchandise, circumventing the 90-day limit on the protest of decisions, if the amendment of protests were not restricted.

To paraphrase this further, he would not be able to raise the appraisalment question after the 90-day period under the bill.

However, going back to summarize the second full paragraph on page 27, a protest may be amended under regulations prescribed by the Secretary at any time within the 90-day period within which the protest may be filed. This is not intended as a change in the existing law. The bill will not prevent the assertion of additional claims or grounds for consideration either in connection with the review of a protest or in subsequent litigation, provided that these claims or grounds pertain to an administrative decision that has been properly protested within the 90-day period.

This would permit the party to introduce new grounds with respect to the classification protest that concerned Miss Shostak, even though those grounds do not become pertinent until after the 90-day period has expired.

Mr. KASTENMEIER. Thank you, Mr. Lehman.

I did not desire to transform the hearing into an adversary proceeding. I will ask Mr. Levy for further comment on that. And then I think the committee will have to deal with that matter in another way.

But does that help at all?

Mr. LEVY. I suggested earlier that there is really no disagreement at all on the concept. Mr. Lehman pointed out that the Bureau has a very definite interpretation of this statute. We suggest that the statute ought not to be ambiguous at all, and there certainly is language which would remove completely any doubts as to what Congress intends.

So it seems very clear to us that as it is written now, it is confusing and subject to interpretation and it ought not be.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. HUTCHINSON. You are suggesting that instead of simply relying upon some words in a report, which the court will probably not get around to reading, that it might be better to clarify the language in the statute itself. Is that right?

Mr. LEVY. Yes.

Mr. HUTCHINSON. Thank you.

Mr. KASTENMEIER. Mr. James R. Sharp's statement will be received for the record as it was in the Senate, if he cares to subsequently make it available to the committee.

This concludes the hearing on S. 2624 and related House bills.

If there remain questions raised that parties care to comment on, I would invite either modified statements or letters directed to the committee within the next week.

(Subsequently Hon. William D. Ruckelshaus, Assistant Attorney General, Civil Division, Department of Justice, submitted the following:)

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., February 4, 1970.

HON. ROBERT W. KASTENMEIER,
*Chairman, Subcommittee No. 3,
House Judiciary Committee, Washington, D.C.*

DEAR MR. KASTENMEIER: I have had an opportunity to review the prepared statements submitted at the January 23, 1970 hearing of your Subcommittee on S. 2624 and related bills by Mr. Gerald H. O'Brien, on behalf of the American Importers Association, Inc.; J. Bradley Colburn, Esq., on behalf of the Association of the Customs Bar; and Miss Marjorie M. Shostak, on behalf of the Foreign Trade Association of Southern California; World Trade Committee, Los Angeles Area Chamber of Commerce; and the Los Angeles Customs and Freight Brokers Association. I would like to furnish you, for inclusion in the record of the hearings of your Subcommittee, our comments with respect to the various allegations and recommendations made by these witnesses relative to the provisions of title I of S. 2624. I understand that the Treasury Department has furnished the Subcommittee with its comments relative to the provisions of title II of the bill.

1. MR. O'BRIEN, FOR THE AMERICAN IMPORTERS ASSOCIATION

(a) *Filing fee.*

Objection to payment of a filing fee is based upon the nature of the typical customs entry transaction, which frequently involves a series of repeated individual entries of the same merchandise, each one of which may raise a question of duty liability in a small amount. It is suggested, as an alternative, that if any fee is required, it should be exacted only when notice of trial is filed in the particular case.

The filing fee serves a basic and essential management purpose for the Customs Court. Under present law, the automatic referral procedure encourages indiscriminate filings of cases without regard to whether the importer actually intends to litigate the issue or not. As a consequence, many thousands of cases filed each year are eventually abandoned. In the meantime, however, the cases clog up the

channels of the court and impose additional burdens on its staff as well as the staffs of the Customs Bureau and the Customs Section of the Department of Justice. It is expected that before paying a filing fee, an importer will give serious consideration to whether or not he desires to litigate. The effect of the fee, therefore, will be to screen out those cases where the importer has no wish to go to court.

The bill contains a special provision designed to minimize the impact of the filing fee in situations involving repetitive entries of the same merchandise. Under this provision, the importer can consolidate in a single summons all of his protests that involve a common issue. As a practical matter, therefore, the importer can put all of his protested entries of the same merchandise that the Bureau of Customs has denied within the last 180 days into a single summons.

The suggestion that if a filing fee is imposed it be paid only when the case is ready to go to trial would completely destroy the value of the filing fee as a management tool. If this proposal were adopted, the Court would still be burdened each year with thousands of cases that would be eventually abandoned without trial.

(b) Deposit of duties claimed as prerequisite to filing suit

It is asserted that if the Government, subsequent to initial deposit of duties, decides that it was in error and demands additional duty, the Government, not the importer, should wait for the money.

The initial deposit of estimated duties at the time entry documents are filed reflects the Bureau of Customs' estimate of duty liability at that time based on entry documents submitted by the importer, which are generally taken at face value for this purpose. Subsequent determinations of increased duty liability result from investigation and evaluation by the Bureau of Customs of value figures, merchandise descriptions and other information contained in the documents, as well as examination of samples of merchandise itself.

The required deposit of duty at the time of entry would differ from the importer's own estimate only when there were a clear dispute as to the applicable law, which only the Court could decide, or when there were patent computational errors on the face of the entry documents or when some change had occurred in applicable law between the time of exportation of the merchandise and the time of its arrival in this country.

If the entry procedure on which the preliminary estimate of duty liability is based were, in fact, a full-scale examination and processing by Customs, all entries could be liquidated at the time of entry and no subsequent processing would be necessary. However, such processing would cause substantial delay in the release of the merchandise and would create intolerable obstacles to the flow of trade.

The importer should not be entitled to retain the use of additional duties determined to be due while court proceedings continue over possibly lengthy periods of time. Any delay in the collection of duty, solely because of the commencement of a court action, would encourage litigation, including unnecessary lawsuits. It would thus clearly conflict with a prime objective of this bill.

(c) Presumption of correctness and burden of proof.

It is asserted that in appraisal cases, under present judicial practice, the court may find that the Government's theory is wrong and that the importer's theory or some other theory is correct; however, if the importer cannot support his theory with proof, the Government's appraisal will stand as presumptively correct. It is claimed that this practice is unfair to importers and should be corrected by a provision authorizing the Court in such cases to refer the entry to the Bureau of Customs for reappraisal, in accordance with the directions of the Court.

This criticism of existing law fails to consider that the decision of the Customs Court, in the circumstances described, in, in effect, a finding that the importer has failed to sustain his burden of proof to establish that his theory of appraisal is correct and the Government's incorrect. That he failed to sustain this burden because of his inability to provide the facts essential to support his theory does not alter this situation.

The practical effect of the proposal would be to give the importer two or more opportunities to establish his point after he had already failed in presenting his arguments and facts to the Bureau at the administrative level and the Court at the judicial level.

2. MR. COLBURN, FOR THE ASSOCIATION OF THE CUSTOMS BAR

(a) Hearings in foreign countries

Objection to the provision for holding hearings in foreign countries is based upon the considerable time and expense that allegedly would fall on the importer. Consequently, no such hearings should be set without the concurrence of all interested parties. It is also alleged that the proposal involves serious questions as to the power of the United States Customs Court or other judge to exercise subpoena powers or control witnesses, and otherwise to utilize full judicial authority in the course of a hearing in a foreign jurisdiction.

This provision, as amended by the Senate, is limited in scope to evidentiary hearings in countries whose laws permit such hearings. In effect, therefore, the Customs Court judge conducting such a hearing will function as a hearing examiner, and not as a judge exercising his full powers with respect to subpoena of witnesses, control of conduct, etc. However, the judge conducting the hearing will be able to observe the demeanor of the witnesses and reach a conclusion as to the credibility of their testimony. This judge will also conduct the rest of the trial in the United States and thus will benefit from his observations at the time of the foreign hearing. By so restricting the scope of the provision, it is believed that constitutional or international law questions have been avoided.

The provision also establishes criteria of economy, efficiency and justice which the Chief Judge must observe to authorize foreign hearings. As the Senate report makes clear, on p. 16, the Chief Judge would be expected to take into account the importance of the case to the parties and must decide whether it would be less expensive and more efficient to send a judge and the attorneys for both parties to a foreign country to interrogate the witnesses than it would be to bring the witnesses to the United States or to obtain their testimony through the usual means of affidavits, depositions, commissions or letters rogatory.

The Senate added an additional protective safeguard by permitting a party affected by the Chief Judge's decision to take an interlocutory appeal to the Court of Customs and Patent Appeals. This will assure that an independent and objective review will be made of the Chief Judge's decision to authorize a hearing abroad.

It is not expected that the authority to authorize foreign hearings will be exercised frequently. From time to time, however, cases do arise in which testimony from foreign witnesses is essential to its proper disposition. In these instances, the Court must be able to order a foreign hearing when that is the preferable method from the standpoint of economy, efficiency and justice.

The proposal submitted by Mr. Colburn to make the authorization to hold foreign hearings dependent upon the consent of both parties to a case is not a workable solution. Either party could hamstring the Court's efforts to carry out its responsibility for administering justice by refusing to consent to a foreign hearing when he believes the testimony to be adduced at the foreign hearing will be unfavorable to his side.

(b) Filing fees

This criticism has been fully discussed in connection with the comments made with respect to the testimony of Mr. O'Brien, on behalf of the American Importers Association.

(c) Amendments to court actions

Mr. Colburn claims that the provision with respect to amendments to court actions would sharply limit the scope of 28 U.S.C. 2642. That section now provides that the Customs Court, under its rules and in its discretion, may permit amendment of protests, appeals for reappraisal, applications for review, petitions for remission and pleadings.

However, Mr. Colburn then recommends that the language in the bill be revised to extend the scope of the present provision so as to permit amendments of causes of action in circumstances that have heretofore not been permitted by the courts. His proposal would permit a claim involving only value to be amended to make a claim relating to classification, and vice versa.

There is complete agreement among all those appearing before the Committee on what is permitted under the present rule followed by the Court with respect to amendment of actions to raise appraisal issues in classification cases, and vice versa. The Court does not now permit a classification question to be raised by way of amendment in an appraisal case, nor does it permit an appraisal question to be raised by way of amendment in a classification case. This rule governs the vast majority of all cases that come before the Court.

This leaves only a handful of cases that may involve other situations. It is only with respect to these few cases that disagreement exists between Mr. Colburn and the Government concerning the precise meaning and applicability of the cases cited. In these cases, the Court has exercised its discretion in accordance with the statute and its understanding of the particular facts involved in the case. Thus, the disagreement reflects the different weight given to the decided cases as guides to the exercise of judicial discretion in future cases.

The language in S. 2624 would not change the Court's powers in this regard. It would still be within the discretion of the Court to determine, on the basis of the facts involved in the case, whether or not the new grounds related to the same administrative decision contested in the protest. The provision, therefore, accords with the position the Customs Court has taken in the past.

The following extract from an opinion of the Court in *International Grocery Company v. United States* 43 Cust. Ct. 422, Abstract 63573 (1959), cited by Mr. Colburn in his memorandum, sums up concisely the state of the law which we believe we have properly represented and which the proposed legislation seeks to retain:

"Perhaps because this court traditionally has taken a liberal view toward protest amendment, when it appears to be in the interest of justice to permit the sought for amendment, there has grown up a body of *dicta* which, when selectively cited, might appear to support jurisdiction to permit, within judicial discretion, almost any amendment. There are, however, limits to our jurisdiction.

"There is no sound reason to believe that Congress intended to confer on the court jurisdiction to permit, through protest amendment, a plaintiff to protest, after the expiration of the statutory period permitted for protest, a *customs transaction or collector's decision* as to which he did not timely file his protest. There is sound reason to believe that Congress intended to confer on the court jurisdiction to permit, through protest amendment, a plaintiff to enlarge or make more specific the grounds of protest with respect to a *transaction or decision* which was, in fact, timely protested.

"It becomes necessary, then, to consider what was the *transaction or decision* which was *originally protested in the suit before us*." (Emphasis added)

Mr. Colburn seeks to enlarge the area of permissible amendment by doing away with the restriction that amendments must be related to the decision complained of in the administrative protest; this would permit an appraisalment or classification issue to be raised even though it had not been the subject of the administrative protest. This proposal would effectively undermine any concept of a statute of limitations. It would also do violence to accepted principles of administrative law and judicial administration requiring a party to give the administrative official an opportunity to correct any errors at the administrative level so as to alleviate unnecessary litigation.

The provision in S. 2624 as passed by the Senate clearly and concisely sets forth not only the present state of the law but the desirable minimal requirements of the law. No change of language appears to be required.

3. MISS SHOSTAK, FOR THE WEST COAST ORGANIZATIONS.

(a) *The absence of a backlog.*

Miss Shostak denies the existence of a huge backlog of unresolved cases burdensome to the United States Customs Court by quoting the following part of Senate Report No. 91-576, beginning at page 7:

"It must be noted however that these figures are somewhat deceptive since, in customs matters, a single decision may frequently affect a large number of cases that have been suspended during the trial of a 'test' case."

She then asserts that the disposition of the pending test cases would dispose of many of the pending cases, the great majority of which are being held in suspension awaiting the outcome of a relatively small number of test cases.

Miss Shostak fails to quote the following comments of the Senate committee which come immediately after her quotation with respect to this matter:

"On the other hand, the 'test' case under which there are thousands of cases suspended, is rare and generally involves a threshold issue common to a great variety of merchandise. The suspended cases often involve other issues of fact or law that for convenience have been suspended because of the desire to dispose of the common threshold issue first. The resolution of the threshold issue, therefore, will not *ipso facto* dispose of the suspended cases.

"As a matter of fact, the decision in a 'test' case does not necessarily control the disposition of cases suspended thereunder unless the suspension involves identical merchandise, and, in any case, there is always the question as to whether

the merchandise in the suspended case is similar in all material respects to that in the decided case. Also, of course, each of the suspended cases must be examined by counsel to determine any remaining issues and to settle the amount of duties on the importation. In addition, either the importer or the Government might be dissatisfied with the trial of the decided case or feel that additional testimony or arguments are available which will result in a different decision and, therefore, will decide to retry the issue rather than abide by the decision of the earlier case."

(b) Injection of formal procedures in Customs Court

Miss Shostak objects to the establishment of formal procedures in the Customs Court as being inconsistent with the concept of the Court as a "businessman's court".

Among the more serious problems facing the Customs Court today are those resulting from the automatic referral of cases and the absence of formal judicial procedures. These are carryovers from the 1890's when the Board of General Appraisers, the predecessor of the Customs Court, functioned as an administrative agency reviewing the decisions of the Bureau of Customs. In the absence of a summons instituting an action in the court and setting forth the basis for the suit, the Court cannot accurately and readily determine what issues are involved in each case. It lacks, therefore, any rational basis for effectively managing its docket or calendar, establishing a comprehensive and accurate system of suspending cases, or adequately exercising control over the movement of its cases. This bill will provide the Court with the management tools it requires for effective and efficient operations.

(c) Filing fee

This subject has been discussed in connection with the comments made by Mr. O'Brien on behalf of the American Importers Association.

(d) Use of a single procedure to determine all issues

It is asserted that when both value and classification issues involving the same goods are to be considered, trial of these issues in a single proceeding is undesirable because the divergent issues require different witnesses and different periods of time for preparation. Miss Shostak's proposal would deprive the court of the necessary authority to manage a trial in accordance with its judgment as how best to proceed. Under the bill, the Court has full authority to order a severance whenever it would be in the best interests of justice to sever the issues.

(e) Elimination of appellate review in Customs Court

It is claimed that importers are being deprived of an inexpensive appeal by the elimination of the three-judge tribunal that reviews single-judge decisions in appraisement cases.

The present review of single-judge appraisement decisions by a three-judge division of the Customs Court, with the right of further appeal to the Court of Customs and Patent Appeals, is an unnecessary and time-consuming step. It has been eliminated for that very reason. In the ten-year period between July 1, 1958, and June 30, 1968, there have only been 152 cases decided on review of reappraisements or an average of about 15 cases a year. Many of these same cases were later appealed to the Court of Customs and Patent Appeals. This intermediate appeal procedure is very little used and decides only a handful of cases at best.

(f) Requirement for filing a summons

It is objected that the requirement for filing a summons in the Customs Court results in duplication of the paperwork involved in the initial filing of protests and appeals with the Bureau of Customs.

This objection assumes that the protest filed with the Bureau of Customs provides the basic information needed by the Customs Court for determining that its jurisdiction has been properly invoked and that justiciable issues within its cognizance are presented. This is an erroneous assumption in most cases; many protests contain insufficient information and this deficiency makes it difficult for the Court to discharge its functions properly.

The requirement for a summons to be filed in order to commence an action in a court is a common requirement in every court. There is no logical reason why this requirement should not apply to importers.

(g) Documents forwarded as official record

Although the list of documents to be included in the official record of the case has been expanded to include all of the suggestions made in the Senate hearings, it is objected that the list is still incomplete because there are other documents now sent to the Court by the customs officials at the port.

This objection overlooks the fact that the provision is not intended to be all-inclusive, and it does not exclude the forwarding or the introduction, by either party, of such other documents as may be essential in the proof of the case. The Senate report makes this intent clear in the following quotation from page 19:

"Section 2632(f) does not restrict the official record to the listed items nor does it limit discovery or the introduction of evidence during the trial of the case."

(h) Hearings in foreign countries

This objection has been dealt with in connection with the comments made by Mr. Colburn for the Association of the Customs Bar.

(i) Amendment of causes of action

This comment has been dealt with in connection with the comments of Mr. Colburn for the Association of the Customs Bar.

(j) Location of an office of the Clerk of the Customs Court in Los Angeles

This proposal to establish an office of the Clerk of the Customs Court in Los Angeles would provide special facilities for the convenience of Los Angeles importers and the two law firms in Los Angeles that specialize in customs matters. Justification for this is claimed on the basis of the volume of importations in that area. It is also asserted that the present system whereby court papers are forwarded, without charge, to counsel at their request as often as they request it, is inadequate. None of these reasons are sound or supported by the facts.

An analysis of the 75,000 cases commenced in the Customs Court for fiscal year 1969 discloses the following distribution:

	Number	Percent
New York.....	40,000	53
Los Angeles.....	7,150	9½
San Francisco.....	6,800	9
Chicago.....	4,500	6
Philadelphia.....	2,800	4
Houston-Laredo.....	1,600	2
Buffalo.....	1,150	1½

It is quite obvious from these figures that, on the basis of volume of work, there is no particular reason for singling out Los Angeles for special treatment, in preference to any of the other major outports.

It should also be noted that the selection of Los Angeles could not benefit such other ports as San Francisco and Seattle, which have almost an equal volume of cases, since the distance separating Los Angeles from these two other ports is so great that papers filed in Los Angeles would not be readily accessible to importers in these other West Coast ports. If there is any justification for establishing a Clerk's office in the court in Los Angeles, equal reasons exist for establishing similar clerks' offices in numerous other ports such as San Francisco, Chicago, Philadelphia, Seattle, Houston and Buffalo. This is obviously impractical.

It should be noted that under existing Court rules, attorneys practicing in the Customs Court are able to requisition any files they need; these are duplicated and sent to the attorneys at no cost to them. Such papers have often been requisitioned several times during the year. No reason has been advanced to justify any change from this existing practice.

Sincerely yours,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General, Civil Division.
By STANLEY D. ROSE,
Legislative Officer, Civil Division.

STATEMENT OF AMERICAN BAR ASSOCIATION

By James H. Lundquist, chairman, Standing Committee on Customs Law; Alfred R. McCauley, chairman, Special Committee on Customs Section of Administrative Law; Robert L. McCarty, Delegate to House of Delegates Section of Administrative Law, on H.R. 12691, January 23, 1970

Mr. Chairman and members of the subcommittee: This statement is made in behalf of the American Bar Association pursuant to the authority conferred by a resolution adopted by the House of Delegates at the Association's Annual Meeting, August 11-13, 1969 in Dallas. A copy of that resolution which was jointly proposed by the Standing Committee on Customs Law and the Section of Administrative Law is attached to this statement. The Subcommittee will also be interested to know that the resolution was supported by the Section of International and Comparative Law when considered in the House of Delegates.

The need for expeditious handling of disputes involving the assessment of duties and other rights of importers and exporters has become acute during the past decade of ever-increasing volume of customs entries. Accordingly, it is believed that the legislation at hand is both timely and appropriate. The American Bar Association supports the general purposes of S. 2624.

Of major importance to importers and domestic manufacturers, is the period of time between actual importation of goods and the final action of customs officers with respect thereto. Under current procedures it may take a year or more after importation before a decision as to the appropriate valuation of such goods is made. Under the present statute, value must be ascertained as a separate action and thereafter classification-rate of duty assessed against the value is made as a separate act. Additional matters such as appropriate marking, laboratory analysis of certain products, labeling and number of other statutes and regulations administered under the authority of the Bureau of Customs can, and often do, extend the period of uncertainty for more than two or three years. This means, of course, that if an importer is regularly entering goods his contingent liability may increase to the point where a decision by customs officers raising either the value or the rate of duty could in effect raise his actual costs of importing years after the goods have entered the commerce of the United States and, presumably, after he has costed his entire operation. Similarly, if a domestic manufacturer wishes to avail himself of statutory provisions affording an opportunity of challenging the rates of duty applied to import competition, he too must wait the long period of time before an action can be consummated. In addition to the above the burden placed on the U.S. Customs Service by extended administrative review of customs entries overburdens already busy federal officials.

Accordingly, the American Bar Association recommends that decisions as to value, classification and all other matters relating to the clearance of imported goods through customs be made within a reasonable period of time after entry, and with actual notice of action taken; and that an importer be given the opportunity to have all objections to decisions of Customs officers with respect thereto resolved in a consolidated procedure, with an opportunity to present evidence, views and arguments at the administrative level prior to the institution of an action in the Customs Court.

Furthermore, it is believed the administrative process applicable to imported merchandise should be completed by the issuance of a final decision by customs officers which shall be rendered within a reasonable period of time after the filing of a protest.

Upon receiving notice of a final decision, the importer shall have the right to judicial review by instituting an action in the United States Customs Court.

In order to better serve the purposes of expediting all determinations with respect to imported merchandise, it seems desirable to apply a similar consolidated procedure to actions before the United States Customs Court. Under present procedure, judicial challenge of appraisement is instituted by the filing of an Appeal for Reappraisal. This form of action involves a separate and distinct trial of issues prior to any determination with respect to classification (rate of duty). Because it is desirable to work-out a procedure before the Court whereby an aggrieved party can seek adjudication of all issues we recommend that separate judicial review of contested appraisement of imported merchandise prior to final administrative determination of classification and other matters should be abolished.

Another procedure that tends to slow down the judicial process is the current approach to litigation at the various outposts in the United States. As the Subcommittee knows the U.S. Customs Court travels a circuit throughout the United

States and Puerto Rico to hear cases brought by importers. This is handled by a single judge who travels from New York and hears the record. However, the judge that handles the actual litigation does not necessarily participate in the final decision. He generally hears the case and refers it back to New York where a division of three judges will review the record and rulings and thereafter render judgment. It seems desirable, therefore, in the interest of speeding justice, that this system be modified to provide for trials and decisions by a single judge in all cases except where, because of the significance of the matter, a panel of three judges would be more appropriate.

STATEMENT OF GEORGE BRONZ, ATTORNEY-AT-LAW, WASHINGTON, D.C., MEMBER OF THE BAR OF THE CUSTOMS COURT

When an importer is assessed a higher duty than he thinks is proper, it is desirable that the issue be resolved with reasonable promptness. However, speed is not critical when the question is solely one of money. Adequate time can be permitted for full administrative consideration, with thorough judicial review thereafter. This is the normal pattern in our legal system.

There are, however, cases where extended administrative consideration would make judicial review impossible. If Customs officers exclude merchandise from entry or delivery, the importer cannot always wait four months for administrative reconsideration, plus an even longer period for a full-scale trial and decision by the Customs Court. An importer with an unresolved duty issue can assume the financial risk, and continue his imports. An importer whose product is refused entry must suspend his business until the conclusion of judicial proceedings. Apart from the expense of warehousing in bond, the merchandise may be perishable, or, when quotas are involved, the quota period may run out. Today, the importer has no real access to judicial review in such cases. S. 2624 would make his plight worse: it would lengthen the period for administrative reconsideration.

Effective judicial review can only be accorded in these situations by vesting jurisdiction in the Customs Court to entertain an action, on a proper showing of urgency, while there is still time to afford effective relief. The most convenient device for this purpose is the action in the nature of mandamus, long available to the district courts in most fields of administrative law under § 1361 of the Judicial Code. With similar jurisdiction in the area of its specialty, the Customs Court would be empowered, by the "all writs" provision, Judicial Code § 1651, to make such interim and temporary orders as it may find appropriate to keep the issue alive for judicial determination.

The absence of any means of securing effective judicial review in emergency cases, notably those involving the exclusion of merchandise, is a conspicuous deficiency in the present scope of judicial review of Customs issues. S. 2624 affords an opportunity to remedy this deficiency.

It is proposed that the following provision be added to the Judicial Code by S. 2624:

§ 1583. The Customs Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff under any provision of law with respect to the entry of merchandise into the United States, notwithstanding Section 1582(c) hereof.

STATEMENT OF PROF. FREDERICK W. HESS, UNIVERSITY OF MISSOURI, KANSAS CITY, SCHOOL OF LAW

My name is Frederick W. Hess. I express my appreciation to the subcommittee for this opportunity to present my views on H.R. 12691, H.R. 12857 and H.R. 12921.

I am a professor of law; my teaching and research include International Law, Regulation of International Trade and Administrative Law. I am admitted to practice before the U.S. Customs Court and the U.S. Court of Customs and Patent Appeals, and have appeared in customs cases since 1962. I am chairman of The Missouri Bar committee on International Law and Foreign Trade, and of the corresponding committee of the Kansas City Bar Association; I am a past president of the International Trade Club of Kansas City, a current member of the Foreign Trade Council of the Chamber of Commerce of Greater Kansas City, and a member of the Kansas City Regional Export Expansion Council of the Commerce Department.

All of the views set forth below are my personal views and do not necessarily represent those of the organizations named.

My comments are based on the action which the Senate took on S. 2624, as set forth in Senate Report No. 91-576, inasmuch as that Senate Bill was originally identical to the Bills before your Subcommittee.

My purpose in offering the present statement is to express my alarm about the proposed legislation, and to recommend against its adoption. In my view the present administrative and judicial organization charged with the application of the customs laws is excellent, tested, well known to the importers, whereas the proposed legislation is unnecessary, burdensome, time-consuming, expensive, inequitable to the import trade, and its complete departure from traditional concepts would plunge the Courts, the Bureau of Customs and the public into years of uncertainty. I believe the two principal effects of the Bills, if enacted, would be:

1. Judicial review of administrative action will become so encumbered with technical difficulties and expense as to become meaningless;

2. The cost of importing will rise, and the proposed Bills, if enacted, will thus constitute a non-tariff barrier, at a time when the U.S. Government, at the forthcoming GATT conference, seeks the abolition of foreign non-tariff barriers which impede our own export trade.

Our import trade, which in 1969 exceeded 30 billion dollars, was exceeded in volume and dollar amount by our export trade. For our trading partners, as for ourselves, imports are the counterpart of exports, the one being impossible without the other.

Trade of such magnitude deserves the same effective judicial review which we would expect our own exports to receive in the customs courts of foreign nations. By impeding such judicial review the proposed legislation would touch on international obligations of the United States contained in Art. X, par. 3(b) of the General Agreement on Tariffs and Trade which provides:

"Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the PROMPT review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be INDEPENDENT of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts" (capitalization supplied).

In addition to a host of other changes, the Bills propose to extend the period of administrative review of customs controversies from 90 days to two years; to consolidate the present "Appeals for Reappraisalment" with "Protests" into one single civil action; and to require the importer to institute such civil action by summons instead of the present referral by the Bureau of Customs to the Customs Court. These proposals are predicated, as the principal basis, on the large accumulation of cases before the Customs Court, 431,612 in fiscal year 1969.

These statistics neglect, however, to state several significant factors:

1. Under current law and practice any single entry decided by the Bureau of Customs adversely to the claims of the importer may become a separate action in the Customs Court. Very large numbers of entries, however, are repetitive entries of the same merchandise over some period of time by the same importer. Consolidation of these entries, as is the case for trial purposes, will show that the actual volume of issues before the court is much smaller than that of separate cases.

2. A second category are the cases suspended under a "test" case. Here the issues in the suspended case are the same as in the test case, or else the government would resist and the court deny suspension, but the importer is different from the plaintiff in the test case. Once the test case is finally decided, the suspended cases are susceptible of summary disposition.

3. A simplified Customs Court reporting practice, published in No. 22, Vol. 3, Cust. Bull., together with amended Customs Court Rule 5(c), published in No. 11, Vol. 3, Cust. Bull., has permitted the disposition of a very large number of cases in tabular form.

Because of the foregoing three factors, I do not believe that an unmanageable case load threatens the U.S. Customs Court. (A similar conclusion was reached, in 1937, by Judge Joseph R. Jackson, then Assistant Attorney General, Customs Division, Department of Justice, in response to an analogous proposal then advanced by the Treasury Department.)

The Senate Report cited two additional bases which deserve analysis.

The second basis advanced is the "new set of tariff schedules" (TSUS). In deciding *Laurence Myers Scaffolding Co. v. United States*, C.D. 2809, 1966, 57 Cust. Ct. 333, Chief Judge Rao commented at p. 338:

"This is the first instance in which the second division of this court has been called upon to interpret the provisions of the Tariff Schedules of the United States, made effective on August 31, 1963, by Proclamation No. 3548 (77 Stat. 1017) of the President of the United States, and designed as stated in the Tariff Classification Study of the United States Tariff Commission for the following purposes:

"(1) Establish schedules of tariff classification which will be logical in arrangement and terminology and adapted to the changes which have occurred since 1930 in the character and importance of articles produced in and imported into the United States and in the markets on which they are sold.

"(2) Eliminate anomalies and illogical results in the classification of articles.

"(3) Simplify the determination and application of tariff classifications.

"One has to peruse but briefly the provisions of the Tariff Schedules of the United States to be impressed with the particularity with which merchandise is provided for in detailed itemizations. In view of this particularization, *it naturally follows that the language used was selected with the view to pinpoint the classification of merchandise rather than to encompass imported articles within the broader language which previously controlled the tariff classification of merchandise. As indicative of this treatment is the fact that merchandise previously encompassed by the provisions of paragraph 312 of the Tariff Act of 1930, as modified, known as the 'structural shapes' provision, is now provided in 17 different items of the Tariff Schedules of the United States. * * **" (Italic supplied).

It is obvious that under these circumstances the need for judicial construction of the TSUS was bound to mount. The Customs Court has so far devoted only a few years to this task. It would serve neither the interests of the Bureau of Customs nor those of the importers if judicial review were rendered less easily available at this time than it has been in the past, and if such judicial review were obscured by a totally novel procedural approach. Once the scope of the TSUS has been interpreted, the volume of litigation will decrease to a level commensurate with normal technical development.

The third basis advanced, "a more aggressive attitude on the part of importers and manufacturers in challenging customs decisions" is understandable not only in view of the novelty of the TSUS, but also due to the administrative reforms accompanying the 1965 reorganization of the field structure of the Bureau of Customs. In order to eliminate excessive delays in the liquidation of entries sometimes lasting over several years, the Bureau in many instances employed a "pre-entry review procedure" under which an importer had to make his entry under terms acceptable to the Bureau both as to value and classification, or the proffered entry would be rejected. Obviously under these circumstances differences of opinion between the Bureau and the importer were not eliminated, but their resolution was deferred to the judicial level. It appears vital under these conditions that judicial review remain as easily available as in the past, or the importer would be subject to the absolute discretion of the Bureau.

The Senate Report mentions "administrative review" at several levels, which is expected to provide relief. In my opinion this expectation is unrealistic for the reasons that (1) the Bureau of Customs does not now and is not likely to receive in the foreseeable future the budgetary resources to fill all positions presently authorized, let alone to assume new functions; (2) in most controverted situations field personnel are bound by Bureau policy decisions, and the prospects of relief (except to clear up factual situations so as to bring the importer within established policy; this is available under existing procedures) appear remote where they would involve a reversal of policy; (3) the expense to the importer in arguing his case at successive administrative levels, in addition to those of any ensuing litigation, would further encumber the import trade.

For the reasons stated, the bases for the introduction of the Bills appear to me invalid.

In addition to the foregoing general comments, the following views on particular aspects of the Bills are submitted.

1. One of the paramount features of the Bills is the consolidation of Appeals for Reappraisal and of Protests into one single civil action. The Senate Report states that under present law an entry, after notice of appraisal, may be the subject of a judicial reappraisal proceeding, then returned for

administrative liquidation whereafter, on protest, it could be the subject of a second judicial (classification) proceeding. Aside from the fact that in my opinion such instances of repeated litigation occur only very rarely, and that in other fields of judicial review of administrative action it is not uncommon for cases to move between administrative agencies and courts more than once, the proposed measure would, in an apparent effort of simplification, join two totally dissimilar issues in one proceeding, as to each there exists—even under the proposed legislation—an impressive body of statute and case law, as well as different procedural rules. The result would be confusion rather than simplification. On the other hand, the present procedure has the advantage that (1) the judicial remedy follows the administrative step against which it is directed, with all its concomitant advantages in availability of witnesses and records, and (2) unless or until the importer loses his appeal for reappraisement, he is not required to pay the additional duties necessitated by the higher value found by the Bureau. Under the proposed legislation, however, all duties must be paid (as under present law is required in classification disputes only) before the importer may go to court. In view of the length of time of the administrative review process and any subsequent judicial proceedings, this additional expense will further encumber the import trade.

2. The Senate Report further states that the Bureau of Customs now must automatically refer denials of protests to the Customs Court without regard to whether or not the importer intends or desires to litigate the Bureau's decision. I believe this statement to be erroneous: Where the Bureau has furnished the importer under present sec. 501, Tariff Act of 1930, with notice of appraisal, it has thus advised him that its position is final, and his appeal for reappraisement is thus a logical response clearly indicating his desire to litigate; however, the Bureau is not as powerless, as the Senate Report would indicate, to correct a mistake, short of errors as to the construction of a law, as it possesses this power under sec. 520(c)(1) already; in situations where the Bureau is willing to concede even an error of law, and the case is already filed in the Customs Court, present court rules permit settlement by stipulation without great formalities. In protest cases, the Bureau retains administrative jurisdiction over the matter for 90 days from filing of the protest, during which time the importer may abandon his claim administratively, thus obviating the need for "automatic" forwarding to the court. On the other hand, where the importer allows this period to elapse without such abandonment, this, too, is a reasonable indication of his desire for judicial determination. As the need for institution of the civil action by separate summons thus appears predicated on a misconception, the foregoing clarification merits the Subcommittee's consideration.

3. The abolition of the intermediate appeal stage in reappraisement matters appears unwarranted. The manpower of the Court of Customs and Patent Appeals comprises only five judges; that court, moreover, also is charged with appellate jurisdiction in patent and trade-mark matters, over decisions of the U.S. Tariff Commission under secs. 337 and 337a, Tariff Act of 1930, and over findings of the Secretary of Commerce under headnote 6, schedule 8, part 4, TSUS. Moreover, under present law the jurisdiction of the appellate court in reappraisement cases is limited to questions of law, so that issues such as weight and sufficiency of evidence do not require review in depth. I therefore believe that the Court of Customs and Patent Appeals is ill-equipped to deal with added appeal cases. Also, the present procedure has the advantage of lesser expense and delay, since no printed briefs are required in the appellate term of the Customs Court, and the calendar moves faster. Aside from the fact that the proposed legislation would result in transferring part of a congested docket to another court, by its added cost it would add another encumbrance on the import trade.

4. The erosion of the present privilege of introducing, in reappraisement cases, affidavits, as is now provided in title 28, sec. 2633, is regrettable. Under the proposed legislation such affidavits must be served, before trial, on the opposing party. This proposal runs counter to elementary trial procedure that counsel is not required to disclose his witnesses to his opponent in advance of their being called at the time of trial. An affiant is but a witness "whose attendance cannot be reasonably had". The abuse of affidavits has, under existing law, been curtailed by the court's prerogative to rule as to the admissibility and the weight to be given in the case of affidavits. In my opinion the proposed legislation would compel counsel to divulge his entire case to his opponent before trial, which would further make judicial review meaningless.

5. Compared to the rather inexpensive procedure connected with the preparation and introduction of affidavits, under the proposed legislation the importer or his counsel may be required to accompany the Court to a distant country for an evidentiary hearing. The Senate Report argues that the Judge would thus be enabled to "observe the demeanor of the witness", which would facilitate his decision of the case upon his return. This argument is specious because (1) the court has functioned well over many decades under a system where the hearing judge, while on circuit, "observed the demeanor of the witness" while not necessarily participating in the decision of the case if another division of the court had jurisdiction; (2) the value of demeanor evidence in essentially administrative matters is controverted (cf. Jaffe, *Judicial Control of Administrative Action*, 1965, at p. 610 et seq.); (3) it would strain the psychological perceptiveness of the most sophisticated judge if he had to correctly assess the demeanor of witnesses speaking a foreign language in a country of alien culture, e.g., Japan. In view of the availability of title 28, secs. 1781, 1783, and present Customs Court Rule 21, such court sessions in a foreign country cannot be said to be required in the interests of justice. The United States, while considering adherence to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1968), would act inconsistently by holding court in foreign countries at the same time judicial assistance is sought from these countries in other matters. But most important to the importer, the cost of such extraterritorial court sessions would be disproportionate in most cases to the amount in litigation, and thus greatly impair the value of the judicial remedy. The provision of interlocutory appeals to the Court of Customs and Patent Appeals in such situations but adds to the expense and delay, and to the already great burden on that appellate tribunal. (Instead of enacting the proposed provision, I respectfully submit that your Subcommittee may wish to consider enacting the provisions of present Federal Civil Rule 28(b) into the Judicial Code so as to facilitate the utilization of letters rogatory by the Customs Court).

6. The proposed legislation would permit decisions, findings of fact and conclusions of law to be issued orally from the bench without the requirement of a written opinion by the judge. In the present state of the law, with the majority of the TSUS provisions not yet judicially construed, it is difficult to see how a judge, without the benefit of briefs of counsel of both sides, can adjudicate, orally, matters of the complexity of customs law. It is probable that the party losing such orally decided case would petition for a re-hearing, and thus more protracted litigation would ensue. I also feel that the proliferation of oral and thus unpublished decisions would raise constitutional problems under Art. I, sec. 8 of the Federal Constitution commanding a uniform administration of duties throughout the United States. The fact that the appeal would have to await the availability of the transcript would pose further problems, as transcripts become available at ports outside New York only several weeks after the trial. This may conceivably engender the filing of "protective" appeals, thus creating an evil the Bills seek to cure elsewhere.

7. That importers should pay a fee for the use of the judicial machinery of the government, as any other litigants, appears at first sight as a fair proposition. However, as discussed above, since each entry is apt to mature into a separate action, such fees could grow into sums out of proportion to the amounts in issue. The Senate Report suggests some relief by permitting consolidation of all protests that have been denied within the preceding 180 days. However, the importer who continuously imports the same merchandise should be permitted to consolidate all entries, regardless of date of denial, into one action, up to the time the case is tried for the first time. Payment of the fee at the time of notice of trial would solve this problem.

8. The abolition of former statutory offices, and the substitution of "the appropriate customs officer" in sections 509, 510 and 511, places an awesome power without judicial check in the hands of subordinate personnel. I respectfully submit to your Subcommittee to repeal sections 509, 510 and 511 of the Tariff Act of 1930, and to enact in their place provisions analogous to title 26, secs. 7602 to 7605, thus placing the powers of the subordinate customs officers under the same judicial restraints which now applies to summons by the Internal Revenue Service.

In summary, I submit to your subcommittee:

(a) That all provisions of the proposed legislation be rejected except as stated below;

(b) That all classification cases in the Customs Court be tried by a single judge, but that the present jurisdiction and procedure of the appellate term in reappraisement cases remain unaffected;

(c) That the provisions of Fed. Civ. Rule 28(b) be enacted into the Judicial Code and thus made applicable to the Customs Court;

(d) That the Customs Court be empowered to levy a reasonable fee but under the conditions discussed in par. 7, above;

(e) That secs. 509, 510 and 511 of the Tariff Act of 1930 be repealed and the provisions discussed in par. 8, above, be enacted in their place.

Respectfully submitted,

FREDERICK W. HESS.

NORMAN G. JENSEN, INC.,
Palo Alto, Calif., January 19, 1970.

CONGRESSMEN ON THE JUDICIARY COMMITTEE,
House of Representatives, Washington, D.C.

DEAR CONGRESSMEN: First, please pardon this letter being mimeographed. Time is too short to have typed a letter to each Committee member.

This letter is to express to you our opposition to S2624.

This bill as written will lead to only the larger importers being able to get to Customs Court: the costs would prevent the small business man from getting judicial justice. If there is to be a filing fee, it should be when the notice of trial is filed.

Hearings in foreign countries should not be allowed.

The government should pay interest from the date of liquidation on all refunds it makes; the importer should pay interest on increases of duty beginning thirty days after liquidation and receipt of Notice of Increase and Demand for Payment. Said notice should be sent by registered mail.

All documents and other items in conjunction with an entry should accompany a protest on that entry to the Court.

The informal manner of filing protests with the Customs; the manner of transmitting the protest to the Court; and the use of copies of the protests as notices has worked well for years. The trend should be for less complicated procedures and less costly burdens on the importer to get his day in Court.

Please have one copy of this letter introduced as a statement against this bill.

We respectfully solicit your vote against S2624.

NORMAN G. JENSEN.

STATEMENT OF NORMAN G. JENSEN, CHAIRMAN OF BOARD OF DIRECTORS OF
NORMAN G. JENSEN, INC.

January 21, 1970

I am Norman G. Jensen from Palo Alto, California. I am Chairman of the Board of Directors of Norman G. Jensen, Inc., a firm of Customs Brokers and Freight Forwarders.

I taught school in North Dakota for 10 years—the last 4 of which I was city superintendent and coach. I quit teaching school in 1937 and started business as a Customs Broker at Portal, North Dakota. I have been in this business since 1937. The firm now has thirty-two operating offices in addition to the Central Office in Palo Alto.

I have had experience in customs at seaports, interior ports, and ports on the Canadian border. I have had many opportunities to discuss the problems of our clients with customs officials in large as well as small ports.

In addition to the Norman G. Jensen, Inc., my son and I have World Freight Forwarders, Inc., an Oregon Corporation, also engaged in the business of Customs Brokers and Freight Forwarding. This firm has connections on the East Coast and in foreign countries.

I no longer perform operating work at a branch office. My work is reviewing protests, appeals, and petitions before any branch office submits them to the Customs and assisting personnel of our firm and our clients on questions of procedure and interpretation on customs matters as a customs consultant.

S. 2624 appears to be designed to promote the interests of the governmental agencies—Treasury, Justice, and Judiciary—with practically no efforts to enact into law improvements in procedure to aid the interests and needs of the importers or to remove any inequities in customs liquidation or litigation procedures.

Proponents of S. 2624 cite and stress the number of cases pending before the Customs Court. The Congressional Record of July 14, 1969 reads in part:

"A few pertinent statistics provide a vivid picture of the problems which beset the U.S. Customs Court. In fiscal year 1963, the court received about 35,000 new cases. By fiscal year 1968, it was receiving over 108,000 cases. In the same period, the court increased its rate of termination of cases from an annual average of 32,000 during the period between fiscal year 1963 and fiscal year 1966 to more than 43,000 in fiscal year 1968.

"Thus, despite the substantial rise in its case termination rate, the court has been faced with a growing accumulation of pending cases. In fiscal year 1963 these amounted to 186,452; in fiscal year 1964 to 199,650; in fiscal year 1965 to 218,926; in fiscal year 1966 to 245,123; in fiscal year 1967 to 343,065; and in fiscal year 1968 to 404,932.

"By December 31, 1968 the number of pending cases had risen to 431,348. By March 31, 1969 there were 439,278 cases pending."

This quotation, while entirely accurate, does not tell the whole story, and cannot in itself be used to show the condition in the court.

On February 20, 1969 Honorable Morgan Ford, United States Customs Court Judge, in an address to the Foreign Trade Association of Southern California, showed that there was no delay because of the courts' condition in the amount of pending cases. He explained that a party litigant can have a case set for trial in New York within 60 days and at other ports of entry, where the court holds hearings on circuit, at the periodic sessions there. Judge Ford called this a unique situation, unlike State and Federal courts where there is a waiting period of months to years to obtain trial date.

In this same address, Judge Ford explained that one test case may dispose of thousands of pending cases. Three items were mentioned: one test case involving over 53,000 pending cases on plywood; one case on the classification of articles made of man-made fibres involving over 42,000 pending cases; and the third, a test case relating to the dutiable value of goods exported from Japan subject to floor prices established by the Japanese Ministry of International Trade and Industry (MITI), (Exhibit attached.)

These three issues represented approximately 37 percent of the cases then pending before the court. The plywood cases (over 53,000 of them) are now being processed under a test case decided in favor of the importers. The articles of man-made fibres case (over 42,000 of them) are suspended under the test case decided by the Customs Court and now are pending on appeal before the Court of Customs and Patent Appeals. The MITI floor prices cases have been decided in favor of the importers and are now pending a review before the Appellate Term of the Customs Court.

The amount of pending cases before the court does not in itself show any actual congestion. A plaintiff whose case is ready for trial can obtain a hearing within 60 days after filing at the port of New York. This would not be possible under the provisions of S. 2624, which preclude the forwarding of the cases to the Customs Court for a minimum of 120 days after the protest is filed.

Joseph R. Jackson, Assistant Attorney General, Division of Customs, New York, in his report to the Attorney General, in 1937, said, in part:

"... The filing of protests, therefore, does not reflect a litigious disposition on the part of importers as it does the effort of prudent business men to save their rights to the same duties as their competitors, pending final adjudication of customs duties.

"While therefore, the number of protests filed, has, in the nature of things been large, the number of issues represented by these protests has been relatively small. It is safe to say that at no one time . . . were there more than 300 issues represented by 'test cases'. It is believed that this estimate is excessive and that the average actual number of issues pending at any one time would be considerably less than 300."

In a report of a committee of the Association of the Customs Bar, February 2, 1932 the following quotation appears:

"It is impossible to stigmatize as evil the judicial clarification of our tariff statutes, the equal protection of all importers paying customs taxes and the performance of their legal duty to their clients by customhouse brokers and customs attorneys.

"Customs litigation has been the subject of much . . . misrepresentation regarding its volume, based upon the number of protest and appeals to reappraisal filed, which is large, rather than the number of issues presented which is

relatively small. The number of issues presented has never embarrassed the courts or threatened the revenue. The number of protests and appeals filed has been significant principally as showing that customhouse brokers and customs attorneys have performed their duty and protected their clients on individual importations affected by pending issues. If the remedial system did not facilitate and invite such protection it would be an unjust system."

This report, made in 1932, and quoted by the Honorable Joseph R. Jackson in 1937, has the same truth and justness in 1969.

More time is needed to clear up misconceptions before the bill is enacted.

S. 2624 proposes to abolish using separate proceedings for appraisement and classification and to institute a single continuous procedure for deciding all issues in any entry of merchandise. The evidence required for appraisement cases is different from that required for protest cases.

Further, the estimated duty paid with an entry is untouched in an appraisement case until the correct value is established. S. 2624 would require payment of all Customs duties as claimed due on the Government's theory of dutiable value, before that value can be contested in the Customs Court. This is not required under the present law. To change to this procedure would work an extreme hardship upon many importers and could preclude judicial review.

The Customs Court was created by Congress to be a "Business Man's Court" and has always operated with a minimum of formality, because of the unique nature of the litigation. It has been understood and accepted that the Customs Court is as available to the importer as is the Customs House. S. 2624 would impose a filing fee in an amount not determined but limited by the fees charged in District Court. To take a protest into Customs Court, the accepted thought that the Customs Court should be as available as the Customs House precludes charging a fee. A fee for taking a protest to Customs Court would not be equitable; some entries have one consignee or one item, while a consolidated entry may contain merchandise for as many as fifty importers. The importer is entitled to get his protest into Customs Court with the least possible expense.

Filing fees where numerous protests are filed for one issue could make Customs Court the most expensive court in the country.

Section 210 (b) of S. 2624 would eliminate the existing administrative authority of customs field officers to correct errors of appraisement, which are frequently routinely called to their attention by importers and brokers without the need for the services of attorneys. Section 520 now authorizes relief without court action when such errors are called to the attention of the Customs service within one year from the date of appraisement; S. 2624 would reduce that time to 90 days after liquidation, and in addition would require that such claims be included in a protest—meaning a new item in Customs Court.

S. 2624 would eliminate the appellate review of value cases in Customs Court (now available without court costs and without incurring printing expense) and would require that all appeals be taken to the Court of Customs and Patent Appeals, where all transcripts and briefs are required to be printed. The cost of printing is a heavy burden to be imposed on the importer. Notwithstanding the expense, the number of appeals to the Court of Customs and Patent Appeals would necessarily increase. Under the present law many cases are resolved at the appellate review level of the Customs Court. The provisions of S. 2624 would not provide for this review.

S. 2624 would eliminate the present automatic referral to the Customs Court of protests and reappraisement appeals 90 days after filing. The present law requires that appraisement, including completion of an appeal to reappraisement, be completed before an entry is liquidated. The present law provides that liquidation of an entry by the customs is final and conclusive upon the importer, unless within 60 days after, but not before, such liquidation the importer files a protest setting forth his reason for objection to the custom's action. Until an entry is liquidated the importer cannot know whether or not he has any dispute with the customs, because until the entry is liquidated no one knows what rate of duty the customs may assess. Within the 60 days after liquidation the importer may file his protest with the customs and then the customs and the importer may study the protest during the 90 day period until the protest is referred to the Customs Court.

S. 2624 would have a civil case filed in Customs Court after the denial or constructive denial of a protest. To have the case referred to the court a Summons would have to be filed with the court in New York within 180 days after the denial or the constructive denial of a protest. In addition, copies would have to be served on the Secretary of the Treasury and the Department of Justice.

Under the present law multiple copies of the protest are filed with the Customs and, after the 90 days, these copies are sent by the Customs to the court and governmental agencies. Filing a summons is an unnecessary duplication of much of the paper work required to prepare and file a protest.

For years the trend has been to remove formality from the courts. This proposal in Customs Court is retrogression—a step in the wrong direction.

S. 2624, relating to decisions of judges in contested cases, eliminates the necessity for writing opinions in all cases stating the reasons and facts upon which the decision is based.

This proposal is most harmful, since the decisions of the Customs Court in contested cases are most important for guidance of local customs officials. These decisions are used by customs brokers in advising their clients—the importers.

S. 2624 would extend the benefit of the statutory presumption of correctness to every decision of the Customs officials. This statute now applies only to appraisement. To extend this statute to all decisions of all customs officials increases the burden of proof of the importer. At the present time, in appraisement cases, the importer has to prove that the decision is wrong and then has to prove what the correct decision is. Extending this to all decisions of every customs official is clothing the customs with a holy and almost impenetrable shroud. This is contrary to the general precepts of our government.

S. 2624 provides for constructive denial of a protest which has not been allowed or denied in whole or in part after two years have elapsed from the date the protest was filed. S. 2624 provides that the importer may request an accelerated disposition of the protest any time after 90 days have elapsed after the protest was filed.

This is an added burden on the importer. The two-year provision is inequitable. It leads the customs official to delay making a decision on the protest. At the present time the customs official has 90 days, and then the protest must be sent to the court.

S. 2624 would direct the customs officials to transmit to the court only the entry, the invoices, the protest, and a copy of the denial of the protest if one was issued. The present law requires the transmittal to the court of "the entry and the accompanying papers, and all the exhibits connected therewith". S. 2624 would eliminate sending to the court:

1. The Summary of Entered Value whereon the customs officials record their appraisement, examination notes, weight notations, sampling request and anything else the customs officials want recorded.
2. Laboratory reports on which the classification is frequently based.
3. Preliminary notices sent to the importer on Customs Forms 5555 and 5561 which often reflect the action taken by the customs officials.
4. Correspondence of the importer with the customs officials relating to the transaction.
5. Other records and documents relating to the entry.
6. Samples taken by the customs officials for examination.

These documents are needed for the court as well as the parties litigant.

S. 2624 would broaden the statutory provisions relating to examination of importers and others and the inspection of their books, papers, records, correspondence, to permit these activities by an "appropriate customs officer" instead of continuing the safeguards now in the law, which restrict this power to the Collector's and Appraiser's officials who appraise and classify imported merchandise. This power should be vested by statute only in the District Director.

S. 2624 has this provision:

"Upon application of a party and for good cause shown, or upon his own initiative, the chief judge may authorize a judge of the court to preside at a trial or hearing in a foreign country."

This provision can force an importer, at great expense to him, to appear at a trial or hearing in a foreign country. The courts should be only in the United States and at that location convenient to importers.

It is doubtful that this provision to have United States Courts sit in foreign countries is constitutional.

S. 2624 appears to have been drafted by the Departments of Justice and Treasury without views from importers, their customs brokers and their customs attorneys. The bill is well prepared for the purpose intended: to strengthen the position of the customs to the detriment of the importers.

The importer wants and is entitled to equitable conditions under which to pursue his business. He wants and is entitled to receive decisions from the customs and its courts with the least possible assistance from his customs brokers and his

customs attorney. He wants and is entitled to elimination of unnecessary costs, red tape, and formal procedures. He wants and is entitled to removal of unnecessary delays.

S. 2624 does not provide this.

All action on this bill, in fairness to the importers, their customs brokers and customs attorneys, should be deferred for six months during which time importers and governmental agencies—Treasury, Justice, Judicial, The Senate Finance Committee and the Small Business Administration—be invited to submit recommendations keeping in mind:

That the Customs Court is a Business Man's Court;

That access to the court be without filing fees;

That red tape and formality be reduced to a minimum;

That the customs be empowered to reliquidate a protested entry any time before it has been sent to the Customs Court;

That the customs, with the consent of the importer in writing, may hold a protest for more than 90 days;

That the importer may amend his protest at any time before it is heard in court;

That the court may, on motion of the plaintiff, amend the protest in a hearing; and

That Appeals for Reappraisal be handled in a procedure separate from the procedure of a protest.

[From the Los Angeles Daily Journal, Feb. 20, 1969]

HOW ONE CASE DECIDES THOUSANDS IN CUSTOMS COURT TOLD BY JUDGE

BACKLOG PRESENTS NO PROBLEMS

There are no delays in setting cases for trial before the United States Customs Court, Honorable Morgan Ford, United States Customs Court Judge, of New York, stated in an address to the Foreign Trade Association of Southern California at the Biltmore Hotel on February 13.

Notwithstanding that there were over 404,000 cases pending before the Court as of the close of fiscal 1968, Judge Ford said a party litigant can have a case set for trial before the Court at its headquarters at New York within 60 days, and at other ports of entry at which the Customs Court holds hearings on circuit, at the Court's periodic sessions there. This a unique situation, unlike many State and Federal Courts, where there are waiting periods of months or years in obtaining trial dates.

Judge Ford indicated that a decision in one test case in the Customs Court often establishes a precedent which disposes of hundreds, sometimes thousands, of cases. As an example, he indicated that the decision of the Customs Court in a test case involving the dutiable value of plywood will dispose of in excess of 53,000 cases pending before the Court. A test case now pending on the classification of articles made of man-made fibers (synthetic textiles) has over 42,000 cases pending under it. A test case relating to the dutiable value of goods exported from Japan subject to floor prices established by the Japanese Ministry of International Trade and Industry (MIBI) has pending under it over 49,000 cases. These three issues represent approximately 37 per cent of the cases now pending before the Court.

During the fiscal year 1968, Judge Ford stated, 209 test cases involving various justiciable issues were submitted to the Customs Court for decision. "Twenty-eight percent of these cases were tried on the West Coast; 40 per cent at our headquarters at New York; and the remaining 32 per cent at other ports of entry throughout the United States," the Judge told the assembled international trade group.

Judge Ford is presiding at circuit hearings of the Court on the West Coast, on assignment by Chief Judge Paul R. Rao. He has just concluded hearings at Seattle, Portland, San Francisco and San Diego. At the conclusion of the Los Angeles term of Court, Judge Ford will return to the headquarters of the Court at New York, where the Court has recently moved into a building specially constructed for the Customs Court, at One Federal Plaza.

Judge Ford paid tribute to Chief Judge Rao, as the architect of the idea of a building for the United States Customs Court, which was formerly housed in a warehouse building adjacent to the Port, in which the Customs officials in charge of examination of merchandise then also had their offices.

"After 22 years of inspired and tireless effort on the part of our Chief Judge, his dream has become a reality, and we now occupy our own Court Building, with courtroom as beautiful as any in which I have presided, at ports throughout the United States," said Judge Ford.

Judge Ford also commented favorably on the facilities provided for the Court in Los Angeles, in the New Federal Building, where circuit hearings are held periodically, praising the acoustics in the courtroom as comparable or better than in many facilities used by the Court in other parts of the country.

One of the problems in disposing of cases pending before the Court is due to a shortage of help in some of the government departments involved in processing cases subject to summary disposition, Judge Ford said. "With maximum effort and cooperation from importer-litigants, their counsel, the Bureau of Customs and its Field offices, and from the Customs Section of the Department of Justice, we will continue to have a highly efficient, businessman's court, the kind envisioned when the court was created by Congress some 43 years ago."

STATEMENT OF MITSUBISHI INTERNATIONAL CORP., NEW YORK, N.Y.

This memorandum is submitted on behalf of MITSUBISHI INTERNATIONAL CORPORATION (hereinafter MIC) for consideration by the Subcommittee in connection with the proposed bill S. 2624 "To improve the judicial machinery in Customs Courts by amending the statutory provisions relating to judicial actions and administrative proceedings in customs matters, and for other purposes."

MIC is engaged in the importation into the United States of various kinds of merchandise, through all of the principal ports of entry in this country. A number of these importations consist of substantial shipments of footwear, which include certain so-called tennis shoes, having rubber soles and fabric uppers, which are subject to duty on the basis of American Selling Price. The determination by the appropriate customs officer of the particular American Selling Price that, in his opinion, is the proper dutiable basis of each different kind of tennis shoe imported has resulted in constant serious value problems during the past ten years, which have required the filing of thousands of appeals for reappraisal to contest the findings of the respective customs officers.

The filing of an appeal for a reappraisal under the law presently in effect (Sec. 501, Tariff Act of 1930) is a fairly simple, practical matter. It must be filed within 30 days from the date of a written notice of appraisal which is sent to the importer, as required by the law, before liquidation of the entry. An official Customs Form (CF 4305) is used for filing the appeal. The form is filled in, and signed, and then filed in the Custom House at the port of entry. After filing, the appeal and the invoice covered thereby are transmitted to the Customs Court, usually within 30 days after filing, for determination of the issues raised thereby. This simple, practical procedure has served for some 50 years to bring before the Customs Court all cases involving the question of the proper dutiable value of imported merchandise, and it has never presented any difficulties or caused any problems. Moreover, no filing fees were required to be paid.

The bill not only proposes to make drastic changes in the present law by repealing the said separate, simple and practical procedure, which enabled those wishing to bring questions of dutiable value before the Customs Court for adjudication to readily do so, but also proposes to set up a new procedure for that purpose which, when compared with the present one, is so cumbersome, and presents such great difficulties, that compliance therewith would be a severe hardship and a tremendous burden upon importers wishing to avail themselves of the opportunity to bring such value questions before the Customs Court for judicial review.

Title II of the bill, dealing with administrative proceedings in customs matters, proposes to repeal the separate appraisal procedure. Sec. 205 (p. 21) proposes to amend Sec. 501 of the Tariff Act and eliminate therefrom all provisions relating to the giving of written notice of appraisal by the Government, and the filing of a written appeal for a reappraisal by the consignee or his agent. We are deeply concerned over the proposed repeal of the present provision requiring that written notice of appraisal be given to the importer, as such repeal will result in a very serious burden on importers wishing to raise questions as to the proper dutiable value of their imported merchandise. At the very least, any amendment of said Sec. 501 should include provisions which would require that written notice of appraisal be given to the consignee, his agent, or his attorney

if (a) the appraised value is higher than the entered value, or (b) in any case, if the consignee, his agent, or his attorney requests such notice in writing before appraisement, at the time of entry of the goods, setting forth the reason for requesting the notice. The importance of the receipt by the consignee, or his agent, of such written notice will be further discussed hereinafter.

Sec. 207 (p. 22) proposes to amend Sec. 514 of the Tariff Act by requiring a comprehensive written protest to be filed, after the liquidation of an entry, setting forth all objections to the appraised value of the merchandise, and other required data. Sec. 207(b)(1) (pp. 23-24) prescribes the form of the protest, which takes the place of the simple form of appeal for a reappraisement now in use. Sec. 208 (p. 25) then proposes to amend Sec. 515 of the Tariff Act to provide for a review of a protest filed pursuant to Sec. 514 by "The appropriate customs officer * * *" who, unless a request for an accelerated disposition of a protest is filed after 90 days following the filing of the protest, may allow or deny the protest anytime within two years after the date the protest was filed. Notice of the denial of the protest must be mailed in the form and manner prescribed by the Secretary.

When a protest has been denied, in order to bring the matter before the Customs Court, the bill proposes that a civil suit must be brought. Sec. 112 (p. 10) of Title I proposes to amend Sec. 2631 of Title 28 of the United States Code to require that when a protest has been denied, an action must be commenced within 180 days after the date of the notice of denial. Sec. 113 (p. 10) proposes to amend Sec. 2632 of said Title 28 in such a way that a party wishing to contest the denial of a protest must commence a civil action in the Customs Court by filing "a summons in the form, manner, and style and with the content prescribed in rules adopted by the Court."

To understand the hardship confronting those who may wish to bring cases involving the dutiable value of their imported goods before the Court, under the proposed new procedure, it is only necessary to compare the simple procedure under the present law, under which an appeal for a reappraisement is filed within 30 days after receipt of written notice of appraisement, and usually reaches the Customs Court within the next 30 days, with the complicated and burdensome procedures proposed by the bill, under which two and one-half years could elapse before the matter reaches the Court, and which would require a tremendous amount of additional work.

Said Sec. 113 also proposes to amend said Sec. 2632 (see (b) p. 11) to require the imposition of a filing fee payable upon commencing an action, the amount of which shall be fixed by the Customs Court but shall not be less than \$5. If enacted into law, this proposal will result in a further serious burden on importers, and is an unfair charge which is equivalent to a penalty for bringing a civil action in the Customs Court.

To understand why this is so, it is necessary to consider the difference between the nature of actions commenced in City and State Courts and in Federal Courts other than the Customs Court, with those commenced in the Customs Court. Generally speaking, in most of the cases brought in said other Courts, the litigant needs only to commence one action to protect himself, and must pay only one filing fee. In the Customs Court, the questions generally relate either to the dutiable value or rate of duty applicable to imported merchandise. As the average importer usually continues to import the same kinds of merchandise, he must make a separate entry for each shipment as it arrives in this country. In order to protect himself, he must file a protest covering each and every entry after it is liquidated, when the merchandise imported thereunder involves decisions by the customs officer which the importer is protesting. Thereafter, he must commence civil action by filing a summons within a specified time after the protest has been denied. Sec. 207(b)(1) (p. 24) of the bill will require the filing by many importers of thousands of protests, because each protest is limited to one entry (except where an entry covers merchandise of different categories). Accordingly, as the protests are denied, the importer must commence a great many civil actions to insure his continued protection. While Sec. 110(d) (p. 9) permits an importer to include in a civil action entries involving common issues, this, at most, enables him to commence a smaller number of actions, depending upon the dates of denial of the protests, and other considerations. It is evident that if an importer must pay the proposed minimum filing fee of \$5 for each civil action commenced, many importers, including MIC, will pay filing fees amounting to many thousands of dollars, which is clearly unreasonable.

It will thus be seen that due to the peculiar nature of customs litigation, there is a vast difference between the requirements necessary to protect the interests of a litigant in the Customs Court and those necessary to protect a litigant in

the other Courts. Under the circumstances, it is clearly unfair to impose a filing fee upon the commencement of a civil action when a summons is filed by an importer, in view of the fact that he must start many actions which involve the same question, and the same class of merchandise, in order to properly protect himself.

The Congress provided for a filing fee (\$1 per protest) under the Tariff Act of 1913. That fee was abolished and not included in the Tariff Act of 1922, after Congress found that it resulted in a hardship upon small importers, which caused them to refrain from contesting questionable assessments of duty. It is submitted that no filing fee should be charged when an importer is contesting what he believes to be an illegal determination of dutiable value or classification.

It may be contended, however, that a party should not be permitted to bring action in the Customs Court unless he pays some charge. If it is decided that a filing fee should be imposed on importers using the Customs Court, the fee should not be imposed on every civil action commenced in the Court, involving the same questions and the same class of merchandise, but only on a so-called test case when the case is noticed for trial by the importer. The payment of such fee would be equivalent to the payment of a filing fee by a litigant in the other Courts. The amount of the filing fee should be fixed by the Customs Court and should not be more than the filing fee for commencing a civil action in a United States District Court.

We have hereinabove discussed the proposal to repeal the present law, which provides that written notice of appraisement be sent by the Government to the consignee, his agent, or his attorney, and stated that the importance of receiving such notice would be further discussed herein. The receipt of such written notice, as provided in Sec. 501, is of vital importance because it brings to the direct attention of the importer, or his agent, the specific entries which involve a question of dutiable value. Clearly, only a certain percentage of all entries involves questions of value. At the present time, the importer need consider only those entries which are the subject of a written notice of appraisement in determining whether an appeal for a reappraisement should be filed.

Under the procedure proposed in the bill, an elaborate protest must be filed *within 90 days after the liquidation of an entry* to contest the appraised value. There is no proposed provision which requires written notice of appraisement, such as is included in the present Sec. 501 of the Tariff Act. Hence, under the bill an importer will not receive any written notice informing him as to the particular liquidated entries which involve questions of value.

MIC makes approximately several thousands of entries each year covering merchandise imported through all of the principal ports of entry in the United States. As indicated, although only a certain number of such entries involve questions of value, such number is substantial. Without written notice of appraisement, the burden of determining which of the entries should be protested after liquidation, to protect MIC's interests when a value question is involved, is truly monumental. Sec. 204 (a) of the bill proposes to amend Sec. 500 (e) (p. 20) of the Tariff Act, to give notice of liquidation of an entry to the importer, his consignee, or agent, in such form and manner as the Secretary shall prescribe in regulations. Even if such notice were a direct notice in writing, it would be worthless for any purpose except to inform that a certain entry had been liquidated on a certain date.

The Treasury Department recently changed its procedure respecting liquidation of entries. Those made subsequent to the date of change are handled by automatic data processing machinery. With respect to these entries, the importer receives a so-called courtesy notice of liquidation, which is a card automatically filled in by the machine, giving principally the entry number, date of entry, and date of liquidation of the entry. The card contains nothing concerning the value and classification of the merchandise covered by the entry, and is not considered to be an official notice of the liquidation of the entry. The official notice consists of a bulletin posted at the port of entry, listing all entries liquidated on a given day, as required by present law. The only notice of liquidation for entries made prior to the said date of change is the listing in the said bulletin. Separate bulletins are posted at each port for entries liquidated on a given day, one bulletin listing the entries handled by the automatic data processing machinery, and the other bulletin listing the entries not so handled.

In order to properly protect his interests, it would be necessary for an importer, or his agent, to examine the daily bulletin notices of liquidation at all ports at which he makes entries, to ascertain which of his entries had been liquidated, and the date of liquidation, and then to examine the entries to determine whether they

involved a question of value (or classification) which required protesting within 90 days after the date of liquidation. While this would require considerably more work than is necessary in filing an appeal for a reappraisal under present law, it probably could be accomplished, but at a much greater expense, with respect to entries made at the port where the importer is located.

However, as to those entries made at other ports, the importer would be confronted with even greater difficulties and expenses. In such instances, an agent would be needed at each port to examine the bulletins, obtain the dates of liquidation, and then examine the entries for the purposes above explained. All this could, of course, be accomplished, but the expenses in many cases would be so prohibitive in relation to the amounts involved in the questions to be protested, as to discourage importers from contesting the decisions of the customs officers believed to be erroneous. Thus, in effect, importers would in many instances be deprived of judicial review by the proposed bill, because Sec. 110 (p. 8) amends Sec. 1582 of Title 28 of the United States Code, so that the Customs Court will not have jurisdiction of an action unless a protest has been filed, as prescribed by amended Sec. 514 of the Tariff Act of 1930, and denied in accordance with the provisions of Sec. 515 thereof, as amended. In other words, when there is no protest against the liquidation of an entry, no civil action can be commenced in the Customs Court involving that entry.

In view of the large numbers of entries made by MIC at all principal ports of entry, a substantial number of which involve questions of dutiable value, the hardship that will result from repeal of present provisions of the law, requiring that written notice of appraisal be sent to importers, or their agents, is readily apparent. Similar hardship also will be imposed on all other large importers who make numerous entries at the said various ports in this country. As hereinabove suggested, the proposed new procedure, relating to the protesting of decisions as to the appraised value of merchandise after liquidation of an entry, should include specific provisions for the sending of written notice of appraisal by the Government to the consignee, his agent, or his attorney, perhaps in Sec. 500 of the Tariff Act, as amended, subdivision (e) of which provides that notice of liquidation be given to the importer, his consignee, or agent.

Another serious problem that will confront the importer, or his agent, under the proposed bill, will be the keeping track of the dates of denial of all protests filed, in order to file a timely summons to commence a civil action in the Customs Court. As indicated above, such action must be started within 180 days after the date of written notice of denial of a protest, and a number of entries involving common issues and merchandise may be included in a single civil action. In order to avoid starting thousands of civil actions, it will be necessary to keep a record of dates of denial of protests, covering entries of the same merchandise, imported by the same importer, for a period up to six months. This would be unnecessary if the protest were transmitted to the Customs Court, after denial by the reviewing officer, as is the case under present law, and there was no necessity of starting a civil action by the filing of a summons, as provided in the proposed bill.

Another provision of the bill which gives us grave concern is Sec. 204 (c) (p. 20), which proposes to amend Sec. 505 (a) of the Tariff Act to require the consignee to deposit at the time of making entry the amount of duties *estimated by the customs officer to be payable thereon*.

Prior to August 1, 1966, an importer was entitled to enter his merchandise at the value he believed to represent the proper dutiable value thereof, regardless of the cost of value given in the invoice, by virtue of the provisions of Sec. 487 of the Tariff Act, which reads as follows:

"The consignee or his agent may, under such regulations as the Secretary of the Treasury may prescribe, at the time entry is made, make in the entry such additions to or deductions from the cost or value given in the invoice as, in his opinion, may raise or lower the same to the value of the merchandise."

However, in May 1966, new procedural requirements were instituted in Region II (New York) in connection with the entry of merchandise, which required importers to enter their merchandise at the value and rate of duty determined by the customs officer. Entries that did not comply with the customs requirements were rejected. This caused such hardship that a courtesy period was given which suspended rejection of entry for a short period. Then, on July 12, 1966, Information Bulletin No. 5 was issued at New York, which stated among other things: "Effective August 1, 1966, this courtesy period is terminated and all entries which do not meet customs requirements will be rejected." It is our understanding that such entry requirements also had to be followed by importers at the various ports of entry throughout the United States.

Since August 1, 1966, if an importer wished to continue in business, he was compelled to enter his merchandise at the value and rate demanded by the customs officer. He could not, as a practical matter, refuse to so enter the merchandise, because upon such refusal he could not enter his goods. Clearly, without the goods, he could not remain in the importing business.

Thus the administrative officials, by means of Information Bulletin No. 5, simply read Sec. 487 out of the Tariff Act and rendered it wholly meaningless. Sec. 505(a) of the Tariff Act, as proposed to be amended by said Sec. 204(c), *which requires the consignee to deposit at the time of entry the amount of duties estimated by the customs officer to be payable on the merchandise*, is in direct conflict with said Sec. 487 and, unless it has escaped our attention, the bill does not repeal the latter section.

We strongly oppose the provisions of Sec. 505(a), as proposed to be amended by Sec. 204(c) of the bill, because under the Tariff Acts of 1922 and 1930, up to August 1, 1966, an importer was entitled to enter his merchandise at the value he believed to represent its correct dutiable value. Then, if the appraising officer advanced the value and the importer appealed for a reappraisal, the importer was not required to pay duty on the basis of the appraised value, unless the Customs Court decided the appeal against the importer. In many cases, final decision of the Court was not handed down until some three or four years had passed after filing of the appeal.

When an importer recovers duties deposited as a result of erroneous or illegal decisions of the customs officer, he does not receive interest on the amount recovered. Hence, when an importer must deposit the duties estimated by the customs officer to be payable on the merchandise, and subsequently recovers it without interest, the effect is an interest-free loan to the Government, sometimes for long periods. Since, in many instances, to remain competitive in the domestic market, the importer must absorb some or all of the duty exactions being contested, it is a serious and unfair burden on him to require that he deposit at the time of entry the amount of duties estimated to be payable by the customs officer, when a valuation question is involved.

To eliminate this burden on the importer, and to give effect to the provisions of Sec. 487 of the Tariff Act, the period after the word "thereon" in proposed Sec. 505(a) should be deleted and the following exception included: "(except when the consignee or his agent has entered the merchandise pursuant to the provisions of Section 487 of this Act at a value which, in his opinion, is the value of the merchandise)."

MIC is in agreement with the announced objectives of S. 2624 to improve the procedures dealing with the review by the Customs Court of the decisions of customs officers, and to improve the administration of the tariff statutes by customs officials. However, while the bill contains certain provisions which it is believed would improve judicial review, and others which would appear to help in administering the tariff provisions, it contains so many other provisions onerous to importers, which impose upon them many new burdens and hardships, that the bill will fail to accomplish its stated purpose unless it is drastically amended. In its present form, the bill would not make a good law, and it is not worthy of enactment into law unless it is amended to eliminate some, if not all, of the new burdens and hardships that its present provisions would impose on all importers.

We have discussed herein only several of the proposed provisions which are of greatest concern to us. There are many others which also are detrimental to the interests of all importers, and which, if enacted into law in their present form, would sharply interfere with the judicial review that is so readily available to importers under existing law.

One of the major reasons why we are so concerned about having a practical and adequate remedy available to contest decisions of the customs officers, as to the dutiable value of our imported goods, is the fact that hundreds of the entries we make each year cover so-called tennis shoes of a kind subject to the American Selling Price (hereinafter ASP) basis of valuation for duty purposes. The crux of this dutiable basis is that the appraising officer must determine the ASP at which a domestically produced tennis shoe either like or similar to the imported shoe is *freely offered for sale* to all purchasers under certain criteria set forth in the statute—Sec. 402a(g), Tariff Act of 1930.

It is common knowledge today that most countries consider the ASP basis of valuation unfair for a number of good reasons, not the least of which is that such basis, in many instances, enables the domestic manufacturer to establish the amount of the dutiable value of the imported article which is found to be

like or similar to the domestically produced article. This is made possible by reason of the interpretation made by the Customs Court of the words "freely offered for sale" found in the statute.

For example, a domestic manufacturer will establish a price list of, let us say, \$4 per pair, for a certain trademarked shoe, which is for sales to retail dealers, and claim that the shoe is freely offered not only to retailers but to all prospective buyers at that price. However, the identical shoe will be offered to certain wholesale dealers, or other large volume buyers, at a price lower than \$4 per pair, but certain restrictions are specified in order to obtain the shoe at the lower price. Since the sales at the lower price are not freely offered within the meaning of the statute, because of the restrictions, the price of \$4 is claimed to be the one at which a similar imported shoe should be appraised, because that price is claimed to be freely offered to all buyers without restrictions. If the appraising officer appraises the imported shoe on the basis of the price list to retailers (and this has happened many times), we must contest the decision and try to establish that the \$4 price is not the correct ASP within the meaning of the pertinent statute.

Another example is when the domestic manufacturer makes shoes identical in quality with the trademarked shoes, above mentioned, except that they do not bear the trademark. Such shoes are then offered to buyers other than retailers, at negotiated prices much lower than \$4 per pair, but again certain restrictions are specified in order to obtain the shoes at the lower price. This enables the manufacturer to claim that the shoes are not a proper subject of consideration by an appraising officer when he is seeking to determine the ASP applicable to a similar imported shoe, because the said domestic shoes are not freely offered for sale within the meaning of said statute.

Because of this situation, we have found it necessary to file thousands of appeals for reappraisal during the past ten years, and under existing law have experienced no difficulty whatsoever in the filing of said appeals. However, as shown hereinabove, the new procedure proposed by the bill, to contest the decisions of the customs officer as to the value of merchandise, if enacted into law, would confront us with such problems and be burdensome as to make it practically impossible to properly protect our interests. It is submitted that importers should not be required to cope with such intolerable provisions, in order to avail themselves of the opportunity to bring their questions of value (or classification) before the Customs Court for determination.

It is sincerely hoped that if this bill is enacted into law, it will be appropriately amended, before enactment, to eliminate at least some, if not all, of the tremendous burdens and hardships, hereinabove discussed, that would result if certain of the proposed provisions were enacted into law in their present form.

STATEMENT OF THOMAS E. O'NEILL, VICE PRESIDENT AND GENERAL COUNSEL,
NATIONAL ASSOCIATION OF ALCOHOLIC BEVERAGE IMPORTERS, INC., JANUARY
29, 1970

On behalf of the membership of the National Association of Alcoholic Beverage Importers, Inc., I would like to generally endorse the Bill S. 2624 which is currently pending before your Subcommittee. Although I have several small suggestions for the improvement of the proposed legislation, we regard this as a bill which should prove of benefit to the Government and importers alike.

The National Association of Alcoholic Beverage Importers numbers in its membership most of the larger importers in the United States, and our members are responsible for the importation of approximately 85% of the alcoholic beverages presently entering the United States.

On behalf of these members, I would like to propose additional matter for consideration in connection with S. 2624, the bill to improve the judicial machinery in the customs courts and to revise certain administrative proceedings in customs matters. Specifically, I request an amendment to the language of Title 19, Section 467. At the outset, let me point to the fact that the amendment which I propose has had the previous approval of the Treasury Department and the Bureau of Customs. My proposal for a change in this section is identical to a proposed change which was sponsored by the Treasury Department in the Customs Administrative Act of 1959. Considering the fact that this proposal would simplify the duties of Customs officials, as hereafter detailed, it certainly is germane to the purpose of the bill to simplify administrative proceedings in Customs matters. As presently in force, this section of the law makes it necessary to affix a stamp to each barrel, cask, or similar bulk package containing alcoholic beverages. Because of the man-hours expended, this procedure is wasteful to the Bureau of Customs, as well as expensive to importers.

There is no longer any reason for the retention of the requirements of this section, or for that matter, the requirements of Section 468 and Section 469. These sections have been carried over from the Act of March 1, 1879, which imposed certain taxing and regulatory requirements in the areas of both alcoholic beverages and tobacco. While the various sections of this law relating to actual taxation have been recodified and changed considerably over the years under various revisions of the Internal Revenue Code, Sections 11, 12 and 13 of the Act of March 1, 1879, Stat. 342, were made a part of the Customs laws. When these laws were recodified, the original text of the 1879 law was continued as Sections 467, 468 and 469, of Title 19, U.S.C.

The legislative history of the 1879 law does not disclose the specific purpose of these sections. However, it is obvious that the purpose of such sections was to prohibit tax evasion. Prior to the War Revenue Act of 1917, Chapter 63, Sec. 300, 40 Stat. 308, internal revenue taxes were not payable on imported distilled spirits. Since the enactment of the War Revenue Act of 1917, internal revenue taxes have been, and are currently assessed and collection in addition to the duties on imported spirits, as well as on other alcoholic beverages.

Read in the light of the foregoing, it is obvious that the original purpose of these below-quoted sections has passed into obscurity.

Section 467. Deposit of imported liquors in bonded warehouse

All distilled spirits, wines, and malt liquors, imported in pipes, hogsheads, tierces, barrels, casks, or other similar packages, shall be first placed in public store or bonded warehouse, and shall not be removed therefrom until the same shall have been inspected, marked, and branded by a United States customs-gauger, and a stamp affixed to each package, indicating the date and particulars of such inspection; and the Secretary of the Treasury is authorized to prescribe the form of, and provide, the requisite stamps, and to make all regulations which he may deem necessary and proper for carrying the foregoing requirements into effect. Any pipe, hogshead, tierce, barrel, cask, or other package withdrawn from public store or bonded warehouse purporting to contain imported liquor, found without having thereon the stamp hereby required, shall be, with its contents, forfeited to the United States; and whenever any cask or package of imported distilled spirits of not less than five wine-gallons is filled for shipment, sale, or delivery on the premises of any wholesale liquor dealer, the same shall be stamped with a special stamp for imported spirits, under such rules and regulations as the Commissioner of Internal Revenue has prescribed, or may hereafter prescribe, in the case of domestic distilled spirits. Mar. 1, 1879, c. 125, Sec. 11, 20 Stat. 342.

Section 468. Stamps and brands effaced on emptying packages of imported liquors

Every person who empties or draws off, or causes to be emptied or drawn off, the contents of any package of imported liquors stamped as above required, shall, at the time of such emptying, efface, obliterate, and destroy the stamp thereon, and also all other marks or brands which shall have been placed thereon in accordance with the law or regulations concerning imported liquors; every cask or other package from which the stamp for imported liquors required by section 467 of this title to be placed thereon shall not be effaced, obliterated, or destroyed, on emptying such package, shall be forfeited, and the same may be seized by any officer of internal revenue wherever found; and all the provisions and penalties of R.S. Sec. 3324, relating to empty casks or packages from which the marks, brands, or stamps have not been effaced or obliterated, and relating to the removal of stamps from packages, and to having in possession any stamps so removed, shall apply to the stamps for imported spirits herein provided for, and to the casks or other packages on which such stamps shall have been used. Mar. 1, 1879, c. 125, Sec. 12, 20 Stat. 342; May 28, 1880, c. 108, Sec. 12, 21 Stat. 148.

Section 469. Dealing in or using empty stamped imported liquor containers

If any person shall purchase or sell, with the imported-liquor stamp herein required remaining thereon, or any of the marks or brands which shall have been placed thereon in accordance with the laws or regulations concerning imported liquors remaining thereon, any cask or other package, after the same has been once used to contain imported liquors and has been emptied; or if any person shall use or have in possession such cask or package, with any imitation of such marks or brands, for the purpose of

placed domestic distilled spirits therein for sale; every such cask or package, with its contents, if any, shall be forfeited to the United States. And every such person who shall violate any of the provisions of this section shall be liable to a penalty of \$200 for every such cask or package so purchased, sold, used, or had in possession. Mar. 1, 1879, c. 125, Sec. 13, 20 Stat. 343; May 28, 1880, c. 108, Sec. 13, 21 Stat. 148.

Realizing that at the time of the original enactment of the Act of March 1, 1879, imported liquors did not pay the Federal excise tax, the clear purpose of surviving Section 467 of Title 19 is easily ascertained. Its inclusion in present law is clearly an anachronism. When the three foregoing sections are read together, we note that Section 468 requires that the stamps be effaced, obliterated, and destroyed upon emptying, while Section 469 prohibits dealing in empty containers which have been stamped in accordance with the law, and specifically forbids the possession of any stamped cask or package "for the purpose of placing domestic distilled spirits therein for sale."

The obvious intent of these two provisions was to prohibit the evasion of the domestic distilled spirits tax by filling empty liquor casks of foreign origin with untaxed domestic spirits. Under today's detailed laws and regulations governing all phases of production of domestic distilled spirits, as well as importation of distilled spirits from abroad, this practice would be absolutely impossible.

In addition to the archaic nature of these statutory provisions, there is, as previously indicated, a great burden placed upon the Bureau of Customs and upon individual importers by the statute.

Official statistics of the Department of Commerce report quantities of imports in gallons. Through trade knowledge of sizes of containers used, it is possible to estimate the numbers of containers based on gallonage of imports. In 1968 there were imported into the United States approximately 400,000 barrels of beer, 400 hogsheads of wine, and 170,000 barrels of distilled spirits. These barrels have to be spread out in a warehouse so that the inspection, branding, stamping and marking can be done. It takes one man about 6 to 8 hours to do this for 400 barrels. Accordingly, in 1968 we estimate that more than 11,000 man-hours were expended by Customs personnel in this operation. And for no purpose that can be ascertained.

In addition, the procedure is burdensome to commerce. The importer has to wait often as long as a week before he can get his goods. In the case of beer, this can often be ruinous. If the weather is hot and the beer is on the docks awaiting this procedure, it can spoil; if the weather is very cold, the beer can freeze.

With the development of containerized cargo, beer importers are deprived of the time-saving advantages containerization offers because the barrels have to be unloaded, spread out in a customs warehouse, marked, stamped, and branded, then reassembled and moved to refrigerated warehouses. Without the costly and onerous inspection and stamping procedure, they could be moved directly to the importer's warehouse.

There is no requirement in the law for stamps to be affixed to containers of domestically produced wine or beer. In 1954 the Internal Revenue Code was amended to eliminate the affixation of stamps on domestically produced wine and beer containers when tax payment by return was adopted (Title 26, I.R.C. 5061). Stamps are still required to be affixed to bulk containers of domestically produced distilled spirits (Title 26 I.R.C. 5205). Still, the law discriminates against importers of bulk beer and wine in favor of domestic producers, and places a discrimination and undue burden upon foreign imports of these products. This discrimination should be eliminated.

We propose that the scope of S. 2624 be expanded to include an amendment to Section 11 of the Act of March 1, 1879 (Title 19, U.S.C. sec. 467) to read as follows:

Sec. 11. The Secretary of the Treasury may by regulation require such marks, brands, and stamps or devices to be placed on casks or similar containers of imported distilled spirits, beer, and wine as he deems proper and necessary in the administration of the Federal laws applicable to such liquors and may specify those which the importer or owner shall place or have placed on the containers. Any cask or similar container of such distilled spirits, beer, or wine which is found out of the custody of internal-revenue or customs officers not bearing any mark, brand, or stamp or device required by the regulations issued by the Secretary shall be, with its contents forfeited to the United States.

It is significant to point out that the foregoing proposal is identical to Section 3 of the Treasury Department sponsored bill, H.R. 9146, entitled "Customs Administrative Act of 1959" (86th Congress). In its analysis supporting the bill, Treasury had this to say of Sec. 3 of H.R. 9146:

Sec. 3. Section 11 of the Act of March 1, 1879 (19 U.S.C. 467) would be amended by eliminating detailed statutory requirements regarding inspection and a time consuming stamping procedure by customs officers of casks and other containers of imported liquors. If the Secretary should deem it necessary in the administration of applicable Federal laws for any marks or stamps to be placed on containers of imported liquors, he would be authorized to issue regulations requiring the marks or stamps. An obsolete provision dealing with distilled spirits in containers of not less than 5-wine gallons is deleted.

Since the Bureau of Customs and the Treasury Department have thus previously consented and approved of this amendment, we respectfully request that it now be included within the scope of S. 2624.

THE BILL AS PRESENTLY BEFORE YOUR COMMITTEE

I would direct your attention to testimony filed by Mr. Gerald H. O'Brien of the American Importers Association on January 23, 1970, before Subcommittee No. 3. We think that the seven constructive suggestions which he makes on pages 6 and 7 of his testimony would help improve the bill and correct certain inequities which exist in the bill in its present form.

Additionally, I would direct your attention to the fact that Mr. Edwin G. Martin filed a letter for the record in the Senate hearing on this bill. Mr. Martin is an attorney in Customs matters for a number of alcoholic beverage importers and the points which he has raised in this letter are of particular interest to our industry.

I would direct your attention to Section 110 of the bill, which would be designated as Section 1582 of Title 28. Throughout this section, the word "duties" appears, and it would be well for the Committee report on this bill to indicate that the established meaning under the present law is intended to be continued. The term "duties", under the present law, has been construed to include Internal Revenue taxes imposed on importation for the purposes of Customs Court jurisdiction. Also, in regard to Section 1582, new Subsection (c) dictates that the Customs Court shall not have jurisdiction of an action unless, among other things, "all liquidated duties, charges or exactions have been paid at the time the action is filed." The present law limits the rule to entries for consumption on which duties are owing. The timing of liquidations is in the discretion of Treasury. Duties are not due on goods entered into bonded warehouses, but the Treasury may liquidate the entries before duties are payable. Under the pending bill, an importer whose goods are still in the warehouse would be denied the right to litigate the liquidation, unless he is willing to pay the duties in advance. While this construction is probably not intended, a simple amendment to page 9, line 12 of the bill would be in order. The addition of the words "that are due and payable" immediately following the phrase, "all liquidated duties, charges or exactions" would cure the problem.

Under the present law, value can be litigated without advance payment of increased duties, but the pending bill changes this. We suggest that the bill be amended further to require a special notice to the importer that increased duties have been liquidated. If it should be disclosed after suit is filed that increased duties have been liquidated, but not paid, the importer could not, under the pending bill, correct it by paying the duties and filing a new suit because only one civil action may be brought to contest denial of a single protest.

One further problem with Section (c) of proposed new Section 1582 is that it might inadvertently frustrate the intent of consolidation of suits. A consolidated suit covering many entries would have to be dismissed if increased duties on only one entry were unpaid at the time the action is filed. If there is an inadvertent error, the taxpayer should have the opportunity to correct the error by paying the duty after the suit is filed.

While proposed new Section (d) of Section 1582 has as its general purpose the promotion of consolidation, it would be helpful if the Committee report indicated that the consolidation of protests by different importers will be permitted, and also, that if the report indicated that protests at different ports could be consolidated.

The proposed legislation should provide for the payment of interest by the Government on excess duties collected. The bill would permit the litigation of protests only when excess duty claimed by the government is paid. This will be after the liquidation occurs. In a suit resulting from the protest, it may be several years before the question of value or classification is settled. If the government

is proved wrong in regard to either the valuation or classification which led to the payment of additional duty, it will have had use of the importer's money for this period of time. A more equitable arrangement would be to provide that in the event there is a refund, interest should also be paid to the importer on the amount of the refund.

STATEMENT OF JAMES R. SHARP, ATTORNEY AT LAW

SUMMARY OF PROPOSALS FOR AMENDMENT TO S. 2624

I am James R. Sharp, attorney at law, with offices at 1108 - 16th Street, N.W., Washington, D.C. 20036. I have been engaged in legal matters since receiving my law degree from the University of Chicago some 34 years ago. I spent ten years in various legal and administrative capacities with the federal government and for the past 24 years have been actively engaged in the practice of law throughout the country, with offices in Washington, D.C. I tried my first case in the Customs Court about 20 years ago and my practice since that time has consistently included a substantial number of cases in the Customs Court.

I present this statement on S. 2624 for two reasons—the first is as a Customs practitioner to heartily endorse The Customs Court Act. In the analysis of the bill which the Attorney General sent to the Congress, he pointed out that the bill constitutes the "First major restructuring of administrative and judicial review of the initial Bureau of Customs decisions since the establishment of the General Board of Appraisers in 1890." Little more than this need be said to drive home to this Committee the vital need for prompt action in this field. There have been complaints voiced before this Committee about some of the provisions of the proposed bill. This Committee may well report this bill out with amendments, but it must report it, and promptly, for it is urgently needed.

Reform in the area of Customs administrative and court procedures is so slow in coming I urge that you not simply approve the Senate Bill. Instead I urge you improve it by some simple amendments which will aid in cutting the volume of litigation and serve the ends of justice in this Court. My suggestions are four in number.

1. *Provide the Court with Authority to Enforce Its Judgments.*—My first suggestion is to give the Court some authority other than to render judgments. All the court is empowered to do under the present law is to decide whether the Customs officials have erroneously decided valuations or classifications. It has no power to enforce its findings or do anything about cases in which the Treasury Department refuses to take administrative action to carry out judgments of the court.

I have a case now which illustrates my point. In *Falcon Sales Co. v. United States* 47, Cust. Ct. 129, C.D. 2292 (1961), the court held that a Presidential Proclamation increasing duties on spring clothes pins from 10 cents a gross to 20 cents was void. When this judgment came down, there were a considerable number of entries made on payment of duties at 20 cents a gross which had not been protested within 60 days after the liquidation at 20 cents per gross. The importer I represented maintained that if the President's Proclamation pursuant to which the liquidation was made was void so was the liquidation. If so, the goods in the unprotested entries had never been liquidated according to law and would have to be liquidated anew at 10 cents per gross, the legal rate. After litigation through the Court of Customs, *Cajo Trading, Inc. v. United States*, 56 Cust. Ct. 143, C.D. 2621 (1966) and the CCPA sustained our position, certiorari was applied for by the Government and was denied. The Court of Customs then simply entered an order that the protests of the refusal of the District Directors to liquidate at 10 cents per gross was "premature" because the entries had never been validly liquidated. So all this litigation culminated simply in an order dismissing the protests as premature. There was no power in the Court to say to the District Directors—these entries have never been validly liquidated, you are ordered to now liquidate them at 10 cents per gross.

When I petitioned the District Directors to so liquidate the entries, they did so in most cases. However in some they claimed that during the course of the long litigation from 1959 through 1968 they had destroyed their official entry papers pursuant to established practice and so were no longer required to take any action. This despite the fact the entries had never been liquidated "in accordance with law".

Other courts can issue writs of mandamus to require officials to take required action in which there is no action. Not the Customs Court. Other courts can hold those who disobey their orders in contempt. Not the Customs Court.

If, as the Treasury officials urge, the Customs Court is to be moved into the 20th Century, why not give it the tools all other courts have to require administrative officials to carry out the judgments of the Court.

The amendment I urge on you to solve this problem is a simple one. It can be accomplished by amending Judicial Code § 1583 to read as follows:

"§ 1583. The Customs Court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff under any provision of law with respect to the entry of merchandise into the United States notwithstanding Paragraph 1582(c) hereof."

The language suggested has been adopted from Judicial Code Par. 136.

2. *Give the Court Power to Require the Government to Produce Evidence Within Its Control.*—There is a second area in which the administration of justice by the Customs Court could be improved by an amendment to S. 2624. I tried a case in that Court in the Spring of 1969 involving three entries of Swedish Hardboard made in 1953. The Government in 1953 and 1954 had made an investigation and discovered that no Swedish Hardboard manufacturer freely offered the product to all purchasers in Sweden. Instead they all restricted their sales by selling through selected, exclusive area distributors. Accordingly, under the anti-dumping law applicable to the cases at issue, third country sales prices were applicable in determining foreign market value with which to compare the U.S. purchase price.

The Customs Bureau when called on in 1969 claimed confidentiality, mind you, as to its 1953 investigative report finding on whether hardboard was or was not freely offered in Sweden. And the Court held it had no power to determine whether the administrative branch rightly or wrongly was claiming the secrecy which its finding was so obviously not entitled to. Because I couldn't otherwise satisfactorily prove the facts borne out by the Treasury Department's finding, I lost the decision. This despite the fact Treasury officials had openly told me in 1953-54 the results of their investigation. But in 1969 I could not get the facts except from the Treasury Foreign Report and Treasury would not provide them, nor could the court require their production. It was the type of information that wasn't even entitled to confidential treatment in 1954, to say nothing of 1969.

What kind of helplessness is this to be suffered by a court? If this is to be an up to date Court with modern procedures it must have up to date powers to compel the production of documents on request of litigants where the documents are clearly not entitled to be shrouded with secrecy at the convenience and whim of a Government which already enjoys a presumption of correctness when it litigates in this Court.

However, aside from appearing to urge adoption, I urge some badly needed additions to the bill which if adopted would further reduce the case load of the Court and permit it to more effectively carry out its responsibilities.

3. *Make Administrative Classification Rulings Published in Abstract Form Binding on the Court.*—I urge that the bill include an amendment to Section 315(d) of the Tariff Act of 1930 (19 U.S.C. 1315(d)). That Section relates to advisory classification rulings by the Bureau of Customs, the Bureau's practice in connection with the publication of same and a recent Customs Court decision relating to such practice.

Section 315(d) of the Tariff Act of 1930, as amended, provides as follows:

"No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury Decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties. June 17, 1930, c. 497, Title III, §315, 46 Stat. 695; June 25, 1938, c. 679, §6, 52 Stat. 1081; Aug. 8, 1953, c. 397, §3(a), 67 Stat. 508."

It might be assumed upon reading this provision that if an importer or his representative obtained a ruling from the Commissioner of Customs as to the rate of duty believed applicable to a certain article, the ruling would be binding upon the Bureau until thirty days after it published in the weekly Treasury Decisions a notice of adoption of a new ruling setting a higher rate of duty on the particular article. Unfortunately this is not so. Let me point out why.

Section 16.10a of the Customs Regulations provides that any importer or foreign exporter may on application to the Commissioner of Customs receive a decision as to the proper Tariff Classification of an article intended to be imported into

the United States. Pursuant to that provision numerous applications are received each month by the Commissioner both as to articles intended to be imported and as to articles actually being imported. The practice has been to refuse to make such rulings when the exact question submitted relating to the identical article is already in litigation in the Court of Customs. Under 16.10a(b) of the Regulations the Commissioner is also authorized to refuse to make such rulings (1) if he believes that the application is not in good faith by one properly concerned with the matter or (2) if the information submitted is inadequate or (3) if the ruling applied for is already covered "by a controlling published decision."

Section 16.10a(b) of the regulations also provides:

"... The decision will be published in the weekly Treasury Decisions if it will affect a substantial volume of imports or if it is for any other reason of sufficient importance to justify such publication."

Paragraph (c) of 16.10a provides:

"Any decision published pursuant to paragraph (b) shall be deemed to establish a uniform practice within the meaning of section 315(d), Tariff Act of 1930, as amended. The decision will not be changed by a further ruling of the Commissioner to impose higher duties on such an article unless the prior decision should prove to be clearly wrong. When it appears to the Commissioner that a correct interpretation of the law may require such a ruling, notice that the prior ruling is under review will be published in the Federal Register so that the parties in interest will have an opportunity to make such written submissions as they desire, within a period which will be specified in the notice, with respect to the correctness of the contemplated action. If after the consideration of such submissions as may be received the Commissioner issues a ruling imposing higher duties, it will be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the expiration of 90 days after the date of publication of such ruling in the weekly Treasury Decisions."

All of this seems to be fairly clear but the decision of the Court of Customs in *Borneo Sumatra Trading Company, Inc. v. U.S.*, 101 Treas. Dec. No. 10, p. 41, C.D. 2624, Decided March 3, 1966, and a Treasury Decision published by the Bureau of Customs about three months after the Borneo Sumatra decision was rendered (T.D. 66-125, Treas. Dec. Vol. 101, No. 24, p. 4-5) have left the situation completely chaotic and in need of corrective action.

To appreciate this fact it is necessary to briefly review the *Borneo Sumatra* case. Commencing in the fall of 1958 and in reliance on a classification decision published in abstract form (the form in which all such rulings are published) in the weekly Treasury Decisions, an importer commenced the importation of the article with respect to which the decision related. He entered the goods in substantial volume claiming a duty rate of 12½% ad valorem in accordance with the published classification ruling. Upon liquidation of each of his entries the Collector of Customs arrived at a different classification and applied the applicable duty rate of 20% ad valorem. By the time the entries were liquidated the imports had long since been sold at prices which contemplated only the 12½% duty rate so the importer was faced with a substantial loss on the transactions.

On behalf of the importer we protested the action of the Collector. Upon the litigation of such protests in the Customs Court we pointed out to the Court the requirements of Section 16.10a of the Customs regulations and Section 315(d) of the Tariff Act of 1930, arguing that the published advisory ruling was binding on the Customs Bureau in that it established a "uniform practice" and could be changed to provide for a higher rate only after the expiration of 30 days following the publication of a change in the prior ruling. The argument was rejected by the three Judge Court which heard the protest. The panel concluded that the actual "decision" on which the importer had relied had not been published in the manner contemplated by the law and regulations. It held that since the decision was published only in "abstract" form and not in full, it could not have been the intention of the Treasury Department to be bound by it. The Court further found

"We have not been able to locate any example of a published decision under Regulation 16.10a and surmise there may have been none." (Emphasis supplied)

The Judge who wrote this opinion had been the Commissioner of Customs before his appointment as a Judge of the Court of Customs. He therefore spoke with considerable insight.

This latter finding resulted from the fact that it has been the practice of the Treasury Department to publish all such classification rulings only in abstract form. It seemed to us inconceivable that the Treasury Department intended by this device to circumvent the provisions of Section 315(d) of the Act and Section 16.10a of the regulations.

The Bureau of Customs was somewhat shocked by the Court's suggestion that never since the Bureau issued its regulations in 1950 had it properly published a classification ruling issued at the request of an importer or foreign exporter. Indeed it should have been for every issue of the Treasury Decisions containing such rulings stated explicitly that the publication thereof is for the "information and guidance" of persons concerned. Instead of eliminating the confusion or acknowledging that the Court's ruling was binding on it, the Bureau issued a meaningless T.D. 66-125¹ which reads as follows:

"The Bureau of Customs has received numerous inquiries relating to the effect of the decision of the Customs Court in *Borneo Sumatra Trading Co., Inc. v. United States* (CD 2624) * * *

"This is to give notice that notwithstanding the decision in CD 2624 the Bureau of Customs will continue to consider itself bound by any ruling issued by it to the same extent and in the same manner as it would have before that decision was made."

I think the Committee will recognize that the Bureau has no power to declare the law and cannot determine by what Customs Court decisions it will or won't be bound. The Court had just three months earlier, determined that the Bureau of Customs was *in no way bound* by a published abstract decision on a classification matter, insofar as is concerned Section 315(d) or Section 16.10a of the Regulations. So T.D. 66-125 is worse than meaningless for it is confusing.

Unless and until Section 315(d) is amended the situation will remain in this incongruous state. Importers and foreign exporters who seek and obtain rulings under Section 16.10a of the Regulations will undoubtedly continue to believe that no higher rate than that stated in the ruling can be applied until and unless a notice of a new ruling setting a higher rate is published in the *Federal Register*. This will breed excessive litigation.

The problem can be solved very simply by adding a sentence to Section 315(d) of the Tariff Act of 1930 as follows:

"Any such ruling shall be regarded as so published whether published verbatim or in abstract form."

However, I urge a further amendment to assure *uniformity* in the application of the customs classifications which have been ruled upon and thus assure equality of treatment to all importers who may be importing the same article. To accomplish this I urge that an additional sentence to read as follows be inserted just prior to the sentence above suggested:

"All administrative rulings by the Secretary of Treasury relating to the classification of articles being imported or intended to be imported into the United States shall be published in the *Federal Register*."

Under Section 16.10a the Commissioner publishes a classification ruling made at the request of an importer or foreign exporter *only* if he believes that the ruling will "affect a substantial volume of imports" or "is for any other reason of sufficient importance to justify such publication." My experience leads me to believe that it is frequently impossible for the Commissioner to foretell whether a particular ruling would affect a substantial volume of imports. This is particularly true since in most cases such rulings are sought in respect to "new" articles, those more or less new in commerce, which are "intended to be imported." If the Commissioner guesses wrong as to the probable volume affected and elects not to publish a particular ruling, the entire importing fraternity other than the one importer (or foreign exporter) who sought the ruling is without any knowledge of it. Why should this be so? Would it not be better and more likely to assure equal opportunity and treatment *if all importers and foreign exporters* (not just a few) had access to the Commissioner's opinions as to the proper classification for customs duty purposes of articles on which the Commissioner has issued rulings? The cost of the publication could not be great if, as I have suggested above, the Congress should authorize the publications of such rulings in abstract form.

4. *Provide For Payment of Interest on Deficiencies and Overpayments of Duties.*—I have a final proposal this Committee should consider. While it has to do with the payment of interest on deficiencies and overpayments, and is therefore technically not within the jurisdiction of this Committee, the Bill you are here considering changes the rules so that you should be aware of how this affects the matter of interest. You may, with this understanding wish to suggest to the appropriate House Committees other legislation which is within their jurisdiction to correct the inequities initiated by the legislation you are here considering.

¹ T.D. 66-125, Treas. Dec. Vol. 101, No. 24, pp. 4-5.

Under present law, if an import is classified by the Collector under a different section of the Tariff Act from that under which the importer claimed upon entry and for that reason the duty is greater than claimed by the importer, the importer must pay the additional duty *before* the Court will hear the importer's protest of the Collector's classification. And if the protest is upheld in the ensuing litigation, the Government refunds the excess duty paid *without interest* regardless of the period over which the litigation may have extended. On the other hand, under present law, appeals to reappraisement are liquidated *without* the payment of additional duty resulting from the appraiser's appraisement of an entry at a greater value than that claimed by the importer. In this case it is the importer rather than the Government who gets the break for it is not until the entry is liquidated *after the judgment in the appeal to reappraisement becomes final* that the importer must pay the additional duty.

But under the bill before you, this situation will all be in the Government's favor, and I believe unjustifiably so. In other words, there will be only one type of procedure, namely, a protest procedure and it will cover all complaints whether they relate to valuation or classification or both. If the Court follows the policy heretofore established, it will permit the litigation of protests under the new Act *only when the excess duty claimed by the Government (rightfully or wrongfully) is paid*. This is after the liquidation occurs. The litigation resulting from the protest may well go on for years and the Government may be proven to be dead wrong in the valuation or classification which led to the payment of the additional duty. Yet the Government will have had use of the importer's money for the ensuing years without any requirement to pay interest thereon upon making refund of the sum wrongfully extracted from the importer.

This in my opinion is inequitable and unfair. If a taxpayer pays too little income tax and his return is challenged, the issue may be litigated in the Tax Court without payment of the claimed deficiency. But—if the taxpayer loses, *he must pay interest* on the deficiency. If, on the other hand, when his return is challenged, he pays the deficiency claimed and then litigates a claim for refund in the District Court or the Court of Claims and the Government loses the taxpayer is entitled to a refund *with interest*. Why should there be a difference in treatment between an income taxpayer and an importer duty payer? If the Government wrongfully extracts excess moneys from the public, whether in the form of taxes or customs duties and enjoys the benefits thereof for periods of time (usually several years in the case of litigated duty payments) it should be required to pay interest on the excess collected when making refund thereof. What justification can there be for any other rule? Most importers operate on substantial sums of borrowed capital. In such cases excess duties are largely paid out of borrowed capital. It makes no sense that the Government should have free use of the funds.

I urge therefore that the bill be amended to provide for payment of interest on refunds of excess duty collected by the Government, whether the collection was as a result of a voluntary reliquidation by the customs officials or as a result of a final decision by the Court.

CONCLUSION

Here are four solid suggestions, gentlemen, for improvement of the bill before you—suggestions born of practical experience before the court and in administrative proceedings in the Bureau of Customs which lead to litigation. I urge you to seriously consider these amendments to solve the problems I have pointed up. You will thus vastly improve the Bill before you.

MEMORANDUM, JANUARY 19, 1970, AND CHARTS FROM DEPARTMENTS OF TREASURY AND JUSTICE

COMPARISON OF ADMINISTRATIVE AND JUDICIAL PROCEDURES IN CUSTOMS MATTERS UNDER PRESENT LAW AND UNDER S. 2624

1. ENTRY PROCEDURES

When merchandise arrives in the United States, other than noncommercial merchandise carried on the person by a traveler, it is temporarily in the custody of the United States Customs Service until the importer or his agent proves ownership and complies with customs requirements. The entry procedure is designed to permit the Customs Service to maintain some form of control over imported merchandise until all monies estimated to be due the Government have been paid and all other Governmental requirements have been met.

Normally, documents covering merchandise to be imported into the United States, such as commercial invoices, bills of lading, and declarations or affidavits regarding the status of particular types of merchandise, are assembled by the importer or his agent, the customs broker, and an entry document is prepared in which the importer is required to declare among other things the value and classification of the merchandise.

This set of documents is presented at the customhouse for preliminary examination. At this examination the claimed quantity, value, classification, rate and amount of duty are reviewed by a customs official who may reject the entry, accept the entry unconditionally (normally only in the cases of noncommercial shipments), or accept it conditioned on the filing of a bond to insure, among other things, the production of documents which are not available, the redelivery of the merchandise to customs custody if required, and the payment of additional duties if found due.

Presentation of entry documents may take place before the goods have arrived in the port or, after the goods have arrived, either before or after their examination and release by customs. When the merchandise has arrived within the limits of the port and the customs official is satisfied that the documents are in order, and estimated duties have been deposited or a determination has been made by customs that no duties are due, the entry can be officially "accepted" and the merchandise considered entered.

While, generally, importers elect to make "consumption" entries in which the entry documents are accepted, estimated duties paid, and the merchandise released, it is not unusual for an importer either to seek immediate release of his merchandise under a provisional release procedure which allows him to make formal entry and deposit duties at a later time, or to place his merchandise in warehouse under a "warehouse" entry and pay the estimated duties when the merchandise, or a portion of the merchandise is withdrawn. However, the importer has 5 days after the goods arrive to make entry, no matter which form of entry he selects. After the 5-day period has elapsed, and entry has not been made, the goods are sent to a general order warehouse at the expense of the importer. The 5-day time period may be extended upon request.

When entry has been completed by the payment of the estimated duties, customs officers review the documentation (taking into account a physical examination of a part or all of the goods) to verify the statements made in the entry documents and to insure that all customs laws and other laws administered by customs have been complied with. Often examination has been accomplished by sampling the goods, but customs has the authority to order an examination of all the merchandise at official Government premises, the importer's premises, container stations, airports, or docks. On those entries that are other than routine repeat shipments the customs officers conduct appropriate inquiry to determine or verify the value and classification of the goods.

The proposed legislation makes no changes in these procedures.

2. APPRAISEMENT PROCEDURE

Present Law

S. 2624

(a) After receiving an entry with a proper invoice and determining by means of actual examination that the product represented by the entry documents and the imported product are one and the same, the customs official must decide whether the value and classification declared by the importer at the time of entry, are correct. Prior to the reorganization of the Customs Service in 1965 two separate officials were responsible for the appraisement of the merchandise and the classification of the merchandise. Now, while appraisement and classification functions have been placed under the responsibility of one official, the law still requires that the merchandise be appraised and classified separately. Therefore, the customs official first makes a determination as to the value of the merchandise.

(a) There will be no separate appraisement procedure. It will be combined with classification and liquidation into an integrated procedure.

*Present Law**S. 2624*

(b) If he determines that the value stated by the importer is too low or that the quantity entered was larger than stated or that the classification or rate of duty was misstated or erroneous, he sends the importer a notice, prior to formal appraisement, that he intends to make a change in the assessment of duties.

(c) This notice gives the importer the opportunity to come in and explain the difference to the customs officer. This is an informal conference procedure before final determination.

(d) After the conference, if one takes place, or after completing his appraisement, if there was no conference, the import specialist prepares the final appraiser's report and forwards it, with all related papers, to the district director. If it appears to be in order, the district director or his delegate dates and signs the final appraiser's report. If the district director disagrees with the prepared report, he makes appropriate changes and then signs and dates it.

(e) If the appraised value is higher than the entered value or if a change in the classification of the merchandise results from the appraiser's determination of value, or, in any case, if the importer has made a written request before appraisement for such notice, a formal notice of appraisement is mailed to the importer.

(f) The importer has 30 days from the date of mailing of notice to file an appeal for reappraisement with the district director.

(g) The appeal is transmitted together with the invoice and all papers pertaining to the appraisement to the United States Customs Court. The appraisement matter is now before the court. The effect of the appeal is to divest the Customs Service of jurisdiction over the appraisement, pending final court decision.

(h) From the time the appraisement report is signed and notice given, Customs cannot change the appraisement without going to the Customs Court. Even if the appraisement is based upon an obvious clerical error and correction is to the importer's interest, Customs must appeal to the court to correct the erroneous appraisement.

(b) The importer will still receive notice, prior to formal notice of liquidation, that the customs officer is about to determine that additional duties are due.

(c) The importer will still have an opportunity for an informal conference.

(d) After the conference, if one takes place, or, if there was no conference, after completing his determination of the appraised value, classification, applicable rate of duty and final amount of duty, the import specialist will liquidate the entry and will forward it, with all related papers, to the district director, usually through the assistant district director. It will be reviewed and if it appears to be in order, the district director or his delegate will date and sign the liquidation. If the district director disagrees with the liquidation submitted to him, he will make appropriate changes after consultation with the customs officer who made the original decision and then sign and date it.

(e) through (o) No longer applicable. See the discussion in section 3, *Liquidation procedure*.

*Present Law**S. 2624*

(i) The appeal for reappraisement is heard and decided in the Customs Court by a single judge. He must prepare a written decision together with a statement of his reasons and the facts on which his decision is based. This is an inflexible statutory requirement. A written decision and reasoned opinion is prepared even in the simplest type of case, except those decided on stipulation or abandoned.

(j) The decision of the judge becomes final unless an application for review is filed with the Customs Court within 30 days from the date of the decision.

(k) If an application for review is timely filed, the chief judge assigns it to one of the three divisions of three judges into which the court is divided. The three-judge division considers the case on the record made before the single-judge. After hearing arguments by the parties, it affirms, reverses or modifies the decision of the single judge or remands the case to him for further proceedings.

(l) The decision of the three-judge division must also be a fully reasoned written opinion. The decision of the division is final and conclusive unless an appeal is taken to the Court of Customs and Patent Appeals.

(m) Appeals to the Court of Customs and Patent Appeals must be taken within sixty days after the entry of the decision of the three-judge division of the Customs Court but the appeal shall be on questions of law only. The decision is based upon the record and evidence taken before the division as well as upon oral argument. The decision is final and conclusive unless set aside or modified by the Supreme Court on writ of certiorari.

(n) An appeal for reappraisement has the effect of suspending liquidation, since an entry cannot be liquidated until the final appraised value has been determined.

(o) If there is no appeal for reappraisement, the appraisement becomes final 30 days from the date notice was given or 60 days from the date of the appraiser's report.

3. LIQUIDATION PROCEDURE*Present Law*

(a) The entry file now goes back to the import specialist. He has already made his tentative classification at the time of entry and reviewed his findings after examining the merchandise. He now proceeds to liquidate the entry.

(a) There will be no separate appraisal procedure. There will be a single, integrated procedure under which the customs officer will determine the appraised value, the applicable rate of duty and the final amount of duty. He will then prepare a final liquidation of the entry.

*Present Law**S. 2624*

(b) Notice of liquidation is posted in the customhouse by entry number, date of entry and identification of importer. At the same time, a courtesy copy of the liquidation containing the date of the official liquidation is prepared by the customs computer, and this is mailed to the importer.

(c) The importer has 60 days after notice in which to protest the liquidation on any of the grounds set forth in Section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514). The protest must be in writing. The effect of the protest is to request Customs to reliquidate the entry in accordance with the importer's claim.

(d) During this same 60 day period, Customs has the right to reliquidate the entry on its own initiative. The rate of duty may be increased or decreased, but the appraisement cannot be changed.

(e) If Customs reliquidates the entry, it starts a new 60 day period running. The notice of reliquidation is given in the same manner as the notice of liquidation, *i.e.*, by posting in the customhouse and by mailing a courtesy copy to the importer of record.

(f) Several protests may be filed with respect to the same entry of merchandise. Thus, for example, one protest may be filed by the customs broker alleging a shortage and another protest may be filed by the attorney challenging the classification.

(g) If the decision which has been protested is modified by granting one of several grounds claimed by the importer, Customs reliquidates the entry. Notice of reliquidation is provided by the usual methods of posting and mailing of a courtesy copy.

(h) The importer can protest the reliquidation within 60 days from notice thereof. In that event, Customs does not conduct a further review of the original decision. Review is limited to the claimed error in reliquidation.

(i) If a protest is denied, the protest and related papers go directly to the Customs Court.

(b) No change.

(c) The importer will have 90 days after notice in which to protest the liquidation on any of the grounds set forth in section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514). The protest must be in writing. These grounds will include appraisement.

(d) Customs will have 90 days from the date of liquidation to reliquidate the entry on its own initiative. This may include a change in the appraisement.

(e) No change, except period is extended to 90 days.

(f) Several protests may be filed with respect to the same entry of merchandise, but unless each protest contests a different category of merchandise, the protests will be deemed to be a single protest for customs court purposes.

(g) No change.

(h) No change.

(i) If the protest is denied, Customs will give the importer mailed notice of the denial. The importer will have 180 days from the date of mailing of the notice in which to commence an action in the Customs Court. He will be required to commence such action by filing a summons in accordance with the rules of the court.

*Present Law**S. 2624*

(j) When the protest is filed, the protest and related papers are initially reviewed by the customs officer who made the original decision on liquidation. He then prepares a decision allowing or denying the protest. This, together with the related papers, are forwarded to the district director through appropriate channels of review. It is reviewed at each stage and finally signed by the district director.

(k) When a protest has been reviewed by the district director, it is referred to the region for further action if:

- (1) The protest is allowed;
- (2) It raises a question of regional or national uniformity;
- (3) It raises a question of interpretation of a specific court decision;
- (4) It raises a question of interpretation of a specific Bureau ruling;
- (5) It raises a question involving administrative procedures or practices;
- (6) The protesting party specifically requests review at a regional level; and
- (7) It is determined by the district or the region to require coordination or review at the region.

(l) The Customs Court has ruled that the law provides that after 90 days have elapsed, Customs is divested of jurisdiction to take any further action with respect to the protest and must transmit it and the related papers to the court for appropriate attention. Customs must, therefore, review its decision within 90 days after a protest has been filed.

(m) Protest cases are tried by a three-judge division of the court. All decisions are in writing with a statement of the reasons therefor and of the facts on which the decision is based.

(j) A revised review procedure is being developed. (See (k) below). In addition to protest may cover appraisement as well as classification or other issues.

(k) No change, unless the protesting party specifically requests, within the 90 day period, that his protest be reviewed by customs officers who did not participate in the original liquidation and shows that the issues involved fall within the special circumstances, e.g., novelty, lack of uniformity, that will appear in Treasury Regulations and which, in most instances, will justify review at Bureau Headquarters.

(l) Review of protests will be governed by provisions for accelerated disposition and constructive denial. At any time after 90 days have elapsed from the date of filing the protest, the importer may file a written request with Customs for accelerated disposition. If it is not allowed or denied in whole or in part within the next thirty days, it will be deemed denied on the thirtieth day following mailing of the request. All other protests must be allowed or denied within 2 years from the date the protest was filed. When a protest has been denied, notice must be given and the importer will have the right to commence an action in the Customs Court within 180 days, following the date of mailing the notice.

(m) Protest cases, whether involving appraisement or classification, will normally be tried by a single judge. However, upon application of any party, or upon his own initiative, the chief judge will have the power to designate a three-judge trial if he finds that the case involves a constitutional question or has broad and significant implications in the administration or interpretation of the customs laws. In contested cases, the judge will have the option of supporting his decision by either a statement of findings of fact and conclusions of law or by an opinion stating the reasons and facts upon which his decision is based.

*Present Law**S. 2624*

(n) In outport cases, *i.e.*, ports other than New York, protest cases are heard by a single judge who acts somewhat like a special master to take testimony. The case is decided by a three-judge division, none of whose members need have heard the testimony.

(o) Appeals from decisions in protest cases go directly to the Court of Customs and Patent Appeals.

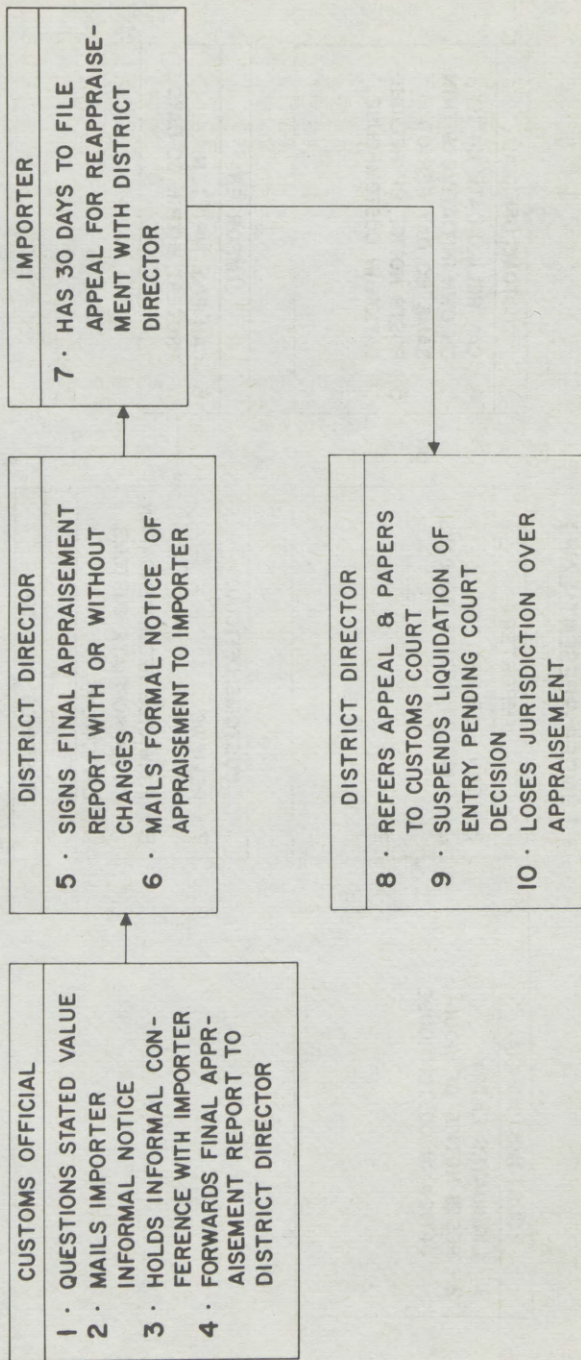
(p) Review of decisions of the Court of Customs and Patent Appeals may be requested of the Supreme Court by petition for a writ of certiorari.

(n) Outport cases will be tried in the same manner as other cases, either by a single-judge or three-judges, as discussed in sec. 3(m) above. The judge or three judges, in outport cases will have full authority to hear and decide the case.

(o) The direct appeal to the Court of Customs and Patent Appeals will now cover all cases, including appraisement as well as classification and other cases. The Court of Customs and Patent Appeals will have the same powers and authority in reviewing such appeals as the Court of Appeals has with respect to appeals from the district courts.

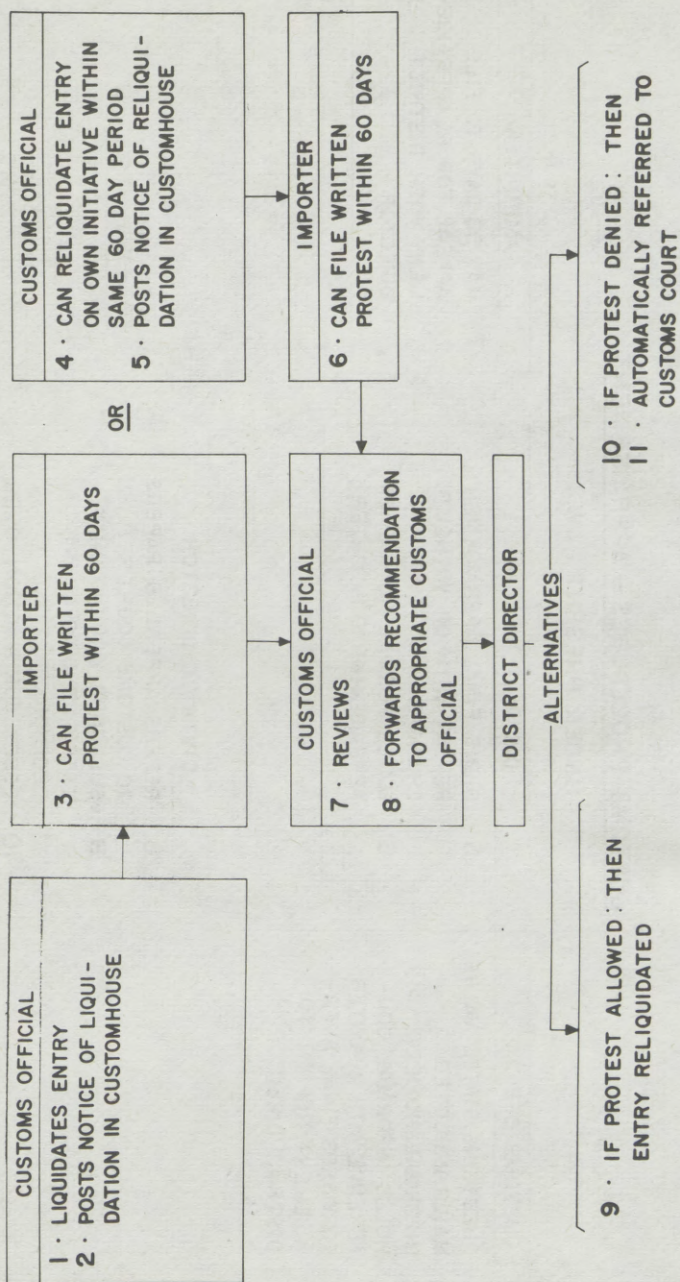
(p) No change.

CUSTOMS PROCEDURES - APPRAISEMENT
(UNDER PRESENT LAW)



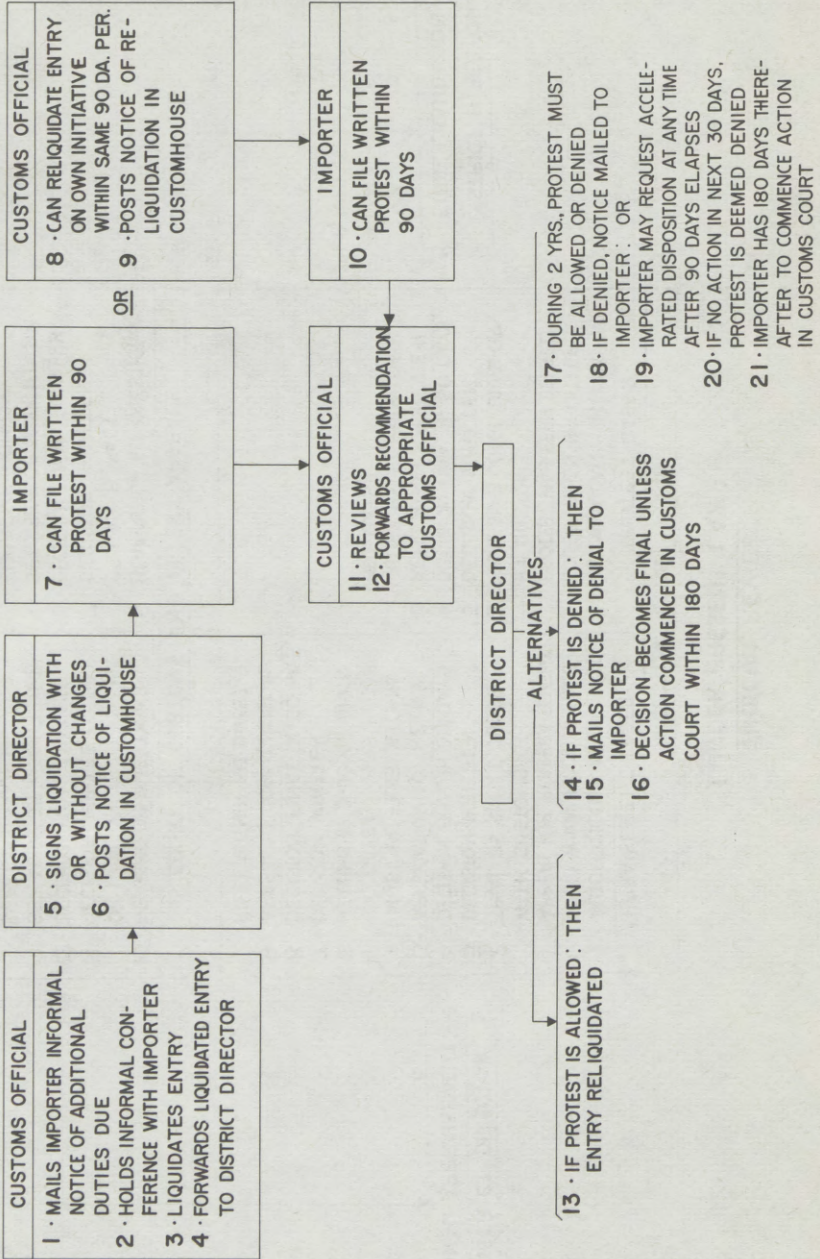
CUSTOMS PROCEDURE - LIQUIDATION

(UNDER PRESENT LAW)

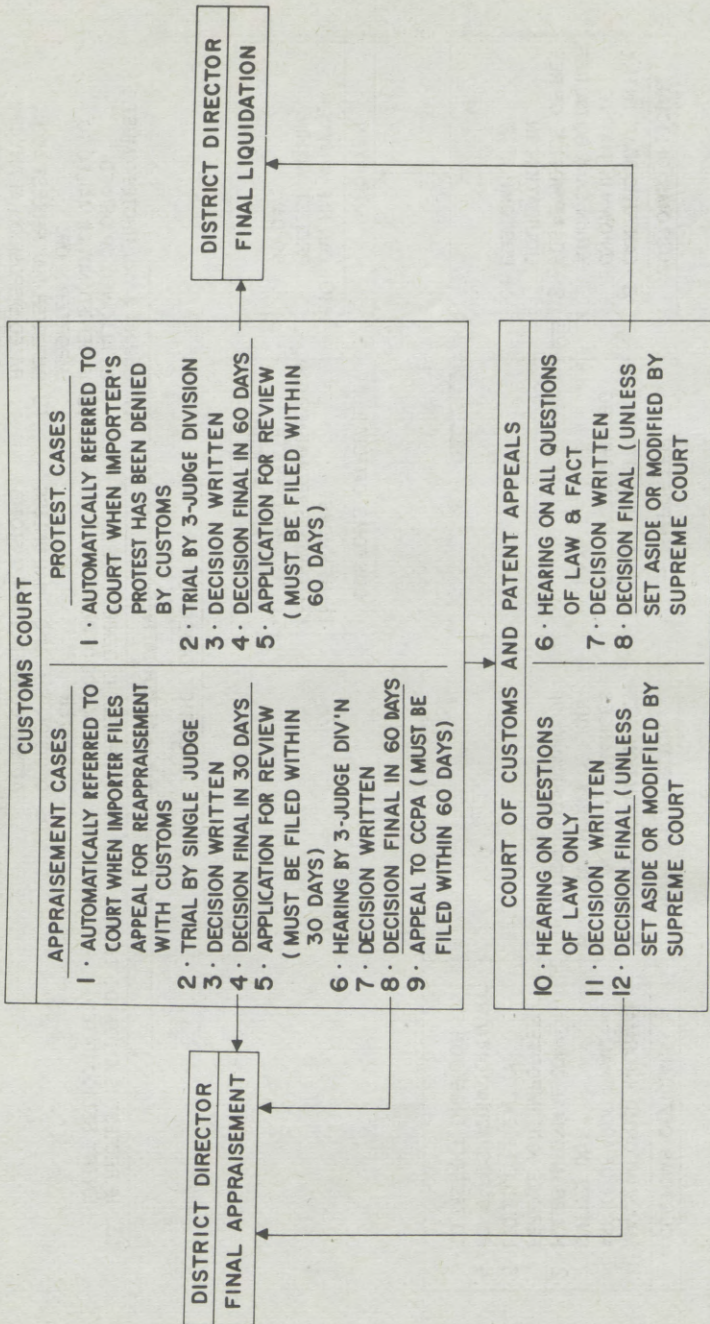


LIQUIDATION PROCEDURE

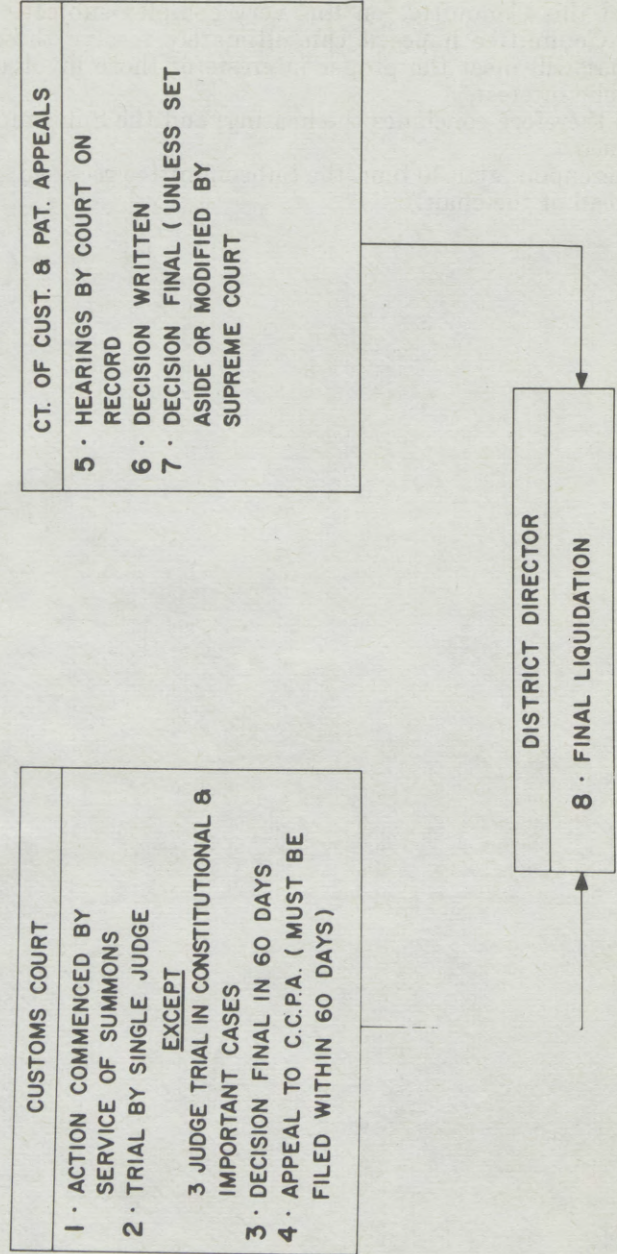
(UNDER S.2624)



JUDICIAL REVIEW
(UNDER PRESENT LAW)



JUDICIAL REVIEW
(UNDER S. 2624)



Mr. KASTENMEIER. The Committee desires again to express its gratitude to all the witnesses for their contribution and enlightenment of this Committee on this very complex subject.

The Committee hopes it can ultimately resolve these issues in a way that will meet the proper interests of those involved as well as the public interest.

This therefore concludes the hearing, and the Subcommittee stands adjourned.

(Whereupon, at 1:30 p.m. the Subcommittee recessed, to reconvene at the call of the chair.)

