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The Appellate Jurisdiction of the Temporary Emergency Court of Appeals

I. INTRODUCTION

In 1971, Congress created the Temporary Emergency Court of Appeals (TRECA)\(^1\) to hear appeals from federal district court decisions arising under the Economic Stabilization Act of 1970 (ESA).\(^2\) The ESA originally authorized the President to impose emergency wage, price, and rent controls,\(^3\) and later ESA amendments authorized the President to allocate petroleum products in emergencies.\(^4\) Although the ESA expired on April


Congress continued the effect of these ESA amendments by enacting the Emergency Petroleum Allocation Act of 1973 (EPAA). Because the EPAA incorporated the ESA provisions for judicial review, the TECA currently has appellate jurisdiction of all federal district court cases arising under the


President Nixon continued some of the COLC's operations until December 31, 1974. See Exec. Order No. 11,788, 3 C.F.R. 877 (1974) (providing for orderly termination of the ESA program and various follow-up activities).


7. See EPAA, 15 U.S.C. § 754(a) (1) (1976). The judicial review provisions of the amended ESA, as incorporated in the EPAA, provide:

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy, except that nothing in this subsection . . . affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense . . . raised in any proceeding before such court . . .

(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals . . .

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issue certified, give binding instructions and remand the action to the certifying court for further disposition.
ESA or the EPAA.8

In most cases appealed to the TECA, either the only issue appealed is one clearly arising under the ESA or the EPAA,9 or the resolution of an issue clearly arising under the ESA or the EPAA determines the outcome of the litigation, even though non-ESA or non-EPAA issues are also involved.10 In these

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10. See, e.g., Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 591 F.2d 711, 716 (Temp. Emer. Ct. App.) (despite common law breach of contract claims, TECA had exclusive appellate jurisdiction of the case because “the resolution of the litigation in its entirety requires application of the EPAA”), cert. denied, 100 S. Ct. 168 (1979); Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375, 1384 (10th Cir. 1978) (all issues appealed, including breach of contract allegations, were inseparable from issues concerning ESA/EPAA oil pricing regulations), cert. denied, 441 U.S. 952 (1979); M. Spiegel & Sons Oil Corp. v. B.P. Oil
cases, the TECA has decided the entire appeal by deciding the ESA or EPAA issues. There is, however, a narrow category of cases in which ESA or EPAA issues are joined on appeal with non-ESA or non-EPAA issues, and the resolution of the ESA or EPAA issues in the cases does not dispose of the entire appeal.\(^\text{11}\) When deciding these cases, both the TECA and the circuit courts have had to determine what issues the TECA may decide on appeal.

In this narrow category of cases, courts have consistently limited the TECA's jurisdiction to consideration only of the ESA or EPAA issues involved. For example, in \textit{United States v. Cooper},\(^\text{12}\) the TECA refused to hear a criminal count of a multicontact appeal. The court reasoned that only the circuit court of appeals could rule on charges arising under a federal crimi-

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nal statute even though those charges were based on violations of the ESA and were joined, at trial and on appeal, with ESA claims. Similarly, in *Clark Oil & Refining Co. v. Department of Energy*, the TECA held that it lacked subject matter jurisdiction because the only issue actually adjudicated by the district court arose solely under the Department of Energy Act and not the EPAA even though the plaintiff's only claim for relief arose under the EPAA. In other cases the TECA has re-

13. United States v. Cooper, 482 F.2d at 1397-99. Cooper, a landlord, was charged with willfully and knowingly making false representations about material facts within the jurisdictions of the Department of the Treasury, the IRS, and the Price Commission. These charges stemmed from violations of rent controls promulgated pursuant to the ESA. The district court found Cooper liable both civilly (for ESA violations) and criminally (for false representation and ESA criminal violations), and entered separate civil and criminal judgments against him on separate dates. *Id.* at 1395. Cooper appealed his criminal conviction to the Ninth Circuit but did not appeal to the TECA. The Ninth Circuit transferred the entire appeal to the TECA for further proceedings, concluding that sole jurisdiction to review the matter was vested by statute in the TECA. *Id.* at 1396.

The TECA held that, even though the Ninth Circuit had jurisdiction of the appeal from the criminal conviction, the circuit court lacked authorization to transfer all or part of the appeal to the TECA. *Id.* at 1398. Although the joinder of the claims at trial was permissible, on appeal the issues should have been severed. Because timely appeal of the ESA issues was not filed with the TECA, the TECA lacked jurisdiction to hear even the ESA issues. *Id.* at 1400.


15. Clark Oil & Ref. Co. v. Department of Energy, No. DC-53, slip op. at 10 (Temp. Emer. Ct. App. Oct. 15, 1979). In *Clark*, Commonwealth Oil Refining Co. (Corco) had applied for a grant of exception relief offered under the oil entitlements program—a Department of Energy effort to provide incentives for transporting California crude oil to out-of-state refineries. The Department of Energy's Office of Hearing Appeals granted relief to Corco in a proposed order. *Id.* at 3. Other refiners objected to this proposed order, triggering Department of Energy proceedings to review the proposed relief. Corco received interim relief so that it could ship oil to Puerto Rican refineries during the pending Department of Energy proceedings. The other refiners appealed the order granting Corco interim relief to the Federal Energy Regulatory Commission (FERC). Based on regulations issued after these appeals were filed, the FERC dismissed the appeals, holding that it lacked the statutory authority to review grants of interim relief. *Id.* at 4. One refiner filed a complaint in federal district court alleging that the FERC improperly refused to review the interim order. The district court held that the FERC had improperly refused to review the order and remanded the case to the FERC. *Id.* The Department of Energy and Corco appealed this district court holding to the TECA.

The threshold question on appeal to the TECA was whether the TECA had jurisdiction over the appeal. The plaintiffs/appellees argued that the adjudicated issue arose solely out of the Department of Energy Act and was outside the TECA's jurisdiction. *Id.* at 5. The defendants/appellants argued that, even though the adjudicated issue arose solely from the Department of Energy Act, it was part of a larger "case" arising under the EPAA and was therefore within the TECA's jurisdiction. *Id.* at 7. The TECA majority accepted the plaintiffs/appellees' argument and dismissed the appeal for lack of subject matter jurisdiction. The majority rejected the defendants/appellants' argument that
fused to hear antitrust, fair trade, and contract claims that were joined with ESA or EPAA issues on appeal.  

Relying on the familiar tenet that grants of special jurisdiction should be strictly construed, most courts have found that limiting the TECA's jurisdiction to ESA and EPAA issues most closely conforms with the congressional purpose for creating the TECA. In Coastal States Marketing, Inc. v. New England Petroleum Corp., however, the Court of Appeals for the Second Circuit moved beyond mere reliance on the tenet of strict construction and provided the most comprehensive analysis to date of the TECA's jurisdictional grant. The court considered three approaches to allocate appellate jurisdiction between a federal court of appeals and the TECA when several issues had been adjudicated by a federal district court in a single case. First, following the plain language of the TECA's jurisdictional

the TECA has broad jurisdiction based on the nature of the "case" appealed and failed to accept the dissent's view that an adjudicated procedural issue arising wholly within an EPAA claim should be heard by the TECA. Id. at 10. The Court of Appeals for the Fifth Circuit, however, dismissed, for lack of jurisdiction, an appeal from a Florida federal district court that had dismissed an EPAA claim for failure to exhaust administrative remedies. The circuit court concluded that the TECA had sole jurisdiction of the appeal. Ven-Fuel, Inc. v. Department of Energy, (5th Cir. Nov. 26, 1979).


18. 604 F.2d 179 (2d Cir. 1979).

19. Coastal States Marketing, Inc. (Coastal States) sued New England Petroleum Corporation (Nepco) for damages resulting from Nepco's alleged breach of a contract to buy oil from Coastal States. Jurisdiction was based on diversity of citizenship. Nepco moved to reopen discovery in order to prove that Coastal States had overcharged Nepco in violation of ESA/EPAA price controls, thus making the sales contract illegal. Nepco's motion was not granted and Nepco was found liable for $192,936. Id. at 181.

The Second Circuit remanded the case, permitting Nepco to demonstrate the illegality of the sales contract. Id. On remand, however, the district court judge denied all relief requested by Nepco, concluding that the sales transactions were exempt from mandatory price controls and were not illegal. Id.

Nepco appealed the denial of the motions for relief to both the Second Circuit and the TECA. Nepco then obtained a stay of proceedings in the TECA and moved to have the appeal in the Second Circuit transferred to the TECA, arguing that section 211(b)(2) of the Economic Stabilization Act Amendments of 1971 granted exclusive jurisdiction of the matter to the TECA. Id.
grant, the TECA could have jurisdiction only of those issues or cases "arising under" the ESA or EPAA according to the rules of traditional federal question "arising under" analysis (arising under jurisdiction). Under this approach, the TECA would have jurisdiction of ESA or EPAA issues raised in the complaint but not those raised in the answer or counterclaim. Second, the TECA could have exclusive jurisdiction of all issues appealed from district court cases that had involved any ESA or EPAA issue, even though the issue was raised as a defense or counterclaim (TECA case jurisdiction). Third, the

20. See note 7 supra.


22. Since 1877, the scope of federal question jurisdiction has been narrowed by applying the "well-pleaded complaint" rule, which requires that the federal question appear on the face of the complaint. See Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877). Thus, no federal question jurisdiction exists if the only federal question raised is in the answer, defense, or counterclaim. Id. Likewise, no federal question jurisdiction exists when a plaintiff anticipates federal question defenses in his complaint. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 129 (1974). See generally C. WRIGHT, supra note 21, §§ 17-22.

Only the Seventh Circuit has interpreted section 211(b)(2) of the Economic Stabilization Act Amendments of 1971 as "consistent with interpretations of the same phrase, 'arising under,' in the context of federal question jurisdiction in the federal courts." St Mary's Hosp., Inc. v. Ogilvie, 496 F.2d 1324, 1326 (7th Cir. 1974) (defendant's counterclaim based on ESA grounds did not make the case appealable to the TECA).

23. The TECA has heard ESA or EPAA issues when raised by counterclaims or answers. See, e.g., Citronelle-Mobile Gathering, Inc. v. Gulf Oil Co., 591 F.2d 711 (Temp. Emer. Ct. App.) (issues raised by Gulf's counterclaim clearly arose under EPAA, and TECA would have heard them if timely appeal to TECA had not been withdrawn), cert. denied, 100 S. Ct. 168 (1979); Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375 (10th Cir. 1978) (ESA/EPAA issues raised in counterclaim were properly appealed to TECA), cert. denied, 441 U.S. 952 (1979); Sohio Petroleum Co. v. Caribou Four Corners, Inc., 573 F.2d 1259 (Temp. Emer. Ct. App. 1978) (defendant's answer raised issue of EPAA stripper well exemption and district court made findings of fact on that issue, therefore appeal to TECA was proper). The case approach is commonly argued before the courts. See, e.g., Clark Oil & Ref. Co. v. Department of Energy, No. DC-53 (Temp. Emer. Ct. App. Oct. 15, 1979); Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979); United States v. Cooper, 492 F.2d 1393 (Temp. Emer. Ct. App. 1973).
TECA could have exclusive jurisdiction only of ESA or EPAA issues raised on appeal, leaving the appropriate court of appeals to decide any non-ESA or non-EPAA issues (TECA issue jurisdiction). The Coastal States court then described the disadvantages and advantages of each approach:

Each of the three approaches implicates conflicting considerations. Limiting the TECA to traditional "arising under" jurisdiction makes applicable a well-developed body of jurisdictional law, yet scatters among the courts of appeals some ESA issues, raised by way of answer or otherwise, on which the expertise of the TECA would be helpful. Giving the TECA "case" jurisdiction assures uniform decision-making of all ESA issues, yet withdraws from the courts of appeals many non-ESA issues, which may really be the dominant issues in the case and which the TECA may have no interest and no special competence in deciding. Splitting the cases and giving the TECA only TECA "issue" jurisdiction assures uniformity of decision-making on all ESA issues and avoids burdening the TECA with non-ESA issues, yet encounters the risk of delay and confusion inevitably associated with a system of bifurcated appeals.24

After determining that neither the language creating the TECA nor its legislative history conclusively defined the TECA's jurisdiction,25 the court turned to existing precedent to resolve the issue. It rejected "traditional arising under" jurisdiction because courts had not limited the TECA's jurisdiction to issues raised in the complaint.26 Case jurisdiction was also ruled out because the TECA traditionally disclaimed jurisdiction of all non-ESA or non-EPAA issues.27 The court concluded that is-

25. Congress used the phrase "cases and controversies arising under" in section 211(b)(2) of the Economic Stabilization Act Amendments of 1971. The court considered this strong but not conclusive evidence that the traditional federal question meaning should also be applied to the words used in the ESA. Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179, 183 (2d Cir. 1979). The court also noted that Congress did not intend to have all ESA issues reviewed by the TECA, because the lawmakers did not give federal district courts original and exclusive jurisdiction to hear state cases raising ESA issues in defenses. Id. The Second Circuit suggested, however, that federal district court cases in which such issues are raised in answers may be within the TECA appellate jurisdiction because "important federalism concerns weigh against expanding removal of state court cases, [but] are totally absent when the only issue is which of two coordinate federal appellate courts has jurisdiction." Id.
26. 604 F.2d at 183.
27. See id. at 184-85.
sue jurisdiction was proper because the existing bifurcated appellate system demonstrated acceptance of the issue approach.\footnote{28} 

This Note critically examines the analysis that courts have used to confine the TECA's appellate jurisdiction solely to issues concerning the ESA or EPAA and identifies problems inherent in the issue approach. An alternative analysis is then suggested. The Note proposes that the TECA should be granted "limited case jurisdiction" under which the TECA would be required to decide all issues in a case when any ESA or EPAA issues have been adjudicated by the district court. Currently, there are proposals before Congress that would create other specialized courts which structurally resemble the TECA. This Note suggests that Congress carefully define the jurisdictions of these proposed courts in order to avoid the problems now facing the TECA.

II. PROBLEMS RESULTING FROM THE CURRENT DEFINITION OF TECA JURISDICTION

Limiting the TECA's jurisdiction to consideration of only ESA and EPAA issues requires courts to sever the issues in some appeals so that the circuit court may take appellate jurisdiction of those issues not arising under either the ESA or EPAA.\footnote{29} This system of bifurcated appeals often creates problems for litigants, causes forced decisions, and results in inefficient judicial administration.

A system of bifurcated appeals can easily confuse litigants concerning the proper forum for their appeal.\footnote{30} Of course,  

\footnote{28. \textit{Id.} at 184-87. The court further maintained that the congressional purpose in creating the TECA would not be served if every ESA issue raised, even if not adjudicated, could be the basis for appeal to the TECA. Thus, the court ruled that ESA issues must be adjudicated by the district court in order to form the basis for appeal to the TECA. \textit{Id.} at 186-87.}

\footnote{The court again recognized that if the TECA's jurisdiction was confined to ESA or EPAA issues, the phrase "cases and controversies arising under" would assume a meaning different from that normally associated with those words. The court, however, justified that difference in two ways. First, the court noted that there were no comity considerations in this case. Second, the court stated: Whatever the hazards might be in forecasting whether a federal question will really be in controversy when pleaded in an answer, no similar risks are encountered in routing to a specialized federal appellate court all issues within its special competence that have actually been adjudicated in a district court. \textit{Id.} at 186.}

\footnote{29. See text accompanying notes 9-11 supra.}

\footnote{30. The best example of this confusion is found in Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 591 F.2d 711 (Temp. Emer. Ct. App.), \textit{cert. denied},}
some confusion is unavoidable whenever specialized subject matter courts are involved since litigants must determine whether the circuit court or the special court is the proper appellate forum. The existence of bifurcated appeals makes this determination of the proper forum even more difficult; litigants must decide the proper forum for each possible issue on appeal rather than for the appeal as a whole. Litigants who make this determination improperly may, in extreme cases, be deprived of appellate review altogether. A system of bifurcated ap-

100 S. Ct. 168 (1979). Citronelle-Mobile Gathering, Inc. (Citmoco), sued Gulf Oil (Gulf) for money damages arising from Gulf's alleged breach of a contract to buy oil from Citmoco at prices above the maximum ceiling price allowed by the EPAA. Gulf counterclaimed for the difference between the price charged and the lawful maximum ceiling price. Citmoco raised a constitutional issue that the district court refused to certify to the TECA. Citmoco appealed the district court judgment to both the Fifth Circuit and the TECA. 591 F.2d at 713-14. Later, Citmoco moved to dismiss its appeal to the TECA. Id. at 715. Although that motion was granted, Citmoco had requested the dismissal only because Citmoco was certain that the Fifth Circuit had jurisdiction over the appeal. Id.

The Fifth Circuit remanded the case to the district court with directions to certify to the TECA the constitutional questions raised by Citmoco. The TECA held that although the controversy could have been heard in the TECA if timely notice of appeal had been filed there, the Fifth Circuit lacked jurisdiction to order the district court to certify the constitutional question to the TECA. Therefore, the jurisdiction of the TECA terminated when Citmoco voluntarily withdrew its appeal to the TECA. Id. at 716.

The Tenth Circuit Court of Appeals has recently recognized the problems associated with bifurcated appeals. See Oklahoma Assoc. of Consumers & Producers v. Fea, No. 79-1847, slip op. at 5 (10th Cir. Oct. 23, 1979) ("[Nothing] other than mass confusion [will be gained] by the promoting of simultaneous circuit court TECA appeals.").


32. In United States v. Cooper, 482 F.2d 1393 (Temp. Emer. Ct. App. 1973), see note 13 supra, Cooper lost his appellate review of the ESA issues in the case because his appeal to the TECA was untimely and because the TECA held that the Ninth Circuit's transfer of jurisdiction to the TECA was improper. 482 F.2d at 1400. On these facts, even if Cooper had appealed to the TECA he would have been forced to decide which court had jurisdiction of the false representation charges that were part of the appeal. According to the TECA's decision, even the Ninth Circuit was unable to properly make this determination. Id.
peals may also impose undue hardship on litigants. Undue hardship may occur when arguments must be made before two different courts which may be located in different cities.33

Bifurcated appeals may also cause forced decision making when the TECA and a circuit court must decide nearly identical but severed issues. For example, at least one circuit court that was considering issues severed from ESA issues was left no real choice in making its decision. The court stated:

Apparently, no one called the attention of TECA to the appeals with which the Tenth Circuit is now concerned.

We find ourselves in an anomalous situation. Appeals have been taken to both TECA and the Tenth Circuit from the same district court judgment. Both appeals deal with the same subject, the validity of the March 13 contract. In TECA the question was compliance with the Economic Stabilization Act. In the Tenth Circuit the question is the authority of Local 612 to make the contract in violation of the rules and policies of the parent union.

A strange situation exists when two different appellate courts are reviewing the same district court judgment. . . . An intolerable situation would result if we came out with a different disposition than did TECA.34

Finally, bifurcated appeals may cause unnecessary and undesirable delay. Even advocates of the issue approach recognize that the ultimate resolution of an appeal will be delayed when an action in either the circuit court or the TECA must be stayed pending the decision of related issues in the other court.35 In cases in which the proceedings in the other court need not be stayed, the parties must still wait until the busier circuit court resolves its non-ESA or non-EPAA issues before they can obtain the final disposition of the appeal. Moreover, the process of allocating jurisdiction between the two courts may cause delay and inefficient use of judicial resources.36

33. Although the TECA hears cases in the circuit in which the case arose, the circuit court may hear the same case in a different city. For example, Gordon v. Laborers’ Int’l Union, 490 F.2d 133 (10th Cir. 1973), cert. denied, 419 U.S. 836 (1974), was heard in Denver, but its companion case, Associated Gen. Contractors, Inc. v. Laborers’ Local 612, 476 F.2d 1388 (Temp. Emer. Ct. App. 1973), was heard in Oklahoma City.


35. The possibility of delay was acknowledged in Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179, 186 & n.9, 187 n.10. See also Newell v. Federal Energy Administration, 591 F.2d 704, 709 (Temp. Emer. Ct. App. 1979) (TECA made no comment on Federal Energy Administration or Department of Energy issues; the proceedings considering these issues had been stayed by the District of Columbia Circuit Court pending TECA resolution of ESA/EPAA issues).

36. In Connecticut Mun. Group v. Federal Power Comm’n, 498 F.2d 993 (D.C. Cir. 1974), the District of Columbia Circuit Court had refused to hear the
III. THE ANALYSIS USED TO SUPPORT ISSUE JURISDICTION

Both the Coastal States analysis and the more typical analysis that courts have used to support the issue approach are flawed. The Coastal States analysis is faulty because the court initially restricted its analysis to a choice among the three potential approaches most frequently offered by courts when defining the TECA's jurisdiction, without first carefully grounding the analysis in the congressional purpose for creating the TECA. As a result, this analysis fails to consider approaches that may be more consistent with congressional intent.

The more traditional analysis used by other courts is flawed by rigid adherence to the presumption that "courts of special jurisdiction should strictly construe their statutory grants of jurisdiction." Application of that presumption is unappealed issues on July 23, 1973, ruling that the TECA was the appropriate forum. Id. at 995. The TECA later refused to hear some of those issues in City of Groton v. Federal Power Comm'n, 487 F.2d 927, 935 (Temp. Emer. Ct. App. 1973), holding that the District of Columbia Circuit Court was the only proper appellate forum. The circuit court was then forced to reconsider the issue in Connecticut Mun. Group v. Federal Power Comm'n, 498 F.2d 993 (D.C. Cir. 1974). Acknowledging the delay and confusion suffered by the parties in this case, the circuit court announced

the accommodation which will be made in future cases where this Court is asked to review an order of the Federal Power Commission raising Federal Power Act issues which appear inextricably interwoven with [ESA] issues ... . Our course ... will be to hold our review in abeyance until review by the District Court and TECA is completed. This will permit TECA to dispose of questions under the [ESA]. TECA's disposition under Section 211(a) of that Act will clarify what questions may remain for disposition by this Court under Section 313(b) of the Federal Power Act. This is a common sense accommodation of the two jurisdictional schemes.

Id. at 998.


37. See 604 F.2d at 182-83. That these are the most frequently urged approaches is evident from case law. See, e.g., Bray v. United States, 423 U.S. 73 (1975) (per curiam) (Supreme Court rejects unlimited case approach on facts of case); Clark Oil & Ref. Co. v. Department of Energy, No. DC-53, slip op. at 9-10 (Temp. Emer. Ct. App. Oct. 15, 1979) (case approach urged by counsel but rejected by TECA); St. Mary's Hosp. v. Ogilvie, 496 F.2d 1324, 1326 (7th Cir. 1974) (court uses traditional arising under approach by applying well-pleaded complaint rule).

38. United States v. Cooper, 462 F.2d 1393, 1398 (Temp. Emer. Ct. App. 1973). This rule of statutory construction has been applied frequently by the
warranted in the context of the TECA. Courts citing the rule of strict construction emphasize the special expertise and competence of the TECA. This suggests that the court's narrow application of the rule stems from a belief that "it is more desirable to use judges who hear all types of cases than to create a special tribunal with judges who hear only [one] kind of case." TECA judges, however, are not appointed to serve exclusively on the TECA, but are selected from the federal judiciary to serve on the TECA in a part-time capacity. Because they serve part-time, they are not likely to develop the "tunnel vision".

TECA. See Spinetti v. Atlantic Richfield Co., 552 F.2d 927, 930 (Temp. Emer. Ct. App. 1977) (applying strict construction rule); Spinetti v. Atlantic Richfield Co., 522 F.2d 1401, 1403 (Temp. Emer. Ct. App. 1975) (citing strict construction language of Cooper and reiterating rule.) Both Spinetti cases relied on United States v. California, 504 F.2d 750 (Temp. Emer. Ct. App. 1974), cert. denied, 421 U.S. 1015 (1975), as precedent for applying the rule. Such reliance, however, is misplaced. In United States v. California, the TECA strictly construed the ESA savings clause provisions in order to determine whether the case appealed was within the exceptions of the clause. The TECA stated that "this contention must be considered in light of [the rule] of statutory construction [that] jurisdictional statutes are to be strictly construed," id. at 754, and cited Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1946), as authority for that proposition. In Utah Junk, however, the Supreme Court construed a procedural provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (expired 1947), that allowed aggrieved parties to protest governmental price schedules promulgated under that act "at any time" after the price schedules' effective date. The Supreme Court determined that a close reading of the statute supported the conclusion that Congress intended to liberalize the right to challenge the validity of price regulations. The effect of reading the statute strictly was to give the Emergency Court of Appeals broader jurisdiction; the strict construction rule did not require a narrow reading of the statute but merely a "close" reading. Thus, the TECA's conclusion that the strict construction rule requires a narrow construction of jurisdictional grants is not supported by the Supreme Court's opinion in Utah Junk.


40. C. WRIGHT, supra note 21, § 5, at 14. Although Wright offers this view as a reason for Congress' reluctance to create specialized courts, it is reasonable to believe that this view also explains the court's reluctance to allow broad jurisdiction of specialized courts. The experiences of the Commerce Court certainly support this view. Created in 1910, the Commerce Court was quickly abolished because of allegations that it was dominated by the railroad industry. Haworth & Meador, A Proposed New Federal Intermediate Appellate Court, 12 U. Mich. J.L. Ref. 201, 227-28 (1978). This experience created a fear that specialized courts would produce "tunnel visioned judges." Id. Accord, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 234-35 (1975). Other fears were that vested interests might capture a specialized court, id. at 235, that exclusive jurisdiction would "reduce the incentive . . . to produce a thorough and persuasive opinion in articulation and support of a decision," id., and that the quality of appointments would suffer. Id.

41. C. WRIGHT, supra note 21, § 5.
vision" that other full-time specialized judges have developed and that Congress has feared.42 Although TECA judges are likely to develop special expertise on ESA and EPAA matters, that expertise is merely a by-product of the TECA system. Congress sought to achieve consistency of ESA and EPAA decision making by centralizing appeals arising from those acts in one tribunal, not by creating a panel of narrowly specialized judges.43 Because the TECA was not designed to reach consistency solely through specialized expertise and because there is no danger of overspecialization among TECA judges, the general rule requiring strict construction of jurisdictional grants to specialized courts should not apply to the TECA.

Nonetheless, even nonspecialized courts tend to narrowly construe statutory grants of jurisdiction.44 Out of deference to the constitutionally mandated separation of powers between the different branches of the government, courts are careful not to usurp Congress' power to define the jurisdiction of the lower federal courts.45 Thus, even if the principle of strict construction of jurisdictional grants to specialized courts does not apply to the TECA, the broader principle of strict construction arguably does apply to the TECA. But this principle is merely a canon of construction;46 courts should not adhere to this principle if it frustrates the statutory scheme that provides for jurisdic-

42. See note 40 supra.
43. See notes 51-53 infra and accompanying text. See also P. CARRINGTON, D. MEADOR & M. ROSENBERG, supra note 36, at 170 ("specialized courts with generalized judges could assure in some cases a competently expert court, without the hazards associated with long-term entrenchment in specialties or the even graver hazards associated with the selection of specialist judges for duties close to the vital interests of well-organized political groups").
45. Felix Frankfurter acknowledged that:
[t]he central problem of statutory construction is to ascertain meaning. But the meaning is to be found by one authority of another's composition. The divorce of the functions of authorship and interpretation becomes of profound importance when such divorce is one of the great safeguards of a free society. This may sound like a highfalutin way of referring to the separation of powers. Highfalutin or not, consciously kept in mind or not, this is the source of the judiciary's problems in construing legislation. Frankfurter, A Symposium on Statutory Construction—Foreward, 3 VAND. L. REV. 365, 366 (1950). See also Horack, Cooperative Action for Improved Statutory Construction, 3 VAND. L. REV. 382, 388-89 (1950).
tion. Strict adherence to this principle has partially frustrated the statutory scheme of the TECA by creating a system of bifurcated appeals that causes hardship to parties, forced decision making, and inefficient judicial administration.

In cases in which the district court has certified substantive constitutional questions to the TECA, the TECA has not applied the principle of strict construction. Although section 211(c) of the ESA grants the TECA discretion to decide either the entire case in which the constitutional question arises or merely the constitutional issues involved, the TECA has invariably taken jurisdiction of the entire case. These decisions

47. Another policy militates against adherence to this principle when bifurcated appeals would result:

The principle which pervades the modern systems of pleading, especially the federal system, as exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action. Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 470 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951). Although Williamson involved the application of res judicata, the opinion evinces the desire that courts and lawmakers have for convenient, efficient judicial procedure.

This desire is also evident from the increasing willingness of federal courts to exercise pendent jurisdiction. Although this trend is partially attributable to the recent creation of federal rights that are coextensive with state rights, it also derives from the "complexity and expense of modern litigation" which encourages the settlement of disputes between parties in a single suit. Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 657 (1968). In Hagens v. Lavine, 415 U.S. 528, 545-46 (1974), the Supreme Court stated: "[I]t is evident from Gibbs that pendent state claims are not always, or even almost always, to be dismissed [by the federal courts]. On the contrary, given advantages of economy and convenience, and no unfairness to litigants, Gibbs contemplates adjudication of these claims."

48. See notes 29-36 supra and accompanying text.


50. See, e.g., Griffin v. United States, 537 F.2d 1130, 1137 (Temp Emer. Ct. App. 1976) ("We do not deal with mere abstractions in responding to certified constitutional issues . . ., and we need not close our eyes to pendent considerations or consequences."); cert. denied, 429 U.S. 919 (1976); United States v. Pro Football, Inc., 514 F.2d 1396, 1397 (Temp. Emer. Ct. App. 1975) ("[The TECA] granted the government's motion to have the entire case, both constitutional and non-constitutional issues, presented to [it] for final disposition."); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1323 (Temp. Emer. Ct. App.) ("[The TECA] granted the joint motion . . . to have the entire cases . . ., presented to [it] for consideration."); cert. denied, 419 U.S. 896 (1974); Schertzinger v. Dunlop, 489 F.2d 1307, 1309 (Temp. Emer. Ct. App. 1973) (The TECA exercised discretion under section 211(c) of the ESA to hear the entire case.); United States v. Ohio, 487 F.2d 936, 938 (Temp. Emer. Ct. App. 1973) (The TECA heard the entire case from which constitutional issues were certified, but only because the facts were undisputed and no extensive evidentiary hearing was required.), aff'd sub nom. Fry v. U.S., 421 U.S. 542 (1975); National Petroleum Refiners Ass'n v. Dunlop, 1980]
are inconsistent with the TECA's usual refusal to hear non-ESA or non-EPAA issues. The TECA's willingness to decide entire cases in the context of constitutional questions suggests that an alternative to the issue approach may be feasible in other cases.

IV. A SUGGESTED APPROACH FOR DEFINING THE TECA'S APPELLATE JURISDICTION

The proper scope of the TECA's appellate jurisdiction can best be analyzed by considering, first, what role Congress intended for the TECA, in light of the legislative history and language of the TECA's jurisdictional grant, and second, what jurisdictional approach would best enable the TECA to fulfill that role. The TECA's legislative history indicates that Congress created this emergency court of appeals\footnote{486 F.2d 1388 (Temp. Emer. Ct. App. 1973) (The TECA remanded to the district court the entire case from which constitutional issues had been improperly certified.).} in response to the contentions of the TECA's proponents that the entire stabilization program and system of national economic controls would be jeopardized without special review provisions.\footnote{51. The TECA is the second emergency court that Congress has created. The first court of appeals was created in 1942, but has since been abolished. C. WRIGHT, supra note 21, § 5, at 14.}

\footnote{52. Two members of the Nixon Administration, John Connally and Charles E. Walker, made the following arguments in support of the TECA:}

Cases will be tried at the district court level . . . . We propose that the appellate level for all cases under this act consist of one court—the Temporary Emergency Court of Appeals . . . . The purpose of this court is to provide one focal point for court decisions made under this program. This will avoid inconsistent decisions and will insure speed of decision by bypassing the crowded dockets of the circuit courts of appeals. Such a court was used with great success in earlier price controls efforts.

. . . . We believe that these judicial review provisions will make an essential contribution to the fair administration of the program and that they properly balance the requirements for individual fairness and prompt determinations with the need for smoothly functioning administrative action.

These review provisions were thought necessary to ensure consistent implementation of the ESA and EPAA, to minimize delay in administering the ESA and EPAA programs, and to provide relief for persons aggrieved by the operation of those programs.53

The plain language of TECA's jurisdictional grant can be interpreted in two ways. In that grant Congress used the phrase "cases and controversies arising under" the ESA or the EPAA.54 If Congress used the phrase as a term of art, it mandates traditional arising under jurisdiction for the TECA and therefore only issues raised in the complaint may be consid-

cited as House Hearings]; Economic Stabilization Legislation: Hearings on S.2712 Before the Senate Comm. on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess. 19-20 (1971) (statement of Charles E. Walker, Under Secretary, Department of the Treasury) [hereinafter cited as Senate Hearings].

David Ginsburg, former General Counsel of the Office of Price Administration, stated: "The objective is certainly to have a single court of appeals to review cases wherever they arise throughout the country. This enables a single policy to be established, a single price policy or wage policy, for the entire country." Senate Hearings, supra, at 127 (statement of David Ginsburg, Attorney at Law, Washington, D.C.).

One apparent exception to this objective appears in the final version of the bill. As originally introduced in the House and Senate, the bill creating the TECA provided that ESA actions could originate only in the federal district courts. S. 2712, 92d Cong., 1st Sess. § 208 (1971); H.R. 11309, 92d Cong., 1st Sess. § 208 (1971). Later, a provision was incorporated in the bill providing that courts of competent jurisdiction—including state courts—could hear cases in which ESA issues are raised as a defense. This provision was included in the final version of the bill passed by both Houses. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(a), 85 Stat. 748 (expired 1974), reprinted in 12 U.S.C. § 1904 note, at 586 (1976). The Joint Conference Committee, when adopting the provision, stated that the "Conferees felt that the . . . provisions would facilitate efficient and equitable administration of the Act." H.R. REP. No. 753, 92d Cong., 15th Sess. 20-21, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2310 (Conference Report: Joint Explanatory Statement of the Comm. of Conference). Questioning before the Senate committee established that the senators were concerned about the inconvenience that would be caused to their constituents by requiring that even the most insignificant ESA issues be heard in federal district court. Senate Hearings, supra, at 33-34 (statement of John Connally, Secretary of the Treasury [dialogue between Senator Thomas McIntyre and L. Patrick Gray III, Assistant Attorney General, Civil Division, Department of Justice]); Senate Hearings, supra, at 56-57 (statement of Alan Cranston, U.S. Senator from California [dialogue between Senator John Sparkman, Chairman of Senate Comm. on Banking, Housing and Urban Affairs, and Charles E. Walker, Under Secretary, Department of the Treasury]). The senators were also concerned about the work load that would be placed on the district court without that provision. Senate Hearings, supra, at 50-51 (statement of Charles E. Walker, Under Secretary, Department of the Treasury [dialogue between Senator Robert Taft and L. Patrick Gray III, Assistant Attorney General, Civil Division, Department of Justice]).


54. See note 7 supra.
If, however, Congress intended that the phrase retain its ordinary meaning, it mandates jurisdiction for the TECA in any case containing an ESA or EPAA issue. As the Coastal States court indicates, limiting the TECA to traditional arising under jurisdiction contravenes the reason for creating the TECA. If the TECA may consider only the issues raised in the complaint, ESA or EPAA issues raised in a counterclaim or defense would be considered by the circuit court. Such a system would undermine the goals of consistent decision making for ESA and EPAA matters. The remaining approach, case jurisdiction, is most likely to achieve the goal of consistent decision making. Under a case approach, the TECA would take jurisdiction over any case involving an ESA or EPAA issue, whether raised by complaint, answer, counterclaim, or otherwise. But as the Coastal States court correctly noted, unlimited case jurisdiction would be overly inclusive. ESA or EPAA issues raised in the district court may be frivolous or unrelated to the central issues on appeal and may have no effect on the court's decision. Giving the TECA jurisdiction over such issues would serve the purpose of consistency, but would burden the TECA with many cases in which the major issues are unrelated to the ESA or the EPAA, and would frustrate the goal of efficiency.

A grant of limited case jurisdiction, however, would be consistent with both the plain language of the TECA's jurisdictional grant and the goals of consistent, efficient decision making. Limited case jurisdiction would require the TECA to decide the entire case on appeal, including issues not arising under the ESA or the EPAA, but only if an ESA or EPAA issue had been adjudicated by the district court. Adoption of this ap-

55. See notes 20-22 supra and accompanying text.
56. See notes 20-21 supra and accompanying text.
58. The Coastal States Court indirectly admitted that only the case jurisdiction approach could further the goals of speed and consistency. See 604 F.2d at 183, 184. Although the Coastal States opinion does not adequately discuss the issue jurisdiction approach, it does fully discuss the issue jurisdiction approach.
59. See note 23 supra and accompanying text.
60. 604 F.2d at 183, 187.
61. The unlimited case approach "withdraws from the courts of appeals many non-ESA issues, which may really be the dominant issues in the case." Id. at 183. See also id. at 187.
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proach would avoid the problems of unlimited case jurisdiction by eliminating cases that contain unimportant ESA or EPAA issues, while ensuring the necessary consistency that is sacrificed under the "arising under" approach.

The limited case approach would also avoid many of the problems associated with bifurcated appeals, and thus help achieve the congressional goals of consistency, minimal delay, and relief for aggrieved persons. The limited case approach would end the confusion that is caused by the issue approach, since there is no need to separate issues and decide the proper forum for each issue. Under the limited case approach, litigants would merely need to determine whether the district court has adjudicated an ESA or EPAA issue. If such an issue has been adjudicated, the litigants could be confident that the TECA would have jurisdiction over the entire appeal. Moreover, because the TECA would review the entire case, litigants would not have to argue the same case before two different courts. The limited case approach would also eliminate the forced decision making that is inevitable under a system of bifurcated appeals whenever the TECA and a circuit court must decide nearly identical but severed issues. Under a limited case system, the TECA would decide both issues. Because jurisdiction of the cases involving adjudicated ESA or EPAA issues would be entirely in the TECA, the delay, resulting when proceedings in either the TECA or a circuit court must be stayed pending the decision of related issues in the other court, will be eliminated.

The application of limited case jurisdiction would be relatively simple and would resemble jurisdictional allocations often made by courts in other contexts. To determine whether limited case jurisdiction is appropriate, the court must employ a two-part inquiry. First, it must inquire whether the issue actually arises under the ESA or the EPAA, and second, whether the district court actually adjudicated the issue. The first inquiry is necessary whenever courts are specialized in subject

62. See notes 29-36 supra and accompanying text.
63. See text accompanying note 34 supra.
64. See note 35 supra.
65. For example, the problems in Gordon v. Laborers' Int'l, 490 F.2d 133, 139 (10th Cir. 1973), cert. denied, 419 U.S. 836 (1974), see text accompanying note 34 supra, would be solved under a limited case approach. In Gordon, the TECA would have heard all appealed issues joined with an appealed, adjudicated ESA or EPAA issue.
matter, regardless of the jurisdictional approach taken. The Supreme Court's reasoning in Bray v. United States illustrates how courts would approach this inquiry. In Bray, the Court held that because the defendant's conviction for criminal contempt did not depend on the "existence of [ESA] violations or even the continuation of the investigation" into such violations, the contempt conviction was a separate proceeding. Thus, because the contempt issues did not arise under the ESA, TECA review was not warranted. Similarly, the only issues adjudicated by the district court and appealed to the TECA in Clark Oil & Refining Company v. Department of Energy arose under statutes other than the ESA or the EPAA. Under a limited case approach, the TECA therefore would not have jurisdiction over the appeal.

The inquiry into whether the district court adjudicated a TECA issue is best exemplified by the Second Circuit's decision in Coastal States. This case held that the TECA was the appropriate forum for appealed issues when a district court judge decided an ESA issue while ruling on a motion to vacate the district court judgment. Under the Coastal States rationale, an ESA or EPAA issue should be viewed as "adjudicated" when the district court rules on an ESA or EPAA issue that materially affects the outcome of the case. Courts are accustomed to making such decisions, so this requirement should create no new problems.

The limited case approach is not without difficulties. These problems, however, seem insignificant when compared to the problems that the limited case approach avoids. First, the workload of the TECA could increase because, in addition to the ESA or EPAA issues currently heard by the TECA, the TECA would also hear issues that are now reviewed by the circuit courts. It is possible that as the TECA's work load increases,

66. See generally cases cited in note 31 supra.
67. 423 U.S. 73 (1975) (per curiam).
68. Id. at 76.
71. The circuit courts can only hear appeals from final decisions of the district courts. 28 U.S.C. § 1291 (1976). Such a requirement is very similar to the adjudication requirement of the limited case approach. Though defining finality is sometimes difficult, the "saving grace of the imprecise rule of finality is that in almost all situations it is entirely clear, either from the nature of the order or from a crystallized body of decisions, that a particular order is or is not final." C. Wright, supra note 21, § 101, at 505 (footnote omitted).
TECA decisions would be delayed, thwarting the goal of timely decision making. The limited case approach would, however, increase the number of issues that the TECA must decide only in cases in which appeals are now bifurcated. Given the relatively small number of bifurcated appeals each year, the real increase in the number of issues for the TECA's consideration would not be great. Since the TECA's inception in 1971, it has decided 284 cases. Director, Administrative Office, United States Courts, Annual Report, 207, 208 (1980) [hereinafter cited as Annual Report]. Of these, only a handful resulted in bifurcated appeals. See cases cited in note 11 supra.

Moreover, because the TECA's docket is not nearly as crowded as a circuit court docket, even with some increase in the TECA's work load the TECA would still be able to process cases much faster than the circuit courts. If the TECA is allowed to decide all issues in a case, it is likely that parties aggrieved by the operation of the ESA or the EPAA will receive quicker review of all issues appealed than they now receive, thus furthering the congressional policy of "individual

72. Since the TECA's inception in 1971, it has decided 284 cases. Director, Administrative Office, United States Courts, Annual Report, 207, 208 (1980) [hereinafter cited as Annual Report]. Of these, only a handful resulted in bifurcated appeals. See cases cited in note 11 supra.

73. Fifty-one TECA cases were docketed in 1979 as compared with 35 cases docketed in 1978. In 1978, TECA disposed of 17 cases. In 1979, TECA disposed of 34 cases. As of Sept. 30, 1979, 33 cases were pending before the TECA. Chief Judge Tamm reports that 35 to 50 cases are appealed to TECA yearly and that the case flow is steady. There are usually two cases awaiting opinions and seven cases scheduled for hearings at all times. Hearings for all TECA cases occur within two months of the date on which cases were filed with the TECA. This swift disposition of cases is partly because the time allowed for filing briefs and answers for TECA appeals is one-half the time allowed for filing briefs and answers in circuit courts. Letter from TECA Chief Judge Tamm to Director, Administrative Office, United States Courts, reprinted in Annual Report, supra note 72.

In the more than seven years of the TECA's existence, TECA opinions were not rendered within three months of TECA hearings in only four cases, one of which involved sums of $1.3 billion. Given these figures and the relatively small number of cases involving non-ESA/EPAA issues that would be heard by the TECA if the TECA were to adopt a limited case approach, it is difficult to imagine that using a limited case approach would significantly affect the TECA's admirable case disposition record.

Circuit court dockets are much more crowded. From August 1978 to September 1979, 21,127 appeals were filed in the circuit courts. Administrative Office of the United States Courts, Statistical Analysis and Reports Division, Federal Judicial Workload Statistics 1 (1979) (for the twelve-month period ending September 30, 1979). As of September 30, 1979, 18,695 cases were terminated and 19,615 were left pending. Id. As of September 30, 1979, 525 cases were held under submission (after hearings but awaiting opinions) in the courts of appeals and the court of claims for more than three months; 288 such cases had been submitted for more than three but less than six months (54.9%); 154 such cases had been submitted for more than six but less than nine months (29.3%); 45 such cases had been submitted for more than nine months but less than a year (8.6%); 38 such cases had been submitted for more than one full year (7.2%). The District of Columbia, Ninth, and Tenth Circuits led the other circuits with 65, 158, and 75 cases held under submission, respectively. Id. at 15.
fairness and prompt determination."\(^7\)

Second, increasing the TECA's work load would probably require TECA judges to spend more time deciding TECA cases than they now spend. This problem, however, would probably not be severe since the real increase in the TECA's work load would be minimal. Moreover, if the time commitments became too burdensome, the Chief Justice could exercise the power given him by Congress to appoint new members to the court.\(^7\)

It might appear that the extra time that judges would spend on TECA matters could force the judges to be more narrowly specialized.\(^7\) Such narrow specialization is, however, unlikely because any additional issues the TECA would decide under the limited case approach would be general issues that the circuit courts now decide.\(^7\)

Third, use of a limited case approach could also cause jurisdictional problems when cases on appeal involve issues arising under two regulatory statutes, which both contain specific judicial review provisions.\(^7\) For example, in *Municipal Electric Utilities Association v. Federal Power Commission*,\(^7\) the court was faced with issues arising under both the Federal Power Act (FPA) and the EPAA. The FPA provides for appellate review of Federal Power Commission orders in the courts of appeals

\(^74\) See note 52 *supra*; text accompanying note 53 *supra*.


\(^76\) For a description of the problems involved in judicial overspecialization, see note 40 *supra*.

\(^77\) A further problem could occur under a limited case approach if the district court ignores key ESA or EPAA issues. Because this approach allows the TECA to hear only cases in which ESA or EPAA issues have been adjudicated, the TECA's primary function of settling ESA and EPAA issues would be frustrated if such issues were ignored. This problem is not, however, unique to a limited case approach; under the TECA's current issue approach, the TECA must also determine whether the district court has adjudicated an ESA or EPAA issue. *See* Coastal States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179, 187 (2d Cir. 1979). If the Problem arises, the TECA could apply the approach circuit courts employ when mitigating the analogous problem of district courts ignoring important issues. *See* C. Wright, *supra* note 21, § 104, at 523 ("[a]n appellee in a circuit court may defend a judgment on any ground consistent with the record, even if rejected by the lower court") (footnote omitted). *See also* Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976).


\(^79\) 485 F.2d 967 (D.C. Cir. 1973).
for the circuit where a party is located or in the District of Columbia Court of Appeals.\textsuperscript{80} Using the issue approach, the Circuit Court stated that an "entirely harmonious accommodation of the two pertinent Congressional enactments can be achieved by dual review of [the FPC] order . . . , each tribunal acting within the sphere of its statutorily defined exclusive jurisdiction."\textsuperscript{81} But using a limited case approach, the TECA would have heard the entire case. This would arguably be an unwarranted assumption of the circuit courts' jurisdiction over FPA issues. There is, however, evidence that the TECA could properly assume jurisdiction of Federal Power Act issues. The circuit courts hear such issues only when such an assumption of jurisdiction would not "constitute an embarassment to the separate jurisdiction of the District Court [and the TECA]" under the ESA.\textsuperscript{82} Moreover, circuit courts already defer to the TECA when FPA issues are inextricably intertwined with ESA or EPAA issues, holding their review in abeyance until TECA review of the case is finished.\textsuperscript{83} By allowing the TECA to initially decide which issues it will hear and by recognizing the primary importance of determining ESA or EPAA issues quickly,\textsuperscript{84} the circuit courts appear willing to allow the TECA to assume limited case jurisdiction. In the context of the Natural Gas Act, the District of Columbia Circuit has resolved a similar conflict in appellate review provisions in favor of the TECA, reasoning \textit{inter alia} that because the ESA deals with the matter of appeals in "specific" terms, it must override a general statutory jurisdictional grant of review to the circuit court.\textsuperscript{85} From a practical standpoint, the problems associated with bifurcated

\textsuperscript{81} 485 F.2d at 971.
\textsuperscript{82} \textit{Id.}
\textsuperscript{84} In \textit{Connecticut Municipal Group}, the District of Columbia Circuit apparently originally refused to hear any of the appeal because the Federal Power Act question "appeared so integrated into an analysis of the purpose and legislative intent of the [ESA] that its extraction and separate review would have frustrated the goals . . . contemplated by the ESA." \textit{Id.} at 997. \textit{See also Municipal Intervenors Group v. Federal Power Comm'n}, 473 F.2d 84, 89-90 (D.C. Cir. 1972).
\textsuperscript{85} \textit{See Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n}, No. 77-1511, slip op. at 4 (Temp. Emer. Ct. App. Apr. 25, 1980). One commentator has stated that "[i]t is not so clear that TECA's exercise of pendent jurisdiction over Natural Gas claims would have done violence to the will of Congress." Theis, \textit{Pendent Jurisdiction Over Claims Arising Under Federal Law} (publication forthcoming in \textit{Hastings L.J.} (manuscript, 44)).
appeals,\textsuperscript{86} which may frustrate the dual congressional purposes of prompt, consistent resolution of ESA or EPAA issues and of relief for persons aggrieved by the operation of either act, also justify TECA limited case jurisdiction even when other regulatory statutes are involved.

V. POSSIBLE IMPLICATIONS OF THE TECA'S JURISDICTIONAL APPROACH

The issue approach that has been chosen to resolve the TECA's jurisdictional problems has other important implications beyond those it creates for the TECA. Pending legislation evinces a trend toward establishing more specialized subject matter courts to deal with complex, technical areas of the law.\textsuperscript{87} The pending legislation would create two specialized tribunals: one would review patent appeals and appeals involving claims against the federal government,\textsuperscript{88} and the other would review tax appeals.\textsuperscript{89} As with the TECA, the problem of defining the jurisdiction of these courts will inevitably arise.

The proposal dealing with patent appeals would create a United States Court of Appeals for the Federal Circuit with exclusive jurisdiction of all civil patent cases now appealable both to the circuit courts from the federal district courts, and to the Court of Customs and Patent Appeals from the Patent and Trademark Office administrative board. The Federal Circuit Court would also hear appeals of nearly all claims currently within the existing Court of Claims appellate jurisdiction.\textsuperscript{90}

\textsuperscript{86} See notes 29-36 \textit{supra} and accompanying text.

\textsuperscript{87} The legislation originated in the Senate as S. 677 and S. 678, 96th Cong., 1st Sess. (1979). The current version of the bills is S. 1477, 96th Cong., 1st Sess. (1979); S. 1477 is explained and summarized in S. Rep. No. 304, 96th Cong., 1st Sess. (1979). The sponsors of the Senate bills were Senators Kennedy and DeConcini. S. 1477 passed in the Senate on October 30, 1979, and was referred to the House Judiciary Committee, Subcommittee on Courts. No formal House action has yet been taken on S. 1477. The legislation is patterned after a proposal by Charles R. Haworth and Daniel J. Meador, although it differs from that proposal in certain important respects. See Haworth & Meador, \textit{supra} note 40, at 201. The most important difference is that the Meador proposal would give jurisdiction of tax cases, environmental cases, claims against the government, and patent cases to one court. \textit{Id.} at 225.

\textsuperscript{88} Sections 301 through 354 of S. 1477 deal with patent appeals and the abolition of the Court of Claims.

\textsuperscript{89} Sections 401 through 407 of S. 1477 deal with tax appeals. Sections 501 through 509 deal with technical and conforming amendments relating to the proposed courts. Sections 601 and 602 set the effective date of the bill and the orderly transition to the new patent and tax case appellate system.

\textsuperscript{90} The jurisdiction of the new Federal Circuit Court is described at S. Rep. No. 304, \textit{supra} note 87, at 35-37. The Senate report also states:

The bill creates an article III court that is similar in structure to the
The proposal dealing with tax appeals would create a United States Court of Tax Appeals with exclusive jurisdiction of civil tax cases now appealable both to the federal circuit courts of appeals and to the Tax Court. Current Court of Claims jurisdiction over tax cases would be eliminated under the proposal.\(^91\) The administration of patent and tax law would be improved by providing for centralized, uniform patent and tax appeals decisions.\(^92\)

Inconsistent interpretations of these legislative proposals indicate that confusion about the proper jurisdictional boundaries for these proposed courts already exists.\(^93\) Because the courts which would be created by the pending legislation would

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\(^91\) The jurisdiction of the new Court of Tax Appeals is described in S. REP. No. 304, supra note 87, at 39-41. The jurisdiction of the Court of Tax Appeals was summarized as follows:

To solve the problems surrounding the resolution of civil tax issues, S. 1477 proposes two major changes in present law:

1. The creation of a United States Court of Tax Appeals with exclusive jurisdiction over civil tax appeals from the district court and the Tax Court; and

2. The elimination of Court of Claims jurisdiction over tax cases.

By virtue of these changes, all civil tax cases would be initiated in either the United States Tax Court or district courts and all civil tax appeals would be heard by the newly created Court of Tax Appeals. Although the decisions of the new court would be subject to review by the Supreme Court on certiorari, it is anticipated that such review would be a rare occurrence. For all practical purposes, the new Court of Tax Appeals would become the final authority in the judicial interpretation of the Federal internal revenue laws.

\(^92\) See id. at 8, 16-17.

\(^93\) Although the Senate Report seems to require the Federal Circuit Court to hear entire cases, id. at 13, an indication that the Federal Circuit Court would have case jurisdiction is made in the context of reassuring skeptics that Federal Circuit Court judges would not be unduly specialized. The jurisdiction of the Court of Tax Appeals is even more ambiguous because the judges would sit part-time on that court (as do TECA judges), id. at 19, and would have to constantly "consider questions of property, contracts, agency, partnerships, corporations, equity, trusts, [and] procedure . . . if they [were] ever to deal effectively with the many problems that make up modern tax law." Haworth & Meador, supra note 40, at 228-29 n.163. Since tax cases contain a variety of is-
closely resemble the TECA, it is likely that these new courts might follow the TECA's example and assume an issue approach to jurisdiction. To avoid this possibility, Congress should carefully draft the jurisdictional provisions so that these new courts will not create additional bifurcated appellate systems by narrowly interpreting statutory grants of jurisdiction. Although a trend toward the establishment of specialized courts may be inevitable because of the increasingly technical and complicated nature of the law, an associated trend toward the establishment of bifurcated appellate systems can and should be avoided.

VI. CONCLUSION

In cases involving issues that do not arise under the ESA or the EPAA, the TECA's statutory grant of appellate jurisdiction is unclear. Courts have decided that in such cases the TECA's jurisdiction should be confined to the issues that arise under the ESA or the EPAA, thus necessitating the bifurcation of cases on appeal. This system of bifurcated appeals has resulted in confusion, hardship for litigants, forced decision making, and delay.

Issues, the proposed Court of Tax Appeals would certainly be compelled to choose between "issue" and "case" jurisdiction, just as the TECA has done. Haworth and Meador have indicated that their proposed court, would have jurisdiction of all ancillary or pendent matters making up the patent, environmental, tax or government claims cases before the new court. Haworth & Meador, supra note 40, at 225, 228 & n.169; Meador, A Proposal For a New Federal Intermediate Appellate Court, 60 J. PAT. OFF. Soc'y 665, 673 (1978). Other commentators, however, have paraphrased Meador as suggesting that "cases, such as antitrust defenses to the main patent action, would not go to the new Court." Miller, Future of the CCPA, 60 J. PAT. OFF. Soc'y 676, 678 (1978).

94. The TECA resembles both the Haworth-Meador and the Kennedy-DeConcini proposals. Because TECA judges assume only part-time TECA duty, they are generalists. Such a characteristic was important in both proposals. All three jurisdictional schemes also provide courts with subject matter jurisdiction over certain kinds of cases, and thus each court must determine how much of an appeal Congress intended it to hear.

The Federal Circuit Court of Appeals may need to apply limited case jurisdiction even more than the TECA or the Haworth-Meador proposed court. Although bifurcated appeals should be avoided in any event, the judges in Kennedy's proposed Circuit Court would hear only two kinds of claims—patent and government claims cases. Although the variety and general nature of government claims cases guarantees that Kennedy's Federal Circuit Court judges would be generalists to some degree, the patent cases may demand a much higher percentage of the judges' time. If the issue jurisdiction of patent cases is given to this court, these judges would become even more specialized than they already are. Since they are capable of handling nonpatent claims, as demonstrated by the jurisdictional grant of governmental claims appeals, they should do so to help preserve their generalist standing and judicial integrity.
The analysis that courts have used to support the current definition of the TECA's jurisdiction is flawed by a failure to consider the approaches to the TECA's jurisdiction that would better serve the TECA's objectives and by an inappropriate adherence to the doctrine of strict construction of jurisdictional grants to specialized courts. Consideration of the TECA's objective to provide a remedy for parties aggrieved by operation of the ESA or the EPAA in a prompt and consistent manner supports the conclusion that a limited case approach most appropriately defines the TECA's appellate jurisdiction. Under this approach, the TECA would take jurisdiction of all issues in a case if the district court had adjudicated any ESA or EPAA issue. Such an approach would eliminate the problems caused by bifurcated appeals and could be easily administered by the courts. Although the limited case approach may cause certain problems, including an increase in the TECA's work load and an assumption of jurisdiction over issues arising under other regulatory acts, these problems are minimal compared to the problems caused by other approaches. In view of pending legislation that would create specialized courts closely resembling the TECA, it is important that the problems surrounding the TECA's jurisdiction be remedied to provide an effective model for the proposed courts.