American University Law Review

Volume 67 | Issue 4 Article 1

2018

Federal Circuit Jurisdiction: Looking Back And Thinking Forward

Timothy B. Dyk
Harvard Law School

Follow this and additional works at: http://digitalcommons.wcl.american.edu/aulr

Part of the Administrative Law Commons, Constitutional Law Commons, Contracts Commons, Government Contracts Commons, Intellectual Property Law Commons, and the Jurisprudence Commons

Recommended Citation
Dyk, Timothy B. (2018) "Federal Circuit Jurisdiction: Looking Back And Thinking Forward," *American University Law Review*: Vol. 67 : Iss. 4 , Article 1.
Available at: http://digitalcommons.wcl.american.edu/aulr/vol67/iss4/1

This Foreword is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

Federal Circuit Jurisdiction: Looking Back And Thinking Forward

Keywords
Court of Federal Claims, Merit Systems Protection Board, Board of Contract Appeals, United States Patent and Trademark Office

This foreword is available in American University Law Review: http://digitalcommons.wcl.american.edu/aulr/vol67/iss4/1

FOREWORD

FEDERAL CIRCUIT JURISDICTION: LOOKING BACK AND THINKING FORWARD

THE HONORABLE TIMOTHY B. DYK*

This Foreword will focus on a subject near and dear to my heart: Federal Circuit jurisdiction. This is a topic of some importance that has not, in recent years, received the attention it deserves. The views expressed are my own and in no way attributable to our court or my colleagues.

When Congress created the U.S. Court of Appeals for the Federal Circuit in 1982,[1] it conferred a wide-ranging jurisdiction and contemplated that only a limited part of this jurisdiction—certainly a good deal less than half—would be patent cases. At the outset, in addition to patent cases, our jurisdiction included cases involving federal employment from the Merit Systems Protection Board (MSPB), cases from the Court of Federal Claims resolving non-tortious monetary claims, appeals from the Boards of Contract Appeals involving contract disputes, antidumping and customs classification cases from the Court of International Trade, certain determinations from the International Trade Commission, and trademark registration cases from the United States Patent and Trademark Office (PTO).[2]

Following the Federal Circuit's creation in 1982, Congress has expanded our jurisdiction a number of times, diversifying it even further. In 1986, Congress passed the National Childhood Vaccine

---

* Circuit Judge, U.S. Court of Appeals for the Federal Circuit. A version of this Foreword was presented at a Faculty Workshop at American University Washington College of Law on October 20, 2017. I thank my clerk, Zachary E. Shapiro, for assisting me with this Foreword.

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

2. 28 U.S.C. § 1295 (2012).

Injury Act,[3] and our court was given appellate jurisdiction over cases involving vaccine injury claims.[4] In 1988, the Veterans' Judicial Review Act[5] created judicial review of Veteran Administration benefit determinations and conferred jurisdiction over decisions of the U.S. Court of Appeals for Veterans Claims and over Veteran Administration rulemaking.[6] In the same year, Congress gave our court jurisdiction over appeals from the Government Accountability Office Personnel Appeals Board.[7] In the early 1990s, Congress passed the Federal Courts Administration Act of 1992,[8] which conferred jurisdiction over all appeals and pending cases from the Temporary Emergency Court of Appeals, created by the amended Economic Stabilization Act of 1970.[9] The Government Employee Rights Act of 1991[10] also expanded our jurisdiction to cover judicial review of certain civil rights claims from Senate employees and presidential appointees,[11] while the Congressional Accountability Act of 1995 gave us jurisdiction over the Office of Compliance.[12]

For the first thirty years of our existence, patent cases always amounted to less than 50% of the Federal Circuit's total cases.[13] When I joined the court in 2000, patent cases were roughly 33% of our

---

3. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1 to -34 (2012)).

4. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4307, 101 Stat. 1330, 1330-224 to -225 (codified as amended at 42 U.S.C. § 300aa-11 to -12 (2012)).

5. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (codified at scattered sections of 38 U.S.C.).

6. 38 U.S.C. § 7292 (2012).

7. General Accounting Office Personnel Amendments Act of 1988, Pub. L. No. 100-426, § 103, 102 Stat. 1598, 1598 (codified as amended at 31 U.S.C. § 755 (2012)).

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 15 U.S.C. § 3416(c) (2012)).

9. *See id.* § 102 (amending Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799).

10. Government Employee Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1088 (codified as amended at 42 U.S.C. §§ 2000e-16a to -16c (2012)).

11. *Id.* § 309.

12. Congressional Accountability Act of 1995, Pub. L. No. 104–1, § 215(c)(5), 109 Stat. 3, 17 (codified at 2 U.S.C. § 1341(c)(5) (2012)).

13. *See* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction,* 100 GEO. L.J. 1437, 1485 (2012) (explaining how patent cases made up only 40% of the Federal Circuit's docket in 2012); *see also* U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2012 (2013), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Caseload_by_Category_Appeals_Filed_2012.pdf (illustrating that patent cases made up 45% of the Federal Circuit's docket in fiscal year 2012).

docket.[14] However, in recent years, our docket has changed, particularly after the 2011 enactment of the sections of the Leahy-Smith American Invents Act (AIA) establishing post grant review of patents.[15] Since 2013, when the impact of the AIA came to fruition, patent cases have constituted over 50% of the docket and amounted to 63% in 2016.[16] However, even this 63% figure understates the degree of patent dominance since patent cases are typically more difficult and time consuming than many other cases. I estimate that the total time devoted to the patent docket at the Federal Circuit likely exceeds 80%.[17]

This patent dominance is contrary to Congress's original vision that our court would have a diverse caseload.[18] The Senate Report concerning the Federal Courts Improvement Act of 1982, the legislation which created

---

14. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2000 (2001) (on file with author).

15. Leahy-Smith America Invents Act, Pub. L. No. 112-29, §§ 141, 311, 125 Stat. 284, 299, 314 (2011) (codified as amended at 28 U.S.C. §§ 1295(a)(1) and 1338(a) (2012)); *see* Evan J. Wallach & Jonathan J. Darrow, *Federal Circuit Review of USPTO Inter Partes Review Decisions, by the Numbers: How the AIA Has Impacted the Caseload of the Federal Circuit*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 105, 108–09 (2016) (noting that the 2011 amendments addressed the need for a more efficient system to challenge invalid patents).

16. *See* U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2016 (2017), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Caseload_by_Category.pdf (graphing the distribution of appeals before the Federal Circuit in 2016 with patent cases making up 63% of the docket); U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2015 (2016), http://www.cafc.uscourts.gov/sites/default/files/Caseload%20by%20Category%20%282015%29.pdf (displaying 61% patent cases); U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2014 (2015), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/caseload_by_ category_appeals_filed_2014.pdf (displaying 54% patent cases); U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2013 (2014), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/fy%2013%20 filings%20by%20category.pdf (displaying 53% patent cases). *Compare* U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2009 (2010), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ ChartFilings09.pdf (charting the Federal Circuit's patent-related cases at only 36% of its docket before AIA became law), *with* U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY: FY 2012 (2013), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Caseload_by_Category_Appeals_Filed_2012.pdf (showing that after AIA became law, the percentage of patent-related cases before the Federal Circuit jumped to 45%).

17. Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 78 (2016).

18. *See, e.g.*, ROBERT J. DOLE, FEDERAL COURTS IMPROVEMENT ACT OF 1981, S. REP. NO. 97-275, at 6 (1981) (explaining that the Court of Appeals for the Federal Circuit would have jurisdiction over a wide range of subject matter).

the Federal Circuit, stated that

> [t]he Court of Appeals for the Federal Circuit will not be a "specialized court," as that term is normally used. The court's jurisdiction will not be limited to one type of case, or even to two or three types of cases. Rather, it will have a varied docket spanning a broad range of legal issues and types of cases.[19]

And Congress's intent in this respect derived from important public policy concerns about specialized courts, many of which had been articulated by the Hruska Commission, a group convened in 1975 to study the increasing caseload of appellate courts.[20]

One concern articulated by the Hruska Commission was that specialized court judges might develop a form of judicial "tunnel vision" and lose the generalist perspective that is essential to ensuring that the law develops in accordance with other fields of jurisprudence.[21] The Hruska Commission also expressed concerns over whether a "monopolistic" court might be less likely to provide clear reasoning in its decisions and might be more prone to developing an inflexible, esoteric jurisprudence.[22] Furthermore, the Hruska Commission was concerned that "[j]udges of a specialized court, given their continued exposure to and great expertise in a single field of law, might impose their own views of policy even where the scope of review . . . is supposed to be more limited."[23]

---

19. S. REP. NO. 97-275, at 6.

20. *See* COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted in* 67 F.R.D. 195, 369–71 [hereinafter HRUSKA COMMISSION REPORT] (articulating Congress's fear that circuit splits would cause inconsistencies in patent disputes); Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 592–93 (1992) (detailing that the proposal for the new court met the goals of appellate reform because it avoided unnecessary specialization).

21. *See* ROBERT KASTENMEIER, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1981, H.R. REP. NO. 97-312, at 31 (1981) ("Several witnesses . . . expressed fears that the Court of Appeals for the Federal Circuit would be unduly specialized or would soon be captured by specialized interests."); HRUSKA COMMISSION REPORT, *supra* note 20, at 234 (concluding, in line with those of Simon Rifkind, that specialized judges could develop "tunnel vision" limiting the perspective of additional legal issues, which could harm the quality of federal decision-making). *See generally* Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1004–06 (1991) (detailing opposition to the proposal to create the court due to the "specialized" nature of the Federal Circuit's docket).

22. *See* HRUSKA COMMISSION REPORT, *supra* note 20, at 235 (worrying that granting one court exclusive jurisdiction might reduce the desire to craft thorough and persuasive opinions and would dilute the regional influence in those cases).

23. *Id.*

The Hruska Commission's report articulated additional worries. There was concern that specialization could lead to increased potential for industry and special interest capture.[24] There were also fears that a specialized court would struggle to attract talented judges.[25] Part of this concern was whether the judges interested in serving on a specialized court might only be ones with specialized training.[26]

While most would concede that the court has attracted talented judges, some argue that at least some of these other potential problems have manifested themselves with the Federal Circuit, particularly as our jurisdiction became more patent centric.[27] However, outside of the academy, the growing trend toward patent dominance at the Federal Circuit has been met with widespread apathy. This apathy extends not only to Congress, but to the Judicial Conference and the practicing patent bar. Indeed, it sometimes appears that the patent bar would be quite happy if we became nothing but a patent court, concerned only with the articulation and application of patent law.

This is not to say that there have not been proposals to modify our jurisdiction. In fact, there have been three remarkably ill-advised

---

24. *Id.*

25. *Id.* (expressing concern that there would be difficulty locating qualified individuals to serve on the court and the appointment process would lack visibility, potentially resulting in special interest capture).

26. *See id.* (noting that the court might miss the advantages of judges' exposure to a diverse range of law).

27. *See generally* Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 808 (2010) (discussing the risks of specialization and tunnel vision); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 660–61 (2009) (expressing concern that the centralization of appeals of specific subject matter in one circuit will result in low-quality decisions and a lack of judicial innovation); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. L. REV. 1619, 1628–37 (2007) (examining problems arising from both centralization and specialization in federal courts); COMMITTEE ON PATENTS & COMMITTEE ON FEDERAL COURTS, N.Y.C. BAR, SHOULD PATENT JURISDICTION BE REMOVED FROM THE JURISDICTION OF THE FEDERAL CIRCUIT AND RETURNED TO REGIONAL COURTS OF APPEAL? 1 (2015), https://www2.nycbar.org/pdf/report/uploads/20072952-SHOULDPATENTJURISDICTIONBEREMOVEDFROMTHEJURISDICTIONOFTHEFEDERALCIRCUITANDRETURNEDTOREGIONALCOURTSOFAPPEAL.pdf [hereinafter SHOULD PATENT JURISDICTION BE REMOVED] (arguing that the Federal Circuit has failed to meet their original purpose due to entrenched judges and a lack of uniformity). *But see* George C. Beighley, Jr., *The Court of Appeals for the Federal Circuit: Has It Fulfilled Congressional Expectations?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671, 672 (2011) (finding the Federal Circuit to be a "successful experiment that has stood the test of time").

proposals relating to our jurisdiction, two of which would have substantially affected it.

First, some have proposed stripping our court of its exclusive jurisdiction over patent cases.[28] This could occur by extending patent jurisdiction to specific regional circuit courts or to the District of Columbia Circuit.[29] Others suggested that appellants receive a choice between appealing to the Federal Circuit and appealing to the appropriate regional circuit.[30] Proponents of such plans highlighted that these proposals would allow other courts to weigh in on the development of patent law, reducing the risk of judicial tunnel vision by diluting the influence of the Federal Circuit.[31]

Justice Stevens once suggested that our exclusive jurisdiction was undesirable,[32] and the Supreme Court has twice chipped away at that exclusivity: once in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*[33] and once in *Gunn v. Minton*.[34] However, it should be noted that Congress

---

28. *See, e.g.*, Nard & Duffy, *supra* note 27, at 1622; Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 9 (2013) (questioning whether Congress should eliminate the Federal Circuit's exclusive jurisdiction over patent cases and allow parties to appeal patent cases to the regional circuit).

29. *See* Nard & Duffy, *supra* note 27, at 1625 (suggesting that the Federal Circuit and the D.C. Circuit Court of Appeals share appeals from the PTO); Wood, *supra* note 28, at 9 (arguing that all the federal courts of appeals should have jurisdiction over patent law as with almost every other federal claim); SHOULD PATENT JURISDICTION BE REMOVED, *supra* note 27, at 1 (advocating for the return of patent law jurisdiction to all of the circuit courts of appeals).

30. *See, e.g.*, Wood, *supra* note 28, at 9.

31. *See* Nard & Duffy, *supra* note 27, at 1623–64 (explaining how increased access to multiple circuit courts would allow for increased innovation and competition within patent law).

32. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and concurring in the judgment) ("An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention. Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.").

33. 535 U.S. 826, 834 (2002) (holding that the Federal Circuit lacked jurisdiction to hear appeals from cases that do not establish a patent-law claim under 28 U.S.C. § 1338 on the face of the plaintiff's complaint), *superseded in part by statute*, Leahy-Smith American Invents Act § 19(b), Pub. L. No. 112-29, 125 Stat. 284 (2011), *as recognized in* Xitronix Corp. v. KLA-Tencor Corp., 882 F.3d 1075 (Fed. Cir. 2018).

34. 568 U.S. 251, 253, 265 (2013) (holding that 28 U.S.C. § 1338(a), which provides for exclusive federal jurisdiction over a case "arising under any Act of Congress relating to patents," does not deprive state courts or federal courts in diversity cases of subject matter jurisdiction over state law claims alleging legal malpractice in a patent case).

statutorily overruled *Vornado*,[35] and the Court carefully crafted the ruling in *Gunn* to cabin its scope.[36]

There is good reason to reject proposals to remove our exclusive jurisdiction. The patent bar has often pointed out that allowing other courts to consider patent appeals would generate considerable uncertainty, while destroying uniformity and predictability in patent jurisprudence. Indeed, the suggestion that exclusive jurisdiction be eliminated would appear to be directly contrary to Congress's concern that our court was necessary to bring greater uniformity and predictability to patent law.[37] Uniformity and predictability are the cornerstones of a well-functioning patent system,[38] and it is difficult to imagine these being preserved if other courts began establishing conflicting precedential law in the field of patents.

In 2006, Congress advanced a second proposal to enlarge our jurisdiction that sought to add all immigration appeals to our docket.[39] This proposal came in two immigration bills, namely the Securing America's Borders Act,[40] which died in the Senate, and the Comprehensive Immigration Reform Act of 2006,[41] which passed the Senate but was never enacted into law.

While these bills had the primary goal of reforming America's immigration system, both contained provisions to transfer exclusive

---

35. For a discussion of what is known as the "Holmes Group fix," see *Vermont v. MPHJ Technology Investments, LLC*, 803 F.3d 635, 643–44 (Fed. Cir. 2015).

36. *Gunn*, 568 U.S. at 264–65 (holding that Federal Circuit jurisdiction is not exclusive over legal malpractice claims involving patent law issues).

37. *See* ROBERT J. DOLE, FEDERAL COURTS IMPROVEMENT ACT OF 1981, S. REP. NO. 97-275, at 5 (1981) (reporting that patent practitioners, jurists, and agents of major technology companies collectively testified that they were in favor of a central court that would provide uniformity in patent law).

38. ROBERT KASTENMEIER, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1981, H.R. REP. NO. 97-312, at 22 (1981) (clarifying that uniform and reliable patent jurisprudence will encourage more patent applications and incentivize investment in inventing).

39. Marius Meland, *Immigration Bill Would Swamp Federal Circuit, Critics Say*, LAW360, (Mar. 21, 2006, 12:00 AM), https://www.law360.com/articles/5784/immigration-bill-would-swamp-federal-circuit-critics-say (reporting on Congress's bill and the immediate push back from critics worried that this proposal could add up to 11,000 appeals to the court's docket per year); *see* Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1857 (2013) (exploring then-Chief Judge Paul Michel's opposition to Congress's 2006 proposal of adding immigration appeals to the Federal Circuit's docket).

40. Securing America's Borders Act, S. 2454, 109th Cong. § 501 (2006) (proposing to expand the Federal Circuit's jurisdiction to include immigration appeals).

41. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707(b)(1) (2006).

jurisdiction over appeals from final administrative orders or district court decisions arising from any action taken to remove or exclude an alien from the United States from the regional circuits to the Federal Circuit.[42] This would have included appeals from decisions of the Board of Immigration Appeals, as well as appeals from district court decisions in habeas corpus proceedings.[43] In order to handle the influx of new cases, the proposed pieces of legislation increased the number of authorized judgeships on the Federal Circuit from twelve to fifteen, and even then, in many circumstances, immigration appeals would have been heard only by a single judge.[44]

Predictably, these proposals caused a considerable stir. Notably, there was swift and significant opposition from jurists, the academy, and the patent bar.[45] Even with three new judges, there was concern that the Federal Circuit would be significantly overworked; adding immigration jurisdiction could have increased our caseload by over 800%.[46] Hearings were held on the change in jurisdiction by the Senate Judiciary Committee with jurists and legal scholars testifying.[47] Nearly all of those who testified expressed consistent concerns that the Federal Circuit would be unable to effectively handle an eight-fold increase in caseload.[48]

In the end, Congress did not enact either proposal into law,[49] though Senator Kirsten Gillibrand recently proposed a bill that could transfer immigration appellate jurisdiction to the Federal Circuit, while adding more judges to deal with the increased caseload.[50] It is too early to

---

42. S. 2454, § 501; S. 2611, § 707(b)(1).

43. S. 2454, § 501; S. 2611, § 707(b)(1).

44. *See* S. 2452, §§ 502(b)(3)(A), 510(a)(2); S. 2611, § 701(b)(3)(A).

45. *See, e.g.*, Meland, *supra* note 39 (reporting the concerns of immigration experts and patent attorneys that the new proposal would create additional delays on the already overburdened Federal Circuit).

46. *Immigration Litigation Reduction: Hearing before S. Comm. on the Judiciary*, 109th Cong. 45 (2006).

47. *See generally id.*

48. *See id.* at 45 (expressing concern that a 25% increase in judgeships would not offset the 800% increase in caseload, especially since no provision was made for additional staff or funding).

49. *See S. 2454 (109th): Securing America's Borders Act*, GOVTRACK.US, https://www.govtrack.us/ congress/bills/109/s2454 (last visited May 9, 2018) (detailing how the bill died in Congress); *S. 2611 (109th): Comprehensive Immigration Reform Act of 2006*, GOVTRACK.US, https://www.govtrack.us/congress/bills/109/s2611 (last visited May 9, 2018) (showing that the bill was passed by the Senate, but failed to pass the House).

50. Nicole Narea, *Exclusive: Immigration Court Overhaul Outlined in Draft Bill*, LAW360 (May 10, 2018, 12:37 PM), https://www.law360.com/articles/1042453.

determine whether this new proposal (which would also make major changes to immigration appeals below the circuit level) would eliminate the problems with the earlier rejected approach.

Finally, there have been informal proposals that the Supreme Court, as a discretionary matter, limit its review of our court and grant fewer writs of certiorari for patent cases.[51] Proponents of this view argue that the Supreme Court has a limited understanding of patent law and is poorly equipped to grasp the complex technological issues that often arise in patent litigation.[52] They often highlight that Supreme Court rulings tend to upend long-establish patent practices.[53] Paul Michel, former Chief Judge of the Federal Circuit, argued that

> [i]t seems to me that all of the recent Supreme Court decisions suffer from a lack of that broader perspective; the interaction of the different parts of the patent statute, the interaction between the PTO, the courts, the companies, the inventors, the investors, all these different players in this vast, rather complicated system. And so, to my eye, too much has been decided based on gut reactions or even worse, huge assumptions.[54]

Similarly, Donald Dunner—an original member of the Hruska Commission—argued that the Supreme Court's patent review "has created uncertainty and a lack of predictability . . . the very conditions that led to the Federal Circuit's formation."[55]

In my view, what I wrote a decade ago in a Foreword about Supreme Court review of our cases remains true today.[56] I believe that the

---

51. *See* Donald Dunner, *Response to Judge Timothy B. Dyk*, 16 CHI.-KENT J. INTELL. PROP. 326, 329 (2017) (arguing that the Supreme Court must continue to review the Federal Circuit's decisions, but must find a way to not undermined the purpose of the court); *see also* Golden, *supra* note 27, at 660 (stating that the argument for the generalist Supreme Court to review the Federal Circuit is unpersuasive because the Court lacks the requisite expertise to add any significant value to the substantive questions which appear before the Federal Circuit).

52. *See* Gene Quinn, *Killing Industry: The Supreme Court Blows Mayo v. Prometheus*, IPWATCHDOG (Mar. 20, 2012), http://www.ipwatchdog.com/2012/03/20/supreme-court-mayo-v-prometheus (critiquing the Supreme Court's opinion in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012), for possessing only a "cursory understanding of patent law").

53. *See id.* (underscoring the sudden upheaval the Supreme Court's decision in *Mayo* would have on current patent holders).

54. Paul R. Michel, *The Supreme Court Saps Patent Certainty*, 82 GEO. WASH. L. REV. 1751, 1753 (2014).

55. Dunner, *supra* note 51, at 326.

56. *See generally* Timothy B. Dyk, Forward, *Does the Supreme Court Still Matter?*, 57 AM. U. L. REV. 763 (2008).

Supreme Court has been crucial to the development of patent law and likewise beneficial to our court.[57] It "plays a critical role in reinterpreting . . . and in altering our jurisprudence to keep up with the demands of a changing world."[58] Regardless, proposals to limit Supreme Court review have never gained traction, and the Supreme Court shows no signs of backing away from review of our patent cases. In fact, the Court granted certiorari in nine Federal Circuit cases in the 2016 to 2017 term, even higher than their average of four cases per term, from 2005 through 2015, though so far this term the Court has granted review in only three cases.[59]

What is perhaps most notable about these proposals is not that they are ill advised. Rather, it is that there has been little recognition of the need to diversify the Federal Circuit's docket to ameliorate the undesirability of becoming predominantly a patent court. At the same time, Congress has not given us new jurisdiction in more than twenty years.

Perhaps the lack of interest in our changing jurisdiction is primarily the result of lack of interest and/or unfamiliarity with our court. However, I suggest that there are other factors at work as well.

First, many of the other circuits that would stand to lose jurisdiction are likely reluctant to further reduce their caseload in areas they regard as interesting. These concerns played a role in limiting the original jurisdiction of our court in the early 1980s.[60] Interestingly, this fear of losing jurisdiction is at odds with the sentiment of fifty years ago that the federal courts of appeals had too many cases.[61]

In the mid-1970s, there was concern related to the rapid increase in appellate caseload as the number of appeals increased from roughly 3900 in 1960 to over 16,000 by 1974.[62] Several groups and commissions convened to study this increase in caseload, including the Hruska Commission.[63] The recommendations and advice of these groups were partially responsible for the creation of the Federal Circuit in 1982.

57. *Id.* at 768.

58. *Id.*

59. *See* Dyk, *supra* note 17, at 69 tbl.1 (illustrating the increase in grant of certiorari).

60. Beighley, *supra* note 27, at 687–700 (discussing the debate and concerns expressed when considering legislation to create the U.S. Court of Appeals for the Federal Circuit).

61. *See* ROBERT KASTENMEIER, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1981, H.R. REP. NO. 97-312, at 17 (1981) (explaining that a significant increase in caseloads in the 1960s and 1970s in the federal courts of appeals had created a crisis).

62. *Caseloads: U.S. Courts of Appeals, 1982–2016*, FED. JUD. CTR., https://www.fjc.gov/history/courts/caseloads-u.s.-courts-appeals-1892-2016 (last visited May 9, 2018).

63. *Supra* notes 20–26 and accompanying text.

However, over the past twenty-three years, federal appellate caseload has remained relatively constant.[64] While there were more than 60,000 appellate cases commenced in 2016,[65] there appears to be little concern, apart from the Fifth, Ninth, and Eleventh circuits,[66] that the present caseload is unmanageable.

Second, it is hard to make the case that our court is currently underemployed. Indeed, one could argue that our court simply does not currently have the resources to undertake a significantly expanded caseload even with twelve active judges and six senior judges. While the absolute number of cases—including the number of cases per judge—are at the lower end for the Federal Circuit compared to other circuits,[67] these statistics do not provide the full story. This is because the patent cases that the Federal Circuit primarily handles are complex, requiring more time and engagement than cases in many other areas of law.[68] This results in a very significant workload and perhaps even a greater burden.

Furthermore, unlike most other circuits, the Federal Circuit schedules oral argument in all counseled cases and does not employ staff attorneys to assist in merits disposition, though we do use staff attorneys for motions.[69] It is possible that in the future our patent caseload could shrink naturally, or there could be an increase in other cases.[70] However, as things now stand, it would be difficult to handle a large influx of new cases without compromising our ability to grant

---

64. *See Caseloads: U.S. Courts of Appeals, 1982–2016*, *supra* note 62 (reflecting that cases commenced before the federal courts of appeals have not fluctuated greatly since 1993).

65. *Id.*

66. *See* Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL'Y REV. 57, 73 (2016) (examining how the Fifth, Ninth, and Eleventh Circuits faced caseload pressure, such as time management, resulting in fewer dissents and reversals).

67. *See* U.S. COURTS OF APPEALS—CASES COMMENCED, TERMINATED, AND PENDING, BY CIRCUIT AND NATURE OF PROCEEDING DURING THE 12-MONTH PERIOD ENDING MARCH 13, 2016 (2016), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_b1_0331.2016.pdf (comparing the number of cases per judge across the different circuit courts).

68. ROBERT KASTENMEIER, COURT OF APPEALS FOR THE FEDERAL CIRCUIT ACT OF 1981, H.R. REP. NO. 97-312, at 22–23 (1981) ("Directing patent appeals to the new court will have the beneficial effect of removing these unusually complex, technically difficult, and time-consuming cases from the dockets of the regional courts of appeals.").

69. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, INTERNAL OPERATING PROCEDURES 6 (2016), http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster2.pdf.

70. There appears to be an increasing docket in the Court of Federal Claims, the International Trade Commission, the Court of Appeals for Veteran's Claims, and the MSPB. Panel Discussion at the 2018 Federal Circuit Judicial Conference (Mar. 16, 2018).

every counseled case oral argument.

Third, there is no constituency lobbying for change. This is quite different from the situation that existed when our court was created. Then, the patent bar was a vocal proponent of creating the Federal Circuit to provide increased uniformity and predictability through vesting jurisdiction in a single appellee court.[71]

Today, rather than acting as a constituency lobbying for change, the patent bar seems to like our jurisdiction the way it is. In fact, in 2006, there was strong and vocal opposition from the patent bar in response to the legislative proposals to expand the Federal Circuit's jurisdiction.[72] So too, if the Federal Circuit were given exclusive jurisdiction in new areas, and that jurisdiction were made exclusive, I expect that many lawyers who practice in those areas would resist because they might prefer the ability to forum shop over national uniformity. As a result, at this time, there is no significant push to grant the Federal Circuit new jurisdiction.

Finally, there is the difficulty of identifying areas of law to specifically add to our jurisdiction. Some cases might benefit from national uniformity, such as suits brought under the False Claims Act[73] or patent antitrust claims. Another option would be to give our court exclusive jurisdiction over cases brought under the recently enacted Defend Trade Secrets Act of 2016,[74] which created new federal civil cause of action related to trade secret misappropriation. This Act was modeled

---

71. *See Court of Appeals for the Federal Circuit—1981: Hearing on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 85 (1981) (statement of James W. Geriak, Attorney from L.A., Cal.); Marion T. Bennett, *The United States Court of Appeals for the Federal Circuit—Origins*, *in* THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY, 1982–1990, at 8–9 (Marion T. Bennett ed., 1991) (detailing how the Carter administration strove to increase uniformity in patent law to promote technological innovation); *The Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals*, 94 F.R.D. 350, 350–51 (1982) (congratulating various parties and members of the patent bar for their contributions to the establishment of the Federal Circuit).

72. *See, e.g.*, Letter from E. Anthony Figg, Chair, ABA Section of Intellectual Prop. Law, to Arlen Specter, Chairman, U.S. Senate Comm. on the Judiciary, Patrick Leahy, Ranking Member, U.S. Senate Comm. on the Judiciary (Mar. 30, 2006), https://www.americanbar.org/content/dam/aba/migrated/intelprop/legislativebranch/march2006/Immigration_Appeals.authcheckdam.pdf (explaining that the Federal Circuit was established after a decade of research and consideration, and arguing that because Congress had not taken similar efforts in regards to immigration, an expansion of the Federal Circuit's jurisdiction was improper).

73. 31 U.S.C. § 3729 (2012).

74. Pub. L. No. 114-153, 130 Stat. 376 (2016).

after the Uniform Trade Secrets Act,[75] and our court has had extensive experience dealing with trade secret cases. Given the novelty of this field of law, jurisdiction centered in the Federal Circuit could allow us to help guide and develop this field of jurisprudence.

Another possibility would be granting our court jurisdiction over MSPB cases related to discrimination. Given our current review of the MSPB, this would have the benefit of consolidating all jurisdiction related to the MSPB in one reviewing court. Other types of jurisdiction could establish the Federal Circuit as an alternative forum to other regional circuits. For instance, we already have non-exclusive jurisdiction over certain tax refund cases coming from the Court of Federal Claims.[76] This could be expanded to non-exclusive jurisdiction for all tax refund cases involving a certain minimum claim or tort claims against the government.

Identifying new areas of jurisdiction is a necessary, and difficult, step to expanding our future jurisdiction.

I note that many of my colleagues on the court have sought the benefits of a broader experience by sitting on other circuits and district courts. This is not a long-term substitute for expanding our jurisdiction. Precedent exists for such a jurisdictional expansion, as Congress has on at least six occasions in the past expanded our jurisdiction.[77] We can only hope that Congress will give further attention to this issue.

These are my thoughts about a problem in need of a solution. I can only hope that, in the coming years, the academy will devote additional attention to this question. That would be a first step towards spurring the necessary debate of ensuring that the Federal Circuit remains a generalized court.

---

75. UNIF. TRADE SECRETS ACT (UNIF. LAW COMM'N 1985).

76. *See* Rader, *supra* note 21, at 1003.

77. *Supra* notes 2–12 and accompanying text (discussing the six ways Congress has expanded the Federal Circuit's jurisdiction).