507–512, 514, 517–519, title VI, sections 703, 902, 905, 906, 1103, 1104, 1107–1110, 1114, and 1115 of the Senate amendment, and modifications committed to conference: Messrs. LoBIONDO, SHUSTER, and OBERSTAR.

From the Committee on Ways and Means, for consideration of sections 102, 121, 201, 203, and 301 of the House bill, and sections 201, 203, 304, 401–404, 407, and 1105 of the Senate amendment, and modifications committed to conference: Messrs. THOMAS, SHAW, and RANGEL.

There was no objection.

FURTHER MESSAGE FROM THE SENATE

A further message from the Senate by Ms. Curtis, one of its clerks, announced that the Senate has passed a bill of the following title in which the concurrence of the House is requested:

S. 3930. An act to authorize trial by military commission for violations of the law of war, and for other purposes.

ESTABLISHING A PILOT PROGRAM IN CERTAIN DISTRICT COURTS

Mr. SENSENBRENNER. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 5418) to establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges, as amended.

The Clerk read as follows:

H.R. 5418

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

SECTION 1. PILOT PROGRAM IN CERTAIN DISTRICT COURTS.

(a) ESTABLISHMENT.—

(1) IN GENERAL.—There is established a program, in each of the United States district courts designated under subsection (b), under which—

(A) those district judges of that district court who request to hear cases under which one or more issues arising under any Act of Congress relating to patents or plant variety protection must be decided, are designated by the chief judge of the court to hear those cases;

(B) cases described in subparagraph (A) are randomly assigned to the judges of the district court, regardless of whether the judges are designated under subparagraph (A);

(C) a judge not designated under subparagraph (A) to whom a case is assigned under subparagraph (B) may decline to accept the case; and

(D) a case declined under subparagraph (C) is randomly reassigned to one of those judges of the court designated under subparagraph (A).

(2) SENIOR JUDGES.—Senior judges of a district court may be designated under paragraph (1)(A) if at least 1 judge of the court in regular active service is also so designated.

(3) RIGHT TO TRANSFER CASES PRESERVED.—This section shall not be construed to limit the ability of a judge to request the reassignment of or otherwise transfer a case to which the judge is assigned under this section, in accordance with otherwise applicable rules of the court.

(b) DESIGNATION.—The Director of the Administrative Office of the United States Courts shall, not later than 6 months after the date of the enactment of this Act, designate not less than 5 United States district courts, in at least 3 different judicial circuits, in which the program established under subsection (a) will be carried out. The Director shall make such designation from among the 15 district courts in which the largest number of patent and plant variety protection cases were filed in the most recent calendar year that has ended, except that the Director may only designate a court in which—

(1) at least 10 district judges are authorized to be appointed by the President, whether under section 133(a) of title 28, United States Code, or on a temporary basis under other provisions of law; and

(2) at least 3 judges of the court have made the request under subsection (a)(1)(A).

(c) DURATION.—The program established under subsection (a) shall terminate 10 years after the end of the 6-month period described in subsection (b).

(d) APPLICABILITY.—The program established under subsection (a) shall apply in a district court designated under subsection (b) only to cases commenced on or after the date of such designation.

(e) REPORTING TO CONGRESS.—

(1) IN GENERAL.—At the times specified in paragraph (2), the Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the pilot program established under subsection (a). The report shall include—

(A) an analysis of the extent to which the program has succeeded in developing expertise in patent and plant variety protection cases among the district judges of the district courts so designated;

(B) an analysis of the extent to which the program has improved the efficiency of the courts involved by reason of such expertise;

(C) with respect to patent cases handled by the judges designated pursuant to subsection (a)(1)(A) and judges not so designated, a comparison between the 2 groups of judges with respect to—

(i) the rate of reversal by the Court of Appeals for the Federal Circuit, of such cases on the issues of claim construction and substantive patent law; and

(ii) the period of time elapsed from the date on which a case is filed to the date on which trial begins or summary judgment is entered;

(D) a discussion of any evidence indicating that litigants select certain of the judicial districts designated under subsection (b) in an attempt to ensure a given outcome; and

(E) an analysis of whether the pilot program should be extended to other district courts, or should be made permanent and apply to all district courts.

(2) TIMETABLE FOR REPORTS.—The times referred to in paragraph (1) are—

(A) not later than the date that is 5 years and 3 months after the end of the 6-month period described in subsection (b); and

(B) not later than 5 years after the date described in subparagraph (A).

(3) PERIODIC REPORTING.—The Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b) and the Director of the Federal Judicial Center, shall keep the committees referred to in paragraph (1) informed, on a periodic basis while the pilot program is in effect, with respect to the matters referred to in subparagraphs (A) through (E) of paragraph (1).

(f) AUTHORIZATION FOR TRAINING AND CLERKSHIPS.—In addition to any other funds made available to carry out this section, there is authorized to be appropriated not less than $5,000,000 in each fiscal year for—

(1) educational and professional development of those district judges designated under subsection (a)(1)(A) in matters relating to patents and plant variety protection; and

(2) compensation of law clerks with expertise in technical matters arising in patent and plant variety protection cases, to be appointed by the courts designated under subsection (b) to assist those courts in such cases.

Amounts made available pursuant to this subsection shall remain available until expended.

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from Wisconsin (Mr. SENSENBRENNER) and the gentleman from Michigan (Mr. CONYERS) each will control 20 minutes.

The Chair recognizes the gentleman from Wisconsin.

□ 1930

GENERAL LEAVE

Mr. SENSENBRENNER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks and include extraneous material on H.R. 5418, currently under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

Mr. SENSENBRENNER. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in support of H.R. 5418 to establish a pilot program in certain U.S. district courts to encourage enhancements of expertise in patent cases among district judges. It is widely recognized that patent litigation has become too expensive, too time consuming, and too unpredictable. This addresses those concerns by authorizing a pilot program to improve the expertise of Federal district judges responsible for hearing patent cases.

The need for such a program is apparent. Patent cases account for nearly 10 percent of complex cases and consume significant judicial resources. Despite the investment of the additional resources by district judges to these cases, the rate of reversal on claim construction issues remains excessive.

One sitting Federal judge characterized the manner that the judiciary employs to resolve these cases as marked by ''institutional ineptitude.'' I would say, parenthetically, that that is a remarkable admission by a Federal judge.

The premise underlying H.R. 5418 can be stated in three words: practice makes perfect. Judges who are able to focus more attention on patent cases are more likely to avoid error and thus reduce the likelihood of reversal.

The bill requires the director of the Administrative Office of the Courts to select five district courts to participate in a 10-year pilot program to enhance judicial patent expertise. The bill specifies criteria that the director must employ in determining eligible districts and then preserves the continued random assignment of cases to prevent the pilot districts from becoming magnets for forum-shopping litigants.

Finally, the legislation will require the director to provide both the House

and Senate Judiciary Committees with periodic reports to help assess the program's efficiency and effectiveness.

Mr. Speaker, the bill does not purport to comprehensively address all of the ill associated with patent litigation, nor does it seek to substantively amend the patient laws or the judicial process. However, the program established by this bill will enhance judicial expertise in this crucial area while providing Congress important information to further improve the administration of patent claims.

Mr. Speaker, I commend the two gentlemen from California, Mr. SCHIFF and Mr. ISSA, for introducing this bill. I urge Members to support this important legislation.

Mr. Speaker, I reserve the balance of my time.

Mr. CONYERS. Mr. Speaker, I ask unanimous consent that the gentleman from California (Mr. SCHIFF) control time on our side.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

There was no objection.

Mr. SCHIFF. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise today in support of H.R. 5418, legislation that I introduced with my colleague, Representative ISSA, in order to establish a pilot program in the Federal district courts to encourage the enhancement of expertise in patent cases among district judges.

I want to thank my colleague from California for his leadership and tenacity on this issue that has brought us to this place. I also want to thank the chairman and ranking member of the Judiciary Committee and the Chair and ranking member of the Subcommittee on the Courts, the Internet and Intellectual Property for working to bring the bill to the floor today.

Mr. Speaker, I join with my colleague, Mr. ISSA, in introducing this legislation because I believe it is a worthy proposal that is narrowly drafted and will provide us with valuable and important insight on the operation of patent litigation in the Federal court system.

This patent pilot program, created under the bill, is designed to enhance expertise in patent cases among district judges, provides district courts with resources and training to reduce error rates in patent cases, and helps reduce the high cost and lost time associated with patent litigation.

The legislation has received an impressive display of broad-based support from a wide-ranging spectrum of interested parties, including the technology industry, the pharmaceutical industry, the consumer electronics industry, biotech, intellectual property owners and other IP organizations, as well as a U.S. district chief judge.

Several months ago, the Judiciary Subcommittee on the Courts, Internet and Intellectual Property held a hearing on improving Federal court adjudication of patent cases. At this hearing a number of proposed solutions were discussed, serious concerns were expressed with other proposals that would have called for the creation of a new specialized court as well as proposals that would move all patent cases to an existing specialized court.

These concerns centered around the need to maintain generalist judges, random case assignment, and to maintain the important legal percolation that occurs currently among the various district courts.

Our approach avoids these pitfalls and is a worthwhile program that Congress should establish on a test basis. It also bears mentioning that we have consulted very closely with the Administrative Office of the U.S. Courts, the representative of the Federal judiciary.

Indeed, these discussions led to a number of important improvements to the legislation that are reflected in the final product. We are also pleased that companion legislation has been introduced in the other body by Senators HATCH and FEINSTEIN.

In closing, I would like to stress that while this legislation is an important first step to addressing needed patent reforms, I believe that Congress must continue to work to address a number of issues surrounding patent litigation that require broad-based reforms to our patent system.

Mr. Speaker, I look forward to continuing my work with my colleagues on the Judiciary Committee and in Congress to address these issues.

Mr. Speaker, I reserve the balance of my time.

Mr. SENSENBRENNER. Mr. Speaker, I yield such time as he may consume to the author of the bill, the gentleman from California (Mr. ISSA).

Mr. ISSA. Mr. Speaker, I will be brief, not because this is not a great piece of legislation. I am very proud of the work we have done on a bipartisan basis in our committee, but because the fact is, this is a piece of legislation whose time has come.

This bill was voted unanimously out of the Judiciary Subcommittee and brought to the floor on suspension because in fact all of the details necessary to make a good piece of legislation were worked out with the community that will need it, use it, and benefit from it.

That includes members of the Federal bench, the AO, the Administrative Office of the judicial branch. It also includes both branches here in the Capitol and members from the administration. I believe this is an example of bipartisan work at its finest.

I thank my coauthor on this, Mr. SCHIFF, for working tirelessly on this, and for his good words. I would particularly like to thank the chairman, Mr. SENSENBRENNER, and Mr. CONYERS for taking the work we did in subcommittee as sufficient and bringing it quickly to the floor.

Last but not least, I very much want to thank the staff of the subcommittee and the chairman and ranking member of the subcommittee, who encouraged us all along the way, held the necessary hearings, and have told us to do this and then do more.

Mr. SCHIFF. Mr. Speaker, I want to acknowledge the superb work done by my colleague, who really was the driving force behind this legislation.

Mr. SMITH of Texas. Mr. Speaker, H.R. 5418, a bill "[t]o Establish a Pilot Program in Certain United States District Courts to Encourage Enhancement of Expertise in Patent Cases Among District Judges," deserves the support of the Members of the House.

For the past 2 years, the Subcommittee on Courts, the Internet and Intellectual Property has conducted a thorough review of problems associated with the issuance of patents and the adjudication of patent claims.

H.R. 5418 focuses on one aspect of patent litigation—the recognition that judges are too often inexperienced in dealing with technical areas of the law and that they rarely have the opportunity to have a patent case go all the way through trial.

Patent cases equal only 1 percent of cases filed in U.S. District Courts but are responsible for nearly 10 percent of complex cases. On average, an individual federal judge has only 1 patent case go all the way through trial every 7 years, which means trial-level judges may have no more than 3 or 4 such cases over their entire judicial career.

These statistics suggest judges could benefit from the development of greater expertise and that they might develop this ability by handling these cases, which are so vital to American companies.

Mr. Speaker, the bill before us is designed to enable designated federal judges to have the opportunity to enhance their expertise in handling these cases and to measure the effects, if any, on patent litigation.

Introduced by Representatives DARRELL ISSA and ADAM SCHIFF, the bill followed an October 2005 Subcommittee oversight hearing on proposals to structurally reform the patent litigation system.

This bipartisan measure was approved by the Subcommittee on July 27, 2006 and approved by the full Judiciary Committee on September 13, 2006.

As amended, the bill will require the Director of the Administrative Office of the Courts to select 5 districts to participate in a 10-year pilot project.

It will also require the Director, on a periodic basis, to prepare and report to Congress on aspects of the project and to make a recommendation on whether the program should be extended, expanded, or made permanent.

Mr. Speaker, I urge my colleagues to support this bipartisan bill.

Mr. Speaker, I yield back the balance of my time.

Mr. SENSENBRENNER. Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. SENSENBRENNER) that the House suspend the rules and pass the bill, H.R. 5418, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

ELECTRONIC SURVEILLANCE MODERNIZATION ACT

Mr. SENSENBRENNER. Mr. Speaker, pursuant to House Resolution 1052, I call up the bill (H.R. 5825) to update the Foreign Intelligence Surveillance Act of 1978, and ask for its immediate consideration.

The Clerk read the title of the bill.

The SPEAKER pro tempore. Pursuant to House Resolution 1052, in lieu of the amendments recommended by the Committee on the Judiciary and the Permanent Select Committee on Intelligence printed in the bill, the amendment in the nature of a substituted printed in House Report 109–696 is adopted, and the bill, as amended, is considered read.

The text of the bill, as amended, is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Electronic Surveillance Modernization Act''.

SEC. 2. FISA DEFINITIONS.

(a) AGENT OF A FOREIGN POWER.—Subsection (b)(1) of section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801) is amended—

(1) in subparagraph (B), by striking ''; or'' and inserting '';''; and

(2) by adding at the end the following:

''(D) is reasonably expected to possess, control, transmit, or receive foreign intelligence information while such person is in the United States, provided that the official making the certification required by section 104(a)(7) deems such foreign intelligence information to be significant; or''.

(b) ELECTRONIC SURVEILLANCE.—Subsection (f) of such section is amended to read as follows:

''(f) 'Electronic surveillance' means—

''(1) the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a particular known person who is reasonably believed to be in the United States under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; or

''(2) the intentional acquisition of the contents of any communication under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are reasonably believed to be located within the United States.''.

(c) MINIMIZATION PROCEDURES.—Subsection (h) of such section is amended—

(1) in paragraph (2), by striking ''importance;'' and inserting ''importance; and'';

(2) in paragraph (3), by striking ''; and'' and inserting ''.''; and

(3) by striking paragraph (4).

(d) WIRE COMMUNICATION AND SURVEILLANCE DEVICE.—Subsection (l) of such section is amended to read as follows:

''(l) 'Surveillance device' is a device that allows surveillance by the Federal Government, but excludes any device that extracts or analyzes information from data that has already been acquired by the Federal Government by lawful means.''.

(e) CONTENTS.—Subsection (n) of such section is amended to read as follows:

''(n) 'Contents', when used with respect to a communication, includes any information concerning the substance, purport, or meaning of that communication.''.

SEC. 3. AUTHORIZATION FOR ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS FOR FOREIGN INTELLIGENCE PURPOSES.

(a) IN GENERAL.—The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is further amended by striking section 102 and inserting the following:

''AUTHORIZATION FOR ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE PURPOSES

''SEC. 102. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

''(1) the electronic surveillance is directed at—

''(A) the acquisition of the contents of communications of foreign powers, as defined in paragraph (1), (2), or (3) of section 101(a), or an agent of a foreign power, as defined in subparagraph (A) or (B) of section 101(b)(1); or

''(B) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a); and

''(2) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h);

if the Attorney General reports such minimization procedures and any changes thereto to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least 30 days prior to the effective date of such minimization procedures, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

''(b) MINIMIZATION PROCEDURES.—An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under the provisions of section 108(a).

''(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

''(1) an application for a court order with respect to the surveillance is made under section 104; or

''(2) the certification is necessary to determine the legality of the surveillance under section 106(f).

''AUTHORIZATION FOR ACQUISITION OF FOREIGN INTELLIGENCE INFORMATION

''SEC. 102A. (a) IN GENERAL.—Notwithstanding any other law, the President, acting through the Attorney General may, for periods of up to one year, authorize the acquisition of foreign intelligence information concerning a person reasonably believed to be outside the United States if the Attorney General certifies in writing under oath that—

''(1) the acquisition does not constitute electronic surveillance;

''(2) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a wire or electronic communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to wire or electronic communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;

''(3) a significant purpose of the acquisition is to obtain foreign intelligence information; and

''(4) the proposed minimization procedures with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

''(b) SPECIFIC PLACE NOT REQUIRED.—A certification under subsection (a) is not required to identify the specific facilities, places, premises, or property at which the acquisition of foreign intelligence information will be directed.

''(c) SUBMISSION OF CERTIFICATION.—The Attorney General shall immediately transmit under seal to the court established under section 103(a) a copy of a certification made under subsection (a). Such certification shall be maintained under security measures established by the Chief Justice of the United States and the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless the certification is necessary to determine the legality of the acquisition under section 102B.

''(d) MINIMIZATION PROCEDURES.—An acquisition under this section may be conducted only in accordance with the certification of the Attorney General and the minimization procedures adopted by the Attorney General. The Attorney General shall assess compliance with such procedures and shall report such assessments to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate under section 108(a).

''DIRECTIVES RELATING TO ELECTRONIC SURVEILLANCE AND OTHER ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION

''SEC. 102B. (a) DIRECTIVE.—With respect to an authorization of electronic surveillance under section 102 or an authorization of an acquisition under section 102A, the Attorney General may direct a person to—

''(1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition of foreign intelligence information in such a manner as will protect the secrecy of the electronic surveillance or acquisition and produce a minimum of interference with the services that such person is providing to the target; and

''(2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the electronic surveillance or acquisition or the aid furnished that such person wishes to maintain.

''(b) COMPENSATION.—The Government shall compensate, at the prevailing rate, a person for providing information, facilities, or assistance pursuant to subsection (a).

''(c) FAILURE TO COMPLY.—In the case of a failure to comply with a directive issued pursuant to subsection (a), the Attorney General may petition the court established under section 103(a) to compel compliance with the directive. The court shall issue an