

# THE FEDERAL CIRCUIT AND CONGRESSIONAL INTENT

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Grateful as I am for the invitation by the editors of *The American University Law Review* to submit a short comment on the first ten years of the life of the Court of Appeals for the Federal Circuit, I am acutely aware of some risk to objectivity. Nostalgia can make memory selective. Nonetheless, I am convinced that an objective study would conclude that all the judges, law clerks, and administrators who served the Federal Circuit so diligently through the first decade of its life can be proud of their collective accomplishments. Those "in at the creation" will recall the skeptics' predictions that the Federal Circuit would be short-lived. The dedicated efforts of a bench burdened with numerous and constant vacancies and of the smallest staff of any federal court of appeals have consigned those predictions to the dustbin of history. A major element in accomplishing that result is the Federal Circuit's careful, clear, and constant compliance with its congressional charter.

From its very first case, the Federal Circuit set out to meet Congress' express intent that it contribute to increased uniformity and reliability in the fields of national law assigned. In its first three years, for example, it identified and resolved all of the thirteen conflicts in the previous patent law decisions of the regional circuit courts and removed the slogans that for years had barnacled the patent law. Less dramatically and perhaps less visibly, but just as firmly, the Federal Circuit insisted on uniformity in the laws of international trade, government contracts, claims against the government, federal personnel, and veterans appeals. Thus the Federal Circuit met the desire of its congressional creators for increased uniformity and elimination of forum shopping in its assigned areas of national law.

The Federal Circuit also recognized at the outset that assurance

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of reliability required the maintenance of a maximum level of uniformity among its own statements of the law. Simply put, a court created to reduce existing conflicts would fail in its mission if its opinions were to create new jurisprudential conflicts. The Federal Circuit also recognized the special responsibility placed on it as the probable court of last resort in most of its cases. To meet these concerns, the judges exercised a proper preference for judicial humility over pride of authorship, unanimously agreeing to subject their panel-approved precedential opinions to review by all their colleagues and by the Senior Technical Advisor. That review was limited to language that might appear to create a conflict with the Federal Circuit's precedents and did not involve a review of the decision itself. Though the ten-day review period added to the interval from filing to final decision and increased each judge's workload, it was a major example of the mission dedication that resulted in the early and continuing success of the Federal Circuit.

Another congressionally expressed expectation—that the Federal Circuit would not attempt either to unduly restrict or to expand its own jurisdiction—was met and satisfied in a number of cases in a number of fields. For example, the Federal Circuit exercised its appellate jurisdiction in an appeal limited to a copyright issue in *Atari, Inc. v. JS & A Group, Inc.*,<sup>1</sup> a case in which the statutory requirement of district court jurisdiction under section 1338 was met. The court, however, denied jurisdiction in *Christianson v. Colt Industries Operating Corp.*,<sup>2</sup> an appeal in which antitrust considerations framed the issue but the requirement for district court jurisdiction under section 1338 was not met.

The congressional comment that the Federal Circuit could provide a ready repository for congressional creation of additional jurisdiction led to speculation that much more would be added. To the contrary, the only jurisdiction added in the first ten years was over appeals from the new Court of Veterans Appeals and jurisdiction to conduct APA-type review of Department of Veterans Affairs regulations.

Now that over 10,000 appeals have been decided, early assumptions that the Federal Circuit would somehow be more "specialized" than the regional circuit courts appear to have been abandoned—and rightly so. Writers have apparently realized that all courts get their jurisdiction from Congress and that assignment of a variety of

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1. 747 F.2d 1422 (Fed. Cir. 1984).

2. 822 F.2d 1544 (Fed. Cir. 1987), *vacated and remanded on other grounds*, 486 U.S. 800 (1988).

fields of law to one court and a variety of other fields to another court cannot mean that one is more "specialized" than the other. Writers have also apparently noticed that the Federal Circuit, in following congressional intent that it exercise "case" jurisdiction, i.e., that it decide all issues in appeals properly before it, considers and disposes of many of the same issues disposed of by the regional circuits including due process and other constitutional issues.

Similarly, the uninformed, unsupported, and unsupportable assertion that the Federal Circuit might somehow become biased in favor of patents has apparently by now foundered on the facts. Hewing to their oaths of office, the judges simply ignored that assertion as they proceeded to decide each case on its own facts in the light of precedent. Constructive, fact-based criticism is important and always welcome, but it is well for litigants and potential litigants that articles based on result-oriented and partial statistics appear a thing of the past.

Perfection eludes us all (including most especially writers of short comments on a court's early history) and no human institution is totally perfect. In some areas, the Federal Circuit has had to "feel its way" toward a definitive statement of the law. Examples are inequitable conduct and the doctrine of equivalents in the field of patents, takings claims in constitutional law, and jurisdiction in federal personnel and government contract cases. Such case-by-case development of the law is normal and will doubtless continue. An occasional misstep may require correction, by the court in banc or by the Supreme Court, but the Federal Circuit's established procedures have kept such aberrations to an absolute minimum. I believe most observers would agree that a combination of careful decisionmaking and willingness to correct error have resulted in a substantial and consistent body of jurisprudence, the study of which enables counsel to more confidently advise a clientele.

To best serve its critical role in a free society, the law must be understandable, uniform, reliable, and consistent with the intent of the people's representatives who enacted it. To the maximum extent achievable by human beings, it can fairly be said that the law entrusted to the Court of Appeals for the Federal Circuit fully meets those criteria.

