

ARTICLES

ORIGIN OF THE FEDERAL CIRCUIT: A PERSONAL ACCOUNT

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The inaugural session of the United States Court of Appeals for the Federal Circuit on October 1, 1982, marked an important moment in the history of the federal judiciary. There then came into being for the first time a federal intermediate appellate court whose jurisdiction was in no way defined in territorial terms but was nationwide in scope, extending over certain decisions of all ninety-four federal district courts as well as over decisions of several administrative bodies and subordinate courts. The events leading up to that day form a fascinating chapter in the history of the federal courts and of judicial reform, about which more should be recorded before it is lost to memory. In these pages I present an account of the origin of the Federal Circuit from the vantage point of one who observed and participated in the earliest stages of its creation. This sketch is based on personal recollections, unpublished letters and memoranda, and miscellaneous other sources.¹

A comprehensive history of the Federal Circuit would probably begin with the establishment of the Court of Claims in 1855² and

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1. The accuracy of the content of the unpublished letters and memoranda cited in this Article is the sole responsibility of the author. Where nothing is cited in support of a statement in the text, the source is the author's recollection. All unpublished letters and memoranda cited within are on file with the University of Virginia Law Library. Many persons contributed to the creation of the Federal Circuit—many more than could be mentioned in this Article; the omission of their names should not be interpreted as a lack of awareness of and appreciation for the parts they played. This is not a comprehensive, objective historical study of this episode. Rather, it is the story told from the author's vantage-point, based on his recollections. The author apologizes for the too-frequent but unavoidable use of the first person pronoun.

2. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

the Court of Customs and Patent Appeals in 1929.³ Other antecedent developments would be the growing concerns about the federal appellate system in the early 1970s, manifested in the work and reports of the Freund Committee,⁴ the Hruska Commission,⁵ and the Advisory Council on Appellate Justice,⁶ the efforts of the latter culminating in the National Conference on Appellate Justice in 1975.⁷ This account, however, is focused on those events leading more immediately and directly to the creation of the Federal Circuit. With that more limited slice of history in mind, the most obvious beginning point is the establishment of the Office for Improvements in the Administration of Justice.

I. A NEW OFFICE AND ITS MISSION

In January 1977, Griffin B. Bell took office as Attorney General of the United States. He came to that position with a long record of experience and interest in the courts and judicial reform. For fifteen years he had served as a judge on the United States Court of Appeals for the Fifth Circuit. He had recently been chairman of the American Bar Association's Judicial Administration Division and had been actively involved with the Advisory Council on Appellate Justice⁸ and the 1976 Pound Confer-

3. Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475, *repealed by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 122, 96 Stat. 36.

4. See REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573, 584 (1973) (recommending creation of National Court of Appeals to relieve Supreme Court). This committee, appointed under the aegis of the Federal Judicial Center, was referred to by the name of its chairman, Professor Paul A. Freund of the Harvard Law School.

5. The formal title of this body, referred to by the name of its chairman, Senator Roman Hruska of Nebraska, was the U.S. Commission on Revision of the Federal Court Appellate System. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, *amended by* Pub. L. No. 93-420, 88 Stat. 1153 (1974). Congress directed the Hruska Commission to report recommendations on changes in the geographical boundaries and structure and procedures of the judicial circuits. *Id.* § 1(a)-(b). The Commission ceased existence ninety days after submission of its final report. *Id.* § 6. See COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), *reprinted in* 62 F.R.D. 223, 228 (1974) (recommending no realignment of existing judicial circuits, but suggesting division of the Fifth and Ninth Circuits); COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted in* 67 F.R.D. 195, 199-204 (1975) (summarizing recommended changes in appellate system including creation of "a National Court of Appeals").

6. This body, chaired by Professor Maurice Rosenberg of the Columbia Law School, consisted of thirty judges, lawyers, and law professors. From 1971 to 1975 it served in an advisory capacity on appellate matters to the Federal Judicial Center and the National Center for State Courts.

7. ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975 MATERIALS FOR A NATIONAL CONFERENCE, SAN DIEGO, CALIFORNIA I-IV (1975).

8. See *supra* note 6 (describing Advisory Council on Appellate Justice).

ence,⁹ having been made chairman of the ensuing effort known as the Pound Conference Follow-Up Task Force.¹⁰ Thus, it was not surprising that he brought to his work at the Department of Justice a zeal for enlisting the resources and influence of the Department in the cause of court reform and the administration of justice. To that end he had developed the idea, even before he was sworn in, of creating a new office in the Department to be charged specially with those responsibilities.

In the past there had been offices in the Justice Department assigned to work on various aspects of justice system problems, but they had been given relatively limited responsibilities. Bell's idea was to establish an office with a broad mission covering the entire justice system of the country, including both federal and state courts, nonjudicial entities, and Justice Department practices and policies. To heighten the status and influence of this office he wanted it headed by an assistant attorney general, and at his invitation I agreed to fill the position. Bell and I drafted the charter for what became known as the Office for Improvements in the Administration of Justice (OIAJ). This charter gave OIAJ authority to pursue an almost unlimited array of matters concerning the problems and needs of the nation's dispute-resolving and justice-administering institutions and services.¹¹ The work of OIAJ, discontinued in 1981, is itself a significant chapter in the history of the Department of Justice,¹² but this is not the place to present it. Rather, this account is limited to only one of OIAJ's many projects—the creation of the Federal Circuit.

II. THE CREATIVE PHASE

In organizing OIAJ, it became evident that a plan of action more focused than OIAJ's charter was desirable. To that end the professional staff and I developed a two-year plan, which received the ap-

9. See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *reprinted in* 70 F.R.D. 79 (1976) (containing papers from conference popularly known as "The Pound Conference"). The Conference commemorated Roscoe Pound's address delivered to the American Bar Association in 1906. *Id.* at 80; see Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, Address at the 1906 Annual Meeting of the American Bar Association*, *reprinted in* 35 F.R.D. 241, 273 (1964) (containing speech later discussed at Pound Conference).

10. See A.B.A., *REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE*, *reprinted in* 74 F.R.D. 159, 165 (1976) (explaining that purpose of Task Force was to implement proposals of 1976 Pound Conference).

11. 42 Fed. Reg. 8140 (1977).

12. The story of OIAJ is partly told in Daniel J. Meador, *Role of the Justice Department in Maintaining an Effective Judiciary*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, July 1982, at 136.

proval of the Attorney General.¹³ Released in final form in May 1977, the plan set four goals for OIAJ, along with a list of specific measures to be pursued to achieve each. One of the goals was "to assure access to effective justice for all citizens."¹⁴ Among the steps to be taken to achieve this goal was "to develop proposals for rationalizing and increasing the appellate capacity of the federal judiciary."¹⁵ This was an attractive topic for Bell in light of his experiences as an appellate judge and on the Advisory Council on Appellate Justice.

At that point, however, no one had clearly in mind what ideas concerning the appellate courts would be pursued. Many ideas had been put forward during the preceding decade; those would have to be studied and evaluated to determine their merits and political feasibility. The likelihood was that fresh ideas, more politically acceptable, would need to be developed. We did not want to invest time in formulating interesting proposals that had no chance of being adopted by Congress or the judiciary. On the other hand, we were prepared to act imaginatively and boldly and to exert leadership to push proposals that we considered necessary or useful to improve the system. An important premise underlying the creation of OIAJ was that vigorous executive leadership was needed, and we intended to do what we could to provide it.

During the spring and summer of 1977, OIAJ's energies were directed to a variety of projects that appeared more immediately urgent than appellate court problems.¹⁶ By late fall of that year, because of my interest in the subject, as well as the interest of the Attorney General, I concluded that OIAJ must begin to move on the appellate front. OIAJ had a competent staff of more than a dozen lawyers and several social scientists. None of them, however, had substantial experience on appellate matters; moreover, they were all busily occupied with OIAJ's numerous other projects. Thus, it appeared that if we were to make real headway with appellate matters, we would need to engage the assistance of a knowledgeable lawyer or academician from outside the Justice Department.

13. Office for Improvements in the Admin. of Just., *A Two-Year Program for Improvements in the Administration of Justice* (May 9, 1977).

14. *Id.*

15. *Id.*

16. New projects then underway in OIAJ included the enlargement of the jurisdiction of federal magistrates, establishment of experimental programs in court-annexed arbitration, creation of neighborhood justice centers, improvement of class action procedures in mass injury cases, modifying the federal diversity of citizenship jurisdiction, and eliminating the Supreme Court's mandatory jurisdiction.

Fortunately, Congress had just appropriated two million dollars to establish the Federal Justice Research Program, and Attorney General Bell placed the administration of that program with OIAJ.¹⁷ The idea of a research fund had been first advanced by Attorney General Edward Levi. Bell had continued to advocate its establishment, and it had at last come to fruition. Its purpose was to provide the Attorney General with a fund to conduct research on matters of concern to the Justice Department and to the administration of justice generally.¹⁸ This happy turn of events meant that OIAJ had funds at its disposal to engage outsiders for a variety of research undertakings, and it gave us the resources to engage someone to help with the contemplated appellate project.

After giving considerable thought to the matter and consulting with staff members, I approached Charles R. Haworth, then a law professor at Washington University in St. Louis. He was known to me as a careful, competent legal scholar who taught procedural subjects and who had done substantial research and writing on the federal appellate courts.¹⁹ He agreed to take on the appellate project, and he came to the OIAJ offices in December 1977, for an initial meeting with me and the staff lawyers who were to work with him.

OIAJ then had two deputy assistant attorneys general: Ronald Gainer, in charge of criminal justice projects, and Paul Nejelski, in charge of civil justice projects. Work on appellate matters came under Nejelski's responsibility. Organizational lines were not rigid, however, and Gainer and several other staff lawyers participated at various stages in the appellate project. The staff lawyer with primary responsibility for working with Haworth was Denis Hauptly. He was later joined by James McMullen, Joan Barton, Frank Cihlar, Karen Skrivseth, and Scott Taylor. Because of my special interest in the subject, I took a more active part than usual in working directly with Haworth and individual staff lawyers as the project progressed.

The plan developed at the December meeting and refined through correspondence in January, was that Haworth and OIAJ would jointly compile a tentative list of specific appellate topics to be pursued, realizing that the list could be shortened or lengthened as we progressed. By the end of January 1978, the list had been

17. 42 Fed. Reg. 8140, 8141 (1977).

18. *Id.*

19. See generally Charles R. Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 Sw. L.J. 839 (1976) (responding to Hruska Commission report on reforms of court system and advocating National Court of Appeals); Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257 (advocating use of screening and summary procedures to speed flow of cases).

formulated. It included seventeen items, one of which was "the feasibility and potential jurisdiction of specialized courts in the areas of the environment, science, and taxes."²⁰ Where that item would take us, however, was not articulated at the time.

The plan called next for Haworth to make several trips to Washington, D.C. during the late winter and spring of 1978 to interview key individuals and to confer with OIAJ staff. The purpose of the interviews was to gather the widest possible array of ideas concerning the federal appellate courts and to determine the degree of interest, support, or opposition concerning the ideas on our list. It was anticipated that through these interviews, occurring over a period of several months, the list would be refined and that by early summer we could arrive at a set of proposals. The proposals would be incorporated into a bill that would have a realistic chance of success in Congress and would result in some long-needed improvements in the federal courts of appeals. That was to be Phase I of the project. Phase II would focus on more difficult and far-reaching ideas for a possible restructuring of the appellate courts and their jurisdiction. To work on Phase II, Haworth would join the OIAJ staff on a full-time basis at the close of the academic year in June and would remain until midsummer.

In accordance with this plan, between January and May 1978, Haworth made several trips to Washington. On each visit he spent two or three days walking the corridors of the House and Senate office buildings, the Justice Department, numerous administrative agencies, the United States Court of Appeals for the D.C. Circuit, the United States Court of Claims, and the United States Court of Customs and Patent Appeals. He talked with staff lawyers, judges, and other officials. Often Denis Hauptly or James McMullen, and sometimes other OIAJ staff lawyers, accompanied him. I referred to these interviews as a "vacuum cleaner process." We wanted to ascertain how the key people saw the problems, what they thought should be done, and what seemed politically workable.

By June we had accomplished Phase I. A set of important yet relatively small-scale proposals concerning the United States courts of appeals had been drafted and circulated to relevant parties for comment.²¹ Although some of these measures became legislative companions to the later-formulated proposal for the Federal Circuit,

20. Letter from Charles R. Haworth (CRH), Professor, Washington Univ. School of Law, to Daniel J. Meador (DJM), Assistant Attorney General, OIAJ, Dep't of Justice (Jan. 11, 1978).

21. These proposals dealt with, among other things, interest on judgments pending appeal, conversion of all interlocutory appeals to a discretionary basis, and intercircuit assignments of judges and panel composition. Later, other appellate proposals were developed by

this Article is focused hereafter on Phase II of OIAJ's appellate project.

III. DEVELOPING THE PROPOSAL

When OIAJ began to consider appellate restructuring in early 1978, it did not begin with a clean slate. In the previous six years there had been a wealth of proposals, discussions, and writings on the subject. The reports of the Freund Committee and the Hruska Commission had focused national attention on the federal appellate courts to a greater degree than at any time since the creation of the courts of appeals in 1891. The work of the Advisory Council on Appellate Justice and the National Conference on Appellate Justice had intensified interest among the bench and bar. The problems of appellate overload and the resulting disharmony in decisional law seemed clear to many thoughtful students of the system, but in some quarters the very existence of such problems was contested. No consensus had emerged. The proposals to create a so-called National Court of Appeals had gone nowhere. Indeed, by 1978, the entire subject seemed in danger of fading from the agenda. It was my view, however, that because the system was beset with the sorts of difficulties previously identified, it would be irresponsible for those in positions of public authority not to continue the search for workable solutions. Thus, I was determined that OIAJ should tackle this challenging puzzle and that, unlike prior efforts, this effort should not founder.

Two important lessons had been taught by the reactions to the Freund and Hruska Reports. One was that it was politically unacceptable to shut off any case in the lower federal courts from access to the Supreme Court by way of certiorari, however unavailing that might be in reality. The other was that there was substantial resistance to creating a "fourth tier" in the federal judiciary, as a National Court of Appeals would have done. Attorney General Bell had indicated that we should not pursue any ideas in that direction. In addition, a widespread sentiment was evident among the bench and bar against having "specialized courts." Later discussions had also served to focus attention away from the allegedly overburdened Supreme Court (several Justices having denied that they were unduly burdened) to the intermediate appellate tier as the locus of the problems.

OIAJ, such as the proposal to limit the terms of chief judges to seven years and to provide that no one could become chief judge after the age of 65.

It was against this backdrop that OIAJ began to think about measures to increase coherence in decisional law by reducing or more effectively resolving intercircuit conflicts. At the outset it was taken as a given that "global solutions" were not likely to be salable. We had to develop an idea of more modest proportions, yet one that would accomplish something of significance; a proposal not too radical, yet one that would go beyond mere tinkering.

From the beginning it was clear that the two areas in which there was the most pressing need for a higher degree of uniformity, because of the large number of intercircuit conflicts, were the patent and tax fields. This conclusion had emerged from the Hruska Report. Haworth had verified it by retrieving and reviewing that commission's files from the National Archives in Washington, D.C.²² Haworth's conversations around Washington also tended to support that view, although not with unanimity.

One of the ideas to surface early in the project was to give the Court of Customs and Patent Appeals (CCPA) exclusive jurisdiction over all patent appeals from the district courts nationwide. That proposal had been mentioned in the Hruska Report. However, it had the drawback of intensifying the specialized character of an already rather peculiar, specialized court. As to tax cases, there had long been a proposal to create a court of tax appeals.²³ But that, too, ran afoul of the deeply ingrained American aversion to specialized courts. With those two ideas eliminated, the perplexing question confronting OIAJ was how to devise a means of achieving a higher level of decisional coherence in the tax and patent fields, given the practical and theoretical constraints mentioned.

The first time that the words "United States Court of Appeals for the Federal Circuit" appeared in writing, as far as I recall—at least in relation to the court that now bears that name—was in a letter from me to Haworth, dated March 14, 1978.²⁴ However, those words were not used there to describe the present court; no one had then envisioned such a forum. Rather, the words were used to convey to Haworth an idea for an intermediate appellate court that would be composed of existing circuit judges sitting together by designation from time to time to hear appeals in patent and tax cases from all the district courts.²⁵ The idea of having an appellate

22. Letter from CRH to James McMullen, OIAJ staff attorney (Mar. 15, 1978); Letter from Jane Danowitz, OIAJ staff, to CRH (Apr. 7, 1978).

23. The idea had first been advanced by Erwin N. Griswold many years earlier. Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

24. Letter from DJM to CRH (Mar. 14, 1978).

25. *Id.*

court without judges of its own had been discussed frequently in recent years as a way of avoiding specialization, but at the same time having a nationwide forum with exclusive jurisdiction over certain categories of cases. The Temporary Emergency Court of Appeals provided an existing model—a single, centralized forum on line with the regional courts of appeals.²⁶ As this letter of March 14 evidenced, thinking was beginning to concentrate on the concept of combining tax and patent appeals in one court that, while located in the intermediate tier, would be a court of nationwide jurisdiction.

During Haworth's several visits to Washington in early spring to conduct interviews and confer with OIAJ staff, priority was given to the other appellate proposals—those constituting Phase I—as we were intent on developing them to the point that they could be publicly circulated for comment in June 1978. Brooding, however, continued on possible solutions for the patent and tax appeals problem and there were intermittent discussions with Haworth and the staff during this period.

The next significant step was a letter from Haworth dated May 11, 1978, in which he summarized his thoughts on the subject.²⁷ After recapitulating the ideas and developments of recent years, he proposed for the first time the idea of merging the Court of Claims and the CCPA as a means of providing a nationwide forum with the desired jurisdiction. He suggested that the new tribunal be called the "United States Court of Claims and Science." It would have all the jurisdiction of the two existing courts as well as jurisdiction over all patent and tax appeals from the district courts. To broaden the court's docket, thus minimizing charges of specialization, the court would also have appellate jurisdiction over certain environmental appeals from the district courts. It is not clear in retrospect to what extent these ideas had been mentioned in the numerous informal discussions of the previous weeks, but this was the first time they had been put into writing. All that can now be said is that some time between early March and mid-May 1978—the precise moment cannot be pinpointed (if there was any precise moment)—various ideas had coalesced and what later became the Federal Circuit had been conceived. It quickly became a growing embryo.

By a memorandum dated May 30, 1978 to Haworth and the key OIAJ staff working on this project, I scheduled a meeting to discuss

26. The Temporary Emergency Court of Appeals had exclusive jurisdiction over appeals from the federal district courts in matters arising under the Economic Stabilization Act of 1970. Economic Stabilization Act of 1970, Pub. L. No. 92-210, Sec. 211(b)(2), § 205, 85 Stat. 743, 749 (1971).

27. Letter from CRH to DJM (May 11, 1978).

several of the appellate proposals to be convened as soon as Haworth arrived for his summer stint in the office.²⁸ Included in that memorandum was the following item: "Consolidate the Court of Claims and the Court of Customs and Patent Appeals into a new appellate court of nationwide jurisdiction."²⁹

The idea of combining the Court of Claims and the CCPA did not come out of any specific suggestions made during the numerous interviews of that spring. The persons interviewed were generally concerned with narrower points of appellate procedure and jurisdiction, or maintained that nothing of great magnitude was awry in the appellate courts. This was not surprising. Practicing lawyers, whether they are in private law firms or with government agencies, are consumed daily with their immediate tasks and have little time for or interest in the larger problems of the judicial system. Likewise, counsel in the House and Senate Judiciary Committees tend to be less concerned with large-scale, long-range reworkings of the system than with more immediate and politically attractive targets. The interviews were helpful, however, in providing us with a range of perspectives about the appellate courts. The process generated information about caseloads in the various courts, and it drew our attention to the two courts whose business already included some patent and tax cases. Thus the interviews fed the intellectual ruminations that led to the crystallization of the idea of merging and re-vamping these two somewhat unusual courts.³⁰

It was not until June 1978, after the idea of merging the two courts had taken shape in OIAJ, that interviews were conducted with judges of these two courts. Haworth met with Chief Judge Daniel M. Friedman of the Court of Claims and a week later with Chief Judge Howard T. Markey of the CCPA. To each he described the idea of merging the courts and conferring on the new entity a broad jurisdiction over tax and patent appeals. Each was noncommittal in response. This was the response we had rather hoped for, fearing above all else a negative reaction. Opposition to the idea from either of these courts would, we thought, be fatal to the proposal. Being then optimistic and hopeful, we considered that the absence

28. Memorandum from DJM to CRH, Paul Nejelski, James McMullen, Denis Hauptly, and Scott Taylor, OIAJ staff attorneys (May 30, 1978).

29. *Id.*

30. These interviews probably had a salutary effect on the eventual passage of the legislation, as they raised the visibility of OIAJ and made many influential persons aware that the Justice Department was engaging in constructive law reform beyond its usual interest in criminal matters.

of negative hints from those chief judges gave us a green light to proceed with developing the proposal.

With Haworth on board full-time in June and into early July, discussions in OIAJ concentrated on working out the details of this idea. As his final assignment before returning to St. Louis, Haworth was given the task of drafting the memorandum that would be circulated to the public unveiling the proposal to create a new court of appeals by combining the Court of Claims and the CCPA. In mid-July, after Haworth's departure, his initial draft underwent brainstorming and editorial sessions, most of them taking place around the table in my office. For these sessions I convened the two deputies, Ronald Gainer and Paul Nejelski, and staff lawyers Denis Hauptly, James McMullen, and Peter Reient. Extraordinary efforts were made to craft the memorandum to take into account the history of appellate reform, lessons of the past decade, concerns gleaned from the literature and the interviews, gains to be achieved for the federal appellate system, and finally, the practical political considerations.

One amusing and seemingly trivial editorial point that generated lively discussion was whether the essence of the proposal to create the new court should be stated at the outset with the explanation to follow, as is customary in such memoranda, or whether the background and justification should come first with the specific proposal being revealed thereafter. If the proposal were stated first, I feared that the usual instinctive reaction against changing existing judicial arrangements would occur among many readers and the force of the explanation would be lost. This view prevailed. Thus, the section entitled "The Proposal" came as the climactic conclusion after a slow build-up of facts and arguments that we hoped would lead the reader to see the creation of the new court as an almost irresistible step to solve the problems sketched.

The final version agreed to within OIAJ, dated July 21, 1978, was entitled "A Proposal to Improve the Federal Appellate System."³¹ Within a few days thereafter three hundred copies were printed and mailed to every office, agency, organization, and individual likely to have any significant interest in the subject. Comments were invited. That distribution officially unveiled to the public the idea of the Federal Circuit. Although only six months of work had gone into this

31. This 21-page, single-spaced document was accompanied by a one-page cover memorandum from me explaining that the proposal was advanced for comment, that it had not been approved by the Attorney General, and that it did not represent a formal Justice Department position.

proposal, behind it lay years of studies, discussions, writings, and the thoughts of dozens of judges, lawyers, and scholars. Also behind it lay years of frustrated efforts to overcome the deficiencies of the federal appellate system. This sobering history tempered but did not altogether dampen the hope and zest accompanying the launching of this fresh idea.

IV. THE PROPOSAL AND THE RESPONSES

The key features of the proposal, set out in a twenty-one page, single-spaced memorandum, were the following:

- Merger of the Court of Claims and the CCPA to form a new intermediate appellate court, to be entitled either the United States Court of Appeals for the Federal Circuit or the United States Court of Special Appeals;
- Authorization of the trial commissioners of the Court of Claims to enter final judgments in cases currently within the jurisdiction of that court, to be reviewable by the new appellate court (nothing was stated about how this trial-level jurisdiction was to be organized);
- The new appellate tribunal created through the merger to be vested with jurisdiction to review decisions of the Court of Claims trial commissioners and of the Customs Court and to assume authority over all matters previously within the CCPA's jurisdiction; in addition, the new court to have appellate jurisdiction over Tax Court decisions and federal district court decisions in civil tax cases, in cases brought under the patent laws, and in cases brought under certain environmental statutes;
- The new appellate court to consist of the twelve judges of the two merging courts plus three additional Article III judges, all of whom to be United States circuit judges, like the judges of all the federal courts of appeals;
- The new appellate court, unlike other courts of appeals, to be authorized to sit in panels of more than three judges.³²

After describing this proposal, the memorandum proceeded to point out that the proposal met the appellate reform "imperatives" learned from recent years' investigations and experiences. It satisfied these imperatives in that it did not create a fourth tier, did not denigrate the status of U.S. circuit judges, did not call for undue specialization, did not obstruct access to the Supreme Court, and

32. OFFICE FOR IMPROVEMENTS IN THE ADMIN. OF JUST., A PROPOSAL TO IMPROVE THE FEDERAL APPELLATE SYSTEM (1978).

did not substantially enlarge the federal judiciary; at the same time, it established a permanent court with judges of its own.³³

The memorandum then analyzed the current caseloads of the two existing courts and projected the details of the caseload of the new court. It argued that this proposed marriage would be easy because of the circumstances that the two courts both occupied the nine-story court building on Lafayette Square, the Court of Claims on the ninth floor and the CCPA on the eighth; the courts shared the same library, and their personnel shared the same dining facilities; and the Judicial Conference of the United States had issued a standing order approving an interchange of judges between the two courts. The point was that it would be an extraordinarily easy and inexpensive step simply to put the two together.

In an effort to pull the sting from the anticipated charge of specialization, the memorandum spelled out the long and varied list of legal issues that would come before the new court, an array far richer than might meet the eye from a mere catalog of the categories of jurisdiction to be allotted to it.

Over the next three months, letters in response flowed into OIAJ. The memorandum had specified September 30, 1978 as the deadline for comments, but it was not enforced. Letters continued to arrive in OIAJ through October and thereafter. By early November, three months after the proposal had been launched, OIAJ had received a total of ninety written responses. Of these, forty-six were generally in favor of the proposal, and twenty-nine were opposed; the remainder took no position on its merits. Thirty-one were from judges, thirteen of whom served on the courts that would be affected if the proposal were implemented.³⁴ In addition to these written responses, numerous informal oral comments were received, by telephone and through random conversations with OIAJ staff and me.

Especially reassuring were the favorable responses from several federal circuit judges who had been actively concerned with the problems of the appellate system. These included Judges Clement F. Haynsworth of the Fourth Circuit,³⁵ Pierce Lively of the Sixth

33. *Id.*

34. Memorandum from Martha McNeely, OIAJ staff, to DJM (Oct. 20, 1978); Memorandum from Martha McNeely, OIAJ staff, to DJM (Nov. 15, 1978).

35. Letter from Hon. Clement F. Haynsworth, Jr., Chief Judge, U.S. Court of Appeals for the Fourth Circuit, to DJM (July 28, 1978).

Circuit,³⁶ and Wilfred Feinberg³⁷ and Henry Friendly³⁸ of the Second Circuit. Also encouraging were favorable responses from five judges of the Court of Claims.³⁹ However, the chief judge of that court, Daniel Friedman, was cautious; he did not endorse the merger but suggested instead an alternative of enlarging the exclusive jurisdiction of the existing courts.⁴⁰ Chief Judge Howard Markey of the CCPA was noncommittal, deeming it unseemly either to endorse or to oppose the idea of the merger.⁴¹ Erwin N. Griswold, former Solicitor General and then associated with a Washington law firm, gave an unenthusiastic endorsement, stating that the proposal was "better than nothing."⁴² The only Supreme Court Justice to respond, John Paul Stevens, said that the memorandum was "thoughtful" but that he had not yet come to a conclusion about the idea.⁴³ He did suggest that, if the new court were formed, tax and patent appeals might come to it by way of transfer from the regional courts of appeals.⁴⁴

Several federal judges opposed the merger. Judge Shirley M. Hufstедler of the Ninth Circuit, whose support I had hoped to gain, expressed opposition on the ground that to push this proposal would doom the Hruska Commission proposal for a National Court of Appeals, which she favored.⁴⁵ Judge Joseph Weis of the Third Circuit opposed the proposal on the ground that it would be a move toward specialized courts, which he opposed.⁴⁶ On the other hand, Judge Harry Phillips of the Sixth Circuit did not oppose specialized

36. Letter from Hon. Pierce Lively, U.S. Court of Appeals for the Sixth Circuit, to DJM (Oct. 13, 1978).

37. Letter from Hon. Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit, to DJM (Aug. 28, 1978).

38. Letter from Hon. Henry J. Friendly, U.S. Court of Appeals for the Second Circuit, to DJM (Sept. 6, 1978).

39. Letter from Hon. Marion T. Bennett, U.S. Court of Claims, to DJM (Sept. 7, 1978); Letter from Hon. Edward S. Smith, U.S. Court of Claims, to DJM (Sept. 21, 1978); Letter from Hon. Robert L. Kunzig, U.S. Court of Claims, to DJM (Sept. 21, 1978); Letter from Hon. Byron Skelton, U.S. Court of Claims, to DJM (Sept. 26, 1978); Letter from Hon. Philip Nichols, Jr., U.S. Court of Claims, to DJM (Aug. 8, 1978).

40. Letter from Hon. Daniel M. Friedman, Chief Judge, U.S. Court of Claims, to DJM (Sept. 27, 1978); Letter from Hon. Daniel M. Friedman, Chief Judge, U.S. Court of Claims, to DJM (Dec. 13, 1978).

41. Letter from Hon. Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals, to DJM (Dec. 12, 1978).

42. Letter from Erwin N. Griswold, Jones, Day, Reavis & Pogue, Washington, D.C., to DJM (Sept. 19, 1978).

43. Letter from Hon. John Paul Stevens, U.S. Supreme Court, to DJM (Sept. 28, 1978).

44. *Id.*

45. Letter from Hon. Shirley M. Hufstедler, U.S. Court of Appeals for the Ninth Circuit, to DJM (Aug. 16, 1978).

46. Letter from Hon. Joseph F. Weis, Jr., U.S. Court of Appeals for the Third Circuit, to Hon. Collins J. Seitz, Chief Judge, U.S. Court of Appeals for the Third Circuit (Aug. 9, 1978).

courts, but still did not favor the merger.⁴⁷ Judge Irving Kaufman of the Second Circuit likewise did not object to specialization, but felt that environmental cases should not be included.⁴⁸ From another direction, criticism was voiced on the ground that the new court, because of its varied jurisdiction, would be insufficiently specialized. We interpreted this view as encouraging evidence that we had achieved the objective of avoiding undue specialization, and some responses expressly praised the proposal on that ground.

Specialists in the tax and patent fields also had mixed reactions. Several well-known patent lawyers endorsed the merger of the courts.⁴⁹ However, leaders of the Patent Law Association of Chicago and of the New York Patent Law Association opposed the merger.⁵⁰ The few members of the tax bar who responded were divided on the proposal. Generally, reactions to the inclusion of environmental appeals within the new court's jurisdiction ran almost entirely against the idea.

Within OIAJ, we considered the written and oral responses sufficiently supportive of the key features of the proposal to warrant our continuing with the plan. A few storm clouds loomed, however, and it was apparent that some aspects would require rethinking. Perhaps the clearest point to emerge by late October was that the suggested jurisdiction over environmental appeals should be dropped. Opposition to the inclusion of such cases in the new court's docket was substantial and growing.

It was clear also that the method of selecting the chief judge—more precisely, the selection of the first chief judge—was a sensitive point that had to be treated with delicacy. The subject was so touchy that the memorandum of July 21 had not mentioned it. The problem was that there were two chief judges then sitting, one or both of whom would lose that position upon the merger of the two courts. Another matter not addressed in the memorandum concerned the organization of the new trial court that would take over

47. Letter from Hon. Harry Phillips, U.S. Court of Appeals for the Sixth Circuit, to DJM (Oct. 11, 1978).

48. Letter from Hon. Irving R. Kaufman, U.S. Court of Appeals for the Second Circuit, to DJM (Aug. 8, 1978).

49. Letter from Charles L. Gholz, Oblon, Spivak, McClelland, Maier & Neustadt, Arlington, Virginia, to OIAJ (Aug. 8, 1978); Letter from John R. Walker, Walker & McKenzie, Memphis, Tennessee, to OIAJ (Aug. 16, 1978); Letter from Homer O. Blair, Esq., Lexington, Massachusetts, to DJM (Aug. 24, 1978); Letter from C. Frederick Leydig, Leydig, Voit & Mayer, Chicago, Illinois, to DJM (Aug. 30, 1978); Letter from Laurence H. Pretty, Esq., Fulwider, Patton, Rieber, Lee & Utecht, Los Angeles, California, to OIAJ (Sept. 7, 1978); Letter from I. William Millen, Millen & White, Arlington, Virginia, to DJM (Oct. 5, 1978).

50. Letter from Howard W. Clement, President, The Patent Law Association of Chicago, to DJM (Sept. 21, 1978); Letter from John A. Reilly, President, The New York Patent Law Association, Inc., to DJM (Sept. 21, 1978).

the Court of Claims jurisdiction. What was this forum to be called? Where was it to be placed in the judicial structure? Would it have Article I or Article III judges? Suggestions had been received, but OIAJ had not yet come to grips with these questions.

The most serious and difficult problems that the responses foreshadowed concerned the tax and patent appeals. In each field the fundamental question was whether there should be a single appellate court of nationwide jurisdiction. On that question, in each of those fields, opinion was sharply divided. Unless the new court was vested with jurisdiction over at least one of these categories, it would fail to accomplish a major objective of the whole effort, namely to create a federal intermediate appellate court with nationwide jurisdiction over all district court decisions in some types of cases, in order to heighten uniformity.

V. DRAFTING, SELLING, AND NEGOTIATING

From the time the memorandum of July 21, 1978 had been distributed, we in OIAJ were keenly aware that we faced an uphill road. The natural tendency of bench and bar to adhere to existing arrangements, the low priority accorded judicial reform measures in Congress, and the numerous controversial points in the proposal, posed obstacles of substantial magnitude. There remained also numerous policy decisions to be made within OIAJ before actual drafting of a bill could proceed.

The public selling of the proposal began on September 13, 1978 with an address by me before the annual meeting of the Federal Bar Association in Washington.⁵¹ Shortly thereafter, I spoke to a gathering of some seventy-five lawyers convened by the Patent, Copyright, and Trademark Committee of the District of Columbia Bar Association.⁵² Later, I met informally with members of the Patent Lawyers Club of Washington⁵³ and the Patent Law Association of Chicago. On these latter two occasions there was considerable interchange with the lawyers during which the proposal received mixed reactions. I accepted an invitation from the University of Virginia Law School student newspaper to publish an article explaining

51. Daniel J. Meador, *A New Federal Appellate Court*, Address at the Annual Meeting of the Federal Bar Association (Sept. 13, 1978).

52. Memorandum from Denis Hauptly, OIAJ staff attorney, to Phase II File (Sept. 28, 1978).

53. Letter from I. William Millen, Millen & White, Arlington, Virginia, to DJM (Oct. 5, 1978).

the idea of a new federal intermediate court.⁵⁴ Later, Charles Haworth and I co-authored an article on the subject for the *University of Michigan Journal of Law Reform*.⁵⁵

In early October, Denis Hauptly sent a memorandum reminding me that we should be moving ahead with this project on three fronts: (1) after compiling and studying all the comments, we should make the necessary policy decisions concerning details of the new court and then proceed to draft a bill; (2) OIAJ staff should proceed to hold discussions with staff counsel on the appropriate subcommittees of the House and Senate Judiciary Committees, as well as with staff on the committees in the tax and patent fields, to brief them on the status of the proposal and to attempt to enlist their support; and (3) having had substantial and constructive contacts with the patent bar, we should communicate with the tax bar.⁵⁶ Over the next few weeks we moved in all three of these directions.

In addition, we believed it to be imperative to discuss the proposal with the judges of each of the courts to be affected and to attempt to gain their support or at least to neutralize them as opponents. Thus, during October and November of 1978, several OIAJ staff lawyers and I went to visit with the judges of the four concerned courts at their quarters in Washington.

The first visit was with the CCPA on October 5.⁵⁷ Four of the court's five judges were present. Chief Judge Markey, standing at a lectern, opened the meeting with a prepared statement. He reiterated his view that it would be inappropriate for the court to take any position on legislative proposals of this sort. He presented a useful breakdown of the proposal into its two most significant parts, pointing out that they presented distinct questions: the merger of the Court of Claims and the CCPA, and the vesting of exclusive nationwide jurisdiction in a single, appellate court. He said again that his court was ready to supply any information desired.⁵⁸ The ensuing discussion among the judges was rather favorable in tone.

54. Daniel J. Meador, *DICTA: Justice Tenders New Appellate Court Proposal*, VA. L. WKLY., Oct. 27, 1978, at 1. Requests for meetings on the proposal were at times too numerous for me to respond personally, so I involved other staff members. For example, at my suggestion, Charles Haworth spoke on the proposal before the Patent Bar of Detroit.

55. Daniel J. Meador & Charles R. Haworth, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201 (1979) (outlining merger of Court of Claims and CCPA based on 1978 OIAJ proposal). Joan Barton of the OIAJ staff assisted in the preparation of this article. *Id.* at 201.

56. Memorandum from Denis Hauptly, OIAJ staff attorney, to DJM (Oct. 2, 1978).

57. Memorandum from Denis Hauptly, OIAJ staff attorney, to Phase II File (Oct. 10, 1978).

58. *Id.*

On October 10, we met with the trial commissioners of the Court of Claims.⁵⁹ The atmosphere there was generally supportive. The concerns related mainly to the structure of the new trial level and whether the judges would have Article I or Article III status. The commissioners were also concerned about retirement arrangements for the new positions; they suggested a system similar to that in the Tax Court.⁶⁰ This was a particularly useful discussion, as we had not focused sharply on those features.

We met later that same day with several Court of Claims judges.⁶¹ Five of them had already endorsed the essence of the proposal. Chief Judge Friedman, however, who was present, had previously indicated that he did not favor the merger, although he did support an enlarged jurisdiction for his court. On the whole, this was a warm and helpful interchange.

Those three meetings contrasted markedly with our gathering with the Tax Court judges on November 3.⁶² Twelve of its sixteen active judges were present, plus three senior judges. The atmosphere was cool but polite. It was evident from the outset that there was little, if any, support around the table for channeling Tax Court decisions for review to the proposed new court. Some of the judges challenged the premise that there was a significant number of inter-circuit conflicts in tax cases. Some thought that centralized review of tax appeals might be a good idea, but that a special court of tax appeals should be created for that purpose. Some opposed the idea of linking taxes and patents in the same court, although they did not address the fact that those two fields were already linked in the regional circuits. We left the meeting with the sense that the proposed tax appeals jurisdiction was likely to be in trouble, but this was not surprising.

In that fall of 1978, it had been known for some time that Senator James O. Eastland would not be seeking re-election and would thus be relinquishing the chairmanship of the Senate Judiciary Committee. He would be succeeded in that position by Senator Edward M. Kennedy. That development was destined to have unexpected and

59. Memorandum from Joan C. Barton, OIAJ staff, to Phase II File (Oct. 11, 1978).

60. Provisions to this effect were included in early drafts of the OIAJ bill, but they proved complicated and were subsequently dropped. Congress corrected the situation in 1990 by establishing a new retirement system for Claims Court judges. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 306, 104 Stat. 5089, 5105-5112 (1991) (to be codified at 28 U.S.C. § 178).

61. Memorandum from Hon. Louis Spector, U.S. Court of Claims, to DJM (Oct. 12, 1978).

62. Memorandum from Joan C. Barton, OIAJ staff, to Phase II File (Nov. 8, 1978).

significant ramifications for the Federal Circuit proposal and its progress.

Early in the fall, one of Senator Kennedy's key committee counsel, Kenneth Feinberg, met in the OIAJ offices, at his request, with me and several members of the OIAJ staff. He had come to say that Senator Kennedy wanted to develop a justice system reform package to be introduced soon after the new Congress convened in January 1979. We went over all the court improvement projects on which OIAJ had been working since its creation over a year and a half earlier. Few had made any significant headway in Congress. Feinberg indicated that the Senator would probably want to incorporate all of them into the package, including the Court of Claims-CCPA merger, and that he might have some additional proposals of his own. We were elated at this news. Here at last might be what we had been hoping to find: an influential Senator willing to assume aggressive leadership in seeking passage of our court improvement measures. We agreed to keep in touch and to coordinate our work.

My elation over this development was fueled in part by my frustrations during the past year in trying to get President Carter to exert leadership on our justice system program. He had a unique opportunity, in my judgment, because of OIAJ's work, to be the first President to put forward a comprehensive program of constructive court improvements. Attorney General Bell and I had discussed this several times, and he had relayed the suggestion to the White House, but to no avail. Though thwarted in that direction, my elation in the wake of the Feinberg visit was tempered by the realities of the political situation. Tensions had already begun to surface between Kennedy and Carter. Carter had begun to encounter political difficulties, and talk was being heard of a potential Kennedy challenge in the next election, although the Democratic primaries were still eighteen months away. I could easily imagine Kennedy's taking over all of OIAJ's proposals and kicking off his new chairmanship with a dramatic justice improvement program, thus portraying himself as a strong leader, while the President remained silent. Although my major interest was in getting bills enacted—and I had no taste for petty political sparring—I felt an obligation, as a member of the Administration, to bring this development to the attention of the Attorney General and to make at least one more effort to move the President to act.

Inasmuch as President Carter seemed averse to the idea of a major speech on the subject, I suggested to the Attorney General that perhaps a formal White House reception for the judiciary of the na-

tion might afford an occasion for him to make some informal remarks about his upcoming legislative package of court improvement measures and to convey to the bench and bar that he was taking the lead in this endeavor. The Attorney General agreed. I then followed up with a memorandum to Attorney General Bell on October 23 which elaborated the suggestion that President Carter hold a reception to show his interest in the justice improvement program, and warned that otherwise, Senator Kennedy would seize the leadership on this subject and would take credit for the proposals OIAJ had developed.⁶³

Although I was reluctant to invoke what I considered to be crass political references, it occurred to me that this might attract White House attention when nothing else had done so. The Attorney General sent a memorandum to the President, dated October 25, 1978, recommending the reception and the remarks to be given by the President to the assemblage.⁶⁴ The recommended guests included the Supreme Court Justices, the chief judges of the United States courts of appeals, all the state chief justices, members of the House and Senate Judiciary Committees, the officers of the major national legal organizations, and others. My memorandum was attached, so that the White House would get the political message that was omitted from the Attorney General's memorandum. To my knowledge, no response was received to this communication.

At about this same time the White House staff had asked the Justice Department to submit the items in its legislative program for the new Congress, grouping them into four categories in order of priority. After a meeting with several departmental officials, we recommended that the Department submit in the fourth priority "Ap-

63. Memorandum from DJM to Griffin B. Bell, Attorney General, Dep't of Justice (Oct. 23, 1978). The memorandum read in part:

The President probably has one last opportunity to claim credit for the justice improvements program on which we have been working since February 1977. . . . We are now shaping up the legislative program for the new Congress, and the President can still take an opportunity such as this reception, and perhaps some other occasion, to put forward a justice proposal as part of the administrative program.

If he does not do this before the end of the year, Senator Kennedy will take all of the credit for it. Ken Feinberg, of Kennedy's staff, has already been to see me twice. Last week Pat Wald [then Assistant Attorney General for Legislative Affairs], Ben Civiletti [then Deputy Attorney General], and some members of my staff spent almost an entire morning going over all the items in our program. . . .

Unless the President says something first, it is inevitable that it will look as though he, Kennedy, is the only person in town with any foresight and leadership on the subject. The President will have lost a significant opportunity.

Id.

64. Memorandum from Griffin B. Bell, Attorney General, Dep't of Justice, to Jimmy Carter, President of the United States (Oct. 25, 1978).

pellate Court Restructuring and Reform Package.”⁶⁵ At that point, though, the Federal Circuit had a much higher priority in my mind than this would suggest. We had not yet even drafted a bill, however, and there were still numerous details to be decided on and points to be negotiated both within and outside of the Department.

Through November and December attention in OIAJ was focused on drafting a bill to implement the Federal Circuit concept. The principal statutory drafter in OIAJ was Karen Skrivseth. She was assisted in this effort by Denis Hauptly and Joan Barton. The drafting task was technically quite difficult because of the many small provisions scattered throughout the United States Code that would have to be amended in order to effectuate the proposed judicial restructuring. We had to abolish two Article III courts and create in their place one new Article III appellate court and one new trial court, the exact structure of which had not been decided upon. This complicated marriage and divorce would require the redrawing of appellate routes and name changes in a multitude of places.

After considerable discussion, taking into account all the suggestions received, we decided to establish the trial forum as an Article I court whose judges would be appointed by the President and would hold office for terms of fifteen years. The trial commissioners of the Court of Claims would become the first judges of the new court. A suggestion that such an independent trial court be created had been made a year earlier by the Court of Claims Committee of the District of Columbia Bar Association.⁶⁶ We were also influenced by the example of the Tax Court. It provided a model of a multi-judge, nationwide trial court, and it seemed safe to follow that model rather than to innovate radically. Even the name of the new court was influenced by that example. If we had a “Tax Court” then why not a “Claims Court”? There would also be a symmetry in name with the Customs Court. Inasmuch as “Court of Claims” was the name of the court that was to cease to exist, to continue it as the name of an entirely new body would be confusing. Like the Customs Court, but unlike the Tax Court, the new court would be located within the judicial branch and its decisions would be reviewable by the new appellate court. We had recently decided that the name of this new

65. Memorandum from Patricia M. Wald, Assistant Attorney General for Legislative Affairs, to Benjamin R. Civiletti, Deputy Attorney General, Dep’t of Justice (Nov. 8, 1978). The following were included as top priorities: enlargement of magistrates’ jurisdiction, abolition of general diversity jurisdiction, elimination of the Supreme Court’s mandatory jurisdiction, and authorization for court-annexed arbitration in the district courts. Those measures had been developed long before in OIAJ and had already been introduced in Congress.

66. Memorandum from Joan C. Barton, OIAJ staff, to Phase II File (Oct. 11, 1978).

appellate body should be the United States Court of Appeals for the Federal Circuit.

As mentioned earlier, the initial choice of the chief judge for the Federal Circuit presented a complicated personal and institutional problem. If the existing statute, specifying that the chief judge of every federal court is designated on a seniority basis, were to be applied, both of the sitting chief judges would lose their positions, and the chief judgeship would go to a judge who had never been chief judge of either court. That did not seem quite appropriate. In the end we decided to compromise by providing that the first chief judge would be appointed by the President, but that thereafter the statute on seniority would govern. That would have the effect of passing the choice to the White House.

Having given up jurisdiction over environmental appeals, we thought it desirable to confer a modest amount of additional appellate jurisdiction on the new court to provide the optimum amount of business for its judges and a more diversified docket, thus further warding off charges of specialization. After reviewing statistical data from the Administrative Office, we chose to include appeals from orders of the Civil Aeronautics Board.

As the year 1978 came to a close, the OIAJ draft bill was circulated, as was usual with such proposals, to all litigating divisions and offices in the Justice Department.⁶⁷ The tax jurisdiction proved to be the only significant sticking point among these departmental entities, and it was a major one. The Assistant Attorney General for the Tax Division, M. Carr Ferguson, manifested his opposition.⁶⁸ This was no surprise as he had indicated earlier that this was his view.⁶⁹ We had decided nevertheless to include tax appeals because we thought that the centralizing of such in a single national court made sense and that this new court was the most appropriate forum, thus avoiding creation of a new specialized court. Also, we hoped that we could garner sufficient support for the idea to enable us to persuade the Attorney General to approve it.

Ferguson was joined in his opposition by the Office of General Counsel for the Internal Revenue Service and by key officials in the Treasury Department. They took the position that the existing arrangements for tax appeals were not altogether unsatisfactory, but if

67. Memorandum from DJM to Griffin B. Bell, Attorney General, Dep't of Justice (Dec. 21, 1978).

68. Memorandum from M. Carr Ferguson, Assistant Attorney General, Tax Division, Dep't of Justice, to DJM (Jan. 31, 1979).

69. Memorandum from M. Carr Ferguson, Assistant Attorney General, Tax Division, Dep't of Justice, to DJM (Oct. 6, 1978).

appeals were to be centralized they should be routed to a Court of Tax Appeals. At a meeting with several of those lawyers, I found them to be uncompromising in their opposition to the OIAJ proposal.⁷⁰ It was evident that one of their major concerns related to the judges who would make up the Federal Circuit. They seemed to have a low regard for the tax decisions rendered by the Court of Claims and did not want those judges to be making nationwide precedential decisions on tax law. We had sensed this view earlier in conversations with tax practitioners and with some Tax Court judges. We argued, unavailingly, that if this was a problem it was temporary and transitional.

It became clear early in 1979 that the positions of Ferguson and OIAJ could not be reconciled despite several attempts to work out the matter. It thus was necessary to do what nobody liked to do except as a last resort, namely, to take the question to the Attorney General for resolution. After a meeting in his office attended by Ferguson, Patricia Wald, me, and others, Bell made a Solomonic decision. He decided that we should delete jurisdiction over appeals from the district courts but retain jurisdiction over appeals from the Tax Court.

Although that decision settled the internal Departmental dispute, we faced increasing evidence that even the pared-down tax jurisdiction would meet opposition from the Treasury Department and elsewhere. Thus, the question arose as to whether we should send the draft bill forward to the Office of Management and Budget (OMB) for approval as it then stood or whether we should delete tax appeals altogether. On February 16, I sent a memorandum to the Attorney General setting forth our options, as follows: (1) eliminate appeals from the Tax Court, and let the bill go forward with the President's message without further objections from the Treasury; (2) leave the bill as it is (or possibly restore appeals in tax cases from the district courts) and let either OMB or the President decide between us and Treasury; (3) abandon the effort to present an administration bill, but describe in the President's message the problems and the need to work toward a bill with Congress, thereby leaving OIAJ to work informally with the House and Senate Judiciary Committees to develop a bill in the future.⁷¹

Griffin Bell had the ability to make decisions unequivocally and quickly when faced with the necessity of doing so. Here he reacted

70. Memorandum from DJM to Griffin B. Bell, Attorney General, Dep't of Justice (Feb. 16, 1979).

71. *Id.*

without delay. He directed that we drop all the tax appeals jurisdiction from the bill, except that which the Court of Claims already had. This latter jurisdiction would be vested in the new Claims Court and would flow on appeal from that court to the Federal Circuit. Bell had never been enthusiastic about centralizing tax appeals, so his decision was not surprising. This action was also understandable under the circumstances, but it was disappointing to lose an opportunity to clean up the tax appeals confusion. The most important consideration, however, was to move ahead to establish the Federal Circuit by merging the two existing courts with at least some jurisdiction over district court cases nationwide; the patent appeals would provide that dimension. With the tax appeals debate resolved, the way was open for OMB clearance of the OIAJ draft bill.

Apart from the tax appeals controversy, the sharpest point of attack during the OMB clearance process was directed to the inclusion of appellate jurisdiction over appeals from the Civil Aeronautics Board. The main argument was that it made no sense to single out that one agency, as distinguished from several others, for Federal Circuit review.⁷² We considered this feature of the bill to be almost a throw-away, so we had little hesitation in deleting it. At this point we wanted nothing to derail the plan to get the bill introduced in the Senate with its central features intact. It was a pleasant and reassuring experience for us in OIAJ when no other significant opposition to those features surfaced in the OMB clearance process.

In the meantime what I had predicted would happen did happen. In its January 8, 1979 issue, the *National Law Journal* carried a story on Senator Edward Kennedy's upcoming court reform efforts, saying that "the powerful Massachusetts Democrat is planning a major reform of the federal judicial system."⁷³ Although the article stressed proposals in the Kennedy bill concerning discipline of federal judges and automatic increases in federal judgeships, it listed numerous other items that had been developed in OIAJ, including "merging the Court of Claims and the Court of Customs and Patent Appeals."⁷⁴ The impression conveyed by the article was that all of these measures had originated in Senator Kennedy's office.

72. Letter from Marvin S. Cohen, Chairman, Civil Aeronautics Board, to James M. Frey, Assistant Director for Legislative Reference, Office of Management and Budget (Feb. 1, 1979).

73. Edward J. Burke, *Draft of Kennedy's Court Bill Would Speed Action on New Federal Judges*, NAT'L L.J., Jan. 8, 1979, at 1, 3.

74. *Id.*

Terrence Adamson, then Special Assistant to the Attorney General and head of the Department's public information office, immediately shot a cryptic note to OIAJ Deputy Paul Nejelski: "Why abdicate all of our prior leadership to Senator Kennedy?"⁷⁵ To this I responded with an explanation of our frustrated efforts over the last year to move President Carter to exert leadership on the judicial front, and I attached my memorandum of October 23 to the Attorney General and his memorandum of October 25 to the President urging a reception for the judiciary in December.⁷⁶

Kennedy's staff was aware of the difficulties we were having in clearing the tax appeals jurisdiction. In consultation with Mortimer Caplin, Commissioner of Internal Revenue in the Kennedy administration, Senator Kennedy had decided to develop a bill of his own to create a Court of Tax Appeals. Through discussions between Feinberg and OIAJ staff it was agreed that we would have two bills, one being the OIAJ bill (in whatever form it could be finally cleared through OMB) and the other being the Kennedy bill, the major feature of which would be the Court of Tax Appeals. The understanding was that Kennedy would back our bill—indeed, would introduce it. The two bills would then be processed together.

VI. BILL LAUNCHING AND SENATE PASSAGE

Although Justice Department efforts to activate President Carter in behalf of our justice improvement proposals had thus far proved unsuccessful, we had not given up hope. During January and early February 1979, while negotiations were continuing over tax appeals and other details of the bill, and while the OMB clearance process was in progress, discussions continued with the White House staff. Eventually the President agreed to submit a message to Congress endorsing the entire array of judicial measures developed by OIAJ and to hold a White House press briefing to give the measures a high-level send-off. Although I do not know, I have always thought that this step was prompted, at least in part, by the threat of Senator Kennedy's taking over leadership on judicial reform.

The long-hoped-for press briefing took place at the White House on February 27, 1979. Standing on a low platform before an assembled crowd of media representatives, President Carter was flanked by Senator Kennedy and Representative Peter W. Rodino, Chair-

75. Memorandum from Terrence B. Adamson, Special Assistant to the Attorney General, to Paul Nejelski, Deputy Assistant Attorney General, OIAJ (Jan. 2, 1979).

76. Memorandum from DJM to Terrence B. Adamson, Special Assistant to the Attorney General (Jan. 4, 1979).

man of the House Judiciary Committee. The two key subcommittee chairmen were also present: Senator Dennis DeConcini of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, and Representative Robert W. Kastenmeier of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Attorney General Bell was also on the platform, along with other Justice Department officials and several members of the House Judiciary Committee.

President Carter opened with some general remarks about the importance of maintaining an effective judicial system.⁷⁷ He then called on Representative Rodino who commended the effort and pledged his support.⁷⁸ The President next turned to Senator Kennedy who made remarks in a similar vein.⁷⁹ In response to the President's inquiry about the prospects for passage, Kennedy said that he thought they were good. This prompted laughter among the assembled group.⁸⁰ After hearing from the two chairmen, the President departed, turning the briefing over to the Attorney General.⁸¹

Judging from the reactions there and from the later press coverage of this event, my impression was that the media representatives were more interested in the interchange between Carter and Kennedy than they were in the substance of the measures. The press took note of the fact that the President called first on the Chairman of the House Judiciary Committee instead of the Chairman of the Senate Judiciary Committee, thus not following normal order.⁸² Most news accounts paid scant attention to the proposed merger of the Court of Claims and the CCPA and the creation of the two new courts.⁸³

77. See Federal Civil Justice System: Remarks to Reporters on Proposed Legislation, Feb. 27, 1979, PUB. PAPERS 340 (1980) (noting worldwide recognition of United States judicial system).

78. See *id.* at 341 (recognizing that House Judiciary Committee is primarily concerned with how citizens view justice system and seeks to ensure that system reflect highest ideals).

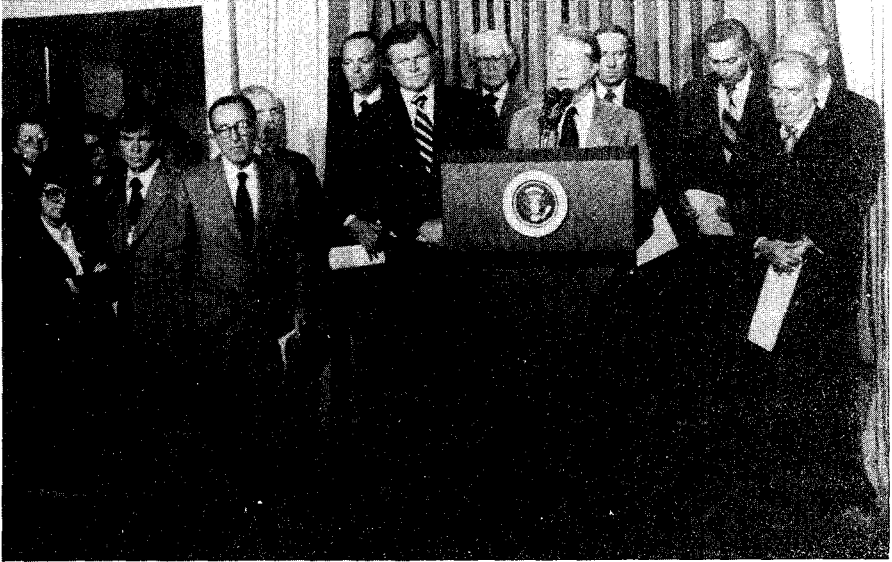
79. See *id.* at 341-42 (commending President Carter for his efforts to make system more available and more efficient).

80. *Id.* at 342.

81. *Id.*

82. Warren Weaver, Jr., *Response Favorable As Carter Asks Congress To Back Court Reform*, N.Y. TIMES, Feb. 28, 1979, at A-17.

83. See, e.g., *Carter Backs Plan Combining Two Courts into Appeals Bench*, WALL ST. J., Feb. 28, 1979, at 12 (discussing proposals to consolidate Court of Claims and Court of Customs and Patent Appeals into new appellate court as well as proposals to allow interest on court judgments to be levied from prejudgment date and adoption of measures to unclutter federal courts); *Carter Offers a Proposal To Streamline U.S. Courts*, BALTIMORE SUN, Feb. 28, 1979, at A-7 (discussing effect of proposals on way civil cases are handled in federal and appellate courts); Fred Barbash, *Carter Seeks Major Changes in U.S. Courts*, WASH. POST, Feb. 28, 1979, at A-2 (discussing several major changes in federal court system, one of which included proposal to combine Court of Claims and Court of Customs and Patent Appeals into new U.S. Court of Appeals for Federal Circuit); Warren Weaver, Jr., *Response Favorable As Carter Asks Congress To*



Launching the Bill

Presidential Press Briefing, The White House—February 27, 1979

Front Row Left to Right: Patricia M. Wald (Asst. Atty. Gen., OLA); Griffin B. Bell (Atty. Gen.); Sen. Edward M. Kennedy (Chm., Sen. Jud. Comm.); President Jimmy Carter; Rep. Peter W. Rodino (Chm., House Jud. Comm.)

Second Row Left to Right: Terrence B. Adamson (OPI, Dept. of Justice); unidentified White House staffer; Daniel J. Meador (Asst. Atty. Gen., OIAJ); Sen. Dennis DeConcini (Chm., Subcomm. on Improvements in Judicial Machinery, Sen. Jud. Comm.); Sen. Howard M. Metzenbaum (Sen. Jud. Comm.); Rep. Thomas F. Railsback (House Jud. Comm.); Rep. Robert W. Kastenmeier (Chm., Subcomm. on Courts, Civil Rights & Admin. of Justice, House Jud. Comm.); Rep. Robert McClory (House Jud. Comm.)

With this official launching, matters moved with relative expedition, at least as measured by the usual pace of congressional activity. On March 15, 1979, Senator Kennedy introduced the OIAJ bill as S. 677,⁸⁴ and his own bill as S. 678.⁸⁵ The latter included all the provisions of the former, plus the proposal for a Court of Tax Appeals and some other items.

The legislative process commenced with a hearing on March 20 before the full Senate Judiciary Committee, with Senator Kennedy

Back Court Reform, N.Y. TIMES, Feb. 28, 1979, at A-17 (discussing six proposals designed to ensure readily available forum where controversy can be resolved quickly, fairly, and at reasonable cost).

84. S. 677, 96th Cong., 1st Sess. (1979).

85. S. 678, 96th Cong., 1st Sess. (1979).

presiding.⁸⁶ Only three witnesses, in addition to me, appeared at that one-day hearing: Chief Judge Frank Coffin of the United States Court of Appeals for the First Circuit; A. Leo Levin, Director of the Federal Judicial Center; Judge John Newman of the United States District Court in Connecticut. The proceeding was warm and supportive, unruffled by controversy. It was devoted to an overview of the entire range of proposals in the two bills.

The action then passed to the subcommittee level. Senator DeConcini's Subcommittee on Improvements in Judicial Machinery held hearings on both bills on May 7, 9, and 10, with a follow-up on June 18.⁸⁷ On the first day, the leadoff witnesses were Erwin N. Griswold, M. Carr Ferguson, Judge Jack Miller of the CCPA, and myself.⁸⁸ They were followed by a panel of five patent lawyers and representatives from the District of Columbia Bar Association, the Association of the Bar of the City of New York, and the New York Patent Law Association.⁸⁹ Appearing on the second day were Chief Judge Daniel Friedman of the Court of Claims (accompanied by two judges of his court and a trial commissioner), Dean Paul Carrington of Duke Law School, Edward Garabedian of the Administrative Office of the United States Courts, and representatives from the tax section of the New York Bar Association.⁹⁰ The witnesses on the third day were Chief Judge Howard Markey of the CCPA, Professor Bernard Wolfman of Harvard Law School, representatives from the Treasury Department and the Internal Revenue Service, and three former Commissioners of Internal Revenue.⁹¹ Witnesses on the final, follow-up day were Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, Chief Judge John Brown of the United States Court of Appeals for the Fifth Circuit, a representative from the Association of the Bar of the City of New York, and five tax practitioners.⁹²

86. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

87. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Addendum to Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

88. *Addendum to Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 2-54 (1979).

89. *Id.* at 54-94.

90. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 75-121 (1979).

91. *Id.* at 111-54.

92. *Id.* at 162-308.

In relation to the Federal Circuit proposal, key witnesses were the two chief judges of the courts to be abolished and merged. Chief Judge Friedman, speaking for the Court of Claims, took no position on the precise proposal for the new courts. However, he did say, "We fully support the objectives of these proposals to improve the functioning and effectiveness of the federal appellate system by eliminating the uncertainties that now exist in certain areas of the law because of conflicting decisions or views among the different circuits, and thereby providing a more coherent body of law for the country."⁹³

Chief Judge Friedman did express opposition to the provisions requiring that the court sit in divisions, that each judge sit in the same division for two years with a gradual rotation among all divisions, and that cases be assigned on a regular, categorical basis to the various divisions.⁹⁴ He had made this point earlier in a letter to OIAJ, urging that it was important for all judges to sit constantly with each other so as to avoid a compartmentalization of the court.⁹⁵ I had responded to him in a letter that, because of the nationwide jurisdiction that this appellate court would exercise, uniformity, stability, and predictability in its decisions were particularly desirable and that this would more likely be achieved by stable panels than by ever-shifting groups of judges.⁹⁶ I added, however, that this was simply an idea that we had put forward and that if testimony at the hearings showed it to be unwise we would not press the matter.⁹⁷

Chief Judge Markey again expressed the view he had stated many times previously that it would be unwise for his court to take any position one way or the other on the pending proposal.⁹⁸ He pointed out that if the court endorsed the merger it would appear to be engaged in empire building; if it opposed the idea it would appear to be standing in the way of progress.⁹⁹ He informed the com-

93. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 76 (1979) (statement of Hon. Daniel M. Friedman, Chief Judge, U.S. Court of Claims).

94. *See id.* at 76-77 (noting that arguments against such provisions far outweigh benefits in promoting doctrinal stability).

95. Letter from Hon. Daniel M. Friedman, Chief Judge, U.S. Court of Claims, to DJM (Mar. 20, 1979).

96. Letter from DJM to Hon. Daniel M. Friedman, Chief Judge, U.S. Court of Claims (Apr. 3, 1979).

97. *Id.*

98. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 111 (1979) (statement of Hon. Howard T. Markey, Chief Judge, U.S. Court of Customs and Patent Appeals).

99. *See id.* at 112 (stating lack of personal interest in congressional action or inaction on merger proposal).

mittee that he had earlier recommended that the chief judge of the new court be appointed by the President because the task would be administratively demanding and the President should be entitled to find the best available administrator for this important national court.¹⁰⁰

The Senate hearings were reassuring in that no new, significant opposition developed. Objections were still being voiced from some segments of the patent bar, but these seemed to be outweighed by the support that had been manifested. During the previous fall of 1978, a clear split in the patent bar had become evident. Denis Hauptly reported that he had divided the letters OIAJ was receiving from patent lawyers into two stacks. The favorable pile consisted almost entirely of corporate letterheads; the unfavorable pile consisted almost entirely of trial lawyer letterheads. Taking advantage of the situation, Frank Cihlar of the OIAJ staff had organized the corporate patent counsel into an effective support group for the Federal Circuit.

The only two features of the bill that seemed likely not to survive were the provisions relating to the assignment of judges and cases to divisions in the new appellate court and the authorization of appellate jurisdiction over district court decisions in trademark cases. As it developed, these provisions were deleted within the Judiciary Committee. Otherwise, there was reason to believe that the bill had a realistic chance of progressing further along the legislative track.

After the introduction of S. 677 and S. 678 in March 1979, the Justice Department had to face the question of what position it would take on the Kennedy proposal for a Court of Tax Appeals. The problem was politically sensitive. On the one hand, Attorney General Bell was not sympathetic toward the idea of centralizing tax appeals; neither was Assistant Attorney General M. Carr Ferguson. On the other hand, Senator Kennedy was the prime mover behind the OIAJ bill as well as his own, and we did not want to jeopardize his support for our proposals by opposing a key feature of his bill. His proposal called for a court to be composed of circuit judges from all of the existing courts of appeals, sitting by designation for three-year terms on the Tax Court. This idea was more attractive to the Treasury and tax people than our original proposal had been. Thus, there was evidence of support within the Administration for the proposal. Still, there were those who opposed any effort in the direction of a single, nationwide tax appeals court.

100. *See id.* (noting that administration of new court would be critical to early success).

Realistically, the Justice Department had two options: (1) support creation of the new tax appeals court; or (2) take no position either way.¹⁰¹ During late March and April this question was discussed within the Justice Department and was eventually put to the Attorney General. He decided that we would take no position on the creation of a new tax appeals court and that individual members of the Department and the Administration would be free to testify as to their own, individual views on the matter. Thus, in my testimony I made known my support for the idea of centralizing tax appeals but suggested that the new Federal Circuit court would be a more appropriate forum than a court with no judges of its own but consisting of circuit judges rotating through it for short terms.¹⁰²

From its earliest stages, the Federal Circuit proposal had been met with a different reception in the House than it had in the Senate. Early conversations between OIAJ staff lawyers and the two key staff members on Representative Kastenmeier's House Judiciary Subcommittee, Michael Remington and Bruce Lehman, had given us the impression that the subcommittee had other matters already on its agenda of higher priority and that this subject was not likely to receive serious attention any time soon. Thus, during the fall we concentrated on the Senate, working with both Kenneth Feinberg of Senator Kennedy's office and Robert Fiedler, counsel for Senator DeConcini's subcommittee. Following the White House briefing by President Carter, however, efforts were renewed with the House to arrange for the OIAJ bill to be introduced. There still seemed to be little enthusiasm from Representative Kastenmeier's subcommittee and staff. On April 30, 1979, Representative Rodino introduced our bill as H.R. 3806, but no hearings seemed to be in the offing.¹⁰³

From early May, when Senator DeConcini's subcommittee hearings were held, through June and into July, discussions and negotiations continued among OIAJ staff lawyers, Senate committee staff counsel, and individual lawyers and judges concerned with the Federal Circuit proposal. The upshot was that a decision was made within the Committee to combine S. 677 and S. 678 into a new, clean bill. That bill, denominated S. 1477, was introduced on July

101. Memorandum from M. Carr Ferguson, Assistant Attorney General, Tax Division, Dep't of Justice, to Patricia M. Wald, Assistant Attorney General for Legislative Affairs (Apr. 9, 1979); Memorandum from DJM to Patricia M. Wald (Apr. 10, 1979); Memorandum from Patricia M. Wald to Griffin B. Bell, Attorney General, Dep't of Justice (Apr. 17, 1979).

102. *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 70 (1979) (statement of Daniel J. Meador, Assistant Attorney General, OIAJ, Dep't of Justice).

103. H.R. 3806, 96th Cong., 2d Sess. (1979).

10, 1979.¹⁰⁴ It embodied all the proposals of the OIAJ bill and the Kennedy bill, with some revisions and modifications. To our great delight, and considerable surprise, the Senate Judiciary Committee voted favorably on that bill on July 31 and sent it to the Senate floor with a recommendation that it pass.¹⁰⁵ Probably no event during my time in the Justice Department gave me greater pleasure and sense of satisfaction than this committee action. It was especially timely in that Attorney General Bell and I were both scheduled to leave the Justice Department in mid-August. While much unfinished business would inevitably be left pending, at least some major proposals had moved a significant step toward fruition.

The Senate Judiciary Committee's report on S. 1477, issued on August 3, said all that we could have hoped it would say, given the compromises we had already made along the way months earlier.¹⁰⁶ This was hardly surprising in that OIAJ staff lawyers had cooperated closely with Senate Committee staff counsel in drafting the report. One passage in particular was especially significant for the future:

Testimony on S. 677 and S. 678 supported the premise that the capacity of the federal appellate courts to provide a nationwide answer to legal questions could be expanded through the establishment of new courts of appeals whose jurisdiction is defined on a topical rather than a geographical basis. The creation of the Court of Appeals for the Federal Circuit provides such a forum for appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity. The absence of such a court in the present federal judicial system has compelled Congress from time to time in the past to create special courts to handle a narrow category of cases. Although the jurisdiction of the Federal Circuit is presently delineated in the manner outlined above, the creation of a federal appellate court with jurisdiction that is defined in terms of subject matter rather than territory provides an institutional structure which the federal judicial system, as it is presently constituted, lacks.¹⁰⁷

The two categories of district court cases included in the bill were actions arising under the patent laws and government contract claims, the latter having been added in the committee. The report estimated that 372 appeals in those two categories would be re-

104. S. 1477, 96th Cong., 1st Sess. (1979).

105. Memorandum from DJM to Griffin B. Bell, Attorney General, Dep't of Justice (July 31, 1979); see S. REP. NO. 304, 96th Cong., 1st Sess. (1979) (reporting votes on bill).

106. S. REP. NO. 304, 96th Cong., 1st Sess. 14 (1979) (concluding that merger of courts is desirable and logically feasible).

107. *Id.* at 9-10.

routed from the regional circuits to the Federal Circuit.¹⁰⁸ Although we had hoped for the inclusion of environmental and tax appeals, the paramount concern here was to establish an appellate court with jurisdiction over at least some district court cases nationwide, and that the bill achieved. Also, it was important to establish the principle that any new federal appellate court be integrated into the existing tier of United States courts of appeals, with its judges being United States circuit judges, like the judges on all other courts of appeals. The number of the judges on the court had been scaled back from fifteen to twelve (the number of judges on the two courts being abolished) before the bill had been introduced in March, because of the elimination of environmental and tax cases.

After much discussion following the May and June hearings, a decision had been reached to provide that the chief judge of the new court of appeals would be the person who was senior in service as the chief judge of either the Court of Claims or the CCPA. This meant, as everyone, of course, knew, that the first chief judge of the Federal Circuit would be Howard Markey, assuming that he was still in office when the new court came into being. Thereafter, the chief judge would be chosen on a seniority basis, like the chief judges of all other federal courts.

A decision had also been made along the way to disconnect the tax appeals court proposal in the Kennedy bill from the Federal Circuit proposal in the OIAJ bill. Although the Tax Appeals Court was included in S. 1477 and in the Senate Judiciary Committee's report on that bill, a separate bill embodying that proposal alone was introduced on August 3, as S. 1691.¹⁰⁹ It had long been mutually agreed within OIAJ and Senator Kennedy's staff that the tax appeals court proposal would not be allowed to get in the way of the Federal Circuit proposal; it had been contemplated all along that the two would be treated separately, although they were dealt with in the same hearings. The introduction of S. 1691 in early August marked a permanent severance of the two proposals.

The Federal Circuit proposal received a modest boost in September when the Judicial Conference of the United States endorsed the concept of centralizing all patent appeals. However, the conference expressed no view on appellate court structure; it was silent on the question of merging the two existing courts.¹¹⁰

108. *Id.* at 14.

109. S. 1691, 96th Cong., 1st Sess. (1979).

110. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64 (1979).

On October 30, 1979, S. 1477 was passed by the Senate on a voice vote.¹¹¹ It did not include the proposal to create a tax appeals court. However, it had two serious problems insofar as its potential receptivity in the House of Representatives was concerned. One was that it contained the so-called Bumpers amendment.¹¹² This was a proposal that had been under consideration by the Senate for some time to alter the standard for judicial review of administrative agency action. It was quite controversial. The other problem was that the bill, as enacted by the Senate, contained provisions that had been in the Kennedy bill dealing with disciplinary procedures for federal judges.¹¹³ That subject, too, had long been on the Senate agenda, and the approach taken by the Senate was not popular with key members of the House Judiciary Committee. Thus, the prospects of House action on S. 1477 in the fall of 1979 were not promising. But, with well over a year remaining in the 96th Congress, there was hope that the matter could be worked out and the Federal Circuit could still be brought into being.

On August 15, 1979, in accordance with a longstanding plan, I relinquished my position in OIAJ to return to the University of Virginia law faculty. Griffin Bell, who had been struggling for months to disengage himself at the Justice Department to return to his Atlanta law firm, left a few days later. Maurice Rosenberg of the Columbia University law faculty became Assistant Attorney General in charge of OIAJ, and Benjamin Civiletti became the Attorney General. From this point forward, OIAJ's legislative program was in their hands. Thus, my personal account of the origin of the Federal Circuit must end here. But the story was far from over; the rest will be sketched briefly.

VII. THE REMAINING ROAD TO ENACTMENT

Nearly seven months had passed since the introduction of S. 677 and S. 678 to create the Federal Circuit to its passage by the Senate. Another two and one-half years, however, would go by before final enactment of the measure. This substantial time difference between the Senate and House consideration of the bills can be explained largely by the relative lack of initial enthusiasm for the measure in the House and the absence there, during the first year, of leadership committed to passage of the bill. In the end, however, Representa-

111. 125 CONG. REC. 30,102 (1979).

112. S. 1477, 96th Cong., 1st Sess. § 503 (1979).

113. S. 1477, 96th Cong., 1st Sess. §§ 161-166 (1979).

tives Kastenmeier and Rodino must be given credit for action in the House.

Congressional attention to the bill, especially in the House, was probably heightened by a series of annual interbranch seminars commenced by the Brookings Institution in 1978.¹¹⁴ Each seminar brought together Justice Department officials, members of the House and Senate Judiciary Committees, and federal judges to discuss mutual problems in the administration of justice. At the seminar in March 1979, only a week before the introduction of S. 677 and S. 678, I described the Federal Circuit proposal.¹¹⁵ At the seminar in January 1980, S. 1477 was a major item on the agenda.¹¹⁶

The Federal Circuit was carried forward in the House, at least initially, by its confluence with what was referred to as "industrial innovations proposals."¹¹⁷ President Carter had sent a message to Congress in October 1979 on this subject. There was growing concern that the United States might be lagging behind other industrial nations and that steps should be taken to induce more innovation. It had always been one of our arguments in support of the centralized patent jurisdiction that predictability as to the validity of patents was important in promoting investment in research and production. Thus, the Federal Circuit and proposals for industrial innovations made a natural match.

In January 1980, Frank Cihlar, who had assumed a major OIAJ staff responsibility for S. 1477 and H.R. 3806, outlined to Assistant Attorney General Maurice Rosenberg a series of steps that OIAJ should pursue to coordinate these efforts in Congress.¹¹⁸ At that time, Representative Kastenmeier's subcommittee seemed more in-

114. See Mark W. Cannon & Warren I. Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1 (1981) (recounting history of seminars). One of OIAJ's earliest projects was an effort to establish a Federal Justice Council, a formal body to be composed of representatives from all three branches of the federal government that would engage continuously in planning for the justice system. The inability to agree on such a body prompted the initiation of the Brookings Institution seminars as an alternative. For an updating report on the seminars, see Warren I. Cikings, *Bringing the Three Branches of Government Together*, THE THIRD BRANCH, Feb. 1992, at 10, 10.

115. Brookings Institution, Seminar on the Administration of Justice, Williamsburg, Virginia, Mar. 9-11, 1979.

116. Brookings Institution, Seminar on the Administration of Justice, Williamsburg, Virginia, Jan. 18-20, 1980.

117. See *Carter's Plans for Innovation: Mixed Reaction*, CHEMICAL WK., Nov. 7, 1979, at 54 (noting President Carter's characterization of legislative proposals on industrial innovation as important first step to deal with perceived lag in U.S. science and technology); William H. Jones, *Carter Describes Program To Encourage Innovation*, WASH. POST, Nov. 1, 1979, at B1 (discussing administration's legislative proposals in nine key areas aimed at increasing cooperation between government and industry in order to spur innovation).

118. Memorandum from Frank P. Cihlar, OIAJ staff, to Maurice Rosenberg, Assistant Attorney General, Dep't of Justice (Jan. 11, 1980).

terested in industrial innovations than it did in the idea of the Federal Circuit. But the collaborative work by OIAJ paid off, and the subcommittee held a hearing on the whole package on April 3, 1980.¹¹⁹

At that hearing, Rosenberg testified on behalf of the Department of Justice.¹²⁰ He traced the recent history of abortive appellate reform efforts and presented a comprehensive analysis of the appellate court proposal. He was ideally situated to make this presentation, as he had chaired the Advisory Council on Appellate Justice and had long worked on the precise problems being addressed.

The legislative maneuvering was destined to last another two years. On September 5, 1980, the House Judiciary Committee issued a report recommending passage of H.R. 3806 containing the Federal Circuit proposal,¹²¹ and on September 15, the House passed the bill.¹²² The bill was then sent to the Senate. Although both houses of Congress had now approved provisions creating the United States Court of Appeals for the Federal Circuit and the United States Claims Court, they did not come together before the end of the 96th Congress.

The process, therefore, had to start over again with the introduction of fresh bills in the 97th Congress when it convened in January 1981, the month that saw the departure of the Carter administration and the inauguration of President Ronald Reagan. William French Smith became Attorney General, and OIAJ as such was reorganized into the Office of Legal Policy with a reoriented mission.¹²³

119. *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess.* (1980).

120. *Id.* at 367 (testimony of Maurice Rosenberg, Assistant Attorney General, OIAJ).

121. H.R. REP. NO. 1300, 96th Cong., 2d Sess. (1980).

122. 126 CONG. REC. 25,367 (1980).

123. In 1991, the president of the American Bar Association recommended the reestablishment of OIAJ. Talbot D'Alemberte, *A Message from the President: Restarting Engine of Law Reform*, 77 A.B.A. J. 8 (1991). On February 3, 1992, the ABA House of Delegates adopted the following resolution:

BE IT RESOLVED, that the American Bar Association supports the reestablishment in the United States Department of Justice of the Office for Improvements in the Administration of Justice (OIAJ) with broad authority to pursue a range of programs and projects relating to the entire justice system.

BE IT FURTHER RESOLVED, that the Office be headed by an Assistant Attorney General, under the direction of the Attorney General.

BE IT FURTHER RESOLVED, that OIAJ be authorized and responsible for developing ways to improve the operation of the civil and criminal justice system and to enhance citizen access to justice.

ABA House of Delegates, Res. No. 122A (Feb. 3, 1992).

By this time, however, the proposal for the Federal Circuit, having already passed both houses, had developed such a momentum of its own that it was not likely to be derailed by a change of administration, especially when there was no opposition manifested by the new regime. In April 1981, hearings were again held in the House Judiciary Subcommittee,¹²⁴ and in May, hearings were held in the Senate Judiciary Subcommittee.¹²⁵ In November, the House passed the Federal Circuit proposal by a vote of 321 to 76;¹²⁶ in December, the Senate passed the measure by a vote of 83 to 6.¹²⁷ But the bills differed, and it was not until March 1982 that the two houses united to enact a common bill.¹²⁸

At mid-morning on April 2, 1982, President Reagan came out of the Oval Office, shook hands through a small group of distinguished guests, and took his seat at a table on the lawn of the Rose Garden. He was there to sign Public Law 97-164, an "Act to establish a United States Court of Appeals for the Federal Circuit, to establish a United States Claims Court, and for other purposes."¹²⁹

Behind the President on that sunny day in early spring were gathered some of his top officials, including Attorney General Smith and Commerce Secretary Malcolm Baldrige, neither of whom had played a significant role in the events that had brought us there. Others present had been and would continue to be key figures in this chapter in the federal judiciary's history. All the judges of the Court of Claims and the CCPA were on hand witnessing, in effect, the signing of the "death warrant" for their courts, but witnessing also the beginning of something greater than the sum of the two. As I stood there, between the chief judges of the courts soon to disappear, my mind ran back to the time four years earlier to the many brainstorming sessions around the table at OIAJ, before the words "Federal Circuit" had even entered the vocabulary. I recalled those days and hours invested by the OIAJ staff lawyers and the congressional staff counsel to bring us to this point. As I replayed in my mind the touchy negotiations and intellectual tussles involved in

124. *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

125. *Federal Courts Improvement Act of 1981—S. 21 and State Justice Institute Act of 1981—S. 537: Hearings on S. 21 and S. 537 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

126. H.R. 4482, 97th Cong., 1st Sess., 127 CONG. REC. 27,985-86 (1981).

127. S. 1700, 97th Cong., 1st Sess., 127 CONG. REC. 29,888 (1981).

128. H.R. 4482, 97th Cong., 2d Sess., 128 CONG. REC. 3562 (1982); H.R. 4482, 97th Cong., 2d Sess., 128 CONG. REC. 4949 (1982).

129. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).



Signing the Bill The White House—April 2, 1982

Seated: President Ronald Reagan

Standing Left to Right: Rep. Peter W. Rodino (Chm., House Jud. Comm.); Rep. Robert McClory (House Jud. Comm.); William French Smith (Atty. Gen.); Fred Fielding (Counsel to the Pres.); Hon. Howard T. Markey (Chief Judge, CCPA); Daniel J. Meador; [unidentified face]; Hon. Daniel M. Friedman (Chief Judge, Ct. of Cls.); Sen. Robert Dole; Sen. Paul Laxalt; Malcolm Baldrige (Sec. of Comm.)

launching this project, I heard someone off to the side mumble, *sotto voce*: "This brokered marriage is about to be consummated."

VIII. RETROSPECTIVE OBSERVATIONS

In retrospect the most notable aspect of the Federal Circuit's creation is the relative speed with which it took place. The four years from initial conception to enactment is an extraordinarily short time within which to bring about a major court reform. Proposals of equal magnitude, as well as those of lesser importance, usually languish in Congress for many years longer. Why the relative expedition in this instance? Answers to this question may yield lessons helpful in effectuating future judicial reforms.

Although the precise idea of the Federal Circuit was conceived in the spring of 1978, it was the outgrowth of at least six years of work

by others to bring about change in the federal appellate structure. Without that prior attention to the subject, it is doubtful that the ground would have been sufficiently laid for the reception of the Federal Circuit proposal. Accordingly, it may be more realistic to say that the establishment of this court was the culmination of a ten-year rather than a four-year effort. Viewing the process this way underscores the reality that court improvements are not quick-fix projects. Time is required for education, gestation, and the building of attention. Even taking into account the prior work, however, the bringing into being of these new appellate and trial forums still seems to have taken a comparatively short time. Thus the question remains as to why this was so.

Here, one must speculate. I suggest that four circumstances combined to produce the result.

1. *High-level initiative and leadership.* It is as true in matters of judicial reform as elsewhere that what is everybody's business is nobody's business. To effectuate change someone must take the lead and persevere. In this instance, that leadership was provided by the Department of Justice and OIAJ. Leadership on this project could have come from elsewhere, for example, from the Federal Judicial Center, the Judicial Conference, Congress, or the bar. But it was not forthcoming from any of those quarters. The conclusion seems inescapable that had it not been for OIAJ there would today be no Federal Circuit. It is equally true that had Griffin Bell not been Attorney General there would have been no OIAJ.¹³⁰ The point, though, is that affirmative leadership from some high-level source is essential in launching and carrying to fruition any significant court improvement effort.

2. *Congressional leadership.* Although leadership elsewhere is important in developing an idea and building support for it, in the end it will go nowhere without the interest and leadership of individual members of Congress. Senator William M. Evarts of New York provided that crucial element in the establishment of the courts of appeals in 1891. With the Federal Circuit it was Senator Kennedy, at least initially. Had he not become Chairman of the Senate Judiciary Committee in 1979 and had he not taken over the OIAJ proposals as a matter of special interest, it is doubtful that the Federal Circuit would have been established as soon as it was or at all. In the

130. Recently the American Bar Association has gone on record as supporting the reestablishment of OIAJ in the Department of Justice. See *supra* note 123 (setting forth ABA's resolution supporting reestablishment of OIAJ). The history of the Federal Circuit suggests that this would be a salutary step for the administration of justice.

House, though not moving into action until a year later, Representative Kastenmeier thereafter played a key leadership role.

3. *Nonpartisan approach.* From the beginning, OIAJ approached this project, as it did all others, in a strictly nonpolitical, nonpartisan way. We were not seeking to advance the interest of any group or to implement any ideological view. Our sole objective was to improve the federal judiciary in the interest of the country as a whole. We dealt equally with Democrats and Republicans in Congress, consulting with all and keeping all informed. In working this way, OIAJ was able to maintain a more or less detached, objective position, to the benefit of all its proposals for, as its name indicated, "improvements in the administration of justice."

4. *A good idea.* Even if all the foregoing circumstances exist, a proposed judicial reform is not likely to be adopted unless it is soundly conceived and probably productive of desirable results. The idea of merging the Court of Claims and the CCPA and creating a new court of appeals and a new trial court was just such an idea. It made sense in terms of procedural efficiency, judicial structure, and heightened coherence in the law. Like all good ideas for court improvement, this one resulted from high-minded intellectual creativity brought to bear on existing conditions and felt needs.

Other circumstances may have contributed to the Federal Circuit's birth, but these four at least were present and significant. Bearing them in mind may be useful in seeking to overcome other difficulties in the judiciary.

In long-range significance for the future of the federal judiciary, the most notable result of this episode is that it gave the system, for the first time, an appellate court with jurisdiction defined nonterritorially by subject matter. The Senate Judiciary Committee had perceptively identified this historically important feature, pointing out that Congress can add new categories of appeals to the court's jurisdiction as circumstances seem to require. With careful internal management, the size of the court can be substantially expanded to accommodate such new business. Tax appeals remain a leading candidate for the kind of centralized national treatment this court, alone within the federal judiciary, is equipped to provide. But whatever the future brings, 1982 will remain a signal year, along with 1891, in the history of the federal intermediate appellate tier.