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Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY
UNITED STATES SENATE

CONCERNING

S. 677 AND S. 678

ON

MAY 7, 1979

Mr. Chairman and Members of the Subcommittee:

On March 20, 1979, I testified before the Committee on the Judiciary to state the views of the Department of Justice and the Administration in support of S. 677, the Judicial Improvement Act of 1979. I am honored to appear before this Subcommittee to present again the views of the Department and the Administration in support of this bill. In addition, I will present views on some portions of S. 678, the Federal Courts Improvement Act of 1979.

On February 27, 1979, the President sent a message to Congress expressly endorsing all of the proposals contained in S. 677. At the outset, I wish to stress that the President and the Attorney General believe that the enactment of this bill, as well as the other measures endorsed in the President's message, is important to place the federal judiciary in position to deal effectively with its business and to provide fair and adequate access to justice for the people of this country.

S. 677 -- THE JUDICIAL IMPROVEMENTS ACT OF 1979

The following is a summary of the first six titles of S. 677, presented for the convenience of the Subcommittee, but without repeating the supporting reasons set forth in my written statement submitted at the March 20 hearing.

Title I -- Terms of Chief Judges. This would change existing law, which has no minimum or maximum term of service for a chief judge of a district or circuit court, to place a limit of five years on the term of a chief judge and to provide that one cannot initially take office as a chief judge after the age of 65. A chief judge could continue to serve in that office until the age of 70, or until the expiration of five years. This would assure a minimum term as well as a maximum term. An essentially similar provision appears in Part A of Title I of S. 678.

Title II -- Appellate Panels. This would require that at least three judges decide every appeal and that at least two of the three be active judges of the circuit where the appeal is pending. This provision also appears in Part B of Title I of S. 678.

Title III -- Judicial Councils. This would restructure the judicial councils of the circuits so that no council would be larger than eleven judges, consisting of not more than seven circuit judges and four district judges. A council would contain at least two district judges. Under existing law, there is no limit to the size of the councils, and they contain no district judges. Part C of Title I of S. 678, with some variations, also puts limits on the size of the circuit councils and provides for membership of district judges.

Title IV -- Pensions. This provides that when a federal judge resigns from the bench to accept an appointment in the executive branch, he can be given full annuity credit toward his executive retirement for the years of service on the federal court. The substance of this provision is contained in Section 132 of Title I of S. 678, except that S. 677 would properly have the judicial branch contribute to the executive branch retirement system.

Title V -- Transfer of Cases. Under existing law, a court without jurisdiction has no option except to dismiss the case, even though there is another federal court which does have jurisdiction. This provision authorizes any federal court which lacks subject matter jurisdiction over a case to transfer that case to another federal court which does have jurisdiction. It is also contained in Part B of Title II of S. 678.

Title VI -- Interest. This provision authorizes the district courts, in their discretion, to require a defendant, against whom a money judgment has been entered, to pay interest on the amount of the judgment from the date the claim arose or from the date at which the defendant was informed of the facts giving rise to liability, whichever is later. The interest rate on judgments, after their entry, would be altered to reflect the contemporary prime rate as determined by the Internal Revenue Service in connection with interest on taxes. An essentially similar provision is contained in Part C of Title II of S. 678.

Title VII -- United States Court of Appeals for the Federal Circuit and United States Claims Court. Perhaps the major feature of S. 677 is Title VII, which would create a new intermediate appellate court to be known as the United States Court of Appeals for the Federal Circuit. This proposal also appears, with some variations, as Title III of S. 678. Because of the importance of such restructuring on the federal judiciary, the background and justification for this proposal will be set out at length below.

A NEW INTERMEDIATE APPELLATE COURT

This Committee is well acquainted with the statistics that illustrate the problems of judicial administration at the federal appellate level. In the fifteen years from 1962 to 1977, appellate court filings increased from 4,823 cases to 19,188, while the number of federal circuit judges increased from 78 to 97. The increase in filings exceeded the increase in judgeships by a twelve-to-one ratio, and the number of filings for each judgeship more than tripled. Docket pressures on the Supreme Court increased concomitantly.

Congress recognized the critical nature of the caseload explosion when it enacted the Omnibus Judgeship Act (P.L. 95-486) last year, which authorized 117 new district court judgeships and 35 new appellate judgeships. That much-needed measure will meet some compelling problems of the judicial system, but it fails to cure a basic weakness that has arisen in the federal judicial structure. Contemporary observers recognize that there are certain areas of federal law in which the appellate system is malfunctioning. The basic problem is the inability of the present federal appellate system to render within a reasonable time decisions that have precedential value nationwide. A decision of any one of the eleven regional circuits is not binding on any of the others. Only decisions of the Supreme Court have that effect; yet the Supreme Court currently is reviewing less than 1% of the decisions of the courts of appeals.

This is an inadequate degree of review to assure supervision of the system. As a result, there are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which -- although the rule of law may be fairly clear -- courts apply the law unevenly when faced with the facts of individual cases. The difficulty here is structural Since the Supreme Court's capacity to review cases cannot be enlarged significantly, the remedy lies in some reorganization at the intermediate appellate level.

The essence of the proposal to solve these systemic problems is the creation of a new intermediate appellate court. This would be accomplished through a merger of the Court of Claims and the Court of Customs and Patent Appeals into a single appellate court with expanded jurisdiction. The new court, to be called the United States Court of Appeals for the Federal Circuit, would be an Article III court on line with the existing U.S. courts of appeals. It would inherit, in appellate form, all of the jurisdiction of the two existing courts. This includes appeals in suits against the government for damages, appeals from the Customs Court, appeals from the Patent and Trademark Office, and a few other agency review cases. In addition, the court would have jurisdiction over all federal contract appeals in which the United States is a defendant, over patent and trademark appeals from all federal district courts, and over some appeals

from the Merit Systems Protection Board. The new court would consist of the twelve judgeships of the two existing courts; those courts themselves would be abolished. Further review would be in the Supreme Court by certiorari.

Before proceeding to explain this proposal and its justification in detail, it is useful to note developments over a period of years which led to this legislation.

A. Recent Federal Appellate Court Reform Efforts

To increase the capacity of the federal judicial system for definitive adjudication of issues of national law, various proposals for restructuring the federal appellate courts have been considered in recent years by lawyers, jurists, and academicians. Detailed recommendations have been developed by the Study Group on the Caseload of the Supreme Court (the Freund Committee), the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), and the Advisory Council for Appellate Justice chaired by Professor Maurice Rosenberg. See Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195 (1975); Advisory Council for Appellate Justice, Recommendation for Improving the Federal Intermediate Appellate System (1975).

Thus, when we began efforts in the Department of Justice to draft legislation to resolve continuing problems of the federal appellate courts, we did not write on a clean slate. We have tried to draw on the experiences of those groups and to present a program that would alleviate some of the most compelling problems of the appellate system and would also be politically feasible.

1. The Study Group on the Caseload of the Supreme Court

The earliest court reform efforts of this decade focused on the Supreme Court. Filings in the Supreme Court increased from 1,234 cases in the 1951 term to 3,643 cases in the 1971 term. Of the 3,643 cases filed during the 1971 term, however, only 143 cases were disposed of by full opinion.

In 1971, Chief Justice Burger expressed concern about docket congestion in the Supreme Court when he appointed the Study Group on the Caseload of the Supreme Court, under the auspices of the Federal Judicial Center. Chaired by Professor Paul Freund, the Study Group reported in December 1972 that the Court was overburdened principally because of the need to screen a greatly increased volume of petitions for certiorari to determine which cases were worthy of consideration. This burden, the Study Group concluded, had led to failure to review issues that the Supreme Court would have decided in previous years, thereby preventing the Court from discharing its historic function of

resolving conflicting decisions among the circuits and otherwise authoritatively settling important questions of federal law.

To alleviate the problem, the Study Group recommended the creation of a National Court of Appeals. See Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972). This court would have been composed of seven judges of the existing courts of appeals, who would have been designated to sit on a rotating basis. The court would have had the power to decide some cases on their merits, but its major responsibility would have been to screen certiorari petitions that previously would have been filed in the Supreme Court. From the National Court of Appeals, about 400 cases a year would have been passed to the Supreme Court for further screening and possible review.

Although the proposal of the Study Group was the product of a distinguished group of lawyers and academicians, it provoked substantial controversy and gained little acceptance. The report did, however, serve to focus attention on weaknesses in the federal appellate system and led to further serious efforts to deal with those problems. Indeed, the latest effort to put the Supreme Court in a better position to manage its business is the bill to place the Court's jurisdiction largely on a discretionary basis (S. 450), which passed the Senate in April. This bill would alleviate some of the Supreme Court's problems by enabling it to manage its docket more easily.

2. The Commission on Revision of the Federal Court Appellate System

Limitations on the capacity of the Supreme Court and its possible overload are not the only difficulties that beset the federal appellate system. The ballooning caseloads of the eleven geographically-organized courts of appeals, combined with the fact that only one reviewing court -- the Supreme Court -- can render decisions that are binding nationwide, have caused serious problems of unevenness and uncertainty in federal law.

The present framework of the courts of appeals was created by the Evarts Act in 1891. See Circuit Courts of Appeals Act of 1891, ch. 517, 26 Stat. 826. In that Act, Congress established a structure that served well until recently. The jurisdiction of the appellate courts is almost entirely mandatory, and there is little room for the courts' discretionary control of their dockets. In theory, a court of appeals must decide each case on its merits, even though this is often done summarily; unlike the Supreme Court, the appellate court cannot base its disposition of a case on a discretionary refusal to review. It is this intermediate tier of appellate courts that has carried the brunt of the legal explosion.

This exponential docket growth has increased opportunities for the development of disparate legal doctrines among the circuits. The likelihood that any decision by an appellate court will be reviewed by the Supreme Court is increasingly slight; moreover,

on many issues, there is no definitive legal ruling that must be followed. As a result, it is not unusual for the appellate courts to reach different decisions on the same issue. In addition, the likelihood of inconsistent adjudication within each circuit has grown as the number of judges has increased; in the larger circuits, the en banc procedure has decreased in effectiveness as a means of definitively establishing the law of the circuit. See P. Carrington, D. Meador, & M. Rosenberg, Justice on Appeal 161-63 (1976).

Congress responded to this problem in October 1972 by creating the Commission on Revision of the Federal Court Appellate System chaired by then-Senator Roman Hruska. The Commission was directed to study inadequacies in the entire federal appellate court system and to suggest changes in boundaries for the judicial circuits and in the structure and internal procedure of the courts of appeals. See Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, as amended, 28 U.S.C. § 41 (1976).

The Commission's first report recommended splitting the Fifth and Ninth Circuits, thereby creating two new regional courts of appeals. See Commission on Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, reprinted in 62 F.R.D. 223 (1973). This proposal has yet to be enacted and does not appear to be presently under active consideration by the Congress.

The second report of the Hruska Commission dealt with court structure. See Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195 (1975) (hereinafter cited as the Hruska Commission Report). As with the Study Group, the recommendation was for a new court, to be denominated a National Court of Appeals. But little about the Hruska Commission's National Court resembled the Study Group's Court, other than the name and the fact that each would have been a new tribunal inserted between the courts of appeals and the Supreme Court. The Hruska Commission benefited from reactions to the earlier proposal, as well as from the contemporaneous work of the Advisory Council on Appellate Justice. As a result, the Hruska Commission came to perceive the problem differently, and the Commission's proposal avoided most of the criticisms of the Study Group's recommendation. See Owens, The Hruska Commission's Proposed National Court of Appeals, 23 U.C.L.A. L. Rev. 580, 599 (1976).

The National Court of Appeals devised by the Hruska Commission would have had the power to decide cases on the merits, but its jurisdiction would have consisted solely of cases referred by the Supreme Court or transferred from the courts of appeals. It would have been composed of permanent Article III judges.

The Hruska Commission proposal was premised on the need to "increase the capacity of the federal judicial system for definitive adjudication of issues of national law" in order to remedy what the Commission characterized as the problem of "unnecessary and undesirable uncertainty." See Hruska Commission Report, supra, at 5, 13, 67 F.R.D. at 208, 217. The Commission pointed to four major consequences of the appellate system's lack of adequate capacity for the declaration of national law: (1) the Supreme Court's failure adequately to resolve conflicts among the circuits; (2) delay; (3) the burden upon the Supreme Court of hearing cases not clearly worthy of its attention; and (4) uncertainty in the law caused by potential intercircuit conflict, even though actual conflict might never develop. An additional problem, which was identified as particularly pressing in patent law, was said to be the Supreme Court's inability to monitor a complex field of law in which problems were caused not so much by actual unresolved conflicts between the circuits as by perceived disparities in results, a condition that encouraged unbridled forum shopping. Id. at 13-16, 67 F.R.D. at 217-21.

Critics raised a number of objections to the Hruska Commission's proposal, as they had previously to the Freund Committee's recommendations. Most critics agreed, however, that even though the evidence compiled by these groups might not justify a National Court of Appeals in the mold which they

had suggested, it did reveal an appellate system that was not working well. See, e.g., Feinberg, A National Court of Appeals, 42 Brooklyn L. Rev. 611, 624-27 (1976).

We believe that the problems identified in the Hruska Commission Report continue, and that indeed they may be worsening. Some solutions for these problems are imperative. The proposed United States Court of Appeals for the Federal Circuit holds the potential of solving at least some of these problems.

3. Specialized Courts

As an alternative remedy to the lack of uniformity and the uncertainty of legal doctrine in specific areas of the law, several commentators have advocated the establishment of an appellate court with national jurisdiction over a single area of litigation. For example, for at least the past forty years, some distinguished tax attorneys have advocated a national court to review tax cases. See, e.g., Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153 (1944); Traynor & Surrey, New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies, 7 Law & Contemp. Prob. 336 (1940). Other observers have concluded that because decisions in environmental cases were so inconsistent as to impede agency action, a special court might be warranted for these types of cases. See Whitney, The Case for Creating a Special Environmental Court System, 14

William & Mary L. Rev. 473, 500-01 (1973). Still other commentators propose some form of centralized review of actions of federal executive and administrative agencies. See, e.g., Nathanson, Proposals for an Administrative Appellate Court, 25 Admin. L. Rev. 85 (1973).

An examination of the various proposals reveals that, in certain areas of the law, specialized appellate courts may offer three potential advantages over review in the regional circuit courts of appeals: specialized courts could permit judges to develop expertise in the subject-matter of their cases, thus improving the quality of decision (this factor is particularly relevant in fields where technical expertise expedites decision making); by minimizing actual and potential intercourt conflicts, a specialized court could reduce or eliminate disuniformity and uncertainty in the law -- and the forum shopping that accompanies these conditions; and by removing some of the most time-consuming cases from the dockets of the regional courts of appeals, a specialized court could relieve the caseload burden on the other courts. The total effect would be an improvement of the conditions for decision making in both the regional and the specialized appellate courts. Cf. Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum L. Rev. 1, 73 (1975).

These potential advantages would not accrue, however, without corresponding costs. Indeed, because of sizeable disadvantages, specialized courts have encountered broad opposition. Objection to a court with jurisdiction limited to a single, narrow category of cases rests primarily on twin concerns: such a court could foster the development of judges who take too limited and arcane a view toward the development and application of the law; and such a court would be vulnerable to capture by special interests centering on the subject matter of its jurisdiction.

The first of these concerns involves the apprehension that judges on a specialized court could lose sight of the basic values at stake in their decisions. Because the judicial process requires "the unique capacity to see things in their context," judges benefit from constant exposure to pressures that tend to expand the breadth of their experience. Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A.J. 425 (1951). Consequently, if one field of law becomes segregated from the mainstream of the law, there is a danger that the judges will develop "tunnel vision" and that the body of law will evolve "a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law." Id. As a result, the "seclusiveness" of

that branch of the law becomes further intensified, and the field of law becomes effectively "immunize[d] . . . against the refreshment of new ideas." Id. at 426.

The second apprehension -- that vested interests might capture a specialized court -- stems in part from experiences with the Commerce Court. Established in 1910 and abolished in 1913, the Commerce Court had been given jurisdiction over a single category of cases that commanded extraordinary public attention during a populist era of our history. See F. Frankfurter & J. Landis, The Business of the Supreme Court 153-74 (1928). Although during the period of the Court's existence it was asserted that the Commerce Court was dominated by the railroads, the opposite appears to have been true, in that the court and the railroads were not allies. See Dix, The Death of the Commerce Court: A Study in Institutional Weakness, 8 Am. J. Legal Hist. 238, 247 (1964). Whatever the facts, however, those experiences have left a strong distaste for specialized courts among American lawyers and judges.

Although we recognize the advantages of a specialized appellate forum in certain circumstances, on balance, we believe that law and justice are likely to be better served through appellate tribunals which are not limited in their jurisdiction to a single category of cases.

4. Omnibus Judgeship Act

Whatever the merits or lack of merits of earlier proposals, as a practical matter none of them has gained broad support. Consequently, the problems persist. Unfortunately, the malfunctioning also will not be solved by the recent enactment of the Omnibus Judgeship Act, which will add 152 new judges to the federal judiciary. It is a curious characteristic of judicial organization and procedure that a remedy for one malady in the system often creates or exacerbates another -- and that is the case here. The Act is unlikely to alleviate docket congestion permanently, and, more importantly, it will not increase the capacity of the federal judicial system for definitive adjudication of issues of national law. Indeed, the addition of new judgeships will only worsen problems of unevenness and uncertainty in the federal law. This is because the new appellate judgeships will increase the number of decisional units at the intermediate level without increasing the system's capacity for definitive resolution of conflicts among the decisional units. See Carrington, Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542, 544-46 (1969).

5. Imperatives of Federal Court Restructuring

The discussion provoked by the Study Group, the Hruska Commission, and the Advisory Council for Appellate Justice

produced agreement on principles, stated in various ways, that must be considered in any future appellate court reform effort. These reform imperatives which, for reasons of public opinion or sound policy, cannot be ignored, are:

1. No fourth tier should be added to the federal judicial system.
2. Any new appellate tribunal with substantial, continuing jurisdiction should be composed of Article III judges of its own.
3. If a new court is created, its jurisdiction and position in the system should be such as not to diminish the status of existing courts and judges.
4. Undue specialization of courts and judges should be avoided.
5. Any new tribunal should provide flexibility in the federal court system to meet changing docket conditions.
6. Access to and review by the Supreme Court should remain available.
7. The number of judges or courts within the federal judiciary should not be unduly expanded.
8. A new court should operate free of jurisdictional uncertainties.

The proposed U.S. Court of Appeals for the Federal Circuit satisfies these imperatives.

B. United States Court of Appeals for the Federal Circuit

The proposal to create a new Court of Appeals for the Federal Circuit through a merger of the Court of Claims and the Court of Customs and Patent Appeals (CCPA) addresses the structural problems which have been the concern of all of these efforts of the last decade and which are left uncorrected by the Omnibus Judgeship Act. First, it would reduce the number of decision-making entities within the federal appellate system. Second, it would provide a new forum for the definitive adjudication of selected categories of cases.

1. Background -- The Existing Courts

Since the new appellate court would absorb the business of the Court of Claims and Court of Customs and Patent Appeals -- and thus those two courts would be discontinued as such -- a brief explanation of the background and business of those courts is useful to an understanding of the legislation we are proposing.

a. The Court of Claims

The Court of Claims was created in 1855 primarily to relieve the pressure on Congress from the volume of private bills. Act of February 24, 1855, c. 122, 10 Stat. 612. In 1953 it was declared by Congress to be an Article III court (Act of July 28, 1953, § 1, 67 Stat. 226), an action confirmed by the

Supreme Court. See Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The court is composed of seven judges, who sit either en banc or in three-judge panels. Headquartered in Washington, D.C., the court can and does sit elsewhere. (For a history of the Court of Claims, see Bennett, The United States Court of Claims, A 50-Year Perspective, 29 Fed. Bar J. 284 (1970); Symposium, The United States Court of Claims, 55 Geo. L. J. 573 (1967).

The jurisdiction of the Court of Claims is quite general and varied, even though the United States is always the defendant and the court has limited equity power and no criminal jurisdiction. See 28 U.S.C. §§ 1346, 1491-1506 (1976); 33 U.S.C. § 1321(i) (1976); 50 U.S.C. § 1218 (1976); 91 Stat. 274 (1977). Most of the court's docket is made up of government contract and tax cases, with Indian claims cases, military and civilian pay cases, and inverse condemnation cases making up the bulk of the remainder. Patent cases are heard whenever the United States is the ultimate user of beneficiary of a product or process that allegedly has infringed the rights of a patent owner.

By statute the Court of Claims is a court of first instance (28 U.S.C. §§ 1491-1505 (1976)), but in reality its seven Article III judges function largely as an appellate court. Initial determinations in the cases before this court are ordinarily made by one of sixteen Court of Claims commissioners who serve in fact as the trial judges of the court. See 28 U.S.C. §§ 792(a), 2503 (1976). These trial judges issue all

interlocutory orders and preside over pretrial proceedings and the trial itself, functioning much as district court judges do, except that Court of Claims judges do not conduct jury trials. See Cowen, Foreword, A Symposium: The United States Court of Claims, 55 Geo. L.J. 393, 395 (1966). Their functions are also analogous to those performed by federal magistrates and special masters. The trial judges hear cases throughout the country, but only the Article III judges may enter dispositive orders. After the conclusion of a trial, the trial judge prepares a report containing findings of fact and recommended conclusions of law. Definitive action in the case is then taken by the Article III judges, sitting either in panels of three or en banc. Because of the anomalous position of the trial judges within the present judicial system, a restructuring of the Court of Claims has been advocated by the Court of Claims Committee of the Bar Association of the District of Columbia. This problem is dealt with in S. 677 and S. 678 by vesting all of the trial jurisdiction of the present Court of Claims in a new Article I forum entitled the United States Claims Court.

Review of Court of Claims decisions is available by writ of certiorari in the Supreme Court. The trial judges, but not the Article III judges, also adjudicate congressional reference cases. 28 U.S.C. §§ 1492, 2509 (1976).

The 1978 Clerk's Report shows that the Article III judges of the Court of Claims wrote 102 majority opinions involving 117 cases. At the close of the year ending September 30, 1978, the Court had only 29 cases awaiting decision, of which 19 were disposed of on or before October 18, 1978. Although the docket of the Article III judges therefore is current and does not appear heavy when compared with that of the regional courts of appeals, the generally lengthy nature of government contract cases and numerous dispositions of cases by order appear to fully occupy the court.

Cases are commenced in the Court of Claims by filing a "petition," which is a pleading analogous to a complaint in district court. All cases are placed on the trial judges' docket, where they remain until the case is refined to an issue of law and the trial judge files a report with the Article III judges. If a major motion is filed in a case, it may appear on the dockets of both the trial judges and the Article III judges; thus, not all petitions require the attention of a trial judge. In 1978, 583 petitions were placed on the trial judges' docket, and a total of 1,524 petitions were pending before the trial judges at the end of the court year.

b. Court of Customs and Patent Appeals

Created as the Court of Customs Appeals in 1909 (Customs Administrative Act of 1890, c. 407, § 29, 26 Stat. 131, as added by Payne-Aldrich Tariff Act of August 5, 1909, c. 6.,

§ 28, 36 Stat. 11, 105), the name was changed to the Court of Customs and Patent Appeals following the addition of patent jurisdiction in 1929. Act of March 2, 1929, c. 488, 45 Stat. 1475. The court is composed of five judges. It was declared by Congress in 1958 to be an Article III court (Act of August 25, 1958, § 1, 72 Stat. 848, added to 28 U.S.C. § 211 (1958)), a status which was upheld by the Supreme Court. Glidden v. Zdanok, 370 U.S. 530 (1962). (For a history of the CCPA, see Graham, Court of Customs and Patent Appeals: Its History, Functions, and Jurisdiction, 1 Fed. Bar J. 33 (1932)).

The CCPA has jurisdiction over appeals from decisions of the U.S. Customs Court, the Patent and Trademark Office, the U.S. International Trade Commission, and from certain findings of the Secretaries of Commerce and Agriculture. See 15 U.S.C. § 1071 (1976); 19 U.S.C. § 1337(c) (1976); 28 U.S.C. §§ 1541-1545 (1976). The court has no jurisdiction of patent infringement cases and no copyright jurisdiction.

In 1978, the court had 153 filings and 199 dispositions. The Clerk's Report for that year shows 20 customs, commerce, and international trade cases, and 133 patent and trademark cases. According to the Annual Report of the Director of the Administrative Office of the United States Courts, the average time for disposition of a patent or trademark case in

the CCPA has fallen from 31.5 months from filing to decision in 1973 to 9.2 months in 1978.

Each judge on the CCPA has two technical advisors to assist him in resolving cases. These advisors are lawyers whose training is identical to that of a law clerk, except that they also have technical degrees and experience in a scientific or engineering field or in patent law. They serve for two years and confer with the judges on both legal and technical matters. In addition, the Court has a permanent Chief Technical Advisor.

While allowance must be made for the complicated nature of much of the CCPA's caseload, the court appears to have some capacity for a larger volume of business. Evidence of this ability to handle additional cases is revealed by the frequent sittings by two of the five CCPA judges in other courts. During 1977, one of the judges sat 36 days on the circuit courts of appeals, hearing 209 cases; another judge served 9 days in the courts of appeals, hearing 47 cases. In 1978, one judge sat 16 days, hearing 101 cases; another judge sat 9 days, hearing 41 cases. These sittings on other courts are cited simply to show that there is judge-time available for the adjudication of appeals in addition to those that make up the current CCPA docket.

2. <u>The Proposed New Court: Organization and Structure</u>

The proposed U.S. Court of Appeals for the Federal Circuit -- which would absorb the business of the Court of Claims and the CCPA -- would not be an additional tier in the

federal judiciary. Rather, it would be another circuit, functioning much like the other courts of appeals, except that its jurisdiction would be defined by subject matter instead of geography. Review of the new court's decisions would be in the Supreme Court by writ of certiorari.

As a transitional measure, the persons occupying the twelve Article III judgeships of the two existing courts on the effective date of this legislation (two years after the date of enactment) would become judges of the new court. The positions would be designated as United States circuit judgeships, and future vacancies on the court would be filled by Presidential appointment, with Senatorial confirmation.

As a further transitional feature, the first chief judge of the Court of Appeals for the Federal Circuit also would be appointed by the President, with Senatorial approval. After the first chief judge of the Federal Circuit vacated that position, the chief judge would be chosen by seniority of commission, in the manner prescribed for other United States courts of appeals under 28 U.S.C. § 45.

The jurisdiction of the new appellate court would be both limited and exclusive. As we noted previously, it would inherit virtually all of the jurisdiction of the two existing courts. In addition, it would have jurisdiction over all federal contract appeals in cases brought against the government, over

patent and trademark appeals from federal district courts throughout the country, and over appeals from the Merit Systems Protection Board. The new court would not have any jurisdiction over cases brought under the Federal Tort Claims Act. Since these cases (only one of which has ever been filed in the present Court of Claims) frequently involve the application of state law, they will continue to go to the regional courts of appeals. In all, the new court would handle approximately 900 cases annually. Although the projected caseload is somewhat lighter than the number of cases that are docketed in the regional courts of appeals, it must be remembered that the cases considered by the new court will be unusually complex and time-consuming.

The new appellate court would have its headquarters in Washington, D. C., in the facilities presently shared by the two existing courts. By rule of court, it could sit at other designated places throughout the country. The court would sit in panels of three or more judges or en banc. Under existing law, other United States courts of appeals are authorized to decide cases in separate divisions, each consisting of three judges. See 28 U.S.C. § 46(b) (1976). The jurisdiction of the Court of Appeals for the Federal Circuit would consist of an unusual number of complex cases in which current law is disuniform or inconsistently applied, and its decisions are intended to have nationwide precedential effect. Consequently, the judges

of the Federal Circuit would be authorized to determine the size of the divisions in which the court would sit -- with the provision, however, that divisions could not consist of less than three judges. This would permit the Federal Circuit to sit in panels of more than three judges, but as less than a full en banc court, for cases in which authoritativeness of decision and doctrinal stability could be enhanced by the use of larger panels. Panels of five judges, for example, might provide greater assurance of sound collective judgment and afford greater dignity to the decisions, thereby contributing to nationwide stability in the law.

Under the bill, it is contemplated that the court would manage the assignment of cases and judges to panels in such a way as to assure a balance between continuity and rotation, and a balance between the development of subject matter competence and the avoidance of undue specialization. This would be achieved through a blend of gradual rotation of panel assignments of judges and subject matter assignments of cases. This is important in order to promote doctrinal coherence and stability.

Taken together, the provisions on panel composition and the provisions on the assignment of cases to panels authorize the court to conduct its adjudicative business in a flexible way that will take advantage of the backgrounds and special competencies of its judges. It provides an optimal procedure for developing sound, uniform legal doctrine.

As mentioned previously, the Court of Claims also performs a substantial trial function which, in practice, is carried out by the trial judges of the court rather than by the Article III judges. Under this proposal, the trial function of the Court of Claims would be assigned to an independent Article I court resembling the Tax Court of the United States. The new trial court would be called the United States Claims Court. Its jurisdiction would be identical to the trial jurisdiction of the current Court of Claims, except that it would not hear Federal Tort Claims Act cases.

The United States Claims Court would be composed of sixteen Article I judges, who would be appointed by the President with the consent of the Senate. They would serve for a term of fifteen years. The chief judge of the Claims Court would be designated by the judges of the court on a biennial basis. As a transitional measure, persons who were in active service as trial judges of the Court of Claims on the effective date of this legislation would become Article I judges of the United States Claims Court. They would serve for a term of fifteen years, measured from the day they had first taken office as trial judges of the Court of Claims, and they would be eligible for reappointment. Like the present Court of Claims and the Tax Court, the Claims Court would be authorized to sit nationwide. The court would be required to establish times and places of its

sessions with a view toward minimizing inconvenience and expense to litigants.

1. Administrative Efficiencies and Economics

The creation of a single new appellate entity has considerable advantages. The Court of Claims and the Court of Customs and Patent Appeals were historically justified at the time they were created, and those courts have done a good job with the cases that have been assigned to them through the years. But the merger of these two courts now would reduce some overlapping functions and would provide for more efficient court administration. For example, there should be considerable savings through the maintenance of one clerk's office instead of two.

At the same time, the consolidation of the two courts would bring them administratively into the mainstream of the federal judiciary and would upgrade the status of their judges and functions. Although both courts participate in the Judicial Conference (28 U.S.C. § 331) and are among the courts within the jurisdiction of the Administrative Office of the United States Courts (28 U.S.C. § 610), their integration into the judicial budgetary and administrative process is far from total. On budgetary matters, for example, the proposed budgets for the two courts are routed to the Office of Management and Budget through the Administrative Office, along with the proposed budgets for the

district and circuit courts; but, unlike the other courts that are serviced by the Administrative Office, representatives of each of these courts appear directly before the appropriating committees of the Congress to justify their budget requests, in much the same fashion as the Supreme Court. Whatever the historical reason for this practice may be, there is little justification today for having two courts (other than the Supreme Court), out of the entire federal judiciary, appear separately to explain their budgetary submissions. The merger of the two courts would permit them to be fully integrated into the budgetary process. Thus, merging these two courts into a single court, as a regularized part of the intermediate appellate tier, would assure more effective and rational administration of the federal judiciary as a whole.

4. Availability of a Central Appellate Forum

In addition to achieving administrative efficiencies, the establishment of the Court of Appeals for the Federal Circuit would provide an appellate forum capable of exercising jurisdiction over appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity. Thus, once such a forum is created, Congress will have available a central appellate court to which it can route categories of cases as needs and conditions change in the years ahead.

The absence of such a court in the present federal judiciary has compelled Congress from time to time in the past to create special courts. In 1971, for example, Congress created the Temporary Emergency Court of Appeals (TECA), composed of three or more district or circuit judges designated by the Chief Justice, to hear all appeals nationwide in cases arising under the Economic Stabilization Act of 1970. P.L. 92-210. According to its legislative history, TECA was originally established to gain consistency of decision. S. Rept. No. 507, 92nd Cong., 1st Sess. (1971).

Although TECA's original caseload arising under the 1970 Act diminished and then disappeared after the expiration of the mandatory wage-price controls authorized under the Act, TECA was given additional jurisdiction under three subsequent statutes:

(1) The Emergency Petroleum Allocation Act of 1973;

(2) The Energy Policy and Conservation Act of 1975; and

(3) The Emergency Natural Gas Act of 1977.

TECA continues in existence and, to date, has rendered at least 116 reported opinions.

Such piecemeal establishment of courts with national appellate jurisdiction to provide consistency of legal doctrine carries with it many administrative disadvantages. When Congress established TECA, for example, it authorized the court to prescribe

rules governing its procedures and to appoint a clerk and such other employees as it deemed necessary or proper. As a result, TECA duly promulgated its own rules of procedure (33 in number) and currently employs three full-time clerks and a full-time law clerk to serve the 19 judges currently designated for the court. The court currently has only 20 cases pending on its docket. Modest though these matters may seem, they constitute a proliferation of rules and personnel that could be avoided if there were in existence a court capable of exercising jurisdiction over appeals from throughout the nation. If the U.S. Court of Appeals for the Federal Circuit had been in existence, Congress would not have needed to create TECA.

TECA is but one example in our history of a felt need for the availability of central review of issues of national significance. The proposed court would provide an on-going forum, adequately staffed and organized, to which Congress could direct appeals in categories of cases where there is particular need for definitive, uniform decisions. It would remove the necessity for special, ad hoc courts.

5. Improved Administration of the Patent Law

Based on the evidence it had compiled, the Hruska Commission singled out patent law as an area in which the application of the law to the facts of a case often produces different outcomes in different courtrooms in substantially

similar cases. See Hruska Commission Report, supra, at 15, 144-57, 67 F.R.D. at 214, 361-76. Furthermore, in a Commission survey of practitioners, the patent bar indicated that uncertainty created by the lack of national law precedent was a significant problem, and the Commission singled out patent law as an area in which widespread forum-shopping is particularly acute. Id. at 144-57, 67 F.R.D. at 361-76.

There are three possible forums for patent litigation: the Court of Customs and Patent Appeals, a federal district court, or the Court of Claims.

If the Patent and Trademark Office denies a patent, the disappointed applicant may choose between review of the decision in the CCPA or a suit against the Commissioner of Patents and Trademarks in the United States District Court for the District of Columbia. A loser in a patent interference proceeding may appeal to the CCPA or may file a civil action in federal district court where the issues will be considered de novo. This suit will be subject to the general rules of venue and in personam jurisdiction. The winner in an interference proceeding, as appellee, may exercise the option to remove the case from the CCPA to federal district court. Review of CCPA decisions is in the Supreme Court, while review of decisions of the District of Columbia District Court is in the Court of Appeals for the District of Columbia Circuit.

Jurisdiction of suits for infringement of patents or for declaratory judgments of non-infringement is in the federal district courts. Thus, because district courts throughout the United States handle patent cases, each of the eleven circuit courts of appeals renders decisions on patent questions. Further review is by certiorari in the Supreme Court.

The Court of Claims decides patent cases in which the United States is an alleged infringer. The decisions of the court are reviewable by the Supreme Court.

Although these multiple avenues of review do result in some actual unresolved conflicts in patent law, the primary problem in this area is uncertainty which results from inconsistent application of the law to the facts of an individual case. Even in circumstances in which there is no conflict as to the actual rule of law, the courts take such a great variety of approaches and attitudes toward the patent system that the application of the law to the facts of an individual case produces unevenness in the administration of the patent law. Perceived disparities between the circuits have led to "mad and undignified races" between alleged infringers and patent holders to be the first to institute proceedings in the forum that they consider most favorable. H. Friendly, Federal Jurisdiction: A General View 155 n.11 (1973).

The Hruska Commission's patent law consultants, Professor James B. Gambrell and Donald R. Dunner, Esq., deplored the forum

shopping that occurs in that field of the law. They pointed out that, at least when the issue turned on validity, "[p]atentees now scramble to get into the 5th, 6th, and 7th circuits since the courts are not inhospitable to patents whereas infringers scramble to get anywhere but in these circuits." Hruska Commission Report, supra at 152, 67 F.R.D. at 370. They concluded that forum shopping on this scale "not only increases litigation costs inordinately and decreases one's ability to advise clients, it demeans the entire judicial process and the patent system as well." Id.

The Supreme Court's decision in Blonder-Tongue Laboratories v. University of Illinois, 402 U.S. 313 (1971), does not wholly cure the problem. Until that case, the doctrine of mutuality of estoppel required that for the patentee to be bound by the prior decision, the alleged infringer must also be bound. Since the litigating parties were rarely identical, multiple litigations occurred, stare decisis being the only deterrent. In Blonder-Tongue, however, the United States Supreme Court announced the demise of the requirement of mutuality of estoppel. The stakes in an individual patent litigation have thereby grown because a loss by the patentee on the issue of validity may bind him in all subsequent litigation. While this is a salutary development in that it reduces multiple litigations over the same patent, the effect is to settle the validity of the patent under one circuit's

view of the law and its approach in applying the law, which may differ from that of other circuits. In other words, although the Blonder-Tongue rule may settle certain issues as to a particular patent, it does little to establish nationally uniform administration of patent law. Moreover, because the first court to decide a case will settle the validity of the patent, this new estoppel effect may even intensify forum shopping. Centralized review of patent cases in the proposed court would resolve this problem.

The infrequency of Supreme Court review of patent cases leaves the present judicial system without any effective means of assuring even-handedness nationwide in the administration of the patent laws. The proposed new court would fill this void in the system.

Directing patent appeals to the new court also would have the salutary effect of removing these unusually complex, technically difficult, and time-consuming cases from the dockets of the regional courts of appeals. This would leave those courts better able to handle other types of cases that flow to them. Although the creation of the new court would therefore reduce the workload of the appellate courts, case management is not the primary goal of the legislation; rather, the central purpose is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exists in the administration of patent law.

6. Avoidance of Specialization and Other Pitfalls

The proposed new court should not be misunderstood to be a "specialized court," as that term is normally used. The court's jurisdiction would not be limited to one type of case, or even to two or three types of cases. Rather, it would have a varied docket spanning a broad range of legal issues and types of cases. It would handle all patent appeals and some agency appeals, as well as all other matters that are now considered by the CCPA or the Court of Claims. The cases heard by these courts contain a variety of issues. For example, the Court of Claims decides cases involving federal contracts, civil tax issues if the government is the defendant, Indian claims, military and civilian pay disputes, patents, inverse condemnation, and various other matters. The CCPA decides patent and customs cases from several sources, and those cases often include allegations or defenses of "misuse, fraud, inequitable conduct, violation of the antitrust laws, breach of trade secret agreements, unfair competition, and such common law claims as unjust enrichment." See Kauper, Statement submitted to Hruska Commission, May 20, 1974, at 14 (unpublished; on file in National Archives).

The variety of issues that arise in the patent law is borne out by an analysis done by the Office for Improvements in the Administration of Justice of patent appeals in the regional federal appellate courts during 1976, 1977, and 1978 (appeals

which would hereafter go to the new court). Most of those appeals presented only questions under the patent law. However, during that time, the circuits disposed of approximately 61 cases raising mixed patent, trademark, and antitrust or unfair competition issues. Of these, the circuit courts were called upon to decide antitrust questions in ten cases and unfair competition issues in sixteen cases.

This rich docket assures that the work of the proposed court would be broad and diverse and not narrowly specialized. The judges would have no lack of exposure to a wide variety of legal problems. Moreover, the subject matter of the new court would be sufficiently mixed to prevent any special interest from dominating it. When patent cases, claims of all sorts against the government, and some civil tax cases and agency appeals are combined, it is clear that no single interest could muster sufficient political influence to control the selection of a majority of the judges on the court.

In addition to avoiding objections to specialized courts, the proposed court is structured and organized so as to observe all of the imperatives of appellate court reform identified earlier in this statement. It also avoids objections which have been raised to other appellate restructuring proposals of recent years.

7. Logistical Feasibility

The proposal contains additional positive features. From a practical standpoint, a merger of the Court of Claims and the CCPA could be accomplished with virtually no disruption to the people involved. The existing courts already jointly occupy almost all of the Courts Building on Lafayette Square in Washington, D.C., where there appears to be room for additional judges' chambers. The two courts share the same library, and court personnel share the same dining facilities. The Court of Claims trial judges are also located in this building. Furthermore, there is already a standing order of the Judicial Conference allowing the interchange of judges between the two courts. See Report of the Proceedings of the Judicial Conference of the United States, September 23-24, 1976, at 53.

An analysis of the workload of the proposed new court discloses that this merger also could be accomplished easily in terms of caseload. The dockets of both existing courts are current. Set out below are tables showing the sources of cases for the proposed court.

Caseload in the Court of Customs & Patent Appeals - FY 1978

Type of Case	Filed	Terminated
Customs, Commerce and International Trade	20	26
Patent and Trademarks	133	173
Total CCPA cases	153	199

The docketing of cases in the Court of Claims presents a confusing statistical picture to the uninitiated. Some cases appear on the trial judges' docket and others appear on the docket of the Article III judges, while some cases are placed on both dockets. For purposes of projecting the new court's caseload, the relevant statistics are not those that reveal the total caseload of the Court of Claims but rather those that reflect the caseload of the Article III judges on the Court. The following table contains those figures.

Appellate Caseload in the Court of Claims - FY 1978

Total Dispositions by Article III Judges	
- In chambers	150
- Calendared	151
- Requests for Review	50
Total Article III-Judge Workload	351

In addition to inheriting the jurisdiction of the CCPA and the Court of Claims, the new appellate court would also receive patent appeals and all appeals in federal contract cases brought against the United States that are presently heard in the regional courts of appeals. On the basis of 1978 figures, approximately 145 patent and trademark appeals and 214 federal contract appeals would be rerouted to the new intermediate appellate court. The new court's appellate jurisdiction in patent cases is defined in relation to the district court's jurisdiction; that is, if the district court

has jurisdiction over the case under 28 U.S.C. § 1338, on the ground that the case arises under the patent law, the appeal in that case would go to the new appellate court, instead of to the regional circuit.

To recapitulate, at least on the basis of 1978 figures, the new court would be handling 153 cases that would otherwise have been heard by the CCPA, 351 cases that would have been heard by the Court of Claims, and 359 patent or federal contract cases coming directly from the district courts that would have been heard by the regional courts of appeals. This would provide a total docket of about 863 cases. Figures are not yet available concerning appeals from the newly created Merit Systems Protection Board.

This number of appeals would provide an adequate but not burdensome workload for a court of twelve judges. Several years ago, Professor Charles Alan Wright estimated that about 80 dispositions per year would be appropriate for a busy but not overworked federal appellate judge. See Wright, The Overloaded Fifth Circuit: A Crisis in Judicial Administration, 42 Texas L. Rev. 949, 957 (1964). The projected annual filings per judgeship in the proposed court would be approximately 72, which is lower than the per judgeship filings in any of the regional circuit courts in 1978. See 1978 Annual Report of the Director of the Administrative Office of the United States Courts. Filings per judgeship in the eleven circuits ran from a low of 123 in the

Eighth Circuit to a high of 238 in the Ninth Circuit. Id. However, because the new court will be considering cases that are unusually complex and technical, its cases will be extraordinarily time-consuming, and fewer of them will be appropriate for summary disposition than is true of the cases that make up the dockets of the regional courts of appeals. Therefore, a reduced number of cases per judgeship is realistic. In addition, there is value in not having a newly created court with nationwide jurisdiction overloaded initially.

In summary, the consolidation of the Court of Claims and the Court of Customs and Patent Appeals would be logistically and technically uncomplicated. Furthermore, it would make maximum use of facilities and of personnel that are already a part of the federal system. Thus, the proposal makes only a modest change in federal appellate court structure. It would, however, bring desirable uniformity to a critical area of the law. The forum shopping that is common to patent litigation would be reduced. Business planning would be made easier as more stable law is introduced. Moreover, as the new court brings uniformity to this field of law, the number of appeals resulting from attempts to obtain different rulings on disputed legal points can be expected to decrease.

At the same time, the merger of the courts would relieve docket pressures both on the regional appellate courts and on the Supreme Court. Although the number of appeals to be redirected is not great in proportion to the total caseload of these courts, the cases that would be rerouted contain some of the most complex and time-consuming issues that the courts consider. The impact of the new court on the dockets of these courts therefore would be far greater than a first glance at the raw numbers might indicate. The proposed new intermediate federal appellate court therefore would increase the capacity of the judicial system for definitive adjudication of issues in the patent law and other fields in which it has jurisdiction.

S. 678 -- THE FEDERAL COURT IMPROVEMENT ACT OF 1979

There are two proposals in S. 678 on which I would like to submit the views of the Administration and the Department of Justice, and one provision on which I would like to present my own views.

Section 151 -- Temporary Assignment of Judges to Administrative Positions. This would authorize an active or retired justice or judge of the United States to be assigned temporarily to the position of Administrative Assistant to the Chief Justice, Director of the Administrative Office of the United States Courts, or Director of the Federal Judicial Center. Such service would be without additional compensation.

This provision would make available to the judiciary the talents of administratively able judges and could thereby strengthen the administration of the federal judiciary. Presently, the Office of the Chief Justice is administratively overloaded, and enactment of such a proposal could make it possible for the Chief Justice to delegate a larger array of his routine administrative duties. As such, this is a meritorious proposal and should be enacted. However, it should not be regarded as a solution to more fundamental problems besetting the administration of the federal judiciary. Those problems deserve continuing study and may require some alterations in the administrative machinery of the judiciary.

Section 201 -- Interlocutory Appeals. This amends 28 U.S.C. § 1292(b) to provide the courts of appeals with discretionary authority to entertain appeals from interlocutory orders in civil actions after a refusal by a

district judge to certify the matter for appeal in accordance with the provisions of existing law. Although the Department favors some modification of this section, the need for such broad power in the courts of appeals is far from clear. Other remedies, such as the writ of mandamus, may be available in appropriate cases.

The breadth of the current proposal is such that it is likely to increase needlessly the number of interlocutory rulings brought to the courts of appeals for review. Moreover, it could permit delay by artful litigants and generally enhance the prospects of increased costs of litigation. Consequently, we do not support enactment of this provision in its present form.

We would recommend, however, enactment of a more modest proposal that would require the courts of appeals to review interlocutory orders when the Attorney General of the United States certified that the ruling involved a question concerning national security or foreign intelligence of such magnitude that it would warrant prompt and full consideration by an appellate court. This would eliminate the possibility of a recurrence of the unseemly situation that developed last year in the Socialist Workers case in New York, in which the Attorney General was compelled to incur a contempt citation before he could bring a matter of this nature before the court of appeals.

Title IV -- U. S. Court of Tax Appeals. S. 678 contains provisions to create a new federal appellate court, to be known as the United States Court of Tax Appeals. This Court would have exclusive nationwide jurisdiction over all civil tax appeals -- appeals from the federal district courts as well as from the Tax Court. It would be composed of twelve United States circuit judges, designated to sit for terms of three years while continuing to function as judges on their home circuits. The Department of Justice and the Administration have taken no overall position in relation to this proposal. It is understood that various officials within the Administration most concerned with the issues involved may present individual or departmental views. It is with such thorough, good-faith airing of views on this complex issue that the most responsible discussion can take place. Hence, on this proposal, I do not speak for the Department of Justice or the Administration. I offer herewith only the views of myself on this question, for whatever value they may be to the Committee as it considers this proposal.

1. The Objective. The objective of the proposal is to create a single appellate forum which would decide all appeals in civil tax cases from throughout the United States. I endorse that objective, and I congratulate Chairmen Kennedy and DeConcini and their staffs for their efforts on this proposal. This has long been advocated by tax lawyers and other informed observers. The problems of uncertainty and unevenness in the administration of the tax

law have often been noted and were prominently identified as a problem needing attention during the hearings of the Hruska Commission in the mid-1970's. The President in his message to Congress on February 27, 1979, noted that a "need exists for uniformity and predictability of the law in the tax area, where conflicting appellate decisions encourage litigation and uncertainty."

An understanding of the forums available for tax cases is useful background in evaluating this proposal. Under the present system, a taxpayer has three possible forums for tax litigation: the Tax Court, a federal district court, or the Court of Claims. The choice of court depends on whether the taxpayer is willing or able to pay the demanded taxes.

If the taxpayer refuses or is unable to pay, he must litigate his contention in the Tax Court of the United States. The Tax Court considers itself to be a national court bound only by a Supreme Court decision or a circuit opinion "squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone." Jack E. Golsen, 54 T.C. 742, 757 (1970). Soon after the Tax Court stated this rule, it was presented with identical issues in separate litigations, one of which would have been appealable to the Eighth Dircuit and one to the Fifth. The Eighth Circuit had not ruled on the issue, and there was no precedent to follow; the Tax Court in that case ruled in favor of the government. Kenneth W. Doehring, Tax Ct. Memo. 1974-234. The Fifth Circuit, however, had previously decided the issue in

favor of the taxpayer; the Tax Court felt bound to follow that rule and therefore ruled in favor of the taxpayer. Paul E. Puckett, Tax Ct. Memo. 1974-235. These cases illustrate the potentially inconsistent results that taxpayers must consider if they decide to litigate before the taxes are paid.

Appellate review of decisions of the Tax Court takes the form of an inverted pyramid, with the cases fanning out over the entire country to the eleven regional courts of appeals. Review in each case is in the circuit in which the taxpayer is located. Review of Tax Court decisions by the regional appellate courts is not, however, an effective means of producing uniformity of treatment for taxpayers. For example, in another set of cases, two brothers who lived in different circuits were co-owners of the same exclusive right to open Dairy Queen franchises in the State of Washington. When they appealed a decision of the Tax Court to their respective circuit courts of appeals, one brother obtained the benefit of capital gains treatment for money received from sales of individual franchise outlets, while the other brother was required to treat the payments as ordinary income in the nature of royalties. Compare (Theodore E.) Moberg v. Commissioner, 310 F. 2d 782 (9th Cir. 1962), with (Vern H.) Moberg v. Commissioner, 305 F. 2d 800 (5th Cir.). Thus, these taxpayers received disparate treatment of the most blatant kind simply because of the absence of a controlling national tax forum.

A taxpayer with the financial ability and willingness to pay the tax under protest has some choice as to the forum in which to sue for a refund. One alternative is to file suit in federal district court. Under most circumstances, the taxpayer may file suit in the federal district court in which he resides or, in the case of a corporation, in the federal district court in which the principal place of business is located. Alternatively, suits may be filed in the United States Court of Claims, which is located in Washington, D. C. District court decisions are reviewable by the regional courts of appeals and the Supreme Court, while Court of Claims decisions are reviewable by the Supreme Court.

This variety of available forums contributes to disuniformity in tax law. Indeed, articles which have considered a specialized tax court are replete with examples of direct conflicts among the courts that review tax cases. See, e.g., Miller, A Court of Tax Appeals Revisited, 85 Yale L. J. 228, 234-35 (1975). As many as ten years may elapse before a final decision is reached on some tax issues. As a result of this delay, critical areas of the law remain open until the Supreme Court or Congress resolves them. This failure to define the national law adequately and quickly leads to uncertainty in legal doctrine and severe consequences for the appellate system. Lack of uniformity breeds forum-shopping as the attorneys for taxpayers

scramble to find a court with a decision directly in point with the special facts of their case, or at least a court whose general approach to problems leans toward the taxpayer's position.

The costs of uncertainty in the tax law outweigh whatever benefits there may be in prolonged and competing considerations of the same tax law question by the different circuits. The argument that the law gains through the approaches of different appellate courts has much less force in the tax law than it does in other areas such as, for example, constitutional law. This fermentation and prolonged consideration is a luxury which the tax law system cannot afford.

The creation of an appellate tax court with jurisdiction to render decisions that are binding nationwide would have material benefits for the system. Such a court would introduce certainty into tax litigation. As a result, taxpayers would know more quickly whether to settle or to press an issue -- a development that could reduce court congestion as taxpayers come to recognize areas of tax law in which appeal would be fruitless. Predictability within the system would contribute to equality of treatment for all taxpayers,

and citizens would know more clearly the tax consequences of their actions. The Internal Revenue Service also would benefit from this certainty of legal doctrine since it would reinforce our tax system, which depends upon self-assessment and administrative resolution of controversies. In addition, channelling tax litigation to a single forum would encourage expertise in the resolution of tax cases, and thereby reduce the time necessary to decide those cases.

2. Means of Achieving the Objective. Whether the structure embodied in S. 678 is the best means available for providing a single appellate forum for tax cases is much less clear. One admirable feature of the bill is that it does not create a narrowly specialized court, that is, an appellate court which decides nothing but tax appeals. As I pointed out earlier in this statement, there is much sentiment against rigidly specialized appellate courts. On the other hand, doctrinal coherence and stability -- which are among the prime purposes of a single appellate court -- would be better served through an appellate court which had permanent judges of its own. Putting these two considerations together, the ideal forum would be one which is not narrowly specialized, but which would have its own permanent compliment of appellate judges.

This combination is achieved through the proposed U. S. Court of Appeals for the Federal Circuit, as provided for in S. 677 (Title VII) and in S. 678 (Title III). Earlier in my testimony, I pointed out that this tribunal would not be specialized but would have a wide range of jurisdiction, and it would have twelve permanent judgeships (which could be added to as the demands of judicial business justify). Moreover, a permanent court of this kind would have an established clerk's office and other facilities. The proposed U. S. Court of Tax Appeals, on the other hand, would require additional facilities of some kind, and it would also require a clerk's office and supporting personnel.

The judges of the proposed court of tax appeals would also remain judges on their home circuits. Scheduling problems for the tax appeals court might be unusually difficult, given the need to fix times and places compatible with judges from across the country who would also have continuing, substantial involvement in their own appellate courts. Moreover, the judges of the new court would themselves be confronted with a continual division of duties during their three-year terms. These split responsibilities, in turn, could pose awkward administrative and logistical problems for each of the existing circuit courts.

All things considered, from the standpoint of administrative convenience and expense, the use of the proposed U.S. Court of Appeals for the Federal Circuit would be preferable. Generally speaking, the federal judicial system can be administered better and more effectively by having fewer judicial units rather than many. We should avoid, wherever possible, adding to the number of separate forums. In addition, because the Court of Appeals for the Federal Circuit would have permanent judges, it would be a preferable forum for tax appeals from the standpoint of continuity and doctrinal stability.

One of the arguments made against including tax appeals in the proposed U.S. Court of Appeals for the Federal Circuit is based on the premise that the individuals who at this moment are judges of the Court of Claims and the CCPA are not the ideal persons to serve as judges in the future on tax appeals. That argument, however, lacks real substance and, indeed, is irrelevant to the institutional question whether a new U.S. Court of Appeals for the Federal Circuit is the appropriate forum for civil tax

appeals. In the first place, this is at most a short-run, transitional matter. Under the terms of S. 677, the creation of the U.S. Court of Appeals for the Federal Circuit would not come about until two years after the date of enactment of the bill. Assuming that the bill were enacted in this session of Congress, the new court would not come into being until late in 1981. By that time, four of the twelve persons occupying these judgeships would have become eligible for retirement. Several more judges would be eligible for retirement within the next few years, and all of the judges would be eligible for retirement by 1989. All new appointments would be made by the President, and considered by the Senate, in light of the new duties to be carried out by the new appellate court. In the second place, an examination of the backgrounds, qualities, and work of the individuals presently serving as judges on the two existing courts reveals that they compare favorably, as a whole, with the bulk of circuit judges throughout the country. But in any event, the

merits of including tax appeals in the new court's jurisdiction should not be decided on the basis of the individuals filling judgeships in those courts at present.

In summary, in order to achieve the desirable objective of providing a single appellate forum for civil tax cases nationwide, there are two possibilities before the Congress: to create a new, additional appellate court, under S. 678, known as the U. S. Court of Tax Appeals, with no judges of its own; or, to route all tax appeals to the U. S. Court of Appeals for the Federal Circuit, as established under S. 677. Considerations of sound judicial administration and doctrinal stability point to the latter as probably the preferable of these two choices. However, if this suggestion is not acceptable to the Congress, the proposal in S. 678 should be enacted. The objective of creating a single appellate forum for tax cases, and the arguments that have been raised in support of that forum, would be well served by that action.

3. Selection of Judges for the Proposed U. S. Court of Tax Appeals. If the proposed court of tax appeals, under S. 678, is to be created, careful thought needs to be given as to the method of selecting the judges who are to sit on the court for three-year terms. The bill presently provides that these judges are to be designated by the Chief Justice. That provision is in line with other provisions presently in the law under which the Chief Justice designates judges to sit temporarily on various courts other than their own.

However, designations to sit on the tax appeals court would be different from other designations which the Chief Justice now makes. This is so because the authority to designate the twelve judges to sit on all tax appeals nationwide is, to a large extent, an authority to determine much about the content and direction of the tax law in the courts.

Institutionally, in both fact and appearance, it might be preferable to have these designations made by the Judicial Conference of the United States rather than by the Chief Justice alone. Since the Judicial Conference includes the Chief Judges of all the circuits and one district judge from each circuit, it provides a broadly representative group of judges from throughout the federal judiciary and would thus provide a balanced, collective judgment as to the most appropriate circuit judges to sit on the tax appeals court. Moreover, this method of designation would avoid the risk that any one official might be accused -- rightly or wrongly -- of attempting to control the interpretation of the tax law.

Another question concerning the composition of the tax appeals court which needs careful thought is whether the designated judges should sit on the court full time during the three-year term. Full time designations would have the advantage of avoiding the difficult administrative

and logistical problems which will be encountered if the judges continue to sit simultaneously on their home circuits. Requiring judges to sit exclusively on the tax appeals court for the three-year term would also make it possible to involve fewer judges. For example, perhaps seven judges would be adequate to handle the annual caseload in civil tax appeals if those judges were devoting their entire time to that business.

A possible objection to the full-time designations is that it would take a judge totally away from his home circuit for a three-year period, thus depriving that circuit of one full-time active judge. However, it must be remembered that, under S. 678, the circuit would be deprived of a substantial portion of the judge's time. Moreover, if fewer judges could be utilized for tax appeals, the loss nationwide to the circuits would not be great. With senior judges available and other intercircuit assignments, this would seem to be a liveable situation.

CONCLUSION

On behalf of the Administration and the Department of Justice, I wish to commend the Committee on the Judiciary and this Subcommittee for giving serious attention to these important problems concerning the effective functioning of the federal judiciary. Despite the fact that Congress

created the Hruska Commission (and that Commission performed a splendid piece of work on many of these problems), Congress had not, until this year, devoted any substantial consideration to the structure of the federal judiciary. If the federal courts are to be maintained as effective agencies of justice, Congress should enact, without further delay, the proposals embodied in S. 677 and those proposals in S. 678 endorsed in this statement.