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SINGLE COURT OF PATENT APPEALS—A LEGISLATIVE HISTORY

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STUDY OF THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-FIFTH CONGRESS, SECOND SESSION

PURSUANT TO

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STUDY NO. 20

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FOREWORD

This study, by Margaret M. Conway of the Legislative Reference Service, Library of Congress, was prepared for the Subcommittee on Patents, Trademarks, and Copyrights as part of its study of the United States patent system, conducted pursuant to Senate Resolutions 55 and 236 of the 85th Congress. It was prepared under the supervision of John C. Stedman, associate counsel for the subcommittee, and is one of several historical digests covering important and recurring congressional proposals for amending the patent laws.

Ever since 1891, when patent appeals to the circuit courts of appeal were substituted for direct appeals to the Supreme Court, patent appellate procedure has been the target for criticism because of the delay and inconsistencies supposedly resulting from nine different jurisdictions—and subsequently, even more—reaching independent decisions on the validity of patents, despite the fact that the national reach of the patent grant makes a single uniform national decision highly desirable. While ultimate review by the Supreme Court frequently occurs, there is no assurance of such review. In any event, the existing procedure has appeared to many to be unnecessarily cumbersome, time consuming and expensive.

The solution usually proposed has been the substitution of a single court of patent appeals in place of the present procedure. Miss Conway's study reviews the efforts to achieve this objective. It shows that from the turn of the century until World War I vigorous efforts, spearheaded by the American Bar Association, were made to enact such legislation, efforts which received wide, although not unanimous, support from bar groups, individual lawyers and others. From 1919 to 1936, there was little interest in the matter. Between 1936 and World War II, it received attention again, but with wider opposition than previously. Following another period of quiescence, the issue was revived in 1956 with my introduction of S. 3744.

Whether one favors this or some other solution to the problem of multilayered reviews, conflicting decisions, and, on occasion, inadequate technical foundation on the part of judges rendering complex decisions, it is clear that we face here an issue that has not grown less with time, and which must be resolved if the patent system is to operate properly. Miss Conway's study provides us with information on this subject, in terms of the thinking and suggestions of earlier days, which should be of great value in helping one to approach the issue with understanding and wisdom.

This study is presented as a result of the work of Miss Conway for the consideration of the members of the subcommittee. It does not represent any conclusion of the subcommittee or its members.

JOSEPH C. O'MAHONEY,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, United States Senate.

DECEMBER 29, 1958.

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SINGLE COURT OF PATENT APPEALS—A LEGISLATIVE HISTORY

By Margret M. Conway (Legislative Reference Service)

INTRODUCTION

Prior to the creation of the United States Circuit Courts of Appeal in 1891, all appeals in patent cases went directly from the United States circuit courts, which had exclusive jurisdiction in the first instance, to the United States Supreme Court. Although technically a decision, even by the United States Supreme Court, holding a patent invalid is not a decision in rem invalidating the patent, but is merely an adjudication as between the parties to that particular suit, yet the effect of such a decision, with few exceptions, had been the same as if it were a judgment in rem, and when once a patent had been held invalid by the United States Supreme Court, the general public was fairly safe in thereafter disregarding the patent.

However, in time, the Supreme Court docket became so congested that cases appealed to it could not be decided until several years after being docketed. Fortunate was the patentee who could obtain a decision in 5 years; the average lapse of time became 10 years. Measured against the 17-year life of the patent, the time spent in litigation took up more than half of the exploitable life of the grant.

With their establishment in 1891, the United States circuit courts of appeals, were given final jurisdiction in all cases arising under the patent laws of the United States subject, of course, to the authority of the Supreme Court to call any case before it on certiorari. The years subsequent to the establishment of these courts of appeals demonstrated that neither the public nor the patentee was in an improved position. Since the decision of a court of appeals in any one circuit was of no binding effect in any other circuit, and the doctrine of comity was not often applied, this arrangement merely resulted, to a considerable extent, in there being nine different courts of last resort.

Over the period extending from 1900 to approximately 1918, the section of patent, trademark and copyright law of the American Bar Association consistently supported the establishment of a special court of patent appeals with jurisdiction throughout the United States. In 1918, their report shows that such advocacy was set aside in favor of other overriding considerations resulting from the war. The report for 1919 reverses the previous trend, due to lack of favorable action on the proposal by Congress.

Previous to the period during which the American Bar Association was advocating the establishment of a special court of patent appeals, eight bills had been introduced in Congress making this proposal. Two of these were reported. After 1903, another 24 bills

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were introduced, of which 3 were reported, and a number of hearings held. None of the bills introduced during this period was ever passed by either House.

Thereafter, there followed a considerable period of time during which the idea was not even brought before Congress. In 1936, companion bills were introduced in the Senate and House to establish a single court of patent appeals, and from then until the commencement of World War II there were intermittent proposals in Congress respecting the court. This resurgence of interest can in considerable measure be ascribed to awakened concern about the economic effect of patents, which was ultimately explored in the hearings and studies of the Temporary National Economic Committee.

Since World War II, the only proposal to establish a special court of patent appeals was made in the 84th Congress when Senator O'Mahoney introduced S. 3744. There was no action on this bill.

PART ONE. EARLY PROPOSALS (1887–1921)

I. BILLS AND ACTION

Although the introduction of bills to establish a court of patent appeals antedates the creation of the United States circuit courts of appeals in 1891, from that moment forward until World War I, there was a continuous interest in the introduction and support of such bills.

The accompanying table 1 gives a listing of such bills by Congress, with notation as to their principal provisions, and any action which was taken on them by either House of the Congress.

TABLE 1.—*Bills and action, 1887–1921*

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
50th Cong. (1877–89):						
S. 2141	Mr. Gorman (by request) 19 Congressional Record 1490.	A court of patent appeals of the United States, having a chief justice and 4 associate justices, appointed by the President, by and with the consent of the Senate.	Appellate jurisdiction (1) from circuit courts of the United States and from the Supreme Court of the District of Columbia in all cases touching on patents; (2) from the Commissioner of Patents on questions of patentability, priority of invention, and Patent Office practice.	To the Supreme Court in all cases except those relating to Patent Office practice.	Annual term in Washington.	
H. R. 9084	Mr. Rayner 19 Congressional Record 2618.	do	do	To Supreme Court (1) where $100,000 or more is involved; (2) where Supreme Court deems question sufficiently important to accept appeal.	(1) Notice of appeal under R. S. 4912 must be filed in Patent Office as well as court; (2) appeal is allowed under R. S. 4911; (3) R. S. 4915 is repealed.	Reported out of House Judiciary Committee (H. Rept. 3426), 19 Congressional Record 2618. Number of judges changed to a chief justice and 2 associate justices.
51st Cong. (1889–91):						
S. 1588	Mr. Gorman 21 Congressional Record 354.	A court of patent appeals of the United States, having a chief justice and 5 associate justices.	Appellate jurisdiction (1) from circuit courts of the United States and from the Supreme Court of the District of Columbia in all cases touching on patents; (2) from the Commissioner of Patents on questions of patentability, priority of invention, and Patent Office practice. Jurisdiction also extended to questions of reissue.	To Supreme Court, in all cases regardless of amount, as now exists with regard to appeals in admiralty and maritime cases.	do	

TABLE 1.—*Bills and action, 1887–1921*—Continued

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
51st Cong. (1889–91)—Con. H. R. 831	Mr. Culbertson of Texas. 21 Congressional Record 1131.	A court of patent appeals of the United States, having a chief justice and 4 associate justices, appointed by the President, by and with the consent of the Senate.	Appellate jurisdiction (1) from circuit courts of the United States and from the Supreme Court of the District of Columbia in all cases touching on patents; (2) from the Commissioner of Patents on questions of patentability, priority of invention, and Patent Office practice.	To the Supreme Court in all cases except those relating to Patent Office practice.	Annual term in Washington.	Reported out of House Judiciary Committee (H. Rept. 30), 21 Congressional Record 1370. The number of associate justices was reduced to 4.
53d Cong. (1893–95): S. 2013	Mr. Jones of Arkansas (by request). 27 Congressional Record 1093.	Court of patent appeals in the Patent Office, having a chief judge and 2 associate judges, appointed by the President, by and with consent of the Senate and holding office during good behavior.	Jurisdiction: (1) in interference cases upon declaration of Commissioner; (2) after the 2d rejection of the claims of any application for a patent or a reissue.	Final judgment appealable to the court of appeals of the District of Columbia.	No term listed; Patent Office authorized to make rules for practice before it.	
H. R. 8553	Mr. McRae. 27 Congressional Record 1092.	do	do	do	do	
55th Cong. (1897–99): S. 4256	Mr. Hansbrough. 31 Congressional Record 3277.	High court of patent, trademark, and copyright appeals, having a chief justice and 4 associate justices appointed by the President, by and with the consent of the Senate.	(1) By appeal or writ of error from final decisions in all cases arising under the patent, trademark or copyright laws (to 5 judges); (2) by appeal from interlocutory orders and decrees of courts of 1st instance (to 2 judges).	Questions and propositions of law, may be certified to the Supreme Court which may (1) determine them, or (2) order whole record brought up as if on writ of error and appeal.	Provides for repeal of the act setting up the circuit courts of appeal.	
H. R. 7083	Mr. Hicks. 31 Congressional Record 848.	Patent court of the United States, having a chief justice and 4 associate justices.	Interferences which have been certified to the court by the Commissioner after having gone through administrative procedure of the Patent Office.			

56th Cong. (1899–1901):					
S. 1883	Mr. Hansbrough 33 Congressional Record 579.	High court of patent, trademark and copyright appeals, having a chief justice and 4 associate justices appointed by the President by and with the consent of the Senate.	(1) By appeal or writ of error from final decisions in all cases arising under the patent, trademark or copyright laws (to 5 judges); (2) by appeal from interlocutory orders and decrees of courts of 1st instance (to 2 judges).	Questions and propositions of law may be certified to the Supreme Court which may (1) determine them, or (2) order whole record brought up as if on writ of error or appeal.	Provides for repeal of the act setting up the circuit courts of of appeal.
H. R. 5294	Mr. Sulzer 33 Congressional Record 659.	do	do	do	do
58th Cong. (1903–5):					
S. 2632	Mr. Platt of Connecticut 38 Congressional Record 237.	Court of patent appeals, having a chief justice and 4 associate justices, appointed by the President, by and with the consent of the Senate.	(1) Original jurisdiction: suits in equity for infringement, where cause has accrued less than 6 years prior to filing bill. (2) Appellate jurisdiction: (*a*) all other infringement actions; (*b*) suits brought by the United States seeking cancellation of letters patent; (*c*) from final decisions of the Patent Office in all ex parte and inter partes cases.	Questions and propositions of law may be certified to the Supreme Court which may (1) determine them, or (2) order up the whole record on certiorari.	Allows appeals and writs of error to this court from the courts of the Indian Territory and from the Supreme Court of the District of Columbia.
H. R. 10769	Mr. Currier 38 Congressional Record 1011.	do	do	do	do
S. 4656	Mr. Platt of Connecticut 38 Congressional Record 2530.	do	Appellate jurisdiction: (1) infringement cases; (2) suits brought by the United States seeking cancellation of letters patent.	do	do
H. R. 13087	Mr. Otis 38 Congressional Record 2451.	do	do	do	do

TABLE 1.—*Bills and action, 1887–1921*—Continued

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
58th Cong. (1903–5)—Con. H. R. 9296	Mr. Sherman 38 Congressional Record 568.	United States Court of Patent Appeals, having 7 judges, of whom the president judge shall be appointed by the President, by and with the advice and consent of the Senate; and the other 6 shall be appointed, 2 every 2d year, by the Chief Justice from the circuit court judges, for terms of 6 years each.	(1) Original jurisdiction: suits brought by the United States to annul or change letters patent. (2) Appellate jurisdiction: (*a*) from final judgments and decrees of circuit courts of the United States relating to patents; (*b*) from the Commissioner of Patents in cases, including interferences, arising under the patent laws of the United States.	The Supreme Court may review final decisions of this court, by certiorari or otherwise.		
59th Cong. (1905–7): S. 1693	Mr. Kittredge 40 Congressional Record 385.	A court of patent appeals, having a presiding justice and 4 associate justices, appointed by the President, by and with the advice and consent of the Senate.	Appellate jurisdiction by appeal or writ of error from final decisions of: (1) circuit and other United States courts including Territorial courts of first instance; (2) in all cases involving the validity or infringement of letters patent in the Supreme Court of the District of Columbia; (3) in suits brought by the United States seeking cancellation of a patent.	Questions may be certified to the Supreme Court and the latter may either determine them, or require the whole record to be sent up for review and determination.		
H. R. 8458	Mr. Currier 40 Congressional Record 481.	do	do	do		

S. 3517	Mr. Beveridge 40 Congressional Record 1347.	United States Court of Patent Appeals, having 7 judges, of whom the president judge shall be appointed by the President, by and with the consent of the Senate; and the other 6 shall be appointed, 2 every 2d year, by the Chief Justice from the circuit courts for terms of 6 years each.	(1) Original jurisdiction: Suits brought by the United States to annul or change letters patent. (2) Appellate jurisdiction: (*a*) from final judgments and decrees relating to patents, in the circuit courts of the United States; (*b*) from the Commissioner of Patents in cases, including interferences, arising under the patent laws of the United States.	The Supreme Court, may review final decisions of this court, by certiorari or otherwise.		
H. R. 12470	Mr. Gilbert of Indiana 40 Congressional Record 1300.	do	do	do		
60th Cong. (1907–9):						
S. 3161	Mr. Beveridge 42 Congressional Record 500.	United States Court of Patent Appeals, having 5 judges, of whom the president judge shall be appointed by the President by and with the advice and consent of the Senate; and the associate justices shall be designated, 2 every 3d year, from the circuit and district judges of the United States.	Appellate jurisdiction from final decisions: (1) in the circuit courts in cases arising under the patent laws; (2) in any other court having jurisdiction by statute over patent cases. The court shall have no jurisdiction over patent cases arising in the Court of Claims.	The Supreme Court, by certiorari or otherwise, may require any case to be sent up to it for review and determination.		
H. R. 14047	Mr. Overstreet 42 Congressional Record 811.	do	do	do		Reported out of House Patents Committee (H. Rept. 1415), 42 Congressional Record 4571. The designation "president judge" was changed to "chief justice."

TABLE 1.—*Bills and action, 1887–1921*—Continued

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
60th Cong. (1907–9)—Con.						
H. R. 19466	Mr. Harrison 42 Congressional Record 3548.	A court of patent appeals, having 5 justices (a presiding justice and 4 associates) appointed by the President, by and with the consent of the Senate.	Appellate jurisdiction by appeal or writ of error from final decision: (1) in circuit or other United States courts, including Territorial courts having jurisdiction of patent questions; (2) the Supreme Court of the District of Columbia in questions involving patent validity or infringement.	Questions may be certified to the Supreme Court, which may either determine them or require the whole record to be sent up for review and determination.		
H. R. 20386	Mr. Chaney 42 Congressional Record 4453.	A court of patent appeals, having 5 judges of whom the president judge shall be appointed by the President of the United States by and with the consent of the Senate, and the 4 other judges appointed by the Chief Justice of the United States, from among the circuit judges of the United States, for terms of 6 years, 2 being designated every 3d year.	Appellate jurisdiction: (1) by appeal or writ of error from final judgment and decrees in the circuit courts of the United States in cases arising under the patent laws; (2) in appeals from interlocutory decrees of the circuit courts or other courts of first instance arising out of the patent cases. No jurisdiction is given over cases arising in the Court of Claims.	The Supreme Court may require, by certiorari or otherwise, any case to be certified to it for review and determination.		
H. R. 21455	Mr. Currier 42 Congressional Record 5509.	United States Court of Patent Appeals, having 5 judges. The chief justice shall be appointed by the President by and with the advice and consent of the Senate; and the other 4 judges by the Chief Justice of the United States from the circuit judges for terms of 6 years, 2 being designated every 3d year.	do	do		Reported by the House Judiciary Committee (H. Rept. 2145), 42 Congressional Record 2336. The designation "chief justice" was changed to "president judge".

61st Cong. (1909–11):						
S. 4982	Mr. Beveridge 45 Congressional Record 458.	do Nominations by chief justice were to be from among circuit and district judges	do	do		Reported by Senate Patent Committee (S. Rept. 296), 45 Congressional Record 2486. The amendments related to salaries. The bill was passed over in the Senate, 45 Congressional Record 2950.
H. R. 14622	Mr. Currier 45 Congressional Record 141.	do	do	do		
62d Cong. (1911–13):						
H. R. 9843	Mr. Sulzer 47 Congressional Record 1353.	do	do	do		Reference changed to Committee on the Judiciary, 48 Congressional Record 905.
H. R. 26277	Mr. Sulzer 48 Congressional Record 10955.	do	do	do		
65th Cong. (1917–19):						
S. 4	Mr. Owen 55 Congressional Record 188.	do	do	do		
H. R. 5011	Mr. Charles B. Smith 55 Congressional Record 3589.	United States Court of Patent Appeals, having 7 judges; a chief justice appointed by the President by and with the consent of the Senate, and the 6 associate justices appointed by the Chief Justice of the United States, 2 every 3d year.				
66th Cong. (1919–21):						
S. 818	Mr. Owen 58 Congressional Record 235.	United States Court of Patent Appeals, having 5 judges, appointed as in previous bills.	do	do		
H. R. 5012	Mr. Nolan 58 Congressional Record 720.	do	do	do		

II. HEARINGS

A. FIFTY-NINTH CONGRESS (1905–07)

1. H. R. 12470 (GILBERT OF INDIANA)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the president judge shall be appointed by the President with the advice and consent of the Senate, and the other six judges shall be designated every second year by the Chief Justice of the United States from the circuit courts for terms of 6 years each.

Gives the court (1) original jurisdiction of suits brought by the United States to annul or change letters patent, and (2) appellate jurisdiction (*a*) from final judgments and decrees in the circuit courts of the United States relating to patents, and (*b*) from the Commissioner of Patents in cases, including interferences, arising under laws of the United States. Review by the Supreme Court, by certiorari or otherwise, is provided for.

b. Hearings and testimony

A hearing was held on H. R. 12470 before the House Committee on Patents on April 25 and May 2, 1906.[1] Witnesses appearing in person included Judge Taylor, of Fort Wayne, Ind., on behalf of the American Bar Association, and Mr. Melville Church, on behalf of the Washington Patent Law Association. Short statements from the Chicago and Boston Bar Associations were also made part of the record.

(1) *Hon. Robert S. Taylor*, Fort Wayne, Ind., appearing as chairman of the Committee on Patents, Trademarks and Copyrights of the American Bar Association:[2]

He identified the bill which was receiving the support of the American Bar Association as H. R. 12470. He continued:

> The action proposed is of fundamental and far-reaching importance. To create such a court as is provided for in this bill adds a new department to the Government of the United States, and one which, when created, we may presume will stand forever. It is one of transcendent importance.

He went on to show how the nine circuit courts of appeal were creating conflicts, not out of varying interpretations of the patent law, but out of conflicts of judgment on the validity of the patent itself. And since this arose from a view of mechanics rather than law, a single court would aid considerably in preventing confusion with reference to the patentee's rights.

Judge Taylor appended to his statement the argument of the American Bar Association in support of the Patent Court of Appeals. Among other things, it stated:

> There should be one court of appeals in patent matters, because each patent covers the whole United States, and a suit on it is in reality a suit between the patentee and all the people of the United States, the issue being the right of the patentee to exclude the public for a time from the use, without his consent, of the thing patented or alleged to be patented. When brought into litigation, the

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[1] U. S. Congress, House Committee on Patents. Hearing on H. R. 12470, April 25 and May 2, 1906.

[2] Unless otherwise indicated, statements of witnesses and others hereinafter set forth are summaries or digests, not verbatim statements. Direct quotes are set off by use of smaller type.

patent should be dealt with once and for all by an appellate court, whose conclusions would be binding upon the courts and people of the whole United States. It is only in this way that the patentee and the public generally can become assured of the extent and limitation of their respective rights. Moreover, all patents should be dealt with not only in accordance with the same rules of law, but with the same spirit and from the same point of view, and this is possible only when as to all patent questions, there is a single court of last resort.

(2) *Melville Church*, representing the Washington Patent Law Association:

He stated that he was in sympathy with Judge Taylor's bill and that he agreed that there should be a court of patent appeals, but he advocated what he believed to be a better specific method, namely, that contained in H. R. 15077 to enlarge the jurisdiction of the present court of appeals of the District of Columbia. His objections to Judge Taylor's bill may be summarized as follows:

a. There seems to be opposition among the judges to the plan of being rotated out of the circuits into this court of patent appeals and then back home.

b. The bill results in a depletion of good patent judges in the respective circuits from which these judges are proposed to be brought into the court of patent appeals.

c. The ABA bill provides for the designation of judges by the Chief Justice of the United States Supreme Court. The Chief Justice is not necessarily well qualified to decide who are the best patent judges in the country.

d. If the best patent judges were not sent to this court of patent appeals, we would have a court which was not composed of strong patent judges, judges deeply impregnated with the mysteries of that particular branch of jurisprudence, but a court in which we would be constantly educating judges in the patent law—a patent law kindergarten.

(3) Statement of the *Boston Patent Lawyers*, signed by *W. A. Richardson.*

This statement, included in the published hearing for April 25, 1906, stated objections to the creation of a court of patent appeals, which may be summarized as follows:

a. Expense to litigants.—Infringement suits are brought in the district in which the defendant is an inhabitant or has his place of business. It is then appealed to a localized circuit court of appeals, established under the 1891 act. Under this bill, the appeal would have to be taken to Washington, a considerable increase in cost over present procedure.

b. Unsatisfactory character of proposed tribunals.—One bill which has just been proposed is to enlarge the present court of appeals of the District of Columbia and give it jurisdiction of patent appeals. A second bill provides for the appointment of a special court of permanent judges at great expense to the United States. Both these bills are highly objectionable for the reason that such courts, dealing year after year mainly or exclusively with patent cases, yearly become narrower and more technical. Such a court must be heartily opposed by any thinking lawyer.

c. Satisfactory character of the present courts.—No substantial reason has been advanced for taking away patent appeals from the

present tribunals except the cry of "conflict" between the different appellate courts as to patents. In the first place, any such conflict can be remedied by the Supreme Court calling up the case on certiorari, and such provision was made in the appeals act for the express purpose of determining a conflict. In the second place, the instances of differences of opinion between the appellate courts in 14 years can be counted on your fingers, and I know of my own knowledge that in most of the cases the difference was apparent rather than real, there being new evidence introduced before the second tribunal which changed the results.

d. Reasons actuating the promotors of this bill.—The proposal for this legislation was largely due to discontent of patent lawyers with the circuit court of appeals in the seventh circuit during the lifetime of Judge Woods. The strongest backing that the bill really has comes from an association of Washington attorneys, and it is obvious that any of the proposed bills would be in their interest, since local counsel would not be able to go to Washington to attend all motions in the court of appeals, and would be obliged to hire a Washington attorney to look after such matters, as was the case while appeals went to the Supreme Court.

B. SIXTIETH CONGRESS (1907-09)

1. H. R. 14047 (OVERSTREET)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the president judge shall be appointed by the President with the advice and consent of the Senate, and the four associate justices designated by the Supreme Court from the circuit and district judges for terms of 6 years.

Gives the court jurisdiction of appeals from all final decisions (1) in the circuit courts in cases arising under the patent laws, or (2) in any other court, except the Court of Claims, having jurisdiction by law over patent cases

Review by the Supreme Court, by certiorari or otherwise, was provided for.

b. Hearings and testimony

A hearing was held both on H. R. 14047, to create a court of patent appeals, and on H. R. 16650, to amend the law of patent designs, by the House Committee on Patents on March 18, 1908.[3] Witnesses on behalf of H. R. 14047 included Mr. Stuart; Mr. Frederick P. Fish and Mr. Edson, on behalf of the American Bar Association; Mr. Wetmore, on behalf of the New York Bar Association; and others representing the Patent Law Association of Washington.

(1) *Frederick P. Fish*, of Boston, representing the American Bar Association:

> Under the Circuit Court of Appeals Act, passed in 1891, nine circuit courts of appeal were established, composed of the district and circuit judges within the respective circuits. Patents were not among the cases which might be appealed as of right from a circuit court of appeals decision to the Supreme Court. When a patent comes before such a circuit court of appeals, no other

[3] U. S. Congress, House Committee on Patents. Hearings on H. R. 14047 and H. R. 16650, March 18, 1908.

court is bound by that adjudication, except as between the particular parties and their privies. Suits may be brought for violations in the eight other circuits, and differing decisions rendered. The 17 years of the patent right run out very quickly. Moreover, the Supreme Court has held, in *Kessler* v. *Eldred* (206 U. S. 285) that where a patent is sustained in one circuit and held invalid in another, the manufacturer in the latter may send his goods with impunity into the former, although if he made them in that circuit he would be an infringer. The best thing would be to restore the appeal by right to the Supreme Court.

However, that is not likely to be done. A single court of patent appeals is the preferable solution. When a patent has been fought through the courts and to the court of appeals, every court in the United States would be bound by the decision of that court. If the patentee is defeated, he will know it is useless for him to start in to sue other people. The American Bar Association has been considering this matter for 10 years. Personally I would prefer 7 judges, but 5 is an adequate number. Under the proposed system the judges will come from different parts of the country and will sit on the appellate bench for at least 6 years—for 12 years, perhaps—that is in the discretion of the Supreme Court. After that term, these judges will go back to their circuit *trained patent judges* [italics are Mr. Fish's], and in the course of time by the operation of this bill we shall have a good patent judge in every circuit in the United States. Following the enactment of this law, in my judgment, two things will happen: there will be a diminution in the unnecessary and cruel litigation and multiplication of trials on the same patent, and there will be an increase of litigation of a healthy kind, for men will not dread so much seeking to have their rights established.

(2) *Edmund Wetmore*, representing the New York Bar Association, stated:

Our system is to secure the right to exclusive profits to the inventor for 17 years in order to assure the dedication of the patent to the public at large at the end of that period. Now, that being the system under which we have gone up to the present time, the one great thing that we desire and must have in the administration of the law, to round it out and perfect it as it should be, is uniformity of decisions. This, a single court of patent appeals will supply. There is no better way of securing a court in which absolute confidence may be placed than by selecting its judges from those who have already been tried upon the bench and who are occupying the honorable position of a circuit judge or district judge of the United States. Further, their appointment is for only a short term. If they do not show aptitude, they need not be reassigned. I also agree that the bench should contain seven members. I do not see that continuing in office as judge of the circuit court or district court while he is serving on the court of patent appeals will greatly impede the work of the latter court. He will be free to sign orders, etc., of his circuit or district court, but his main work will be on the patent court.

(3) *Thomas J. Johnson*, a patent attorney of New York City, appeared in opposition to the bill:

This business of the judges holding their offices for a specified length of time has never yet appeared as a provision in any bill affecting the judiciary of the United States. I believe that it offends the Constitution. Further, I do not believe this bill is expedient. There is not enough litigation to warrant a separate court on that ground, and there are able patent judges in the circuits who are handling the matter sufficiently well already.

(4) *S. T. Fisher*, representing the Washington Patent Law Association, stated:

I would like to say a word about the constitutionality question. The service of the judges on the patent court of appeals is by designation, not by appointment, and their life offices are expressly not vacated.

(5) *James I. Kay*, of Pittsburgh, stated:

Contact with many of the patent lawyers and judges has led me to believe that it would be wiser to have a permanent court, so that we should have permanency of decision. Further, we have noted that most of the patent cases

have arisen in districts where the dockets are crowded anyway. This will limit the selection of judges to the circuits that are less busy, and also have less patent litigation to begin with.

c. Further action

The bill was reported out of the House Committee on Patents on April 6, 1908, without amendment (H. Rept. 1415, 60th Cong). The report recommended that if the proposal was acceptable, the bill be referred to the Committee on the Judiciary. Significant comments in the report include the following:

In brief, the purpose of the bill is to establish what we had prior to 1891—a single court of last resort in patent causes. Prior to the passage of the circuit court of appeals bill in 1891 the circuit courts of the United States had jurisdiction of patent causes, and from the decisions of these courts there was an appeal to the Supreme Court of the United States, so that we had ultimately a single tribunal dealing with patent causes, thus giving us uniformity of decisions. The Circuit Court of Appeals Act of 1891 eliminated the right of appeal to the Supreme Court, and that court has jurisdiction to hear a patent cause only on certiorari.

In view of the fact that the Supreme Court was burdened and seldom allowed certiorari, the consequence was that the courts of appeals decisions governed. And these often were in conflict with each other.

The report went on to say:

The court created by this bill, which is a new departure in judicial acts, is believed by nearly all those who have given the most attention to this question to be the best practical method of dealing with this matter, and the bill has the endorsement of the American Bar Association and of the Association of the Bar of the City of New York * * * Judge Taylor, in speaking of this proposed court, says [that its system of designation of judges] gives us a selection of judges without parallel and would be superior in the decision of causes in a patent court to any court that ever sat in the world.

2. H. R. 21455 (CURRIER)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the chief justice of said court shall be appointed by the President of the United States by and with the advice and consent of the Senate, and the 4 associate judges shall be designated by the Chief Justice of the Supreme Court from among the circuit and district judges to serve for periods of 6 years.

Gives the court jurisdiction of appeals from all final decisions (1) in the circuit courts in cases arising under the patent laws, or (2) in any other court, except the Court of Claims, having jurisdiction by law over patent cases.

Provides for review by the United States Supreme Court of decisions of the Court of Patent Appeals, by certiorari or otherwise.

b. Hearings and testimony

A hearing was held on H. R. 21455, by the House Judiciary Committee.[4] Witnesses included Mr. Taylor, Mr. Frederick P. Fish of Boston, and Mr. Joseph Edson, for the American Bar Association. A statement by Mr. Edmund Wetmore on behalf of the New York Bar Association was also included in the record.

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[4] U. S. Congress, House Committee on the Judiciary. Hearings on H. R. 21455, January 5, 1909.

(1) *Hon. Robert S. Taylor*, Fort Wayne, Ind., representing the American Bar Association, reviewed the background of the bill:

I will say historically that the movement out of which this bill originated began in the patent section of the American Bar Association in 1890. The subject was considered in that section for 2 years. In 1892 a report was made upon it to the full association, and the standing committee on patents, trademarks, and copyright law was directed to frame and report a bill, and at the next meeting of the association that was done. The bill, as reported by the committee, was considered, discussed, and approved, and the committee was directed to use its efforts to secure its passage as a law. It was introduced and has been pending in 2 Congresses prior to this one, and so has been before Congress for 6 years. It has been reported upon each year to the American Bar Association. The reports of the committee have been approved from time to time, and it has been directed to continue its efforts to secure the passage of the bill.

Judge Taylor also noted that the bill had the endorsement, not only of the American Bar Association, but also of the Washington Patent Law Association, the Patent Law Association of Chicago, and the Bar Association of New York, as well as the approval of a very large number of Federal judges and other lawyers.

He also testified respecting the constitutionality of the law:

No objection to it on this ground has been made, so far as I am aware, except in respect to the designation of circuit and district judges in it. It has been suggested that, as it is a new court, there must be new judges created to sit in it, and that this can only be by the President's appointment and confirmation by the Senate; also that the designation of these judges for limited periods of time will be a violation of the Constitution that all Federal judges shall hold office during good behavior; and further, that the diminution in the compensation of the judges when they retire from the Court of Patent Appeals to the work of their circuits and districts, which the bill contemplates, will be a violation of the provision of the Constitution forbidding the reduction of the salary of a judge.

Judge Taylor's rebuttal to these arguments was as follows:

They [the judges of the Patent Court of Appeals] will continue to be circuit judges and district judges during their service in the Court of Patent Appeals, just as they do during their service in the United States circuit courts of appeals. They will draw their salaries as circuit judges and district judges, just as they do while sitting in the circuit courts of appeals, plus such additional sums as will make their total compensation, while serving in the Court of Patent Appeals, $11,500 a year. These additional sums will not be part of their salaries as circuit judges and district judges, but extra compensation for extra service. It is provided in section 5 that when they retire under the law after reaching the age of 70 they shall receive the pensions of circuit judges and district judges. All this is by their own consent—the extra work, the extra pay, and the retiring allowance. * * * Congress has repeatedly exercised authority to put upon a judge with his consent work additional to that within the scope of his regular official duty and to pay him an extra compensation for that extra work.

(2) *Frederick P. Fish* of Boston appeared in association with Judge Taylor. He pointed out how great was the amount of patent litigation generally throughout the country and particularly in the second circuit and how the establishment of this new court would expedite its disposition. He also remarked that the bill should carefully specify that the associate judges were "designated" rather than "appointed."

(3) *Arthur Stuart*, Baltimore, Md., submitted a brief in behalf of the constitutionality of the court.

(4) *Joseph Edson*, Washington, D. C., submitted various letters from district and circuit judges favoring the establishment of a Court of Patent Appeals; a resolution by the Denver Bar Associa-

tion favoring the court; and a table showing the total number of cases disposed of by circuit courts of appeals from 1893 to 1906, inclusive. He further stated that the Commissioner of Patents had informed him that 52 or 53 percent of the work in the Court of Appeals, District of Columbia, was patent work.

(5) *Edmund Wetmore's* testimony was a reprint of that which he had previously given before the House Patents Committee on H. R. 14047.

c. Further action

H. R. 21455 was reported out of the House Committee on the Judiciary on February 13, 1909, with amendments changing the salaries payable (H. Rept. 2145, 60th Cong.). The report reviewed the necessity for the legislation and commented on its constitutionality as follows:

> Some question has arisen with reference to the constitutionality of the plan involving the transfer from circuit and district courts of judges to the Court of Patent Appeals and the payment to those judges while sitting upon the Court of Patent Appeals of an additional compensation over and above that which they receive as their regular compensation as circuit or district judges and the retirement of these same judges upon their circuit or district salaries without regard to their extra compensation. A case so closely analogous to this one as to make us feel that it puts this question finally at rest was before the Supreme Court of the United States in *Benedict* v. *United States* (176 U. S. 357). In this case the Supreme Court decided that it was entirely competent and proper for Congress to pass an act providing for the payment of an extra salary to a circuit or district judge whenever the extra compensation was "extra pay for extra work performed, for particular as distinguished from continuous service."

C. 61ST CONGRESS (1909–11)

1. H. R. 14622 (CURRIER)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the chief justice thereof shall be appointed by the President, by and with the consent of the Senate, and the 4 associate justices shall be designated, with their consent, by the Chief Justice of the United States from among the circuit and district judges to serve for terms of 6 years.

Gives the court appellate jurisdiction from final judgment and decrees in the circuit courts of the United States in cases arising under the patent laws, and also from interlocutory decrees of the circuit courts or other courts of first instance, except the Court of Claims, in cases arising out of the patent laws.

Provides for review by the Supreme Court, by certiorari or otherwise.

b. Hearings and testimony

A hearing was held by the Committee on the Judiciary on January 27, 1910, on H. R. 14622.[5] Witnesses on behalf of H.R. 14622 included Judge Robert Stewart Taylor, representing the American Bar Association, Mr. T. C. Pool, of the Chicago Patent Bar Association, and Messrs. Stuart, of Baltimore, Edson, and S. T. Fisher.

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[5] U. S. Congress, House Committee on the Judiciary. Hearings on H. R. 14622, January 27, 1910.

(1) *Hon. Robert S. Taylor*, of Gary, Ind., representing the American Bar Association:

This bill has been pending before the previous three Congresses. It was introduced by Representative Currier, the chairman of the Committee on Patents, in the same form as approved by that committee last year, in the hope that further consideration by the committee would be obviated, and that the Judiciary Committee would have time to give it favorable consideration.

He then repeated much of the material presented in previous hearings about the necessity of uniformity of decision, and the difficulties then existent with divergent opinions arising in the various courts of appeal. Representative Carlin asked why a totally new court would not be the preferable idea, and Judge Taylor replied:

It has been pretty thoroughly discussed * * * It is because a new court appointed by the President would almost inevitably and necessarily be selected from among practicing patent lawyers; and as a practitioner myself in that line for many years, it is my opinion, as it is the opinion of many others, that they are not fit to be there. The man to be a judge of any court ought to be a man of the broadest preparation; he ought to be a man of large foundations in the knowledge of the law * * * a knowledge of the law which he can get nowhere else in the United States so well as by service on the United States bench.

(2) *Mr. Dodge* testified jointly with *Mr. T. C. Pool*, of the Chicago Patent Bar Association.

In an interchange of questions and answers between Representative Carlin and Mr. Dodge, the following interesting point was developed:

Mr. CARLIN. * * * If you had a court of appeals in the Patent Office, created as the bill creating the commission for interstate commerce matters creates that commission—a court where a patent could be taken immediately at the time of its granting, and where its validity could be determined—would not that be better than leaving this question to the various courts?

Mr. DODGE. I think that would not be, for the simple reason that there might not, and probably would not, be anybody interested in investigating the matter.

Mr. CARLIN. Does not the Patent Office always put such a case in interference?

Mr. DODGE. An interference is where there are two applicants for the patent, and that would not apply at all in the case of an infringement * * * In infringement cases, where there is a party who lays no claim whatever to the invention, that is a different matter. Infringing patents are granted right along; they are granted for the differences that come between the old patent and improvements. Every machine—every line of machinery—is made up of a series of accretions made from time to time.

(3) *Arthur Stuart*, Baltimore, Md., stated:

The American Bar Association, the Bar Association of the State of New York, the Bar Association of Chicago, and the Patent Law Association of Washington, D. C., have all endorsed the bill.

(4) *S. T. Fisher*, stated:

The main reason for this bill is to have a single court of final jurisdiction, and if we could just in every case get one decision which should extend all over the country and be binding on every circuit, in ninety-nine cases out of a hundred that would be all that was needed.

2. S. 4982 (BEVERIDGE)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the chief justice thereof shall be appointed by the President, by and with the consent of the Senate, and the four associate justices shall be designated with their consent by the Chief

Justice of the United States, from among the circuit and district judges for terms of 6 years.

Gives the court appellate jurisdiction from final judgments and decrees in the circuit courts of the United States in cases arising under the patent laws, and also from interlocutory decrees of the circuit courts or other courts of first instance in cases arising out of the patent laws.

Provides for review by the Supreme Court, by certiorari or otherwise.

b. Report on the bill

S. 4982 was reported out of the Committee on Patents on February 28, 1910, with several minor amendments chiefly relating to salaries.[6] The bill was passed over in the Senate.[7]

The report covered three main topics: (1) the need of the proposed court, (2) the personnel of the proposed court, and (3) the constitutionality of the proposed court.

The need of the bill was emphasized by the fact that the nine circuit courts of appeal have exercised their jurisdiction (since their establishment in 1891) as courts of last resort in litigation over general matters without the confusion and uncertainty that has attended patent litigation. This has been true because, as a general proposition, a decision in litigation of this sort has been final and binding with respect to the parties to the suit and to the subject matter involved. In patent cases the reverse has been true, because a patent right is coextensive with the United States, and yet it is the subject of determination by nine different courts of last resort, no one of which is bound by the other.

The proposal for selecting the personnel of the court was commented on:

> The plan of selecting the judges suggests that the public will have the benefit of the wisdom, first, of the President in nominating and the Senate in confirming those now on the Federal bench, and second, of the Chief Justice of the Supreme Court who is officially advised of the abilities and qualifications of the Federal judges designated by him to sit as judges of the new court. * * * The suggestion that the four associate judges should be chosen from the bar whose specialty has been patent litigation is resisted with great emphasis by the ablest patent lawyers in the country. Their argument is that judges of the proposed court should be first and primarily great lawyers, well versed and trained in the general law, its principles and their application; that lawyers who may be experts in patent matters may be deficient in that broader understanding of the underlying and basic principles so essential to the efficient dispensation of justice. * * *

And finally, although the question of the bill's constitutionality had not been seriously questioned, the following reasons in support of it were advanced:

> (1) As to the power granted to the Chief Justice to designate justices for the court being a contradiction of article II, clause 2, section 2, a careful reading of that provision shows that the Supreme Court judges are the only court officers who must be appointed by the President. Congress is given the power to vest the appointing power of any other judge of any other court in the courts themselves.
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> (2) As to the statement that the increase in salary to be given temporarily to a Federal judge while serving on the Court of Patent Appeals and its withdrawal

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[6] S. Rept. No. 296, 61st Cong.
[7] 45 Congressional Record 2950.

when he returns to his district or circuit bench being in contravention of article III, section 1, of the Constitution, extra allowances may be made to judges for special services, without violating this provision of the Constitution; and this temporary increase in compensation is such a temporary allowance.

D. SIXTY-SECOND CONGRESS (1911–13)

1. H. R. 26277 (SULZER)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the chief justice thereof shall be appointed by the President, by and with the consent of the Senate, and the four associate justices shall be designated, with their consent, by the Chief Justice of the United States from among the circuit and district judges to serve for terms of 6 years.

Gives the court appellate jurisdiction from final judgment and decrees in the circuit courts of the United States in cases arising under the patent laws, and also from interlocutory decrees of the circuit courts or other courts of first instance, except the Court of Claims, in cases arising out of the patent laws.

Provides for review by the Supreme Court, by certiorari or otherwise.

b. Hearings and testimony

A hearing before the House Committee on the Judiciary was held on December 6, 1912, on H.R. 26277.[8] Among the witnesses were Mr. Charles F. MacLean, Mr. Charles C. Copeland, and Mr. Frank S. Gardner, of the New York Board of Trade and Transportation, and Mr. James T. Haile, secretary of the Manufacturers' Association of New York. Various reports and letters endorsing the bill were also included in the printed hearings.

(1) *Charles F. MacLean*, New York Board of Trade and Transportation, pointed out that the bill was drawn before the law doing away with the circuit court as it formerly existed went into effect in 1912 and assumed that technical amendments would be made to the bill to this effect. He also stated that persons who have interested themselves in this bill—especially members of the Board of Trade and Transportation of New York—are of the opinion that the persons appointed as judges of this court should be persons selected with reference to their special qualifications for such a judiciary. With such special qualification, it is consonant that their salaries be higher than other judicial salaries. As for the objection that a court sitting in Washington would create hardship as to the attendance of witnesses, there is no justification for this objection since evidence in patent cases is taken by deposition and there is no jury trial. As for deferring institution of a particular reform—to wit, solution of the problems attending patent litigation by creation of a court to be occupied solely with this special class of cases—until the whole court procedure has been reformed, that is contrary to experience in these matters. Reform is always sporadic.

(2) *Charles C. Copeland*, chairman of the committee on the Court of Patent Appeals, New York Board of Trade and Transportation,

[8] U. S. Congress, House Committee on the Judiciary. Hearings on H. R. 26277, December 6, 1912.

mentioned that the Sulzer bill had been endorsed by the National Manufacturers' Association, the New York Board of Trade and Transportation, and the Manufacturers' Association of New York. He also offered an extract from the letter of Mr. S. O. Edmonds, New York City, showing that the New York County Lawyers' Association had approved the Sulzer bill, and also introduced other letters of endorsement from Judge Taylor of Fort Wayne, Ind., for the American Bar Association and Mr. Henry Houston Kenyon of New York; Mr. Charles C. Bullsley of Chicago; and Mr. Arthur L. Morsell of Milwaukee.

The following interchange took place between Representative Beall and Mr. Copeland:

Mr. BEALL. The idea is, that the appeal shall go directly from the trial court to this Court of Patent Appeals.

Mr. COPELAND. Yes, sir.

Mr. BEALL. And further, if necessary, to the Supreme Court of the United States?

Mr. COPELAND. Yes, sir; under certain conditions.

(3) *Frank S. Gardner*, secretary of the New York Board of Trade and Transportation, introduced the report of the special committee on the patent court of appeals, endorsing the Sulzer bill. The report, after a short review of past activities by other organizations and past proposals in Congress, stated:

We * * * therefore recommend that this board unqualifiedly endorse the proposition to create such a court and urge the passage of the pending bill H. R. 9843, introduced by Mr. Sulzer. We further recommend that this committee, in cooperation with the officers of the board, be authorized to take steps to promote the creation of such court.

(4) *James I. Haile*, secretary of the Manufacturers' Association of New York, stated:

I believe that with the consensus of opinion upon the part of lawyers admitting the necessity for this court, they being learned in the law, and we laymen, we ordinary, practical businessmen, being the sufferers, as has been shown * * *, this bill should be passed.

(5) *Endorsements* of the bill were printed in the hearings from the committee on patents, National Association of Manufacturers; the New Haven Chamber of Commerce; the Rockford Manufacturers' and Shippers' Association; the Watertown Chamber of Commerce; the Chester Board of Trade; the Toledo Commerce Club; the Philadelphia Board of Trade; the Spokane Chamber of Commerce; the Civic Commission of the Moline Club, Moline, Ill.; the Manufacturers' Association of Seattle; the Paducah Board of Trade; and the Chambers of Commerce of Buffalo; Hamilton, Ohio; Cincinnati; Dayton; Flint, Mich.; Trenton; New Orleans; Detroit; and others.

E. SIXTY-SIXTH CONGRESS (1919–21)

H. R. 5012 (NOLAN)

a. Provisions

Establishes a United States Court of Patent Appeals.

Provides that the chief justice shall be appointed by the President, by and with the consent of the Senate, and the other four judges shall be designated with their consent, by the Chief Justice of the United States from the circuit and district judges for terms of 6 years, 2 to be designated every third year.

Jurisdiction is given by appeal or writ of error from final judgments and decrees in the circuit courts of the United States in cases arising under the law of patents, and also in appeals from interlocutory decrees of the circuit courts or other courts of first instance arising out of patent cases.

The Supreme Court may permit, by certiorari or otherwise, any case to be certified to it for review and determination.

b. Hearings and testimony

Hearings were held before the Committee on Patents on July 9, 10, 11, 12, 17, 18, 24, and 30, 1919, on three bills, H.R. 5011 to establish the Patent Office as an independent bureau, H.R. 5012, to establish a United States Court of Patent Appeals, and H.R. 7010, to increase the force and salaries in the Patent Office.[9] These hearings are popularly known as the Nolan hearings.

Witnesses who appeared for the purpose of testifying with respect to the patent court of appeals included: Mr. Edwin Prindle, National Research Council; Mr. Frederick P. Fish of Boston; Mr. Thomas Ewing, former Commissioner of Patents; Mr. Milton Tibbetts, representing the National Association of Manufacturers; Judge Learned Hand of the southern district of New York; Mr. Delos Holden, patent attorney; Mr. Thomas E. Robertson of the American Patent Law Association; Mr. Bert Russell of the Patent Office Society, and Judge Manton of the Second Circuit Court of Appeals. A statement by Mr. Coulston, Chief Clerk, United States Patent Office, was also included in the record.

(1) *Edwin Prindle*, secretary of the Patent Committee of National Research Council, presented the report of that committee which included the following statement:

> The first proposal which your committee recommends is the establishment of a single court of patent appeals that will have jurisdiction of appeals in patent cases from all the United States district courts throughout the country, in place of the nine independent circuit courts of appeal in which appellate jurisdiction is now vested.
>
> We shall never have a uniform and definite patent law, consistently applied, until we have a single court of patent appeals independent of local sentiment, realizing a responsibility to fix the principles of the law and enforcing an harmonious application of these principles on the lower courts. It would be of the utmost value to those in the United States who are engaged in industry if the present confused condition could be corrected and a single tribunal devote itself to crystallizing the fundamentals of the patent law and to educating the courts throughout the land to uniformity in applying these principles in special cases.

(2) *Frederick P. Fish*, Boston, Mass., patent attorney, stated:

> I have never heard one single reason advanced by anybody that seemed worthy of consideration against this Court of Patent Appeals. I have heard lawyers say it is more convenient to go to Boston or Chicago or Cincinnati than to come to Washington * * * But the additional trouble and the small added expense that might be incurred would be nothing as compared with the great principle of having a uniform patent law, uniformly applied, where a decision of the first case will go a long way toward settling the validity and scope of a patent, and toward determining the acts that will not infringe it * * *
>
> That is the point of view from which I have been looking at this Court of Patent Appeals proposition for over 20 years * * *

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[9] U. S. Congress, House Committee on Patents. Hearings on H. R. 5011, 5012, and 7010, July 9, 10, 11, 12, 17, 18, 24, and 30, 1919.

(3) *Thomas Ewing*, former Commissioner of Patents, approved of the Patent Court of Appeals. When, however, it was brought to his attention by Congressman Davis, that there were only three districts which had more than one judge, he thought that that fact required considerable consideration to be given to this point, since its chief theory was to rotate the judges out of the districts.

(4) *Milton Tibbetts*, chairman of the patent committee of the National Association of Manufacturers, said:

> After patents are issued it is the function of the Federal courts to interpret and adjudicate them. With numerous appellate courts in different circuits, as at present, where local conditions may affect conditions (sic), it is not surprising that various phases of the patent law have been differently interpreted in different parts of the country and patents have often been held valid in one circuit and invalid in another. This retards the growth of industries, because a patent may provide protection in one section of the country and not in another, thus limiting quantity production and constantly depriving the consumer of the lower price benefits of that production. Such uncertainties and such ambiguous determinations of interests should be largely removed or at least greatly mitigated by the establishment of a Court of Patent Appeals, such as is proposed in H. R. 5012.

(5) *Judge Learned Hand*, United States judge of the southern district of New York, testified in favor of a Patent Court of Appeals:

> The first and salient advantage which will come from the court is that a patent will be what the United States professes to make it. It will be a patent for the United States.

He suggested that the designated judges be chosen only from the circuit judges and not from the district judges, since it is the circuit judges who would be relieved of all patent business. He also believed the terms were too long.

(6) *Thomas Robertson*, president of the American Patent Law Association, endorsed the bill, and stated that a conference had been held between the Washington Patent Law Association and the American Bar Association on their differences on a Court of Patent Appeals bill. He offered the report of this conference to the committee with the request that it be made part of the record. The ABA bill proposed a court composed of designated circuit judges and a permanent presiding judge; the Patent Law Association proposed a permanent, separate court. The conclusion was that some court of final resort in patent matters should be established.

(7) *Delos Holden*, patent attorney for Thomas A. Edison, favored the bill. The court, to him, seemed very advantageous, and could not be looked on as a drastic change, because it was almost the same as going back to the original plan.

(8) *Bert Russell*, secretary of the Patent Office Society, reported that his society felt that eligibility to the court should not be restricted to judges of the circuit and district courts. His suggestion, in effect, looked to a compromise between the two types of courts proposed, to wit, a shifting court and a court which might include men relatively expert in some particular department and selected with reference to the breadth of their scientific and legal attainments.

(9) *Judge Martin Manton* of the United States Circuit Court of Appeals for the Second Circuit, opposed the establishment of a separate Court of Patent Appeals because he felt that the work was being sufficiently taken care of in the circuit courts of appeals. Fur-

ther, he contended that the number of patent appeals, over the years, had been steadily decreasing.

(10) *Mr. Coulston*, Chief Clerk, United States Patent Office, at the request of Congressman Nolan, submitted a written statement to the committee. Respecting the special Court of Patent Appeals, it reported:

> * * * The examiners in the Patent Office have individually and collectively given careful consideration to this bill, and * * * if not unanimously, at least by a large majority, they have reached a conclusion favorable to it.

F. REPORT OF THE COMMITTEE ON PATENT, TRADEMARK AND COPYRIGHT LAW OF THE AMERICAN BAR ASSOCIATION [10]

On January 12, 1904, the Senate Committee on Patents published as a Senate Document the "Report of the Committee on Patent, Trademark and Copyright Law of the American Bar Association on the Subject of a Court of Patent Appeals." This ABA report stated:

> The subject has been receiving the attention of the Patent Section for several years and the scheme here outlined may be taken as the result of prolonged study and consultation by the members of that Section. It is, in substance, that there should be created by Congress a court for the determination of patent and copyright cases, having jurisdiction of all appeals and writs of error in those cases; its decisions to be final, subject only to such power of review by the Supreme Court as shall be necessary to preserve the jurisdiction vested in that court by the Constitution as the Supreme Court.

The report also contained a draft of the proposed bill, setting up a court of 7 judges, the president judge to be appointed by the President of the United States, by and with the advice and consent of the Senate, and the other judges to be designated from among the circuit judges for terms of 6 years by the Chief Justice of the United States, 2 being so designated every second year. The remainder of the bill follows the same tenor as all the other bills introduced in subsequent Congresses and sponsored by the American Bar Association.

There is also included a Memorandum, Re Court of Patent Appeals Bill, which is evidently not a commentary on the draft bill, since the divergencies between its comments and the proposals in the draft bill are too great. It is interesting to note that one comment in this memorandum proposes that the judges "be learned in the practice and rules of decision of the patent law," a factor never subsequently advocated by the American Bar Association, nor, in fact, contained in the draft bill included in the report.

G. REPORT OF THE COMMISSION ON ECONOMY AND EFFICIENCY

By the act of August 21, 1912,[11] the President was authorized to set up a Special Commission on Economy and Efficiency to investigate the conduct of business of the various executive departments and agencies of the Government and to make proposals, where necessary, for the more expeditious handling of such business.

On May 10, 1912,[12] President William H. Taft requested the Congress to authorize him to appoint such a Commission of qualified per-

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[10] S. Doc. No. 81, 58th Cong., printed at the request of Senator Platt of Connecticut.
[11] 37 Stat. 643.
[12] H. Doc. 749, 62d Cong.

sons to investigate the patent laws for various purposes, namely, expeditious handling of applications in the Patent Office, amendments to the patent laws necessary to make effective the provisions of the Convention of the International Union for the Protection of Industrial Property, as revised at Washington in 1911. He did not ask, nor did the resolution noted above provide, for any study of the advisability of a court of patent appeals.

When the Commission made its report on December 7, 1912,[13] its recommendations for proposed changes in the law were limited to the terms of the joint resolution. However, it did make several comments on subjects not reported on, including a court of patent appeals. It stated:

> While this Commission is not called upon to make a recommendation upon the subject, it invited those who practice before the Patent Office, and others interested in patents, to submit their views on the question of the advisability of creating a court of patent appeals. The answers received indicate that the opinion is practically unanimous that such a court be established.

The report also commented on other questions coming before the Patent Office, of a type which were treated in a quasi-judicial manner in the Office but were open to judicial appeal by one of the parties. The Commission remarked:

> * * * It may be found advisable to consider whether a patent should not be made valid by law to the extent of giving the patentee a right to an injunction in a case against alleged infringers. This would probably require the adoption of the practice of publishing applications when ready for allowance with the opportunity for anyone to file opposition within a limited time, and if none were filed or it was decided that the patent should issue it ought to be held valid for all purposes until declared invalid by a court. Such a system would probably require also that any person claiming to be injured by the grant of a patent could file annulment proceedings within a limited period, such as 3 years, and thereafter the patent would not be subject to attack.

PART TWO. RECENT PROPOSALS (1936–57)

III. BILLS AND ACTION

After a considerable period of time, interest in a special patent court of appeals was revived. This revival seems to have been instigated chiefly by the economic depression of the thirties, and the various studies being made looking toward the stimulation of industry. It was thought that a special court, which would assist in the more expeditious settlement of patent disputes, would be a factor of considerable help in encouraging the taking out of patents and the creation of industry under their protection.

Again, the accompanying chart (table 2) lists the bills introduced in Congress during these years, together with a notation as to their principal provisions, and any action taken on them by either House of Congress. It will be noted that the bills introduced during this period demonstrate a more sophisticated approach to the problem.

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[13] H. Doc. 1110, 62d Cong.

TABLE 2.—*Bills and action, 1936–57*

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
74th Cong. (1935–37): S. 3823	Mr. McAdoo. 80 Congressional Record 1007.	Establishes a court of patent appeals of 5 judges; all of the judges shall be appointed by the President, by and with the consent of the Senate, and the presiding judge shall be so designated in his commission; the judges shall be chosen from persons who have demonstrated special aptitude in the practice and administration of patent law.	The court shall have exclusive appellate jurisdiction to review final decisions of the district courts in all cases which include (*a*) issues arising under the patent laws; (*b*) proceedings to obtain a patent by bill in equity; (*c*) proceedings as to patent interferences; (*d*) proceedings where the jurisdiction of the district court has been invoked upon an issue arising under the patent laws. Appeals are also permitted from interlocutory decrees and orders, if made within 30 days; also, in suits for infringement, an appeal may be taken from any decree which is final except for the ordering of an accounting.	Appeal to the Supreme Court, by writ of certiorari, is permitted.	3 scientific advisers are authorized to be appointed to the court, to hold office during good behavior, except that any such adviser may be removed at the pleasure of the court.	
H. R. 12371	Mr. Crosser of Ohio. 80 Congressional Record 5750.	Establishes a United States Court of Patent Appeals of 5 judges; the chief justice shall be appointed by the President, by and with the consent of the Senate, and the other 4 judges shall be designated by the Chief Justice of the United States from among the circuit and district court judges to serve for terms of 6 years.	The court shall have jurisdiction to hear appeals from final judgments and decrees in the district courts and other courts having jurisdiction of questions under the patent laws, except questions arising in the Court of Claims; such appeals must be made within 6 months; appeals may also be made from interlocutory orders or decrees, if made in 60 days.	——do——		

TABLE 2.—*Bills and action, 1936–57*—Continued

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
75th Cong. (1937–39): S. 475	Mr. McAdoo. 81 Congressional Record 295.	Establishes a court of patent appeals consisting of 5 judges; all of the judges shall be appointed by the President, by and with the consent of the Senate, and the presiding judge shall be so designated in his commission; the judges shall be chosen from persons who have demonstrated special aptitude in the practice and administration of patent law.	The court shall have exclusive appellate jurisdiction to review final decisions of the district courts in all cases which shall include (*a*) issues arising under the patent laws; (*b*) proceedings to obtain a patent by bill in equity; (*c*) proceedings as to patent interferences; (*d*) proceedings where the jurisdiction of the district court has been invoked upon an issue arising under the patent laws. Appeals are also permitted from interlocutory decrees and orders, if made within 30 days; also, in suits for infringement, and appeal may be taken from any decree which is final except for the ordering of an accounting.	Appeal to the Supreme Court, by writ of certiorari, is permitted.	3 scientific advisers are authorized to be appointed to the court, who shall hold office during good behavior, except that any such adviser may be removed at the pleasure of the court.	The bill was reported from the Committee on Patents (S. Rept. 1367), 83 Congressional Record 1853, with only minor changes in the text.
H. R. 5636	Mr. Connery. 81 Congressional Record 2259.	do	do	do	do	
H. R. 5855	Mr. Crosser. 81 Congressional Record 2664.	Establishes a United States Court of Patent Appeals consisting of 5 judges, the chief justice shall be appointed by the President, by and with the consent of the Senate, and the other 4 judges shall be designated by the Chief Justice of the	The court shall have jurisdiction to hear appeals from final judgments and decrees in the district courts and other courts having jurisdiction of questions under the patent laws, except questions arising in the Court of Claims;	Appeal to the Supreme Court by certiorari or otherwise.		

		United States from among the circuit and district court judges to serve for terms of 6 years.	such appeals must be made in 6 months. Appeals may also be made from interlocutory orders or decrees, if made within 60 days.		
76th Cong. (1939–40): S. 2687	Mr. Bone 84 Congressional Record 8803.	Establishes a circuit court of appeals for patents with a presiding judge and 4 associate judges, each of whom shall have been active in the general practice of the law prior to his appointment.	The court shall have exclusive appellate jurisdiction to review final decisions of the district courts in cases involving (*a*) issues arising under the patent laws; (*b*) proceedings to obtain a patent by bill in equity or (*c*) proceedings in district courts with respect to interfering patents; and (*d*) proceedings where an issue under the patent laws has been raised. The court shall have no jurisdiction of appeals from the Court of Claims. Appeals from interlocutory decrees may also be filed within 30 days of entry; and from any suit in infringement which is final except for an accounting.	Appeal to the Supreme Court may be made by certiorari or otherwise.	The bill was reported from the Committee on Patents (S. Rept. 748) 84 Congressional Record 8803, without amendment.
H. R. 7178	Mr. Celler 84 Congressional Record 9070.	do	do	do	Provides for the services of 3 engineers as technical assistants to the court.
77th Cong. (1940–42): S. 928	Mr. Bone 87 Congressional Record 1206.	do	do	do	

TABLE 2.—*Bills and action, 1936–57*—Continued

Congress and bill No.	Author	Court and membership	Jurisdiction	Appeal	Miscellaneous	Action
84th Cong. (1955-56): S. 3744	Senator O'Mahoney	Establishes a court of appeals for patents, consisting of 5 judges appointed by the President, with the advice and consent of the Senate. Circuit judges may be temporarily designated by the Chief Justice of the United States to serve as judges of this court.	The court shall have jurisdiction of appeals from decisions of (1) the Board of Appeal and Board of Interference Examiners of the Patent Office; (2) the Commissioner of Patents as to trademark applications; (3) final decisions of the district courts in cases arising under the patent laws, or where an issue under the patent laws has been raised.	Review by the Supreme Court may be obtained by (1) writ of certiorari, (2) certification by the court of appeals for patents of any question of law, and upon such certification the Supreme Court may give binding instructions.		

IV. HEARINGS

A. SEVENTY-FIFTH CONGRESS (1937–39)

S. 475 (M'ADOO)

a. Provisions

A court of the United States is created, to be known as the Court of Patent Appeals, consisting of a presiding judge and four associate judges, each of whom shall have demonstrated special aptitude in the practice or administration of the patent law, and each of whom shall be appointed by the President by and with the advice and consent of the Senate. The presiding judge shall be so designated in his commission. Any three members shall constitute a quorum, and the concurrence of the majority thereof shall be necessary for a decision. In case of emergency the Chief Justice may designate any qualified United States circuit or district judge or judges to act on the court.

Authorizes three scientific advisers, each of whom has demonstrated aptitude in scientific and technological fields. They shall devote their services exclusively to the court.

The judges of this court shall hold office during good behavior. They shall be considered to be circuit judges for purposes of retirement. The scientific advisers shall hold office during good behavior, except that any such adviser may be removed at the pleasure of the court. If any scientific adviser resigns, or is removed, after holding office at least 10 years, and having attained age 70, he shall continue to receive the salary which is payable at the time of his resignation or removal.

The court shall always be open, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits and at such places as the court may designate. The marshal of said court in the District of Columbia and the marshals of the several district courts shall provide rooms as necessary. The court shall be a court of record.

The court shall have exclusive appellate jurisdiction to review by appeal the final decisions of the district courts, the Supreme Court of the District of Columbia, and the United States district courts for Hawaii, Puerto Rico, and Alaska, and for the Virgin Islands and the Canal Zone, in all cases which include (*a*) issues arising under the patent laws; (*b*) proceedings to obtain a patent under 35 U. S. C. 63 (now, 35 U. S. C. 145, 146); (*c*) proceedings as to patents under 35 U. S. C. 66 (now, 35 U. S. C. 291); and (*d*) proceedings under 28 U. S. C. 400 (now, 28 U. S. C. 2201, 2202) where the jurisdiction of the district courts has been invoked upon an issue arising under the patent laws. The court shall have no jurisdiction over appeals originating in the Court of Claims.

Appeals are also permitted from interlocutory decrees and orders, if made within 30 days from the handing down of such order or decree. Also, in any suit for infringement, an appeal may be taken from any decree which is final except for the ordering of an accounting. Wherever lower courts exercise concurrent jurisdiction with the Court of Claims or adjudicate claims against the United States under the four categories noted in outlining the court's exclusive jurisdiction, they shall be subject to review in the Court of Patent Appeals.

All appeals from final judgments must be made within 3 months after entry of such judgment.

The court shall be considered equivalent to a circuit court of appeals for the purposes enumerated herein. No appeals may hereafter be filed in any of these cases in the circuit courts of appeal.

b. Hearings and testimony

A hearing was held before the Senate Committee on Patents on June 22, 23, and 24, 1937, on S. 475.[14]

Witnesses appearing in person included: Mr. Henry D. Williams, a patent attorney from New York City; Mr. Karl Fenning for the National Council of Patent Law Associations; Mr. Wallace R. Lane for the Chicago Patent Law Association; Mr. Theodore S. Kenyon for the New York Patent Law Association; Mr. Gano Dunn for the Business Advisory Council for the Department of Commerce; Mr. Thomas E. Robertson for the American Patent Law Association; Mr. Jo Baily Brown, patent attorney of Pittsburgh, Pa.; Mr. Walter J. Blenko, a patent attorney, also of Pittsburgh; Mr. John A. Dienner, Chicago, Ill.; Mr. Ralph Snyder for the Chicago Patent Law Association; Mr. Henry C. Parker, American Chemical Society; Mr. Charles H. Potter, patent attorney, Washington, D. C.; Mr. George Ramsey, patent attorney, New York City; Hon. Conway P. Coe, Commissioner of Patents; Dr. Thomas Midgley, Worthington, Ohio; Mr. Herman Lind, Cleveland, Ohio.

(1) *Henry D. Williams*, patent attorney, New York City, testified that he was chairman of the committee on patents, trademarks and copyrights of the New York County Lawyers' Association, but was appearing on his own behalf because a majority of the committee did not favor the bill. He felt that the confusion among the circuit courts of appeal and the hesitancy of the Supreme Court to hear patent cases had beclouded the patent law generally. A single court of patent appeals for the whole country would clarify the whole structure of patent law by encouraging the initiation of litigation and also settling it more readily.

(2) *Karl Fenning*, chairman of the committee on patent legislation, National Council of Patent Law Associations, made several points in favor of the single court:

> The important thing in litigation, as you probably know, after all, is procedure. It has been said that two-thirds of the cases which go up on appeal go up on the merits possibly, but largely go up on matters of procedure and practice. * * * [In the instance of whether to use the long or short form of bill under the new equity rules of 1912, it took 25 years for the question to be decided by the Supreme Court, and finally they determined that the short form should be used.] * * * If we have a single court which will determine those matters [procedure and the question of validity of a patent throughout the United States], it seems to me it is a highly desirable matter.

On the provision for technical advisers, Mr. Fenning said:

> I think the advisers are entirely superfluous and improper. The time when a technical adviser might be useful to a court is at the trial * * *
>
> If a man has a patent matter on appeal with no opportunity for cross-examination, it seems to me it is like throwing your case into a bag and hoping you will get something out of it. There may be some advantage in having unbiased technical advisers to aid the court, but I doubt if any of you would want your

[14] U. S. Congress, Senate Committee on Patents. Hearings on S. 475, June 22, 23, and 24, 1937.

college professor in chemistry to decide everything pertaining to chemistry in which you were interested, or your professor of electrical engineering in connection with your interests in that field.

He commented on one further major point:

One thing I want to refer to is the qualification of the judges and of the scientific advisers. Your bill proposes a Court of Patent Appeals which shall consist of a presiding judge and four associate judges, each of whom shall have demonstrated special aptitude in the practice and administration of the patent law before or in the United States courts. There is no question in my mind that such a provision is constitutional, but what disturbs me very materially is that there is no provision for enforcing it. If the President of the United States appointed a man who had never seen a patent, to this bench, and the Senate confirmed him, as I understand it, there is nothing that the profession could do to get him off.

(3) *Wallace R. Lane*, Chicago Patent Law Association, reported that the Chicago Patent Law Association had voted unanimously against the bill.

(4) *Theodore Kenyon*, New York Patent Law Association, reported that the New York Patent Law Association had voted against establishment of a court of patent appeals as provided in S. 475, against attaching any scientific advisers to such a court if it were established, and against legislation providing for a court of patent appeals consisting of judges designated by the Chief Justice of the United States from the United States district and circuit judges.

(5) *Gano Dunn*, representing the Business Advisory Council for the Department of Commerce, presented a resolution in favor of the court as follows:

Resolved,

1. The Business Advisory Council for the Department of Commerce endorses the recommendation of the Science Advisory Board that the processes of patent litigation be simplified in order that expenses and delays may be reduced by the prompt, enlightened decision of patent cases by a single court of patent appeals.
2. The Council also endorses the recommendation that adequate scientific and technical advice on a high plane be made available to the court and to all courts dealing with the intricate technical problems involved in modern patent cases.
3. The Council also endorses the principle that the standard of invention should be raised and recommend careful attention to this problem on the part of those charged with the administration of the Patent Office.

(6) *Thomas E. Robertson*, former Commissioner of Patents, and chairman, committee on patents, American Patent Law Association, reported that the association had taken a referendum among its members on five special questions, with results as follows:

1. Do you favor in principle a single court of patent appeals? Majority, yes.

2. Do you favor a single court of patent appeals constituted as provided in section 1 of S. 3823, 74th Congress? (Duplicate of S. 475, 75th Cong.) Majority, no.

3. Do you favor a single court of patent appeals as provided in H. R. 12371, 74th Congress? (Similar to S. 475, except the judges are designated for a term instead of for life.) Majority, no.

4. Do you approve the appointment of scientific advisers as provided by section 2 of S. 3823, 74th Congress? Majority, no.

5. Do you approve giving this court jurisdiction of appeals in suits arising under R. S. 4915, as provided in section 12 of S. 3823, 74th Congress? Majority, yes.

(7) *Jo Baily Brown*, patent attorney, Pittsburgh, Pa., favored the court and felt that the chief attack upon it resulted from the fear of the litigating patent lawyers that if you have such a court it would be technical or narrow. He did not consider this conclusion any more valid than that patent lawyers necessarily disqualify themselves by becoming specialists in patent law.

(8) *Mr. Blenko*, patent attorney, Pittsburgh, Pa., opposed the passage of the bill, for two reasons. First, there was no need for a single court of patent appeals, as the so-called conflict between the circuits was not so great a handicap as it was assumed to be. Secondly, the technical advisers were unnecessary, as a court of appeals would feel bound by the facts as found in the court of first resort.

(9) *John Dienner*, member of the Patent Office Advisory Council, personally thought that a single court of appeals would aid the Patent Office by giving it a single standard by which it could judge the making of a contract.

(10) *Ralph M. Snyder*, Chicago Patent Law Association, reiterated the objection of the Chicago Patent Law Association to the bill and particularly pointed out that the association was vigorously opposed to the idea of having engineering advisers act with the court of appeals where they would not be subject to cross-examination.

(11) *Henry C. Parker*, American Chemical Society, was in favor of the bill on the ground that the establishment of such a court would assist in cutting down on the litigation currently involved in patent appeals. He went on to say:

> Now, the second point that causes industry to favor this bill is that it believes that the decisions of this new court will not only be more consistent but also more accurate. I believe that it is the almost unanimous opinion of the scientific and technical professions that this court should be so constituted that it will be able to understand technical questions and be able to analyze them correctly.

(12) *George Ramsey*, patent attorney, New York City, pointed out how the diversity of decisions in the circuit courts could affect Patent Office procedure and said further:

> These variations in interpretation of the law present a serious problem to the Patent Office. One circuit may hold a patent is invalid because it is filed on a divisional application filed more than 2 years after claims have been canceled in the patent case under the requirement of division.
>
> Another circuit may hold that a patent issued on a divisional application is valid so long as there is continuity of subject matter between the patent application and the divisional application. This leaves the officials of the Patent Office in a quandary.

(13) *Hon. Conway P. Coe*, Commissioner of Patents:

He noted that the Bureau of the Budget opposed passage of the bill as not being in accord with the program of the President, but stated that he was personally in favor of it. He stated:

> I strongly advocate a single court and I should favor its creation if but one of the benefits it promises were obtainable. My viewpoint is that of the Commissioner of Patents, charged by the law and my official oath with the administration of an agency which serves so usefully the social and economic welfare of the Nation.
>
> My own careful study of the bill and the judgment of others who have considered its provisions prompt me to the conviction that its enactment would produce most salutary improvements in our patent system. Some of these I shall ask your permission to enumerate:
>
> 1. It would reduce the duration and cost of litigation.
> 2. It would lessen the volume of litigation.

3. It would make for uniform interpretation of the law.
4. It would enhance the validity of issued patents, thus providing a definite, permanent standard for the guidance of the Patent Office.
5. Decisions of such a court coming from judges possessing the legal and technical training needed for correct adjudication of the questions involved in patent litigation would promote the fundamental purpose and assure the proper working of the patent system.
6. The judges chosen for this court would become students of the patent law and specialists in its application.
7. Through its final decisions, effective throughout the country, this court would contribute an element of certainty as to the rights of the inventor and the interest of the public and thereby tend to encourage industry.
8. The lack of interest in the patent system itself manifest in the utterances of numerous Federal courts and the progressive tendency to destroy rather than vindicate the patent grant imperil the whole system. * * *
9. Certiorari to the Supreme Court affords no adequate safeguard to the grantee or the public even if the excessive delay involved in such recourse were obviated. * * *

c. Further action

S. 475 was reported out of the Senate Committee on January 5, 1938, with minor changes in its text.[15]

In this report, which was made by Mr. McAdoo from the Committee on Patents, five reasons were given for the establishment of a court of patent appeals. These are:

(1) It would curtail the time and cost of litigation.
(2) Similarly, it would reduce the volume of litigation.
(3) It would make for uniform interpretation of patents issued by providing a definite standard for the Patent Office.
(4) Judges of the circuit court of appeals for patents would become students of and experts in the patent law.
(5) Final decisions of this court, effective throughout the United States, would provide an element of certainty, now lacking as to the rights of inventor, industry, and the public.

The report cited the testimonials of the various groups who had studied the Patent Office (previously discussed). In commenting upon the opposition of the Bureau of the Budget, it noted that the cost of the court would involve principally the salaries of additional judges now needed in the court of appeals in the various circuits.

B. SEVENTY-SIXTH CONGRESS (1940–42)

1. S. 2687 (BONE)

a. Provisions

A circuit court of appeals for patents consisting of a presiding judge and four associate judges, each of whom shall have been active in the general practice of the law before his appointment to the court by the President, by and with the advice and consent of the Senate. Judges shall hold office during good behavior. Three members shall constitute a quorum. The court shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several circuits.

The court shall have exclusive appellate jurisdiction to review final decisions of the district courts in cases which include (*a*) issues arising under the patent laws, (*b*) proceedings to obtain a patent by bill in equity, (*c*) suits concerned with interfering patents, and (*d*) declara-

[15] S. Rept. No. 1367, 75th Cong., 83 Congressional Record 1853.

tory judgment proceedings where an issue under the patent laws has been raised. The court shall have no jurisdiction of appeals from the Court of Claims. Appeals from interlocutory decrees under any of the above may be filed within 30 days from date of entry of such order or decree.

Appeals may lie from any decree in an equity suit for infringement which is final except for an accounting. Such appeal must be taken within 30 days from entry.

Appeals, otherwise, must be made within 3 months of entry. The court may certify at any time to the Supreme Court, any question or proposition of law; and the judgment and decree of the court shall be subject to review by the Supreme Court on certificate, certiorari, or appeal, as the case may be.

b. Hearings and testimony

Hearings were held before the Senate Committee on Patents on S. 2687, to establish a circuit court of appeals for patents, and S. 2688, to limit the term of patents to 20 years, on July 5 and 6, 1939.[16]

The first day's hearing was devoted to the Patent Court of Appeals. The witnesses on this question included Conway P. Coe, Commissioner of Patents; Mr. George Ramsey, chairman of the Patent Office Advisory Committee; Mr. W. H. Wheeler, Business Advisory Council, Department of Commerce; Mr. Roberts Larson, American Patent Law Association; Mr. Karl Fenning, National Council of Patent Law Associations; and Mr. William N. Cromwell, Chicago Patent Law Association.

(1) *Hon. Conway P. Coe*, Commissioner of Patents, repeated his recommendations in favor of a patent court of appeals, and stated his belief that this court, because it was ambulatory, would be particularly useful in obtaining certainty of a patent to an inventor without undue expenditure of money.

(2) *George Ramsey*, Chairman, Patent Office Advisory Committee, pointed out that the Patent Office Advisory Committee had begun its consideration of a court of appeals of this type early in 1934, and ever since that time the committee had been uniformly in favor, in principle, of such a court. He further stated that the decision of the court, although in personam as to the litigants, would be in rem as to the substance of the patent, and that was what they were trying to accomplish.

(3) *W. H. Wheeler, Jr.*, member of the Business Advisory Council of the Department of Commerce, reported that the Advisory Council were on record in favor of this proposal for the single court of patent appeals for 3 years.

(4) *Roberts B. Larson*, chairman, committee on laws and rules, American Patent Law Association, reported that his association was in favor of the idea of a patent court of appeals, but the polling of the membership had taken place before S. 2687 was introduced, so it did not indicate their thought on the specific bill.

(5) *Karl Fenning*, chairman, committee on patent legislation, National Council of Patent Law Association, stated that his organization was against the bill in principle, because patent matters were

[16] U. S. Congress, Senate Committee on Patents. Hearings on S. 2687 and S. 2688, July 5 and 6, 1939.

proceedings in personam and if they were changed to proceedings in rem, it would require each and every infringer to be brought into the pleadings.

(6) *William N. Cromwell*, of the Chicago Patent Law Association, reported that both he and his organization were opposed to the bill, chiefly because it was felt that the court would not necessarily hand down a connected line of decisions.

c. Further action

S. 2687 was reported out of the Senate Patents Committee July 11, 1939, with some minor amendments in its text.[17] The report reviewed all the committees and associations which had favorably considered the establishment of such a court. Thus, the report stated:

> On January 3, 1938, the President referred to certain abuses of patents and expressed the view that some "existing laws require reconstruction." Testimony before the Temporary National Economic Committee, created after the President's message, was in favor of a single court of patent appeals. The Commissioner of Patents, when called upon by said committee for suggestions to improve the patent laws, made the said court one of his major recommendations.
>
> The President's Science Advisory Board in its report submitted September 1, 1935, recommended the formulation of a single court of patent appeals.
>
> The American Association for the Advancement of Science adopted a resolution approving a single court, December 1, 1935.
>
> While there have been a few who objected to the bill or to various provisions of it, the sentiment expressed at the hearing and in letters and reports is overwhelmingly in favor of the single court for patent appeals. The American Patent Law Association by a referendum of its members, has approved the principle of the bill. The establishment of a single court for patent appeals was also approved by the Philadelphia Patent Law Association, the Bar Association of the District of Columbia, the committee on patents and trademarks of the National Association of Manufacturers, the Motor Wheel Corp., the Automotive Parts and Equipment Manufacturers Association, and the Machinery and Allied Products Institute.
>
> The Director of the Budget has advised that the bill is in accord with the President's program.
>
> The Department of Justice and the Department of Commerce have approved the bill.

The Committee on Patents stated that they had tried, through permanent appointment of the judges, and permitting this court to sit in any circuit, to do away with some of the chief objections against previous bills.

There was also a short discussion on the floor of the Senate of certain aspects of the bill.[18] Mr. Bone explained:

> The pending bill creates an orthodox circuit court of appeals. It departs from none of the orthodoxies of appellate procedure. The proposed method of handling appeals preserves in full the unrestrained and unrestricted right of appeal to the Supreme Court. The only difference between the court provided for in the pending bill and the average circuit court of appeals is the fact that all appeals in patent cases are siphoned through the new court. In all other respects it is an orthodox circuit court of appeals.

Thereupon he was questioned as to whether or not the bill should be first referred to the Committee on the Judiciary, which has charge of setting up courts, before being brought on the floor for consideration. Mr. Bone stated that the Committee on Patents also consisted of several lawyers, and the Judiciary Committee would be considering

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[17] S. Rept. 748, 76th Cong.
[18] 84 Congressional Record 9364.

the same basic issues that the Patents Committee had had to consider. It was just a question of making a choice.

The bill was referred to the Senate Committee on the Judiciary on May 6, 1940.

C. THE TNEC STUDY

Under the authority of Public Resolution 113, 75th Congress,[19] the Temporary National Economic Committee began its study of the concentration of economic power in the United States. Among other subjects, consideration was given to the question of patents.[20]

1. HEARINGS

Hearings on proposals for changes in the patent law and procedure were held on January 16, 17, 18, 19, and 20, 1939. The Court of Patent Appeals was mentioned by several witnesses.

Mr. Conway P. Coe, then Commissioner of Patents, testified (pp. 855–856, 860):

> Finally, there comes the litigation of patents. When a patent issues to an inventor we purport to give him the right, the exclusive right, for a term of 17 years to prevent others from making, using, or selling the invention covered by it. But we say that with our tongue in our cheek, for we know better * * * As you are aware, if the inventor undertakes to invoke the law for his protection he must file suit in a United States district court. If the decision of that court be objectionable to him or to the other party, the case must be taken to one of the 10 circuit courts of appeals * * * But having taken this appeal, what has he gained? Hardly more than a ruling as to his rights in that particular circuit * * *
>
> My conviction is that the poor inventor, and through him the public, suffers injustice precisely for the reason and to the extent that the monopoly, the exclusive right, purportedly bestowed on him is not now fully safeguarded * * * (pp. 855–856). I recommend for your consideration as a major improvement in the patent laws the creation of a single court of patent appeals (p. 860).

Dr. Vannevar Bush, representing the Carnegie Institution of Washington, made three suggestions, among which was the recommendation for a Court of Patent Appeals (p. 892).

Included in the appendix to this volume of the TNEC hearings was the summary report of the Science Advisory Board, Committee on the Relation of the Patent System to the Stimulation of New Industries, made to the President on April 1, 1935.[21] Dr. Vannevar Bush was Chairman of the Board. The second major recommendation contained in this report was:

> We recommend, therefore, that there be established a single court for patent appeals, in order to establish and maintain harmony and accuracy in judicial interpretations of patent questions, by confining the appellate jurisdiction in civil patent causes to one court, composed of permanent judges having the necessary scientific or technical background.

Further comments on the single Court of Patent Appeals contained in the report were:

> Each judge should be learned in the law and proficient in knowledge of the industrial application of science, and should have had a reasonable experience in the trial of patent suits on the bench or at the bar. If, in order to grasp more

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[19] Act of June 15, 1938 (52 Stat. 705).
[20] TNEC. Investigation of Concentration of Economic Power, Pt. 3. Hearings on Patents, January 16, 17, 18, 19, and 20, 1930.
[21] Ibid., pp. 1139–1148.

fully special technical questions, the court wishes to call temporarily upon experts to advise and consult on difficult points, it should be enabled to do so.

In view of the importance of this court the salaries paid to the judges should be adequate to attract men of the highest stamp * * *.

[Its jurisdiction should include] suits in Federal courts, other than the Court of Claims, (1) alleging infringement of a patent, (2) alleging breach of a license agreement involving a patent or invention, (3) in equity to obtain a patent, (4) in equity alleging interfering patents, or (5) under the declaratory-judgment law, involving any of the above issues.

The court should be composed of a sufficient number of permanent judges * * * [and] should also hold terms at least once a year in each judicial circuit, except as these may be omitted at the discretion of the senior or chief justice of the court.

It appears desirable that there be transferred to this new court the present jurisdiction of the Court of Customs and Patent Appeals of all patent and trademark appeals from the Patent Office.

2. SUPPLEMENTARY MATERIAL

A supplementary volume, issued in 1941, contained material submitted to the committee.[22] Among these items was a monograph by *Senator William H. King* of Utah, expressing his opinion on various aspects of patents considered by the committee, including some procedural matters. He disapproved of a separate court of patent appeals.

Senator King starts out by saying (p. 18046):

The next major recommendation for change in our patent laws has been for the creation of a separate court of patent appeals. In general this change is favored by those who oppose compulsory licensing bills.

He then gave a short review of the history of the proposal, beginning with the bill introduced in 1903, and ending with the then pending bill (S. 2687, 76th Cong.), introduced by Senator Bone. He then summarizes the points made in favor of the bill in the report of the Senate Committee on Patents, and later proceeds to show why he disagrees with them. Thus (p. 18048):

Briefly, the report of the Committee on Patents states that the various circuit courts of appeal vary greatly in the treatment of patents; that the various circuit courts are guilty of inconsistent rulings in patent matters and "a patentee is not assured of universal recognition of his patent, nor is the public assured of universal invalidity of the patent, in the case of one held invalid, until after numerous suits in various jurisdictions." * * *

It is further stated in the committee report that the same patent may be the subject of suit in several jurisdictions, and the result often is disagreement among the appellate courts as to the facts and the interpretation of the law. * * *

The committee report finally states that it often requires years of litigation in the various circuit courts to obtain anything approaching a final result. * * *

As to the first contention of the Committee on Patents, he pointed out (p. 18049):

Courts of appeals are bound by the record of the court below, and many of the alleged conflicting decisions probably could be traced directly to the fact that new evidence was produced in a second trial which was not available to the court in a prior suit.

His comment on the committee's second contention as to the desirability of universal validity, was (p. 18049):

A decree in a patent suit operates in personam only, and not in rem. A decree in one suit in favor of the plaintiff would not be binding on a new and

[22] TNEC. Investigation of Concentration of Economic Power, Pt. 31–A. Hearings, supplemental data (1941).

subsequent defendant. That defendant would be entitled to his day in court. * * * To preclude him the right to do so would be contrary to established concepts of justice and to the common law. * * *

[As to the universal invalidity of a patent] * * * there is an easier, a simpler, and a cheaper solution to it than the creation of a single court of patent appeals. I refer to the proposal that the law be amended to provide that where a plaintiff has unsuccessfully prosecuted one suit and his patent has been declared invalid that he shall thereafter be barred from prosecuting additional suits based on the same patent in different jurisdictions.

As to the last contention of the committee, Senator King pointed out (p. 18050) that testimony of Commissioner Coe before the TNEC showed that in the 4 fiscal years 1935 to 1938 inclusive, there had been 3,953 patent cases in the district courts of which only 538 were appealed to the circuit courts of appeal, or approximately 12 percent. It seemed to him unnecessary, therefore, to set up a single court of appeal to handle so few cases.

3. REPORT

In its final report, published in 1941, the Temporary National Economic Committee approved the establishment of a single court of patent appeals.[23] The recommendation, which was unanimous, read:

Single Court of Patent Appeals.—In order to improve the existing mechanism for the issuance of patents and the determination of disputes relating thereto, we recommend the creation of a single court of patent appeals with jurisdiction coextensive with the United States and its territories. Such a court would replace the present 11 different and independent jurisdictions and should do much to assure uniform treatment of patents and to reduce the time and cost of patent litigation.

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[23] TNEC, final report, p. 37 (1941).

APPENDIXES

APPENDIX A

STATEMENTS OF AMERICAN BAR ASSOCIATION

STATEMENTS ON A SINGLE COURT OF PATENT APPEALS CONTAINED IN THE ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

[The following material is not so much bibliographic as informative. It is intended to trace the history of the advocacy by the association of the idea of a single court of patent appeals. The association, which was about the earliest group to advocate such a court, pressed for its adoption until approximately 1920. Page references are to the proceedings of the association unless otherwise indicated.]

1899

The section of patent, trademark, and copyright law established a committee to look into the question of a patent court of appeals, and to report on their study the following year.

1900

The chairman of the committee (Mr. Frederick P. Fish) reported that before the passage of the courts of appeals act in 1891, patent appeals had to be taken directly to the Supreme Court. The circuit courts of appeals have not remedied the situation, but only complicated it, because divergent opinions have caused divergent decisions.

"The reason why there should be one court of appeals in patent matters is because each patent covers the whole United States and a suit on it is in reality one between the patentee and all the people of the United States, the issue being the right of the patentee to exclude the public for the time being from the use, without his consent, of the thing patented or alleged to be patented" (p. 507–510).

An extensive report was brought in by the committee to the section of patent, trademark and copyright law. This report was signed by Messrs. R. S. Taylor, L. L. Bond, and Edmund Wetmore. After reviewing, in extenso, the confusion brought into the law by having patents adjudicated in nine different circuit courts of appeals, the committee suggested a single court of patent appeals according to the following plan:

"1. The name of the court to be 'The Court of Patent Appeals,' or some such designation, its sittings to be at Washington, its jurisdiction to be confined to patents, unless it should be thought best to include copyright and trademark cases, and to be final in those cases, except that when the court finds itself in disagreement with a decision of the Supreme Court it shall certify the question to the Supreme Court for reconsideration, and except also, that the Supreme Court shall have power to order any case decided by it to be sent up for review.

"2. Its membership to consist of a chief justice and some number, say six, judges; the chief justice to be appointed for life by the President, with the advice and consent of the Senate, from the circuit judges in office at the time of the passage of the bill, and the acceptance of the appointment to vacate the appointee's office as circuit judge.

"3. The other judges to be selected and designated by the Chief Justice of the Supreme Court from among the circuit judges, to sit for the stated periods of 2, 4, and 6 years (assuming the number to be 6) at the outset, and after that for periods of 6 years, as the original period expires.

"4. In case of the inability of any judge to sit, by reason of sickness of himself or family, interest in the suit or other cause, the chief justice[21] to have power to designate another circuit judge to sit in his place for a stated time, or for the trial of a particular cause or causes.

"5. The judges of the circuit courts to receive, while sitting in the court of patent appeals, the salary and allowance provided for the justices of the Supreme Court, less $1,000 or some such sum, per annum; and the chief justice to receive the same salary and allowances provided for the Chief Justice of the Supreme Court, less a like amount.

"6. All appeals and writs of error in patent, and possibly, also, in copyright and trademark cases, to lie directly from the trial court to the Court of Patent Appeals" (pp. 543–552).

1903

The section of patent, trademark and copyright law is reported as having adopted the recommendation of the committee respecting the Court of Patent Appeals (pp. 57–84).

1904–13

The reports of the section of patent, copyright and trademark law show consistently favorable consideration of the idea, and outline various bills in Congress which have been supported by the representatives of the section.

1918

It is intimated in the report of the committee on patent, trademark and copyright law, that "Federal legislation and administration have since the last report of this committee been concentrated upon and congested by matters actually or ostensibly relating to war exigencies that the pending bills mentioned in that report and several since introduced * * * have for the most part remained in abeyance. It has not been an opportune time to press remedial legislation. * * *" (American Bar Association Journal, July 1918, p. 481).

1919

In the report of the committee on patent, trademark and copyright law, the chairman, at length, replied to the motion of Mr. Edson made at the previous meeting that he had been derelict in his duty in not supporting the concept of a single court of patent appeals. The chairman pointed out, among other things, that past efforts had not been acted on favorably by Congress so there was no point in continuing such endeavors. Further, "In our opinion, the advantage of having appeals in other cases originating in the district courts will more than counterbalance any likely to accrue from diverting them to the proposed Court of Patent Appeals." (American Bar Association Journal, July 1919, pp. 440–446).

1920

The section of patent, trademark and copyright law adopted a resolution stating that "no legislation is desirable in the direction of substituting a special court of patent appeals for the appellate jurisdiction now existing; for reasons stated in the report adverse to such legislation submitted by the standing committees [of the section]" (p. 338 of the proceedings of the ABA).

1927

The section went on record as favoring the jurisdiction bill (H. R. 16222, 69th Cong.) transferring patent appeals from the Court of Appeals of the District of Columbia to the Court of Customs and Patent Appeals.

1931, 1932, 1936, 1938, 1939

The section went on record as opposing a single Court of Patent Appeals.

1940

At the midwinter meeting, the section (item 13) authorized disapproval of H. R. 234, providing for an administrative court which would include the Court of Customs and Patent Appeals, and (item 21) disapproved the proposal made by the section in San Francisco that a single Court of Patent Appeals be established (p. 411, et seq.).

There have been no further comments noted.

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[21] It is not clear whether the term "chief justice", as used here, refers to the chief justice of the patent court of appeals, or to the Chief Justice of the Supreme Court, but it probably refers to the latter.

APPENDIX B

BILLS IN CONGRESS PROPOSING A SPECIAL COURT OF PATENT APPEALS

S. 1693 (59th Cong., 1st sess., December 14, 1905)

A BILL To establish a court of patent appeals, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created a court of patent appeals, which shall consist of a presiding justice and four associate justices, of whom any three shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as hereinafter defined and established. The court shall prescribe the form and style of its seal and the forms of writs and other process and procedure conformable to its jurisdiction conferred by law. It shall appoint a marshal and a clerk and such deputies and other officers as may be necessary, with the same duties and powers, under the direction of the court, as those of corresponding officers of the Supreme Court of the United States, so far as the same may apply. As soon as possible after its organization the court shall establish a table of costs and fees, no item of which shall exceed in amount a similar cost or fee in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over into the Treasury of the United States in the same manner as is provided in respect of the costs and fees in the Supreme Court of the United States. The court shall have power to establish such rules as may be necessary for the conduct of the business within its jurisdiction. The presiding justice shall preside at the sessions of the court; in his absence the associate justice senior in commission or, where two commissions bear the same date, senior in age shall preside.

SEC. 2. That the presiding justice and associate justices shall be appointed by the President, by and with the advice and consent of the Senate. They shall be learned in the law and in the practice and rules of decision of the patent law and the law of copyrights. The presiding justice shall receive a salary of ten thousand five hundred dollars per annum, and the associate justices of ten thousand dollars per annum each, to be paid out of the Treasury of the United States in equal monthly installments on the first day of each calendar month. They shall hold their offices for life or during good behavior; and if any of them shall resign his office after having been twenty years upon the bench, or after having been ten years upon the bench and having attained the age of seventy years, he shall be paid during the remainder of his natural life the salary to which he was entitled at the time of his resignation.

SEC. 3. That a term shall be held annually by the court of patent appeals at Washington, in the District of Columbia. The first term of the said court shall be held on the second Monday in October, in the year nineteen hundred and six, and thereafter at such times as may be fixed by the said court.

SEC. 4. That the court of patent appeals established by this Act shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the circuit courts of the United States, the Territorial or other United States courts of first instance having jurisdiction of patent or copyright causes, and the supreme court of the District of Columbia in all cases involving the validity or infringement of or the title to any letters patent of the United States for any invention or discovery, in all suits brought by the United States seeking the cancellation of any letters patent for any invention or discovery, and in all cases involving the validity or infringement of or the title to any copyright protected by the laws of the United States. The decisions of the court of patent appeals in any case within its jurisdiction shall be final.

On any subject within its appellate jurisdiction the court of patent appeals, at any time before entering its final order or decree disposing of a case, may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court of the United States may either give its instruction on the questions certified to it, which shall be binding on the court of patent appeals in such case, or it may require the whole record and cause to be sent up to it for consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal: *Provided*, That in any case made final in the court of patent appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, the case to be certified

to that court for its review and determination, with the same power and authority as if the case had been carried thereto by appeal or writ of error.

SEC. 5. That in cases within the jurisdiction of the court of patent appeals, as herein defined, no appeal by writ of error or otherwise shall hereafter be taken or allowed from a circuit court to any circuit court of appeals, and no appellate jurisdiction shall hereafter be exercised or allowed in such cases by the circuit courts of appeal; nor shall any appeal be taken from any Territorial or other United States court of first instance to any appellate tribunal other than the court of patent appeals established by this Act; nor shall any such tribunal exercise appellate jurisdiction therein; nor shall any appeal be taken from the supreme court of the District of Columbia to the court of appeals of the District of Columbia; nor shall such court of appeals of the District of Columbia exercise any appellate jurisdiction therein: *Provided*, That cases docketed on appeal before the first of July next preceding the organization of the court of patent appeals, in the clerk's office of any circuit court of appeals, or of the court of appeals of the District of Columbia, or of the appropriate court having appellate jurisdiction over any Territorial or other United States court of first instance, by filing therein a transcript of record and appeal bond, where the latter is required by law or rule of court, shall be proceeded with by the said courts with the same power and authority as if this Act had not been passed.

SEC. 6. That where, upon a hearing in equity in any court in a case in which an appeal from a final decree may be taken under the provisions of this Act to the court of patent appeals, any interlocutory order or decree touching an injunction shall be made, an appeal may be taken therefrom to the court of patent appeals: *Provided*, That the appeal must be taken within thirty days from the time of the entry of such interlocutory order or decree, unless the time be extended by order of the court or of the judge hearing the cause, and it may take precedence in the appellate court, and the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal except by the order of that court or a judge thereof: *And provided further*, That the court below may, in its discretion, require as a condition of the appeal an additional injunction bond.

SEC. 7. That whenever, on appeal or writ of error or otherwise, a case coming from a court of first instance shall be reviewed and determined in the court of patent appeals, such cause shall be remanded to the lower court for further proceedings, to be there taken in pursuance of such determination.

SEC. 8. That no appeal or writ of error by which any final decree or judgment may be reviewed in the court of patent appeals under the provisions of this Act shall be taken or allowed except within six months after the entry of the judgment or decree sought to be reviewed; and all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this Act in respect to the court of patent appeals, including all provisions for bonds or other securities to be required and taken on such appeals or writs of error; and any justice of the court of patent appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States.

SEC. 9. That the court of patent appeals shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law, to administer oaths, and to punish contempts of its authority, subject to the provisions of law regulating the exercise of the jurisdiction by the courts of the United States.

SEC. 10. That the marshal shall receive a salary of three thousand dollars and the clerk shall receive a salary of five thousand dollars, payable monthly out of the Treasury of the United States; and the deputies, criers, bailiffs, messengers, or other officers of the court shall be allowed the same compensation for their respective services as is now allowed for similar services in the circuit courts of the United States. The Architect of the Capitol shall provide suitable rooms for the accommodation of the court in the Capitol building; or, with the approval of the presiding justice, the marshal of the court shall lease such rooms as from time to time may be necessary.

H. R. 12470 (59th Cong., 1st sess., January 19, 1906).

A BILL To establish a court of patent appeals

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created a United States court of patent appeals, which shall consist of five judges, of whom four shall constitute a quorum, and shall be a court of record with jurisdiction as is hereinafter limited and established. Such court shall prescribe the form and style of its seal and the forms of its writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court, who shall have the same powers and perform the same duties under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall have the same powers and perform the same duties now possessed and performed by the Clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be three thousand five hundred dollars a year, and the salary of the clerk shall be five thousand dollars a year, both to be paid monthly in twelve equal payments. The costs and fees now provided by law in the Supreme Court of the United States shall be the costs and fees in the United States court of patent appeals; and the same shall be collected, expended, accounted for, and paid over to the Treasury Department of the United States in the same manner as is provided by law in respect to the costs and fees in the Supreme Court of the United States. The court shall have power to establish all needful rules and regulations for the conduct of its business.

SEC. 2. That the President of the United States, by and with the advice and consent of the Senate, shall appoint a president judge of said United States court of patent appeals, and as vacancies occur shall in like manner appoint others to fill such vacancies from time to time. The acceptance of that office by a judge of the circuit court or district court of the United States shall vacate his office as circuit or district judge.

SEC. 3. That upon the taking effect of this Act the Chief Justice of the United States shall designate from among the judges of circuit courts of the United States and the district courts of the United States two judges to sit as associate judges of the United States court of patent appeals for three years from the first day of the first term thereof, and two others to sit as associate judges of the same court for six years from the first day of the first term thereof. And after that, as the periods expire for which such designations shall have been made, the Chief Justice of the United States shall fill the vacancies thus occurring by designation of other judges from among the judges of the circuit courts and the district courts of the United States to sit for periods of six years each. In case of the death or disability of any associate judge of the said court the Chief Justice shall designate another judge of a circuit court or a district court of the United States to sit for the unexpired period for which his predecessor had been designated. No judge shall be designated to sit as associate judge in the United States court of patent appeals for more than one period of six years continuously; but any associate judge of said court, whose period of service shall expire after not more than three years of continuous service, may be designated to sit for a further period of six years. The designation of a judge of the circuit court or district court of the United States to sit as associate judge of the United States court of patent appeals and his service in that court shall not vacate his office as judge of the circuit or district court, as the case may be.

SEC. 4. That a term of the United States court of patent appeals shall be held annually in the city of Washington, beginning on the second Monday of October in each year, and the same may be adjourned from time to time as the court shall order. If at any time for the meeting of the court a quorum of the judges shall not be present, the judges present may adjourn the court, and, if necessary, adjourn again from time to time until a quorum appear. If at any sitting of the court the president judge shall be absent, the associate judge senior in commission as judge of the circuit court of the United States, or senior in age in case of commissions of even date, shall preside. If no judge of a circuit court shall be present, the associate judge senior in commission as a judge of a district court of the United States, or senior in age in case of commissions of even date, shall preside. Until it shall be otherwise provided by Congress, the sessions of the

court shall be held in a building or rooms to be provided by the marshal of the District of Columbia, under the direction and approval of the Attorney-General of the United States. The court shall by order authorize its marshal to employ such deputies and assistants for himself and the clerk of the court and such criers, bailiffs, and messengers as the business of the court shall require, and to pay the salaries of such employees at rates of compensation not exceeding those paid for similar services in the Supreme Court of the United States, and to pay all other necessary incidental expenses of the court. The president judge and each of the associate judges shall be entitled to employ a clerk, whose salary, at a rate not exceeding that allowed the clerks of the Chief Justice and associate justices of the Supreme Court, shall be paid as part of the expenses of the court. The court shall have power, in its discretion, to appoint a reporter and to fix by order his salary or other compensation and direct the form and manner of the official publication of its decisions.

SEC. 5. That the president judge of the United States court of patent appeals shall receive a salary of twelve thousand dollars per year. The circuit judges of the United States sitting as associate judges of the same court shall each receive the salary allowed him by law as a circuit judge and in addition thereto during the time of his service as associate judge of the United States court of patent appeals, but not longer, such additional sum as will make his entire compensation during that service eleven thousand five hundred dollars per annum. The district judges sitting as associate judges of the United States court of patent appeals shall each receive the salary allowed to him by law as district judge and in addition thereto during the term of his service as associate judge of the United States court of patent appeals, but not longer, such additional sum as will make his entire compensation during that service eleven thousand five hundred dollars per annum. All the said salaries shall be payable in twelve equal monthly installments.

SEC. 6. That the United States court of patent appeals shall have jurisdiction to hear and determine appeals and writs of error from final judgments and decrees in the circuit courts of the United States in cases arising under the laws of the United States relating to patents for inventions and to copyrights, and from final judgments and decrees in cases arising under the laws of the United States relating to patents for inventions and to copyrights rendered by any other court having jurisdiction under the laws of the United States to hear and decide such cases in the first instance: *Provided, however*, That it shall have no jurisdiction in cases originating in the Court of Claims. All such appeals shall be taken within six months after the entry of the order, judgment, or decree sought to be reviewed. The practice, procedure, and forms to be observed in the taking, hearing, and determination of such appeals and writs of error shall conform to the practice, procedure, and forms observed in like cases in the Supreme Court of the United States, subject to such rules and regulations as shall be prescribed by the court for itself.

SEC. 7. That whenever, by an interlocutory order or decree in a circuit court of the United States or other court having jurisdiction under the laws of the United States to hear and decide in the first instance cases arising under the patent and copyright laws, in a case in which an appeal may be taken from the final decree of such court to the United States court of patent appeals, an injunction or restraining order shall be granted, or refused, or continued, or vacated, or modified, or retained without modification after motion to modify the same, an appeal may be taken from such order or decree by the party aggrieved to the United States court of patent appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree; and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the United States court of patent appeals, or a judge thereof, during the pendency of such appeal.

SEC. 8. That the president judge and the associate judges of the United States court of patent appeals shall each exercise the same powers in term and in vacation in the allowance of appeals, supersedeas orders, and other matters incidental to the jurisdiction and business of the court as are now exercised by the Chief Justice and associate justices of the Supreme Court of the United States in relation to the business and jurisdiction of that court.

SEC. 9. That the decisions of the United States court of patent appeals in all cases within its appellate jurisdiction shall be final, except that it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination

with the same power and authority in the case as though it had been carried by appeal or writ of error from the trial court directly to the Supreme Court.

SEC. 10. That whenever any case shall have been certified from the United States court of patent appeals to the Supreme Court of the United States, by certiorari or otherwise, it shall be, upon its determination by the Supreme Court, remanded to the circuit court of the United States or other court in which it originated for further proceedings to be taken in pursuance of such determination. And in every case determined by the United States court of patent appeals upon appeal or writ of error the case shall be remanded to the circuit court of the United States or other court from whence it came for further proceedings to be taken in pursuance of such determination.

SEC. 11. That all appeals and writs of error in cases in which appellate jurisdiction is by this Act conferred upon the United States court of patent appeals which shall have been pending without hearing in the United States circuit courts of appeals or other courts of appellate jurisdiction for less than three calendar months prior to the taking effect of this Act shall be transferred from such circuit courts of appeals or other courts to the United States court of patent appeals and be heard and determined in that court as though they had been taken there from the trial courts by appeal or writ of error; all other appeals and writs of error in cases in which appellate jurisdiction is by this Act conferred upon the United States court of patent appeals which shall be pending in the United States circuit courts of appeals or other courts of appellate jurisdiction at the time of the taking effect of this Act shall remain and be heard and determined by the courts in which they may be pending, respectively, as though this Act had not been passed.

SEC. 12. That after the taking effect of this Act no appeal or writ of error shall be taken from any circuit court or other court of the United States to any United States circuit court of appeals or other appellate court in any case in which an appeal or writ of error may be taken to the United States court of patent appeals under the provisions of this Act.

SEC. 13. That all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

SEC. 14. That this Act shall take effect and be in force on the day of , nineteen hundred and six.

S. 475 (75th Cong., 1st sess., January 6, 1937)

A BILL To establish a Court of Patent Appeals

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

SECTION 1. That the United States Code, title 28, shall be amended by adding thereto the following sections:

"SECTION 1. COURT; JUDGES; SALARIES; QUORUM; CIRCUIT OR DISTRICT JUDGES MAY ACT.—There shall be a court of the United States to be known as the Court of Patent Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall have demonstrated special aptitude in the practice or administration of the patent law before or in the United States courts, and each of whom shall be appointed by the President, by and with the advice and consent of the Senate. The presiding judge shall receive the salary of $13,500 per annum, and the associate judges shall each receive the salary of $13,000 per annum, payable monthly from the Treasury. The presiding judge shall be so designated in the commission issued to him by the President; and the associate judges shall have precedence according to the dates of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of a majority of those members sitting shall be necessary to any decision thereof. In case of an emergency, or of the temporary inability or disqualification, for any cause, of one or more of the judges of said court, the Chief Justice of the United States may, upon request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act as judge or judges of said court during said temporary inability, disqualification, or other emergency; and such circuit or district judge or judges shall be duly empowered so to act. In case the presiding judge is unable because of illness or any other cause to exercise any power given or to perform any duty imposed by law, such power or duty shall be exercised by the associate judges of the court in the order of the seniority of their respective commissions.

"SEC. 2. SCIENTIFIC ADVISER; SALARIES.—Three scientific advisers to the court, each of whom has demonstrated aptitude in scientific and technological fields, shall be appointed by the court, and each scientific adviser shall receive the salary of $12,000 per annum, payable monthly from the Treasury. The scientific advisers shall be appointed from diverse scientific and technological fields. The scientific advisers shall devote their services exclusively to said court, and shall not be eligible for appointment as commissioners, masters, receivers, or referees, and shall receive no fees other than the salary provided for the services which they perform. The scientific advisers shall act in an advisory capacity to said court in accordance with directions or assignments from the presiding judge.

"SEC. 3. TENURE AND RETIREMENT OF JUDGES AND SCIENTIFIC ADVISERS.—The judges of the Court of Patent Appeals shall hold office during good behavior. For the purpose of section 375 of this title (relating to the resignation and retirement of judges of the courts of the United States), the judges of this court shall be considered to be circuit judges. The scientific advisers of this court shall hold office during good behavior, except that any scientific adviser may be removed at the pleasure of the court. When any scientific adviser resigns his office, or is removed by the court, after holding the office at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation or removal.

"SEC. 4. MARSHAL; APPOINTMENT, SALARY, AND DUTIES.—Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as were provided on March 3, 1911, for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of $3,000 per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be marshals of said court. Any marshal of said court is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

"SEC. 5. CLERK; APPOINTMENT, SALARY, AND DUTIES.—The court shall appoint a clerk whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as were exercised and performed on March 3, 1911, by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The clerk shall receive a salary of $5,000 per annum, which shall be in full payment for all service rendered by such clerk, and shall be considered to be a clerk of a circuit court of appeals, for the purposes set forth in this title, sections 544 and 546. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court shall be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States. The costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the circuit court of appeal; and the same shall be expended, accounted for, and paid over to the Treasury of the United States.

"SEC. 6. ASSISTANT CLERK, STENOGRAPHIC CLERK, BAILIFF, AND MESSENGER.—In addition to the clerk, the court may appoint an assistant clerk, five stenographic clerks, one bailiff, one messenger, and such other employees as may be appropriated for by Congress, whose salaries shall be payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of, and perform such duties as are assigned them by, the court. The assistant clerk, stenographic clerks, bailiff, messenger, and other employees shall be allowed the same compensation for their respective services as are allowed for similar services in the circuit court of appeals.

"SEC. 7. COURT ALWAYS OPEN; SESSIONS; EXPENSES.—The Court of Patent Appeals shall always be open for the transaction of business and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge or scientific adviser who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than in the city of Wash-

ington shall be paid, upon his written and itemized certificate, by the marshal of this court, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him; any clerk, assistant clerk, or other officer of this court who, in pursuance of provisions of this chapter and by order of the presiding judge of this court, shall attend a session of said court at any place other than the city of Washington shall be paid, upon his written and itemized certificate approved by the presiding judge, by the marshal of this court, his actual and necessary expenses incurred for travel and attendance; and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

"SEC. 8. ROOMS FOR HOLDING COURT.—The marshal of said court for the District of Columbia and the marshals of the several districts in which sessions of the Court of Patent Appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court. In case rooms cannot be provided in said buildings, then the said marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for said court.

"SEC. 9. COURT OF RECORD; SEAL; RULES; DECISIONS.—The said Court of Patent Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

"SEC. 10. RECORDS PLACED ON CALENDAR; CALL OF CALENDAR.—Immediately upon receipt of any record transmitted to the Court of Patent Appeals for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every two months. Such calendar need not be called during the months of July and August of any year.

"SEC. 11. OPINIONS OF COURT; WRITING; FILING; RECORDING COPY IN PATENT OFFICE.—The opinion of the Court of Patent Appeals in every case shall be rendered in writing, and shall be filed in such case as part of the record thereof, and a certified copy of said opinion shall be sent forthwith to the Commissioner of Patents and shall be entered of record in the Patent Office.

"SEC. 12. APPELLATE JURISDICTION.—The Court of Patent Appeals shall have exclusive appellate jurisdiction to review by appeal final decisions of the district courts, the Supreme Court of the District of Columbia, the United States District Courts for Hawaii and for Puerto Rico, and for Alaska, or any division thereof, and for the Virgin Islands and for the Canal Zone, in all cases which include (a) issues arising under the patent laws, (b) proceedings to obtain a patent under title 35, section 63, (c) proceedings as to patents under title 35, section 66, and (d) proceedings under title 28, section 400, wherein the jurisdiction of the district courts has been invoked upon an issue arising under the patent laws: *Provided*, That this court shall have no jurisdiction over cases originating in the Court of Claims, nor in cases where a direct review may be had in the Supreme Court of the United States under title 28, section 345.

"SEC. 13. APPEALS IN PROCEEDINGS FOR INJUNCTIONS.—Where, upon a hearing in a district court, or the Supreme Court of the District of Columbia, or the United States District Courts for Hawaii and for Puerto Rico, or for Alaska, or any division thereof, or for the Virgin Islands, or for the Canal Zone, or by a judge thereof in vacation upon any of the causes specified in section . . . of this title (section 12 hereof), an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, an appeal may be taken from such interlocutory order or decree to the Court of Patent Appeals; and sections 346 and 347 of title 28 shall apply to such cases in the Court of Patent Appeals as to other cases therein. The appeal to the Court of Patent Appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the

court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below, or the appellate court, or a judge thereof. The court below may, in its discretion, require an additional bond as a condition of the appeal.

"SEC. 14. APPEALS IN SUITS IN EQUITY FOR INFRINGEMENT OF LETTERS PATENT FOR INVENTIONS; STAY OF PROCEEDINGS FOR ACCOUNTING.—When in any suit in equity for infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the Court of Patent Appeals: *Provided*, That such appeal be taken within thirty days from the entry of such decree; and the proceedings upon the accounting in the court below shall not be stayed unless so ordered by that court during the pendency of such appeal.

"SEC. 15. REVIEW OF JUDGMENTS OF LOWER COURTS EXERCISING CONCURRENT JURISDICTION WITH COURT OF CLAIMS OR ADJUDICATING CLAIMS AGAINST THE UNITED STATES.—In cases in the lower courts specified in section . . . of this title (section 12 hereof) wherein they exercise concurrent jurisdiction with the Court of Claims or adjudicate claims against the United States, involving one of the causes of action set forth in section . . . of this title (section 12 hereof), the judgment shall be subject to review in the Court of Patent Appeals like other judgments of the district courts; and title 28, sections 346 and 347, shall apply to such cases in the Court of Patent Appeals as to other cases therein.

"SEC. 16. ALLOWANCE OF APPEALS.—Any judge of the Court of Patent Appeals, in respect of cases brought or to be brought before that court within the provisions of this Act, shall have the same powers and duties as to allowances of appeals and the conditions of such allowances as by law belong to judges of the circuit courts of appeal.

"SEC. 17. TIME FOR MAKING APPLICATION FOR APPEAL.—No appeal intended to bring any final judgment or final decree before the Court of Patent Appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

"SEC. 18. COURT EQUIVALENT TO A CIRCUIT COURT OF APPEALS, FOR CERTAIN PURPOSES.—The Court of Patent Appeals shall be considered to be a circuit court of appeals, and the judges and officers thereof shall be considered to be judges and officers of a circuit court of appeals, for the purposes set forth in title 28, sections 218 (relating to conferences of circuit judges, and so forth, and as to said section the presiding judge of this court shall be considered to be the senior judge), 222a (relating to law clerks for circuit judges), 346 (relating to certification of questions to the Supreme Court), 347 (relating to writs of certiorari issued by the Supreme Court, and appeals to the Supreme Court), 350 (relating to the obtaining of writs of certiorari), 372 (relating to the oaths of judges), 377 (relating to the power to issue writs), 395 (relating to rights of officers of the court), 865 (relating to the provision of printed transcripts), 870 (relating to bonds and costs on appeal), 872 (relating to writs of error), 877 (relating to the remanding of cases), 878 (relating to damages and costs on affirmance), and 879 (relating to limited rights of reversals)."

SEC. 2. That the United States Code, title 28, shall be amended in the existing sections thereof in the following particulars:

"SEC. 1. Section 225 shall be amended by inserting, at the ends of each of parts (a) and (b) thereof, the following: '*Provided, however*, That the circuit court of appeal shall have no jurisdiction in such cases as are within the jurisdiction of the Court of Patent Appeals, as specified in sections . . . and . . . of this title' (sections 12, 13, 14, and 15 hereof).

"SEC. 2. Section 227 shall be amended by adding at the end thereof the following: '*Provided, however*, That the circuit courts of appeal shall have no jurisdiction in such cases as are within the jurisprudence of the Court of Patent Appeals, as specified in sections . . . and . . . of this title' (sections 12, 13, 14, and 15 hereof).

"SEC. 3. Section 227A shall be, and the same is hereby, expressly repealed."

SEC. 3. All appeals defined in sections . . . and . . . of this title (sections 12, 13, 14, and 15 hereof) which shall have been filed in the circuit courts of appeal, or in the Court of Appeals of the District of Columbia, and all cases for which application for appeal shall have been made, at the time this Act comes into effect, shall be heard and determined by the respective appellate court as though this Act had not been passed; except that the Court of Patent Appeals may order that any such case or cases not theretofore heard or submitted to the appellate court be transferred forthwith to the Court of Patent Appeals,

together with the original papers, printed records, and record entries duly certified. All applications for appeals after the date this Act comes into effect in causes in which the appellate jurisdiction is by this Act conferred upon the Court of Patent Appeals shall be made for appeal to the Court of Patent Appeals.

SEC. 4. That all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed.

SEC. 5. This Act shall take effect 90 days after its enactment.

S. 3744 (84th Cong., 2d sess., April 26, 1956)

A BILL To establish a United States Court of Appeals for Patents, 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 "Court of Appeals for Patents Act".

ORGANIZATION

SEC. 2. Part I of title 28 of the United States Code is amended by inserting, immediately after chapter 9 thereof, the following new chapter:

"CHAPTER 10.—COURT OF APPEALS FOR PATENTS

"Sec.
"221. Appointment and number of judges.
"222. Precedence of judges.
"223. Tenure and salaries of judges.
"224. Sessions.
"225. Quorum.
"226. Opinions.

"§ 221. Appointment and number of judges

"The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Appeals for Patents.

"Within the jurisdiction conferred upon such court and except as otherwise provided by law, it shall have all of the powers of a court of appeals of the United States. Within such jurisdiction and except as otherwise provided by law, each judge of such court shall have all of the powers of a circuit judge of the United States.

"§ 222. Precedence of judges

"The chief judge of the Court of Appeals for Patents shall have precedence and preside at any session of the court which he attends.

"The associate judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

"§ 223. Tenure and salaries of judges

"Judges of the Court of Appeals for Patents shall hold office during good behavior. Each shall receive a salary of $25,500 a year.

"§ 224. Sessions

"The Court of Appeals for Patents may hold court at such times, and at such places within any judicial circuit, as it may fix by rule.

"§ 225. Quorum

"Three judges of the Court of Appeals for Patents constitute a quorum. The concurrence of a majority of the judges sitting is necessary to any decision.

"§ 226. Opinions

"The Court of Appeals for Patents, on each appeal from a Patent Office decision, shall file a written opinion as part of the record and send a certified copy to the Commissioner of Patents, who shall record it in the Patent Office."

ASSIGNMENT OF JUDGES

SEC. 3. (a) Subsection 291 (b) of title 28 of the United States Code is amended to read as follows:

"(b) The Chief Justice of the United States may designate and assign temporarily a judge of the Court of Customs Appeals or a judge of the Court of Appeals for Patents to serve as a judge of the Court of Appeals or the District

Court for the District of Columbia when requested by the chief judge of the court in need of such assistance."

(b) Section 291 of such title is amended by (1) redesignating subsection (d) as subsection (e), and (2) inserting, immediately after subsection (c), the following new subsection:

"(d) The Chief Justice of the United States may, upon presentation to him by the chief judge of the Court of Appeals for Patents of a certificate of necessity, designate and assign temporarily any circuit judge to serve as a judge of the Court of Appeals for Patents."

(c) Section 292 of such title is amended by (1) redesignating subsection (d) as subsection (e), and (2) inserting, immediately after subsection (c), the following new subsection:

"(d) The Chief Justice of the United States may, upon presentation to him by the chief judge of the Court of Appeals for Patents of a certificate of necessity, designate and assign temporarily any district judge to serve as a judge of the Court of Appeals for Patents."

OFFICERS AND EMPLOYEES

SEC. 4. Part III of title 28 of the United States Code is amended by inserting, immediately after chapter 53 thereof, the following new chapter:

"CHAPTER 54.—COURT OF APPEALS FOR PATENTS

"Sec.
"841. Clerk and employees.
"842. Marshal.
"843. Reporter.
"844. Bailiffs and messengers.
"845. Law clerks and secretaries.

"§ 841. Clerk and employees

"The Court of Appeals for Patents may appoint a clerk and a librarian, and such assistant clerks, stenographic law clerks, clerical assistants, library assistants, and other employees as may be necessary, all of whom shall be subject to removal by the court.

"The clerk shall pay into the Treasury all fees, costs, and other moneys collected by him. He shall maintain an office at the seat of government.

"§ 842. Marshal

"The Court of Appeals for Patents may appoint a marshal who shall serve within the District of Columbia and shall be subject to removal by the court.

"He shall attend the court at its sessions, and shall serve and execute all process and orders issuing from it. He shall purchase books and supplies, and perform such other duties as the court may direct. Under regulations prescribed by the Director of the Administrative Office of the United States Courts, he shall pay the salaries of judges, officers, and employees of the court and disburse funds appropriated for the expenses of the court.

"United States marshals for other districts where sessions of the court are held shall serve as marshals of the court.

"§ 843. Reporter

"(a) The Court of Appeals for Patents may appoint a reporter who shall be subject to removal by the court.

"(b) The reporter shall prepare and transmit weekly to the Commissioner of Patents, for publication, copies of all opinions relating to patent and trademark appeals rendered by the court pursuant to section 1551 of this title.

"(c) The reporter also shall compile and publish, at least once a year, in such manner as the court directs, all opinions rendered by the court, together with necessary digests and indexes as the court directs.

"§ 844. Bailiffs and messengers

"The Court of Appeals for Patents may appoint necessary bailiffs and messengers who shall be subject to removal by the court.

"Each bailiff shall attend the court, preserve order, and perform such other necessary duties as the court directs.

"§ 845. Law clerks and secretaries

"Each judge of the Court of Appeals for Patents may appoint necessary law clerks and secretaries."

JURISDICTION

SEC. 5. Part IV of title 28 of the United States Code is amended by inserting immediately after chapter 93 thereof, the following new chapter:

"CHAPTER 94.—COURT OF APPEALS FOR PATENTS

"Sec.
"1551. Patent Office decisions.
"1552. Final decisions of district courts on patent matters.

"§ 1551. Patent Office decisions

"The Court of Appeals for Patents shall have jurisdiction of appeals from decisions of—

"(1) the Board of Appeals and the Board of Interference Examiners of the Patent Office as to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and such appeal by an applicant shall waive his right to proceed under section 145 or 146 of title 35, United States Code; and

"(2) the Commissioner of Patents as to trademark applications and proceedings as provided in section 21 of the Act entitled 'An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes', approved July 5, 1946 (60 Stat. 435, as amended; 15 U. S. C. 1071).

"§ 1552. Final decisions of district courts on patent matters

"Except where a direct review may be had in the Supreme Court, the Court of Appeals for Patents shall have jurisdiction of appeals from all final decisions of the district courts of the United States in any case, controversy, or matter—

"(1) arising under title 35, United States Code; or

"(2) in which jurisdiction of the district court was invoked under section 1338 of this title.

"The Court of Appeals for Patents has no jurisdiction to review any decision of the Court of Claims."

PROCEDURE

SEC. 6. Part VI of title 28 of the United States Code is amended by inserting, immediately after chapter 167 thereof, the following new chapter:

"CHAPTER 168.—COURT OF APPEALS FOR PATENTS PROCEDURE

"Sec.
"2611. Rules.

"§ 2611. Rules

"The rules of the Court of Appeals for Patents shall conform as near as may be to the rules of practice and procedure of the courts of appeals of the United States."

TECHNICAL AMENDMENTS

SEC. 7. (a) Title 28 of the United States Code is amended by striking out the words "Court of Customs and Patent Appeals" and the name "United States Court of Customs and Patent Appeals" wherever they appear therein, and inserting in lieu there of the words "Court of Customs Appeals" and the name "United States Court of Customs Appeals", respectively.

(b) Title 35 of the United States Code, and 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 (60 Stat. 435, as amended; 15 U. S. C. 1071), are amended by striking out the words "Court of Customs and Patent Appeals" and the name "United States Court of Customs and Patent Appeals" wherever they appear therein, and inserting in lieu thereof the words "Court of Appeals for Patents" and the name "United States Court of Appeals for Patents", respectively.

(c) The analysis of title 28 of the United States Code, and the analysis of part I thereof, are amended by inserting, immediately after the item relating to chapter 9 thereof, the folllowing new item:

"10. Court of Appeals for Patents..... 221".

(d) The analysis of such title, and the analysis of part III thereof, are amended by inserting, immediately after the item relating to chapter 53 thereof, the following new item:

"54. Court of Appeals for Patents..... 841".

(e) The analysis of such title, and the analysis of part IV thereof, are amended by inserting, immediately after the item relating to chapter 93 thereof, the following new item:

"94. Court of Appeals for Patents..... 1151".

(f) The analysis of such title, and the analysis of part VI thereof, are amended by inserting, immediately after the item relating to chapter 167 thereof, the following new item:

"168. Court of Appeals for Patents Procedure..... 2611".

(g) Sections 216 and 1542 of title 28 of the United States Code are repealed.

(h) Section 451 of such title, as amended by this Act, is amended by inserting, immediately after the words "the Court of Customs Appeals,", wherever they appear therein, the words "the Court of Appeals for Patents,".

(i) Section 833 (b) of such title is amended to read as follows:

"(b) The reporter shall prepare and transmit weekly to the Secretary of the Treasury, for publication, copies of all opinions relating to customs rendered by the court."

(j) Section 1256 of title 28 of the United States Code is amended to read as follows:

"§ 1256. Court of Customs Appeals and Court of Appeals for Patents

"Cases in the Court of Customs Appeals may be reviewed by the Supreme Court by writ of certiorari. Cases in the Court of Appeals for Patents may be reviewed by the Supreme Court by (1) writ of certiorari, or (2) by certification of any question of law by the Court of Appeals for Patents in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such questions."

(k) The item contained in the analysis of chapter 81 of such title which relates to section 1256 thereof is amended to read as follows:

"1256. Court of Customs Appeals and Court of Appeals for Patents; certiorari.".

(l) Section 1291 of title 28 of the United States Code is amended by inserting, immediately after the words "Supreme Court", a comma and the words, "or where appellate jurisdiction is conferred upon the Court of Appeals for Patents by section 1552 of this title".

(m) Section 1926 of title 28 of the United States Code is amended to read as follows:

"§ 1926. Court of Customs Appeals and Court of Appeals for Patents

"Fees and costs in the Court of Customs Appeals and in the Court of Appeals for Patents shall be fixed by a table of fees adopted by each such court and approved by the Supreme Court. The fees and costs so fixed shall not, with respect to any item, exceed the fees and costs charged in the Supreme Court, and shall be accounted for and paid over to the Treasury."

(n) The item contained in the analysis of chapter 123 of such title which relates to section 1926 thereof is amended to read as follows:

"1926. Court of Customs Appeals and Court of Appeals for Patents."

EFFECTIVE DATES

SEC. 8. (a) The amendments made by sections 2, 4, and 6 of this Act shall become effective on the date of enactment of this Act.

(b) All other amendments made by this Act shall become effective on the date on which a quorum of the judges of the Court of Appeals for Patents have been appointed and have qualified, and such court is organized and prepared to discharge its duties under amendments made by this Act, as determined by notice to be published in the Federal Register upon direction of the chief judge of such court.

SAVING PROVISION

SEC. 9. (a) No action or proceeding pending in any court of the United States on or before the date fixed pursuant to section 8 (b) of this Act shall abate because of the enactment of this Act.

(b) Each such action pending in the Court of Customs and Patent Appeals, in any court of appeals of the United States, or in the Supreme Court of the United States may be continued to its termination pursuant to law in effect on the day preceding the date so fixed.

APPENDIX C

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Makes a statistical review of the various patent appeals handled by the circuit courts of appeal and the Supreme Court. Finds 75% of the cases in the circuit courts of appeal come before the 2d, 7th, 6th, and 3d circuits; that very few reach the Supreme Court; and there is no way to determine from the facts whether these litigated patents are the industrially important ones. Advises against a special patent court of appeals.

WOODWARD, WILLIAM REDIN. PATENTS AND ADMINISTRATIVE LAW. 55 Harvard Law Review 950, 960–962 (April 1942).

In covering the larger problem of how to handle patent appeals, discusses the movement for a specialized patent court of appeals and comes to the cautious conclusion that such would be advisable, since its scope would definitely be wider than that of the Court of Customs and Patent Appeals, and might permit an appeal by the Government as well as the petitioner.

FOLK, GEORGE E. A REVIEW OF PROPOSALS FOR REVISION OF THE UNITED STATES PATENT SYSTEM. National Association of Manufacturers (1946), Washington, D. C.

A pamphlet outlining the NAM's suggestions for patent reform. Gives a critical review of suggestions with which the NAM does not agree. The appendix contains recommendations of various other groups. The NAM favors the proposal for such a court.

DAVIS, WILLIAM H. PROPOSED MODIFICATIONS IN THE PATENT SYSTEM. 12 Law and Contemporary Problems 796, 802 (Autumn 1947).

One paragraph in a general listing of suggestions for improved patent procedure, mentions a single court of patent appeals as an idea very favorably received.

RIFKIND, SIMON. A SPECIAL COURT FOR PATENT LITIGATION? THE DANGER OF A SPECIALIZED JUDICIARY. 37 ABA Jour. 425–6 (June 1951).

Maintains there is no need for judicial experts in patent cases, because license agreements are essentially contracts—infringement is essentially trespass—patent rights are a species of property rights—proof in patent litigation is subject to the law of evidence—specialization on the judicial level goes against the detachment and dispassionateness necessary to the judiciary.

2. JOURNAL OF THE PATENT OFFICE SOCIETY

REPORT OF PATENT COMMITTEE TO NATIONAL RESEARCH COUNCIL. 1 J. P. O. S. 341, 342 (March 1919).

Made the single court of patent appeals, on a par with the circuit courts of appeals, the preferred recommendation. Attached H. R. 5011, 65th Cong., which it recommended. This bill follows the ABA plan.

NECESSITY FOR PATENT COURT. 9 J. P. O. S. 59 (October 1926).

Memorandum from Patent Committee of American Chemical Society urging establishment of a competent technical court to handle patent trials.

PRINDLE, EDWIN J. PROPOSAL OF A SINGLE COURT OF PATENT APPEALS AND DRAFT OF A BILL THEREFOR. 13 J. P. O. S. 438 (September 1931).

Reviews the general reasons for a single court of patent appeals, and gives a brief history of various endeavors in Congress to effectuate this idea. He appends the draft of a bill.

———. ADDITIONS TO THE PROPOSED DRAFT OF BILL. 13 J. P. O. S. 528 (October 1931).

Lists three amendments which Mr. Prindle has accepted to his bill.

REYNOLDS, CHARLES L. IN FAVOR OF A SINGLE COURT OF PATENT APPEALS. 13 J. P. O. S. 596 (November 1931).

A brief agreement with Mr. Prindle's article (see 13 J. P. O. S. 438, supra) and a notation that an appeal under R. S. 4915 should not lie to such court, but that the appeal to the courts under R. S. 4915 should be repealed.

LANE, WALLACE R. WHY A SINGLE COURT OF PATENT APPEALS IS NOT NECESSARY. 13 J. P. O. S. 569 (November 1931).

Recites at length from reports of the Committee on Patents, Trademarks and Copyrights of the American Bar Association, from a report of the Chicago Patent Law Association, and from the Nolan hearings in 1919—all quotations in opposition to a single court of patent appeals.

STODDARD, ELLIOTT J. COMMENTS ON MR. LANE'S LETTER AS TO THE BILL FOR A COURT OF PATENT APPEALS. 14. J. P. O. S. 188 (March 1932).

Gives a long series of quotations, both past and current, from people and groups still in favor of the concept of a single court of patent appeals.

LIVERANCE, FRANK E. AN ALTERNATIVE FOR A SINGLE COURT OF PATENT APPEALS. 14 J. P. O. S. 210 (March 1932).

STODDARD, E. J. FEDERAL COURT OF APPEALS. 14 J. P. O. S. 816 (October 1932).

Disapproves of appointing judges to a special patent court for life, as suggested in the Prindle bill. Would prefer the old American Bar Association proposal, i. e., judges chosen from the whole Federal judiciary for limited terms.

RICE, WILLIS B. A COURT OF PATENT APPEALS. 17 J. P. O. S. 18 (January 1935).

Reviews the theory that if "two circuits disagree as to the validity of a claim, the Supreme Court may be petitioned for certiorari," and finds that so much time is consumed in obtaining two disagreeing decisions, that often no advantage can be taken of this procedure. Feels that the establishment of a court of patent appeals would aid in both sustaining the validity of patents, and also result in a higher standard of patentability.

RITCHEY, F. O. THE SPLIT INFINITIVE AND THE SPECIAL PATENT COURT OF APPEALS. 17 J. P. O. S. 518 (June 1935).

A very brief note in favor of a special patent court of appeals whose judges would be able to comprehend the complex patent questions of today.

GREENWALD, JULIUS. A COURT OF PATENT APPEALS. 18 J. P. O. S. 427 (June 1936).

In relation to S. 3823 (1936). Reviews the whole history of the concept as heretofore appearing in the Journal of the Patent Office Society.

BROWN, JO BAILY. THE SITUATION CONFRONTING OUR PATENT SYSTEM. 21 J. P. O. S. 159, 180 (March 1939).

Proposes, among other solutions for the confusions of our patent system, that a single court of patent appeals be established.

ZUGELTER, FRANK. SUGGESTIONS FOR SOME IMPROVEMENT IN OUR PATENT SYSTEM. 23 J. P. O. S. 62 (January 1941).

Reviews chiefly the question of establishing a patent court of appeals.

SWEET, DONALD H. COMMENTS ON SUGGESTIONS OF MR. FRANK ZUGELTER. 23 J. P. O. S. 150 (February 1941).

Questions Mr. Zugelter's contention that one of the reasons a special court for patent appeals has never been established is because men in a lucrative patent practice do not wish to leave it in order to serve on such court.

PATENT JUDGES FOR PATENT CASES. 23 J. P. O. S. 460 (June 1941).

A short stating that improvement in patent cases can be accomplished more by assuring the appointment and use of trial judges who can really handle patent law, than by setting up a special patent court of appeals. If necessary, use could be made of some sort of an administrative court.

A PATENT APPEALS COURT. 25 J. P. O. S. 360 (May 1943).

Consists of an editorial copied from The Journal of Commerce and Commercial (January 20, 1943) advocating such a court.

MERONI, CHARLES F. COMMENTS AND OBSERVATIONS CONCERNING RECOMMENDATIONS IN REPORT OF THE NATIONAL PATENT PLANNING COMMISSION. 26 J. P. O. S. 117, 125 (February 1944).

Takes issue with the Commission's recommendation for a single court of patent appeals, unless it is clearly delineated and understood that such court is a Federal court of appeals rather than a bureau court. Suggests establishing an entirely new Federal Circuit Court of Appeals to handle patent litigation alone.

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