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Keywords

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AFTERWORD

PAST, PRESENT, AND FUTURE IN THE LIFE OF THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

THE HONORABLE PAUL R. MICHEL*

Now in its twenty-eighth year,¹ the Federal Circuit has steadily gained momentum, maturity, and acceptance. Having arrived in its sixth year,² I have been privileged to serve during the majority of its lifetime as the nation's youngest federal court of appeals and the only one with national subject-matter jurisdiction. Before becoming the court's fifth chief judge, I served under each of the preceding four chief judges.³ They were effective leaders, each in their different way,

* Chief Judge, U.S. Court of Appeals for the Federal Circuit.

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

2. See Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html> (search "Michel"; then follow "Michel, Paul Redmond" hyperlink) (last visited Apr. 7, 2010) (stating that the Honorable Paul R. Michel was nominated to the U.S. Court of Appeals for the Federal Circuit by President Ronald Reagan on December 19, 1987 to fill the seat vacated by the Honorable Phillip Benjamin Baldwin, was confirmed by the Senate on February 29, 1988, and received his commission on March 4, 1988).

3. See Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html> (search "Markey"; then follow "Markey, Howard Thomas" hyperlink) (last visited Apr. 7, 2010) (stating that the Honorable Howard T. Markey served as Chief Judge from 1982 to 1990); Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html> (search "Nies"; then follow "Nies, Helen Wilson" hyperlink) (last visited Apr. 7, 2010) (stating that the Honorable Helen Wilson Nies served as Chief Judge from 1990 to 1994); Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html> (search "Archer"; then follow "Archer, Glenn Leroy Jr." hyperlink) (last visited Apr. 7, 2010) (stating that the Honorable Glenn L. Archer, Jr. served as Chief Judge from 1994 to 1997); Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/>

and I learned from them all. On June 1, 2010, Circuit Judge Randall R. Rader will succeed me as chief judge.⁴ By then my tenure will have exceeded twenty-two years as a circuit judge⁵ and five and one-half years as the chief judge.⁶ Although neither I nor any other chief judge or individual judge embodies the court, let me share my own perspectives, recollections, and observations gathered over all these years, for not only are they what I know best, but they reflect more than three quarters of the history of the court itself.

The genesis of the court in the late 1970s was a faltering patent enforcement system that threatened further industrial, technological, employment, and economic decline.⁷ Many people assumed the new court, created by statute in 1982,⁸ was a patent court and nothing more. For example, at a 1988 nationwide meeting of all circuit judges, a panel moderator, himself a judge, called the Federal Circuit a “specialized patent court.”⁹ Chief Judge Markey rose to his feet and fairly shouted from the rear of the large meeting room that our court was no such thing. In fact, patent-related appeals, then as now, constituted only about one-third of our docket.¹⁰ To be sure, now as then, they represent some of our most important and difficult cases. But the unfortunate assumption grew up that all twelve active judges were narrowly specialized technology lawyers who spent all their

history/judges.html (search “Mayer”; then follow “Mayer, Haldane Robert” hyperlink) (last visited Apr. 7, 2010) (stating that the Honorable Haldane Robert Mayer served as Chief Judge from 1997 to 2004).

4. Chief Judge Paul R. Michel, Remarks at the Federal Circuit Bar Association Annual Dinner 4 (Nov. 20, 2009), *available at* <http://memberconnections.com/olc/filelib/LVFC/cpages/9008/Library/Remarks%20of%20Chief%20Judge%20Michel.pdf> (expressing his desire to hand over to Judge Rader a court “that’s equally as strong” as that which he inherited).

5. Federal Judicial Center, *supra* note 2.

6. Michel, *supra* note 4, at 4.

7. *Court of Appeals for the Federal Circuit: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 191, 193 (1981) (statement of Pauline Newman, Director of Patents and Licensing, FMC Corp. Chemical Group).

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

9. The Federal Judicial Center hosted *The Federal Appellate Judiciary in the Third Century: A Bicentennial Conference of Judges of the United States Courts of Appeals* Oct. 24–26, 1988. Essays and commentary regarding the conference and edited for publication are published in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* (Cynthia Harrison & Russell R. Wheeler eds., 1989).

10. See HOWARD T. MARKEY, *THE FIRST TWO THOUSAND DAYS: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1982–1988*, at 25 fig.6 (1989); HOWARD T. MARKEY, *THE SEVENTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1988–1989*, at 14 fig.7 (1989); HOWARD T. MARKEY, *THE EIGHTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 1989–1990*, at 16 fig.7 (1990); *see also* U.S. Court of Appeals for the Federal Circuit, Appeals Filed by Category FY 2009, <http://www.cafc.uscourts.gov/pdf/ChartFilings09.pdf> (last visited Apr. 7, 2010).

preappointment years practicing only patent law. In fact, now as then, the majority of our judges do not possess these characteristics. Of the present eleven active judges, five indeed were patent lawyers: two were chemists who led corporate patent offices; one practiced patent law in various private law firms; another, a former patent examiner, tried several patent cases during decades of a diverse litigation and counseling practice; and another was a patent law professor. Six judges, however, had no patent experience before their appointment. And five senior judges all came from diverse, nonpatent backgrounds. Therefore, only five of sixteen present judges on the Federal Circuit truly were once patent lawyers.¹¹

In my view, the wide variety of our preappointment experiences is actually the greatest strength of our court. Consider the varied backgrounds of the present eleven nonpatent law judges: one judge was a tax lawyer; two were Assistant Solicitors General; one a law school dean; another a civil appeals specialist; three (including myself, Judge Prost, and Judge Rader) came to the court with varied experiences that included drafting legislation as Senate staffers; another had a civil practice in a distinguished law firm; and another litigated for the United States before becoming a special assistant to the then-Attorney General. In addition, three judges had clerked for Supreme Court Justices, and a fourth served as Special Assistant to the Chief Justice of the United States after graduating from West Point and seeing combat duty in Vietnam, experiencing private practice, and serving as Acting U.S. Special Counsel and a judge on the Claims Court.¹²

So we are both patent specialists and nonspecialists, just as our court's docket is a mixture of many patent cases interspersed with an even larger number of veterans benefits cases, government personnel cases, tax refund cases, Fifth Amendment Takings Clause cases, government contract cases, international trade cases, and many others.¹³ The diversity of backgrounds seems entirely fitting to me, and it has worked well to bring both expertise and much breadth of experience to cases to cases. Thus, a typical panel—they are assembled randomly¹⁴—will include one or two patent specialists and

11. *See generally* U.S. Court of Appeals for the Federal Circuit, Judicial Biographies, <http://www.cafc.uscourts.gov/judgbios.html> (last visited Apr. 7, 2010) [hereinafter Federal Circuit Judicial Biographies].

12. *See id.*

13. 28 U.S.C. § 1295 (2006) (explaining the subject matter jurisdiction of the Federal Circuit).

14. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, INTERNAL OPERATING PROCEDURES 11 (2008), <http://www.cafc.uscourts.gov/pdf/IOPs122006.pdf>.

one or two nonspecialists, just as the appeals argued before that panel on that particular day will include one or two patent cases and two or three nonpatent cases, in addition to several pro se cases—often personnel cases—to be decided solely on the basis of the briefs.

The proportion of “patent judges” to patent appeals has remained essentially unchanged over the court’s entire lifetime: today about one-third of our judges (now five of sixteen) are lifetime patent lawyers, just as about one-third of our appeals are patent-related. It has always been so.¹⁵ This fact suggests that either our court has been extraordinarily fortunate or that those who select our judges have been mindful of our docket and have carefully exercised good and proportionate judgment. Personally, I hope the court will always include the same proportions.

Because members of our various specialized bars follow developments in our jurisprudence so closely and know one another so well, they are well prepared to give useful advice and insight on future appointments to the appointing authority. Ultimately that is the President of the United States, but many aides in the White House, members of the Senate Judiciary Committee, and officials in the Justice Department participate as well. Of course, like the White House staff, Senate staff also play an important role. In fact, on the Judiciary Committee staff, each party has its own “appointments counsel.” It is to be hoped, particularly, that Senators on the Judiciary Committee will continue to safeguard appointments against the risk of nonmeritorious, purely political appointments and promote merit-based selections from varied backgrounds.

Whatever a new appointee’s prior experience was, every new judge coming to our court faces an extended period of learning many

15. See U.S. Court of Appeals for the Federal Circuit, About the Court, <http://www.cafc.uscourts.gov/about.html> (last visited Apr. 7, 2010). When the court was created on October 1, 1982, there were eleven active judges for the twelve-seat court. Six judges were originally members of the Court of Claims, and five judges were originally members of the Court of Customs and Patent Appeals. The single vacancy resulted from a vacancy on the Court of Claims, due to the death of Judge Robert Kunzig earlier in 1982. Of the eleven active judges, three (Chief Judge Markey, Judge Rich, and Judge Nies) had intellectual property backgrounds before their appointments to the Court of Customs and Patent Appeals. Both Chief Judge Markey and Judge Rich had practiced patent law. Judge Nies had practiced trademark, copyright, unfair competition, and antitrust law. Judge Phillip Baldwin had fourteen years of experience with patent cases on the Court of Customs and Patent Appeals by October 1982. Judge Jack Miller had nine years of patent law experience on the Court of Customs and Patent Appeals by October 1982. Consequently, five out of the eleven members of the original court were patent lawyers by training and/or experience. See generally Federal Judicial Center, Judges of the U.S. Courts, <http://www.fjc.gov/history/judges.html> (last visited Apr. 7, 2010).

unfamiliar areas of law—several rather complex and difficult, and some actually arcane. The court is therefore fortunate, I think, that all of our active judges are statutorily required to live in the Washington, D.C. area¹⁶ because their chambers are all in the Howard T. Markey National Courts Building on Lafayette Square in front of the White House. This proximity helps newer judges learn the many unfamiliar legal subjects they must master. It also helps all of our active judges work together more closely, collegially, and continually than if the twelve were geographically dispersed across twelve different states. It should be noted that a proposal to revise the patent laws now pending in the Senate would rescind this residency requirement.¹⁷ Proponents, which include several of our judges, cite the symbolic benefit of judges of a national court having nationwide residency and the practical benefit of an even larger talent pool. Opponents, including some of our judges, cite the expected loss of consistency, coherence, and clarity in our opinions that might result from our judges living and working, except for monthly argument weeks, in states and cities scattered all around the country. To be sure, most of the other twelve circuit courts have judges scattered here and there, but the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court, also national courts, have nearly all of their judges residing in the same building nearly all of the time. I believe that the ease of face-to-face communications on both legal and personal matters helps us considerably. Of course, no one knows whether or how much the impressive level of talent now on the Federal Circuit might potentially be elevated if the residency requirement were removed. It is simply impossible to assess the relative strengths of these competing claims in an objective or factual manner. In my own opinion, however, the losses from such a change might well outweigh any gains, just as I would expect if Supreme Court Justices were dispersed to nine different states scattered across the land.

The most dramatic development in the evolution of the Federal Circuit is that we now face, for the first time, a large, sudden change in membership. There is a near certainty of numerous appointments to the court by the incumbent president during his present term. Judge Schall took senior status last October,¹⁸ and I have announced I

16. 28 U.S.C. § 44(c).

17. Patent Reform Act of 2009, S. 515, 111th Cong. § 10(a) (2009).

18. Tony Dutra, *Practitioners Praise Retiring Federal Circuit Judge Schall; Discuss Opening on the Court*, 78 PAT. TRADEMARK & COPYRIGHT J. 464 (2009).

will retire in May, creating a second vacancy.¹⁹ Within two years, seven other judges will be eligible for either senior status or complete retirement, either of which creates a vacancy.²⁰ The president could appoint new people to as many as nine of our twelve active judgeships. If only four or five of the present active judges left active service, the court would experience a marked shift in the balance among its members and perhaps in its jurisprudence as well. Even the most cautious appointments will unavoidably introduce uncertainty and change. A significant shift in direction is possible, particularly in patent doctrine.

The court has never faced so sudden or so large a reshuffling. Rather, new appointees have nearly always arrived gradually. Our current corps of active judges joined the court, respectively, in 1984, 1987, 1988, 1990 (two judges), 1994, 1997, 1999, 2000, 2001 and 2006.²¹ Thus, in any past two-year period, the maximum number of new judges was three. In the next two to three years, however, we could acquire up to seven new judges in addition to the successors for Judge Schall and me, for a total of nine.

When I arrived in March 1988, Chief Judge Markey told me that it usually takes five years for a new appellate judge to hit full stride. There are, of course, exceptions, and we have some on the court now who reached full capacity in a shorter time. But most of us required a long period of learning by doing, by studying, and by consulting more experienced judges. Therefore, the very newness of so many new appointees could present serious challenges quite aside from any doctrinal ambitions they might harbor. One must hope that the president will select replacement judges with care and caution, lest sudden changes in precedent upset the settled expectation of the nation's business leaders on whom the creation of desperately needed new jobs depends. Economists predict that most new jobs will come from innovations in technology, which in turn depend on investment in research and development, which in turn depends on the incentive for recouping such investment that intellectual property rights and protections provide.²² Therefore, whether from new

19. Michel, *supra* note 4, at 3.

20. Scott A. Herbst & Antigone G. Peyton, *On the Horizon: A New Federal Circuit (Part I)*, Jan. 20 27, 2010, <http://www.finnegan.com> (select "Articles" under the "Publications & Resources" dropdown menu; then type "Herbst" in the "Last Name" search field; then select "On the Horizon" hyperlinks).

21. See Federal Circuit Judicial Biographies, *supra* note 11.

22. See PAT CHOATE, *SAVING CAPITALISM: KEEPING AMERICA STRONG* 140–41 (2009) (suggesting that keeping patent protections strong is the best way to help the United States out of the current recession).

jurisprudential views or sheer inexperience, the generational reconstitution of the court's membership presents grave risks; it should be accomplished without creating undue uncertainty.

During my twenty-two years on the court, perhaps the most dramatic internal changes concerned information technologies. When I first arrived, secretaries typed draft opinions on IBM Selectric typewriters. There was no computer department. When we started one, it was small, just two people. Now we have an IT staff of more than ten computer specialists. Notebook and desktop computers, Blackberries, cell phones, home fax machines, Kindles, email, and related information technology have all made our court more productive. They also require replacement with the next generation of such devices approximately every four years. We have maintained this rhythm, and each new device proved faster and better than what it replaced. This equipment has proven crucial because our caseload has grown in number and especially in complexity,²³ yet we still have only the same twelve active judgeships as in 1983, our first year of operation, nor are we likely to see any increase in the next decade. Another major change that helps keep us current and careful has been the recent addition of a fourth law clerk for each active judge who wants one, as nearly all do.²⁴ The effort to get Congress to authorize and fund these new positions took several years and much persuasion. But already we see an upsurge in productivity.

Another boost in capacity comes from our mediation program. Mandatory mediation since 2006 has also enabled our court to remain both expeditious and exacting.²⁵ Although every other circuit court had started a mediation program at least a decade earlier, we originally saw little need and limited prospects. As our caseload grew, however, a greater sense of need arose among our members. Still, many doubted it would prove effective, especially in patent cases, so we began slowly with an experimental, purely voluntary program. It was later strengthened and made mandatory. It has proven highly

23. See U.S. Court of Appeals for the Federal Circuit, Historical Caseload: 1983–2009, <http://www.cafc.uscourts.gov/pdf/HistCaseloadOverall83-09LineChart.pdf> (last visited Apr. 7, 2010); U.S. Court of Appeals for the Federal Circuit, Appeals Filed in Major Origins: 2000–2009, <http://www.cafc.uscourts.gov/pdf/10yrHistCaseldByOrigin00-09.pdf> (last visited Apr. 7, 2010).

24. See H.R. REP. NO. 111-202, at 44 (2009) (noting that the funding recommendation is based partly on the cost of additional law clerks for the Federal Circuit).

25. See U.S. Court of Appeals for the Federal Circuit, Court Mediation Program, <http://www.cafc.uscourts.gov/mediation.html> (last visited Apr. 7, 2010) (stating that the court initiated its mediation plan on October 3, 2005 and revised the program on September 18, 2006 by an en banc order issued on that date).

successful, settling forty-eight cases in 2009, thirty-one being patent appeals.²⁶ We are, in fact, quicker to hear arguments and issue decisions than most circuit courts²⁷ and, I think, at least as exhaustive in our preparation, participation in oral arguments, and opinion-writing. Much credit goes to our Chief Circuit Mediator, Jim Amend, a veteran IP litigator we were fortunate enough to find, and his deputy, Circuit Mediation Officer Wendy Dean. They are supported by experienced private practitioners, mostly retired, who serve pro bono. In my rough calculation, this program adds capacity to dispose of appeals equal to at least one additional active judge. In addition, settlements voluntarily agreed to by the parties may well benefit both sides better than a judicial disposition. We therefore consider it a valuable service to our bar, and so do they. It also saves clients time and expense, for usually the settlement is reached early in the appellate process, before expensive briefs are written. In cases where mediation is not successful, the case proceeds in the ordinary course to a merits panel for briefing and argument.²⁸ The panel never even knows mediation was attempted.²⁹ Our staff mediators select certain appeals for this program based on their assessment of settlement potential. The only thing that is mandatory is the presence of counsel and client at one or more mediation sessions.³⁰ For this and other reasons, the court's mediation program has been well received by the bar. I receive many compliments about the program and the mediators, including from attorneys whose cases did not settle. Needless to say, lawyers representing parties that did settle are even more enthusiastic.

26. U.S. Court of Appeals for the Federal Circuit, Circuit Mediation Office Statistics for the 2009 Calendar Year, http://www.cafc.uscourts.gov/pdf/mediationstats_CY_09.pdf (last visited Apr. 7, 2010).

27. See U.S. Court of Appeals for the Federal Circuit, Median Disposition Time for Cases Decided by Merits Panels 2000–2009, [http://www.cafc.uscourts.gov/pdf/MedDispTime\(chart\)00-09.pdf](http://www.cafc.uscourts.gov/pdf/MedDispTime(chart)00-09.pdf) (last visited Apr. 7, 2010) (showing that the court's time frame for final dispositions has decreased over the past decade); U.S. Court of Appeals for the Federal Circuit, Caseload Analysis FY 2008–FY 2009, <http://www.cafc.uscourts.gov/pdf/CaseloadAnalysisFY09.pdf> (last visited Apr. 7, 2010) (showing that the median time between the court placing a case on the calendar and disposition is 1.6 months); U.S. Courts of Appeals for the Federal Circuit, Table B4: Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit, During the 12-Month Period Ending September 30, 2009, <http://www.uscourts.gov/judbus2009/appendices/B04Sep09.pdf> (last visited Apr. 7, 2010) (showing that it takes the other circuit courts 2.1 months on average from the time they hear a case to make a final disposition).

28. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPELLATE MEDIATION PROGRAM GUIDELINES ¶ 8 (2008), <http://www.cafc.uscourts.gov/pdf/mediationguidelines5-1-08.pdf>.

29. *Id.*

30. *Id.* ¶ 6.

Along with serial upgrades in IT equipment and implementation of our mediation procedure, two of our three courtrooms have been renovated to acquire a new look, actually an old look that reminds many of English courtrooms of the nineteenth century. Construction to renovate the third courtroom will begin soon. Behind their historic façades lies modern telecommunications equipment that can support computer linkages both for judges (with their clerks sitting in the back) and for attorneys at the counsel tables. We even have public access Internet WiFi capability in the foyers outside the courtrooms as well as in our nearby Circuit Library. With embedded cameras, we will soon be able to support videoconferencing so that, when needed, oral argument can be presented from a remote courthouse. Our digital sound recordings of all oral arguments are posted to our website the very same day, and opinions are posted within minutes of their issuance. We can therefore lay claim to being not merely the court that hears technology cases but to being a technologically advanced circuit court.

Our website has been greatly updated, too.³¹ It now contains extensive information, including court calendars, biographies of the judges, and statistics, as well as orders and opinions, local rules, practice tips, and much else. Our website was rated the best of any circuit court.³² So we are at least as transparent as any other court of appeals. Visit our website and see for yourself. The website is now being redesigned for even greater ease of finding desired information. Moreover, it will soon be word searchable and otherwise more state-of-the-art. Its style, however, while new, will remain dignified, formal and court-like. A task force of judges and staff deserve much credit for this upcoming upgrade, as does a top-flight outside vendor.

Of course, fancy courtrooms and sophisticated computers are not the heart of the Federal Circuit; its judges and staff are. I doubt our levels of intense industry, attention to detail, careful coordination, and long-range planning are exceeded by any other circuit court. As mentioned earlier, we judges benefit from frequent conversations in person. But we are also informed on the perspectives of practitioners and their clients by frequent participation in organized bar events, not only of specialty bars like the patent, contract, or veterans' bars, but also of our own overall bar association, the Federal

31. See generally U.S. Court of Appeals for the Federal Circuit Homepage, <http://www.cafc.uscourts.gov> (last visited Apr. 7, 2010).

32. DARRELL M. WEST, STATE AND FEDERAL E-GOVERNMENT IN THE UNITED STATES tbl.A2 (2007), <http://www.insidepolitics.org/egovt07us.pdf>.

Circuit Bar Association. With its strong staff, leadership, and several thousand active members, it is a major asset.

In addition to interaction with many bar associations and other organizations such as Inns of Court, we have enjoyed helpful communication with district judges whose patent rulings we review. We often appear together on panels at conferences. Since 2006, almost fifty district judges from all over America have sat with us during oral argument weeks, normally the first full week of each month, twelve months a year.³³ They have expressed surprise at the diversity of our caseload and the difficulty of many cases in various areas of our jurisdiction. Our court has also gained much goodwill.

Over the last quarter century, our nascent court has gone from relative obscurity, hardly known by anyone except lawyers in specialty bars, to being the focus of sustained attention by the Supreme Court, Congress, the largest general practice firms, the Federal Trade Commission, the National Academies of Science, and the general bar as well as legal news media. Indeed, our public profile keeps increasing. When I started, our work was rarely mentioned at all in the major daily newspapers; now it is regularly covered, sometimes even on the front pages and even more frequently in the business section. In 2003, the Federal Trade Commission issued a report on perceived problems in patent law,³⁴ which was followed the next year by a similar report issued by the National Research Council of the National Academies of Science.³⁵ Between 2006 and 2009, the Supreme Court decided several major patent cases³⁶ and will continue to do so, with its decision in the most recent case expected this spring. That case, *Bilski v. Kappos*, concerns what innovations are legally eligible for consideration for patenting.³⁷ In the Congresses

33. U.S. Court of Appeals for the Federal Circuit, List of Visiting Judges 2006–2010, http://www.ca9c.uscourts.gov/pdf/Visiting_Judges.pdf (last visited Apr. 7, 2010).

34. FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (2003), <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

35. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., A PATENT SYSTEM FOR THE 21ST CENTURY (Stephen A. Merrill, Richard C. Levin, & Mark B. Myers eds., 2004).

36. *Carlsbad Tech., Inc. v. HIF Bio Inc.*, 129 S. Ct. 1862, 90 U.S.P.Q.2d (BNA) 1353 (2009); *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 86 U.S.P.Q.2d (BNA) 1673 (2008); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 82 U.S.P.Q.2d (BNA) 1400 (2007); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 82 U.S.P.Q.2d (BNA) 1385 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 81 U.S.P.Q.2d (BNA) 1225 (2007); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 77 U.S.P.Q.2d (BNA) 1801 (2006); *Ebay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 78 U.S.P.Q.2d (BNA) 1577 (2006); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 77 U.S.P.Q.2d (BNA) 1961 (2006).

37. No. 08-964 (U.S. argued Nov. 9, 2009).

starting in 2005, 2007, and 2009, committees in both the Senate and the House of Representatives held hearings on comprehensive patent law revision bills.³⁸ Some observers expect a floor vote in the Senate this spring.

The lawyers appearing before us have also changed considerably. In the 1980s, most lawyers briefing and arguing cases in the court were specialists, often from specialized firms, such as intellectual property boutiques. Gradually, we began to see more lawyers with general civil litigation backgrounds and from giant firms with comprehensive corporate practices. Even members of the elite Supreme Court bar began appearing in our courtrooms.³⁹ One interesting effect I have observed is a convergence of general civil litigators and specialized patent litigators toward a new combined patent bar, each side learning much from the other. Once fully concluded, the merger resulted in a sharp rise in the quality of argument in the current decade, compared to the 1980s when we mostly saw only patent specialists, or in the 1990s, when general litigators new to patent law struggled while patent lawyers were challenged to persuade our increasingly diverse bench. Now nearly every general practice firm has an intellectual property practice, and those that did not develop one internally often merged with a small specialty firm to enter the field. Since patent law became viewed as an area of high activity and continuing growth, those big firms that still lacked such a practice scrambled to acquire one. Even in slow hiring years, intellectual property lawyers remain in high demand. Law schools that had long ignored the court began offering more courses related to our jurisdictions, especially in patent law and litigation. Aware of the hiring potential, more and more law students took such courses, an increasing number at the graduate level. Law schools have, in turn, attracted more individuals with scientific or technological backgrounds. Obviously, with more trials and larger awards in the last decade, lawyers and their firms would be expected to gravitate toward the areas we review. With the steady loss of manufacturing jobs to overseas locations, opinion makers and politicians began to grasp that we still produce innovation that can

38. Patent Reform Act of 2009, S. 610, 111th Cong. (2009); Patent Reform Act of 2009, S. 515, 111th Cong. (2009); Patent Reform Act of 2009, H.R. 1260, 111th Cong. (2009); Patent Reform Act of 2007, S. 1145, 110th Cong. (2007); Patent Reform Act of 2007, H.R. 1908, 110th Cong. (2007); Patent Reform Act of 2006, S. 3818, 109th Cong. (2006); Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005).

39. Among the notable Supreme Court advocates who have argued cases in the Federal Circuit are Carter Phillips, Kenneth Starr, and Seth Waxman.

drive economic growth as it did in the 1990s.⁴⁰ For me, it is nevertheless difficult to understand why so many law schools were so slow to catch on to new realities that did not escape the attention of the firms that hired their students. But belatedly, most schools have tried to catch up, with scores now offering law and technology journals alongside traditional law reviews. Several, including the George Washington University Law School, even established intellectual property centers that sponsor important conferences, and Boalt Hall at Berkeley began holding annual short courses to train U.S. district judges in patent law and litigation, an important and ever-growing part of their dockets.

In our Hollywood culture of celebrity and entertainment, a cynic might deduce that our court has belatedly been “discovered” by the media and recognized as important simply because of the sheer increase in news coverage itself, though the work we perform was just as important ten or twenty years ago. Be that as it may, we now receive a level of attention unheard of when I joined the court in 1988, or even ten years later. More lawyers than ever before want to be nominated to the court; more law graduates and young associates want to clerk here. As noted earlier, our website almost immediately contains every oral argument and every issued opinion. It gets thousands of “hits” every day, not only from U.S. lawyers but from lawyers all over the globe.⁴¹ In fact, several countries have created new courts modeled on the Federal Circuit, and others are considering doing so.⁴² Traveling around the United States on speaking engagements, I regularly encounter lawyers and law students who know our recent opinions to the point of being able to quote whole passages from memory, like school children in former times who memorized portions of poems or famous speeches like the Gettysburg Address. When my colleague and successor as chief judge, Judge Rader, goes to India, Japan, China, or Korea, he visits with chief justices.

40. PAT CHOATE, DANGEROUS BUSINESS: THE RISKS OF GLOBALIZATION FOR AMERICA 197–98 (2008).

41. Usage statistics for the Federal Circuit website are on file with the Author.

42. See, e.g., Intellectual Property Court, Organization Structure, http://210.69.124.203/ipr_english/index.php?option=com_content&task=view&id=16&Itemid=29 (last visited Apr. 7, 2010) (stating that the Intellectual Property Court of Taiwan was established on July 1, 2008 and hears IP cases); Intellectual Property High Court, About Us, <http://www.ip.courts.go.jp/eng/aboutus/history.html> (last visited Apr. 7, 2010) (stating that the Intellectual Property High Court of Japan was established on April 1, 2005 and hears appeals on patent actions); Patent Court of Korea, Establishment, http://patent.scourt.go.kr/patent_e/intro/intro_02/index.html (last visited Apr. 7, 2010) (stating that the Patent Court of Korea was established on March 1, 1998 and hears patent cases).

Is all this attention beneficial? I suspect in some ways it helps the court be at its best. For example, more lawyers, including district judges, are eager to join our court.⁴³ At the same time, we may face a risk of undue congressional intervention, driven by often inaccurate and usually incomplete media coverage as well as self-interested corporate campaign contributions and public relations campaigns that could undermine the careful, balanced, and predictable evolution of case law. Other benefits and risks could readily be listed. What cannot be doubted is that the glare of publicity will continue, not fade. Most likely, it will increase. Who knows, perhaps one day our oral arguments will be streamed live onto our website and possibly, though on rare occasions, even be televised. While I have personal doubts about the desirability of such developments, they can no longer be dismissed as fantasy. Whatever evolves on this score, it is crucial that an increasingly interested public be an informed public. Otherwise, misunderstanding may cause congressional actions that could prove counterproductive.

In my judgment, the nation's future prosperity, or at least a good portion of it, rests on economic growth systems, particularly the patent system, the international trade system, and the systems for individuals and companies injured by governmental actions to get monetary redress, including government contracts, takings and tax refund cases, and many more. Some consider our court the technology court—and so it is. But it is also the business and commerce court, the innovation court, and the job-creating, prosperity-expanding court. It is, in short, a national asset.

The *American University Law Review's* annual Federal Circuit issue provides a needed foundation for a proper understanding of the court and its work. This issue, in its twenty-fifth year,⁴⁴ provides the baseline of learning that can inform policymakers and those who influence them so that the court will be helped, not hobbled, and assisted to serve the nation well in this decade of competitive challenge. It is a great contribution. I applaud those who have produced it and appreciate the opportunity to add this Afterword.

43. See, e.g., Peter Krause, *U.S. District Judge Kate O'Malley Nominated to Appeals Court in Washington*, THE PLAIN DEALER, Mar. 11, 2010, http://blog.cleveland.com/metro/2010/03/us_district_judge_kate_omalley_1.html (announcing that Judge Kathleen O'Malley of the Northern District of Ohio was nominated on March 10, 2010 by President Obama to fill a vacancy on the Federal Circuit).

44. See Henry John Uscinski, *Editor's Note*, 34 AM. U. L. REV. 591, 593 (1985) (introducing a new annual volume of the *American University Law Review* recapping Federal Circuit case law).