85TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 2349

DECLARING THE COURT OF CUSTOMS AND PATENT APPEALS TO BE A CONSTITUTIONAL COURT

AUGUST 1, 1958.—Referred to the House Calendar and ordered to be printed

Mr. ROGERS of Colorado, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 7866]

The Committee on the Judiciary, to whom was referred the bill (H. R. 7866) to amend title 28, United States Code, relating to the Court of Customs and Patent Appeals, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Amendment No. 1. On page 3, line 21, after the word "to" add the following:

> serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to

The purpose of this amendment is to authorize the assignment of judges of the Court of Customs and Patent Appeals and of the Court of Claims between these two courts. The amendment conforms to the style and scheme of such of the appropriate sections of title 28 of the United States Code relating to the assignment of judges. In addition, the provision makes it clear that it does not apply to the Supreme Court of the United States and to the Customs Court since the latter is already adequately provided for in another section of this bill; namely, section 293 (c) on page 4, lines 7 to 12 of the bill.

Amendment No. 2. On page 5 add the following new subsection (d) at the end of subsection (c):

> (d) The Chief Justice of the United States shall maintain a roster of judges who have retired from regular active service but who are willing and able to undertake special judicial duties from time to time, which roster shall be known

as the Roster of Senior Judges. Any judge of the United States who has retired from regular active service under section 371 (b) or 372 (a) of this title but is willing and able to undertake special judicial duties from time to time either in a particular court or courts specified by him or generally in any court may so indicate by requesting the Chief Justice of the United States to place his name upon the Roster of Senior Judges as available for such duty. The Chief Justice shall remove from the Roster of Senior Judges the name of any such judge who is no longer willing or able to perform any judicial duties. Any retired judge whose name appears upon the Roster of Senior Judges shall be known as a senior judge, and may be designated and assigned by the Chief Justice of the United States to perform such judicial duties as he is willing to undertake in any court of the United States other than the Supreme Court, upon presentation of a certificate of necessity by the chief judge of such court.

The purpose of this amendment is to conform the proposed legislation to existing law. Public Law 85–219, the act of August 29, 1957, added a new subsection (d) to section 294 of title 28 of the United States Code. This section should be properly inserted, since section 5 of the proposed bill amends section 294 of title 28 of the United States Code. In effect, this is a perfecting amendment since the bill was drafted prior to the later amendment to section 294 of title 28 of the United States Code.

Amendment No. 3. On page 5, line 17, strike "(d)" and insert "(e)".

This is a perfecting amendment.

PURPOSE

The purpose of the bill is to amend section 211 of title 28 of the United States Code so as to declare the United States Court of Customs and Patent Appeals to be a court established under article III of the Constitution of the United States.

It would also amend sections 291, 292, 293, 294, and 295 of title 28 of the United States Code which relate to the temporary assignment of circuit and district judges, both active and retired, who sit outside of their circuits and districts, by providing for their assignment, under specified conditions, of a circuit or district judge by the Chief Justice of the United States or a judge of the Customs Court by the chief judge of that court to serve temporarily on the Court of Customs and Patent Appeals. It would also authorize the Chief Justice of the United States to assign temporarily a judge of the Court of Customs and Patent Appeals, whether active or retired, under specified conditions, to perform duties in a court of appeals or a district court and the chief judge of the Court of Customs and Patent Appeals may assign a judge of that court to serve temporarily in the Customs Court. The bill also would permit the assignment of judges between the Court of Customs and Patent Appeals and the Court of Claims.

GENERAL STATEMENT

The Court of Customs and Patent Appeals is a court of the United States under section 211 of title 28 of the United States Code, and the judges of said court are judges of the United States.

The court consists of a chief judge and 4 associate judges appointed by the President, with the advice and consent of the Senate, who hold office during good behavior, at an annual salary of $25,500. It is a court of record of the United States, and 3 judges are necessary for a quorum and 3 judges must concur for a decision. The court is authorized to appoint a clerk and such assistants as it deems necessary, as well as its bailiffs and messengers. It is also authorized to appoint a marshal and a court reporter.

The jurisdiction of the court is to review by appeal final decisions of the Customs Court, of the Board of Appeals and the Board of Interference Examiners of the Patent Office and of the Commissioner of Patents as to trademark applications and proceedings. It also reviews by appeal questions of law in the findings of the United States Tariff Commission as to unfair practices and import trade.

The court was first established in 1909 by the Payne-Aldrich Tariff Act (36 Stat. 105). From 1890 to 1909 the United States circuit courts had jurisdiction over appeals from the former Board of General Appraisers under the Customs Administrative Act of June 10, 1890 (26 Stat. 138). The Payne-Aldrich Act gave the court exclusive jurisdiction of appeals from final decisions to the Board of General Appeals. All pending cases in the circuit court of appeals, district and territorial courts, were transferred to it.

On April 2, 1929, the name of the court was changed to the Court of Customs and Patent Appeals and additional jurisdiction over the decisions and tribunals of the Patent Office was conferred upon it, in the act of March 2, 1929 (44 Stat. 1475). The United States Board of General Appraisers was the predecessor of the United States Customs Court, which was created by the Customs Administrative Act of June 10, 1890.

Public Law 703 of the 84th Congress declared the Customs Court to be a constitutional court. It seems proper, therefore, that the appellate court to which appeals are taken from the Customs Court should have the same status as the lower court; namely, constitutional status. It is also noted that similar legislation was enacted in the 83d Congress, establishing the Court of Claims to be a constitutional court (Public Law 158).

The enactment of this proposal would remove any doubt upon points of law and declare which of the powers Congress was intending to exercise when the court was created. This court handles appeals of a class of cases in law which arise under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority. This subject matter has always been of the type of case at law to which jurisdiction extended by virtue of the Constitution of the United States. Its jurisdiction also extends to controversies to which the United States was a party and to which the judicial power attached.

Thus, the committee is of the opinion that this legislation should be enacted to remove all doubt of the status of the Court of Customs and Patent Appeals as a court established under article III of the Constitution.

Section 2 of the bill would amend section 291 of title 28 of the United States Code relating to the temporary assignment of a circuit judge to act as such in another circuit when so assigned by the Chief Justice of the United States upon the presentation of a certificate of necessity by the chief judge of the circuit wherein the need arises. It further authorizes the designation and temporary assignment of a judge of the Court of Claims or the Court of Customs and Patent Appeals to serve on a circuit court upon the presentation of a certificate of necessity. It would also permit the chief judge of a circuit to assign temporarily a circuit judge to hold district court in any district within the circuit.

Section 3 would amend section 292 of title 28 of the United States Code so as to authorize the Chief Justice to designate temporarily a district judge to serve on the court of appeals upon presentation of a certificate of necessity by the chief judge of that court.

Section 4. would amend section 293 of title 28 so as to permit temporary assignment by the Chief Justice any judge of the Court of Claims to serve in any circuit or district court upon the presentation of a certificate of necessity by the chief judge of the court wherein the need arises, and in addition would permit the judges of those two courts; namely, the Court of Claims and the Court of Customs and Patent Appeals, to serve interchangeably in either court upon presentation of a certificate of necessity by the Chief Judge of the court wherein the need arises.

It would also permit the judges of the court of Customs and Patent Appeals to sit in the Customs Court when the chief judge of the Customs Court deems it necessary and presents a certificate to that effect.

The views of the Department of Commerce are attached hereto and made a part of this report, even though that Department does not deem itself affected by the provisions of this bill. The views of the Department of Justice are attached hereto, as are the views of the Judicial Conference of the United States.

This committee believes this proposal meritorious and recommends its enactment as amended.

THE GENERAL COUNSEL OF COMMERCE,
Washington, D. C., August 20, 1957.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in reply to your request of July 8, 1957, for the views of this Department with respect to H. R. 7866, a bill to amend title 28, United States Code, relating to the Court of Customs and Patent Appeals.

The only agency in the Department of Commerce that might in any way be concerned with any provisions of the bill would appear to be the Patent Office, whose decisions in patent and trademark matters are subject to review by the Court of Customs and Patent Appeals under title 35, United States Code, section 141 and title 15, United States Code, section 1071. However, none of the changes in the law proposed in the bill involving that court would seem to affect

its operations. Accordingly, this Department would defer to the views of those agencies more directly interested in the bill.

Sincerely yours,

FREDERICK C. NASH, *General Counsel.*

OCTOBER 11, 1957.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning the bill (H. R. 7866) to amend title 28, United States Code, relating to the Court of Customs and Patent Appeals.

The bill would amend section 211 of title 28, United States Code, so as to declare the United States Court of Customs and Patent Appeals to be a court established under article III of the Constitution of the United States.

Whether the bill should be enacted involves a question of policy concerning which this Department prefers to make no recommendation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D. C., July 10, 1957.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN CELLER: The bill about which you inquired of Mr. Whitehurst on June 28, 1957 (H. R. 7866), would amend provisions of title 28 of the United States Code relating to the United States Court of Customs and Patent Appeals. It would amend section 211 providing for the appointment of judges of the court by adding a provision declaring it to be a court "established under article III of the Constitution of the United States." It would amend sections 291, 292, 293, 294, and 295 of title 28 which now provide for the temporary assignment of circuit and district judges, both active and retired, to sit outside of their circuits and districts by providing for the assignment under specified conditions of a circuit or district judge by the Chief Justice of the United States or a judge of the Customs Court by the chief judge of that court to serve temporarily as a judge of the Court of Customs and Patent Appeals. Also it would authorize the Chief Justice of the United States to assign temporarily a judge of the Court of Customs and Patent Appeals, whether active or retired, under specified conditions to perform judicial duties in a court of appeals or district court and the chief judge of the Court of Customs and Patent Appeals to assign a judge of that court to serve temporarily in the Customs Court.

A somewhat similar bill, although differing in form, was introduced in the 83d Congress as H. R. 7864. The Judicial Conference of the United States at its annual meeting in September 1954 upon a report of its Committee on Revision of the Laws, of which Circuit Judge Albert B. Maris, of Pennsylvania, is the Chairman, approved that bill with a reservation that it expressed no view on the question whether the declaration that the United States Court of Customs and Patent Appeals was a court established under article III of the Constitution of the United States would be constitutionally effective. The committee stated that it regarded that as a judicial question for determination by the Federal courts if it arose and not within the competence of the Judicial Conference or its committees (pp. 27–28 of the September 1954 report of the Judicial Conference). The pending bill may therefore be regarded as meeting the approval of the Judicial Conference of the United States with the reservation that no opinion is expressed concerning the effect of the amendment of section 211 of title 28 declaring the court to be a court established under article III of the Federal Constitution.

Sincerely yours,

W. L. ELLIS, *Acting Director.*

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below in roman existing law in which no change is proposed, with matter proposed to be stricken out enclosed in black brackets, and new matter proposed to be added shown in italics:

SECTION 211, TITLE 28, UNITED STATES CODE

§ 211. 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 Customs and Patent Appeals. *Such court is hereby declared to be a court established under article III of the Constitution of the United States.*

SECTION 291, TITLE 28, UNITED STATES CODE

§ 291. Circuit judges.

[(a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit, or any judge of the Court of Claims to serve as a circuit judge in any circuit, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.]

(a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.

[(b) The Chief Justice of the United States may designate and assign temporarily a judge of the Court of Customs and Patent Appeals 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) The Chief Justice of the United States may designate and assign temporarily any circuit judge to serve as a judge of the Court of Claims or the Court of Customs and Patent Appeals upon presentation to him of a certificate of necessity by the chief judge of the court in which the need arises.

[(c) The Chief Justice of the United States may, upon presentation to him by the chief judge of the Court of Claims of a certificate of necessity, designate and assign temporarily any circuit judge to serve as a judge of the Court of Claims.]

(c) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

[(d) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.]

SECTION 292, TITLE 28, UNITED STATES CODE

§ 292. District judges

[(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.]

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

[(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.]

(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

[(c) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.]

(c) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

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

(d) The Chief Justice of the United States may designate and assign temporarily any district judge to serve as a judge of the Court of Claims, the Court of Customs and Patent Appeals or the Customs Court upon presentation to him of a certificate of necessity by the chief judge of the court in which the need arises.

SECTION 293, TITLE 28, UNITED STATES CODE

[§293. Circuit or district judges to Court of Customs and Patent appeals.

[The Chief Justice of the United States may, upon presentation to him by the chief judge of the Court of Customs and Patent Appeals of a certificate of necessity, designate and assign temporarily any circuit or district judge to perform such duties as judge of the Court of Customs and Patent Appeals as he is willing to undertake.

The Chief Justice of the United States may designate and assign temporarily a judge of the Customs Court to perform judicial duties in a district court in any circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.]

§ 293. Judges of other courts

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(b) The Chief Justice of the United States may designate and assign temporarily any judge of the Customs Court to perform judicial duties in a district court in any circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(c) The chief judge of the Court of Customs and Patent Appeals may, upon presentation to him by the chief judge of the Customs Court of a certificate of necessity, designate and assign temporarily any judge of the Court of Customs and Patent Appeals to serve as a judge of the Customs Court.

(d) The chief judge of the Customs Court may, upon presentation to him by the chief judge of the Court of Customs and Patent Appeals of a certificate of necessity, designate and assign temporarily any judge of the Customs Court to serve as a judge of the Court of Customs and Patent Appeals.

SECTION 294, TITLE 28, UNITED STATES CODE

§ 294. Assignment of retired justices or judges to active duty.

[(a) Any retired Chief Justice of the United States or associate justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.]

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

[(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

Any retired judge of the Court of Claims (1) may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit as he is willing to undertake, and (2) may be called upon by the chief judge of the Court of Claims to perform such judicial duties in such court as he is willing to undertake.]

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

[(c) Any retired judge of any other court of the United States may be called upon by the chief judge of such court to perform such judicial duties in such court as he is willing to undertake.]

(c) Any retired judge of the Court of Claims, the Court of Customs and Patent Appeals, or the Customs Court may be designated and assigned by the chief judge of such court to perform such judicial duties therein as he is willing to undertake or may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit as he is willing to undertake.

[(d) The Chief Justice of the United States shall maintain a roster of judges who have retired from regular active service but who are willing and able to undertake special judicial duties from time to time, which roster shall be known as the Roster of Senior Judges. Any judge of the United States who has retired from regular active service under section 371 (b) or 372 (a) of this title but is willing and able to undertake special judicial duties from time to time either in a particular court or courts specified by him or generally in any court may so indicate by requesting the Chief Justice of the United States to place his name upon the Roster of Senior Judges as available for such duty. The Chief Justice shall remove from the Roster of Senior Judges the name of any such judge who is no longer willing or able to perform any judicial duties. Any retired judge whose name appears upon the Roster of Senior Judges shall be known as a senior judge, and may be designated and assigned by the Chief Justice of the United States to perform such judicial duties as he is willing to undertake in any court of the United States other than the Supreme Court, upon presentation of a certificate of necessity by the chief judge of such court.]

(d) No retired Justice or judge shall perform judicial duties except when designated and assigned.

[(e) No retired justice or judge shall perform judicial duties except when designated and assigned.]

SECTION 295, TITLE 28, UNITED STATES CODE

§ 295. Conditions upon designation and assignment.

[No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of the Customs Court in active service shall be made without the consent of the chief judge of such court.]

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No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of any other court of the United States in active service shall be made without the consent of the chief judge of such court.

TITLE 28, UNITED STATES CODE

CHAPTER 13.—ASSIGNMENT OF JUDGES TO OTHER COURTS

Sec.
291. Circuit judges.
292. District judges.
[293. Circuit or district judges to Court of Customs and Patent Appeals.]
293. Judges of other courts.
294. Assignment of retired justices or judges to active duty.
295. Conditions upon designation and assignment.
296. Powers upon designation and assignment.

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