TECHNICAL AMENDMENTS TO THE FEDERAL COURTS IMPROVEMENT ACT OF 1982

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3824

TECHNICAL AMENDMENTS TO THE
FEDERAL COURTS IMPROVEMENT ACT OF 1982

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WEDNESDAY, SEPTEMBER 28, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

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

Present: Representatives Kastenmeier, Schroeder, Frank, Moorhead, Kindness, and Sawyer.

Staff present: Michael J. Remington, chief counsel; Thomas E. Mooney, associate counsel; and Audrey K. Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will come to order.

Today, we are holding a brief hearing on the subject of technical amendments to the Federal Courts Improvement Act of 1982, which was signed into law April 2 of last year. The enacted legislation was a product of this subcommittee's work during the span of nearly two Congresses. I am pleased to hear that the legislation is working quite well, by and large.

Incidentally, the purpose of the Federal Courts Improvement Act was to solve some of the diverse structural problems that impaired the ability of the Federal judicial system to satisfy its broad range of administrative and adjudicative responsibilities. To be specific, the new act created a U.S. Court of Appeals for the Federal Circuit by combining two preexisting courts, the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. The act further created a new trial level court called the U.S. Claims Court. And finally, the act contained several titles designed to improve judicial administration nationwide.

Public Law 97-164 is 33 pages long as printed in the Statutes at Large, and it is not surprising that several drafting errors were made or that the public law was not perfect as passed. The bill before us this morning, H.R. 3824, attempts to correct drafting errors and deficiencies that have been brought, in the interim, to the subcommittee's attention.

Now, I ask unanimous consent to insert H.R. 3824 and Public Law 97-164 into the record as an appendix to this hearing. (See appendix 1 at 32.) Without objection, it will be done.

Our first witness this morning—I am very pleased to greet him—is the Honorable Howard T. Markey, chief judge of the U.S. Court of Appeals for the Federal Circuit.

Judge Markey is the first chief judge of the new national circuit. He was previously the chief judge of the now defunct U.S. Court of Customs and Patent Appeals. Judge Markey, you are always welcome. We are always pleased to have you here.

TESTIMONY OF HON. HOWARD T. MARKEY, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, JUDICIAL CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY GEORGE E. HUTCHINSON, CLERK, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge MARKEY. Thank you, Mr. Chairman. It is a pleasure to be here.

I should like at the outset, Mr. Chairman, with your concurrence, to introduce to you and the subcommittee Mr. George E. Hutchinson, clerk of the court, who is accompanying me here this morning.

Second, Mr. Chairman, I have, of course, submitted a written statement and, with your concurrence, I should like to offer that for the record.

Mr. KASTENMEIER. Without objection, your five-page statement will be received and made part of the record.

Judge MARKEY. Mr. Chairman, the act to which you referred, while like all legislative acts, it cannot be expected to be perfect, like all human acts. But the overall operation under the act to date, I think, demonstrates the care and caution with which the act was in fact prepared and enacted by the Congress. As one of its main architects, this subcommittee and your personal attention and interest, Mr. Chairman, contributed to that result.

The statement takes an opportunity to attempt to bring the subcommittee somewhat up to date, even in this early stage, on the operations of the court to date, to give a sort of report of our stewardship.

It is early, as I say. The court completes its first year next week. It has had some 902 appeals filed. It began with an inventory of 263. It has disposed of just under 650 cases thus far. Due to the magnificent, magnanimous cooperation of the judges—due entirely to that factor—the court has disposed of each of its cases within a 5.7-month average from the date it was filed. It has heard every case thus far, with very few exceptions, within 30 days of the day the case was ready to be heard. That is within the 5.7 months.

I refer to the interval, Mr. Chairman, because everything else adds to or subtracts from that measuring stick.

As to H.R. 3824 itself, the court welcomes the two major portions of the bill, as introduced, which deal directly with the court in its operations; namely, the correction of the clear oversight having to do with the right of a district judge to certify a question to the court. The act provides for such certification by judges of the Court of International Trade and judges of the Claims Court. It did not do so for the district courts.

During this first year, we had one such effort of a district judge to certify a question. Reading very carefully the act and remembering the injunction of this subcommittee in the legislative history, that the court should not overreach or outreach or extend its jurisdiction, the court held that it did not have jurisdiction to entertain a certified question from a district court. And that was reported at the time to this subcommittee.

So the amendment to the act that corrects that, Mr. Chairman, is most welcome and will be welcomed also by litigants and the district courts themselves.

The second area that has to do with our court specifically is the filling in of the oversight—not just in this act, but in earlier ones—that gives a set time for appeals to the court from the International Trade Commission. There was no time. It was just simply not mentioned and, therefore, there was no way to measure it. H.R. 3824 will provide a 60-day limitation on time to appeal, which had been in effect much earlier.

So with respect to those two elements, the court welcomes such amendments with open arms.

With respect to another area of the court's operation, but not directly involved with the court, it is necessary, of course, for the parties to bring the case to the court. And there are many steps, many processes, in accomplishing that procedure.

In the past, the act, dealing with the appeals from the Patent and Trademark Office provided that the Commissioner of Patents and Trademarks would certify the record as the first step. The court would not start to count its work or have anything to do, or even know there was a matter around, until we got that certified record.

I would like at this point, Mr. Chairman, to offer to you and the subcommittee a photograph of one such record. I apologize for not having them earlier and putting them in with our statement, but I have also prepared Xerox or photostat copies of that photograph, and should like to add it to the statement, with the chairman's permission.

Mr. KASTENMEIER. Yes; without objection, that will be done.

Judge MARKEY. Thank you.

[The photograph follows:]

Judge MARKEY. The photograph, Mr. Chairman, is the photograph of a record in one case. The chairman will note the beautiful ribbons. Such records have taken on occasion as long as 8 months to prepare. The court has no reason to look at it and, in that particular case, never looked at it.

The cost to litigants, the cost to the taxpayers in time and work in preparing such a record—and this is not uncommon, as far as the size of the record goes—we think is unnecessary. We think the suggested amendments set forth in the statement to H.R. 3824, as introduced, will cure that.

The suggested amendments also have the benefit of making appeals to the court, from all of the 116 tribunals from which appeals may be taken, identical. With respect to all other appeals, the court follows the FRAP rule which provides that, instead of getting the record, the court may get a list of the documents in the record.

The suggested amendments, also, Mr. Chairman, insures that if the court wants to see the record or any part of it, it can do that with a phone call, in effect. It simply orders up the record and takes a look. That phenomena occurs about once or twice every 5 or 6 years, maybe 3 or 4 years. Nobody has ever kept statistics on such things.

But it really isn't necessary for the court to be digging around in these minutia of the record. After all, we have two lawyers, one on each side. Each has a file in his or her office, which should be—and normally is—identical. It is easy enough for the lawyer to make a copy from the office file of whatever is deemed necessary to show the court, put that in the appendix to the brief, and we are then able to understand the case and determine it.

If, per chance, by the merest chance—or even by design—a lawyer should put something in his or her appendix which is not in the record, or misstates the record, it is not difficult to imagine how quickly counsel on the other side will bring that to the attention of the court. And as I say, if at that point there has been a dispute as to whether or not the statement in the appendix is correct or whether or not an item was in fact in the record, it is easy enough then to search out the record and find out.

So with those preliminaries, Mr. Chairman, I should like to subside. I would be glad to answer any questions you or any member of the subcommittee may desire to ask.

[The statement of Judge Markey follows:]

STATEMENT

CHIEF JUDGE HOWARD T. MARKEY

Before the
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
House of Representatives
September 28, 1983

I am pleased, Mr. Chairman, to have been invited to participate at the present hearing related to H.R. 3824.

The Federal Court Improvement Act of 1982 (Act), to the architecture of which you, Mr. Chairman, this Subcommittee and its staff, contributed so very much, has proven an outstanding example of the legislative process envisaged in the Constitution.

Though it is still early, I should seize this opportunity to render a short report on our stewardship. Operations of the Court of Appeals for the Federal Circuit, as created by the Act, have already shown substantial promise. Due entirely to the magnificent and magnanimous cooperation of each of its judges, the court has heard virtually every case within 30 days of its coming ready for hearing. Respecting appeals filed with the court, the average time interval between filing and decision has been 5.7 months. Within that time interval, the portion between hearing and decision has been one month.

Because all procedures either add to or subtract from it, the average time interval serves as a most useful measure of the court's operation. Nonetheless, no statistic, however satisfying, can substitute for care and caution in decision making. The court's

motto, "The Best Decisions, in the Shortest Time, at the Least Cost," properly emphasizes the primacy of the quality of its decisions. It is yet too early, and the data are too limited, to warrant a definitive evaluation of the court's contribution to uniformity in the many national laws within its exclusive substantive jurisdiction. I can report, however, that the court has moved unequivocally in that direction in many of its opinions thus far issued. In sum, the court is fully aware of the opportunity, and fully accepts the challenge, represented by the administration of justice goals that informed passage of the Act by the Congress.

When the Act was under consideration, the focus was not directed to appeals from the Patent and Trademark Office, jurisdiction of which merely transferred over from the former Court of Customs and Patent Appeals. The provisions governing such appeals appear, moreover, in Title 35, not in Title 28, where lay the major provisions of the Act. Certain retained provisions of Title 35 describe longstanding procedures occurring before and after an appeal is docketed and decided by the court. Those procedures, as described, do not match with simpler, cheaper, and more expeditious procedures available to litigants before the court in all other types of cases. H.R. 3824, modified as suggested here, would make those simpler procedures available to all parties filing an appeal in the Court of Appeals for the Federal Circuit.

Title 35, Section 143 presently sets forth that the Commissioner shall transmit certified copies of all necessary papers and evidence. Certification requires substantial expenditure of often

many months of time and of substantial taxpayer funds. As but one example, I should like, with the Chairman's concurrence, to submit a photograph of the certified record in just one case. In that particular case, and in many others, the court found it unnecessary to review any part of the certified record, the submissions of the parties being fully adequate for decision. In the extremely rare instance in which a dispute arises over what appears in the actual record, the court could call for a look at it.

Though the court does not take jurisdiction until after receipt of what the Commissioner transmits, its interest in the overall administration of justice prompts its recommendation that the first sentence under "§ 143. Proceedings on Appeal," and the sentence bridging pages 3 and 4, of H.R. 3824, as introduced August 4, 1983, be revised to read:

> With respect to an appeal described in section 142 of this title, the Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office or, upon request of the Court, the original or certified copies of such documents."

For similar reasons, the court recommends deletion of "and transmitted to the court under section 143 of this title" from the first sentence under "§ 144. Decision on Appeal" and deletion of "and transmitted to the court under paragraph (3) of this subsection" from lines 11 and 12 of H.R. 3824 as introduced on August 4, 1983.

Again to equate the practice in appeals from the Patent and Trademark Office, the court recommends that lines 6 and 7 of page 3, and lines 12 and 13 of page 4 of H.R. 3824 as introduced be revised to read:

> Upon its determination the court shall issue to the Commissioner its mandate and opinion."

No pride of authorship resides in the foregoing recommendations, Mr. Chairman. We believe, however, that such revisions would make the same expeditious procedures available to those filing appeals from the Patent and Trademark Office as are available to those filing appeals from the other 113 tribunals from which appeals may be taken to the court.

There may well be other useful changes. Substitution of "record" for "evidence produced" at line 4 on page 3 and at line 10 on page 4 might, for example, correlate more with the terminology employed in connection with appeals from other tribunals. That change, though welcome, has no effect on litigants like that prompting the recommended revisions.

H.R. 3824 as introduced by you, Mr. Chairman, contains a number of needed and welcomed amendments necessitated by experience to date under the Act. The court not only appreciates the work of the Subcommittee and its staff in working out and moving toward enactment of these amendments, but heartily recommends their adoption.

First, the amendment to Section 1292(b) of Title 28 insures that district judges, like judges of the Court of International Trade and the Claims Court, will be able to certify questions to the court. As reported to you by letter, Mr. Chairman, the court recognized that it has not been authorized in the Act to respond to such a question submitted by a district judge. We have had only that one instance to date, but can anticipate more in the future. Hence, early enactment of that amendment is earnestly to be desired.

The amendment to Section 337(c) of the Tariff Act cures an obvious oversight in that act and would be welcomed by the court, and I am sure by the International Trade Commission and litigants as well.

Again, Mr. Chairman, I appreciate the opportunity of appearing here this morning and would, of course, be pleased to try to answer any question you or members of your Subcommittee may wish to ask.

Mr. KASTENMEIER. Thank you for that very useful testimony, Judge Markey.

Other than those matters that you have especially mentioned and are provided for in the legislation before us, are there any other observations or recommendations for judicial improvement that you care to make at this time?

Judge MARKEY. Mr. Chairman, I think it is probably a little early. We have been so busy getting things organized and rolling. As you know, the subcommittee has wisely provided for an effective date some 6 or 7 months after that passage of the act and, as a result, the court—we were able to get the judges together in numerous meetings, we adopted our rules some 60 days before we actually began operations. We adopted a procedural handbook some 30 days before. And since then, we have been very busy buttoning down the operation, tightening it up, and haven't turned our minds to such other improvements.

I appreciate the opportunity, however, Mr. Chairman, and would appreciate a raincheck in the form of an opportunity to notify you when we have had a chance to really take a hard look at where we are and what improvements we might make.

Mr. KASTENMEIER. You referred to obviating the necessity of sending all these proceedings to your court. Could you give us any sort of general ball park figure in terms of what the cost saving might be, either to litigants or to the system itself by that measure alone?

Judge MARKEY. It would be very difficult, Mr. Chairman. As I mentioned in my comments, the court doesn't deal with this until it gets to us. A subsequent witness for the Patent and Trademark Office may be able—I don't want to put him on the spot—but he may be able to fill in in greater detail.

We were looking at it from our general interest in the overall administration of justice and the recognized interest in this subcommittee in that subject.

Obviously, you are going to save time, which nobody can put a dollar figure on, but it can be very, very important to the litigants and to the Patent and Trademark Office. You are going to save the time and work of the employees preparing such stacks of documents. There will be some time saved, even by our own staff, in simply handling and storing and moving and carting. In this case, we would need a four-wheel cart.

But to put a dollar figure on it, Mr. Chairman, is hard to say. In today's world, with the cost of almost everything being so high, it has to be in the $10,000, $12,000, $15,000 bracket, I would suspect, though it is, as you indicated, a ball park guess.

Mr. KASTENMEIER. Sure.

While it may be early, I wonder if you have any observations about the operations of the newly constituted, or reconstituted, U.S. Claims Court, whose work evolves to your court—at least some of it. Do you feel confident that the Claims Court is working properly and satisfactorily?

Judge MARKEY. So far as we are able to observe, Mr. Chairman; yes. The answer would have to be yes.

We see, of course, only the substantive work, that is the judgments and opinions, supporting opinions, of the judges of the

Claims Court. As the chairman knows, we have no administrative authority or relationship with the Claims Court, nor would that be, we think, a good idea. We are in the same building, and we talk to people and see people. We detect substantial enthusiasm.

What we have seen coming out of the Claims Court—what counts, so to speak—in the nature of judgments and opinions, seem excellent. Whether there may be other problems in other areas, we simply wouldn't know. But when the nitty-gritty comes around, which is the judgments and the opinions, while obviously there will be some cases reversed and some affirmed—and we haven't kept any such track, although the Claims Court may have, we don't know—but even there, it is fairly early. I think we have had some 174 such cases, in round figures.

Although that sounds like a lot, it really isn't when you are dealing with 17 judges. There may be a few, for example, from whom we have seen no opinions as yet, whereas another one may have turned up four or five. We don't pay attention to which judge says is what, because that has nothing to do with the opinion of the courts or our work on it.

So while you recognize that it is still early, from what we see, it is working fine.

Mr. KASTENMEIER. One other question, so long as you are here. As you undoubtedly know, 2 or 3 months ago, the work of our sister subcommittee produced an immigration bill respecting illegal aliens. Among its provisions was the interesting provision that appeals from the court of first instance—apparently, the examining officers' decisions with respect to status—would, in fact, go to the court of appeals of the Federal circuit.

Do you have any view about whether your court would normally be the court of appropriate jurisdiction with respect to such matters or whether you have any special competence to handle such cases?

Judge MARKEY. Mr. Chairman, if I may take that as two question. First, on the question of direction or delegation or provision of jurisdiction to this court—or any other court, as far as that goes—as the chairman knows so well, that question bothered the Founding Fathers at the convention, there was great dispute, great concern, that the Federal courts, given their head, would be running the Government. We already know Mr. Madison's indication that they have no armies, and so on, no swords. I am not so sure that is as true as it once was, but that is neither here nor there.

I do deem the duty of any court to accept and do their best of exercise, whatever jurisdiction the Congress may direct. In the early days of the Supreme Court, it was held very clearly that a court has only that jurisdiction which the Congress may give it and which it may constitutionally accept. Therefore, were the Congress, for example, to say will you do this—or they would not say it that way—but should they do it, I would have to say it is a matter of legislative policy.

The other question, I think the one the chairman really has in mind—or maybe I misinterpreted—was could we do it, the capacity of the court to do it? There, of course, we owe a duty—not just a right, but a duty—to report to the Congress our capacities or lack of capacity. At the moment, if I were asked, I would have to re-

spond with another question, which isn't really fair, but how many cases are we talking about? If we are talking about a few hundred, obviously, we could do it capacitywise anytime; if you are talking about 100,000, there is no way in the world that any court could do it. So somewhere in between is the number.

Mr. KASTENMEIER. I think we are probably talking about many thousands.

Judge MARKEY. Yes; well, that could be very difficult.

But I think the duty of the court would be to report its capability or the lack of it—were jurisdiction to come and then, if there were difficulty, come to the Congress and say, "Look, we have to have more judges, we have to do this and that."

But I think the second question may interrelate with the first one. When you indicated this concept of appeal directly to the court from some hearing officer, that would not only increase the number coming to the court—because, of course, there would not be an intermediate step that would screen out some of the clearly frivolous matters were they to come further into the court—so you would get them all, so to speak, rather than just those looked upon as appealable. That would be unfortunate.

Second, it is not appropriate for appeals from individual, one-person hearing officers to go directly to the court. It hasn't been massaged; it hasn't been matured; it hasn't been through an experienced board or commission which is doing it all the time, doing it every day, charged by the Congress with carrying out the statute, et cetera, et cetera.

Mr. KASTENMEIER. Apparently, this was proposed as a substitute for normal appeals to the Federal district courts, especially in the State of Florida.

Judge MARKEY. Even so, even there, I would look upon it the same way if the district court obtained additional jurisdiction and carried it out and we got appeals from them, obviously, we would take them and we would handle them.

I think, though, there would be far fewer appeals if they went to a district court for a lot of reasons. The procedural setup, the Federal Rules of Civil Procedure applicable in the district court, would tend to again first screen out some of it; second, to organize it, prepare it, so that those who do come to the court of appeals will have been through the stream as appellants from hearing officers would not. So, I guess what I am really saying, Mr. Chairman, is we are there to do or die, not to question why. If the Congress were to decide that we should have additional jurisdiction of any kind, we view our duty as reporting to the Congress our capacity or lack of it.

I would ask for one more second, Mr. Chairman, of your indulgence. You mentioned the word "competence." It is a difficult thing to say, in a way, because it sounds inappropriate. It isn't meant that way. There is a good deal of discussion on occasion about individual judges and their competence.

Mr. KASTENMEIER. I use it in the sense of whether the Supreme Court of the United States is competent to try a traffic case, and the answer is no.

Judge MARKEY. Oh. I misunderstood. I misunderstood.

Mr. KASTENMEIER. I am using it not in terms of the normal sense of individual competence of a person, but rather whether the court is appropriate.

Judge MARKEY. Yes; all right. I apologize for misunderstanding.

Mr. KASTENMEIER. That is all right.

Judge MARKEY. But it has been raised in other contexts, and I thought someone might have raised it before you in another hearing or something.

Obviously, there is a maturing training process. If we get a judge, for example, who has never heard a thing about anything in our jurisdiction, it won't be long, in 3 or 4 or 5 years, when they will have heard a great deal and learned a great deal about everything we are doing. It is not different, I think, from service in the Congress and in some other areas of life. You do need a basic fundamental capability and, as to the details, they can be filled in.

I apologize for misunderstanding.

To answer the question, I think we would be competent under those terms. A lot would depend on quantity. As to the system, it would be a better system, I think, as long as it is going to stay in the administrative process, if it went through a board.

Mr. KASTENMEIER. I raise the question, and I don't want to beat a dead horse or protract the hearing on just this one question, but it does suggest how proposals sometimes arise and how very significant changes can be made without really sometimes thinking through the consequences. And I suppose we ought to be alert to those propositions.

I yield to my friend from Michigan.

Mr. SAWYER. Thank you.

It is good to see you again, Judge.

Judge MARKEY. Yes, Mr. Sawyer.

Mr. SAWYER. You may well have been asked and answered this question before I came in—I was at another subcommittee hearing—but how do you think the court of the Federal circuit is working? Is it acting up to your expectations? How is it going?

Judge MARKEY. Mr. Sawyer, I could not have planted a nicer question if I had to write a planted question.

I did, as a matter of fact, beg the indulgence of the chairman before you arrived to give a very short report on the court, and did refer a little bit here on the premise that we owe a duty of giving some report on our stewardship to our creators, so to speak. This subcommittee and its staff had so much to do with the creation of the court that it deserves to hear, whenever the occasion arises, how we are doing.

I am prejudiced, but I think we are doing great, thanks to the cooperation of the judges. They have been magnificent and magnanimous in their cooperation, virtually changing a way of life, each of them. The judges who formerly served with the Court of Customs and Patent Appeals sat always en banc. Now they must sit in differing panels every day.

The judges who formerly served with the Court of Claims, while they sat in panels for the last few years or so of their life, had entirely different systems of operating. They were not, as a matter of fact, identical with appellate courts. It was a hybrid relationship. They were both appellate judges and, on some matters, trial judges.

All of a sudden, all of those judges had to lead a whole new third life, and they are doing it. They are doing it willingly and cooperatively. It is an honor and a privilege to serve as first among my superiors.

The court itself, statistically, the best measure, in our view, is time from filing of the case to decision, to determination, finish, disposition of the case, because everything else either adds to or subtracts from that. Thus far, with the cases filed with the court, we have disposed of every case—well, the average time for disposal is 5.7 months. That includes all the 4.7 months that it took the lawyers to get the case ready to be heard, and the 1 month to dispose of the case after we heard it, to issue our opinion.

Whether we can maintain that same short term remains to be seen as the cases build up and up and up. But if we stay even very close to it, I think—and I don't have all the statistics in front of me—I think, on that score, we will lead the Federal judiciary.

Mr. SAWYER. I know that the patent lawyers in my area, in Michigan, are very enthusiastic about it. Do you get that impression from the patent bar in general, that they are very happy with it?

Judge MARKEY. Yes, Mr. Chairman, I do. I have had the honor of—I just gave my 45th speech since the 1st of October, not all to patent people, of course, because the court has a much broader jurisdiction, as you know very well, Mr. Sawyer. In every speech, as a matter of fact, I have tried to point out our patent cases so far have been 37 percent of our workload, or our number, 37 percent.

But it is a tendency—we are all concerned with the field in which we earn a living—the tendency of patent lawyers is to speak of it as the patent court. The tendency of international trade lawyers is to speak of it as the international trade court. The merit systems lawyers say it is the merit systems court. It is like the famous committee that is trying to describe an elephant. You know, the blind man who touched his leg, it was a tree; he touched the tail, it was a rope, and so on.

But we have 116 tribunals from which we hear appeals. We have 885 decisionmakers whose decisions come to us. So this is a small part of it.

But I think, Mr. Sawyer and Mr. Chairman, what has—from the letters received, the comments made, not only to me, but to the other judges, the appreciation of the patent bar has centered on exactly the purpose for which this subcommittee approved and forwarded the act, namely, a clarification in the law of patents, a removal of the barnacles from the law of patents, an elimination of the slogans and a return to the statute enacted by this Congress. That, I think, is what has impressed them and what will be, in the long run, long after I am gone, a real contribution because, from that time on, the same statute—assuming we are successful, as I expect we will be, as we have shown so far—the same statute interpreted the same way will be applicable to every case in the land and in every State in the land and in every district court in the land.

Mr. SAWYER. I think—I can only speak for myself, of course—my main interest in the court of the Federal circuit stems from the patent problem. I guess that was the main——

Judge MARKEY. It was. It was the trigger.

Mr. SAWYER. So that is why I was particularly interested in how the patent bar was.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. Judge Markey, we compliment you, not only on your testimony, but on your services as chief judge of the new circuit.

Judge MARKEY. Thank you.

Mr. KASTENMEIER. We are always pleased to have you.

Judge MARKEY. Thank you, Mr. Chairman. It was a pleasure to have been here.

Mr. KASTENMEIER. Our second witness this morning is Rene Tegtmeyer, Assistant Commissioner for Patents. Having joined the Patent and Trademark Office in 1959, and having worked his way up to his present position, Mr. Tegtmeyer has dedicated most of his professional life to public service and improving the patent system.

He is a familiar face to this subcommittee, and is always welcome here.

Mr. Tegtmeyer, you may proceed with your statement.

TESTIMONY OF RENE TEGTMEYER, ASSISTANT COMMISSIONER FOR PATENTS, PATENT AND TRADEMARK OFFICE, DEPARTMENT OF COMMERCE; ACCOMPANIED BY JUDY WINEGAR GOANS, OFFICE OF LEGISLATION AND INTERNATIONAL AFFAIRS, DEPARTMENT OF COMMERCE

Mr. TEGTMEYER. Thank you, Mr. Chairman.

I welcome this opportunity to testify on H.R. 3824. I have with me in the room Judy Goans, a specialist in our Office of Legislation and International Affairs. We have submitted to you a copy of a brief two-page statement with an attachment containing certain proposed revisions in H.R. 3824. And if you would like, I can even more briefly summarize our statement.

Mr. KASTENMEIER. You may proceed as you wish. Assuming you do not follow the text, we will accept your four-page statement for the record, and it will appear in the record.

Mr. TEGTMEYER. Thank you, Mr. Chairman.

If I might make three brief points. One, we favor the proposed revision of 35 United States Code 142, which omits the requirement of the present law that applicants file with the Commissioner of Patents and Trademarks the reasons for appeal to the U.S. Court of Appeals for the Federal Circuit.

Second, we would concur completely in the proposed revisions that Chief Judge Markey presented in his testimony and in his prepared statement. Our own proposed revisions follow or track his identically.

Third, the proposed amendments to 28 United States Code 1292(b) and to 19 United States Code 1337(a) appear to us to be good housekeeping amendments.

That concludes my summary.

[The statement of Mr. Tegtmeyer follows:]

TESTIMONY OF

RENE D. TEGTMEYER

ASSISTANT COMMISSIONER FOR PATENTS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND ADMINISTRATION

OF JUSTICE OF THE HOUSE JUDICIARY COMMITTEE

ON H.R. 3824

SEPTEMBER 28, 1983

Thank you Mr. Chairman:

I welcome this opportunity to appear before you and to present the views of the U.S. Patent and Trademark Office with respect to H.R. 3824.

We favor the proposed revision of 35 USC 142, which omits the requirement of the present law, that appellants file with the Commissioner of Patents and Trademarks the reasons for appeal to the United States Court of Appeals for the Federal Circuit. The Court, its predecessor the Court of Customs and Patent Appeals, and the bar, have recognized for some time that providing such a listing is a procedural step that has no positive benefit.

The proposed revision of 35 USC 144 obviously flows with the change to 35 USC 142.

We question the continued requirement in the proposed revision of 35 USC 143 and 15 USC 1071(a)(3) for routine transmittal by the Commissioner to the Court of certified copies of the necessary papers and evidence designated by the parties to the appeal. Involving the Court in the handling of those copies simply puts an unnecessary link in the chain. In fact, the Rules of the United States Court of Appeals for the Federal Circuit provide in Rule 10(c)(3) "..., the Commissioner shall promptly transmit to the clerk of this court a certified list as described in FRAP 17(b), which shall constitute compliance with the requirement of 35 USC 143 and 15 USC 1071(a)(3) for the transmission of a certified record to the court."

We recommend that the bill be amended to remove the requirement in 35 USC 143 and 15 USC 1071(a)(3) for automatically supplying to the Court a certified copy of the papers and evidence, and in lieu thereof, insert a requirement that a certified list of papers comprising the record of the case be supplied by the Commissioner to the Court, with copies of the papers as requested by the Court. I have appended to this statement copies of 35 USC 143 and 144 and 15 USC 1071(a)(3) and (4) marked-up to reflect this change as well as some minor editorial suggestions.

The proposed amendments to 28 USC 1292(b) and to 19 USC 1337(a) appear to be good housekeeping amendments.

Thank you. That concludes our testimony.

Suggested Amendments

"§143. Proceedings on appeal

"With respect to an appeal described in section 142 of this title, the Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit [~~certified copies of all the necessary papers and evidence designated by the appellant and any additional papers and evidence designated by the Commissioner or another party.~~] a certified list of the documents comprising the record in the Patent and Trademark Office or, upon request of the court, the original or certified copies of such documents. In an ex parte case, the Commissioner may appear in court by his representative and present the position of the Patent and Trademark Office. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Commissioner and the parties in the appeal.

"§144. Decision on appeal

"The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the evidence produced before the Patent and Trademark Office. [~~and transmitted to the court under section 143 of this title.~~] Upon its determination the court shall [~~return~~] issue to the Commissioner [~~a certificate of its proceedings and decisions;~~] its mandate and opinion which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case."

"§1071(a)(3) The Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit [~~certified copies of all of the necessary papers and evidence designated by the appellant and any additional papers and evidence designated by the Commissioner or another party.~~] a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Commissioner forward the original or certified copies of the record during pendency of the appeal. In an ex parte case, the

Commissioner may appear in court by his representative and present the position of the Patent and Trademark Office. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Commissioner and the parties in the appeal.

"(4) The United States Court of Appeals for the Federal Circuit shall review the decision from which the appeal is taken on the [~~evidence produced~~] record before the Patent and Trademark Office. [~~and transmitted to the court under paragraph (3) of this subsection.~~] Upon its determination the court shall [~~return~~] issue its mandate to the Commissioner [~~a certificate of its proceedings and decision,~~] which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case."

Mr. KASTENMEIER. Thank you.

Do you recommend that the bill be amended to remove the requirement for automatically supplying a certified copy of papers in evidence? Is that not in the text of H.R. 3824?

Mr. TEGTMEYER. We are recommending that the text of H.R. 3824 be modified to eliminate the automatic submission of certified copies of all necessary papers in evidence, and in lieu thereof, make the same recommendation that Chief Judge Markey did, that a certified list only of the documents comprising the record in Patent and Trademark Office be provided to the court unless they request that we provide either a copy of the original documents or a certified copy of such documents. I believe that is the same modification that Chief Judge Markey was proposing.

The attachment to my prepared statement sets out the explicit changes that we recommend in H.R. 3824.

Mr. KASTENMEIER. That seems like a reasonsable recommendation.

Do you have any other recommendations to make other than that?

Mr. TEGTMEYER. There are two minor changes that are recommended and reflected in the language of 1071(a)(4), in which we recommend that the term "evidence produced" be modified to "record," and that "the court shall return a certificate of its proceedings and design" be modified to "issue its mandate." And we recommend the same type of change in the provisions of title 35 covered by H.R. 3824.

Mr. KASTENMEIER. Thank you.

Does the gentleman from Michigan have any questions?

Mr. SAWYER. No; I have no questions, Mr. Chairman.

Mr. KASTENMEIER. Your testimony is brief and to the point. I have no particular argument with it. I think it makes sense.

Do you have any other recommendations beyond your statement with respect to that which presumes to cut down the flow of paper between the PTO and the court of appeals? Can you give us any indication of what a cost saving would be secured by virtue of this change?

Mr. TEGTMEYER. We have not made a specific analysis of the cost saving, but I think I would agree with Chief Judge Markey, and a rough estimate of our savings would be somewhere between 1 and 2 staff-years' worth of effort on the part of a clerk in copying the record for the court.

With respect to other changes that might be proposed, I don't think we have any that would affect the court. We have submitted to the Speaker back in July proposed legislation that would combine the board of appeals and the board of patent interferences in the Patent and Trademark Office, and we believe that that kind of change would effect some efficiencies and provide the Office with greater flexibility in handling ex parte appeals and interferences.

Mr. KASTENMEIER. I think that is all the questions I have.

Thank you very much for your appearance, Mr. Tegtmeyer.

Mr. TEGTMEYER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Incidentally, without objection, the Chair would like to receive and make part of the record a letter and its enclosure from acting Chief Judge J. Skelly Wright, Court of Appeals for the District of Columbia, with respect to support of section 5 of H.R. 3824. Without objection, that correspondence will be received and made part of the record.

[The letter and enclosure follow:]

UNITED STATES COURT OF APPEALS
WASHINGTON, D. C. 20001-2867

J. SKELLY WRIGHT
UNITED STATES CIRCUIT JUDGE

September 23, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kastenmeier:

I am writing to express the appreciation of our Court of Appeals for the efforts of you and your staff -- in particular, Mr. Michael Remington -- to correct an inadvertent inequity created by the Federal Courts Improvement Act of 1982.

Details of the inequity and the relief contained in H.R. 3824 appear in the enclosed letter provided for possible use for the record of consideration of H.R. 3824.

Sincerely,

J. Skelly Wright

Acting Chief Judge

Enc.

UNITED STATES COURT OF APPEALS
WASHINGTON, D. C. 20001-2867

J. SKELLY WRIGHT
UNITED STATES CIRCUIT JUDGE

September 23, 1983

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties
and Administration of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kastenmeier:

The United States Court of Appeals for the District of Columbia Circuit strongly urges the passage of H.R. 3824, Section 5, which provides that the individual who was serving as the Marshal of our Court under 713(c) of Title 28, U.S.C., may, after October 1, 1982, the date of enactment of the Federal Courts Improvement Act, continue to so serve.

The need for the remedial provision of H.R. 3824 was generated by faulty action within the Judicial Branch which resulted in unfortunate and inadvertent inclusion in the Federal Courts Improvement Act of 1982 of provision for deletion of 28 U.S.C. §713(c), which provided that:

> "(c) The Court of Appeals for the Distict of Columbia may appoint a marshal, who shall attend the court at its sessions, be custodian of its courthouse, have supervision over its custodial employees, take charge of all property of the United States used by the court or its employees, and perform such other duties as the court directs. Such court may also appoint necessary messengers. The marshal and messengers shall be subject to removal by the Court."

In conjunction with the elimination of the position of Marshal for our Court, the Act authorized our Court -- as well as the other Courts of Appeals -- to appoint a crier. However, the crier is not an equivalent substitute for our Marshal, who performs not only the duties of crier but also the other duties listed in former Section 713(c) above. Those duties are performed by personnel other than a crier in the other circuits. Thus, we need time to establish the positions required for provision of services essential to the functioning of our Court.

Further, the unexpected elimination of the position of Marshal by the Act represents highly unfair treatment of the individual occupying the position.

Adoption of Section 5 of H.R. 3824, which would permit the individual who was serving in the position of Marshal on the date of enactment of the Federal Courts Improvement Act to continue to so serve, would cure a legislative oversight and thereby provide both essential services to the Court and fair treatment to the individual affected by the inadvertent and unexpected elimination of the position of Marshal.

In light of the situation described above, our Court of Appeals strongly urges the adoption of H.R. 3824.

Sincerely,

Acting Chief Judge

Mr. KASTENMEIER. Next we would like to greet our last witness for the day, Mr. Stuart E. Schiffer, who is the Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice.

Mr. Schiffer has worked for the Civil Division for almost 20 years. He brings with him a wealth of experience about Government litigation of civil cases.

You are most welcome, Mr. Schiffer. You may proceed as you wish, sir. You have a very short statement, so if you want to give your statement in its entirety, that would be perfectly fine.

TESTIMONY OF STUART E. SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY VITO J. DI PIETRO, DIRECTOR, COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Thank you, Mr. Chairman, and good morning.

With me this morning is Mr. Vito DiPietro, who is a Director of the Commercial Litigation Branch within the Civil Division.

I will indeed, Mr. Chairman, merely submit my prepared statement for the record, if I may, and offer this morning only the very briefest of remarks, since I think that the prior witnesses have really covered the ground.

Mr. KASTENMEIER. Without objection, your statement will be received and made part of the record.

Mr. SCHIFFER. We concur in the opening remarks of the chairman and the similar remarks of Chief Judge Markey that, by and large, the Federal Courts Improvement Act is indeed working quite well. I think this is to the credit of the Congress, which spent so much time on the legislation, to the courts which were created, and to the bar of the courts.

We support the technical amendments which H.R. 3824 would make to the Federal Courts Improvement Act, and we equally endorse the salutary proposals which Chief Judge Markey suggested this morning.

The chief judge's proposals would merely bring the procedures governing appeals from the Patent and Trademark Office into line with modern appellate practice and with the procedures which govern appeals from the many other tribunals whose cases go to the Court of Appeals for the Federal Circuit.

We didn't address these specifically in our prepared testimony only because we didn't have the text of those recommendations before us, but we think they are all noncontroversial and salutary proposals.

We did indicate in our prepared testimony what I think may be a minor concern, and one which is largely stylistic, to the effect that the staffs of the Patent and Trademark Office and the Department of Justice have been working, I think, extremely well together in the handling of the litigation arising from the work of the Patent and Trademark Office, the appeals from the Office. We simply wanted to insure that there was no intent in this act to alter litigating authority or the manner in which our offices work together. I don't think there is any real problem. We will be happy to work with the subcommittee staff to insure that.

That concludes my remarks, Mr. Chairman. I would be happy to answer any questions you might have.

[The statement of Mr. Schiffer follows:]

Department of Justice

STATEMENT

OF

STUART E. SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND ADMINISTRATION OF JUSTICE

CONCERNING

H.R. 3824 - AMENDMENTS TO FEDERAL COURTS IMPROVEMENT ACT

ON

SEPTEMBER 28, 1983

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before you today to furnish to the Subcommittee the views of the Department of Justice on H.R. 3824, a bill to amend the Federal Courts Improvement Act of 1982.

The Federal Courts Improvement Act (P.L. 97-164, enacted April 2, 1982, effective October 1, 1982), created the Court of Appeals for the Federal Circuit by merging the former Court of Claims and the former Court of Customs and Patent Appeals. The new Court of Appeals for the Federal Circuit was given jurisdiction of appeals in patent cases arising in the district courts, of appeals of determinations of the International Trade Commission under section 337 of the Tariff Act of 1930, and of appeals in patent and trademark matters arising in the Patent and Trademark Office. The major purpose of H.R. 3824 is to correct or improve certain areas concerning the jurisdiction of the Court of Appeals for the Federal Circuit that were overlooked during the consideration and passage of the Federal Courts Improvement Act of 1982.

For the most part, the Department of Justice supports the enactment of H.R. 3824. However, the Department of Justice objects to those sections of H.R. 3824 which could be interpreted to give the Commissioner of the Patent and Trademark Office

unrestricted authority to appear before the Court of Appeals for the Federal Circuit.

Section 2 of the bill amends 28 U.S.C. § 1292(b) which deals with the certification of a controlling question of law by the district court to the Court of Appeals. Under the Federal Courts Improvement Act of 1982, appeals from the district courts may go either to the geographically appropriate circuit court or to the Court of Appeals for the Federal Circuit. The proposed amendment makes it clear that the court which has jurisdiction of the appeal has jurisdiction of the certified question.

Section 3 of the bill amends section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) to specify that an appeal from a determination of the International Trade Commission must be taken within 60 days. In 1975, section 337 provided that appeals from determinations of the International Trade Commission were to be taken to the Court of Customs and Patent Appeals in accordance with the procedure for taking appeals from the Customs Court, that is, within 60 days. (28 U.S.C. § 2601(a)). In 1980, section 337 was amended to provide that appeals were to be taken in accordance with the Administrative Procedure Act (Chapter 7 of Title 5, United States Code), but under the APA, the time for taking an appeal is set out in the governing jurisdictional statute. The net effect of this change was to remove the time limit for taking an appeal. SSIH Equipment SA v. USITC, 673 F.2d 1387 (CCPA 1982). The proposed amendment puts back the original

60 day limit for taking an appeal from a determination of the International Trade Commission.

Section 4(a) of the bill amends sections 142, 143 and 144 of Title 35. These sections deal with appeals from the Patent and Trademark Office in patent cases. The amendments conform these sections to the usual procedure for taking appeals to the circuit courts. Section 4(b) of the bill amends sections 21(a)(2), (3) and (4) of the Lanham Act (15 U.S.C. § 1071(a)(2), (3) and (4)), which deal with appeals from the Patent and Trademark Office in trademark cases. The proposed amendments are identical to those proposed in section 4(a) for patent cases. Section 4(c) of the bill makes section 4(a) and 4(b) applicable to cases pending in the Patent and Trademark Office and in the Court of Appeals for the Federal Circuit.

As I stated above, the Department of Justice objects to section 4 of the bill only to the extent that it could be interpreted to grant to the Commissioner of the Patent and Trademark Office the unrestricted authority to appear before the Court of Appeals for the Federal Circuit. In view of the excellent working relationship between the Patent and Trademark office and the Department of Justice, we see no reason to make any changes in 35 U.S.C. §143 and 15 U.S.C. §1071(a)(3) with respect to ex parte proceedings which might be interpreted to alter that relationship.

This concludes our comments on H.R. 3824. I want to thank the Subcommittee for the opportunity to present the Department's views and for its interest in the very worthwhile objective of perfecting the Federal Courts Improvement Act.

Mr. KASTENMEIER. Thank you very much, Mr. Schiffer.

What were you referring to when you said there are some sections which might appear to give the PTO unrestrictive authority to appear before the Federal circuit?

Mr. SCHIFFER. I don't even know that that was the intent. We were referring to language in section 4 that spoke in terms of the Commissioner appearing in court by his representative, and we simply wanted to make sure that we at least retained the overall supervisory authority of the Attorney General.

Again, I am not sure that the subcommittee had any intent to alter the litigating authority, but we wanted to guard against that possibility.

Mr. KASTENMEIER. Sure.

Would any of the proposed changes likely be, as a policy matter, challenged by any litigants other than the Government?

Mr. SCHIFFER. There is probably no legislation ever enacted which is not going to be challenged, but I truly do regard these as noncontroversial. By and large, as I indicated, they bring procedures governing appeals from the Patent and Trademark Office into line with what is accepted appellate practice. So I doubt that we will see these changes spawning any substantial litigation. To the contrary, I think they will speed up the administration of justice.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman.

Other than the question the chairman asked, because that puzzled me, too, I really don't have any further questions. I read your statement, and I think I follow it.

I was a little confused at first about the part dealing with the certified question, but I think I unraveled my confusion. So I have no further questions.

Mr. KASTENMEIER. Mr. Schiffer, in looking through Public Law 97-164, which is a fairly long law, are there any other technical problems or ills that you see in it other than those that we presume to correct by H.R. 3824 and the amendments that are suggested by the several witnesses here?

Mr. SCHIFFER. By and large, I agree with the chief judge that it is a little difficult at this early juncture to suggest changes. I don't want to preclude our ability to call on the subcommittee at a future date. What we have now is an evolving decisionmaking process, and I think it is probably still going to require some time to be able to really flush out problems.

Mr. KASTENMEIER. Mr. Schiffer, as long as you are here, do you have any views on a companion bill before this subcommittee involving an intercircuit tribunal of the U.S. courts of appeals? You are with the Civil Division, after all. You litigate extensively in the Federal system. I thought that, as long as you were here, you might avail yourself the opportunity to offer some comment.

Mr. SCHIFFER. I think I had best simply indicate that that is not something I have been involved in at all, one of the many areas in which I have no expertise. So I will decline the opportunity.

Mr. KASTENMEIER. All right.

Thank you very much.

Another problem we may have—at least I will mention it to you, and you may or may not be prepared to say anything about it—is the U.S. magistrates system, which this subcommittee has always handled as a matter of jurisdiction, which has been called into constitutional question by the ninth circuit in the *Pacemaker* case.

Do you have any early views on that possible problem confronting us? Certainly your division, the Civil Division, would have something to say on that case.

Mr. SCHIFFER. None, except to concur that the decision did pose a problem, and it is one we are attempting to address. We have moved to intervene before the ninth circuit for the purpose of seeking rehearing. We have submitted a brief.

As I earlier indicated to counsel, I will be happy to supply a copy of that brief to the subcommittee.

Mr. KASTENMEIER. That would be very helpful. That would, I guess, be the more appropriate and more technical response to my question.

[The information is reprinted in app. 2 at p. 93.]

Mr. KASTENMEIER. If there are no further questions—it was a very brief appearance, but a very helpful one—Mr. Schiffer; we thank you very much for coming this morning and testifying before this subcommittee.

Mr. SCHIFFER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. That concludes testimony on H.R. 3824. On that question, the subcommittee stands adjourned.

[Whereupon, at 10:58 a.m., the subcommittee was adjourned.]

APPENDIXES

APPENDIX 1

LEGISLATIVE MATERIALS

98TH CONGRESS
1ST SESSION

H. R. 3824

To make certain technical amendments with respect to the court of appeals for the Federal circuit, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1983

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

---

A BILL

To make certain technical amendments with respect to the court of appeals for the Federal circuit, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Technical Amendments to the Federal Court Improvements Act".

SEC. 2. Section 1292(b) of title 28, United States Code, is amended by inserting "which would have jurisdiction of an appeal of such action" after "The Court of Appeals".

SEC. 3. Section 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)) is amended in the fourth sentence by insert-

ing ", within 60 days after the determination is made," after "appeal such determination".

SEC. 4. (a) Sections 142, 143, and 144 of title 35, United States Code, are amended to read as follows:

"§ 142. Notice of appeal

"When an appeal is taken to the United States Court of Appeals for the Federal Circuit, the appellant shall file in the Patent and Trademark Office a written notice of appeal directed to the Commissioner, within such time after the date of the decision from which the appeal is taken as the Commissioner prescribes, but in no case less than 60 days after that date.

"§ 143. Proceedings on appeal

"With respect to an appeal described in section 142 of this title, the Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit certified copies of all the necessary papers and evidence designated by the appellant and any additional papers and evidence designated by the Commissioner or another party. In an ex parte case, the Commissioner may appear in court by his representative and present the position of the Patent and Trademark Office. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Commissioner and the parties in the appeal.

"§ 144. Decision on appeal

"The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the evidence produced before the Patent and Trademark Office and transmitted to the court under section 143 of this title. Upon its determination the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.".

(b) Paragraphs (2), (3), and (4) of subsection (a) of section 21 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1071(a) (2), (3), and (4)), are amended to read as follows:

"(2) When an appeal is taken to the United States Court of Appeals for the Federal Circuit, the appellant shall file in the Patent and Trademark Office a written notice of appeal directed to the Commissioner, within such time after the date of the decision from which the appeal is taken as the Commissioner prescribes, but in no case less than 60 days after that date.

"(3) The Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit certified copies of all of the necessary papers and evidence designated

by the appellant and any additional papers and evidence designated by the Commissioner or another party. In an ex parte case, the Commissioner may appear in court by his representative and present the position of the Patent and Trademark Office. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Commissioner and the parties in the appeal.

"(4) The United States Court of Appeals for the Federal Circuit shall review the decision from which the appeal is taken on the evidence produced before the Patent and Trademark Office and transmitted to the court under paragraph (3) of this subsection. Upon its determination the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.".

(c) This section shall apply to proceedings pending in the Patent and Trademark Office and to appeals pending in the United States Court of Appeals for the Federal Circuit.

SEC. 5. Any individual who, on the date of the enactment of the Federal Courts Improvement Act of 1982, was serving as marshal for the Court of Appeals for the District of Columbia under section 713(c) of title 28, United States Code, may, after the date of the enactment of this Act, so serve under that section as in effect on the date of the enactment of the Federal Courts Improvement Act of 1982. While such individual so serves, the provisions of section 714(a) of title 28, United States Code, shall not apply to the Court of Appeals for the District of Columbia.

SECTIONAL ANALYSIS OF H.R. 3824

The Federal Courts Improvement Act (Public Law 97-164), enacted April 2, 1982, and effective October 1, 1982, created the Court of Appeals for the Federal Circuit by merging the former U.S. Court of Claims and the former U.S. Court of Customs and Patent Appeals. The Act also created the U.S. Claims Court from the former trial division of the Court of Claims. Finally, the Act contained several improvements to the administration of Federal court business.

For the most part, the technical amendments contained in H.R. 3824 are designed to correct flaws in certain sections of Public Law 97-164 relating to the functioning of the Court of Appeals for the Federal Circuit.

Section 1 of H.R. 3824 provides the title of the bill: the "Technical Amendments to the Federal Court Improvement Act."

Section 2 of the bill amends 28 U.S.C. § 1292(b) to clarify that the circuit court which has jurisdiction of an appeal has jurisdiction of the certification of a controlling question of law.

Section 3 of the bill amends section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) to specify that an appeal from a determination of the International Trade Commission must be taken within 60 days. Public Law 97-164 was silent on this point.

Section 4(a) of the bill amends sections 142, 143 and 144 of Title 35, United States Code. These sections deal

with appeals from the Patent and Trademark Office in patent cases. The amendments conform these sections to the usual procedure for taking appeals to the circuit courts. Section 4(b) of the bill amends sections 21(a)(2), (3) and (4) of the Lanham Act (15 U.S.C. § 1071(a)(2), (3) and (4)), which deal with appeals from the Patent and Trademark Office in trademark cases. The proposed amendments are identical to those proposed in section 4(a) for patent cases. Section 4(c) of the bill makes section 4(a) and 4(b) applicable to cases pending in the Patent and Trademark Office and in the Court of Appeals for the Federal Circuit.

Section 5 of the bill provides a grandfather period for the present marshal for the Court of Appeals for the District of Columbia under section 713(c) of Title 28, United States Code. Public Law 97-164 eliminated the office of marshal from the D.C. Circuit, rendering that circuit consistent with the other circuits. This section does not entail costs to the taxpayer because the former marshal has continued employment in another status.

Public Law 97-164
97th Congress

An Act

To establish a United States Court of Appeals for the Federal Circuit, to establish a United States Claims Court, and for other purposes.

Apr. 2, 1982
[H.R. 4482]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Courts Improvement Act of 1982".

Federal Courts Improvement Act of 1982.
28 USC 1 note.

TITLE I—UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND UNITED STATES CLAIMS COURT

PART A—ORGANIZATION, STRUCTURE, AND JURISDICTION

NUMBER AND COMPOSITION OF CIRCUITS

SEC. 101. Section 41 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended by striking out "twelve" and inserting in lieu thereof "thirteen" and by adding at the end thereof the following:

"Federal	All Federal judicial districts.".

NUMBER OF CIRCUIT JUDGES

SEC. 102. (a) Section 44(a) of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended by adding at the end thereof the following:

"Federal	12".

(b) Section 44(c) of title 28, United States Code, is amended by adding the following sentence at the end thereof: "While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of this Act, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia.".

PANELS OF JUDGES; NUMBER OF JUDGES FOR HEARINGS

SEC. 103. (a) Section 46(a) of title 28, United States Code, is amended by striking out "divisions" and inserting in lieu thereof "panels".

(b) Section 46(b) of title 28, United States Code, is amended—

(1) by striking out "divisions" each place it appears and inserting in lieu thereof "panels";

(2) by inserting immediately before the period at the end of the first sentence the following: ", at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but

not limited to, the unavailability of a judge of the court because of illness"; and

(3) by adding at the end thereof the following new sentence: "The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.".

(c) The first sentence of section 46(c) of title 28, United States Code, is amended by inserting immediately after "three judges" the following: "(except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide)".

(d) Section 46(d) of title 28, United States Code, is amended by striking out "division" and inserting in lieu thereof "panel".

PLACES FOR HOLDING COURT

SEC. 104. (a) Section 48 of title 28, United States Code, is amended by striking out the first two sentences and inserting in lieu thereof the following:

"(a) The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule.".

(b) Section 48 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended further by inserting at the end of the table of circuits and places the following:

"Federal	District of Columbia, and in any other place listed above as the court by rule directs.".

(c) Section 48 of title 28, United States Code, is amended further by striking out the final paragraph and inserting in lieu thereof the following:

"(b) Each court of appeals may hold special sessions at any place within its circuit as the nature of the business may require, and upon such notice as the court orders. The court may transact any business at a special session which it might transact at a regular session.

"(c) Any court of appeals may pretermit, with the consent of the Judicial Conference of the United States, any regular session of court at any place for insufficient business or other good cause.

"(d) The times and places of the sessions of the Court of Appeals for the Federal Circuit shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable.".

ORGANIZATION OF UNITED STATES CLAIMS COURT

SEC. 105. (a) Chapter 7 of title 28, United States Code, is amended to read as follows:

"CHAPTER 7—UNITED STATES CLAIMS COURT

"Sec.

"§ 171. Appointment and number of judges; character of court; designation of chief judge

28 USC 171.

"(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Claims Court. The court is declared to be a court established under article I of the Constitution of the United States.

USC prec. title 1.

"(b) The President shall designate one of the judges of the Claims Court who is less than seventy years of age to serve as chief judge. The chief judge may continue to serve as such until he reaches the age of seventy years or until another judge is designated as chief judge by the President. After the designation of another judge to serve as chief judge, the former chief judge may continue to serve as a judge of the court for the balance of the term to which appointed.

"§ 172. Tenure and salaries of judges

28 USC 172.

"(a) Each judge of the United States Claims Court shall be appointed for a term of fifteen years.

"(b) Each judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

"§ 173. Times and places of holding court

28 USC 173.

"The principal office of the United States Claims Court shall be in the District of Columbia, but the Claims Court may hold court at such times and in such places as it may fix by rule of court. The times and places of the sessions of the Claims Court shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as is practicable.

"§ 174. Assignment of judges; decisions

28 USC 174.

"(a) The judicial power of the United States Claims Court with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

"(b) All decisions of the Claims Court shall be preserved and open to inspection.

"§ 175. Official duty station; residence

28 USC 175.

"(a) The official duty station of each judge of the United States Claims Court is the District of Columbia.

"(b) After appointment and while in active service, each judge shall reside within fifty miles of the District of Columbia.

28 USC 176.

"§ 176. Removal from office

"(a) Removal of a judge of the United States Claims Court during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.

"(b) Before any order of removal may be entered, a full specification of the charges shall be furnished to the judge involved, and such judge shall be accorded an opportunity to be heard on the charges.

"(c) Any cause for removal of any judge of the United States Claims Court coming to the knowledge of the Director of the Administrative Office of the United States Courts shall be reported by him to the chief judge of the United States Court of Appeals for the Federal Circuit, and a copy of the report shall at the same time be transmitted to the judge.

28 USC 177.

"§ 177. Disbarment of removed judges

"A judge of the United States Claims Court removed from office in accordance with section 176 of this title shall not be permitted at any time to practice before the Claims Court.".

(b) The item relating to chapter 7 in the chapter analysis of part I of title 28, United States Code, is amended to read as follows:

"7. United States Claims Court ..... 171".

REPEAL OF PROVISIONS RELATING TO THE COURT OF CUSTOMS AND PATENT APPEALS

28 USC 221 *et seq.*

SEC. 106. Chapter 9 of title 28, United States Code, and the item relating to chapter 9 in the chapter analysis of part I of such title, are repealed.

INTERLOCUTORY APPEALS FROM CERTAIN ORDERS

SEC. 107. Section 256(b) of title 28, United States Code, is amended by striking out "section 1541(b)" and all that follows through "in that section." and inserting in lieu thereof the following: "section 1292(d)(1) of this title, and the United States Court of Appeals for the Federal Circuit may, in its discretion, consider the appeal.".

REPEAL; ASSIGNMENT OF CIRCUIT JUDGES

SEC. 108. (a) Subsection (b) of section 291 of title 28, United States Code, is repealed.

(b) Subsection (c) of such section is amended by striking out "(c)" and inserting in lieu thereof "(b)".

ASSIGNMENT OF DISTRICT JUDGES

SEC. 109. Section 292(e) of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals or" and by striking out "in which the need arises".

REPEAL; ASSIGNMENT OF OTHER JUDGES

SEC. 110. (a) Section 293 of title 28, United States Code, is amended—

(1) by repealing subsections (a), (c), and (d);

(2) by redesignating subsection (b) as subsection (a); and

(3) by redesignating subsection (e), as that subsection will become effective on April 1, 1984, as subsection (b).

(b) The section heading of section 293 of title 28, United States Code, is amended to read as follows:

"§ 293. Judges of the Court of International Trade".

(c) The item relating to section 293 in the section analysis of chapter 13 of title 28, United States Code, is amended to read as follows:

"293. Judges of the Court of International Trade.".

(d) Section 160(a) of title 28, United States Code, as that section will become effective on April 1, 1984, is amended by striking out "293(e)" and inserting in lieu thereof "293(b)".

JUDICIAL CONFERENCE

SEC. 111. Section 331 of title 28, United States Code, is amended—

(1) in the first paragraph, by striking out ", the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals,"; and

(2) in the third paragraph, by striking out the second sentence.

RETIREMENT

SEC. 112. (a) Section 372(a) of title 28, United States Code, is amended—

(1) in the third paragraph, by striking out "Court of Claims, Court of Customs and Patent Appeals, or"; and

(2) in the fifth paragraph, by striking out "Court of Claims, Court of Customs and Patent Appeals, or".

(b) Section 372(b) of title 28, United States Code, is amended by striking out "Court of Claims, Court of Customs and Patent Appeals, or" each place it appears.

(c) Section 372(c)(17) of title 28, United States Code, is amended by striking out "Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court" and inserting in lieu thereof "United States Claims Court, the Court of International Trade, and the Court of Appeals for the Federal Circuit".

REPEAL; DISTRIBUTION OF COURT OF CLAIMS DECISIONS

SEC. 113. Section 415 of title 28, United States Code, and the item relating to section 415 in the section analysis of chapter 19 of such title, are repealed.

DEFINITIONS

SEC. 114. Section 451 of title 28, United States Code (including that section as it will become effective on April 1, 1984), is amended—

(1) in the first definition, relating to court of the United States, by striking out "the Court of Claims, the Court of Customs and Patent Appeals,"; and

(2) in the third definition, relating to judge of the United States, by striking out "Court of Claims, Court of Customs and Patent Appeals,".

TRAVELING EXPENSES AND COURT ACCOMMODATIONS

SEC. 115. (a)(1) Section 456 of title 28, United States Code (including that section as it will become effective on April 1, 1984), is amended to read as follows:

"§ 456. Traveling expenses of justices and judges; official duty stations

"(a) The Director of the Administrative Office of the United States Courts shall pay each justice or judge of the United States, and each retired justice or judge recalled or designated and assigned to active duty, while attending court or transacting official business at a place other than his official duty station for any continuous period of less than thirty calendar days (1) all necessary transportation expenses certified by the justice or judge; and (2) a per diem allowance for travel at the rate which the Director establishes not to exceed the maximum per diem allowance fixed by section 5702(a) of title 5, or in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States, reimbursement for his actual and necessary expenses of subsistence not in excess of the maximum amount fixed by section 5702 of title 5. The Director of the Administrative Office of the United States Courts shall also pay each justice or judge of the United States, and each retired justice or judge recalled or designated and assigned to active duty, while attending court or transacting official business under an assignment authorized under chapter 13 of this title which exceeds in duration a continuous period of thirty calendar days, all necessary transportation expenses and actual and necessary expenses of subsistence actually incurred, notwithstanding the provisions of section 5702 of title 5, in accordance with regulations which the Director shall prescribe with the approval of the Judicial Conference of the United States.

28 USC 291 *et seq.*

"(b) The official duty station of the Chief Justice of the United States, the Justices of the Supreme Court of the United States, and the judges of the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Federal Circuit, and the United States District Court for the District of Columbia shall be the District of Columbia.

"(c) The official duty station of the judges of the United States Court of International Trade shall be New York City.

"(d) The official duty station of each district judge shall be that place where a district court holds regular sessions at or near which the judge performs a substantial portion of his judicial work, which is nearest the place where he maintains his actual abode in which he customarily lives.

"(e) The official duty station of a circuit judge shall be that place where a circuit or district court holds regular sessions at or near which the judge performs a substantial portion of his judicial work, or that place where the Director provides chambers to the judge where he performs a substantial portion of his judicial work, which

is nearest the place where he maintains his actual abode in which he customarily lives.

"(f) The official duty station of a retired judge shall be established in accordance with section 374 of this title. 28 USC 374.

"(g) Each circuit or district judge whose official duty station is not fixed expressly by this section shall notify the Director of the Administrative Office of the United States Courts in writing of his actual abode and official duty station upon his appointment and from time to time thereafter as his official duty station may change.". Notification to Director, Administrative Office, U.S. Courts.

(2) The item relating to section 456 in the section analysis of chapter 21 of title 28, United States Code, is amended to read as follows:

"456. Traveling expenses of justices and judges; official duty stations.".

(b)(1) Section 460 of title 28, United States Code, is amended to read as follows:

"§ 460. Application to other courts

"(a) Sections 452 through 459 and section 462 of this chapter shall also apply to the United States Claims Court, to each court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States, and to the judges thereof. *Infra.*

"(b) The official duty station of each judge referred to in subsection (a) which is not otherwise established by law shall be that place where the court holds regular sessions at or near which the judge performs a substantial portion of his judicial work, which is nearest the place where he maintains his actual abode in which he customarily lives.".

(2) The item relating to section 460 in the section analysis of chapter 21 of title 28, United States Code, is amended to read as follows:

"460. Application to other courts.".

(c)(1) Chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 462. Court accommodations 28 USC 462.

"(a) Sessions of courts of the United States (except the Supreme Court) shall be held only at places where the Director of the Administrative Office of the United States Courts provides accommodations, or where suitable accommodations are furnished without cost to the judicial branch.

"(b) The Director of the Administrative Office of the United States Courts shall provide accommodations, including chambers and courtrooms, only at places where regular sessions of court are authorized by law to be held, but only if the judicial council of the appropriate circuit has approved the accommodations as necessary.

"(c) The limitations and restrictions contained in subsection (b) of this section shall not prevent the Director from furnishing chambers to circuit judges at places where Federal facilities are available when the judicial council of the circuit approves.

"(d) The Director of the Administrative Office of the United States Courts shall provide permanent accommodations for the United States Court of Appeals for the Federal Circuit and for the United States Claims Court only at the District of Columbia. How-

ever, each such court may hold regular and special sessions at other places utilizing the accommodations which the Director provides to other courts.

"(e) The Director of the Administrative Office of the United States Courts shall provide accommodations for probation officers, pretrial service officers, and Federal Public Defender Organizations at such places as may be approved by the judicial council of the appropriate circuit.

"(f) Upon the request of the Director, the Administrator of General Services is authorized and directed to provide the accommodations the Director requests, and to close accommodations which the Director recommends for closure with the approval of the Judicial Conference of the United States.".

(2) The section analysis of chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"462. Court accommodations.".

(3) Section 142 of title 28, United States Code, and the item relating to section 142 in the section analysis of chapter 5 of such title, are repealed.

EXPENSES OF LITIGATION

SEC. 116. (a) Chapter 21 of title 28, United States Code, as amended by section 115 of this Act, is further amended by adding at the end thereof the following new section:

28 USC 463.

"§ 463. Expenses of litigation

"Whenever a Chief Justice, justice, judge, officer, or employee of any United States court is sued in his official capacity, or is otherwise required to defend acts taken or omissions made in his official capacity, and the services of an attorney for the Government are not reasonably available pursuant to chapter 31 of this title, the Director of the Administrative Office of the United States Courts may pay the costs of his defense. The Director shall prescribe regulations for such payments subject to the approval of the Judicial Conference of the United States.".

28 USC 501 *et seq.*

(b) The analysis of chapter 21 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"463. Expenses of litigation.".

INTERESTS OF THE UNITED STATES IN CERTAIN ACTIONS

SEC. 117. Section 518(a) of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court or in the United States Court of Appeals for the Federal Circuit".

TRANSMISSION OF PETITIONS IN SUITS AGAINST THE UNITED STATES

SEC. 118. (a) Section 520 of title 28, United States Code, is amended—

(1) in subsection (a), by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court or in the United States Court of Appeals for the Federal Circuit"; and

(2) by striking out "Court of Claims" in the section heading and inserting in lieu thereof "United States Claims Court or in United States Court of Appeals for the Federal Circuit".

(b) The item relating to section 520 in the section analysis of chapter 31 of title 28, United States Code, is amended to read as follows:

"520. Transmission of petitions in United States Claims Court or in United States Court of Appeals for the Federal Circuit; statement furnished by departments.".

BUDGET ESTIMATES

SEC. 119. (a) Section 605 of title 28, United States Code, is amended—

(1) by inserting immediately before the period at the end of the second undesignated paragraph the following: "and the estimate with respect to the United States Court of Appeals for the Federal Circuit shall be approved by such court"; and

(2) by striking out "Bureau of the Budget" each place it appears and inserting in lieu thereof "Office of Management and Budget".

(b) Funds appropriated to the Court of Customs and Patent Appeals and the Court of Claims for fiscal year 1982 shall be made available for the operation of the United States Court of Appeals for the Federal Circuit and the United States Claims Court. Such sums shall be apportioned among the new appropriations as determined by the Director of the Administrative Office of the United States Courts in consultation with the chief judges of the respective courts.

DEFINITION OF COURTS

SEC. 120. (a) Section 610 of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals" and inserting in lieu thereof "the United States Claims Court".

(b)(1) Section 713 of title 28, United States Code, is amended to read as follows:

"§ 713. Librarians

"(a) Each court of appeals may appoint a librarian who shall be subject to removal by the court.

"(b) The librarian, with the approval of the court, may appoint necessary library assistants in such numbers as the Director of the Administrative Office of the United States Courts may approve. The librarian may remove such library assistants with the approval of the court.".

(2) The item relating to section 713 in the section analysis of chapter 47, United States Code, is amended to read as follows:

"713. Librarians.".

(c)(1) Chapter 47 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

"§ 714. Criers and messengers 28 USC 714.

"(a) Each court of appeals may appoint a crier who shall be subject to removal by the court.

"(b) The crier, with the approval of the court, may appoint necessary messengers in such number as the Director of the Administra-

tive Office of the United States Courts may approve. The crier may remove such messengers with the approval of the court. The crier shall also perform the duties of bailiff and messenger.

28 USC 715.

"§ 715. Staff attorneys and technical assistants

"(a) The chief judge of each court of appeals, with the approval of the court, may appoint a senior staff attorney, who shall be subject to removal by the chief judge with the approval of the court.

"(b) The senior staff attorney, with the approval of the chief judge, may appoint necessary staff attorneys and secretarial and clerical employees in such numbers as the Director of the Administrative Office of the United States Courts may approve, but in no event may the number of staff attorneys exceed the number of positions expressly authorized in an annual appropriation Act. The senior staff attorney may remove such staff attorneys and secretarial and clerical employees with the approval of the chief judge.

"(c) The chief judge of the Court of Appeals for the Federal Circuit, with the approval of the court, may appoint a senior technical assistant who shall be subject to removal by the chief judge with the approval of the court.

"(d) The senior technical assistant, with the approval of the court, may appoint necessary technical assistants in such number as the Director of the Administrative Office of the United States Courts may approve, but in no event may the number of technical assistants in the Court of Appeals for the Federal Circuit exceed the number of circuit judges in regular active service within such circuit. The senior technical assistant may remove such technical assistants with the approval of the court.".

(2) The section analysis of chapter 47, United States Code, is amended by adding at the end thereof the following new items:

"714. Criers and messengers.
"715. Staff attorneys and technical assistants.".

OFFICERS AND EMPLOYEES OF THE UNITED STATES CLAIMS COURT

SEC. 121. (a) Section 791 of title 28, United States Code, is amended by amending subsection (a) to read as follows:

"(a) The United States Claims Court may appoint a clerk, who shall be subject to removal by the court. The clerk, with the approval of the court, may appoint necessary deputies and employees in such numbers as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies and employees shall be subject to removal by the clerk with the approval of the court.".

Repeal.

(b) Section 792 of title 28, United States Code, and the item relating to section 792 in the section analysis of chapter 51 of such title, are repealed.

(c)(1) Section 794 of title 28, United States Code, is amended to read as follows:

"§ 794. Law clerks and secretaries

"The judges of the United States Claims Court may appoint necessary law clerks and secretaries, in such numbers as the Judicial Conference of the United States may approve, subject to any limitation of the aggregate salaries of such employees which may be imposed by law.".

(2) The item relating to section 794 in the section analysis of chapter 51 of title 28, United States Code, is amended to read as follows:

"794. Law clerks and secretaries.".

(d)(1) Section 795 of title 28, United States Code, is amended to read as follows:

"§ 795. Bailiffs and messengers

"The chief judge of United States Claims Court, with the approval of the court, may appoint necessary bailiffs and messengers, in such numbers as the Director of the Administrative Office of the United States Courts may approve, each of whom shall be subject to removal by the chief judge, with the approval of the court.".

(2) The item relating to section 795 in the section analysis of chapter 51 of title 28, United States Code, is amended to read as follows:

"795. Bailiffs and messengers.".

(e) Section 796 of title 28, United States Code, is amended by striking out "The Court of Claims" and inserting in lieu thereof "Subject to the approval of the United States Claims Court, the Director of the Administrative Office of the United States Courts".

(f)(1) Section 797 of title 28, United States Code, is amended to read as follows:

"§ 797. Recall of retired judges

"(a) Any judge of the United States Claims Court who has retired from regular active service under subchapter III of chapter 83 of title 5 shall be known and designated as a senior judge and may perform duties as a judge when recalled pursuant to subsection (b) of this section. 5 USC 8331.

"(b) The chief judge of the Claims Court may, whenever he deems it advisable, recall any senior judge, with such judge's consent, to perform such duties as a judge and for such period of time as the chief judge may specify.

"(c) Any senior judge performing duties pursuant to this section shall not be counted as a judge for purposes of the number of judgeships authorized by section 171 of this title. *Ante*, p. 27.

"(d) Any senior judge, while performing duties pursuant to this section, shall be paid the same allowances for travel and other expenses as a judge in active service. Such senior judge shall also receive from the Claims Court supplemental pay in an amount sufficient, when added to his civil service retirement annuity, to equal the salary of a judge in active service for the same period or periods of time. Such supplemental pay shall be paid in the same manner as the salary of a judge.". Supplemental pay.

(2) The item relating to section 797 in the section analysis of chapter 51 of title 28, United States Code, is amended by striking out "commissioners" and inserting in lieu thereof "judges".

(g)(1) The item relating to chapter 51 in the chapter analysis of part III of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(2) The chapter heading of chapter 51 of title 28, United States Code, is amended by striking out "COURT OF CLAIMS" and inserting in lieu thereof "UNITED STATES CLAIMS COURT".

ABOLISHMENT OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Repeal.
28 USC 831 *et seq.*

SEC. 122. (a) Chapter 53 of title 28, United States Code, and the item relating to chapter 53 in the chapter analysis of part III of such title, are repealed.

(b) Section 957 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "(a)", and

(2) by repealing subsection (b).

TECHNICAL AND CONFORMING AMENDMENTS RELATING TO REPEAL OF COURT OF CUSTOMS AND PATENT APPEALS

SEC. 123. Sections 1255 and 1256 of title 28, United States Code, and the items relating to sections 1255 and 1256 in the section analysis of chapter 81 of such title, are repealed.

COURTS OF APPEALS JURISDICTION

SEC. 124. Section 1291 of title 28, United States Code, is amended—

(1) by inserting "(other than the United States Court of Appeals for the Federal Circuit)" after "courts of appeals"; and

(2) by adding at the end thereof the following new sentence: "The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.".

Infra; post, p. 37.

INTERLOCUTORY DECISIONS

SEC. 125. (a) Section 1292(a) of title 28, United States Code, is amended—

(1) by striking out "The courts" and inserting in lieu thereof "Except as provided in subsections (c) and (d) of this section, the courts";

(2) by striking out the semicolon at the end of paragraph (3) and inserting in lieu thereof a period; and

(3) by striking out paragraph (4).

(b) Section 1292 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

Exclusive jurisdiction.

"(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

"(1) of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

Post, p. 37.

"(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

"(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing

Ante, p. 28.

any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

"(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

"(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.". Stay of appeal.

CIRCUITS IN WHICH DECISIONS ARE REVIEWABLE

SEC. 126. Section 1294 of title 28, United States Code (including that section as it will become effective on April 1, 1984), is amended by striking out "Appeals" and inserting in lieu thereof "Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals". *Ante*, p. 36; *Infra*.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SEC. 127. (a) Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit 28 USC 1295.

"(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

"(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;

"(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was

28 USC 1346.

based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

"(3) of an appeal from a final decision of the United States Claims Court;

"(4) of an appeal from a decision of—

"(A) the Board of Appeals or the Board of Patent Interferences of the Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

"(B) the Commissioner of Patents and Trademarks or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

"(C) a district court to which a case was directed pursuant to section 145 or 146 of title 35;

"(5) of an appeal from a final decision of the United States Court of International Trade;

"(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

"(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (relating to importation of instruments or apparatus);

19 USC 1202 note.

"(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

Post, p. 45.

"(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5; and

"(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1)).

Post, p. 47.

"(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b)). The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

"(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before

the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

"§ 1296. Precedence of cases in the United States Court of Appeals for the Federal Circuit 28 USC 1296.

"Civil actions in the United States Court of Appeals for the Federal Circuit shall be given precedence, in accordance with the law applicable to such actions, in such order as the court may by rule establish.".

(b) The section analysis of chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new items:

"1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit.
"1296. Precedence of cases in the United States Court of Appeals for the Federal Circuit.".

INTERSTATE COMMERCE COMMISSION ORDERS; JURISDICTION

SEC. 128. Section 1336(b) of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

UNITED STATES AS DEFENDANT; JURISDICTION

SEC. 129. Section 1346(a) of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

INTERSTATE COMMERCE COMMISSION ORDERS; VENUE

SEC. 130. Section 1398(b) of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

UNITED STATES AS DEFENDANT; VENUE

SEC. 131. Section 1402(a) of title 28, United States Code, is amended by inserting "in a district court" after "civil action".

CURE OR WAIVER OF DEFECTS

SEC. 132. Section 1406 of title 28, United States Code, is amended—

(1) by repealing subsection (c); and
(2) by redesignating subsection (d) as subsection (c).

UNITED STATES CLAIMS COURT JURISDICTION AND VENUE

SEC. 133. (a) Section 1491 of title 28, United States Code, is amended to read as follows:

"§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

"(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded

USC prec. title 1.

either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

"(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

41 USC 609.

"(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

"(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.".

16 USC 831.

(b) Section 1492 of title 28, United States Code, is amended by striking out "chief commissioner of the Court of Claims" and inserting in lieu thereof "chief judge of the United States Claims Court".

(c)(1) Sections 1494, 1495, 1496, and 1497 of title 28, United States Code, are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court".

(2) The section heading of section 1497 of title 28, United States Code, is amended by striking out "growers," and inserting in lieu thereof "growers'".

(d) Section 1498 of title 28, United States Code, is amended—

(1) in subsection (a), by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in subsections (b) and (d), by striking out "Court of Claims" each place it appears and inserting in lieu thereof "Claims Court".

(e)(1) Sections 1499, 1500, 1501, 1502, and 1503 of title 28, United States Code, are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court".

(2)(A) The section heading of section 1499 of title 28, United States Code, is amended by inserting "and Safety" after "Hours".

(B) The item relating to section 1499 in the section analysis of chapter 91 of title 28, United States Code, is amended to read as follows:

"1499. Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act.".

(f) Section 1504 of title 28, United States Code, and the item relating to section 1504 in the section analysis of chapter 91 of such title, are repealed. Repeal.

(g) Section 1505 of title 28, United States Code, is amended—

(1) by striking out "Court of Claims" the first place it appears and inserting in lieu thereof "United States Claims Court"; and

(2) by striking out "Court of Claims" the second place it appears and inserting in lieu thereof "Claims Court".

(h) Section 1506 of title 28, United States Code, and the item relating to section 1506 in the section analysis of chapter 91 of such title, are repealed. Repeal.

(i) Section 1507 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(j)(1) The item relating to chapter 91 in the chapter analysis of part IV of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(2) The chapter heading of chapter 91 of title 28, United States Code, is amended by striking out "COURT OF CLAIMS" and inserting in lieu thereof "UNITED STATES CLAIMS COURT".

REPEAL OF PROVISIONS RELATING TO THE COURT OF CUSTOMS AND PATENT APPEALS

SEC. 134. Chapter 93 of title 28, United States Code, and the item relating to chapter 93 in the chapter analysis of part IV of such title, are repealed. 28 USC 1541 *et seq.*

REPEAL; CURE OF DEFECTS

SEC. 135. Section 1584 of title 28, United States Code, and the item relating to section 1584 in the section analysis of chapter 95 of such title, are repealed.

REPEAL; TIME FOR APPEAL

SEC. 136. Section 2110 of title 28, United States Code, and the item relating to section 2110 in the section analysis of chapter 133 of such title, are repealed.

COURT OF APPEALS JURISDICTION

SEC. 137. Section 2342 of title 28, United States Code, is amended—

(1) by inserting "(other than the United States Court of Appeals for the Federal Circuit)" after "court of appeals";

(2) in paragraph (4), by inserting "and" after the semicolon;

(3) in paragraph (5), by striking out "; and" and inserting in lieu thereof a period; and

(4) by striking out paragraph (6).

PLANT VARIETY PROTECTION OFFICE DECISIONS

Repeal.

SEC. 138. Section 2353 of title 28, United States Code, and the item relating to section 2353 in the section analysis of chapter 158 of such title, are repealed.

UNITED STATES CLAIMS COURT PROCEDURE

SEC. 139. (a) Sections 2501 and 2502(a) of title 28, United States Code, are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court".

(b)(1) Section 2503 of title 28, United States Code, is amended to read as follows:

"§ 2503. Proceedings generally

"(a) Parties to any suit in the United States Claims Court may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses.

"(b) The proceedings of the Claims Court shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Claims Court may prescribe and in accordance with the Federal Rules of Evidence.

"(c) The judges of the Claims Court shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments. Hearings shall, if convenient, be held in the counties where the witnesses reside.".

Hearings.

(2) The item relating to section 2503 in the section analysis of chapter 165 of title 28, United States Code, is amended by striking out "before commissioners".

(c) Section 2504 of title 28, United States Code, is amended—

(1) by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) by striking out "commissioner" each place it appears and inserting in lieu thereof "judge".

(d) Section 2505 of title 28, United States Code, is amended—

(1) by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) by striking out "report findings" and inserting in lieu thereof "enter judgment".

(e) Section 2506 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(f) Section 2507 of title 28, United States Code, is amended—

(1) in subsection (a), by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in subsection (c), by striking out "Court of Claims" and inserting in lieu thereof "Claims Court".

(g) Section 2508 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(h)(1) Section 2509 of title 28, United States Code, is amended by amending subsection (a) to read as follows:

"(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Claims Court pursuant to section 1492 of this title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.". Hearing officer. 28 USC 1492.

(2) Section 2509 of title 28, United States Code, is amended—

(A) in subsections (b), (c), (d), and (f), by striking out "trial commissioner" each place it appears and inserting in lieu thereof "hearing officer";

(B) in subsections (b), (c), and (e), by striking out "chief commissioner" each place it appears and inserting in lieu thereof "chief judge";

(C) in subsections (b), (f), and (g), by striking out "Court of Claims" each place it appears and inserting in lieu thereof "Claims Court";

(D) in subsection (d), by striking out "of commissioners"; and

(E) in subsection (g), by striking out "commissioners serving as trial commissioners" and inserting in lieu thereof "judges serving as hearing officers".

(i)(1) Section 2510 of title 28, United States Code, is amended to read as follows:

"§ 2510. Referral of cases by Comptroller General 28 USC 2510.

"(a) The Comptroller General may transmit to the United States Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

"(b) The Claims Court shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon.".

(2) The item relating to section 2510 in the section analysis of chapter 165 of title 28, United States Code, is amended to read as follows:

"2510. Referral of cases by Comptroller General.".

(j)(1) Section 2511 of title 28, United States Code, is amended by striking out ", or of the Supreme Court upon review,".

(2) Sections 2511, 2512, 2513(c), 2514, 2515(a), and 2516(a) of title 28, United States Code, are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court".

(k) Section 2517 of title 28, United States Code, is amended—

(1) in subsection (a), by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(2) in subsection (b), by striking out the comma immediately after "discharged".

(l) Section 2518 of title 28, United States Code, and the item relating to section 2518 in the section analysis of chapter 165 of such title, are repealed. Repeal.

(m) Section 2519 of title 28, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court".

(n)(1) Section 2520 of title 28, United States Code, is amended in subsection (a)—

(A) by striking out "(a)";

(B) by striking out "Court of Claims" and inserting in lieu thereof "United States Claims Court"; and

(C) by striking out "$10" and inserting in lieu thereof "$60".

(2) Subsections (b) and (c) of section 2520 of title 28, United States Code, are repealed.

(3) The section heading of section 2520 of title 28, United States Code, is amended by striking out "; cost of printing record".

(4) The item relating to section 2520 in the section analysis of chapter 165 of title 28, United States Code, is amended to read as follows:

"2520. Fees.".

(o)(1) The item relating to chapter 165 in the chapter analysis of part VI of title 28, United States Code, is amended to read as follows:

"165. United States Claims Court Procedure ..... 2501".

(2) The chapter heading of chapter 165 of title 28, United States Code, is amended by striking out "COURT OF CLAIMS" and inserting in lieu thereof "UNITED STATES CLAIMS COURT".

(p)(1) Section 1926 of title 28, United States Code, is amended to read as follows:

Fees and costs, collection.
28 USC 1926.

"§ 1926. Claims Court

"(a) The Judicial Conference of the United States shall prescribe from time to time the fees and costs to be charged and collected in the United States Claims Court.

"(b) The court and its officers shall collect only such fees and costs as the Judicial Conference prescribes. The court may require advance payment of fees by rule.".

(2) The item relating to section 1926 in the section analysis of chapter 123 of title 28, United States Code, is amended to read as follows:

"1926. Claims Court.".

(q)(1) Chapter 165 of title 28, United States Code, is amended by adding at the end thereof the following new section:

28 USC 2522.

"§ 2522. Notice of appeal

"Review of a decision of the United States Claims Court shall be obtained by filing a notice of appeal with the clerk of the Claims Court within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.".

(2) The section analysis of chapter 165 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2522. Notice of appeal.".

REPEAL OF PROVISIONS RELATING TO THE COURT OF CUSTOMS AND PATENT APPEALS

28 USC 2601 *et seq.*

SEC. 140. Chapter 167 of title 28, United States Code, and the item relating to chapter 167 in the chapter analysis of part VI of such title, are repealed.

COURT OF INTERNATIONAL TRADE; PROCEDURE

SEC. 141. Section 2645(c) of title 28, United States Code, is amended by striking out "Customs and Patent Appeals within the time and in the manner provided in section 2601 of this title" and inserting in lieu thereof "Appeals for the Federal Circuit by filing a notice of appeal with the clerk of the Court of International Trade within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts".

FEDERAL RULES OF EVIDENCE

SEC. 142. Rule 1101(a) of the Federal Rules of Evidence is amended by striking out "Court of Claims" the first place it appears and inserting in lieu thereof "United States Claims Court" and by striking out "and commissioners of the Court of Claims". 28 USC app.

PART B—CONFORMING AMENDMENTS OUTSIDE TITLE 28

FEDERAL SALARY ACT

SEC. 143. Section 225(f)(C) of the Federal Salary Act of 1967 (2 U.S.C. 356(C)), is amended by inserting "and the judges of the United States Claims Court" immediately before the semicolon at the end thereof.

MERIT SYSTEMS PROTECTION BOARD

SEC. 144. Section 7703 of title 5, United States Code, is amended—

(1) in subsection (b)(1), by striking out "Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit";

(2) in subsection (c), by striking out "Court of Claims or a United States court of appeals" and inserting in lieu thereof "Court of Appeals for the Federal Circuit"; and

(3) in subsection (d), by striking out "District of Columbia" and inserting in lieu thereof "Federal Circuit".

PLANT VARIETY PROTECTION ACT

SEC. 145. The second sentence of section 71 of the Plant Variety Protection Act (7 U.S.C. 2461) is amended to read as follows: "The United States Court of Appeals for the Federal Circuit shall have jurisdiction of any such appeal.".

FEDERAL FIRE PREVENTION ACT

SEC. 146. Section 11(d) of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2210(d)) is amended by striking out "Court of Claims of the United States" and inserting in lieu thereof "United States Claims Court".

CRIMINAL CODE

SEC. 147. Section 204 of title 18, United States Code, and the section heading thereof are amended by striking out "Court of

Claims" and inserting in lieu thereof "United States Claims Court or the United States Court of Appeals for the Federal Circuit".

TRADEMARK ACT

SEC. 148. Section 39 of the Trademark Act of 1946 (15 U.S.C. 1121) is amended by inserting "(other than the United States Court of Appeals for the Federal Circuit)" after "circuit courts of appeal of the United States".

INDIAN CLAIMS COMMISSION

SEC. 149. (a) Section 29 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes", approved August 13, 1946 (25 U.S.C. 70v-3), is amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "Claims Court".

(b) Subsection (c) of section 29 of such Act is repealed.

(c) Subsection (d) of section 29 of such Act is amended—

(1) by striking out "(d)" and inserting in lieu thereof "(c)"; and

(2) by striking out "Supreme Court in accordance with the provisions of section 1255" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit in accordance with the provisions of section 1295".

Ante, p. 37.

(d) Subsection (e) of section 29 of such Act is amended by striking out "(e)" and inserting in lieu thereof "(d)".

CLAIMS BY INDIANS OF CALIFORNIA

SEC. 150. Section 2 of the Act of May 18, 1928 (25 U.S.C. 652) is amended—

(1) by striking out "Court of Claims" the first place it appears and inserting in lieu thereof "United States Claims Court";

(2) by striking out "Court of Claims of the United States" and inserting in lieu thereof "United States Claims Court"; and

(3) by striking out "Supreme Court of the United States" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit".

INTERNAL REVENUE CODE

SEC. 151. Section 7422(e) of the Internal Revenue Code of 1954 (26 U.S.C. 7422(e)) is amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court".

INTERNAL REVENUE CODE

26 USC 7428.

SEC. 152. Section 7428 of the Internal Revenue Code of 1954 is amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "Claims Court".

INTERNAL REVENUE CODE

SEC. 153. (a) The second sentence of section 7456(c) of the Internal Revenue Code of 1954 is amended to read as follows: "Each commissioner shall receive pay at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of title 28, United States Code, and also necessary traveling expenses and per diem allowances, as provided in subchapter I of chapter 57 of title 5, United States Code, while traveling on official business and away from Washington, District of Columbia.". 26 USC 7456. 5 USC 5701.

(b) Notwithstanding the amendment made by subsection (a), until such time as a change in the salary rate of a commissioner of the United States Tax Court occurs in accordance with section 7456(c) of the Internal Revenue Code of 1954, the salary of such commissioner shall be equal to the salary of a commissioner of the Court of Claims immediately prior to the effective date of this Act. 26 USC 7456 note.

INTERNAL REVENUE CODE

SEC. 154. Section 7482(a) of the Internal Revenue Code of 1954 is amended by inserting "(other than the United States Court of Appeals for the Federal Circuit)" after "United States Court of Appeals". 26 USC 7482.

APPROPRIATION FOR JUDGMENTS AGAINST UNITED STATES

SEC. 155. Section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), is amended by striking out "Court of Claims" and inserting in lieu thereof "Court of Appeals for the Federal Circuit or the United States Claims Court".

CONTRACT DISPUTES

SEC. 156. Section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1)) is amended—

(1) in subparagraph (A), by striking out "Court of Claims" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit"; and

(2) in subparagraph (B), by striking out "United States Court of Claims for judicial review, under section 2510 of title 28, United States Code, as amended herein," and inserting in lieu thereof "Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, United States Code,". *Ante*, p. 37.

CONTRACT DISPUTES

SEC. 157. Section 10(c) of the Contract Disputes Act of 1978 (41 U.S.C. 609(c)) is amended by striking out ", or, in its discretion" and all that follows through "of the case".

CONGRESSIONAL PRINTING

SEC. 158. Section 713 of title 44, United States Code, is amended—

(1) by striking out "eight hundred and twenty-two" and inserting in lieu thereof "eight hundred and twenty";

(2) by inserting "and" after "Superintendent of Documents;"; and

(3) by striking out "to the Court of Claims, two copies; and".

EXECUTIVE AND JUDICIARY PRINTING

SEC. 159. Section 1103 of title 44, United States Code, is amended by striking out "the Court of Claims," and by striking out "chief judge of the Court of Claims,".

CONFORMING AMENDMENTS

SEC. 160. (a) The following provisions of law are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "United States Claims Court":

25 USC 1401, 1402. (1) Sections 1 and 2 of the Act of October 19, 1973 (87 Stat. 466).

(2) Section 8715 of title 5, United States Code.

(3) Section 8912 of title 5, United States Code.

(4) Section 2273(b) of title 10, United States Code.

(5) Section 337(i) of the Tariff Act of 1930 (19 U.S.C. 1337(i)).

(6) Section 606(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2356(a)).

(7) Section 1 of the Act entitled "An Act providing for the allotment and distribution of Indian tribal funds", approved March 2, 1907 (25 U.S.C. 119).

(8) Section 2 of the Act of August 12, 1935 (25 U.S.C. 475a).

26 USC 6110. (9) Section 6110(i)(1) of the Internal Revenue Code of 1954.

(10) Section 2 of the Act of May 28, 1908 (30 U.S.C. 193a).

(11) Section 7 of the Act of July 31, 1894 (31 U.S.C. 72).

(12) Section 183 of title 35, United States Code.

(13) Section 104(c) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 330(c)).

(14) Sections 13(b)(2) and 14 of the Contract Settlement Act of 1944 (41 U.S.C. 113(b) and 114).

(15) Sections 8(d) and 10(d) of the Contract Disputes Act of 1978 (41 U.S.C. 607(d) and 609(d)).

(16) Sections 171 and 173 of the Atomic Energy Act of 1954 (42 U.S.C. 2221 and 2223).

(17) Section 10(i) of the Trading with the Enemy Act (50 U.S.C. App. 10(i)).

(18) Sections 103(f), 103(i), 105, 106(a)(6), 108, 108A, and 114(5) of the Renegotiation Act of 1951 (50 U.S.C. App. 1213(f), 1213(i), 1215, 1216(a)(6), 1218, 1218a, and 1224(5)).

(19) Section 4 of the Act of July 2, 1948 (50 U.S.C. App. 1984).

(b) The section heading of section 108A of the Renegotiation Act of 1951 (50 U.S.C. App. 1218a) is amended by striking out "COURT OF CLAIMS" and inserting in lieu thereof "UNITED STATES CLAIMS COURT".

(c) Section 108A of the Renegotiation Act of 1951 (50 U.S.C. App. 1218a) is amended by striking out "Supreme Court upon certiorari in the manner provided in section 1255" and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit in accordance with the provisions of section 1295".

CONFORMING AMENDMENTS

SEC. 161. The following provisions of law are amended by striking out "Court of Claims" each place it appears and inserting in lieu thereof "Claims Court":

(1) Section 4(c) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(c)).

(2) Section 20 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831s).

(3) Section 403 of the International Claims Settlement Act of 1949 (22 U.S.C. 1642b).

(4) Section 2(a) of the Act of May 15, 1978 (92 Stat. 244).

(5) Section 311(i) of the Federal Water Pollution Control Act (33 U.S.C. 1321(i)).

(6) Section 10(b) of the Intervention on the High Seas Act (33 U.S.C. 1479(b)).

(7) Section 282 of title 35, United States Code.

(8) Section 5261 of the Revised Statutes (45 U.S.C. 87).

(9) Section 41(a) of the Trading with the Enemy Act (50 U.S.C. App. 42(a)).

(10) Section 10(a)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 609(a)(1)).

CONFORMING AMENDMENTS

SEC. 162. The following provisions of law are amended by striking out "United States Court of Customs and Patent Appeals" and "Court of Customs and Patent Appeals" each place they appear and inserting in lieu thereof "United States Court of Appeals for the Federal Circuit":

(1) Section 21 of the Trademark Act of 1946 (15 U.S.C. 1071).

(2) Section 152 of the Atomic Energy Act of 1954 (42 U.S.C. 2182).

(3) Section 305(d) of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2457(d)).

CONFORMING AMENDMENTS

SEC. 163. (a) The following provisions of law are amended by striking out "Court of Customs and Patent Appeals" each place it appears and inserting in lieu thereof "Court of Appeals for the Federal Circuit":

(1) Subsections (d) and (f) of section 516 of the Tariff Act of 1930 (19 U.S.C. 1516 (d) and (f)).

(2) Section 516A (c) and (e) of the Tariff Act of 1930 (19 U.S.C. 1516a (c) and (e)).

(3) Section 528 of the Tariff Act of 1930 (19 U.S.C. 1528).

(4) Section 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)).

(5) Section 284(c) of the Trade Act of 1974 (19 U.S.C. 2395(c)).

(6) Section 308(9) of the Ethics in Government Act (28 U.S.C. App.).

(7) Sections 141 through 146 of title 35, United States Code.

(b)(1) The item relating to section 141 in the section analysis of chapter 13 of title 35, United States Code, is amended by striking out "Court of Customs and Patent Appeals" and inserting in lieu thereof "Court of Appeals for the Federal Circuit". 35 USC 141 *et seq.*

(2) The section heading of section 141 of title 35, United States Code, is amended by striking out "Court of Customs and Patent Appeals" and inserting in lieu thereof "Court of Appeals for the Federal Circuit".

CONFORMING AMENDMENTS

SEC. 164. The following provisions of law are amended by striking out "the United States Court of Claims, the United States Court of Customs and Patent Appeals" each place it appears and inserting in lieu thereof "the United States Claims Court":

(1) Section 6001(4) of title 18, United States Code.

(2) Section 906 of title 44, United States Code.

PART C—MISCELLANEOUS PROVISIONS

CONTINUED SERVICE OF CURRENT JUDGES

28 USC 44 note.

SEC. 165. The judges of the United States Court of Claims and of the United States Court of Customs and Patent Appeals in regular active service on the effective date of this Act shall continue in office as judges of the United States Court of Appeals for the Federal Circuit. Senior judges of the United States Court of Claims and of the United States Court of Customs and Patent Appeals on the effective date of this Act shall continue in office as senior judges of the United States Court of Appeals for the Federal Circuit.

APPOINTMENT OF CHIEF JUDGE OF COURT OF APPEALS FOR THE FEDERAL CIRCUIT

28 USC 45 note.
Post, p. 51.

SEC. 166. Notwithstanding the provisions of section 45(a) of title 28, United States Code, the first chief judge of the United States Court of Appeals for the Federal Circuit shall be the Chief Judge of the United States Court of Claims or the Chief Judge of the United States Court of Customs and Patent Appeals, whoever has served longer as chief judge of his court. Notwithstanding section 45 of title 28, United States Code, whichever of the two chief judges does not become the first chief judge of the United States Court of Appeals for the Federal Circuit under the preceding sentence shall, while in active service, have precedence and be deemed senior in commission over all the circuit judges of the United States Court of Appeals for the Federal Circuit (other than the first chief judge of that circuit). When the person who first serves as chief judge of the United States Court of Appeals for the Federal Circuit vacates that position, the position shall be filled in accordance with section 45(a) of title 28, United States Code, as modified by the preceding sentence of this section.

COURT OF CLAIMS COMMISSIONERS

Judge, U.S. Claims Court.
28 USC 171 note.

SEC. 167. (a) Notwithstanding the provisions of section 171(a) of title 28, United States Code, as amended by this Act, a commissioner of the United States Court of Claims serving immediately prior to the effective date of this Act shall become a judge of the United States Claims Court on the effective date of this Act.

Term of office.

(b) Notwithstanding the provisions of section 172(a) of title 28, United States Code, as amended by this Act, the initial term of office of a person who becomes a judge of the United States Claims

Court under subsection (a) of this section shall expire fifteen years after the date of his or her employment with the United States Court of Claims, or on October 1, 1986, whichever occurs earlier. Any such judge shall continue in office until a successor is sworn or until reappointed. No such individual shall serve as a judge after reaching the age of seventy years. Salary.

(c) Notwithstanding the provisions of section 172(b) of title 28, United States Code, as amended by this Act, until such time as a change in the salary rate of a judge of the United States Claims Court occurs in accordance with such section 172(b), the salary of such judge shall be equal to the salary of a Commissioner of the Court of Claims.

APPOINTMENT OF JUDGES BY THE PRESIDENT

SEC. 168. The Congress— 28 USC 44 note.

(1) takes notice of the fact that the quality of the Federal judiciary is determined by the competence and experience of its judges; and

(2) suggests that the President, in nominating individuals to judgeships on the United States Court of Appeals for the Federal Circuit and the United States Claims Court, select from a broad range of qualified individuals.

TENNESSEE VALLEY AUTHORITY LEGAL REPRESENTATION

SEC. 169. Nothing in this Act affects the authority of the Tennessee Valley Authority under the Tennessee Valley Authority Act of 1933 to represent itself by attorneys of its choosing. 28 USC 171 note. 16 USC 831.

TITLE II—GOVERNANCE AND ADMINISTRATION OF THE FEDERAL COURTS

PART A—CHIEF JUDGE TENURE

APPOINTMENT AND TERMS OF CHIEF JUDGES OF THE COURTS OF APPEALS

SEC. 201. (a) Section 45 of title 28, United States Code, is amended by amending subsection (a) to read as follows:

"(a)(1) The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under;

"(B) have served for one year or more as a circuit judge; and

"(C) have not served previously as chief judge.

"(2)(A) In any case in which no circuit judge meets the qualifications of paragraph (1), the youngest circuit judge in regular active service who is sixty-five years of age or over and who has served as circuit judge for one year or more shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no circuit judge in regular active service who has served as a circuit judge for one year or more, the circuit judge in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the circuit appointed under paragraph (1) shall serve for a term of

seven years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge of the circuit.

"(B) Except as provided in subparagraph (C), a circuit judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years unless no other circuit judge is qualified to serve as chief judge of the circuit under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

(b) Section 45 of title 28, United States Code, is amended by amending subsection (c) to read as follows:

"(c) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the chief judge of the circuit shall be such other circuit judge who is qualified to serve or act as chief judge under subsection (a).".

APPOINTMENT AND TERMS OF CHIEF JUDGES OF THE DISTRICT COURTS

SEC. 202. (a) Section 136 of title 28, United States Code, is amended by amending subsection (a) to read as follows:

"(a)(1) In any district having more than one district judge, the chief judge of the district shall be the district judge in regular active service who is senior in commission of those judges who—

"(A) are sixty-four years of age or under;

"(B) have served for one year or more as a district judge; and

"(C) have not served previously as chief judge.

"(2)(A) In any case in which no district judge meets the qualifications of paragraph (1), the youngest district judge in regular active service who is sixty-five years of age or over and who has served as district judge for one year or more shall act as the chief judge.

"(B) In any case under subparagraph (A) in which there is no district judge in regular active service who has served as a district judge for one year or more, the district judge in regular active service who is senior in commission and who has not served previously as chief judge shall act as the chief judge.

"(3)(A) Except as provided in subparagraph (C), the chief judge of the district appointed under paragraph (1) shall serve for a term of seven years and shall serve after expiration of such term until another judge is eligible under paragraph (1) to serve as chief judge of the district.

"(B) Except as provided in subparagraph (C), a district judge acting as chief judge under subparagraph (A) or (B) of paragraph (2) shall serve until a judge has been appointed who meets the qualifications under paragraph (1).

"(C) No district judge may serve or act as chief judge of the district after attaining the age of seventy years unless no other district judge is qualified to serve as chief judge of the district under paragraph (1) or is qualified to act as chief judge under paragraph (2).".

(b) Section 136 of title 28, United States Code, is amended by amending subsection (d) to read as follows:

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as district judge, he may so certify to the Chief Justice of the United States, and thereafter, the

chief judge of the district shall be such other district judge who is qualified to serve or act as chief judge under subsection (a).".

EFFECTIVE DATE; APPLICABILITY

SEC. 203. (a) The amendments to section 45 of title 28, United States Code, and to section 136 of such title, made by sections 201 and 202 of this Act, shall not apply to or affect any person serving as chief judge on the effective date of this Act. 28 USC 45 note.

(b) The provisions of section 45(a) of title 28, United States Code, as in effect on the day before the effective date of this Act, shall apply to the chief judge of a circuit serving on such effective date. The provisions of section 136(a) of title 28, United States Code, as in effect on the day before the effective date of this part, shall apply to the chief judge of a district court serving on such effective date. *Ante*, p. 51. *Ante*, p. 52.

PART B—PRECEDENCE AND COMPOSITION OF PANEL

PRECEDENCE ON PANEL

SEC. 204. Section 45(b) of title 28, United States Code, is amended by inserting "of the court in regular active service" immediately after "circuit judges" in the second sentence.

COMPOSITION OF PANEL; REQUIREMENTS AND SIZE

SEC. 205. Section 46(c) of title 28, United States Code, is amended by striking out the period at the end of the second sentence and inserting in lieu thereof the following: ", or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member.".

PART C—JUDICIAL COUNCILS OF THE CIRCUITS

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 206. (a) Section 3006A(h)(2)(A) of title 18, United States Code, is amended—

(1) by striking out "judicial council" each place it appears and inserting in lieu thereof "court of appeals"; and

(2) by striking out "Judicial Council of the Circuit" and inserting in lieu thereof "court of appeals of the circuit".

(b) Section 3006A(i) of title 18, United States Code, is amended by striking "judicial council" and inserting in lieu thereof "court of appeals".

(c) The amendment made by subsection (a) of this section shall not affect the terms of existing appointments. 18 USC 3006A note.

PART D—JUDICIAL RESIGNATION; PENSIONS

PENSIONS OF JUDGES WHO RESIGN TO ACCEPT EXECUTIVE POSITIONS

SEC. 207. (a) Section 8332(b) of title 5, United States Code, is amended by striking out "and" at the end of paragraph (10), by striking out the period at the end of paragraph (11) and inserting in lieu thereof "; and", and by inserting at the end thereof the following new paragraph:

"(12) service as a justice or judge of the United States, as defined by section 451 of title 28, and service as a judge of a court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States, but no credit shall be allowed for such service if the employee is entitled to a salary or an annuity under section 371, 372, or 373 of title 28.".

(b) Section 8334 of title 5, United States Code, is amended by inserting at the end thereof the following new subsection:

"(i)(1) The Director of the Administrative Office of the United States Courts shall pay to the Fund the amount which an employee may deposit under subsection (c) of this section for service creditable under section 8332(b)(12) of this title if such creditable service immediately precedes service as an employee subject to this subchapter with a break in service of no more than ninety working days. The Director shall pay such amount from any appropriation available to him as a necessary expense of the appropriation concerned.

"(2) The amount the Director pays in accordance with paragraph (1) of this subsection shall be reduced by the amount of any refund to the employee under section 376 of title 28. Except to the extent of such reduction, the amount the Director pays to the Fund shall satisfy the deposit requirement of subsection (c) of this section.

"(3) Notwithstanding any other provision of law, the amount the Director pays under this subsection shall constitute an employer contribution to the Fund, excludable under section 402 of the Internal Revenue Code of 1954 from the employee's gross income until such time as the contribution is distributed or made available to the employee, and shall not be subject to refund or to lump-sum payment to the employee.". 26 USC 402.

PART E—RULES OF PRACTICE

PUBLICATION OF RULES

SEC. 208. (a) Chapter 131 of title 28, the United States Code, is amended by adding at the end thereof the following new section:

28 USC 2077.

"§ 2077. Publication of rules; advisory committees

"(a) The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. Each court of appeals shall print or cause to be printed necessary copies of the rules. The Judicial Conference shall prescribe the fees for sales of copies under section 1913 of this title, but the Judicial Conference may provide for free distribution of copies to members of the bar of each court and to other interested persons.

"(b) Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court of appeals. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.".

(b) The section analysis of chapter 131 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2077. Publication of rules; advisory committees.".

TITLE III—JURISDICTION AND PROCEDURE

PART A—TRANSFER OF CASES

TRANSFER TO CURE WANT OF JURISDICTION

SEC. 301. (a) Title 28, United States Code, is amended by adding the following new chapter after chapter 97:

"CHAPTER 99.—GENERAL PROVISIONS

"Sec.
"1631. Transfer to cure want of jurisdiction.

"§ 1631. Transfer to cure want of jurisdiction 28 USC 1631.

"Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.".

(b) The chapter analysis of part IV of title 28, United States Code, is amended by adding at the end thereof the following:

"99. General Provisions ..... 1631".

PART B—INTEREST

INTEREST ON JUDGMENTS

SEC. 302. (a) Section 1961 of title 28, United States Code, is amended—

(1) by inserting "(a)" immediately before "Interest shall" in the first sentence;

(2) by striking out "at the rate allowed by State law" in the last sentence and inserting in lieu thereof the following: "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United

States Courts shall distribute notice of that rate and any changes in it to all Federal judges"; and

(3) by adding at the end thereof the following new subsections:

"(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), and shall be compounded annually.

"(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

26 USC 6621.

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

"(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

"(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.".

(b) Section 2411 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "(a)"; and

(2) by repealing subsection (b).

(c) Section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a), is amended by striking out "to which the provisions of section 2411(b) of Title 28 apply".

(d) Section 2516(b) of title 28, United States Code, is amended by striking out "at the rate of four percent per annum" and all that follows through "affirmance" and inserting in lieu thereof ", from the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of the affirmance, at a rate of interest equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment".

TITLE IV—MISCELLANEOUS PROVISIONS

DISTRICT COURT REPORTERS

SEC. 401. (a) Section 753(b) of title 28, United States Code, shall be amended to read as follows:

Recording methods.

"(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceed-

ings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

"The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. Record preservation.

"The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request. Transcripts.

"The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

"The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

"The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.". Records, inspection availability.

(b) The regulations promulgated by the Judicial Conference pursuant to subsection (b) of section 753 of title 28, as amended by subsection (a) of this section, shall not take effect before one year after the effective date of this Act. During the one-year period after the date of the enactment of this Act, the Judicial Conference shall experiment with the different methods of recording court proceedings. Prior to the effective date of such regulations, the law and regulations in effect the day before the date of enactment of this Act shall remain in full force and effect. Regulations, effective date. 28 USC 753 note.

EFFECTIVE DATE

SEC. 402. Unless otherwise specified, the provisions of this Act shall take effect on October 1, 1982. 28 USC 171 note.

EFFECT ON PENDING CASES

SEC. 403. (a) Any case pending before the Court of Claims on the effective date of this Act in which a report on the merits has been filed by a commissioner, or in which there is pending a request for 28 USC 171 note.

review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit.

(b) Any matter pending before the United States Court of Customs and Patent Appeals on the effective date of this Act shall be transferred to the United States Court of Appeals for the Federal Circuit.

(c) Any petition for rehearing, reconsideration, alteration, modification, or other change in any decision of the United States Court of Claims or the United States Court of Customs and Patent Appeals rendered prior to the effective date of this Act that has not been determined by either of those courts on that date, or that is filed after that date, shall be determined by the United States Court of Appeals for the Federal Circuit.

(d) Any matter pending before a commissioner of the United States Court of Claims on the effective date of this Act, or any pending dispositive motion that the United States Court of Claims has not determined on that date, shall be determined by the United States Claims Court.

(e) Any case in which a notice of appeal has been filed in a district court of the United States prior to the effective date of this Act shall be decided by the court of appeals to which the appeal was taken.

Approved April 2, 1982.

LEGISLATIVE HISTORY—H.R. 4482 (S. 1700):

HOUSE REPORT No. 97-312 (Comm. on the Judiciary).
SENATE REPORT No. 97-275 accompanying S. 1700 (Comm. on the Judiciary).
CONGRESSIONAL RECORD:
Vol. 127 (1981): Nov. 17, 18, considered and passed House.
Dec. 8, S. 1700 considered and passed Senate; proceedings vacated and H.R. 4482, amended, passed in lieu.
Vol. 128 (1982): Mar. 9, House concurred in Senate amendment, with an amendment.
Mar. 22, Senate concurred in House amendment.

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98TH CONGRESS
1ST SESSION

H. R. 4222

To make certain technical amendments with respect to the court of appeals for the Federal circuit, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 26, 1983

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

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A BILL

To make certain technical amendments with respect to the court of appeals for the Federal circuit, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Technical Amendments to the Federal Court Improvements Act".

SEC. 2. Section 1292(b) of title 28, United States Code, is amended by inserting "which would have jurisdiction of an appeal of such action" after "The Court of Appeals".

SEC. 3. Section 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)) is amended in the fourth sentence by insert-

ing ", within 60 days after the determination becomes final," after "appeal such determination".

SEC. 4. (a) Sections 142, 143, and 144 of title 35, United States Code, are amended to read as follows:

"§ 142. Notice of appeal

"When an appeal is taken to the United States Court of Appeals for the Federal Circuit, the appellant shall file in the Patent and Trademark Office a written notice of appeal directed to the Commissioner, within such time after the date of the decision from which the appeal is taken as the Commissioner prescribes, but in no case less than 60 days after that date.

"§ 143. Proceedings on appeal

"With respect to an appeal described in section 142 of this title, the Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit a certified list of the documents comprising the record in the Patent and Trademark Office. The court may request that the Commissioner forward the original or certified copies of such documents during pendency of the appeal. In an ex parte case, the Commissioner shall submit to the court in writing the grounds for the decision of the Patent and Trademark Office, addressing all the issues involved in the appeal. The court shall, before hearing an appeal, give notice of the time and

place of the hearing to the Commissioner and the parties in the appeal.

"§ 144. Decision on appeal

"The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue to the Commissioner its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.".

(b) Paragraphs (2), (3), and (4) of subsection (a) of section 21 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1071(a) (2), (3), and (4)), are amended to read as follows:

"(2) When an appeal is taken to the United States Court of Appeals for the Federal Circuit, the appellant shall file in the Patent and Trademark Office a written notice of appeal directed to the Commissioner, within such time after the date of the decision from which the appeal is taken as the Commissioner prescribes, but in no case less than 60 days after that date.

"(3) The Commissioner shall transmit to the United States Court of Appeals for the Federal Circuit a certified list

of the documents comprising the record in the Patent and Trademark Office. The court may request that the Commissioner forward the original or certified copies of such documents during pendency of the appeal. In an ex parte case, the Commissioner shall submit to that court a brief explaining the grounds for the decision of the Patent and Trademark Office, addressing all the issues involved in the appeal. The court shall, before hearing an appeal, give notice of the time and place of the hearing to the Commissioner and the parties in the appeal.

"(4) The United States Court of Appeals for the Federal Circuit shall review the decision from which the appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue its mandate and opinion to the Commissioner, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.".

(c) The amendments made by this section shall apply to proceedings pending in the Patent and Trademark Office on the date of the enactment of this Act and to appeals pending in the United States Court of Appeals for the Federal Circuit on such date.

SEC. 5. Any individual who, on the date of the enactment of the Federal Courts Improvement Act of 1982, was serving as marshal for the Court of Appeals for the District

of Columbia under section 713(c) of title 28, United States Code, may, after the date of the enactment of this Act, so serve under that section as in effect on the date of the enactment of the Federal Courts Improvement Act of 1982. While such individual so serves, the provisions of section 714(a) of title 28, United States Code, shall not apply to the Court of Appeals for the District of Columbia.

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98TH CONGRESS
1ST SESSION

H. R. 1291

To provide for the time in which to appeal to the Court of Appeals for the Federal Circuit from a determination of the United States International Trade Commission.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 1983

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

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A BILL

To provide for the time in which to appeal to the Court of Appeals for the Federal Circuit from a determination of the United States International Trade Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TIME FOR APPEALING FROM A DETERMINATION OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION

SECTION 1. The third sentence of section 1337(c) of title 19, United States Code, as amended by Public Law 97-164, is hereby amended by inserting the words "within sixty days of such determination and" after the words "for review".

EFFECTIVE DATE

SEC. 2. The provisions of this Act shall take effect upon enactment.

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98TH CONGRESS
1ST SESSION

H. R. 2609

To allow the Court of Appeals for the District of Columbia to retain the marshal in office on the date of enactment of the Federal Courts Improvement Act of 1982.

IN THE HOUSE OF REPRESENTATIVES

APRIL 19, 1983

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

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A BILL

To allow the Court of Appeals for the District of Columbia to retain the marshal in office on the date of enactment of the Federal Courts Improvement Act of 1982.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any individual who, on the date of the enactment of the Federal Courts Improvement Act of 1982, was serving as marshal for the Court of Appeals for the District of Columbia under section 713(c) of title 28, United States Code, may, after the date of the enactment of this Act, so serve under that section as in effect on the date of the enactment of the Federal Courts Improvement Act of 1982. While such individual so serves, the provisions of section 714(a) of title 28, United States Code, shall not apply to the Court of Appeals for the District of Columbia.

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APPENDIX 2

ADDITIONAL CORRESPONDENCE

United States Court of Appeals
for the Federal Circuit
The National Courts Building
717 Madison Place, N.W.
Washington, D.C. 20439
(202) 633-6582

Chambers of
Howard T. Markey
Chief Judge

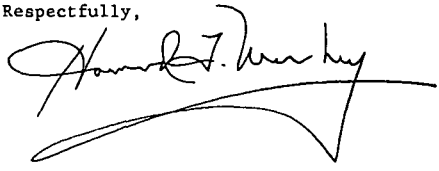
June 22, 1983

The Honorable Robert W. Kastenmeier
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

At the suggestion of the Legislative Affairs Office of the Administrative Office of the U.S. Courts, I enclose a copy of the Order issued this day on this court's Miscellaneous Docket No. 19.

Respectfully,



Enclosure

cc: William J. Weller
Legislative Affairs Officer
w/enclosures

United States Court of Appeals for the Federal Circuit

HARRINGTON MANUFACTURING CO., INC. a North Carolina corporation Plaintiff, v. POWELL MANUFACTURING COMPANY, INC. a North Carolina corporation Petitioner-Defendant.	)	Miscellaneous Docket No. 19.

ORDER

Having considered in banc* the PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. SECTION 1292(b) presented by Powell Manufacturing Co., Inc., and noting the absence from the Federal Courts Improvement Act, Public Law 97-164, of a grant of jurisdiction to consider interlocutory appeals on questions certified to this court by a district court under 28 U.S.C § 1292(b), it is ORDERED:

That the Petition be, and it is hereby, denied for lack of jurisdiction.

FOR THE COURT

22 June 83
Date

Howard T. Markey
Chief Judge

*Circuit Judge Friedman took no part in the consideration and denial of the petition.

Mc Quiston Associates
1035 North Orange Drive
Los Angeles, California 90038
(213) 464-6792; 463-1040

Honorable Robert W. Kastenmeier, Chairman
ATT: Michael J. Remington, Counsel
House Judiciary, Courts Subcommittee
2137 Rayburn Office Bldg
Washington, D.C. 20515

October 5, 1983

Dear Rep. Kastenmeier:

REFERENCE: H. R. 3824, Federal Courts Improvement Act Amendments.

Section 127 of FCIA requires appeals in cases founded upon 28 U.S.C. 1346 to be taken exclusively to the Court of Appeals for the Federal Circuit (CAFC), except as noted therein. See 28 U.S.C. 1295(a)(2). However, the language describing the exceptions is capable of ambiguous interpretation.

Please include in H.R. 3824 suitable language in the statute and in the report that will remove the ambiguity in 28 U.S.C. 1295(a)(2) and clarify Section 403(e) of FCIA, and permit assignment of cases on appeal to the appropriate Circuit Court as directed by CAFC.

I

Neither the House nor the Senate report on FCIA clarifies the intent of language in 28 U.S.C. 1295(a)(2) exempting certain cases from review by CAFC. The confusion created by the statute lies in its punctuation (or lack thereof). Moreover, the Senate's report, which was reprinted in USCC&AN, erroneously added to the confusion by referring to 1346(c), which is not even listed in 1295.

The focus of the ambiguity is the nature of the exemption intended for 1346(a)(2). The statute 1295(a)(2) listed as exemptions 1346(a) & (e), which can be said to "provide for internal revenue"; therefore, it appears that the sole exemption for 1346(a)(2) was intended to be for internal-revenue related actions, regardless of whether they arose from agency regulations or from statutory law, but for no other actions brought under 1346(a)(2). This interpretation is buttressed by the fact that if all causes of action per 1346(a)(2) were to be exempted, then the statute would have called out "1346(a)" instead of separately calling out (a)(1) and (a)(2).

Moreover, the only exemption for a nonspecific action was for 1346(b), the FTCA, and that exemption was fully explained in the reports. One can easily conclude that if any exemption besides internal-revenue related matters was intended by Congress it too would have been explained in the reports. Thus by their silence, the reports buttress the position that all actions founded upon 1346(a)(2), except for those founded upon the internal-revenue regulations and statutes, must be appealed to CAFC.

Nevertheless, the choice of punctuation in 1295(a)(2) unfortunately blurred Congress' intent. I believe the use of the two "unders" was intended to set 1346(a)(1), 1346(b), 1346(e), and 1346(f) apart from the clause dealing with 1346(a)(2). I believe also that the phrase "providing for internal revenue" applies to 1346(a)(2) regardless of whether the basis is an agency regulation ("regulation of an executive department") or a statute ("Act of Congress"). But the absence of a comma between "of this title" and "or" makes it unclear whether only internal-revenue related matters under 1346(f) are exempted or whether all matters thereunder are exempted. Likewise, the absence of a comma between "revenue" and "shall" makes ambiguous the reach of the clause commencing with "1295(a)(2)".

I strongly recommend making a technical correction to 1295(a)(2), in H.R.3824, as follows:

"* * * in a district court--

(A) under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title; or

(B) under section 1346(a)(2) of this title when the claim is founded upon:

(i) an Act of Congress, or

(ii) a regulation of an executive department,

providing for internal revenue;

shall be governed by sections 1291, * * * ;"

II

I question the clarity of Section 403(e) in controlling an appeal of a matter which had been previously appealed and remanded. Moreover, I question the wisdom of immersing CAFC in such localized issues as school controversies just because the United States was also a party under 1346, although the principal party was someone else pursuant to another statute. Furthermore, I believe that an appeal of a matter that is not within the ordinary field of CAFC should be left to the other Circuits, if in fact that matter is dominant within the appeal.

The uncertainty regarding successive appeals may be easily put to rest in H.R. 3824, because it is clearly a technical matter. Section 403(e) refers to "any case" instead of "any appeal", and therefore it would appear that successive appeals are "grandfathered". To put the matter to rest, this Committee need only include in its report language clarifying that the intent of "any case" is to include all successive appeals. The prior reports failed to address this question.

However, the questions regarding the suitability of various matters for review in CAFC, as opposed to other Courts of Appeals, is not necessarily a technical question. Moreover, the settlement between the Circuits by non-statutory means, as proposed by the House report at 41:

> "Should questions legitimately arise respecting ancillary and pendent claims and for the direction of appeals in particular cases, the Committee expects the courts to establish, as they have in similar situations, jurisdictional guidelines respecting such cases."

is simply not carried over into the language in 28 U.S.C. 1295 and 28 U.S.C. 1631. These statutes explicitly prohibit any discretion in the matter of circuit jurisdiction. Federal courts being of limited jurisdiction, they cannot create what Congress has denied by statute, even if Congressional reports urge otherwise.

Moreover, the intent of Congress may well have been to <u>consolidate</u> every matter possible in CAFC, instead of permitting the other circuits to continue adjudicating the matters in question, or so some may claim with force. For example, the intent per 1295(a)(1) is clearly stated to be to consolidate everything within CAFC, regardless of pendent issues. If that intent carries over to 1295(a)(2), then such matters as civil-rights, labor, school board, and anti-trust disputes must be settled in CAFC if for any reason the United States becomes involved through 28 U.S.C. 1346. CAFC probably would be the first to say that it is ill-equipped for that assignment, and that some sort of escape clause is now in order for 1295(a)(2).

The only "technical" way to escape from this trap is to permit CAFC in its wisdom to assign appeals to circuits otherwise denied jurisdiction, on a case-by-case basis. This approach would harmonize with the House report, and therefore satisfies the appellation "technical". The appellant will not gain any new right of appeal, nor choice of forum; however, a litigant might petition

CAFC to transfer the appeal to another circuit for cause.

To implement this remedy, the catchline of 28 U.S.C. 1631 (see Sec 301, FCIA) would be amended to read:

"Transfer to cure want of jurisdiction and other purposes"

Also, the language of 28 U.S.C. 1631 would be amended to read:

"* * * there is a want of jurisdiction or that another circuit is more suitable to decide the appeal, the court shall, * * * filed or noticed or that the appeal court of proper jurisdiction decides is more suitable to hear the appeal regardless of jurisdiction, and the action * * * ."

Alternative methods to effect this remedy would not be as "technical" in nature. They might include some kind of "litmus test" for cases to be appealed to the various circuits, or some kind of option for the parties. However, such tests in 1291(a)(2) might create more indecision or process than by simply letting CAFC have the authority to relinquish its own jurisdiction. While I believe in providing the parties with the option, as the best method, I concede that others may not concur. Therefore, I support the approach of amending 28 U.S.C. 1631 as set forth herein.

* * *

In conclusion, I strongly urge the Committee to include the technical changes I proposed herein in the language of H.R.3824.

Very truly yours,

J. H. McQuiston

m

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

October 25, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

I am writing to recommend a change in section 3 of H.R. 3824, a bill entitled "Technical Amendments to the Federal Court Improvements Act." Section 3 of the bill would amend section 337(c) of the Tariff Act of 1930 to provide for a 60-day period for appeals of U.S. International Trade Commission determinations under section 337 to the U.S. Court of Appeals for the Federal Circuit. Specifically, section 3 would amend the fourth sentence of section 337(c) by inserting the words ",within 60 days after the determination is made," after the words "appeal such determination." Thus, the fourth sentence as amended would read as follows:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination is made, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5.

As you may be aware, a Commission remedy determination issued at the conclusion of a section 337 investigation is subject to disapproval by the President for policy reasons during the 60-day period following issuance of the determination. See section 337(g). Thus, in some instances section 337 determinations are not final on the day they are made. In order to make it abundantly clear that the

60-day appeal period begins to run only when the Commission's determination becomes final, I suggest that the language to be inserted in the fourth sentence of section 337(c) be changed to ",within 60 days after the determination becomes final."

Sincerely yours,

Michael H. Stein
General Counsel
U.S. International
Trade Commission

cc: Michael Remington
Counsel, Subcommittee on Courts,
Civil Liberties, and the
Administration of Justice
Committee on the Judiciary
2137B Rayburn House Office Building
Washington, D.C. 20515

Rufus Yerxa
Professional Assistant, Subcommittee on Trade
Committee on Ways and Means
1111 Longworth House Office Building
Washington, D.C. 20515

ARNOLD, WHITE & DURKEE

TOM ARNOLD
ROBERT A. WHITE (1922-1977)
BILL DURKEE
LOUIS T. PIRKEY
JOHN F. LYNCH
PAUL VANDYKE
JACK C. GOLDSTEIN
RODNEY K. CALDWELL
PAUL M. JANICKE
KENNETH E. KUFFNER
EDWARD W. GOLDSTEIN
ALAN H. GORDON
FLOYD B. NATION
WAYNE M. HARDING
CLARENCE E. ERIKSEN
MICHAEL O. SUTTON
CHARLES H. DE LA GARZA
MICHAEL T. MCELMORE
J. PAUL WILLIAMSON
WILLEM G. SCHUURMAN
TRAVIS GORDON WHITE
JAMES J. ELACQUA
WILLIAM D. RAMAN
SYDNEY M. LEACH
JOHN D. NORRIS
DAVID L. MOSELEY
PATRICIA KAMMERER BRELAND
DONALD J. ASPELUND
MICHAEL E. MACKLIN
PETER J. SHURN III
PATRICIA N. BRANTLEY
STEPHEN H. CAGLE
RONNI L. SHERMAN
THOMAS A. MILLER
KENNETH D. GOODNAN
D. C. TOEDT III
MICHAEL L. LYNCH
ALTON W. PAYNE
JAMES W. TATE II
HENRY L. SMITH, JR.
J. DAVID CABELLO

A PROFESSIONAL CORPORATION

Attorneys at Law

POST OFFICE BOX 4433
HOUSTON, TEXAS 77210

STREET ADDRESS
780 BERING DRIVE
HOUSTON, TEXAS 77057

TELEPHONE (713) 780-7800
CABLE ARNWHITE HOU · TELEX 79-0824

AUSTIN OFFICE
1440 TEXAS COMMERCE BANK BUILDING
700 LAVACA STREET
AUSTIN, TEXAS 78701
TELEPHONE (512) 474-2583

WASHINGTON OFFICE
2001 JEFFERSON DAVIS HIGHWAY
SUITE 808
ARLINGTON, VIRGINIA 22202
TELEPHONE (703) 920-8730

JAMES A. REILLY
OF COUNSEL

FILE:

October 24, 1983

OCT 27

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties & the Administration of Justice
of the House Judiciary Committee
2137 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 3824, 98th Cong.,
1st Sess. (1983)

Dear Congressman Kastenmeier:

I am a member of Council of the American Bar Association's Section of Patent, Trademark and Copyright Law, a former member of the board of directors of the American Intellectual Property Law Association (formerly the American Patent Law Association), and a former chairman of the Federal Practice & Procedure Committees of both of those groups. However, I am writing this letter solely in my private capacity as a concerned citizen and patent attorney.

Frequently along with Frank P. Cihlar, I have spoken and written about the potential issues in the patent jurisdiction of the United States Court of Appeals for the Federal Circuit (hereinafter "CAFC"). Jurisdiction over interlocutory appeals on certified questions in "patent" cases in the district courts was once a "potential" issue, see Cihlar & Goldstein, A Dialogue about the Potential Issues in the Patent Jurisdiction of the Court of Appeals for the Federal Circuit, 10 Am. Pat. L.A. Q.J. 284, 307-08 (1982) (copy enclosed), which is now a

reality. See Harrington Manufacturing Co. v. Powell Manufacturing Co., 709 F.2d 710 (Fed. Cir. 1983).

It is my understanding -- based primarily upon Bill Would Give CAFC Jurisdiction over District Court Interlocutory Orders, 26 Pat., T.M. & Copyright J. (BNA) No. 649, at 506 (Oct. 6, 1983) -- that Section 2 of H.R. 3824, 98th Cong., 1st Sess. (1983), is "intended" to vest the CAFC with exclusive jurisdiction over interlocutory appeals on certified questions pursuant to 28 U.S.C. § 1292(b) in all cases in which the CAFC has exclusive jurisdiction over appeals from final decisions pursuant to 28 U.S.C. § 1295(a)(1)-(2). (Of course, the CAFC, like the regional courts of appeals, would have "discretion" in the exercise of that jurisdiction, as 28 U.S.C. § 1292(b) expressly provides.)

I strongly favor legislation which would give the CAFC exclusive discretionary jurisdiction over interlocutory appeals on certified questions in all cases in which the CAFC has exclusive jurisdiction over appeals from final decisions; and I applaud your efforts to plug this hole in the CAFC's jurisdiction.

If, however, the congressional committee reports do not clarify the matter, perhaps Section 2 of H.R. 3824 will not be effective to accomplish what I understand to be the congressional intent. If the congressional committee reports do not clarify the matter, the proposed second sentence of 28 U.S.C. § 1292(b) may be construed, along with 28 U.S.C. § 1294, to be circular -- and ineffective in changing the present law at all.

The proposed second sentence of 28 U.S.C. § 1292(b) reads as follows: "The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order...." (Emphasis added.) However, since an interlocutory appeal on a certified question is an "appeal," and since 28 U.S.C. § 1294 provides that appeals from "reviewable" decisions of district courts are taken to the appropriate regional courts of appeals (except as provided in 28 U.S.C. §§ 1292(c), 1292(d), and 1295), Section 2 of H.R. 3824 may be wholly ineffective in the absence of carefully drafted congressional committee reports.

Perhaps, it would be appropriate to change "of" (third occurrence) in the proposed second sentence of § 1292(b) to

-- from a final decision in --. The statute itself would then specify that an appeal from an interlocutory order or decree on a certified question of the district court goes to the court of appeals which has jurisdiction over the appeal of the final decision in the action. However, there is a simpler, more direct way of amending the current statute.

As what I regard to be a preferred alternative to the amendment proposed by Section 2 of H.R. 3824, I suggest that 28 U.S.C. § 1292(c)(1) be amended by merely changing "subsection (a)" to -- subsections (a) or (b) --. If § 1292(c)(1) were so amended, the CAFC's exclusive jurisdiction over all appeals from interlocutory orders or decrees of the district courts would be found in § 1292(c). (The CAFC's exclusive jurisdiction over interlocutory appeals pursuant to present § 1292(a) is already vested by § 1292(c)(1); and the CAFC's exclusive jurisdiction over interlocutory appeals pursuant to former § 1292(a)(4) is now vested by § 1292(c)(2).)

The amendment which I have proposed would not change the general statutory arrangement for vesting the CAFC with jurisdiction: 28 U.S.C. §§ 1292(c), 1292(d), and 1295. The CAFC's jurisdiction over appeals from interlocutory orders or decrees of the district courts would still be vested by § 1292(c); the CAFC's jurisdiction over appeals from interlocutory orders of the Court of International Trade and of the Claims Court would still be vested by § 1292(d); and the CAFC's principal jurisdiction would still be vested by § 1295.

Also, the amendment which I have proposed would dovetail nicely with 28 U.S.C. § 1294 which, as previously mentioned, provides that appeals from reviewable decisions of district courts are taken to the appropriate regional courts of appeals except as provided in 28 U.S.C. §§ 1292(c), 1292(d), and 1295.

I very much appreciate your efforts to plug this hole in the CAFC's jurisdiction; and I apologize for not coming forward sooner with suggested statutory language for accomplishing that purpose.

Very truly yours,

Jack C. Goldstein

JCG:scl
Enclosure

Amendment to H.R. 4222

Amend SEC. 2 as follows:

After "SEC. 2", insert "(a)" and add the following new subsection:

"(b). Section 1292(c)(1) of title 28, United States Code, is amended by striking out "subsection (a)" and inserting in its place "subsections (a) or (b)"."

This amendment would clarify that the United States Court of Appeals for the Federal Circuit would have jurisdiction over interlocutory decisions under section 1292(b) by judges of District courts in any case over which the CAFC would normally have jurisdiction.

TOM ARNOLD
ROBERT A. WHITE (1923-1977)
BILL DURKEE
LOUIS T PIRKEY
JOHN F. LYNCH
PAUL VanELTYNE
JACK C. GOLDSTEIN
RODNEY R. CALDWELL
PAUL M. JANICKE
KENNETH E. KUFFNER
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CHARLES H. DE LA GARZA
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JOHN D. HORRIS
DAVID L. MOSELEY
PATRICIA HAMMERER BRELAND
DONALD J. ASPELLUND
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PETER J. BAUM III
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RONNI L. SHERMAN
THOMAS A. MILLER
KENNETH D GOODMAN
D C TOEDT III
MICHAEL L. LYNCH
ALTON W PAYNE
JAMES W. TATE II
HENRY L. SMITH, JR.
J. DAVID CABELLO

ARNOLD, WHITE & DURKEE
A PROFESSIONAL CORPORATION
Attorneys at Law
POST OFFICE BOX 4433
HOUSTON, TEXAS 77210

STREET ADDRESS
750 BERING DRIVE
HOUSTON, TEXAS 77057

TELEPHONE (713) 789-7800
CABLE ARNWHITE HOU • TELEX 79-0924

AUSTIN OFFICE
1400 TEXAS COMMERCE BANK BUILDING
700 LAVACA STREET
AUSTIN, TEXAS 78701
TELEPHONE (512) 474-2583

WASHINGTON OFFICE
2001 JEFFERSON DAVIS HIGHWAY
SUITE 606
ARLINGTON, VIRGINIA 22202
TELEPHONE (703) 920-8720

JAMES A. REILLY
OF COUNSEL

FILE:

October 26, 1983

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
of the House Judiciary Committee
2137 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 3824, 98th Cong.,
1st Sess. (1983)

Dear Congressman Kastenmeier:

Further to my letter dated October 24, 1983, please note the second sentence of 28 U.S.C. § 1291, which reads as follows:

> The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Even though § 1291 is entitled "Final decisions of district courts" (emphasis added), the reference to § 1292(c) and (d) in § 1291 indicates that § 1291 is a limitation on the CAFC's jurisdiction over all appeals, i.e., appeals from interlocutory orders and decrees, as well as from final decisions.

Thus, § 1291 provides an additional, rather compelling argument against construing proposed § 1292(b) as giving the CAFC jurisdiction over interlocutory appeals on certified questions from the district courts.

Congressional intent, as expressed in the legislative history, has its limits; and even the most clearly written congressional committee report may be insufficient to produce the intended result in the case of Section 2 of H.R. 3824 as originally introduced.

In any event, it would appear to be more prudent to try to make sure that the statute itself does the job -- particularly where, as here, the statute can be amended in such a short, direct way.

If Section 2 of H.R. 3824 were amended by your subcommittee so as to amend 28 U.S.C. § 1292(c)(1) by changing "subsection (a)" to -- subsections (a) or (b) --, that statutory amendment would dovetail nicely with § 1294 and with § 1291.

If there is any possible way for your subcommittee to reconsider Section 2 of H.R. 3824, that would be a very worthwhile effort.

Very truly yours,

Jack C. Goldstein

JCG/sm

bcc: ✓Honorable Michael J. Remington
Honorable Howard T. Markey
Honorable Gerald J. Mossinghoff
Honorable Michael K. Kirk
Frank P. Cihlar, Esq.
ABA PTC Executive Committee
James W. Geriak, Esq.
Ms. Michele A. Kukowski
AIPLA Executive Committee
Lester L. Hewitt, Esq.
Edward V. Filardi, Esq.
Michael W. Blommer, Esq.

U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

16 NOV 1983

Mr. Michael Remington
Counsel
House Judiciary Committee
RHOB 2137
Washington, D. C. 20515

Re: Federal Magistrates Act Litigation

Dear Mr. Remington:

At your request, I am writing to inform you of our efforts to defend the constitutionality of the Federal Magistrates Act. As you know, in an August 5, 1983 decision, a panel of the Ninth Circuit held unconstitutional the consensual case reference provisions of the Act in Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (1983). In addition to filing an amicus brief at the Court's request in which we defended the constitutionality of the Act, on September 19, we filed a motion to intervene in this case and a petition for rehearing with a suggestion for rehearing en banc. The Court promptly granted our motion to intervene and, on October 21, ordered that the case be reheard en banc on November 15.

Shortly after our receipt of the panel's decision in Pacemaker, we sent a telegram to all United States Attorneys alerting them to the possibility of challenges to references made under the authority of the Act and asked that they consult the Civil Division in handling such cases. To date, we have received inquiries from a number of United States Attorneys, resulting in our direct involvement with several additional challenges to the Act's constitutionality.

On October 7, we filed a supplemental brief in the Third Circuit, a copy of which I enclose, in response to a request from the Court to address this issue. Recently, we filed a supplemental brief addressing the constitutionality of the Act in a case before the Fifth Circuit in which the Government is already a party. In addition to these two cases, we have received certifications pursuant to 28 U.S.C. § 2403 from the First Circuit and Eighth Circuit that this issue has been raised by a

party on appeal. We have intervened in the First Circuit case and filed a brief defending the Act's constitutionality and anticipate intervening in other court of appeals cases when the issue is certified to us in order to defend the constitutionality of the Act.

The Department is vigorously defending the constitutionality of the Act wherever it comes under challenge. Because of the Committee's special expertise with regard to the Act's constitutionality, we would be grateful for any assistance you might furnish us. To that end, you should feel free to contact Appellate Litigation Counsel Michael F. Hertz (633-3602), the attorney primarily responsible for these cases.

Sincerely yours,

STUART E. SCHIFFER
Deputy Assistant Attorney General

Enclosure

NO. 82-5555

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE WHARTON-THOMAS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FOR THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL BRIEF FOR THE DEFENDANT-APPELLEE THE UNITED STATES OF AMERICA

J. PAUL McGRATH
Assistant Attorney General

W. HUNT DUMONT
United States Attorney

MICHAEL F. HERTZ
PETER R. MAIER
Attorneys, Appellate Staff,
Civil Division, Room 3617,
Department of Justice,
Washington, D.C. 20530.
Telephone: (202) 633-3926

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No. 82-5555

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE WHARTON-THOMAS

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

SUPPLEMENTAL BRIEF FOR THE DEFENDANT-APPELLEE THE UNITED STATES OF AMERICA

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the federal magistrate's trial and entry of judgment in this civil action with the consent of the parties pursuant to 28 U.S.C. §636(c) was consistent with the requirements of Article III of the United States Constitution.

2. Whether this Court has jurisdiction to hear this appeal notwithstanding the inadvertent error on the consent form executed by the parties that erroneously indicated consent to have an appeal from the magistrate's decision heard by the district court.

INTEREST OF THE UNITED STATES

Congress enacted the initial Magistrates Act in 1968, based in part on its "recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the

district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." Mathews v. Weber, 423 U.S. 261, 268 (1976). Subsequently, Congress enacted the Federal Magistrates Act of 1979 only after careful study of its constitutionality. As Congress anticipated the Act has led to substantial improvements in the administration of justice and has proved to be of value to the judiciary and to litigants. 1/ In the year ending June 30, 1982, magistrates terminated 2,452 cases that district courts had referred to them pursuant to the authority of section 636(c). Although the vast majority of these cases were terminated prior to trial, magistrates presided over some 563 non-jury trials during that year and 262 jury trials as well. 2/ Moreover, the authority this law provides to district courts to make case-dispositive reference of civil matters to magistrates, where the parties so consent, has permitted the judiciary to expedite the adjudication of cases and has made dispute resolution available to more

---

1/ According to the results of a 1981 survey on the impact of the 1979 Magistrates Act of all chief judges of federal district courts that the Judicial Conference of the United States conducted, 45 of the 46 chief judges responding reported that they had received no complaints or comments from the bar or from litigants that any pressure had been applied upon them to consent to trial before a magistrate. Administrative Office of the United States Courts, Annual Report of the Director, 1982, 75. In fact, the district courts are well pleased with the initial results under the consensual reference provisions of this statute. Of the thirty chief judges who expressed an opinion in answer to the Judicial Conference's survey question inquiring whether they were satisfied with the initial results of consensual reference of civil cases to magistrates for trial, twenty-eight responded "yes." Id. at 73.

2/ Administrative Office of the United States Courts, Annual Report of the Director, 1982, 75.

persons at lower cost without any sacrifice to individual constitutional rights. As the Senate Judiciary Committee predicted in its report on this law:

> The bill recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged. The latter lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards. This outcome may be more pronounced as the exigencies of the Speedy Trial Act increase the demands on the Federal courts. The imaginative supply of magistrate services can help the system cope and prevent inattention to a mounting queue of civil cases pushed to the back of the docket. S. Rep. No. 96-74, 96th Cong., 1st Sess., 2 (footnote omitted).

For these reasons, the United States has a substantial interest in defending the constitutionality of the statute.

STATEMENT OF THE CASE

A. Statement of Facts

On October 16, 1980, plaintiff-Appellee Jane Wharton-Thomas ("Wharton-Thomas") filed an amended complaint alleging that she suffered injuries in a car collision with a vehicle negligently operated by an employee of defendant-appellee the United States Postal Service and was, therefore, entitled to damages under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 et seq. After this case had been scheduled for a non-jury trial before District Judge Cohen, the parties consented to trial and entry of judgment by a United States Magistrates, James F. Hammill, pursuant to 28 U.S.C. §636(c)(4) and local Rule 40.

The parties executed a consent form on February 8, 1982, on which counsel for both parties inadvertently indicated that any appeal from the decision of the magistrate be taken to the district court rather than to this Court, an alternate appellate procedure authorized by 28 U.S.C. § 636(c)(4). It is undisputed that counsel for both parties desired and believed that any appeal of the magistrate's decision would be to this Court.

The magistrate conducted a four-day trial in early February, 1982. On August 24, 1982, he rendered an opinion in favor of Wharton-Thomas and entered judgment in the amount of $7500 for the district court. Wharton-Thomas filed a notice of appeal to this Court on August 31, 1982. On appeal, she argues that the factual findings upon which the damage award was based were clearly erroneous.

After the parties had filed their briefs, this Court sua sponte asked the parties to address two issues: (1) whether the magistrate's exercise of power in trying this case and entering judgment on behalf of the district court offended Article III of the Constitution (See Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983)); and (2) whether the consent form signed by the parties, which indicated that any appeal from the magistrate's decision would be taken to the district court, deprived this Court of jurisdiction to hear this appeal.

B. The Statutory Plan

1. The Federal Magistrates Act of 1968.

In 1968, Congress passed the Federal Magistrates Act of 1968 (the "1968 Act") which created the Office of United States Magistrate. 3/ Congress intended magistrates to replace United States Commissioners. Commissioners, with the consent of the parties, enjoyed authority to try petty offenses committed on United States property.

The 1968 Act created magistrate positions with an eight-year term of office, increased salaries above the levels that U.S. Commissioners had received, and prohibited the reduction of a magistrate's compensation during his term of his service. 28 U.S.C. §§ 631, 634. District courts were empowered to appoint magistrates to serve the district, just as district court had appointed U.S. Commissioners. 28 U.S.C. § 631. The 1968 Act provided for a magistrate's removal during his term of office for incompetency, misconduct, neglect of duty, or physical or mental disability. 28 U.S.C. § 631(i). Only the judges for the district court in which the magistrate served could exercise removal authority, except that the Judicial Conference of the United States could terminate a magistrate's position upon its determination that the services performed by that office were no longer needed. Id. Finally, the 1968 Act increased the criminal jurisdiction for magistrates, gave magistrates authority to

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3/ Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1108 (codified at 18 U.S.C. §§ 3401-02, 28 U.S.C. §§ 631-39 (1970)) (amended 1976 & 1979).

assist the district courts in civil and criminal cases, enabled magistrates to make preliminary review of petitions for habeas corpus, and gave magistrates authority to exercise "such additional duties as are not inconsistent with the Constitution and laws of the United States." 4/

2. The Federal Magistrates Act of 1976.

Because the 1968 Act did not clearly delineate the power of federal magistrates, in 1976 Congress attempted to clarify and expand the duties and powers of magistrates by enacting the Federal Magistrates Act of 1976 (the "1976 Act"). 5/ This law empowered magistrates to determine non-dispositive pretrial motions subject to review by a district judge under a clearly erroneous or contrary to law standard. The 1976 Act also gave magistrates the authority to make findings and recommendations on dispositive pretrial motions and in prisoner cases. 6/ Such proposed findings and recommendations to which a party objected would be determined de novo by the district court. The 1976 Act also clarified the authority of magistrates to serve as special masters. Finally, the 1976 Act left unchanged preexisting authority for magistrates to perform such additional duties as are not inconsistent with the Constitution and laws of the United States.

4/ See 28 U.S.C. § 636(a)(1) (1970).

5/ Federal Magistrate Act Amendments of 1976, Pub. L. No. 94-577, 90 Stat. 2724 (amending 28 U.S.C. § 636(b) (1970)).

6/ The Supreme Court in United States v. Raddatz, 447 U.S. 667 (1980), upheld the constitutionality of the 1976 Act's provisions authorizing district court judges to refer certain pre-trial motions to magistrates for determination subject to de novo review by the district court.

3. The Federal Magistrates Act of 1979.

Because Congress found that the 1976 Act had not fully remedied the problems of unevenness in the quality of magistrates and disparity in their utilization by district courts, in 1979 Congress enacted the current version of the Federal Magistrates Act ("the Magistrates Act"). 7/ The Magistrates Act, which is codified at 28 U.S.C. § 636, provides that, upon the consent of the parties and when specially designated to exercise such authority by the district court he serves, a full-time United States magistrate may conduct all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case.

In order to ensure that a party's consent to such a reference is free and voluntary, the Magistrates Act directs that a district court's rules for the reference of civil matters to a magistrate "shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. 636(c)(2). After the parties have communicated to the district court clerk their decision whether to consent to referral of their case to a magistrate, "neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate." Id.

7/ In addition, the Magistrates Act upgraded the position of magistrate by establishing a system of merit protection. The statute requires that each district court establish a merit selection panel to nominate candidates for the district court to consider in selecting magistrates. 28 U.S.C. § 631(a).

Notwithstanding the consent of the parties to have their case referred to a magistrate, a district court must independently authorize the reference and, in a proper case, may vacate such a reference. The Magistrates Act provides that the district court "may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection." 28 U.S.C. § 636(c)(6).

The Magistrates Act provides that, upon entry of judgment in any case referred to a magistrate by consent, an aggrieved party may appeal that judgment directly to the appropriate United States Court of Appeals in the same manner as any other district court judgment may be appealed. 28 U.S.C. § 636(c)(3). Alternatively, the Magistrates Act also provides that at the time of the reference the parties may elect to appeal on the record to the district court in the same manner as on appeal from a judgment of the district court to a court of appeals. 28 U.S.C. § 636(c)(4). The appellate judgment of the district court, in turn, may be reviewed by the appropriate United States Court of Appeals upon petition for leave to appeal stating the specific objections to the judgment. 28 U.S.C. § 636(c)(5).

SUMMARY OF ARGUMENT

Consensual reference of civil cases for disposition by federal magistrates does not violate the United States Constitution. Where parties have given their consent, the overwhelming majority of courts have upheld dispute reference to a third party for adjudication.

The expansion of magistrates' authority that this law authorizes does not, in any event, remove the essential attributes of judicial power from the federal district court in violation of the Supreme Court's admonition in Northern Pipeline Construction Company v. Marathon Pipe Line Company, 102 S. Ct. 2858 (1982). While the statute at issue in Marathon gave non-judges permanent, irrevocable jurisdiction over matters without the consent of the parties, the Magistrates Act allows reference only with the consent of the parties and the approval of the district court and makes the reference subject to the district court's authority to vacate the reference of any case. In addition, while the bankruptcy statute reviewed in Marathon created new "judges" of tribunals and carved out a subject matter domain for these new "courts", the Magistrates Act neither creates new judges or maps out a separate jurisdictional fiefdom. Finally, the additional powers that magistrates may exercise pursuant to their authority under the statute to conduct trials and enter judgments represent only an incremental addition to the power that magistrates have exercised for years with the Supreme Court's knowledge and approval.

Consensual reference of civil cases for disposition by a magistrate jeopardizes no interest that Article III protects. Because Article III primarily protects the due process rights of litigants, permitting parties to waive their right to adjudication before an Article III judge no more injures their constitutional rights than does permitting any other voluntary waiver of a due process right. Moreover, reference of a case to

a magistrate involves no greater delegation of federal judicial power from a district court judge to a non-judge than does judicial enforcement of an arbitration award where a federal court exercises its powers to enforce an adjudication made with the consent of the parties by a non-judicial official.

To the extent that Article III also protects non-party interests as part of the constitutional system of checks and balances, case-dispositive references to magistrates under the Magistrates Act do not imperil those interests either. The enhanced authority of magistrates under the Magistrates Act does not undermine the independence of the federal judiciary that Article III guarantees. Magistrates function only at the behest of the district courts to assist in the handling of their caseloads; they do not displace the district court's authority.

As a law that Congress passed after carefully studying potential arguments against its constitutionality and after hearing nearly unanimous views in favor of its validity, the Magistrates Act is entitled to a heavy presumption of constitutionality in this Court. On the other hand, holding the consensual reference provisions of the Magistrates Act unconstitutional would threaten the validity of other procedures employed by district courts that imperil no Article III interest. Specifically, the disposition of misdemeanor cases by magistrates and the use of masters under Fed. R. Civ. P. 53 could both be in jeopardy if 28 U.S.C. § 636(c) is held unconstitutional.

Furthermore, the magistrate's disposition of this case did not violate Article III because this case involved the adjudication of public rights. Therefore, it is a case which, according to Marathon, need not be heard by an Article III judge. Because Congress could have assigned jurisdiction to hear Wharton-Thomas' damage action against the United States under the Federal Tort Claims Act to an Article I court or to an administrative agency without offense to Article III, trial and entry of judgment in this case by a magistrate is permitted by the Magistrates Act and does not offend Article III.

The parties' unintentional signature on the district court's consent form indicating that an appeal from the magistrate's decision be to the district court and not to this Court does not deprive this Court of jurisdiction to hear the appeal. The parties' inadvertent consent was not a knowing and intentional waiver of a legal right. This Court should, therefore, analyze this question as one of a mistake of contract. In that context, this Court may and should reform the parties' written agreement to eliminate their mistaken and unintentional indication that appeal be to the district court rather than to this Court.

ARGUMENT

I. CONSENSUAL REFERENCE OF A CIVIL SUIT TO A MAGISTRATE FOR TRIAL AND ENTRY OF JUDGMENT DOES NOT VIOLATE ARTICLE III OF THE UNITED STATES CONSTITUTION.

Neither the Supreme Court's holding in Marathon nor the language in any of its opinions casts doubt upon the consensual reference provisions of the Magistrates Act. In Marathon, the Supreme Court's limited holding was that a traditional state

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common law action, peripherally related to an adjudication of bankruptcy under federal law, must be heard by an Article III court in the absence of consent of the litigants. See 102 S. Ct. 2858, 2882, (Rehnquist, J., concurring). 8/

In any event, the statutory plan of the Magistrates Act, which authorizes consensual case-dispositive references, does not remove the "essential attributes of judicial power" from the federal district court in contravention of the directive in the Marathon plurality opinion. Id. at 2876. In fact, the Magistrates Act differs significantly from the bankruptcy statute that the Supreme Court analyzed and found constitutionally infirm in Marathon.

Most important, the Magistrates Act, unlike the 1978 Bankruptcy Reform Act, requires party consent as a prerequisite to a magisterial refrence. The Supreme Court, in the plurality, concurring, and dissenting opinions in Marathon, took great pains to distinguish the Bankruptcy Act before it from cases in which jurisdiction rested upon a premise of party consent. Indeed, in the concurring opinion, which contains the narrowest grounds that commanded a majority of the Court, Justice Rehnquist, joined by Justice O'Connor, emphasized that the Court's ruling was confined

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8/ On April 28, 1983, less than a year after it decided Marathon, the Supreme Court promulgated amendments to the Federal Rules of Civil Procedure authorizing magistrates to exercise the authority Congress provided in Section 636(c) of the Magistrates Act. Fed. R. Civ. P. 73(a). See 51 U.S.L.W. 4505 (May 3, 1983). It would be anomalous for the Court to promulgate rules that countenance violation of Article III if it thought that Marathon dictated that conclusion.

to a statute under which a court exercised jurisdiction without the consent of the parties:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 unconstitutional as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. 102 S. Ct. 2881 (emphasis added). 9/

9/ Likewise, in the plurality opinion, four justices distinguished the former practice before bankruptcy courts from the 1978 Bankruptcy Act before it by observing that under the former regime

> "the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court." 102 S. Ct. 2876 n. 31 (emphasis added).

Chief Justice Burger, too, pointed out in his dissent that the Court's holding had no applicability to cases under statutes that permit the exercise of judicial authority only with the consent of the parties:

> [T]he Court's holding is limited to the proposition stated by Justice Rehnquist in his concurrence in the judgment - that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States. 102 S. Ct. at 2882 (emphasis added).

And Justice White also emphasized in his dissent that a statutory plan that required litigant consent would present a far different constitutional issue.

> "In that event [that the holding of the plurality be limited in application to preserve much of section 214(a) of the Bankruptcy Act] cases such as this one would have to be heard by Article III judges or by state courts - unless the defendant consents to suit before the bankruptcy judge - just as they were before the 1978 Act was adopted." 102 S. Ct. at 2884 (emphasis added).

Because the exercise of authority by a magistrate under Magistrates Act requires the consent of the parties -- as well as the that of the district court -- this law permits no encroachment on the rights of litigants before the federal judiciary.

In a second major distinction from Marathon, under the Magistrates Act -- unlike the Bankruptcy Act reviewed in Marathon -- the district court and its judges retain residual responsibility for cases referred to magistrates. The district court must initially approve a civil case reference and at all times retains the power to terminate a reference and conduct proceedings directly. 10/

The Ninth Circuit in Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (1983) petition for rehearing filed, lost sight of the very limited nature of the Supreme Court's Marathon holding. 11/ In ostensible reliance upon

10/ Because decisions of magistrates are subject to appellate review by Article III judges under the Magistrates Act, litigants retain access to the federal judiciary for plenary review with respect to all issues of law and for factual review to the same extent that district court judgments are subject to review by federal appellate courts. Review by an Article III judge largely alleviates any concern that arises as a result of the parties' consent to initial adjudication by a non-Article III official. Although the Supreme Court's plurality opinion in Marathon suggested that appellate review by an Article III judge by itself might not by itself satisfy Article III's demands, the plurality did not imply that appellate review by an Article III judge was irrelevant to assessing the constitutionality of statutes under Article III. See Marathon, supra, 102 S. Ct. at 2879 n. 39.

11/ On September 19, 1983, the United States moved to intervene in Pacemaker pursuant to its right under 28 U.S.C. §2403 and filed a petition for rehearing and suggestion for rehearing en banc. On September 29, 1983, the Ninth Circuit granted the Government's motion to intervene. The Government's rehearing petition and the rehearing petition filed by Instromedix, Inc., are currently pending before that Court.

Marathon, the Ninth Circuit concluded that where persons other than Article III judges possess authority to decide cases and enter judgments not reviewable de novo by an Article III judge, such authority violates the limits imposed by Article III on the exercise of federal judicial power. 12/ The panel deemed the consent of the parties insufficient to cure the statute's Article III problems because the statutory plan at issue allegedly offended constitutional concerns that went beyond the interests of the litigants. That holding flew in the face of Supreme Court precedent that has upheld adjudication by persons other than Article III judges where it takes place with the parties' consent. 13/ Moreover, notwithstanding the complete control over references to magistrates that the district courts retain under the Magistrates Act, the panel also concluded that this statute

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12/ Since announcing this decision on August 5, 1983, the Ninth Circuit panel has amended its opinion three times. On August 11, 1983, the panel amended its opinion to restrict the effect of its holding to cases referred to a magistrate after the date on which it issued the mandate in Pacemaker, which has not yet occurred. (This change appears in the West Report advance sheet report of this case at 712 F.2d at 1314.) The original opinion would have applied the court's holding to all cases still on appeal, or on which the time to appeal had not yet run on the date of the court's decision, and to all cases pending before a magistrate. On September 6, 1983, the panel amended its opinion to delete language in its original opinion (712 F.2d at 1314) that further appeals in the case be directed to it. Instromedix, Inc., had included in its rehearing petition the argument that the Federal Circuit had jurisdiction of any further appeals in this patent case. On October 3, 1983, the panel again amended its opinion this time to alter its holding. Its initial opinion had stated that its holding "prohibits magistrates from entering judgments." 712 F.2d at 1314. The October 3, 1983, order deletes this phrase and substitutes in its place language that the Court's holding "prohibits magistrates from rendering final decisions in civil cases."

13/ See cases and discussion at 17-18, infra.

did not provide the independence from outside influence for the adjudicators that constitutional salary and tenure protections assure Article III judges.

Finally, the Pacemaker panel relied on the absence of Article III protections for magistrates as a basis why they might be susceptible to untoward influence to the detriment of some Article III interests -- presumably interests other than those of the consenting litigants. 712 F.2d at 1312-13. But because magistrates are appointed by district judges and are subject to removal by them and because district judges retain full authority over the reference and retention of cases by the magistrates, Article III interests are not at risk under the consensual reference provision. "The only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." United States v. Raddatz, 447 U.S. 667, 685 (1980). See also Northern Pipeline Construction Company v. Marathon Pipe Line Co., supra, 102 S. Ct. at 2875 n. 30. Such a "threat" could, at most, call into question the wisdom of this law but not its compatibility with Article III. In sum, Marathon did not suggest that section 636 is unconstitutional, and Pacemaker is erroneous in reaching that conclusion based on Marathon.

A. Where the Parties Give Their Consent, A Case-Dispositive Reference to a Magistrate Does Not Violate Article III.

It is hardly surprising that Marathon did not erode the established principle that persons other than federal court judges may play a prominent role in the adjudication of civil suits if the parties consent. The Supreme Court has consistently approved an adjudicatory role for persons other than federal court judges so long as that role rests upon the consent of the parties.

In Heckers v. Fowler, 69 U.S. (2 Wall) 123 (1865), the Supreme Court approved an order issued by a trial court with the consent of the parties that their dispute be determined by a referee as to all issues with the referee's determination to have the same effect as a ruling of the court. In Heckers, the consensual reference also provided for the court clerk to enter judgment in accordance with the referee's report without any involvement by an Article III judge. Pacemaker, however, construed Heckers to hold only that non-Article III judges may preside over trials so long as the district court retains the duty to review the non-judge's recommendations and ultimately decide the case. 712 F.2d at 1311 n. 12. Yet, if that had been the Supreme Court's holding, it would have held the procedure at issue unconstitutional. 14/

14/ Likewise, the Pacemaker panel mistakenly relied upon the Supreme Court's plurality opinion in Glidden v. Zdanok, 370 U.S. 530 (1962), to support its conclusion that litigant consent did not cure any alleged Article III infirmities of the Magistrates Act. 712 F.2d at 1311-1312. But in Glidden, the Supreme Court held only that the Court of Claims and the Court of Customs and (continued)

In Kimberly v. Arms, 129 U.S. 512 (1889), the Supreme Court upheld the validity of the parties' consensual reference of their case to a special master to decide all issues in the case. There, the Court upheld the consensual reference of the dispute to a special master whose findings were to be reviewable only for manifest error. On other occasions, the Court has routinely upheld the parties' power to agree to refer their dispute for determination by arbitrators or referees possessing the power to enter a final judgment. See Ex Parte Peterson, 253 U.S. 300 (1920); York and Cumberland R.R. Co. v. Myers, 59 U.S. (18 Howard) 246 (1855); Thornton v. Carson, 11 U.S. (7 Cranch) 596 (1813). 15/

Of course, courts of appeals have also sanctioned consensual references of civil suits to magistrates for adjudication. Such approval obviously would be inconsistent with a determination that such a consensual reference violates Article III.

Patent Appeals were Article III courts, whose judges could properly serve by designation on federal district courts and courts of appeals. More important, in Glidden the parties had not consented to have their case heard before a judge who lacked Article III protection. But the Pacemaker panel took this plurality opinion to stand for the proposition that litigant consent cannot authorize district court proceedings held before non-Article III officials -- a proposition that was not before the Court in Glidden.

15/ The Supreme Court's decisions upholding the power of bankruptcy referees to hear in a plenary suit with the parties' consent matters related to an adjudication of bankruptcy also show that consent is highly relevant to whether non-Article III officials may enter judgments in the name of an Article III Court. See MacDonald v. Plymouth Trust Co., 286 U.S. 263 (1932); Page v. Arkansas Natural Gas Corp., 286 U.S. 269 (1932).

In the leading case of DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499 (1975), cert. denied, 423 U.S. 1073 (1976), in an opinion by Judge Coffin, the Court of Appeals for the First Circuit held that reference of a case to a magistrate for initial decision with the consent of the parties was both constitutionally and statutorily permissible. The court relied on the Supreme Court decisions in Heckers and Kimberly in concluding that the "parties could, without violation of Article III, freely consent to refer cases to non-Article III officials for decision." 520 F.2d at 507. The court's rationale explained that consensual reference to a magistrate was no more objectionable than enforcement of an arbitration award by a federal court.

> From a constitutional viewpoint, we can see no significant difference between arbitration and consensual reference for decision to magistrates. In both situations the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance. Or put another way, they have chosen another forum . . .. Both modes of conflict resolution serve the same goals of relieving scarce judicial resources and of accommodating the parties. If it be queried whether the dignity of Article III is being compromised by entering judgments on awards made by non-Article III personnel, the sufficient rejoinder is that judgments are entered on arbitrators' awards. 520 F.2d at 505-06. 16/

16/ See also Glover v. Alabama Board of Corrections, 660 F.2d 120, 124 (5th Cir. 1981) (noting that objectives of Article III might be undermined by a case-dispositive reference to a magistrate in the absence of consent of the parties); Polin v. Dun & Bradstreet, Inc., 634 F.2d 1319, 1321 n. 4 (10th Cir. 1980) (en banc) (referring to enactment of Federal Magistrates Act of 1979 as "a new avenue" permitting greater delegation of authority to magistrates); Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352, 353 (5th Cir. 1980) (suggesting that consent of the parties may be a prerequisite for district court referral of a (continued)

The courts also have routinely approved dispute resolution through arbitration by entering judgments based upon arbitration awards, thereby exercising the judicial power of the United States. See Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967); Bernhardt v. Polygraphic Company of America, 350 U.S. 198 (1956).

Finally, the Supreme Court has explicitly approved the waiver of basic constitutional rights by parties including the waiver of rights that would preclude adjudication by a judge of an Article III court. The Court has approved waiver of the right against self-incrimination 17/ and the right to plead guilty to criminal charges. 18/ Additionally, the Supreme Court has upheld the waiver of the right to a jury trial, 19/ waiver of right to counsel, 20/ waiver of right to a speedy trial, 21/ and the waiver of the Fourth Amendment right against unreasonable

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civil case to magistrate for a trial on the merits); Taylor v. Oxford, 575 F.2d 152, 154 n. 7 (7th Cir. 1978) (suggesting that passage of the Magistrates Act may remove statutory impediment barring appealability of judgment entered by magistrate).

17/ Garner v. United States, 424 U.S. 648 (1976); Brown v. United States, 356 U.S. 148 (1958).

18/ Boykin v. Alabama, 395 U.S. 238, 243 (1969).

19/ Duncan v. Louisiana, 391 U.S. 145, 159 (1968); Patton v. United States, 281 U.S. 276 (1930). Under the Federal Rules of Civil Procedure, a party automatically waives the right to a jury trial in a civil case unless he affirmatively exercises it. See Fed. R. Civ. P. 38(d).

20/ Adams v. United States, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938).

21/ Barker v. Wingo, 407 U.S. 514, 530 (1972).

searches. 22/ Just as a party may waive these basic constitutional rights, so may parties waive their constitutional right to an adjudication by a judge of an Article III court.

By contrast, the Supreme Court's decisions invalidating references of cases to persons appointed by the court have all involved circumstances in which the parties did not consent to that reference. For example, in La Buy v. Howes Leather Company, 352 U.S. 249 (1957), the Court struck down a district court's case reference to a special master without the consent of the parties in contravention of Rule 53 of the Federal Rules of Civil Procedure as an abdication of a judicial function that had deprived the parties of their right to a trial before the court. Id. at 258.

Likewise, with the exception of Pacemaker, decisions by federal courts of appeals that have held unlawful dispute reference under the current Magistrates Act or earlier versions of it have either rested upon the absence of clear consent by both parties or the absence of statutory authority for such references prior to the enactment of the current version of the Magistrates Act. In three cases, federal courts of appeals have struck down references of civil matters to magistrates because of the absence of party consent. 23/ In five other cases, the courts have struck down a civil case reference on the grounds

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22/ Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

23/ See Glover v. Alabama Board of Corrections, supra, 660 F.2d 120; Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978); Reed v. Board of Elections Commissioners, 459 F.2d 121 (1st Cir. 1972).

that the Magistrates Act then in effect did not authorize magistrates to perform such functions. 24/

This is not to say, however, that litigant consent can cure defects that really are jurisdictional. While litigants certainly cannot by their consent confer jurisdiction on a court that otherwise lacks it, the jurisdiction over a case referred under the Magistrates Act is that of the federal district court -- not some other tribunal. Therefore, since the procedure that this statute permits simply allows a delegation of functions to officials within the jurisdiction of a district court, the parties do not consent to any exercise of jurisdiction over them or their dispute by an inferior tribunal, i.e., one not constituted under Article III.

B. Unlike the Judicial Framework That the 1978 Bankruptcy Act Established, the Magistrates Act Assures That Federal Magistrates Serve As True Adjuncts To the District Court.

Of central concern to the Marathon plurality was the perceived threat that the Bankruptcy Act posed to the constitutional prerogatives of the judicial branch. Thus, the Marathon plurality noted with alarm that the argument in support of the Bankruptcy Act's bankruptcy court scheme

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24/ See Coolidge v. Schooner California, 637 F.2d 1321 (9th Cir.) cert. denied, 451 U.S. 1020 (1981); Calderon v. Waco Lighthouse for the Blind, supra, 630 F.2d 352; Harding v. Kurco, Inc., 603 F.2d 813 (10th Cir. 1979); Horton v. State Street Bank & Trust Co., 595 F.2d 403 (1st Cir. 1979); Taylor v. Oxford, supra, 575 F.2d 152.

> "threatens to supplant completely our system of adjudication in independent Article III tribunals and replace it with a system of 'specialized' legislative courts" carrying "[t]he potential for encroachment upon powers reserved to the Judicial Branch through the device of 'specialized' legislative courts." 102 S. Ct. 2872-73.

But the Magistrates Act does not endanger these same institutional concerns because magistrates under it serve as true adjuncts to the district courts. While the 1978 Bankruptcy Act reviewed in Marathon established a system of separate tribunals with their own jurisdiction that would operate independently of the federal district courts, in the Magistrates Act Congress created no new courts. Instead, this law authorizes federal district courts to exercise their own judicial power through officials who serve them.

> [W]hen a civil case properly within the jurisdiction of an article III court is tried before a magistrate pursuant to an order of reference by the district court, jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate. Muhich v. Allen, 603 F.2d 1247, 1251 (7th Cir. 1979). See also, TPO, Inc. v. McMillen, 460 F.2d 348, 353 (7th Cir. 1972).

Here, Congress erected no rival court system with its own subject-matter domain. Hence, the Magistrates Act represents no raid upon the jurisdiction that Congress has given to Article III courts. 25/

Under the Magistrates Act, district courts retain the essence of jurisdiction -- the power to decide cases 26/ -- by exercising their discretionary authority (1) whether to permit any references to magistrates, (2) whether to permit reference of a specific case to a magistrate, and (3) whether to utilize their explicit power to vacate a reference of a case to a magistrate at any point. In enacting Section 636(c), Congress made no attempt to control the manner in which district courts would make use of magistrates.

To the contrary, under this statute magistrates may receive case-dispositive references only upon an affirmative act by an Article III court. Thus, the Magistrates Act provides that a magistrate "may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. § 636(c)(1)

25/ Moreover, the 1978 Bankruptcy Act established the presiding officers of the adjunct courts as judges. In so doing, that statute implicitly suggested that these officials, who lacked the tenure and salary protections constitutionally guaranteed to Article III judges, might exercise power independent from the district court and its judges. By contrast, the Magistrates Act creates no now judgeships; it simply augments the power of federal district judges to use magistrates to resolve disputes where the parties -- and the court -- see fit.

26/ See Muskrat v. United States, 219 U.S. 346, 361 (1911).

(emphasis added.) This language leaves no doubt that a district court must determine for itself whether a reference to a magistrate is appropriate.

It is also critically important to realize that under the Magistrates Act judges who authorize case references retain authority to terminate a reference to a magistrate and conduct proceedings directly even if the parties themselves have raised no objection to the reference. 27/ The Magistrates Act states that:

> The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection. 28 U.S.C. § 636(c)(6).

During House floor debate prior to approval of the conference report on the bill, Congressman Peter Rodino, Chairman of the House Judiciary Committee, which reported the bill, emphasized this ongoing responsibility of the district court to supervise a case after referring it to a magistrate:

> [T]he magistrate remains an adjunct to the district court. He cannot try a case without designation by the court and at all times the court maintains power to try the case itself. [125 Cong. Rec. H8722 (daily ed. Sept. 28, 1979) (statement of Rep. Rodino) (emphasis supplied)].

27/ The interim bankruptcy rule that now governs bankruptcy proceedings similarly empowers a district court, on its own motion or at the request of a party, to withdraw a matter that has been referred automatically to the bankruptcy court under the interim rule. The Sixth Circuit relied on this component of the interim rule in upholding it against an Article III challenge. White Motors Corp. v. Citibank, N.A., 704 F.2d 254, 263 (6th Cir. 1983). See also In Re Hansen, 702 F.2d 728 (8th Cir. 1983), In the Matter of Braniff Airways, Inc., 700 F.2d 214 (5th Cir.), cert. denied., 103 S. Ct. 2122 (1983) (upholding constitutionality of interim bankruptcy rule).

Thus, unlike the bankruptcy courts that the 1978 Bankruptcy Act vested with exclusive jurisdiction over a field of matters that could not be withdrawn, magistrates act as true adjuncts of the district courts and carry out their duties only at its behest and under its direction. Because jurisdiction remains vested in the district court at all times, the oft-repeated proposition that parties cannot by consent confer jurisdiction upon a court is inapposite.

Accordingly, the only constitutional issue that the Magistrates Act presents is not one of federal court jurisdiction but one of delegation of power by federal district court judges to other court officials. With respect to that issue, the Supreme Court has repeatedly affirmed the validity of rules and procedures that permit magistrates [28/] and other court officials [29/] to perform functions traditionally performed by judges. Actual decision-making, therefore, cannot be the distinctive hallmark of judicial power. Otherwise, allowing non-judges to carry out such functions as hearing witnesses and

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28/ United States v. Raddatz, 447 U.S. 667 (1980); Mathews v. Weber, 423 U.S. 261 (1976).

29/ Heckers v. Fowler, 696 U.S. (2 Wall) 123 (1865); Kimberly v. Arms, 129 U.S. 12 (1889). See also Steger v. Orth, 258 F. 619, 621 (7th Cir.), cert. denied, 250 U.S. 663 (1919). The Federal Rules of Civil Procedure empower district court clerks to enter final judgments in default cases. Fed. R. Civ. P. 55(b)(1). Clearly, entry of judgments by non-judges does not constitute an unprecedented delegation of authority from judges to other court officials.

evaluating their credibility could not be constitutional. 30/ Thus, it is the right to decide disputes -- and not the mechanics of decision-making -- that falls within the "essential attributes of judicial power" that the Marathon plurality said must remain the province of federal district judges. 31/ Because it does not strip district court judges of that right, the Magistrates Act does not represent an "encroachment or aggrandizement" by Congress at the expense of the judicial branch or draw into question the separation of powers concerns underlying the plurality's opinion in Marathon.

C. Adjudication By A Magistrate With The Consent Of The Parties Imperils No Interest Protected by Article III.

The constitutional rights that the framers of the Constitution intended Article III to protect are the rights of the litigants to have their disputes resolved by an independent federal judiciary. According to Justice Brandeis:

7/ As the Supreme Court observed in 1932, there is "no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." Crowell v. Benson, 285 U.S. 22, 51. In a comment of telling significance to this case, the Court in Crowell also observed that Article III serves primarily to circumscribe the judicial power of the United States in terms of subject matter jurisdiction rather than dictate the mode or forms of practice in the federal courts. Id. at 53.

31/ Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 102 S. Ct. 2858, 2876 (1982).

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> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. Crowell v. Benson, supra, 285 U.S. at 87 (Brandeis, J., dissenting).

Justice Douglas sounded this same theme -- that the Constitutional protections of Article III exist in order to safeguard the due process rights of litigants -- when he wrote:

> The safeguards accorded Art. III judges were designed to protect litigants with unpopular or minority causes or litigants who belong to despised or suspect classes. Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting) (emphasis added).

Thus, the constitutional rights that Article III protects are the due process rights of the litigants, rights that are subject to waiver. 32/

In fact, the Magistrate Act's delegation of authority to magistrates to render binding judgments with the consent of the parties represents smaller threat to a litigant's due process rights than court enforcement of awards rendered under arbitration agreements. Under the Magistrates Act, the parties agree to permit a magistrate to resolve their dispute after it has quickened into a case or controversy filed in federal court. By reaching an arbitration agreement, however, the

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32/ See cases cited at page 20, supra.

parties irrevocably waive their right to an adjudication before an Article III court before any dispute has arisen between them. See DeCosta v. Columbia Broadcasting System, Inc., supra, 520 F.2d 499, 505. Furthermore, unlike a binding arbitration agreement, a reference to a magistrate may be vacated by the district court on motion or sua sponte.

To the extent that Article III protects any interests beyond those of the litigants, consensual case-dispositive references to magistrates do not jeopardize such concerns. Beyond the interests of the litigants themselves, two concerns may support Article III's mandate that the judicial power of the United States be exercised through courts served by judges who enjoy tenure and salary protection. First, Article III serves as part of the system of checks and balances that preserves the federal judiciary as an independent branch free from domination by the executive or legislative branches of government. 33/ Second, an independent federal judiciary may provide a bulwark against encroachment by the federal executive or legislative branches into areas where power is reserved to the states. 34/

33/ United States v. Lovett, 328 U.S. 303, 317 (1946). Palmore v. United States, supra, 411 U.S. at 413 (Douglas, J., dissenting); The Federalist No. 78 (A. Hamilton), at 465-69 (C. Rossiter ed. 1961); P. Bator, D. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Court's and the Federal System 2, 9-11 (2d ed. 1973); Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L.J. 1023, 1032 (1979).

34/ Note, Article III Limits On Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrates Act, 80 Col. L. Rev. 560, 582-83 (1980); cf. The Federalist No. 78 (A. Hamilton) at 465-69 (C. Rossiter ed. 1961).

Reference of a civil case for adjudication by a magistrate under the authority of the Magistrates Act threatens neither of these two policies. Case-dispositive consensual reference poses no risk to the independence of the judiciary from domination by the other branches of government. Under the Magistrates Act, magistrates are appointed by the federal district court that they serve. 28 U.S.C. § 631(a). Moreover, the district courts enjoy plenary authority with respect to whether magistrates receive any references of civil cases, whether a magistrate receives a reference of a specific case, and whether a reference will be withdrawn. For those reasons, the fact that magistrates do not enjoy the identical protections constitutionally guaranteed to judges of Article III courts threatens no Article III interest. Because magistrates are appointed by the district courts that they serve and because those courts retain plenary authority over references to magistrates, the Magistrates Act -- unlike the Bankruptcy Act -- poses no threat to the judiciary from another branch of government. 35/

35/ Furthermore, it is hard to fathom why the possibility of improper influence would pose a bar to the entry of final judgments by magistrates but would not bar their disposition of pre-trial motions or their entry of judgments subject to plenary review by district courts. See United States v. Raddatz, 447 U.S. 667 (1980).

D. Section 2 of the Federal Magistrates Act Enjoys a Presumption Of Constitutionality; Because Holding That Provision Unconstitutional Could Also Imperil Other Rules And Procedures That Threaten No Article III Interest, It Should Be Upheld in the Absence of a Clear Constitutional Imperative.

1. The Federal Magistrates Act Should Be Accorded a Presumption of Constitutionality.

Acts of Congress are entitled to a presumption of constitutionality. United States v. National Diary Products Corp., 372 U.S. 29 (1963); Fullilove v. Klutznick, 448 U.S. 448, 472-73 (1980); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964). This presumption should be given great weight here for two reasons.

First, applying a presumption of constitutionality makes especially good sense in considering a constitutional challenge to this statute in light of the Supreme Court's identification of Article III as a particularly difficult area for judicial analysis. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, 102 S. Ct. 2858, 2881 (Rehnquist, J., concurring). Furthermore, such a policy is eminently reasonable in analyzing Congressional enactments that involve the use of adjuncts to federal district courts. Id. at 2876; 1616 Reminc Limited Partnership v. Atchison & Keller, 704 F.2d 1313, 1318 (4th Cir. 1983).

Second, that presumption is particularly appropriate here because Congress gave such careful consideration to the constitutionality of permitting case-dispositive references of civil cases to magistrates before adopting Section 636(c). Congress concluded on the basis of its painstaking analysis that consensual reference of civil cases was constitutional.

Thus, in reporting the bill that became the Magistrates Act, the Senate Judiciary Committee concluded that the consensual nature of references under Section 636(c) eliminated any threat to the constitutionality of the reference procedure:

> The bill makes clear that the voluntary consent of the parties is required before any civil action may be referred to a magistrate. In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. Near unanimity existed among the witnesses on the overall constitutionality of the bill. S. Rep. No. 96-74, 96th Cong., 1st Sess., 4 (1979).

The House Committee report also declared this provision to be constitutional:

> The committee inquired with great care into any possible constitutional objections to expansion of magistrate civil and criminal case-dispositive jurisdiction with the consent of the parties. It reviewed the printed records from the Senate and House hearings of the 89th, 90th, 94th and 95th Congresses during which this question was also examined. Likewise, the committee reviewed its own reports from the 90th and 94th Congresses.
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> * * *
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> In addition, during the 95th Congress the Senate carefully inquired into the issue during two days of hearings and found that the legislation passed constitutional muster * * *. Since no court has found the present statutory scheme to be constitutionally defective, and several have spoken approvingly, the committee

> is confident that the proposed legislation passes constitutional muster. H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 7-9 (1979) (footnotes omitted). 36/

Finally, during House floor debate, Chairman Peter Rodino of the House Judiciary Committee expressed the Committee's conclusion that the delegation of authority to magistrates to dispose of cases with the consent of the parties was constitutional:

> The Committee on the Judiciary believes that it has an affirmative and continuing obligation to weigh the constitutionality of any and all pieces of legislation before it. We have done this and would like to express your view [sic] that the conference report is constitutionally sound. [125 Cong. Rec. H8722 (daily ed. September 28, 1979)] (statement of Rep. Rodino).

Congress determined that providing authority for case-dispositive references to federal magistrates was constitutional based on three separate, independent bases. First, Congress found this provision constitutional because magistrates would function as adjuncts of the United States district court, subject to its direction and control with jurisdiction remaining in the district court. Second, Congress found the provision was constitutional because any reference of a case to a magistrate for trial and entry of a final judgment would rest upon the

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36/ It is worth noting that the same House committee and subcommittee that concluded that Section 636(c) was constitutional had expressed substantial doubt regarding the constitutionality of the 1978 Bankruptcy Act, which the Supreme Court later held unconstitutional in Marathon. See H.R. Rep. No. 95-595, 95th Cong., 2d Sess., p. 39 U.S. Code Cong. & Admin. News 1978, p. 5787, 6000; Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong., 2d Sess., 33 (Comm. Print No. 3, 1977).

explicit consent of the parties. Third, Congress viewed the provision as constitutional because in all instances an appeal from a magistrate's decision would lie in an Article III court. See H.R. Rep. No. 96-287, supra, at 8-9. This three-part basis for Congress' determination counsels strongly in favor of the conclusion that the Magistrates Act is constitutional. 37/

2. If The Consensual Reference Authority That The Magistrates Act Provides Is Found To Offend Article III, That Conclusion Could Imperil Rules and Procedures That Do Not Threaten Any Interest That Article III Protects.

The assistance that magistrates have begun to provide to the district courts may be lost if this Court holds that the authority of Section 636(c) violates the constitutional protections of Article III. Such a holding would likely eliminate consensual case-dispositive references of civil matters to magistrates for final decision. As discussed above, in the twelve months ending June 30, 1982, magistrates received and terminated 2,542 civil cases with the consent of the parties and presided over 825 trials including 563 non-jury trials and 262

37/ As discussed at pages 21-22, supra, lower court decisions holding judgments entered by magistrates under the authority of the Magistrates Act invalid have either involved cases where the parties did not give consent or have rested upon the court's determination that the law then in effect did not provide authority for case-dispositive references. Although the Supreme Court plurality opinion in Marathon observed that providing for review by an Article III court would not, by itself, satisfy all Article III concerns, the Court did not suggest that the availability of review by an Article III judge was irrelevant to the constitutionality of a statute expanding the duties of non-Article III officials.

jury trials. 38/ Because district courts throughout the United States have been increasing their use of this authority, a civil caseload of this size and more will be returned to an overburdened federal judiciary.

Should this Court reach the same conclusion that the Ninth Circuit reached in Pacemaker -- that de novo review by the district court must follow a magistrate's decision -- that holding could drastically reduce the utility of reference of civil cases to magistrates for trial and recommended disposition. 39/ Because de novo review necessitates considerable time and attention of district court judges, a reference procedure requiring de novo review will be unlikely to conserve scarce judicial resources to any substantial degree and, thus, will frustrate Congress' intent. Accordingly, district courts are unlikely to make much use of such a procedure. As a result, federal district judges would have to resume responsibility for the vast caseload that federal magistrates have assumed pursuant to the Magistrate Act's authority.

Furthermore, a decision finding section 636(c) unconstitutional could immediately imperil other vital district court procedures. First, such a result would cast doubt over the

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38/ Administrative Office of the United States Courts, Annual Report of the Director, 1982, supra, at 75.

39/ Arguably, de novo review by a district judge might be necessary to satisfy Article III where an Article III judge is without power to affect the vesting or divesting of a lesser court official with decisional duties. But the need for de novo review seems far less where, as here, the district court may influence the proceeding by declining initially to refer it to a non-judge or by terminating the reference in medias res.

capacity of magistrates to continue to preside over misdemeanor trials. By statute, magistrates, where designated to exercise such power by the district court they serve and where the defendant consents, now enjoy authority to try and sentence persons accused of misdemeanors. 18 U.S.C. §3401. Under the reasoning of the Pacemaker panel, if consensual reference of civil cases to magistrates for adjudication is invalid, the authority of magistrates to conduct misdemeanor trials also would seemingly offend Article III.

If held invalid, the loss of this authority that magistrates have heretofore exercised would impose an enormous workload on the judges of federal district courts. In the twelve months ending June 30, 1982, magistrates disposed of 86,725 cases involving misdemeanors and petty offenses. 40/ In this circuit alone, district courts would have to absorb a criminal case workload approaching 2,413 cases based on the criminal caseload of misdemeanors and petty offenses that magistrates in the Third Circuit handled in the year ending June 30, 1982. 41/

Second, such a decision would endanger the continued use of masters under the authority of Fed. R. Civ. P. 53, which permits masters appointed by district courts to assist the district courts in several ways. For example, Rule 53(e) permits masters to make findings of fact that are reviewable by the district

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40/ Administrative Office of the United States Courts, Annual Report of the Director, 1982, a M-1, M-1A.

41/ Id.

court only under the clearly erroneous standard. Rule 53(e) also authorizes parties to empower masters to make factual findings that are binding and non-reviewable if the parties so choose.

To the extent that a holding that magistrates may not enter final judgments applies equally to other non-Article III officials like masters, they, too, might lack the power to make final, non-reviewable factual determinations even with litigant consent. Such a holding would also imply that masters' recommendations must always be subject to de novo review rather than review under the clearly erroneous standard that Rule 53 contains. Hence, such a decision would threaten the constitutionality of the functions that Rule 53 expressly authorizes masters to perform.

E. Even Assuming That Section 636(c) May Not Be Validly Applied In Some Cases, Reference Of This Federal Tort Claims Act Case To A Magistrate for Disposition Does Not Offend Article III.

Even under a broad reading of the plurality opinion in Marathon, it is clear that judicial and administrative bodies not constituted under Article III may still adjudicate matters within several jurisdictional realms. One such realm, according to the plurality opinion in Marathon, encompasses all cases involving public rights. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2869.

Wharton-Thomas' FTCA claim involves the assertion of a federally-created cause of action against the United States Government, an action that falls within the sphere of public rights. Indeed, the Marathon plurality opinion linked the public

rights doctrine with "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." Id. at 2869. See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283-85 (1855). See also Ex Parte Bakelite Corp., 279 U.S. 438, 452 (1929). Since the FTCA waives the Government's sovereign immunity in certain specified cases, suits under it surely constitute public rights matters. 42/

Accordingly, the United States could set any conditions it wished upon its consent to be sued in tort, including a condition that such a suit be brought before an Article I court created under Congress' legislative power, or before an administrative tribunal. If Congress could require that such a suit be brought before an Article I tribunal, it surely can require that such a suit be brought before a magistrate under the Magistrates Act, even if such a reference were deemed to be an exercise of jurisdiction by a non-Article III court. 43/

Because Wharton-Thomas' claim is not a private cause of action but falls squarely within the sphere of public rights, the application of Section 636(c) and the reference of this case to a magistrate for a final decision was constitutionally permissible inasmuch as this case need not be heard by an Article III

42/ Suits involving sovereign immunity also touch upon the separation of powers principle, another underpinning for the doctrine of public rights. See Marathon, supra, 102 S. Ct. at 2869.

43/ For the reasons discussed at 23-26, supra, proceedings under the authority of Section 636 are proceedings of the district court, not those of a non-Article III tribunal.

court. Because the statute was constitutionally applied in this case, this Court need not address the far broader issue of the constitutionality of the Magistrates Act on its face. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2880-81 (Rehnquist, J., concurring); cf., Barrows v. Jackson, 346 U.S. 349, 255-256 (1953); Coffman v. Breezes Corporations, Inc.. 323 U.S. 316, 324-325 (1945).

Finally, this Court should take notice that in this case, Wharton-Thomas seeks review only of the magistrate's factual findings that limited her damage award. All factual matters that arise in connection with a case or controversy before an Article III court need not be initially resolved by a federal district judge. According to the Supreme Court there is "no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges" much less district court judges. Crowell v. Benson, 285 U.S. 22, 51 (1932). Here, appellate review by this Court may be all that is necessary to satisfy any Article III concern raised by this particular reference to a magistrate. 44/

44/ See discussion at 14, supra.

II. THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL NOTWITHSTANDING THE ERROR BY BOTH PARTIES IN EXECUTING A FORM CONSENTING THAT ANY APPEAL FROM A DECISION OF THE MAGISTRATE BE TAKEN TO THE DISTRICT COURT.

Both parties agree that it was their intention that any appeal from a decision of the magistrate be to this Court and not to the district court under 28 U.S.C. §636(c)(4). This mutual mistake by the parties, however, ought not deprive this Court of its jurisdiction to hear this appeal.

This Court's jurisdiction over this appeal rests upon 28 U.S.C. §1291, which gives courts of appeals jurisdiction over appeals from final judgments issued by United States district courts. Just as the parties may not by consent create jurisdiction in a court that does not otherwise possess jurisdiction, the parties cannot by private agreement deprive a court of its power to hear a case in a jurisdictional sense.

The fact that the Magistrates Act allows the parties a choice of avenues for appeal further suggests that a mistake in expressing that choice does not constitute a jurisdictional defect. Thus, even when the parties elect to have the district court hear an initial appeal, the statute gives the Court of Appeals jurisdiction to use its discretion to hear an appeal from the district court's decision. 28 U.S.C. § 636(c)(5). Even under this scenario, a court of appeals still retains the power to hear an appeal, albeit later rather than sooner. Therefore,

the written consent of the parties to have an appeal of the magistrate's decision heard by the district court rather than by this Court should be assessed as a question of contractual waiver of the parties' right to appeal and not as a jurisdictional matter.

If viewed as a matter of contractual waiver of a basic legal right, it is plain that the parties' unintentional acquiescence to having the district court hear an appeal from the magistrate's decision in lieu of appeal to this Court should not be interpreted to deprive this Court of jurisdiction. Because it is clear that the parties signed the consent form by mistake and fully intended to retain their right to appeal to this Court, their relinquishment of that right cannot be viewed as a knowing and intelligent waiver. See Johnson v. Zerbst, 304 U.S. 458 (1938). Furthermore, even as a matter of contract law, the inadvertent agreement of the parties that an appeal of the magistrate's decision be to the district court rather than to this Court would be subject to reform by a court if, as is the case here, it is the product of mutual mistake. See Percival Construction Co. v. Miller & Miller Auctioneers, Inc., 532 F.2d 166 (10th Cir. 1976); Hoffa v. Fitzsimmons, 499 F. Supp. 357 (D.D.C. 1980), aff'd in part and vacated in part, 673 F.2d 1345 (D.C. Cir. 1982); Randolph v. Ottenstein, 238 F. Supp. 1011 (D.D.C. 1965).

The form on which the parties intentionally consented to have their case tried by the magistrate -- and inadvertently consented to have their appeal considered by the district court

-- is not a model of clarity. [45/] Because the parties could neither vest nor divest this Court of its power to hear this case in a jurisdictional sense, because their relinquishment of their right to appeal the magistrate's decision to this Court was not knowing and intelligent, and because this Court possesses the power to reform the parties' agreement regarding the appeal procedure to reflect their intentions since it was the product of mutual mistake, this Court possesses jurisdiction to hear this appeal.

CONCLUSION

For the reasons stated, this Court should determine that it possesses jurisdiction over this appeal and affirm the judgment entered by the magistrate for the district court.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

W. HUNT DUMONT
United States Attorney

MICHAEL F. HERTZ
PETER R. MAIER
Attorneys, Appellate Staff
Civil Division, Room 3617
Department of Justice
Washington, D.C. 20530
Telephone: (202) 633-3380

October 1983

45/ The consent form executed by the parties appears as an addendum to this brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1983, I served the foregoing Supplemental Brief Of The United States Of America, upon counsel for Appellant Jane Wharton-Thomas, by causing two copies to be mailed, postage prepaid to:

Lorraine A. DiCintio, Esquire
Ballen, Keiser & Denker
Heritage Bank Building
Broadway & Cooper Streets
Camden, New Jersey 08102

PETER R. MAIER
Attorney

29-441 O - 84 - 10

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RECEIVED
AUG - 3 1983
U.S.C.A. 3RD. CIR.

Jane Wharton-Thomas Plaintiff,

vs.

United States of America

Defendant.

Docket No. 80-1051

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above captioned civil matter hereby waive their right to proceed before a Judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of judgment.

Plaintiff

Defendant

FILED
FEB 9 1982
At 8:30 M
ANGELO W. LOCASCIO
Clerk

Any appeal shall be taken to the United States Court of Appeals for this judicial circuit, in accordance with 28 U.S.C. §636(c)(3), unless all parties further consent, by signing below, to take any appeal to the Judge of the District Court, in accordance with 28 U.S.C. §636(c)(4).

Plaintiff

Defendant

I HEREBY CERTIFY that the above foregoing is a true and correct copy of the original on file in my office.

Please return this form to the Clerk of Court(s) if it has been signed by all parties in the case.

A-1

STATUTORY APPENDIX

United States Constitution, Article III, Section 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 636

§ 636. JURISDICTION POWERS, AND TEMPORARY ASSIGNMENT

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment -

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary -

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary -

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United states magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set

forth in section 631(b)(1) and the chief judge of the district court certifies that a full time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of the court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrate to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (2) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as on an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgement.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party, stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6)The court may, for good cause shown on its own motion or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

United States Court of Appeals
for the Federal Circuit

Chambers of
Giles S. Rich
Circuit Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-6575

16 January 1984

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Hon. Robert W. Kastenmeier, Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Kastenmeier: RE: H.R. 4222

I am pleased to reply to your solicitation of my views on the provisions of the above bill which would eliminate the archaic existing requirement for "reasons of appeal" in appeals to my court from the U.S.Patent and Trademark Office (PTO), contained in 35 USC 142, 143, and 144.

It is indeed true, as you say, that I have spoken on the need to make this change in the past — the distant past. For the record, I believe my first published expression on this matter was in the case of In re LePage's Inc., 312 F.2d 455, 136 USPQ 170 (CCPA 1963), in my concurring opinion. The case was one in which the former U.S. Court of Customs and Patent Appeals, now merged into the Court of Appeals for the Federal Circuit, was forced to dismiss fully briefed and argued appeals in a trademark appeal from the then Patent Office because the attorney for appellant inadvertently failed to file reasons of appeal with his timely notice of appeal, forgetting that he was not in a Circuit Court of Appeals where no such reasons were required. My concurring opinion, with which the late Judge Arthur Smith agreed in a separate concurring opinion well worth reading, included the following:

The Statutes Should be Changed

> My main purpose in writing this opinion is to try to start some wheels turning to modernize the statutes above referred to, to bring them into conformity with existing procedures in the Patent Office and in this court so that they make sense; to conform procedure in taking appeals to this court as nearly as may be to that laid down in the Federal Rules of Civil Procedure so that lawyers need not learn two different procedures within the same Federal court system; and to put an end to the persistent raising by the Patent Office in ex

parte appeals of time-wasting procedural technicalities, of no assistance to anyone, which merely add to the burdens on us and on the bar in deciding controversies on their merits. The bar might well give thought to the desirability of legislation to this end.

You specifically wish to know whether my views remain unchanged. The concise answer is, "YES!" However, the situation has been somewhat altered in the ensuing twenty years, making amendment of Title 35 USC even more imperative, as I will explain.

After my LePages opinion, my next move was to write a bill myself to amend both the patent and trademark statutes to abolish reasons of appeal. The bill was introduced in both houses of Congress in July of 1963, first as Willis bill H.R. 7553, 88th Cong. 1st Sess., July 15, 1963, and next as McClellan S.1940, on July 25, 1963. Having launched the ship two decades ago, it has sailed the legislative timeless oceans ever since. From time to time I would hear something of its adventures. Willis and McClellan have long since departed.

To my surprise, and without any input from me, I noted that on January 2, 1975, by Public Law 93-596, people unknown to me obtained amendments to the patent and trademark statutes which (1) changed the Patent Office to the Patent and Trademark Office and at the same time (2) abolished from the trademark law (15 USC) any requirement for reasons of appeal in appeals to the CCPA from the PTO in trademark cases. This created the anomolous situation that when you appealed to the CCPA (and now to the CAFC) from the same agency you had to file reasons of appeal in a patent appeal but not in a trademark appeal. Even trademark lawyers did not appreciate that fact until after the CCPA had told them in a few opinions that they had unnecessarily filed reasons of appeal. That is the presently prevailing situation, which I am sure you will agree is ridiculous.

I note that your H.R. 4222, Sec. 4(b), contains revisions to the trademark statute, 15 USC 1071(a) (2), (3), and (4) but clearly that is for reasons other than the abolition of reasons of appeal, which is now an accomplished fact. One such reason I assume to be the change in the name of the court from the CCPA to the CAFC, or "Fed. Cir."

I thank you for the opportunity to comment and urge early action on your bill, on other aspects of which I have no comments.

With kindest personal regards,

Sincerely,

Giles S. Rich

United States Court of Appeals
for the Federal Circuit

Chambers of
Giles S. Rich
Circuit Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-6575

16 January 1984

Dear Mr. Kastenmeier,

Supplementing my letter of this date, I attach a Statement of Need which I prepared in 1963 to accompany the bills referred to in my letter. It may be of interest. Of course, the trademark statutes referred to have now been changed. There is a reference to two additional CCPA cases decided in 1963 which contain much additional information (page 5). I will add that the situation has been ameliorated because the PTO Solicitor was persuaded to stop raising the "reasons of appeal" issue. But the statute is still lurking there and should be eliminated.

Sincerely,

Giles S. Rich

PROPOSED BILL TO AMEND THE PATENT AND TRADEMARK STATUTES RE APPEAL TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS -- (CCPA)

STATEMENT OF NEED

The basic objective of this bill is to remove an antiquated procedural trap from the statutory law which wastes much legal and judicial time and often deprives litigants of a review on the merits, and that after all of the work has been done and often great expense incurred (record printed, briefs written and printed and case argued).

The specific object is to abolish the statutory requirements for "reasons of appeal," as "assignments of error" were abolished by the Federal Rules of Civil Procedure a quarter century ago in 1938.

Reasons of appeal are required in the patent statutes by 35 U.S.C. 142, 143, and 144 which prescribe the procedure for taking an appeal from various Patent Office tribunals to the CCPA. [The Trademark Act of 1946 (15 U.S.C. 1051 et seq.) formerly incorporated the patent statutes by reference but in 1963, by the so-called "housekeeping amendments," these sections were incorporated in extenso as paragraphs (2), (3), and (4) of section 21(a) (15 U.S.C. 1071(a)).] The patent and trademark statutes thus include parallel sections requiring the filing of reasons of appeal as well as the notice of appeal.

take care of in 1975

The vice of this requirement, which originated in the patent act of 1839 and has been unchanged since, is threefold. First, it is out of place in the modern world of Federal practice, being first cousin to the assignments of error which were abolished by the F.R.C.P. Secondly, Patent Office rejections frequently grow complex, if not confused, and an oversight in not referring to one out of many rejections has been fatal to many an appeal, preventing a reversal because the court has deemed itself powerless to review the rejection for lack of some "magic words" assumed to be required by statute. Thirdly, no one rightly knows what form of reasons of appeal will be accepted because the history of decisions of the CCPA on the matter is filled with inconsistencies.

But paramount is the unquestioned fact that reasons of appeal are today of no practical use whatever to the court, which derives its knowledge of the points at issue from the decision below and the briefs. The reasons must be written within 60 days from the decision appealed from and are often prepared in haste or under pressure. They tend to be frightfully repetitious and many points raised are often not argued. Briefs, on the other hand, usually involve careful analysis of the issues and set forth the points with care. Since the court gleans the real issues from the briefs, it serves no useful purpose to consider the reasons of appeal.

In the Patent Office, the solicitor does not undertake preparation of his brief and argument until after the appellant's

brief is filed so there too the reasons of appeal are of no real value. As a lawyer, however, the solicitor considers it his duty to point out what he deems to be insufficient reasons of appeal and to argue the lack of jurisdiction of the court to decide issues to which they do not specifically refer.

The existence of the statutory requirements for reasons of appeal, therefore, gives rise to a continuous stream, small but steady, of appeals in which counsel for the Patent Office or appellees raise the technical issue of insufficiency of reasons -- a question of mere formal compliance with a statutory requirement -- which must then be heard and decided. This issue never has anything to do with the merits of the case and is a great waste of time for all concerned. Therefore, the proposed bill would do away with the requirements for reasons of appeal in the above-mentioned patent and trademark statutes.

There is one matter which must be attended to, however, namely, settling on the contents of the appeal record. This necessitates the party in the position of appellee having some knowledge of the points to be argued if parts of the record are omitted. As the F.R.C.P. had to take care of this problem in Rule 75, when assignments of error were abolished, so the bill takes care of the problem in similar fashion. As written, on the basis of full knowledge of the actual practice, the provisions are believed not only to be workable but also to supply the bar with a better idea of how to procesd than do the present antiquated statutes.

It is sincerely believed that prompt passage of such a bill as is here proposed will be a great benefit to the bar, to litigants, and to the court, whose judicial resources of time and energy are being severely taxed by a great increase in the number of appeals being taken to it from the Patent Office. This increase can be appreciated from the following figures showing appeals from the Patent Office for the fiscal years shown:

Fiscal Year	Patent Appeals Docketed
1956	63
1957	82
1958	83
1959	107
1960	127
1961	126
1962	174
1963	250

Furnished herewith are copies of the opinions in the recent case of In re LePage's Inc., 136 USPQ 170 (Jan. 16, 1963), in which an appeal was dismissed because no reasons of appeal were filed, though the case was fully briefed and orally argued and the court and counsel were fully apprised of all the issues. The concurring opinion of Judge Rich relates the statutory history of the reasons of appeal requirements and describes the changes in practice which render them unnecessary. Cases illustrating the inconsistency of decision are also discussed.

A subsequent case, In re Arnold and Brandt, 137 USPQ 330 (April 25, 1963), may be added; and in the near future

opinions are expected in In re Gruschwitz and Fritz (No. 6885)[1] and In re Timmerbeil et al. (No. 6898)[2] which will further illustrate the disparity of views among the judges of the CCPA and will contain a further development of the inconsistent case history on reasons of appeal. Copies of the opinions in the last two cases will follow when they have been handed down.

Consideration of this material will demonstrate the desirability of legislation such as that proposed to remove an unnecessary impediment to the efficient operation of the judicial system, to save time and money for lawyers and litigants, and to end a great waste of judicial energy.

1/ 50 CCPA 1498; 320 F.2d 401; 138 USPQ 451 (CCPA 1963), with appendix of "reasons of appeal" cases.
2/ 50 CCPA 1514; 320 F.2d 413; 138 USPQ 461 (CCPA 1963).

[prepared by Giles S. Rich, Judge, then of the CCPA]