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83D CONGRESS, 2d Session } SENATE { REPORT No. 2353

DECLARING THE COURT OF CUSTOMS AND PATENT APPEALS A CONSTITUTIONAL COURT

AUGUST 7 (legislative day, AUGUST 5), 1954.—Ordered to be printed

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

REPORT

[To accompany S. 3131]

The Committee on the Judiciary, to which was referred the bill (S. 3131) to amend title 28, United States Code, with respect to the United States Court of Customs and Patent Appeals, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

AMENDMENT

The committee amendment is in the nature of a substitute for all but the first section of the bill. This amendment embraces recommendations made by the chairman of the Committee on Revision of the Laws of the Judicial Conference of the United States, whose letter explaining his recommendations is appended hereafter. Further discussion in this report will refer to the bill as proposed to be amended.

STATEMENT

The Court of Customs and Patent Appeals, as it now exists, is a legislative court. There are two classes of United States courts, one class being termed "constitutional courts," meaning those established under article III of the Constitution, and the other class being termed "legislative courts," being those not established under article III. The Court of Customs and Patent Appeals handles a class of cases which very properly should fall under the judicial power of the United States as set forth in article III, which provides that such judicial power "* * * shall extend * * * to controversies to which the

United States shall be a party." There appears to be no doubt but that the Court of Customs and Patent Appeals could have been created under article III. The committee is of the opinion that the court more properly should have been so created, and this bill accomplishes this end.

CROSS ASSIGNMENT OF JUDGES

Present law authorizes the Chief Justice to assign judges of the Court of Customs and Patent Appeals to either the Court of Appeals or the District Court of the District of Columbia, and authorizes the assignment of a circuit or district judge to such service in the Court of Customs and Patent Appeals as he is willing to undertake.

Under S. 3131, as reported from the committee, judges of the Court of Customs and Patent Appeals could be assigned to perform judicial duties in any circuit, in either a court of appeals or a district court, and without regard to any expression of his own willingness. This is in line with other provisions of the Judicial Code with respect to the assignment of other judges to service outside the courts to which they were appointed. Similarly, S. 3131 would permit assignment to service on the Court of Customs and Patent Appeals of any circuit or district judge designated by the Chief Justice. Appropriate provisions along the same line, with respect to retired judges, also are made by the bill.

Certain other technical changes accomplished by the amended language of the bill are fully explained in the letter referred to earlier, from the Chairman of the Committee on Revision of the Laws of the Judicial Conference of the United States, and need not be repeated here.

In addition to this letter, there are also appended hereto and made a part hereof certain other reports received by the Judiciary Committee with respect to this proposed legislation.

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT,
Philadelphia, Pa., May 3, 1954.

Hon. WILLIAM LANGER,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR LANGER: As chairman of the Committee on Revision of the Laws of the Judicial Conference of the United States I submit to you herewith certain perfecting amendments to S. 3131, the bill to amend title 28 of the United States Code to declare the Court of Customs and Patent Appeals to be a constitutional court and to enlarge the existing provisions for the temporary assignment of judges to and from that court.

At present section 291 (b) of title 28 authorizes the Chief Justice to assign judges of the Court of Customs and Patent Appeals to either the Court of Appeals or the District Court of the District of Columbia and section 293 authorizes the assignment of a circuit or district judge to such service in the Court of Customs and Patent Appeals as he is willing to undertake. Section 2 of S. 3131 proposes to broaden section 291 (b) to permit the assignment of a judge of the Court of Customs and Patent Appeals to any judicial circuit but only for such duties as he is willing to undertake and to provide that when such a judge is assigned to the District Court for the District of Columbia he shall be required to perform only such duties as he is willing to undertake. Section 3 of S. 3131 modifies section 293 of title 28 by eliminating the authority to assign district judges to the Court of Customs and Patent Appeals.

The subject matter of section 291 (b) as it presently exists and as proposed to be amended, is improperly placed in that section which relates to the assignment of circuit judges. On the other hand the subject matter of section 293 as proposed to be amended relates only to the assignment of circuit judges and should be in section 291. The enclosed amendments accordingly correct this by including in section 291 (b) the provision authorizing the assignment of circuit judges to the Court of Customs and Patent Appeals and by transferring to section 293, where they more appropriately should be, the special provisions for the assignment of judges of the Court of Customs and Patent Appeals to other courts.

The enclosed amendment of section 2 of S. 3131 accordingly amends section 291 (b) of title 28 to incorporate therein the provisions of section 293 as proposed to be amended by S. 3131 for the assignment of circuit judges to the Court of Customs and Patent Appeals and amends section 292 to incorporate therein as new subsection (e) the provisions of section 293 for the assignment of district judges to that court. In each case the language is modified to eliminate the clause limiting such service to the performance of such duties as a judge of that court "as he is willing to undertake." The present provisions of sections 291, 292, and 295 for the assignment of circuit and district judges to service in other circuits require them to do so, when so assigned by the Chief Justice with the consent of the chief judge of their home circuit, and is not conditioned upon their willingness to perform the specific duties to which they are assigned. Since the Court of Customs and Patent Appeals would become under S. 3131 a constitutional court on a par with the courts of appeals and district courts this provision would no longer be appropriate and should be eliminated in order to conform to the plan of sections 291, 292, and 295 that it shall be the duty of any judge of the United States to perform any assignment in a constitutional court, below the Supreme Court, to which the Chief Justice assigns him with the consent of the chief judge of his circuit. This, of course, is in order to give the Chief Justice authority to use the Federal judicial manpower where it is most needed in the public interest.

The enclosed amendment of section 3 of S. 3131 transfers to section 293 of title 28, where they properly belong, the provisions of section 291 (b) as proposed to be amended by S. 3131 for the assignment of judges of the Court of Customs and Patent Appeals to the United States courts of appeals and district courts. It modifies these provisions in three particulars. The first is that it authorizes such assignment to any district court and not merely to the District Court for the District of Columbia. The second is that it authorizes such assignments upon the request of the chief judge of the circuit rather than of the chief judge of the particular court concerned. The last is that the proviso is eliminated that the assignment may be only for such duties as the judge is willing to undertake. This last proviso is not in the present law and as pointed out above it will be particularly inappropriate when the judges of the Court of Customs and Patent Appeals become judges under article III of the Constitution. They should then be available to take such temporary assignments in other courts as are given to them by the Chief Justice just as is the case now with circuit and district judges. As pointed out later in this letter such assignments should, however, be subject to the consent of the chief judge of their court. The other two changes in section 3 are to conform to the general plan of assignment of constitutional judges for temporary service in other courts which is embodied in sections 291 and 292 of title 28. Under these sections circuit and district judges are assigned to service in a court of appeals or district court in another circuit by the Chief Justice upon a certificate of necessity by the chief judge of the circuit, but not of the chief judge of the particular court seeking assistance. This fits in with the existing assignment responsibilities imposed upon the chief judge of the circuit within his own circuit by section 291 and 292. There is no reason why a separate and somewhat conflicting system should be set up for the assignment of judges of the Court of Customs and Patent Appeals. Nor does there appear to be any reason why these judges, as article III judges, should not be assignable to any district court instead of being restricted to the District Court for the District of Columbia.

Section 4 of S. 3131 would amend section 294 of title 28 by adding two new subsections, one to authorize the assignment of a retired judge of the Court of Customs and Patent Appeals to duties as a circuit judge or as a judge of the District Court for the District of Columbia and the other to authorize retired circuit judges to be assigned to the Court of Customs and Patent Appeals. The latter can be provided for by a simple amendment to present section 294 (b) relating to the assignment of retired circuit and district judges and the enclosed amendment of section 4 of S. 3131 does this. It also brings in district judges as well, since there

are frequently retired district judges of distinguished ability and experience in the field of patent law who could help greatly if assigned temporarily to the Court of Customs and Patent Appeals.

The first amendment proposed by section 4 of S. 3131 is not in accord with the general plan for the assignment of article III judges embodied in title 28 in that it limits assignment of Court of Customs and Patent Appeals judges to but one district court, that in the District of Columbia, and provides for such assignment upon request of the chief judge of the court rather than the chief judge of the circuit. The amendment to section 4 of S. 3131 which is enclosed would correct these points by making the proposed section 294 (d) authorize generally the assignment by the chief justice of a judge of the Court of Customs and Patent Appeals to perform such judicial duties in any circuit, which could be either in the court of appeals or a district court, as he is willing to undertake. The latter clause is, of course, appropriate in the case of a retired judge who may be called upon to render only such judicial work as he is willing and able to undertake.

The enclosed amendment to section 4 of S. 3131 takes care of another point which is necessary to be covered in fitting the assignment of judges of the Court of Customs and Patent Appeals into the general plan of assignment of constitutional judges. By the first paragraph of section 295 of title 28 no circuit or district judge may be assigned outside his circuit without the consent of the chief judge of the circuit. This protects the judges from being assigned away from their own courts except when they can be spared so that such an assignment will not be a hardship upon them or their litigants. If, as is proposed by S. 3131, judges of the Court of Customs and Patent Appeals are now to be assignable into circuits away from Washington a similar provision should be included in the first paragraph of section 295 requiring the consent of the chief judge of their court, so as to protect the work of that court. At the same time it should be made clear that this requirement for consent applies only to active judges since retired judges are not required to carry on the regular work of their former courts and serve only with their own consent so that the requirement of the consent of the chief judge serves no useful purpose in their cases. The amendment to section 4 of S. 3131 which is enclosed amends the first paragraph of section 295 accordingly.

I trust that the enclosed amendments to S. 3131 may prove helpful to your committee.

Sincerely yours,

ALBERT B. MARIS.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D. C., March 22, 1954.

Hon. WILLIAM LANGER,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR LANGER: The bill about which you inquired of me on March 15, 1954 (S. 3131), would amend various sections of title 28 of the United States Code relating to the United States Court of Customs and Patent Appeals.

The principal changes which the bill would make in the present law are as follows:

1. The bill would add at the end of the present section 211 a declaration that the court "is hereby declared to be a court established under article III of the Constitution of the United States."

2. The bill would amend section 291 (b) of title 28 by providing that upon request of the chief judge of any circuit, the Chief Justice of the United States may assign temporarily a judge of the Court of Customs and Patent Appeals to serve as a circuit judge of such circuit to perform such duties as he is willing to undertake. The present law provides for the temporary assignment of a judge of the Court of Customs and Patent Appeals to serve as a judge of the Court of Appeals for the District of Columbia. The proposed amendment would permit a judge of the Court of Customs and Patent Appeals to be assigned temporarily subject to the conditions stated to serve as a circuit judge and so to sit in the court of appeals of any circuit.

3. The bill would amend the present provision of section 293 of title 28 of the United States Code which permits the temporary assignment of any circuit judge or district judge under stated conditions to perform such duties as judge of the Court of Customs and Patent Appeals as he is willing to undertake so as to limit the power of assignment to circuit judges.

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4. The bill would amend section 294 of title 28 of the United States Code by providing for the temporary assignment of any retired judge of the Court of Customs and Patent Appeals under stated conditions to perform such duties as a circuit judge of any circuit as he is willing to undertake, and likewise to perform such duties as a judge of the District Court for the District of Columbia as he is willing to undertake. It would further provide for the temporary assignment under stated conditions of any retired circuit judge to perform such duties as a judge of the Court of Customs and Patent Appeals as he is willing to undertake. Section 294 of title 28 as it now stands does not provide for the temporary assignment of retired judges of the Court of Customs and Patent Appeals to other courts nor for the temporary assignment of a retired circuit judge to that court.

The pending bill has not been considered by the Judicial Conference of the United States and I am therefore not in a position to express an opinion upon the changes in the present law for which it provides.

Sincerely yours,

HENRY P. CHANDLER.

AMERICAN PATENT LAW ASSOCIATION,
Washington, D. C., May 5, 1954.

Subject: S. 3131.

Hon. WILLIAM N. LANGER,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR LANGER: Your letter of April 14 relating to the above addressed to Miss Charlotte Gauer, executive secretary of our association, has been turned over to the writer as chairman of the laws and rules committee.

At a meeting of our committee in Chicago, Ill., on April 23, we considered this bill and recommended to the board that the association report favorably upon it. Thereafter, the board of managers of the association authorized the committee to report to you that the association is in favor of the bill and recommends that it be passed.

We feel that section 1 of the bill is advisable, to make it clear that the Court of Customs and Patent Appeals is one established under article III of the Constitution so that judges of this court are constitutionally qualified to serve temporarily on other constitutional courts, under the provisions of the other sections of the bill.

The association approves the general purpose of the bill in liberalizing the transfer, temporarily, of judges to and from the Court of Customs and Patent Appeals and enabling retired judges to serve, if they so desire and if their services are needed.

Our association respectfully submits that your committee should report favorably on the bill.

Yours very truly,

C. WILLARD HAYES,
Chairman, Committee on Laws and Rules.

DEPARTMENT OF COMMERCE,
OFFICE OF THE GENERAL COUNSEL,
Washington, D. C., April 21, 1954.

Hon. WILLIAM LANGER,
Chairman, Committee on the Judiciary, United States Senate,
Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in reply to your request of April 14, 1954, for the views of this Department with respect to S. 3131, a bill to amend title 28, United States Code, with respect to the United States Court of Customs and Patent Appeals.

The bill, which relates solely to the relationship between the United States Court of Customs and Patent Appeals, and other Federal courts, appears to be of primary concern to the various courts concerned and to the Department of Justice.

After careful consideration of the bill and the possible effects of its enactment upon the activities of this Department, we have concluded that our interest in the subject matter of the bill is too remote to justify our offering for your consideration comments with respect thereto.

If we can be of further assistance in this matter, please call on us.

Sincerely yours,

HAROLD B. CORWIN,
Deputy General Counsel.

JULY 2, 1954.

Hon. WILLIAM LANGER,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: Reference is made to your letter of April 14, 1954, requesting a statement of this Department's views on S. 3131, to amend title 28, United States Code, with respect to the United States Court of Customs and Patent Appeals.

The proposed legislation would establish the United States Court of Customs and Patent Appeals as a constitutional court under article III of the Constitution of the United States. It would further provide that the Chief Justice of the United States might assign judges of the Court of Customs and Patent Appeals to serve as circuit judges and circuit judges to act as judges of the Court of Customs and Patent Appeals.

This Department would have no objection to the enactment of the proposed legislation.

The Department has been advised by the Bureau of the Budget that there is no objection to the submission of this report to your committee.

Very truly yours,

H. CHAPMAN ROSE,
Acting Secretary of the Treasury.

AMERICAN BAR ASSOCIATION,
New Kensington, Pa., April 23, 1954.

Hon. WILLIAM LANGER,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR LANGER: I wish to thank you for your kind letter of April 14, 1954, and the copies of S. 3131 enclosed therewith.

I have noted the desire upon the part of your committee to have a report submitted within 20 days. We in the section of patent, trade-mark, and copyright law of the American Bar Association have no authority to report as a section. Our views must be presented to the governing body of the association, the house of delegates, or on an emergency basis to the board of governors, and be there adopted before we can speak officially. Obviously, the time allowed us by your letter is not sufficient for either of those courses.

I do plan to refer the bill immediately to our section committee on patent law revision in the hope that a report can be brought seasonably to the attention of your committee.

If you are interested in any personal opinion, I believe that S. 3131 is a salutary proposal.

Sincerely yours,

ANDREW H. SCHMELTZ,
Section Chairman.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28.—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 9.—COURT OF CUSTOMS AND PATENT APPEALS

SEC. 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.

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CHAPTER 13.—ASSIGNMENT OF JUDGES TO OTHER COURTS

SEC. 291. Circuit judges.

(a) * * *

[(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 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 judge to serve as a judge of the Court of Customs and Patent Appeals.

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SEC. 292. District judges.

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(e) 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 district judge to serve as a judge of the Court of Customs and Patent Appeals.

[SEC. 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.]

SEC. 293. Judges of Court of Customs and Patent Appeals.

The Chief Justice of the United States may designate and assign temporarily a judge of 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.

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

* * * * * * *

[(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.]

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit or in the Court of Customs and Patent Appeals 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 in another circuit or in the Court of Customs and Patent Appeals shall be made by the Chief Justice of the United States.

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(d) Any retired judge of the Court of Customs and Patent Appeals 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) (e) No retired justice or judge shall perform judicial duties except when designated and assigned.

SEC. 295. Conditions upon designation and assignment.

[No designation and assignment shall be made without the consent of the chief judge or judicial council of the circuit from which a judge is to be designated and assigned.]

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 such judge is to be designated and assigned. No designation and assignment of a judge of the Court of Customs and Patent Appeals in active service shall be made without the consent of the chief judge of such court.

All designations and assignments of justices and judges shall be filed with the clerks and entered on the minutes of the courts from and to which made.

The Chief Justice of the United States, a circuit justice or a chief judge of a circuit may make new designations and assignments in accordance with the provisions of this chapter, and may revoke those previously made by him.