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The Provenance of the Federal Courts Improvement Act of 1982

Richard H. Seamon*

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* Associate Professor of Law, University of South Carolina. I thank Eric G. Bruggink, Senior Judge of the United States Court of Federal Claims, for the honor of inviting me to participate in this symposium. I also thank Judge Bruggink, as well as Dean Dan Meador and Mr. Clarence Kipps, Jr., for helpful comments on a draft of this article.

Introduction

This article begins a symposium recognizing the twentieth anniversary of the Federal Courts Improvement Act of 1982 ("FCIA" or "Act").¹ As the opening article, it attempts to lay a foundation for the symposium by describing the history and purposes of the Act and discussing whether those purposes have been met.

The history of the FCIA reflects that it was conceived as an appellate court reform that came to include trial level reform as well.² The originators of the FCIA wanted to create an intermediate appellate court whose jurisdiction was defined by subject matter rather than geography, and whose decisions would establish nationwide precedent on subjects over which it had exclusive appellate jurisdiction. To create such an appellate court, the FCIA's originators proposed merging two existing courts that carried out appellate functions: the United States Court of Customs and Patent Appeals ("CCPA") and the United States Court of Claims ("Court of Claims"). Because the Court of Claims also carried out trial functions, a new trial court had to be created to assume those functions. An appellate reform thus resulted in the creation of not only a new appellate court but also a new trial court.

The new appellate court was called the United States Court of Appeals for the Federal Circuit, and the new trial court is today called the United States Court of Federal Claims ("COFC").³ The COFC hears nontort claims for monetary relief against the federal government.⁴ The Federal Circuit reviews decisions of the COFC, decisions of other entities in cases involving the government, and some decisions of the federal district courts, most importantly those in patent cases.⁵ In all of these matters, the Federal Circuit's appellate jurisdiction is exclusive.⁶

Although the idea of merging two existing courts made the FCIA seem like a modest structural change, the theory underlying its creation had far reaching implications. The Federal Circuit was conceived as a way of addressing a structural defect in the appellate system. That defect inhered in the regional organization of the existing courts of appeals, none of whose decisions were binding on the others and only a small fraction of whose decisions were reviewed by the United States Supreme Court. This system could not promptly and reliably produce nationwide resolution of issues of federal

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

2 See generally *infra* Part II.

3 Congress named the new court the "United States Claims Court." Federal Courts Improvement Act § 105(a). In 1992, Congress changed the name from the "United States Claims Court" to the "United States Court of Federal Claims" ("COFC"). Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

4 See *infra* Part I.B.

5 See *infra* notes 53-81 and accompanying text.

6 See S. Jay Byler, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 854 (1990) (observing that one of the ways in which the Federal Circuit is unique is that its jurisdiction is exclusive, "meaning that for cases in one of the subject matter areas of its jurisdiction, it is the only court to which an appeal may be taken").

law. The Federal Circuit was created to remedy this shortcoming, especially for cases involving patents.⁷ Yet the Federal Circuit's very existence signifies that the systemic problem that animated its creation is not limited to patent cases. This is why the Commission on Structural Alternatives for the Federal Courts of Appeals (better known as the "White Commission") described the FCIA's creation of the Federal Circuit as "the most significant and innovative structural alteration in the federal intermediate appellate tier since its establishment."⁸

The creation of a new trial court—today's COFC—was incidental to the creation of the Federal Circuit but nonetheless achieved trial level reform. The COFC inherited trial functions that had previously been carried out primarily by a set of commissioners appointed by the Court of Claims. The commissioners could only recommend decisions, all of which had to be reviewed, appellate-style, by Court of Claims judges. In contrast, the COFC is staffed with Article I judges who can enter final judgments. This change from commissioners to Article I judges with final-judgment authority upgraded the trial forum for government claims and made it more efficient.

By most accounts, the FCIA seems to have achieved its purposes. The Federal Circuit has clarified many aspects of patent law and made it more coherent as a whole. In addition, the COFC carries out its trial functions more efficiently than was possible under the commissioner system. The Federal Circuit and the COFC have accordingly proven the usefulness of topically organized national courts. In short, as its name suggests, the FCIA has indeed improved the federal judicial system.

This success warrants study of the history of the FCIA for the light it sheds on three issues. First, the FCIA's history illustrates what it takes to enact judicial reform. Second, the FCIA's history helps us identify what aspects of the judiciary still need reform. Third, the FCIA's history suggests the shape that future reforms might take.

The key to the FCIA's enactment and the judicial reform it brought about was the brilliant idea of creating the Federal Circuit by merging two existing courts. For one thing, this merger idea promised a benefit—streamlining the existing system—that was modest but concrete. The merger of the courts would result in one less court and eliminate some overlapping administrative functions. More important, the merger idea enabled the proposed new appellate court to withstand the charge that it would be merely a specialized court for patent cases. This was essential to overcome the longstanding and widespread hostility to specialized courts.

The tactical motivation for the merger idea shows that the FCIA's supporters and Congress were concerned about some aspects of the court system while others were largely ignored. Because the FCIA's supporters gave non-patent jurisdiction to the proposed new appellate court primarily to avoid charges of overspecialization, neither they nor Congress considered how the new court's patent and nonpatent jurisdiction might mix. They did not, for

⁷ See *infra* notes 227–31 and accompanying text.

⁸ COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 72 (1998) [hereinafter WHITE COMMISSION REPORT].

example, consider whether the new court would devote so much attention to patent appeals that other appeals would get comparatively short shrift. In any event, if Congress expands the Federal Circuit's jurisdiction or creates new courts whose jurisdiction encompasses multiple topics, it will need to consider how the components of the court's jurisdiction interact.

Moreover, because the FCIA was directed to appellate reform, neither the FCIA's supporters nor Congress gave sustained attention to reforms needed at the trial level. The FCIA created the COFC, out of necessity, to take over the Court of Claims's trial functions, and the COFC's birth solved the problems of the commissioner system that was previously used to carry out those trial functions. Congress did not give much attention, however, to other improvements needed in the system for trying claims against the federal government. For example, Congress did not address remedial limitations and jurisdictional uncertainties that had complicated performance of the Court of Claims's trial functions. Those important issues remain largely unaddressed.

This historical account and assessment of the FCIA proceeds in four parts. Part I briefly describes the current composition and jurisdiction of the Federal Circuit and the COFC. Part II details the history and purposes of the FCIA. Part III attempts to assess the FCIA's success. Finally, Part IV looks to the FCIA's history for lessons in crafting future judicial reform.

I. Summary of the FCIA

On this twentieth anniversary, it is worth recalling the odyssey between the FCIA's conception and its enactment because of the valuable lessons it teaches. To understand that odyssey, however, one must first know its destination. Although many lawyers and academicians know one or two pieces of the Act well, few in the legal profession know much about the FCIA as a whole.⁹ This part of the article accordingly provides a brief overview of the FCIA preliminary to a discussion of its history and purposes. Section A describes the FCIA's main accomplishment: the creation of two new federal courts. Sections B and C briefly describe each court. Section D concludes with a summary of the FCIA's achievement.

A. The FCIA's Creation of Two Federal Courts

The FCIA created two new federal courts on October 1, 1982.¹⁰ One is now known as the United States Court of Federal Claims, a trial-level court established under Article I of the Constitution.¹¹ The other is the United States Court of Appeals for the Federal Circuit, an appellate court created under Article III.¹²

⁹ To the extent that the legal profession has come to learn about the FCIA, much credit is due to the Federal Circuit Bar Association. For information on the Federal Circuit Bar Association see <http://www.fedcirbar.org> (last visited July 20, 2003).

¹⁰ Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 402, 96 Stat. 25, 57 (generally providing for an effective date of Oct. 1, 1982).

¹¹ 28 U.S.C. § 171(a) (2000) (establishing the COFC as an Article I court).

¹² See *id.* §§ 41-44 (listing the courts of appeals, including the Federal Circuit).

Both new courts differ in a major way from the federal trial courts and intermediate appellate courts with which most lawyers are familiar. Specifically, the jurisdiction of the two new courts is determined exclusively by subject matter, not geography.¹³ For example, the COFC hears breach of contract claims against the United States regardless of where those claims arise.¹⁴ Similarly, the Federal Circuit hears appeals in patent cases from federal district courts all over the country.¹⁵ More generally, the COFC and the Federal Circuit have nationwide jurisdiction over all of the cases Congress has assigned them to hear. Thus, the venue rules applicable to the ninety-four federal district courts do not constrain the COFC;¹⁶ and the term “Federal Circuit”—unlike the term “First Circuit,” for example—does not denote a geographic region of the country to which any court’s appellate jurisdiction is limited.¹⁷

The next two sections briefly describe the COFC and the Federal Circuit. The COFC is discussed first because all appeals from its decisions go to the Federal Circuit.¹⁸ The types of cases heard by the COFC thus make up one important piece of the Federal Circuit’s appellate caseload.¹⁹

B. The United States Court of Federal Claims

Abraham Lincoln urged Congress to create a court to hear claims against the United States because, he said, it is “the duty of government to render prompt justice against itself.”²⁰ Today, the COFC is the modern ver-

¹³ See *id.* § 41 (providing that the composition of the Federal Circuit encompasses “[a]ll Federal judicial districts”); *id.* §§ 81–132 (establishing a geographically based set of federal district courts); *id.* § 1294(1) (stating that, except as provided in other provisions, including 28 U.S.C. § 1295, appeals from a federal district court go to “the court of appeals for the circuit embracing the district”); *id.* § 1295(a)(1)–(2) (giving the Federal Circuit exclusive appellate jurisdiction over appeals from some federal district court decisions, regardless of where the district courts are located); *id.* § 1491(a)(1) (giving the COFC jurisdiction over certain claims against the government, regardless of where they arise or where the parties reside).

¹⁴ See *id.* § 1491(a)(1).

¹⁵ *Id.* § 1295(a)(1) (giving the Federal Circuit exclusive jurisdiction over appeals “from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title,” with some exceptions); *id.* § 1338(a) (giving the district courts jurisdiction over, among other cases, “any civil action arising under any Act of Congress relating to patents”).

¹⁶ See *id.* §§ 81–132 (dividing the United States into ninety-four districts and establishing a district court in each); *id.* § 1391(a)–(b) (generally basing venue on the district in which the defendant resides or the events giving rise to the action occurred).

¹⁷ See *id.* § 41 (listing the thirteen judicial circuits of United States); see also WHITE COMMISSION REPORT, *supra* note 8, at 72 (“The Federal Circuit has no geographical boundaries, except that of the United States as a whole.”).

¹⁸ 28 U.S.C. § 1295(a)(3).

¹⁹ Of 1,483 appeals filed in the Federal Circuit during the 12-month period ending September 30, 2001, 195 were from the COFC. ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE DIRECTOR: 2001, at 115 tbl.B-8 (2001), <http://www.uscourts.gov/judbus2001/contents.html> (last visited July 20, 2003) (on file with The George Washington Law Review) [hereinafter REPORT OF THE DIRECTOR: 2001].

²⁰ CONG. GLOBE, 37th Cong., 2d Sess. 2 (1862).

sion of the court created to fulfill that duty.²¹ This section briefly describes the COFC's composition, jurisdiction, and remedial powers. In a nutshell, the COFC is the primary trial court for nontort, monetary claims against the federal government.

The COFC comprises sixteen judges nominated by the president and appointed with the advice and consent of the Senate for fifteen-year terms.²² The court's principal office is in Washington, D.C., but it may sit elsewhere in the United States for the convenience of the parties.²³ Although the COFC is an Article I court, it operates much like an Article III court.²⁴

Dedicated to the duty of which Lincoln spoke, the COFC deals exclusively with claims against the United States.²⁵ Most of those claims are asserted under the Tucker Act.²⁶ About one-third of the COFC's cases involve contract claims against the government.²⁷ Another one-quarter or so of its cases are tax refund suits against the government.²⁸ Yet another major portion of the COFC's docket consists of cases in which civilian employees or

²¹ See WILSON COWEN ET AL., *THE UNITED STATES COURT OF CLAIMS: A HISTORY* (PART II), at iv (1978) ("The history of the Court of Claims is the story of an evolutionary process by which the Government of the United States has sought over the years to develop a system that will enable its citizens to assert claims against it and receive fair and just compensation when those claims are justified."); *id.* at 13–25 (describing the history of the creation of the Court of Claims).

²² 28 U.S.C. §§ 171(a), 172.

²³ *Id.* § 173; *cf. In re United States*, 877 F.2d 1568, 1571–72 (Fed. Cir. 1989) (holding that the COFC lacked authority to hold hearings outside the United States).

²⁴ See, e.g., 28 U.S.C. § 372(c)(18) (directing the COFC to adopt procedural rules for complaints against its judges, and specifying that the rules should be consistent with the complaint procedures for other federal judges); *id.* § 460 (making applicable to the COFC the general provisions for federal courts and judges prescribed in 28 U.S.C. §§ 451–463); *id.* §§ 604, 610 (defining the COFC as a "court" for which the Administrative Office of the United States Courts ("Administrative Office") has responsibilities).

²⁵ Eric G. Bruggink, *Commercial Litigation in the United States Supreme Court*, 53 ALA. LAW. 334, 336 (1992) ("The United States is always the named defendant in the [Court of Federal Claims].").

²⁶ Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

²⁷ The figures cited in the text for the COFC's contract and tax cases are taken from the COFC's official website, U.S. COURT OF FED. CLAIMS, *THE HISTORY OF THE UNITED STATES COURT OF FEDERAL CLAIMS* (2001), <http://www.uscfc.uscourts.gov/USCFChistory.htm> (last visited July 20, 2003) [hereinafter HISTORY OF THE COFC]. The figures from that website appear to exclude cases brought in the COFC under the National Vaccine Compensation Program, 42 U.S.C. §§ 300aa-1 to 300aa-34. See 42 U.S.C. § 300aa-12 (2000) (giving the COFC and its special masters jurisdiction over compensation claims). If those vaccine cases are excluded, the figures reported on the COFC's website roughly coincide with statistics reported by the Administrative Office. See REPORT OF THE DIRECTOR: 2001, *supra* note 19, at 267 tbl.G-2A, (reporting that, of 2,571 cases pending in the COFC on Sept. 30, 2001, 699 (about 27%) were vaccine cases, 614 (about 24%) were "[c]ontract" cases, an additional 19 (about 0.7%) were "[d]eclaratory judgments (contract)" cases, and 263 (about 10.2%) were "[t]ax" cases). It would make sense to exclude the vaccine cases if, to use Judge Bruggink's expression, the COFC functioned merely as a "whistlestop" for the vaccine cases. Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 537 (1999).

²⁸ HISTORY OF THE COFC, *supra* note 27; see 28 U.S.C. § 1346(a)(2). *But cf. id.* § 1509 (withholding jurisdiction over certain actions for tax refunds or credits from the COFC).

members of the military sue the government over pay.²⁹ Also large in number, as well as doctrinal importance, are cases involving claims that the government has taken the plaintiff's property without paying the "just compensation" required by the Fifth Amendment of the Constitution.³⁰ Smaller in number, but of historical and political importance, are claims brought against the government by Native Americans³¹ and disputes referred to the COFC by Congress.³² The COFC also hears claims against the United States for patent infringement and copyright infringement and for rights in protected plant varieties.³³

This last piece of the COFC's jurisdiction—cases involving intellectual property claims against the federal government—is important, and yet can be difficult to keep in mind. This is because the Federal Circuit reviews not only cases from the COFC involving intellectual property claims against the government but also cases from the federal district courts involving one type of intellectual property dispute—patent claims—between private parties.³⁴ It is, therefore, inaccurate to think of the Federal Circuit as dealing only with patents; it hears other intellectual property cases as well.

In most cases, the COFC can award only monetary relief.³⁵ For example, the COFC generally cannot award specific performance for the government's breach or repudiation of a contract or enjoin the government's

²⁹ REPORT OF THE DIRECTOR: 2001, *supra* note 19, at 267 tbl.G-2A, (reporting that, of 2,571 cases pending in the COFC as of Sept. 30, 2001, 622 (about 25%) were either "[m]ilitary pay" or "[c]ivilian pay" cases); see 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4101, at 321 (2d ed. 1988 & Supp. 2001) [hereinafter WRIGHT & MILLER] (discussing the COFC's jurisdiction over pay disputes).

³⁰ U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); see 28 U.S.C. § 1491(a)(1) (providing the COFC with jurisdiction over claims against the United States "founded . . . upon the Constitution"); see also REPORT OF THE DIRECTOR: 2001, *supra* note 19, at 267 tbl.G-2A (reporting that, of 2,571 cases pending in the COFC on Sept. 30, 2001, 240 concerned "[p]roperty (taken)"); HISTORY OF THE COFC, *supra* note 27 (reporting that takings claims account for about 10% of the COFC's docket).

³¹ 28 U.S.C. § 1505; see, e.g., COWEN, *supra* note 21, at 64–73, 99–102 (discussing the history of Native American claims in the Court of Claims); Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537 (1994) (discussing more recent claims).

³² 28 U.S.C. §§ 1492, 2509. These "congressional reference" cases are important, among other reasons, because it may be unconstitutional for them to be heard by an Article III court. If so, the COFC could not be made an Article III court while retaining its authority to hear congressional reference cases. See RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 113 (4th ed. 1996) [hereinafter HART & WECHSLER] (noting that, while the Court upheld the Court of Claims's characterization as an Article III court in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court also "expressed doubt about the validity of the congressional reference advisory role" of the Claims Court, and that after *Glidden*, congressional reference claims were transferred to the chief commissioner of the Court of Claims). See generally Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 665, 670–90, 697–98 (1985) (discussing the congressional reference cases).

³³ 28 U.S.C. § 1498.

³⁴ *Id.* § 1295(a)(1).

³⁵ See, e.g., Bruggink, *supra* note 27, at 532–33.

collection of taxes.³⁶ Consequently, plaintiffs who want both monetary and injunctive or declaratory relief usually must seek the monetary relief in the COFC and nonmonetary relief elsewhere, typically in the federal district courts.³⁷ The COFC can, however, grant declaratory or injunctive relief, or both, as an incident to monetary relief³⁸ in “bid protest” cases (a type of dispute over the solicitation and award of government contracts)³⁹ and certain tax cases.⁴⁰

As illustrated by cases in which plaintiffs seek monetary relief in the COFC and equitable relief in federal district court, the COFC and the district courts have much overlapping jurisdiction.⁴¹ In many cases in which the plaintiff asserts claims against the government in the COFC under the Tucker Act, the plaintiff can also assert claims against the government in a federal district court under the Administrative Procedure Act (“APA”)⁴² or the Federal Tort Claims Act (“FTCA”).⁴³ In addition, the COFC and the federal district courts have concurrent jurisdiction over some contract claims and other types of claims against the United States for \$10,000 or less.⁴⁴ Jurisdiction over those small amount claims is shared between the COFC and the district courts under the “Little Tucker Act.”⁴⁵ The COFC and district courts also have concurrent jurisdiction over suits against the United States for tax refunds.⁴⁶ To complicate matters, a third tribunal—the United States Tax Court (“Tax Court”)—hears cases in which, rather than paying a tax and then suing for a refund, a taxpayer withholds tax and is sued by the federal government.⁴⁷

The COFC shares jurisdiction not only with the federal district courts but also with two administrative entities. Specifically, the COFC shares its

³⁶ *Id.* Similarly, the federal district courts generally cannot enjoin the assessment or collection of federal taxes. See 26 U.S.C. § 7421 (2000).

³⁷ See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (“The Claims Court does not have the general equitable powers of a district court to grant prospective relief.”).

³⁸ See 28 U.S.C. § 1491(a)(2).

³⁹ *Id.* § 1491(b)(2).

⁴⁰ *Id.* §§ 1491(a)(2), (b)(2), 1507, 1508; see also 26 U.S.C. § 7428 (2000).

⁴¹ See *Bruggink*, *supra* note 27, at 535–36 (discussing the overlap between the COFC’s jurisdiction and that of other tribunals, including district courts).

⁴² Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2000). The district courts’ jurisdiction for APA claims typically comes from the federal-question statute, 28 U.S.C. § 1331, in the absence of a more specific grant of subject-matter jurisdiction.

⁴³ Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2000). *But cf. id.* § 1500 (restricting the COFC’s jurisdiction over a case if a similar case is pending in another court).

⁴⁴ *Id.* § 1346(a)(2) (giving the district courts and the COFC concurrent jurisdiction, with some exceptions, over civil actions or claims against the United States, “not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”). *But cf. id.* § 1500.

⁴⁵ See, e.g., *Preseault v. ICC*, 494 U.S. 1, 12 (1990) (using the term “Little Tucker Act” to refer to 28 U.S.C. § 1346(a)(2) and noting that the COFC and the district courts have concurrent jurisdiction under that act).

⁴⁶ 28 U.S.C. §§ 1340, 1346(a)(1); see also *Calhoun v. United States*, 32 Fed. Cl. 400, 404–06 (Fed. Cl. 1994) (discussing the COFC’s jurisdiction over tax refund actions).

⁴⁷ See 26 U.S.C. § 7442 (2000) (establishing the jurisdiction of the Tax Court).

jurisdiction over bid protest cases with the General Accounting Office⁴⁸ and its jurisdiction over government contract claims with the agency boards of contract appeals.⁴⁹

This summary of the COFC's jurisdiction cannot begin to depict the entire system for initial adjudication of claims against the federal government. Besides the COFC and the federal district courts, there are also other courts that act as trial-level tribunals for adjudicating disputes with the federal government, such as the United States Court of International Trade⁵⁰ and the Tax Court.⁵¹ Furthermore, many disputes involving the federal government are initially adjudicated in federal agencies.⁵² Suffice it to say that the COFC has the leading role among courts in initially adjudicating nontort claims for monetary relief against the government. As such, the COFC is a mainstay of the system.

C. *The United States Court of Appeals for the Federal Circuit*

The Federal Circuit consists of twelve Article III judges appointed by the president with the advice and consent of the Senate.⁵³ It occupies the same tier of the federal court system as the regional courts of appeals.⁵⁴ Thus, as discussed below, the Federal Circuit hears appeals in certain cases from the federal district courts (among other entities), and its decisions are subject to discretionary review by the Supreme Court.⁵⁵ Like the other federal intermediate appellate courts, the Federal Circuit has a Justice assigned to it⁵⁶ and, under recent legislation, can employ a circuit executive.⁵⁷

As already mentioned, the Federal Circuit reviews cases from all over the country. These cases come not just from the COFC but from many other tribunals, including numerous federal agencies and officials and two types of Article III courts: the Court of International Trade and the federal district courts. All told, the cases from these courts and other entities are of two

⁴⁸ See 28 U.S.C. § 1491(a), (b)(1); 31 U.S.C. §§ 3552–3553(a) (2000). See generally Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636 (1993). Until January 1, 2001, the federal district courts also had jurisdiction over bid protests. See Administrative Dispute Resolution Act of 1996, § 12(a), (d), 100 Stat. 3870, 3874–75 (codified at 28 U.S.C. § 1491 note (2000) (Sunset Provisions)).

⁴⁹ See 41 U.S.C. §§ 606–607 (2000); see also *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993) (“One primary purpose of the [Contract Disputes Act of 1978, 41 U.S.C. §§ 601–613 (2000)] . . . is to achieve parity between the jurisdiction of the United States Court of Federal Claims and the [agency] boards [of contract appeals].”).

⁵⁰ See 28 U.S.C. §§ 251–257.

⁵¹ See *id.* §§ 7441–7448.

⁵² See, e.g., Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 3 (1992) (“Federal agencies . . . decide far more cases than do the federal courts (hundreds of thousands annually).”).

⁵³ 28 U.S.C. § 44(a).

⁵⁴ See, e.g., S. REP. NO. 97-275, at 2–3 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 12–13 (“[The Federal Circuit] is on line with other Federal courts of appeals that is, it is not a new tier in the judicial structure.”).

⁵⁵ 28 U.S.C. § 1254.

⁵⁶ *Id.* § 42.

⁵⁷ *Id.* § 332(h), added by Federal Courts Improvement Act of 2000, § 306, 28 U.S.C. § 332.

types: (1) cases involving claims against the federal government (including intellectual property claims) and (2) patent cases.

Most of the first type of cases—disputes involving the federal government—fall into one of eight categories: (1) federal taxes;⁵⁸ (2) alleged federal “takings” of private property for which just compensation is due;⁵⁹ (3) alleged federal infringement of intellectual property rights such as copyright and patent rights;⁶⁰ (4) Native Americans;⁶¹ (5) vaccine-related injuries;⁶² (6) federal employment;⁶³ (7) international trade;⁶⁴ and (8) federal contracts.⁶⁵ Cases in the first six categories come to the Federal Circuit from the COFC.⁶⁶ Additional sources of cases in the sixth category, cases involving federal employment, are the Merit Systems Protection Board and the United States Court of Appeals for Veterans Claims.⁶⁷ Many cases in the seventh category, cases about international trade, come to the Federal Circuit from the Court of International Trade.⁶⁸ Other international trade cases come to the Federal Circuit from agencies such as the International Trade Commission (“ITC”) and from officials such as the Secretary of Commerce.⁶⁹ Cases in the eighth category, contract claims against the government, can come to the Federal Circuit from the COFC,⁷⁰ the federal district courts,⁷¹ or agency boards of contract appeals.⁷² Because of its authority to review this wide variety of

⁵⁸ See, e.g., *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843 (1996) (reviewing a Federal Circuit decision involving a tax refund).

⁵⁹ See, e.g., *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (reviewing a Federal Circuit decision involving a takings claim); cf. *United States v. Hatter*, 532 U.S. 557 (2001) (reviewing a Federal Circuit decision involving a claim under the Judicial Compensation Clause, U.S. CONST. art. III, § 1).

⁶⁰ See, e.g., *Motorola, Inc. v. United States*, 729 F.2d 765 (Fed. Cir. 1984) (reviewing a United States Claims Court decision involving a patent infringement claim against the federal government).

⁶¹ See, e.g., *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001) (reviewing a claim brought by the Navajo Nation alleging that the federal government breached a fiduciary duty), *rev'd*, 537 U.S. 488 (2003).

⁶² See, e.g., *Shalala v. Whitecotton*, 514 U.S. 268 (1995) (reviewing a Federal Circuit decision involving a vaccine injury compensation claim).

⁶³ See, e.g., *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768 (1985) (reviewing a Federal Circuit decision involving a disability claim in a case on appeal from the Merit Systems Protection Board). For simplicity's sake, this category also includes veterans' claims. See, e.g., *Brown v. Gardner*, 513 U.S. 115 (1994) (reviewing a Federal Circuit decision in a case on appeal from Court of Veterans Appeals).

⁶⁴ See, e.g., *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (reviewing a Federal Circuit decision involving a constitutional challenge to an export tax in a case on appeal from the Court of International Trade).

⁶⁵ See, e.g., *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000) (reviewing a Federal Circuit decision involving a contract claim).

⁶⁶ See 28 U.S.C. §§ 1295(a)(3), 1491(a)(1) (2000).

⁶⁷ 5 U.S.C. § 7703 (2000); 28 U.S.C. § 1295(a)(9); 38 U.S.C. § 7292 (2000).

⁶⁸ See 28 U.S.C. §§ 1295(a)(5), 1581–1584.

⁶⁹ *Id.* § 1295(a)(6)–(a)(7).

⁷⁰ *Id.* §§ 1295(a)(3), 1491(a)(1).

⁷¹ *Id.* §§ 1295(a)(2), 1346(a)(2).

⁷² *Id.* § 1295(a)(10); 41 U.S.C. § 607(g)(1) (2000).

cases involving the federal government,⁷³ the Federal Circuit serves as a federal court of appeals for disputes involving the federal government.⁷⁴

It would be wrong, however, to label the Federal Circuit solely a federal appellate court for disputes involving the government. That is because, in addition to those disputes, the Federal Circuit hears the great majority of appeals in patent cases, regardless whether or not those cases involve claims against the federal government.⁷⁵ The primary source of that appellate authority is 28 U.S.C. § 1295(a)(1).⁷⁶ With certain exceptions, § 1295(a)(1) gives the Federal Circuit exclusive jurisdiction over final decisions of the district courts in cases in which the jurisdiction of the district court “was based, in whole or in part, on section 1338 of this title.”⁷⁷ Section 1338, in turn, gives the district courts exclusive jurisdiction over cases arising under the patent laws.⁷⁸ This means that, whereas most appeals from federal district court decisions go to the regional courts of appeals, appeals in patent cases go from federal district courts throughout the country to the Federal Circuit.⁷⁹ Patent cases make up about 25 to 30% of the Federal Circuit’s caseload.⁸⁰

⁷³ The eight categories discussed in the text do not encompass all of the types of cases involving disputes with the federal government that are within the Federal Circuit’s jurisdiction. *See id.* § 1295. *See generally* 17 WRIGHT & MILLER, *supra* note 29, § 4104 (comprehensively discussing the Federal Circuit’s jurisdiction).

⁷⁴ One anonymous patent litigator reportedly referred to this portion of the Federal Circuit’s docket as “‘all that Smoky-the-Bear [sic] stuff.’” Victoria Slind-Flor, *Formerly Obscure Court Is in Spotlight; Importance of New Technology Makes Its Decisions Big News*, NAT’L L.J., Apr. 30, 2001, at B9.

⁷⁵ 28 U.S.C. § 1295(a)(1). Unlike other federal courts of appeals, the Federal Circuit has statutory authority to employ a small staff of technical advisors, *see id.* § 715(c)–(d), primarily to help the judges with complex questions that arise in patent cases, WHITE COMMISSION REPORT, *supra* note 8, at 72.

⁷⁶ 28 U.S.C. § 1295(a)(1). The Federal Circuit also decides patent issues under its other heads of jurisdiction. Specifically, the Federal Circuit decides patent issues in exercising its power under 28 U.S.C. § 1295(a)(4) to review decisions of the Board of Patent Appeals and Interferences (“Board”). The Board is an entity in the U.S. Patent and Trademark Office that reviews decisions by patent examiners adverse to patent applicants and that decides contests (known as “interferences”) between people who claim the same patent. 35 U.S.C. § 6(b) (2000); *see, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150 (1999) (reviewing a Federal Circuit decision on appeal from the Board). The Federal Circuit also decides patent issues in exercising its power under 28 U.S.C. § 1295(a)(6) to review certain decisions of the ITC. *See, e.g.*, *Hazani v. U.S. Int’l Trade Comm’n*, 126 F.3d 1473 (Fed. Cir. 1997) (reviewing an ITC decision involving a patentee claiming that an importer had violated trade laws by importing and selling goods that infringed the patent).

⁷⁷ 28 U.S.C. § 1295(a)(1).

⁷⁸ *Id.* § 1338(a). Section 1338 also gives the federal district courts original jurisdiction over cases arising under the Plant Variety Protection Act, which affords patent-like protection to novel varieties of sexually reproducing plants. *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 181 (1995). Section 1295(a)(1) of title 28, in turn, gives the Federal Circuit appellate jurisdiction over these cases.

⁷⁹ 28 U.S.C. § 41; WHITE COMMISSION REPORT, *supra* note 8, at 72. The federal district courts are not the only source of the patent cases heard by the Federal Circuit. *See supra* note 76.

⁸⁰ Jonathan Ringel, *Federal Circuit Brings Uniformity to Patent Law*, THE LEGAL INTELLIGENCER, Nov. 26, 2001, at S5. The caseload statistics published by the Administrative Office do not, as far as I can tell, specify the number of patent cases that the Federal Circuit hears. The Administrative Office only reports the number of cases that come to the Federal Circuit from

Besides possessing nationwide jurisdiction defined by subject matter, the Federal Circuit differs from the regional courts of appeals in one other important way: all of the cases in the Federal Circuit's jurisdiction arise under federal civil law. The Federal Circuit has no diversity jurisdiction or criminal jurisdiction.⁸¹

D. Summary of the FCIA's Achievement: Two New National Courts with Jurisdiction Defined Topically, Rather Than Geographically

The federal court system would be easier to understand if it were a simple pyramid of three components, with the geographically assigned district courts forming the base, surmounted by the regional courts of appeals, topped by the Supreme Court. Instead, the system includes the COFC and the Federal Circuit alongside the district courts and the regional courts of appeals.⁸² To complicate matters, the Federal Circuit draws its cases not just from the COFC but also from district courts and various federal agencies and officials. As you might guess, beneath this intriguing structure lies an intriguing history, to which we turn next.

II. History and Purposes of the FCIA

This part discusses the history and purposes of the FCIA. Section A describes the unsuccessful proposals for federal appellate reform that preceded and influenced the FCIA. Section B describes the genesis of the FCIA in the U.S. Department of Justice. Section C discusses the FCIA's voyage through the legislative process. Section D summarizes the purposes of the FCIA.

A. Before the FCIA's Conception

When the FCIA was enacted in 1982, it was the first major judicial reform of the federal appellate system since the Judges' Bill of 1925.⁸³ In the

each of the various courts, agencies, and administrative officials whose decisions are subject to review by the Federal Circuit. See REPORT OF THE DIRECTOR: 2001, *supra* note 19, at 115 tbl.B-8. At least three of these entities, namely, the district courts, the U.S. Patent and Trademark Office, and the ITC, decide patent issues as well as other issues. See *supra* note 76.

⁸¹ Although the Federal Circuit has no diversity jurisdiction, it can decide issues of state law that arise in cases properly within its jurisdiction. See, e.g., *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1349–50 (Fed. Cir. 1991) (holding that the Federal Circuit can review issues of state law and federal law if presented in claims properly joined to a patent claim and within the district court's subject-matter jurisdiction, including its pendent jurisdiction).

⁸² See ADMIN. OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 6 (1999), http://www.uscourts.gov/understand02/content_1_0.html (click map on screen) (last visited July 23, 2003) (graphic illustration of federal court system that includes the Federal Circuit and the COFC along with the district courts, regional circuit courts, and other courts and adjudicatory entities).

⁸³ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936; see, e.g., *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong. 6 (1979) [hereinafter *1979 Senate Hearing*] (statement of Hon. Frank M. Coffin, Judge, United States Court of Appeals for the First Circuit) (comparing bills that included the FCIA proposal to the Judiciary Act of 1789, Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826, and Judges' Bill of 1925); see also FELIX

intervening years, consensus developed that the federal appellate system needed reform. For a long time, however, no consensus emerged on what the reforms should be. Because of the lack of consensus, no major proposals for reform of the appellate system were adopted between 1925 and 1982.⁸⁴ The unsuccessful proposals did, however, lay the groundwork for the FCIA.

Recognition of the need for reform of the federal appellate system developed during the 1960s. Two problems with the system were identified. The first was a caseload crisis:⁸⁵ the number of appeals soared during the 1960s and 1970s.⁸⁶ Most close observers of the federal court system acknowledged existence of the caseload problem.⁸⁷ In contrast, there was less agree-

FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 255-98 (photo. reprint 1993) (1927) (discussing Judiciary Act of 1925); 13 WRIGHT & MILLER, *supra* note 29, § 3504, at 14-15 (citing the FCIA among the significant changes, but stating that, even with those changes, "the federal court structure is still in essentially the form it has had since the Judges' Bill in 1925").

⁸⁴ See HART & WECHSLER, *supra* note 32, at 40-41 (listing major legislative changes in the judicial system since 1958 and, including, as the only major appellate reform before the FCIA, the 1980 statute creating the United States Court of Appeals for the Eleventh Circuit, Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (2000))).

⁸⁵ See, e.g., U.S. DEP'T OF JUSTICE, *THE NEEDS OF THE FEDERAL COURTS: REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM I* (1977) ("[t]he federal courts . . . now face a crisis of overload"), reprinted in *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong. 521-43 (1977) [hereinafter *1977 House Hearing*]; HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 31 (1973) ("The [federal] courts of appeals are already in a state of crisis."); see also AM. BAR FOUND., *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS: REPORT OF RECOMMENDATIONS*, preface-1 (1968) [hereinafter *ACCOMMODATING THE WORKLOAD*] (reporting recommendations based on a study of "the burgeoning workload of the United States Courts of Appeals," which had "accelerated rapidly in the last decade"); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 543 (1969) (describing two purposes of article as to "examine the dimensions of the problem of congestion in the federal courts of appeals and [to] consider various means of dealing with it").

⁸⁶ See, e.g., *1977 House Hearing*, *supra* note 85, at 92 (testimony of Hon. Robert A. Ainsworth, Judge, United States Court of Appeals for the Fifth Circuit; Chairman, Judicial Conf. of U.S. Comm. on Court Admin.) (referring to "the tremendous explosion in litigation which has occurred in the past fifteen years," including in number of appeals filed in federal courts); REPORT OF COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE*, 62 F.R.D. 223, 227 (1973) [hereinafter *Hruska Commission, First Report*] (first report of what was popularly known, and is hereinafter referred to, as the "Hruska Commission," after its chairman, Sen. Roman L. Hruska; remarking that "[f]or more than a decade" federal courts of appeals "have experienced an increase in caseloads unprecedented in magnitude"); HRUSKA COMMISSION, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE*, 67 F.R.D. 195, 391 (1975) [hereinafter *Hruska Commission, Second Report*] (reporting statistics that reflected a 321% increase in appeals filed in the federal courts of appeals between 1960 and 1974).

⁸⁷ See, e.g., *1977 House Hearing*, *supra* note 85, at 94 (testimony of Hon. Robert A. Ainsworth, Jr., Judge, Fifth Circuit; Chairman, Judicial Conf. of U.S. Comm. on Court Admin.) (stating that "there isn't any question" that the courts of appeals were drastically overburdened and that "[a]ny fair person" who examined the statistics would agree); see also AM. BAR ASS'N, *STANDING COMM. ON FED. JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH I* (1989)

ment on the existence and extent of what many observers saw as a second problem: inconsistency in appellate decision making. Some thought this was a big problem, but others disagreed.⁸⁸ Significantly for this tale of the FCIA, many who thought that inconsistency was a problem also thought that it was a particularly acute problem in patent and tax cases.⁸⁹

As to proposed solutions, there was broad agreement about what would *not* work but little agreement on what *would* work. Court observers agreed that the creation of new judgeships was necessary but not sufficient to address the caseload crisis.⁹⁰ Moreover, people who worried about inconsistency in appellate decision making believed that more appellate judges would cause more inconsistency.⁹¹ Besides creating new judgeships, there were pro-

[hereinafter ABA, REEXAMINING STRUCTURE] (referring to the "dramatic expansion" in the courts of appeals' caseloads between 1892 and 1987); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 4-7 (1976) (documenting an increase in the number of appeals); FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) ("However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume.'"); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 7-9 (1974) (discussing the general rise in number of appeals in the state and federal systems); WHITE COMMISSION REPORT, *supra* note 8, at 14 (remarking that circuit judges have faced a "relentlessly increasing caseload since the beginning of the upswing in appeals in the 1960s").

⁸⁸ See, e.g., 1977 House Hearing, *supra* note 85, at 104 (testimony of Hon. Robert A. Ainsworth, Jr., Judge, Fifth Circuit; Chairman, Judicial Conf. of U.S. Comm. on Court Admin.) ("Whether we have all of the conflicts that need resolution in the circuits . . . is questionable."); HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 394-409 (reporting the conflicting views of the Supreme Court Justices on the need for a new appellate court to address inconsistent decisions of the regional courts of appeals); see also *Brown v. Atcon*, 439 U.S. 1014 (1978) (White and Blackmun, J.J., dissenting from denial of certiorari; opinions of Burger, C.J., and Brennan, J.) (discussing the need for a national court of appeals to resolve conflicts in federal law that were not resolved by the Supreme Court); Carrington, *supra* note 85, at 596-604 (discussing the intercircuit conflicts problem).

⁸⁹ See 1977 House Hearing, *supra* note 85, at 235 (testimony of A. Leo Levin, Exec. Director, Hruska Commission; Director, Fed. Judicial Ctr.) (stating that the Hruska Commission had considered the issue of specialized courts in the areas of patent and tax cases); FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, 57 F.R.D. 573, 585 (1972) [hereinafter FREUND COMMITTEE REPORT] (report by a group popularly known, and hereinafter referred to, as the "Freund Committee," after its Chairman, Paul Freund, Professor of Law, Harvard Law School; stating that, despite the risks and disadvantages of specialized appellate tribunals, a strong argument could be made for a specialized court to handle tax cases); FRIENDLY, *supra* note 85, at 153-71; HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 220, 234 (stating that the problem of inconsistent appellate decision making was "particularly acute in the field of patent law" and noting suggestions for creation of a specialized courts for tax appeals and patent appeals); see also Howard T. Markey, *The Phoenix Court*, 10 APLA Q.J. 227, 232-34 (1982) (listing some of the unsettled questions in patent law that had developed before the FCIA).

⁹⁰ See, e.g., 1977 House Hearing, *supra* note 85, at 86 (statement of Hon. Robert A. Ainsworth, Jr., Judge, Fifth Circuit; Chairman Judicial Conf. of U.S. Comm. on Court Admin.) ("I think most of us would agree that simply adding judges to our already overburdened courts is not a panacea."); see also, e.g., ACCOMMODATING THE WORKLOAD, *supra* note 85, at 2-8 (recommending an increase in circuit judgeships and other changes).

⁹¹ See, e.g., 1977 House Hearing, *supra* note 85, at 162 (testimony of Hon. Shirley Hufstедler, Judge, United States Court of Appeals for the Ninth Circuit) (stating that "keep[ing] the circuit law uniform" becomes "virtually an impossible task if you keep increasing the number of judges," and, if the existing circuits were divided, intercircuit conflicts increase); *id.* at 251 (testi-

posals to create specialized courts for matters such as tax and patent law⁹² and proposals to create a national court of appeals.⁹³

Proposals for specialized courts have long been controversial.⁹⁴ That controversy would dog the FCIA's heels during its legislative odyssey, thus warranting some description.⁹⁵ The most famous critic of specialized courts was Judge Simon Rifkind.⁹⁶ In a famous article published in 1951, Judge Rifkind criticized the idea of having specialized courts for patents.⁹⁷ In the process, he discussed the broader "[d]anger" of specialized courts.⁹⁸ He said that to decide cases wisely judges need to see legal issues in a broad con-

mony of then—Professor Robert H. Bork) (stating that increasing the number of federal judges "leads to conflicting decisions"); CARRINGTON ET AL., *supra* note 87, at 147–49 (1976) (describing the relationship between increasing number of appellate judges and maintaining uniformity).

⁹² 1977 *House Hearing*, *supra* note 85, at 215 (remarks of Rep. Wiggins) (noting that among the proposals for dealing with the appellate caseload crisis were proposals for a national court of appeals and for "spinoff legislation in specialized areas to provide for a separate appellate system with ultimate connection to the U.S. Supreme Court"); *see, e.g.*, Tom C. Clark, *A Commentary on Congestion in the Federal Courts*, 3 ST. MARY'S L.J. 407, 410 (1976) (proposing that all tax cases should be handled in the Court of Claims or the Tax Court and that all patent cases should be handled in the United States Court of Customs and Patent Appeals ("CCPA")); Clement F. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 604–07 (1974) (proposing a national court for review of criminal convictions); J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 34–35 (1968) (noting the existence of a group of proposals for specialized courts); *see also* WHITE COMMISSION REPORT, *supra* note 8, at 73 (noting that creation of a single court for all tax cases has been discussed "[f]or more than half a century"); Erwin Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

⁹³ THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 34–37 & n.15* (1994) (summarizing the prominent proposals for a national court of appeals and citing law review commentary on the issue); *see also, e.g.*, ACCOMMODATING THE WORKLOAD, *supra* note 85, at 7 (recommending creation of a "national circuit"); Carrington, *supra* note 85, at 612–17 (proposing a national court of appeals).

⁹⁴ *See, e.g.*, HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 234 (referring to the longstanding debate over specialized courts); *see also Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary, House of Representatives, 96th Cong. 765* (1980) [hereinafter *1980 House Hearing*] (statement of George W. Whitney, on behalf of the Am. Bar Ass'n ("ABA")) (stating that there was a "general consensus" among ABA members "that limiting jurisdiction on appeal in certain categories of cases to a single specialized court will inhibit rather than promote the orderly development of legal principles relating to those substantive areas"); 1977 *House Hearing*, *supra* note 85, at 235 (testimony of A. Leo Levin, Exec. Director, Hruska Commission; Director, Fed. Judicial Ctr.) ("As a general principle it worries me to have specialized judges and specialized courts."); ABA, REEXAMINING STRUCTURE, *supra* note 87, at 10–24, 44–46 (setting forth committee members' conflicting views on specialized appellate courts issue); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951).

⁹⁵ *See infra* notes 193–200, 204, 232–34, 266 and accompanying text (discussing how the "specialized courts" issue arose during legislative consideration of the FCIA).

⁹⁶ *See* HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 234 (describing Judge Rifkind's article on specialized courts as "oft-cited"). Judge Rifkind was a judge on the United States District Court for the Southern District of New York from 1941 to 1950. HAROLD CHASE ET AL., *BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY* 234 (1976).

⁹⁷ Rifkind, *supra* note 94, at 425.

⁹⁸ *See id.* at 425–26 (making criticisms that "are not especially related to the patent law"); *cf. id.* at 426 (devoting a separate section of an article to specific arguments against specialized patent courts).

text.⁹⁹ Furthermore, he said that every area of law, including patent law, needs to benefit from insights and improvements made in other areas.¹⁰⁰ Judges with specialized dockets were in danger of developing their area of law in ways that departed from policies pursued by the general law.¹⁰¹ They also could become isolated from society, whose faith in courts is necessary to courts' effectiveness.¹⁰² Judge Rifkind's opposition to specialized courts has been shared by many later commentators, including prominent ones such as Judge Richard Posner.¹⁰³

The idea of creating a national court of appeals probably got more attention than any other proposal for dealing with the crisis in appellate caseload during the 1960s and 1970s.¹⁰⁴ This new national appellate court would, in effect, be located between the regional courts of appeals and the Supreme Court in the judicial hierarchy.¹⁰⁵ It would resolve conflicts among the circuits that were not important enough for resolution by the Supreme Court.¹⁰⁶ It would thereby expand the appellate system's capacity for achieving uniformity in national law without adding to the Supreme Court's workload.¹⁰⁷

None of these proposals for appellate reform became law. They did, however, contribute to the eventual enactment of the FCIA in two ways. First, they sensitized the legal community, including federal lawmakers, to the need for appellate reform. Second, they provided experiences from which the architects of the FCIA drew important lessons.

⁹⁹ *Id.* at 425 (arguing that the judicial process requires "the unique capacity to see things in their context").

¹⁰⁰ *Id.* ("Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self-correcting forces of the law.")

¹⁰¹ *Id.* (contending that because the law changes to accord with "commonly accepted views of right and wrong" the law thereby "continues its hold on the respect and allegiance of the people"; a body of law segregated from the rest of the law could develop "internal policies . . . which are different from and sometimes at odds with the policies pursued by the general law" and thus will not be reflective of society's notions of right and wrong).

¹⁰² *Id.* (stating that society's acceptance of legal notions of right and wrong are "in the last analysis [law's] major sanction").

¹⁰³ See Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 775-89 (1983).

¹⁰⁴ See HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 236-47; FREUND COMMITTEE REPORT, *supra* note 89, at 590-95; ACCOMMODATING THE WORKLOAD, *supra* note 85, at 7. See generally Charles R. Haworth & Daniel J. Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REFORM 201, 203-08 (1979) (discussing proposals for a national court of appeals); AM. ENTER. INST., PROPOSALS FOR A NATIONAL COURT OF APPEALS (1977) (same).

¹⁰⁵ The two main proposals for a national court of appeals came from the Freund Committee and the Hruska Commission. See HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 236-47; FREUND COMMITTEE REPORT, *supra* note 89, at 590-95; see also BAKER, *supra* note 93, at 35-37 (summarizing the two proposals).

¹⁰⁶ See BAKER, *supra* note 93, at 35-37.

¹⁰⁷ See, e.g., 1977 House Hearing, *supra* note 85, at 141 (statement of Justin A. Stanley, on behalf of the ABA) (stating that the ABA favored a national court of appeals "to meet the needs of the general public and litigants in the Federal courts for greater stability and predictability of national law"); *id.* at 210-15 (testimony of A. Leo Levin, Exec. Director, Hruska Commission; Director, Fed. Judicial Ctr.) (posing and then answering in the negative the question: "[I]s there adequate appellate capacity for definition of the national law for the needs of this country today?").

B. *The FCIA's Conception in the United States Department of Justice's Office for Improvements in the Administration of Justice*

The birthplace of the FCIA was the Office for Improvements in the Administration of Justice ("OIAJ"), a component of the United States Department of Justice ("DOJ") created by Attorney General Griffin Bell in 1977.¹⁰⁸ The father of the FCIA was the Assistant Attorney General in charge of the OIAJ, Dean Daniel Meador. This section describes the genesis of the FCIA based primarily on Dean Meador's account.¹⁰⁹

Early on, the OIAJ made "assur[ing] access to effective justice for all citizens"¹¹⁰ one of its main goals. The OIAJ also determined that one step toward that goal was the development of "proposals for rationalizing and increasing the appellate capacity of the federal judiciary."¹¹¹ The OIAJ developed appellate proposals with the help of Charles R. Haworth, then a professor at the Washington University Law School in St. Louis.¹¹² By early 1978, OIAJ and Haworth had identified seventeen appellate proposals worthy of further investigation.¹¹³ One was "the feasibility and potential jurisdiction of specialized courts in the areas of the environment, science, and taxes."¹¹⁴

In assessing the feasibility of appellate reform in general, the OIAJ and Professor Haworth discerned several "imperatives" from the recent history of attempts at appellate reform.¹¹⁵ They determined that proposals for appellate reform were unlikely to be enacted if they (1) added a fourth layer of courts to the existing three-level system or otherwise denigrated the status of circuit court judges; (2) limited access to the Supreme Court; (3) substantially increased the size of the federal judiciary; (4) created specialized courts; or (5) generated jurisdictional uncertainty.¹¹⁶

¹⁰⁸ See 42 Fed. Reg. 8140 (Feb. 9, 1977) (publishing the final rule creating the OIAJ); Daniel J. Meador, *Role of the Justice Department in Maintaining an Effective Judiciary*, 462 ANNUALS AM. ACAD. POL. & SOC. SCI. 136 (1982).

¹⁰⁹ Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1991).

¹¹⁰ *Id.* at 584 (quoting OFFICE FOR IMPROVEMENTS IN THE ADMIN. OF JUSTICE, A TWO-YEAR PROGRAM FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE (1977), reprinted in 1977 House Hearing, *supra* note 85, at 389-90 [hereinafter OIAJ PROGRAM]).

¹¹¹ *Id.* (quoting OIAJ PROGRAM, *supra* note 110, at 391).

¹¹² *Id.* at 585.

¹¹³ *Id.* at 585-86.

¹¹⁴ *Id.* at 586 (quoting Letter from Charles R. Haworth, Professor, Washington University School of Law, to Daniel J. Meador, Assistant Attorney General, Office for Improvements in the Administration of Justice, United States Department of Justice (Jan. 11, 1978)).

¹¹⁵ See, e.g., 1979 Senate Hearing, *supra* note 83, at 34 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that the FCIA proposal avoided overspecialization and "also observes other imperatives of appellate court reform which have emerged from the debates and experiences of recent years").

¹¹⁶ Meador, *supra* note 109, at 587 (discussing imperatives of appellate-court reform); see also *Federal Courts Improvement Act of 1979: Addendum to Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary*, 96th Cong. 32 (1980) [hereinafter *Addendum to 1979 Senate Hearing*] (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (same); 1979 Senate Hearing, *supra* note 83, at 34 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (same); Haworth & Meador, *supra* note 104, at 227-31 (discussing how the FCIA proposal avoided overspecialization and "also

Further thought and study led the OIAJ and Professor Haworth to focus on the need to bring decisional coherence to appellate decision making in patent and tax cases.¹¹⁷ By May 1978, they had also devised a way to create an appellate court that could achieve this coherence and whose creation would meet the imperatives gleaned from prior, unsuccessful reform efforts.¹¹⁸ Their idea was to consolidate two existing courts that already had nationwide jurisdiction and that heard some patent and tax matters: the Court of Claims and the CCPA.¹¹⁹

The Court of Claims was, at the time, an Article III court that heard nontort claims for money against the federal government.¹²⁰ The Court of Claims' jurisdiction encompassed essentially the same types of claims against the government as are heard today by the COFC.¹²¹ Of particular importance to the history of the FCIA, the Court of Claims' jurisdiction included patent infringement and tax claims against the government.¹²² Unlike the COFC, however, the Court of Claims used commissioners to try most of its cases and to make recommended decisions.¹²³ The commissioners' recom-

observes other imperatives of appellate court reform that have emerged from the experiences of recent years").

¹¹⁷ Meador, *supra* note 109, at 588 ("From the beginning it was clear that the two areas in which there was the most pressing need for a higher degree of uniformity, because of the large number of intercircuit conflicts, were the patent and tax fields.").

¹¹⁸ *Id.* at 589.

¹¹⁹ *Id.* at 589-90.

¹²⁰ See 28 U.S.C. § 171 (1976) (establishing the Court of Claims and designating it an Article III court) (amended 1982 and 1992); 28 U.S.C. §§ 1491-1507 (1976 & Supp. V 1981) (prescribing the Court of Claims's jurisdiction) (amended 1982 and 1992). Although the text describes the Court of Claims as hearing cases not sounding in tort, the Court of Claims could in fact hear some tort claims. Specifically, the Court of Claims had appellate jurisdiction over final judgments from the district courts in actions brought under the FTCA if the parties consented to appeal the matter to the Court of Claims. See 28 U.S.C. § 1504 (1976) (repealed 1982). According to the legislative history of the FCIA, however, this jurisdictional provision was invoked in only one appeal, which was summarily dismissed because, as it turned out, the appellee had not consented to appeal to the Court of Claims. See S. REP. NO. 97-275, at 22 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 32. The FCIA deleted the provision as "moribund" when establishing the jurisdiction of the COFC. H.R. REP. 97-312, at 45 (1981).

¹²¹ See *Addendum to 1979 Senate Hearing*, *supra* note 116, at 32-33 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹²² 28 U.S.C. § 1491 (1976 & Supp. V 1981) (giving the Court of Claims "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, . . . in cases not sounding in tort") (amended 1982, 1992, and 1996); 28 U.S.C. § 1498(a) (1976) (authorizing actions by patent holders against the United States in the Court of Claims "[w]henever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same") (amended 1982, 1992, and 1996); see also *1979 Senate Hearing*, *supra* note 83, at 77-78, 84 (statement and testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (describing the Court of Claims's jurisdiction over tax and patent cases against the government).

¹²³ See 28 U.S.C. § 792 (1976 & Supp. V 1981) (authorizing the Court of Claims to appoint commissioners and fixing the commissioners' salary) (repealed 1982); 28 U.S.C. § 2503 (1976) (authorizing parties to appear before commissioners and giving commissioners specified duties and powers) (amended 1982 and 1992); Ct. CL. R. 14(a), 28 U.S.C. app. at 162 (Supp. V 1981) (providing that, with certain exceptions, "every case filed in the Court of Claims . . . shall initially be referred to a trial judge," meaning a commissioner) (repealed 1982); see also Ct. Cl. Gen.

mended decisions could not become final and binding until they were reviewed by the court's judges.¹²⁴ That review was generally conducted by panels of three of the court's seven authorized judges, functioning in an appellate capacity.¹²⁵ The panels' decisions, in turn, were subject to review by the Supreme Court on certiorari.¹²⁶

The CCPA was an Article III court that, as its name suggests, heard appeals related to the customs laws and the patent laws.¹²⁷ Appeals in customs cases came to the CCPA from the Court of International Trade (which was called the Customs Court until 1980)¹²⁸, the ITC, and the Secretary of Commerce.¹²⁹ Most appeals in patent cases came to the CCPA from entities within the U.S. Patent and Trademark Office.¹³⁰ These cases, however, did not include patent infringement actions between private persons. That is because private parties had to bring patent infringement actions in the federal district courts, whose decisions, before the FCIA was enacted, were appealed to the regional courts of appeals.¹³¹

Order No. 2 of 1973, 28 U.S.C. app. at 608 (1976) (stating that the commissioners would be referred to in court's rules as "[t]rial judge[s]").

¹²⁴ See 28 U.S.C. § 175(c) (1976) ("Cases and controversies shall be heard and determined by a court or division of not more than three judges . . .") (amended 1982).

¹²⁵ Ct. Cl. R. 8, 28 U.S.C. app. at 608 (1976) (providing that the judges of the court "shall function primarily in an appellate capacity") (repealed 1982); *1979 Senate Hearing, supra* note 83, at 83 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) ("At the present time we function very much the way one of the courts of appeals does."); see also 28 U.S.C. § 171 (1976) (establishing the Court of Claims and providing for seven judges, to be appointed by the President, with advice and consent of Senate) (amended 1982 and 1992); 28 U.S.C. § 175(b) (1976) (authorizing the Court of Claims to decide cases by "divisions" consisting of three judges) (amended 1982); Ct. Cl. R. 7(a), 28 U.S.C. app. at 608 (1976) (providing that the court would sit in panels of three) (repealed 1982).

¹²⁶ 28 U.S.C. § 1255 (1976) (providing for Supreme Court review of cases in the Court of Claims by writ of certiorari and by certification) (repealed 1982).

¹²⁷ See 28 U.S.C. § 211 (1976) (establishing the CCPA as an Article III court) (repealed 1982); 28 U.S.C. §§ 1541-1545 (1976 & Supp. V 1981) (prescribing the CCPA's jurisdiction) (repealed 1982).

¹²⁸ See Customs Court Act of 1980, Pub. L. No. 96-417, §§ 501-503, 94 Stat. 1727, 1742-43 (1980) (renaming the CCPA the United States Court of International Trade in multiple titles and sections of the U.S.C.).

¹²⁹ See 28 U.S.C. § 1541(a) (1976 & Supp. V 1981) (repealed 1982); 28 U.S.C. § 1543 (1976 & Supp. V 1981) (repealed 1982); 28 U.S.C. § 1544 (1976 & Supp. V 1981) (repealed 1982).

¹³⁰ 28 U.S.C. § 1542 (1976) (repealed 1982); see also 28 U.S.C. § 1545 (1976) (giving the CCPA appellate jurisdiction over appeals from decisions by entities within the Department of Agriculture under the Plant Variety Protection Act) (repealed 1982). Although most of the CCPA's patent cases came from the U.S. Patent and Trademark Office, patent issues could also come up in cases from the ITC. See *1979 Senate Hearing, supra* note 83, at 120 (testimony of Hon. Howard T. Markey, Chief Judge, CCPA) ("We do consider infringement . . . when we consider decisions of the International Trade Commission over whether a patent has been infringed or whether or not it is valid."); see also 28 U.S.C. § 1543 (Supp. V 1981) (giving the CCPA jurisdiction over certain decisions of the ITC) (repealed 1982).

¹³¹ 28 U.S.C. § 1338(a) (1976) (giving federal district courts original jurisdiction over "any civil action arising under any Act of Congress relating to patents . . .") (amended 1998); 28 U.S.C. §§ 1291-1292 (1976) (giving federal courts of appeals jurisdiction over appeals from final judgments and certain interlocutory orders of district courts) (amended 1982); 28 U.S.C. § 1294(1)-(4) (Supp. V 1981) (specifying regional circuits to which appeals would lie from district courts); see also James F. Davis, *Interview With Judge Giles S. Rich*, 9 FED. CIR. B.J. 55, 57,

As the OIAJ and Professor Haworth conceived it, a consolidated court, composed of the Court of Claims and the CCPA, would inherit the appellate jurisdiction of those two courts and would, in addition, have exclusive appellate jurisdiction over patent and tax cases from the nation's federal district courts.¹³² The Court of Claims and the CCPA drew their attention because the two courts already heard many patent and tax cases.¹³³ Moreover, the CCPA was an appellate court, and the Court of Claims functioned as an appellate court when its three-judge panels reviewed recommended decisions of the trial commissioners.¹³⁴ Although the appellate tax jurisdiction was eventually sheared off and made the subject of separate, unsuccessful legislation, the consolidated appellate court originally conceived by OIAJ and Professor Haworth otherwise survived in the FCIA as the Federal Circuit.¹³⁵

In addition to creating the Federal Circuit to carry out the appellate functions of the Court of Claims and the CCPA, the OIAJ and Haworth proposed creating a new court to inherit the trial functions of the Court of Claims.¹³⁶ The new trial court would be called the Claims Court.¹³⁷ The Court of Claims trial commissioners would initially staff the Claims Court.¹³⁸ Those commissioners, however, would be made judges and given the power to enter final judgments—not merely recommended decisions—and those

63–64 (1999) (comparing the types of patent matters presented to the CCPA with types of patent matters presented to the Federal Circuit). See generally William J. Graham, *The Court of Customs and Patent Appeals, Its History, Functions and Jurisdiction*, 1 FED. B. ASS'N J. 33, 35–37 (1932).

¹³² Meador, *supra* note 109, at 589. Haworth and OIAJ also proposed giving the new appellate court jurisdiction over some environmental law cases from the district courts. *Id.* at 589, 592. The idea behind this jurisdictional grant was to “minimiz[e] charges of specialization.” *Id.* at 589. At later stages, the proposal to create a new appellate court included provisions that would also give it jurisdiction over trademark cases and orders of the Civil Aeronautics Board. See *id.* at 602, 610. On the road to enactment, all of these jurisdictions were sheared off except for patent jurisdiction. See *id.* at 602, 610, 613. The committee, however, added one category of cases to the court's jurisdiction that survived enactment: the Federal Circuit was to have jurisdiction over appeals from decisions of the district courts in cases involving “nontax Little Tucker Act” claims. See *id.* at 612 (stating that this jurisdiction was added in committee); see also *infra* notes 235–43 and accompanying text (describing this jurisdiction).

¹³³ Meador, *supra* note 109, at 590; see also 1979 Senate Hearing, *supra* note 83, at 89 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (describing the types of patent matters handled by the Court of Claims and the CCPA); *id.* at 119–20 (testimony of Hon. Howard T. Markey, Chief Judge, CCPA) (describing the CCPA's jurisdiction as including patent and customs issues); *id.* at 634–38 (reproducing Remarks of Hon. Edward S. Smith, Associate Judge, Court of Claims, before the ABA, Section of Taxation (May 19, 1979)) (describing the number and types of tax cases heard by the Court of Claims).

¹³⁴ See Haworth & Meador, *supra* note 104, at 221 (“By statute the Court of Claims is a court of first instance, but in reality its functions resemble those of an appellate court.”); see also *supra* notes 120–26 and accompanying text (discussing the Court of Claims's trial and appellate functions).

¹³⁵ See Meador, *supra* note 109, at 589 (identifying the period between March and May 1978 as when “what later became the Federal Circuit had been conceived”); see also *id.* at 607, 610–11, 613 (discussing the eventual separation of the proposal to create national court for tax appeals from the proposal to create the Federal Circuit with jurisdiction over patent appeals).

¹³⁶ *Id.* at 592.

¹³⁷ *Id.* at 601.

¹³⁸ Addendum to 1979 Senate Hearing, *supra* note 116, at 35 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); Meador, *supra* note 109, at 592.

judgments would be subject to review by the new appellate court.¹³⁹ Other features of the proposed new trial court, including its organization and its status as an Article I or Article III court, were not resolved in the initial stages.¹⁴⁰

The merging of two courts to create the new appellate court was a brilliant way to make the proposal for a new appellate court politically feasible. For one thing, the merger idea enabled the proposal to be depicted as a streamlining approach that would cause there to be one less court (and one less set of court staff).¹⁴¹ As such, the merger idea promised concrete, but not radical, reform; it was not just change for the sake of change.¹⁴² Reinforcing the apparently moderate nature of the proposed reform, the proposal targeted particular areas of law, including patent law, in which there appeared to be a strong need for national uniformity.¹⁴³ More important, the merger idea enabled the proposed new appellate court to claim the benefits but not the supposed disadvantages of a specialized court. The jurisdiction of the new appellate court would be limited enough to allow its judges to develop expertise but large enough for the judges to view those areas in a broad context. Indisputably, the new court would be less specialized than either of its two predecessor courts.¹⁴⁴

In sum, the FCIA was conceived primarily as an appellate reform that was to be achieved by merging two existing courts that carried out appellate functions. The reform was not prompted by any deficiency in those courts. To the contrary, the Court of Claims and the CCPA were good candidates for the merger because they had “the requisite abilities to handle the subject matter” and were current in their dockets.¹⁴⁵ The new court produced by the

¹³⁹ Meador, *supra* note 109, at 592.

¹⁴⁰ *See id.* (reporting that in a July 1978 OIAJ memo describing the proposal “nothing was stated about how this trial-level jurisdiction was to be organized”); *id.* at 596 (July 1978 memo did not specify whether the new trial court would be an Article I or Article III court.).

¹⁴¹ *See 1979 Senate Hearing, supra* note 83, at 32 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that the FCIA proposal “would simplify judicial administration by reducing the number of decision-making entities at the appellate level”).

¹⁴² *Cf. id.* at 91 (statement of Sen. DeConcini) (asking a witness whether creation of new appellate court combining the appellate functions of the Court of Claims and the CCPA would be “just making change for change sake”).

¹⁴³ *See id.* at 57 (remarks of Sen. DeConcini) (describing the bills containing FCIA proposal as “moderate efforts to achieve topical courts, with jurisdiction to review on a national basis”).

¹⁴⁴ *See id.* at 26 (statement of Hon. Jon O. Newman, Judge, CCPA) (“The proposals concerning new appellate structures for patent and tax appeals strike me as a sensible accommodation of the usual preference for generalist judges and the selective benefit of expertise in highly specialized and technical areas.”). The inspiration to merge the Court of Claims and the CCPA became legislation thanks to much hard work. Dean Meador described exhaustive (and no doubt exhausting) efforts by OIAJ to gather comments on the merger proposal from officials in the executive and judicial branch before the proposal was launched in Congress. *See Meador, supra* note 109, at 590–605. Significantly, he described the pre-legislative process as a dialogue. OIAJ briefed many people on the merger proposal, listened to their comments, and revised the proposal in response to some of them. *Id.*

¹⁴⁵ Haworth & Meador, *supra* note 104, at 233; *see also id.* at 222 (stating that the docket of the Article III judges on the Court of Claims was current); *id.* at 223 (stating that the CCPA’s docket was current).

merger would be given appellate responsibility over *additional* patent and tax cases, which would come up on appeal from the federal district courts. Because the new appellate court would inherit only the appellate functions of the Court of Claims, a new trial court had to be created to assume the Court of Claims's existing trial functions. As it happened, the creation of this new trial court would achieve trial-level reform by replacing commissioners with judges possessing final-judgment authority.

C. Congressional Consideration of the FCIA Proposal

An overview of the FCIA's path through Congress makes the process sound less tortuous than it really was. President Jimmy Carter included the proposal that became the FCIA ("FCIA proposal") in a set of proposals for federal civil justice reform that he sent to the Ninety-Sixth Congress in February 1979.¹⁴⁶ In March 1979, Senator Edward Kennedy introduced in the Senate a pair of bills embodying the FCIA proposal.¹⁴⁷ The Senate held hearings on those bills in the spring and summer of 1979.¹⁴⁸ The first set of hearings in the House of Representatives on a bill embodying the FCIA proposal¹⁴⁹ occurred in April 1980.¹⁵⁰ The FCIA proposal was contained in bills that passed each House of the Ninety-Sixth Congress.¹⁵¹ The Senate and House even reached a compromise working out differences between the bills; "[h]owever, this [compromise] version when brought before the Senate was the subject of an attempt to add a controversial nongermane amendment and the bill was withdrawn without further action."¹⁵² The FCIA thus was not

¹⁴⁶ President's Message to Congress Transmitting Proposals for the Reform of the Federal Civil Justice System, 15 WEEKLY COMP. PRES. DOC. 342, 344-45 (Feb. 27, 1979) [hereinafter President's Message].

¹⁴⁷ The bills were Senate Bill 677 and Senate Bill 678. See S.677, 96th Cong. (1979); S.678, 96th Cong. (1979) The Carter administration backed Senate Bill 677 and Senator Kennedy backed Senate Bill 678. The two bills were virtually identical. The most important difference was that Senate Bill 678, unlike Senate Bill 677, would create a national Court of Tax Appeals. Senate Bill 677 contained no provision for centralized tax appeals. See Meador, *supra* note 109, at 607. After hearings on the bills, the Senate Judiciary Committee reported out a single bill, designated Senate Bill 1477, which embodied the OIAJ's proposal. See S.1477, 96th Cong. (1979); S. REP. NO. 96-304, at 2 (1979) ("S. 1477, is the product of the evolution of S. 677 and S. 678."); Meador, *supra* note 109, at 611-12.

¹⁴⁸ Addendum to 1979 Senate Hearing, *supra* note 116; 1979 Senate Hearing, *supra* note 83.

¹⁴⁹ The House Bill in the Ninety-sixth Congress that embodied the FCIA proposal was House Bill 3806. See H.R. 3806, 96th Cong. (1979); Meador, *supra* note 109, at 611.

¹⁵⁰ 1980 House Hearing, *supra* note 94.

¹⁵¹ See S. REP. NO. 97-275, at 2 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 12 (stating that Senate Bill 1477 passed the Senate by unanimous consent on October 30, 1979, and House Bill 3806, passed the House on suspension calendar by voice vote on September 15, 1980); 126 CONG. REC. 25,367 (1980) (Speaker pro tempore reporting that, on motion to suspend rules and pass House Bill 3806 "(two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed."); 125 CONG. REC. 30,102 (1979) (Presiding Officer reporting that passage of Senate Bill 1477 "is considered to have occurred").

¹⁵² S. REP. NO. 97-275, at 2 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 12; see also *Federal Courts Improvement Act of 1981-S. 21 and State Justice Institute Act of 1981-S. 537: Hearing Before the Subcomm. on Courts, Senate Judiciary Comm., 97th Cong. 2* (1981) [hereinafter *1981 Senate Hearing*] (statement of Sen. Dole) (Although the FCIA proposal "in some form passed both Houses of Congress last Congress, a final compromise measure was not acted upon due to the threat of extraneous amendments being added on the Senate floor."); *Court of Appeals for*

enacted in the Ninety-Sixth Congress. After another set of committee hearings occurred on bills introduced in the Ninety-Seventh Congress,¹⁵³ the FCIA was signed into law by President Reagan in April 1982.

As detailed below, from the beginning of its legislative journey the FCIA proposal was presented primarily as an appellate reform that had a dual aspect. On the one hand, the proposal was significant. It addressed a structural defect in the existing appellate system and expanded the system's capacity to achieve nationwide uniformity in areas of law where the need for such uniformity was strongest. On the other hand, the proposal was modest. It streamlined the system by merging two existing courts that already carried out appellate functions, including in some patent cases. In the process, the proposal would upgrade the trial system for claims against the government. In addition to presenting these two characterizations of the FCIA proposal, its supporters repeatedly emphasized that it would not create a specialized court. In sum, it was a moderate response to a structural problem in the existing appellate system.

1. *The President's Presentation of the FCIA Proposal to Congress*

When President Carter sent his judicial reform proposals to Congress in February 1979, his description of the FCIA proposal referred only to the creation of a new appellate court and its effects on the judicial system and beyond.¹⁵⁴ Consistent with later descriptions, he claimed these effects would be both modest and momentous.

President Carter said that the proposal would “[c]reate a new intermediate Federal appellate court on the same tier as the existing courts of appeals.”¹⁵⁵ He added that the new court “would be formed by merging the Court of Claims and the Court of Customs and Patent Appeals into a single appellate tribunal.”¹⁵⁶ This new tribunal's jurisdiction would be “expanded” from that of its predecessors to give the new court “nationwide jurisdiction for appeals in patent and trademark cases as well as other matters.”¹⁵⁷

the Federal Circuit—1981: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 97th Cong. 2 (1981) [hereinafter 1981 House Hearing] (statement of Rep. Kastenmeier) (to the same effect). Consideration of the Senate bill in the Ninety-sixth Congress was complicated by a floor amendment to the bill, called the “Bumpers Amendment.” The amendment did not relate to the FCIA proposal; rather, it concerned judicial review of administrative agency decisions. *See* 125 CONG. REC. 23,478–79 (1979) (reproducing unprinted amendment No. 535, sponsored by Sen. Bumpers); *see also id.* at 23,479–500, 23,504–05 (debate and Senate approval of the Bumpers Amendment); Meador, *supra* note 109, at 616.

¹⁵³ *1981 Senate Hearing, supra* note 152; *1981 House Hearing, supra* note 152. The bills that were initially introduced in the Ninety-seventh Congress and that embodied the FCIA proposal were Senate Bill 21 and House Bill 2405. After some technical changes in committee, Senate Bill 1700 replaced Senate Bill 21. *See* S. REP. NO. 97-275, at 2 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 12. After House Bill 2405 was marked up following the hearings, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice reported the bill out as House Bill 4482. *See* H.R. REP. NO. 97-312, at 29 (1981).

¹⁵⁴ President's Message, *supra* note 146, at 344–45.

¹⁵⁵ *Id.* at 344.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

(Trademark cases, however, would be eliminated from the new court's jurisdiction while the bill was in committee.)¹⁵⁸ President Carter told Congress that the creation of this new court would affect the existing appellate system in two ways. It "would induce economies from the combination of the two existing courts."¹⁵⁹ "Most important, however, it would expand the Federal judicial system's capacity for definitive adjudication of national law and thereby contribute to the uniformity and predictability of legal doctrine in these areas."¹⁶⁰

The latter effect, the President predicted, would have ramifications outside the judicial system. Because patent law had "long been marked by inconsistent appellate decisions," greater uniformity and predictability in patent law would "encourage industrial innovation."¹⁶¹ "Industrial innovation" and "competitiveness" were buzzwords of the late 1970s and early 1980s. During that time, the United States economy was in recession, unemployment was high, and the inflation rate reached nearly twenty percent.¹⁶² These problems were attributed to the country's lack of "competitiveness" in the global market, which was, in turn, traced to a national crisis in "industrial innovation,"¹⁶³ meaning "the development and commercialization of new products and processes."¹⁶⁴ President Carter thus linked judicial reform to economic well-being.

2. Congressional Hearings on the FCIA Proposal

a. A New Intermediate Appellate Court

In committee hearings, the supporters of a new intermediate appellate court made their case with orderliness and an abundance of evidence that any trial lawyer would envy. They proved that a problem existed; that their proposal would fix the problem where it was most acute; that the proposal would be easy to implement; and that criticism of the proposal was misplaced.

Dean Meador gave the most complete description of the problem in testimony to a Senate subcommittee in 1979. Dean Meador began by citing evidence of a "caseload explosion" in the federal courts of appeals.¹⁶⁵ He

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See 1980 House Hearing, *supra* note 94, at 1 (statement of Rep. Kastenmeier) (referring to "grim" economic conditions).

¹⁶³ See, e.g., 127 CONG. REC. 29,858 (1981) (remarks of Sen. Dole) (stating, on introduction of the 1981 legislation embodying the FCIA proposal, "[o]ur country is facing a lack of industrial innovation which has stifled our ability to continue to lead the world as industrial dreamers and doers").

¹⁶⁴ E.g., 1980 House Hearing, *supra* note 94, at 3 (testimony of Philip Klutznick, United States Secretary of Commerce) (quoting the definition of "industrial innovation" that President Carter had used in his message to Congress).

¹⁶⁵ 1979 Senate Hearing, *supra* note 83, at 72 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); see also 1980 House Hearing, *supra* note 94, at 376-77 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (discussing the increased caseload of the federal courts of appeals).

said that the explosion exposed a “basic weakness” in the appellate system.¹⁶⁶ The weakness consisted of an “inability of the present Federal appellate system to render within a reasonable time decisions that have precedential value nationwide.”¹⁶⁷ The regional courts of appeals lacked the ability to do so on their own because their decisions did not bind each other.¹⁶⁸ Contributing to the predicament, the Supreme Court reviewed less than one percent of their decisions, which was “an inadequate degree of review to assure supervision” of the regional courts of appeals.¹⁶⁹ The problem, Dean Meador summarized, was “structural.”¹⁷⁰

Dean Paul Carrington confirmed Dean Meador’s analysis. Dean Carrington testified that “instability and confusion in the law” are the inevitable results of a regional system of intermediate appellate courts that were not bound by each other’s decisions and whose decisions were only rarely reviewed by the Supreme Court.¹⁷¹ The instability and confusion, in turn, caused forum shopping and unnecessary litigation.¹⁷² Accordingly, Dean Carrington advocated a broad restructuring of the appellate system, as did some other witnesses.¹⁷³ Their position made the FCIA proposal seem modest by comparison.

¹⁶⁶ 1979 Senate Hearing, *supra* note 83, at 72 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); *see also* 1980 House Hearing, *supra* note 94, at 377 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (describing a “basic weakness” in the federal appellate system).

¹⁶⁷ 1979 Senate Hearing, *supra* note 83, at 72 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); *see also* 1980 House Hearing, *supra* note 94, at 377 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ).

¹⁶⁸ 1979 Senate Hearing, *supra* note 83, at 72 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); *see also* 1980 House Hearing, *supra* note 94, at 377 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (mentioning that the regional circuits were not bound by each other’s decision as accounting for their inability to achieve uniform interpretations of national law).

¹⁶⁹ 1980 House Hearing, *supra* note 94, at 377 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ); 1979 Senate Hearing, *supra* note 83, at 72 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹⁷⁰ 1979 Senate Hearing, *supra* note 83, at 31 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); *see also* 1980 House Hearing, *supra* note 94, at 377 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (describing the problem as “structural”).

¹⁷¹ 1979 Senate Hearing, *supra* note 83, at 93 (statement of Paul D. Carrington, Dean, Duke Univ. Law School); *see also id.* at 56 (testimony of former-Solicitor General Erwin Griswold) (“[O]ur appellate facilities are arranged on a geographical basis, and that inevitably leads to the divergence, uncertainty, what I call more chaos than we realize.”).

¹⁷² *Id.* at 93 (statement of Paul D. Carrington, Dean, Duke Univ. Law School); *see also id.* at 47 (statement of former-Solicitor General Erwin Griswold) (explaining that the disagreement in appellate decisions generated litigation because it prevented attorneys from giving definitive advice to their clients).

¹⁷³ *See, e.g.,* 1979 Senate Hearing, *supra* note 83, at 93 (statement of Paul D. Carrington, Dean, Duke Univ. Law School) (referring to his book, CARRINGTON ET AL, *supra* note 87, at 204–07, the relevant part of which was read into the record, in which he urged bold measures for relieving the caseload of the federal appellate courts); *see also* 1981 House Hearing, *supra* note 152, at 160 (statement of Steven C. Lambert & Clarence Kipps, Jr., on behalf of Bar Ass’n of the District of Columbia (“DC Bar”)) (“Giving the [Federal Circuit] exclusive appellate jurisdiction in patent appeals . . . would be an excellent way to determine whether, in time, other matters should be assigned to the Court.”); *id.* at 31 (statement of Daniel J. Meador, Assistant Attorney

In addition to identifying this broad, systemic problem, the FCIA's supporters proved that the problem was particularly acute in patent cases.¹⁷⁴ Witnesses testified that patent law varied in important ways from circuit to circuit.¹⁷⁵ These regional differences were only occasionally, and incompletely, resolved by the Supreme Court.¹⁷⁶ As a result, forum shopping was rampant.¹⁷⁷ Echoing President Carter's position, proponents of the FCIA ar-

General, OIAJ) (stating that the Federal Circuit would have "the capacity for expanded jurisdiction"); 1979 *Senate Hearing*, *supra* note 83, at 41 (testimony of A. Leo Levin, Director, Fed. Judicial Ctr., speaking on his own behalf) (stating his preference for a new national appellate court that "go[es] beyond the patent and tax fields"); *id.* at 57 (testimony of former-Solicitor General Erwin Griswold) (favoring a broader restructuring than the FCIA proposal called for, but supporting the proposal because "he would like to get the camel's nose in the tent").

¹⁷⁴ *E.g.*, *Addendum to 1979 Senate Hearing*, *supra* note 116, at 36-37 (statement of Daniel Meador, Assistant Attorney General, OIAJ) (describing the uncertainty and confusion in patent law); *id.* at 55-56 (statement of Donald R. Dunner, President, Am. Patent Law Ass'n) (same); 1979 *Senate Hearing*, *supra* note 83, at 33 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (discussing problems of inconsistency in patent appeals); *see also id.* at 20 (statement of A. Leo Levin, Director, Fed. Judicial Ctr, speaking on his own behalf) (discussing the "severity" of problems in patent and tax law); *id.* at 531-39 (Memorandum of Phillip Mayer) (describing the uncertainty and confusion in patent law).

¹⁷⁵ *E.g.*, 1981 *Senate Hearing*, *supra* note 152, at 251-69 (statement of Hon. Howard T. Markey, Chief Judge, CCPA); 1980 *House Hearing*, *supra* note 94, at 373-74 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (mentioning inconsistencies in judicial decisions on patent law); *id.* at 731-37 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (detailing inconsistencies in patent law); *Addendum to 1979 Senate Hearing*, *supra* note 116, at 49 (statement of Hon. Jack Miller, Judge, CCPA) (stating that there were "often" variations or conflicts in appellate patent decisions); *id.* at 61 (statement of Donald R. Dunner, President, Am. Patent Law Ass'n) ("there, indeed, is a conflict problem in the Federal courts in the area of patents"); *id.* at 63 (statement of Homer O. Blair) (stating that the validity of a patent varied from circuit to circuit); *id.* at 67 (statement of Harry F. Manbeck, General Patent Counsel, General Electric Co.) (describing a "firmly held conclusion among patent lawyers" that patent law differs from circuit to circuit); 1979 *Senate Hearing*, *supra* note 83, at 33 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (referring to differences among circuits on patent issues); *id.* at 113-14 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (stating that he could personally attest to "the problem" of "nonuniformity" in patent law and believed that "no one denie[d]" this problem); *see also id.* at 195-96 (statement of Hon. Henry Friendly, Judge, United States Court of Appeals for the Second Circuit ("Second Circuit") (retired)) (stressing "[t]he need for expertise in patent appeals").

¹⁷⁶ 1981 *House Hearing*, *supra* note 152, at 260 (reproducing Letter from James B. Gambrell, to Representative Kastenmeier (June 2, 1981)) ("It is no secret that the Supreme Court is unable to handle any significant number of patent related appeals due to the heavy case load in political and civil rights which is docketed each year."); 1980 *House Hearing*, *supra* note 94, at 375 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) ("The infrequency of Supreme Court review of patent cases leaves the present judicial system without any effective means of assuring even-handedness nationwide in the administration of the patent laws."); *Addendum to 1979 Senate Hearing*, *supra* note 116, at 37 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) ("The infrequency of Supreme Court review of patent cases leaves the present judicial system without any effective means of assuring evenhandedness nationwide in the administration of the patent laws."); *id.* at 49 (statement of Hon. Jack Miller, Judge, CCPA) ("In patent cases, for example, only a small fraction of the numerous petitions for certiorari from decisions of the circuit courts of appeals and the Court of Customs and Patent Appeals can be granted.").

¹⁷⁷ *See, e.g.*, 1981 *House Hearing*, *supra* note 152, at 12 (testimony of Hon. Howard T. Markey, Chief Judge, CCPA) (describing the patent law forum shopping problem as a "disease"); *id.* at 64-65 (testimony of Julius Jancin, President-Elect, Am. Patent Law Ass'n) (discuss-

gued that the inconsistency and uncertainty in patent law stifled industrial innovation.¹⁷⁸ As mentioned above, this extrajudicial effect struck a national nerve because of fear that the United States had lost its “competitiveness.”¹⁷⁹

Consistent with their earlier justifications for modification, the supporters of the FCIA proposal depicted the proposal as making a structural, though modest, change.¹⁸⁰ The proposed new Federal Circuit would occupy

ing the “critical problem” of nonuniformity in patent law among federal courts and the associated problem of forum shopping); *1980 House Hearing, supra* note 94, at 389–90 (testimony of Maurice Rosenberg, Assistant Attorney General, OIAJ) (describing the forum shopping problem); *Addendum to 1979 Senate Hearing, supra* note 116, at 55 (statement of Donald R. Dunner, President, Am. Patent Law Ass’n) (stating that the problems in patent law reported by Hruska Commission, including forum shopping, were “still very much with us”); *1979 Senate Hearing, supra* note 83, at 20 (statement of A. Leo Levin, Director, Fed. Judicial Ctr., speaking on his own behalf) (referring to “widely confirmed” forum shopping problem in patent cases).

¹⁷⁸ *1981 House Hearing, supra* note 152, at 192 (statement of Pauline Newman, Director of Patents and Licensing, FMC Corp., on behalf of Ad Hoc Group of Indust. Supporting A Nat’l Court of Patent Appeals) (discussing the relationship between uncertainty in patent law and industrial innovation); *1980 House Hearing, supra* note 94, at 93–94 (testimony of Donald R. Dunner, President, Am. Patent Law Ass’n) (singling out the creation of a court for patent appeals as particularly important to the health of patent system and industrial innovation); *id.* at 372, 376 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (to the same effect); *id.* at 923 (reproducing Letter from James D. D’Ianni, President, American Chemical Society, to Representative Kastenmeier (June 2, 1980)) (stating that the patent system’s incentive to innovate was “significantly weakened” because of differing views on patent laws among federal courts); *Addendum to 1979 Senate Hearing, supra* note 116, at 49 (statement of Hon. Jack Miller, Judge, CCPA) (stating that uncertainty in patent law “is not conducive to innovation”); *id.* at 56–57 (statement of Donald R. Dunner, President, Am. Patent Law Ass’n) (citing uncertainty in patent law as one factor leading to industry cutbacks on research and development); *id.* at 67–68 (statement of Harry F. Manbeck, General Patent Counsel, General Electric Co.) (stating that patents are “a stimulus to the innovative process” and that it is important to people who make decisions about investing in innovation that “unnecessary uncertainties in the patent system” be decreased); *id.* at 71–72 (statement of Richard C. Witte, on behalf of Indus. Research Inst.) (to the same effect).

¹⁷⁹ *See, e.g., 1981 House Hearing, supra* note 152, at 50 (statement of Julius Jancin, President-Elect, Am. Patent Law Ass’n) (“We are experiencing a crisis in the United States with respect to industrial innovation because of the decline of our nation’s technological superiority to the point of prejudice to domestic industries that are unable to compete.”); *id.* at 341 (reproducing President Carter’s Industrial Innovation Initiatives, one of which was creation of single court to hear appeals in patent cases); *1980 House Hearing, supra* note 94, at 2–3 (testimony of Philip Klutznick, United States Secretary of Commerce) (stating the administration’s goal “to encourage development of American products of such quality and price that they are competitive both abroad and at home” and describing existing economic problems of the country); *see also* S. REP. NO. 97-275, at 36 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 45 (reproducing Letter from Donald R. Dunner to Representative Kastenmeier (Sept. 24, 1981)) (stating that long-standing problem of patent reliability, to which the FCIA proposal responded, became “a matter of greater concern with the innovation crisis”); Pauline Newman, *The Federal Circuit: Judicial Stability or Judicial Activism?*, 42 AM. U. L. REV. 683, 684 (1993) (stating that an “ultimately controlling reason” for creation of the Federal Circuit was “[t]he forceful concern of the nation’s technological leadership about the effect on industrial innovation of judge-made patent law”).

¹⁸⁰ *See, e.g., 1980 House Hearing, supra* note 94, at 391 (testimony of Maurice Rosenberg, Assistant Attorney General, OIAJ) (stating that the proposed consolidation would “make only a modest change in the Federal appellate court structure”); *Addendum to 1979 Senate Hearing, supra* note 116, at 39 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (describing the FCIA proposal as a “modest change in Federal appellate court structure”); *1979 Senate Hearing, supra* note 83, at 19 (statement of A. Leo Levin, Director, Fed. Judicial Ctr.,

the same tier as the existing circuit courts of appeals.¹⁸¹ Unlike those courts, however, the Federal Circuit would have a jurisdiction defined by subject matter rather than geography.¹⁸² It would review cases involving specified subject matter regardless of where in the country those cases arose, and its decisions would have “nationwide precedential effect.”¹⁸³ Although its decisions would be subject to review by the Supreme Court, former-Solicitor General Erwin Griswold predicted that “the Supreme Court would rarely exercise its discretion to review these decisions, since there would be no conflicts, and most of the questions decided . . . would not be worthy of Supreme Court review.”¹⁸⁴

Supporters emphasized that the creation of the new appellate court by merging two existing courts was easy and efficient.¹⁸⁵ The judges on the Court of Claims and the CCPA would become judges on the new Federal Circuit.¹⁸⁶ Both the CCPA and the Court of Claims were courts with nationwide appellate jurisdiction, as the new court would be. Each already handled patent matters and therefore had developed some expertise.¹⁸⁷ More generally, both courts had carried out their appellate functions well¹⁸⁸ and were

speaking on his own behalf) (describing the FCIA proposal as a “revision of the structure of the Federal intermediate appellate court system”); *id.* at 57 (remarks of Sen. DeConcini) (describing the legislation as “moderate”); *cf.* 1980 House Hearing, *supra* note 94, at 760 (testimony of Benjamin Zelenko, Chairman, ABA, Special Comm. on Coordination of Fed. Judicial Improvements) (stating that, although creation of the Federal Circuit “is said by its proponents to make only a modest change in the Federal court appellate structure,” some entities in the ABA “expressed a concern that what may appear today as a modest rearrangement of the jurisdiction of two existing tribunals may in the future become a specialized appellate court with expanding national jurisdiction”).

¹⁸¹ See 1979 Senate Hearing, *supra* note 83, at 31 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹⁸² See *id.* at 48 (statement of former-Solicitor General Erwin Griswold).

¹⁸³ *Id.* at 32 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹⁸⁴ *Id.* at 48 (statement of former-Solicitor General Erwin Griswold).

¹⁸⁵ See, e.g., 1980 House Hearing, *supra* note 94, at 385–88 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (discussing “[l]ogistical [f]easibility” of the merger idea).

¹⁸⁶ See *id.* at 369–71 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (explaining that the new courts would be staffed with members of the existing courts and the existing commissioners).

¹⁸⁷ *Id.* at 396 (testimony of Maurice Rosenberg, Assistant Attorney General, OIAJ) (discussing the CCPA’s and the Court of Claims’s existing patent jurisdiction); 1979 Senate Hearing, *supra* note 83, at 89 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (“I therefore suggest that when we come to consider the relative expertise of the [CCPA], and the Court of Claims with respect to patent jurisdiction that the Court of Claims now exercise, expertise lies particularly with our court rather than with the [CCPA].”); *id.* at 114 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (contrasting the CCPA’s expertise in patent matters to that of the regional circuit courts).

¹⁸⁸ 1979 Senate Hearing, *supra* note 83, at 32 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that the Court of Claims and the CCPA “have done a good job with the cases that have been assigned to them”); see also 1981 House Hearing, *supra* note 152, at 159 (statement of Steven C. Lambert & Clarence T. Kipps, Jr., on behalf of the DC Bar) (describing the Court of Claims and the CCPA as “highly regarded national courts”); 1979 Senate Hearing, *supra* note 83, at 78, 83–84 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (discussing Court of Claims’s successful handling of tax cases and emphasizing the Court of Claims’ long history and Congress’s expansion of its jurisdiction).

current in their dockets.¹⁸⁹ The courts were already housed in the same building and shared a library.¹⁹⁰ Merging the two courts thus would “reduce some overlapping functions and would provide for more efficient court administration.”¹⁹¹ Significantly, the active judges on the two existing courts did not oppose the measure.¹⁹²

More important, the combined court would have broad jurisdiction and would therefore avoid concerns about specialized courts.¹⁹³ Indeed, witnesses made clear that the main reason for proposing the merger was “to avoid over-specialization.”¹⁹⁴ This made the merger idea superior to chan-

¹⁸⁹ *1979 Senate Hearing, supra* note 83, at 34 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (“The dockets of both existing courts are current.”); *id.* at 112–13 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (expressing pride in “the accomplishments and efficiency of our court” and emphasizing that the court’s docket was current).

¹⁹⁰ *Id.* at 34 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹⁹¹ *Id.* at 32 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ).

¹⁹² *See 1980 House Hearing, supra* note 94, at 708 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (“The active judges of our court since the inception of this proposal have favored, in principle, the combination of the two courts . . . as long as the judges of the new court have enough to keep them busy.”); *1979 Senate Hearing, supra* note 83 at 76 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (stating that the Court of Claims judges did not oppose legislation to create the Federal Circuit and “fully support[ed] the objectives of these proposals to improve the functioning and effectiveness of the Federal appellate system by eliminating the uncertainties that now exist in certain areas of the law because of conflicting decisions or views among the different circuits”). *But cf. 1981 House Hearing, supra* note 152, at 273–74 (reproducing Letter from Byron Skelton, Senior Judge, Court of Claims, to Representative Kastenmeier (Mar. 17, 1981)) (opposing the merger of the Court of Claims and the CCPA and stating that patent cases should be sent to the CCPA instead of to a new appellate court). Chief Judge Howard Markey, then Chief Judge of the CCPA, submitted a prepared statement at the 1979 Senate hearing in which, although he refused to take a position on the FCIA proposal, he suggested a simpler alternative: giving the CCPA exclusive jurisdiction over patent cases. *See 1979 Senate Hearing, supra* note 83, at 113–14. In the 1981 hearings, however, Chief Judge Markey supported consolidation of the CCPA and the Court of Claims and indicated that the other members of his court did too. *See 1981 Senate Hearing, supra* note 152, at 246–50; *1981 House Hearing, supra* note 152, at 3–15. Judge Markey took a position in the later hearings but not the earlier one, he explained, because in the meantime the Judicial Conference had endorsed the consolidation proposal. *1981 Senate Hearing, supra* note 152, at 245–46; *1981 House Hearing, supra* note 152, at 3.

¹⁹³ *See 1981 House Hearing, supra* note 152, at 9 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (“Neither of the courts to be consolidated is as specialized as some have been led to believe.”); *1979 Senate Hearing, supra* note 83, at 84 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (“[W]e have a very broad jurisdiction.”).

¹⁹⁴ *1979 Senate Hearing, supra* note 83, at 33 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); *see also 1981 Senate Hearing, supra* note 152, at 202 (testimony of Donald R. Dunner, immediate past President, Am. Patent Law Ass’n) (stating that the anticipated “tunnel vision objection” was “principally” the reason that the Federal Circuit was to be given jurisdiction over matters other than patent cases); *1980 House Hearing, supra* note 94, at 93 (testimony of Donald R. Dunner, President, Am. Patent Law Ass’n) (stating that the FCIA proposal to create a new court of appeals by merging the CCPA and the Court of Claims was “absolutely ingenious” because it obviated concerns about “the tunnel vision problem” of a special court of patent appeals); *id.* at 378 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ) (emphasizing that the proposed new appellate court “should not be mistaken as a ‘specialized court’” because it would inherit the jurisdiction of two existing courts); *id.* at 611 (statement of Jordan J. Baruch, Assistant Secretary of Commerce, Office of Productivity, Technology, and Innovation) (stating that the new court for patent appeals was given “other matters,” besides patents, “so as to prevent an over-specialized or clientele-captive court”); *id.* at 629

neling all patent appeals to the CCPA, an alternative that was mentioned by several other witnesses, including Chief Judge Markey and Judge Friendly.¹⁹⁵ Probably not coincidentally, neither Judge Markey nor Judge Friendly opposed specialized courts.¹⁹⁶

(statement of Harry F. Manbeck on behalf of Comm. for Econ. Dev.) (supporting a proposal to give the Federal Circuit “added jurisdiction over matters besides patent appeals” because this would “keep the court from being over-specialized while at the same time adding to the attractiveness of the court for able lawyers”); *id.* at 754 (testimony of Hon. Howard T. Markey, Chief Judge, CCPA) (“[T]he key to [the FCIA proposal’s] success thus far has been the idea [that] by merging the . . . jurisdiction of th[e] two courts, there is created a court which is less specialized than what most people have feared.”); *Addendum to 1979 Senate Hearing, supra* note 116, at 37–38, 46 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (discussing the breadth of the proposed Federal Circuit’s jurisdiction to dispel notion that it would be specialized; stating that channeling patent cases to the CCPA would not achieve the major purpose of proposal because it would not “create a new kind of appellate forum capable of exercising nationwide jurisdiction in a variety of appeals”); *id.* at 57, 62 (statement of Donald R. Dunner, President, Am. Patent Law Ass’n) (“Perhaps the single most significant advantage of both S.677 and 678 is that it significantly disarms this objection [to specialized courts] by providing the judges on the new Court of Appeals for the Federal Circuit with a fairly broad jurisdictional base”; stating that channeling patent appeals to the CCPA “may not be politically feasible,” in contrast to combining the CCPA and the Court of Claims into a new court, which, among other advantages, “would deal directly with the tunnel vision argument” against specialized courts); *1979 Senate Hearing supra*, note 83, at 91 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (arguing that consolidation of the Court of Claims and the CCPA would obviate the negative perception that each was somewhat specialized); *id.* at 478 (Letter from Charles Gholz, on behalf of Association of Former CCPA Law Clerks & Technical Advisors, to Senator DeConcini (May 9, 1979)) (“We are aware that the reason advanced in support of this proposal [to combine the CCPA and the Court of Claims into a single court] is it would tend to insure that the members of the court would hear appeals in a fairly wide range of cases, thus defusing the argument that members of a specialist court become insular.”).

¹⁹⁵ See *Addendum to 1979 Senate Hearing, supra* note 116, at 50 (statement of Hon. Jack Miller, Judge, CCPA) (“The proposal to centralize appeals in patent cases in one appellate court having nationwide jurisdiction can also be achieved by a far simpler and, if anything, more efficient means than by combining the Court of Claims and the [CCPA]. All that would need to be done would be to grant the CCPA, a nationwide appellate court, jurisdiction over appeals from Federal district courts and from the proposed new Claims Court in cases involving patent infringement and patent validity questions.”); *1979 Senate Hearing, supra* note 83, at 113 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (“If the sole purpose of the proposal is to remove nonuniformity and forum shopping from patent law, the obvious, simplest, and most economical means would be the transfer . . . of appeals in patent cases to the Court of Customs and Patent Appeals.”); *id.* at 211 (testimony of Hon. Henry J. Friendly, Judge, Second Circuit (retired)) (stating that the “simple and ideal way to accomplish” the goal of uniformity in patent law was to “broaden the jurisdiction of the Court of Customs and Patent Appeals to give it exclusive jurisdiction over suits and appeals for patent infringement and declaratory judgment now heard in the courts of appeals and, to a minor degree, in the Court of Claims, whose [trial] jurisdiction in patent suits against the Government would be transferred to the district courts”); *id.* at 478 (Letter from Charles Gholz on behalf of Ass’n of Former CCPA Law Clerks & Tech. Advisors, to Sen. DeConcini (May 9, 1979)) (proposing, in lieu of the FCIA proposal, that Congress “add[] jurisdiction over appeals in trademark cases and cases arising under the patent laws to the present jurisdiction of the CCPA”); see also HRUSKA COMMISSION, SECOND REPORT, *supra* note 86, at 235 (mentioning the option of sending all patent appeals to the CCPA).

¹⁹⁶ See *1979 Senate Hearing, supra* note 83, at 113 (statement of Hon. Howard T. Markey, Chief Judge, CCPA) (“I consider some of those arguments [against specialized courts] spurious, others outdated, and the remainder irrelevant”); *id.* at 197–98 (statement of Hon. Henry J. Friendly, Judge, Second Circuit (retired)) (“I applaud so much of [the proposed bill] as would bring all patent appeals before the Court of Appeals for the Federal Circuit, although I regret

As the supporters of the FCIA proposal anticipated, the charge of overspecialization was one of the most, if not the most, important objection to the proposal.¹⁹⁷ The perceived dangers of overspecialization, as one witness summarized them, were “isolation, bias, and susceptibility to special interest pressure.”¹⁹⁸ In addition, critics doubted whether the existing regional circuits really had a problem achieving prompt and uniform resolution of patent-law issues.¹⁹⁹ In any event, they argued that it was healthy for appellate

the dilution of its technical skills by the breadth of jurisdiction conferred.”); HENRY J. FRIENDLY, *supra* note 85, 153–71 (1973) (supporting specialized courts for patent cases and tax cases).

¹⁹⁷ See, e.g., 1981 *House Hearing*, *supra* note 152, at 253 (reproducing Letter from Honorable Walter J. Cummings, Judge, United States Court of Appeals for the Seventh Circuit, to Representative Kastenmeier (Mar. 9, 1981)) (opposing creation of the Federal Circuit and describing it as a “special court” for patent appeals); *id.* at 271 (reproducing Letter from Granger Cook, Jr., to Representative Kastenmeier (May 11, 1981)) (objecting to House Bill 2405 because patent appeals should not be decided by “technical specialists”); *id.* at 453, 460–61 (statement of Sidney Neuman in Position Paper of Bar Ass’n of the Seventh Federal Circuit on House Bill 2405) (stating “[a]s a general proposition” that “specialized courts are not a desirable solution to the problems” addressed by the bill and discussing drawbacks of such courts); 1981 *Senate Hearing*, *supra* note 152, at 76–77 (statement of Albert E. Jenner on behalf of Comm. to Preserve the Patent Jurisdiction of the Courts of Appeals) (discussing concerns about specialized courts); 1980 *House Hearing*, *supra* note 94, at 765 (statement of George Whitney on behalf of the ABA) (describing the proposed Federal Circuit as a “specialized court” and stating consensus of the ABA to be that “limiting jurisdiction on appeal in certain categories of cases to a single specialized court will inhibit rather than promote the orderly development of legal principles relating to those substantive areas”); *id.* at 927 (reproducing Letter from Joseph M. Fitzpatrick, Chairman, Association of Bar of City of New York, to Representative Kastenmeier (Apr. 29, 1980)) (“A single specialized patent appellate court is a step that will ultimately take the patent system out of the mainstream of jurisprudence.”); 1979 *Senate Hearing*, *supra* note 83, at 271 (statement of Comm. on Fed. Courts of Ass’n of Bar of City of N.Y.) (criticizing the proposed Federal Circuit as “a court of permanent specialists”); see also S. REP. NO. 97-275, at 39 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 48 (additional views of Sen. Leahy) (supporting the FCIA proposal but stating that patent law uniquely demanded uniformity in judicial decision making and that bill creating Federal Circuit therefore should not be seen as precedent for creation of “additional specialty courts”); *id.* at 40–41 (additional views of Sen. Baucus) (opposing the FCIA proposal partly out of concern that it “will lead to a proliferation of Federal specialty courts”).

¹⁹⁸ 1979 *Senate Hearing*, *supra* note 83, at 271 (statement of Comm. on Fed. Courts of the Ass’n of the Bar of the City of New York (“NY Bar”)); see also, e.g., 1981 *House Hearing*, *supra* note 152, at 148 (testimony of Sidney Neuman, Vice-Chairman, Comm. to Preserve the Patent Jurisdiction of the U.S. Courts of Appeals) (stating that the Federal Circuit “has the potential for being captured by special interests”).

¹⁹⁹ E.g., 1981 *House Hearing*, *supra* note 152, at 79 (statement of James W. Geriak on behalf of the ABA) (calling arguments about forum shopping “seriously exaggerated”); 1981 *Senate Hearing*, *supra* note 152, at 97 (statement of Sidney Neuman, Vice-Chairman, Comm. to Preserve the Patent Jurisdiction of the U.S. Courts of Appeals) (“There is no serious or substantial lack of uniformity in the patent decisions of the regional courts of appeals.”) (internal capitalization omitted); 1980 *House Hearing*, *supra* note 94, at 181 (testimony of Professor John Stedman) (stating his belief that the lack of uniformity was not as serious a problem in patent law as some FCIA supporters contended); *id.* at 917 (reproducing Letter from Sidney Neuman, Chairman, Ad Hoc Committee of Bar Association of the Seventh Circuit concerning proposed patent legislation, to Representative Kastenmeier (June 3, 1980)) (contending that “there is no substantive basis” for “the premise that there is at present a lack of uniformity in the patent decisions of the regional courts of appeals”); *Addendum to 1979 Senate Hearing*, *supra* note 116, at 78 (testimony of George Whitney, First Vice-President, Am. Patent Law Ass’n; Chairman, ABA, Comm. on Patent Litig., speaking on his own behalf) (stating that conflicts in patent law

courts to arrive at divergent views on some legal issues before the issues were resolved by the Supreme Court; such “percolation” of legal issues tended to ensure that all relevant considerations and perspectives were aired, and therefore could inform the Court’s ultimate resolution of those issues.²⁰⁰

None of this criticism prevented favorable committee action on any of the bills that embodied the FCIA proposal.²⁰¹ Perhaps this was partly because much of the opposition to the proposal crystallized late in the legislative process.²⁰² In addition to being too late, there was too little. The charge of overspecialization had little traction thanks to the merger idea, and the testimony arguing that there were no major problems of incoherence or inconsistency in patent law decisions was dwarfed by evidence to the contrary.²⁰³ Finally, the abstract virtue of allowing legal issues to percolate through the circuits before their resolution by the Supreme Court was outweighed by the dollars and cents at stake in the prompt and definitive resolution of patent law issues.²⁰⁴

were not a real problem, so much as variances in applying law to facts of particular cases); *id.* at 91 (statement of John Tramontine on behalf of the N.Y. Patent Law Ass’n) (expressing doubt that circuit conflicts on patent law were a problem); 1979 *Senate Hearing, supra* note 83, at 664 (reproducing Position Paper of Bar Association of the Seventh Circuit on Senate Bill 677 and Senate Bill 678) (“The alleged lack of uniformity in the patent decisions of the regional courts is a myth.”).

²⁰⁰ 1981 *House Hearing, supra* note 152, at 85 (statement of James Geriak on behalf of the ABA) (criticizing attempt to “create a court which will engender rigid and monolithic uniformity in the law of patents.”); 1980 *House Hearing, supra* note 94, at 782 (testimony of George Whitney on behalf of the ABA) (stating that review of patent cases by regional circuits provided an opportunity “to have growth and development of the law through these interchanges of ideas”); *id.* at 926 (reproducing Letter from Joseph M. Fitzpatrick, Chairman, New York Bar, Committee on Patents, to Representative Kastenmeier (Apr. 29, 1980)) (proposed legislation would eliminate “[t]he geographical checks and balances” on patent law provided by regional federal courts); *Addendum to 1979 Senate Hearing, supra* note 116, at 76 (statement of George Whitney, First Vice-President, Am. Patent Law Ass’n; Chairman, ABA, Comm. on Patent Litig., speaking on his own behalf) (reporting results of a poll of patent litigators, according to which opposition to consolidation of patent appeals was based, in part, on supposed virtues of allowing “diversity of views” generated by allowing appeals in regional circuits); *id.* at 89 (statement of James Wetzel on behalf of Patent Law Ass’n of Chicago) (describing the benefits of allowing divergent views among regional circuits); 1979 *Senate Report, supra* note 83, at 443 (Letter from the New York Bar to Senator DeConcini (May 3, 1979)) (“The geographical checks and balances that for two hundred years have been contributed to our patent system by appellate courts spread across the United States and staffed by generalist judges reflecting the wisdom of their regions will be lost.”); *see also* 1980 *House Hearing, supra* note 94, at 453 (statement of Paul M. Gomory, Director and Advisor, Ass’n for the Advancement of Invention & Innovation) (stating that many patent litigators believed that need for predictability in judicial patent decisions, which would be achieved by creating single intermediate appellate court for patent appeals, was counterbalanced by belief that some of the existing regional courts of appeals understood patent law well); *cf., e.g., Addendum to 1979 Senate Hearing, supra* note 116, at 57 (statement of Donald R. Dunner, President, Am. Patent Law Ass’n) (responding to the “percolation” argument).

²⁰¹ *See Meador, supra* note 109, at 611–12, 616–17.

²⁰² *See 1981 Senate Hearing, supra* note 152, at 2 (statement of Sen. Dole) (remarking that opposition to the FCIA proposal “crystallized” after favorable action in each House of the Ninety-sixth Congress).

²⁰³ *See supra* notes 174–79 and accompanying text.

²⁰⁴ *Cf. Addendum to 1979 Senate Hearing, supra* note 116, at 58 (statement of Donald R. Dunner on his own behalf) (stating that “to the extent that ‘percolation’ . . . is sacrificed by the

b. A New Trial Court

At the congressional hearings, the proposal to create a new trial court—to be called the Claims Court—got less attention than did the proposal to create a new appellate court. Indeed, many witnesses—most of whom were concerned solely with the FCIA’s impact on patent law—referred to the FCIA proposal only as creating a new court of appeals.²⁰⁵ Dean Meador himself described the proposal for a new appellate court as “[b]y far . . . the most important feature.”²⁰⁶ Similarly, Dean Meador’s successor at the OIAJ, Maurice Rosenberg, said that the creation of a new intermediate appellate court was “[t]he essence of the proposal.”²⁰⁷

There are several apparent reasons why the proposed Claims Court got less attention than the proposed Federal Circuit. One reason is that the creation of the new trial court was incidental to the creation of the new appellate court. The new appellate court would assume the Court of Claims’s appellate functions, but the Court of Claims’s trial functions also had to be provided for. As Chief Judge Daniel Friedman, of the Court of Claims, explained:

To deal with the problem resulting from the fact that the Court of Claims now performs both a trial and an appellate function, both bills would create a new court to be called the U.S. Claims Court.

proposed court, this is a small price to pay for the significant advantages to be gained from its adoption”).

²⁰⁵ See, e.g., *1981 Senate Hearing, supra* note 152, at 205 (statement of Donald R. Dunner on behalf of the Am. Patent Law Ass’n) (stating that of various legislative measures under consideration, “formation of a federal court with exclusive appellate patent jurisdiction” was one that had “special importance”); *id.* at 223 (testimony of Richard C. Witte on behalf of the Indust. Research Inst.) (“I am here today to support the single court of patent appeals . . .”); *id.* at 375 (“Statement of National Small Business Ass’n . . . In Support of a Single Federal Court of Appeals”); *1981 House Hearing, supra* note 152, at 254 (reproducing Letter from Donald R. Dunner to Representative Kastenmeier (Apr. 28, 1981)) (describing House Bill 2405 as “dealing with the establishment of the Court of Appeals for the Federal Circuit”); *id.* at 257 (reproducing Letter from A. Leo Levin, Director of the Fed. Judicial Ctr., to Rep. Kastenmeier (Apr. 29, 1981)) (describing House Bill 2405 as “a bill to create a Court of Appeals for the Federal Circuit”); *1980 House Hearing, supra* note 94, at 3 (testimony of Philip Klutznick, United States Secretary of Commerce) (describing House Bill 3806 as “legislation to establish a court of appeals for the Federal Circuit to hear such things as patent-related Federal cases”); *id.* at 764 (statement of George W. Whitney on behalf of the ABA) (describing the bills as “proposed legislation to create a new United States Court of Appeals for the Federal Circuit”); *Addendum to 1979 Senate Hearing, supra* note 116, at 49 (statement of Hon. Jack Miller, Judge, CCPA) (commending the committee for its “clear interest in making some overdue structural improvements in the Federal appellate courts.”); *1979 Senate Hearing, supra* note 83, at 19–20, 26 (statement of A. Leo Levin, Director, Fed. Judicial Ctr., speaking on his own behalf) (describing proposal as entailing “revision of the structure of the Federal intermediate appellate court system”; using “Appellate revision” as the title for a description of the FCIA proposal; referring to “[t]he proposals concerning new appellate structures for patent and tax appeals”); *id.* at 30 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that the FCIA proposal “relates to the Federal appellate courts and their processes”).

²⁰⁶ *Addendum to 1979 Senate Hearing, supra* note 116, at 43–44 (testimony of Daniel J. Meador, Assistant Attorney General, OIAJ).

²⁰⁷ *1980 House Hearing, supra* note 94, at 369 (statement of Maurice Rosenberg, Assistant Attorney General, OIAJ).

This new court would assume the functions that the trial division of the Court of Claims now performs in trying cases. This provision would provide an appropriate arrangement for handling the trial functions of the Court of Claims when that court becomes exclusively an appellate tribunal.²⁰⁸

Another possible reason that the proposal to create the COFC got less attention than the proposal to create the Federal Circuit was the difference in their constituencies. Both proposals had the support of judges, scholars, and lawyers. The Federal Circuit proposal, however, also had the support of businesspeople, and those businesspeople tied the need for the Federal Circuit to the crisis in industrial innovation, a problem that was receiving national attention.²⁰⁹ Finally, the creation of the Federal Circuit was more controversial than that of the Claims Court, mostly because of the "specialized courts" issue.²¹⁰

In any event, when the proposed new trial court was discussed at the hearings, discussion focused on the benefit of replacing commissioners—who could make only recommended decisions—with judges, who could make final decisions.²¹¹ Witnesses identified several problems with the existing commissioner arrangement. First, it caused costly duplication of effort. Every case had to be considered by both a commissioner and the Court of Claims before a final judgment was entered.²¹² Second, and related, the system discouraged settlement of cases at the initial stage because of the inability of the commissioners to enter a judgment.²¹³ Third, the trial commissioners' knowledge that all of their decisions would be reviewed tended to cause them to write unnecessarily long opinions, which caused delay.²¹⁴ Furthermore, the delay could be for naught, as the decision of the commissioner who tried a

²⁰⁸ 1979 Senate Hearing, *supra* note 83, at 79 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

²⁰⁹ See, e.g., 127 CONG. REC. 27,792–94 (1981) (remarks of Rep. Railsback) (emphasizing business support for centralizing patent appeals and listing dozens of business organizations that had expressed support).

²¹⁰ See *supra* notes 94–103, 116, 144, 193–200 and accompanying text.

²¹¹ See, e.g., 1981 House Hearing, *supra* note 152, at 162 (statement of Steven C. Lambert & Clarence T. Kipps, Jr., on behalf of the DC Bar) (referring to commissioner system as "antiquated"); 1981 Senate Hearing, *supra* note 152, at 240 (statement of Clarence T. Kipps, Jr., on behalf of the DC Bar) (same); 1980 House Hearing, *supra* note 94, at 721–22 (testimony of Hon. Daniel M. Friedman, Chief Judge, Court of Claims); 1979 Senate Hearing, *supra* note 83, at 79 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

²¹² See, e.g., 1981 House Hearing, *supra* note 152, at 21 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims); *Addendum to 1979 Senate Hearing*, *supra* note 116, at 33, 45 (statement of Daniel J. Meador, Assistant Attorney General, OIAJ); 1979 Senate Hearing, *supra* note 83, at 79 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

²¹³ 1981 House Hearing, *supra* note 152, at 22 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims); 1979 Senate Hearing, *supra* note 83, at 79 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

²¹⁴ 1981 House Hearing, *supra* note 152, at 22–23 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims); 1979 Senate Hearing, *supra* note 83, at 80 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

case, and was therefore intimately familiar with it, could be set aside by judges who were less familiar with the case.²¹⁵

As far as I can tell, no one at the hearings opposed the creation of the Claims Court. One group supported the concept of its creation but feared that the separation of the Court of Claims's trial and appellate functions would increase the cost and formality of appeals.²¹⁶ In addition, several witnesses believed that the members of the new Claims Court should be made Article III judges rather than Article I judges.²¹⁷

3. *Congressional Committee Reports on the FCIA Proposal*

The FCIA proposal was the subject of four committee reports: two in the Ninety-Sixth Congress²¹⁸ and two in the Ninety-Seventh Congress.²¹⁹ The reports endorsed the main points that had been made by supporters of the FCIA proposal during committee hearings.

a. *Creation of the Federal Circuit*

The Senate reports agreed with the supporters of the FCIA proposal that there were "basic weaknesses . . . in the judicial structure."²²⁰ Echoing the supporters, the reports described one such weakness as a lack of appellate "capacity" to "provide reasonably quick and definitive answers to legal questions of nationwide significance."²²¹ The reports explained that the regional courts of appeals lacked this capacity because their decisions did not bind each other.²²² The Supreme Court could not fill the void because it was already operating at or near "full capacity."²²³

The Senate reports also concurred with the FCIA's supporters about the way to address this lack of appellate capacity. The reports determined that "the capacity of the federal appellate courts to provide a nationwide answer to legal questions could be expanded through the establishment of new

²¹⁵ 1979 Senate Hearing, *supra* note 83, at 510 (reproducing Letter from Angelo A. Iadarola to Senator DeConcini (June 13, 1979)).

²¹⁶ Addendum to 1979 Senate Hearing, *supra* note 116, at 82-83 (statement of Thomas Morton Gittings, Chairman, DC Bar, Court of Claims Comm.) (expressing fear that "separation of the appellate functions of the present Court of Claims from the trial functions will result in a more formalized and more expensive appellate procedure"; but favoring "the basic concept and proposed jurisdiction of the new Claims Court").

²¹⁷ See, e.g., 1981 Senate Hearing, *supra* note 152, at 234 (testimony of Clarence T. Kipps, Jr., on behalf of the DC Bar) (reporting bar association's recommendation that the new Claims Court be an Article III court); 1980 House Hearing, *supra* note 94, at 761 (testimony of Benjamin Zelenko on behalf of the ABA) (reporting that the ABA section of Public Contracts Law favored creation of a Claims Court with Article III status); Addendum to 1979 Senate Hearing, *supra* note 116, at 83 (statement of Thomas Morton Gittings, Chairman, DC Bar, Court of Claims Comm.) (reporting that his committee had studied restructuring Court of Claims and recommended that it be given Article III status).

²¹⁸ S. REP. NO. 96-304 (1979); H.R. REP. NO. 96-1300 (1980).

²¹⁹ S. REP. NO. 97-275 (1981), reprinted in 1982 U.S.C.C.A.N. 11; H.R. REP. NO. 97-312 (1981).

²²⁰ S. REP. NO. 97-275, at 3, reprinted in 1982 U.S.C.C.A.N. at 13; S. REP. NO. 96-304, at 9.

²²¹ S. REP. NO. 97-275, at 3, reprinted in 1982 U.S.C.C.A.N. at 13; S. REP. NO. 96-304, at 9.

²²² S. REP. NO. 97-275, at 3, reprinted in 1982 U.S.C.C.A.N. at 13; S. REP. NO. 96-304, at 9.

²²³ S. REP. NO. 97-275, at 3, reprinted in 1982 U.S.C.C.A.N. at 13; S. REP. NO. 96-304, at 9.

courts of appeals whose jurisdiction is defined on a topical rather than a geographical basis."²²⁴ These courts would hear appeals "in areas of the law where Congress determines that there is special need for national uniformity."²²⁵ Their decisions would "have precedential effect throughout the country."²²⁶

Both the House and Senate reports found that there was a special need for national uniformity in patent law.²²⁷ The reports also described the evidence supporting that finding.²²⁸ In particular, the reports credited testimony that inconsistency in patent law led to forum shopping and uncertainty, which, in turn, stifled industrial innovation.²²⁹ Indeed, the House reports credited the view of many witnesses that the creation of a national court for patent appeals was "one of the most far-reaching reforms that could be made to strengthen the United States patent system in such a way as to foster technological growth and industrial innovation."²³⁰ The House reports went so far as to say that "the central purpose" of the legislation was "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law."²³¹

The committee reports vindicated the supporters' rationale for merging the CCPA and the Court of Claims to create an appellate court for patent appeals. The Senate reports noted the suggestions that all patent appeals should simply be given to the CCPA,²³² but the committees rejected that alternative "as being inconsistent with the imperative of avoiding undue spe-

224 S. REP. NO. 97-275, at 3-4, *reprinted in* 1982 U.S.C.C.A.N. at 13-14; S. REP. NO. 96-304, at 9-10; *see also* H.R. REP. NO. 97-312, at 27 (1981) ("[T]he proposed court will increase the capacity of the federal judicial system for definitive adjudication of patent and other issues falling within its jurisdiction."); H.R. REP. NO. 96-1300, at 24 (1980) (same).

225 S. REP. NO. 97-275, at 4, *reprinted in* 1982 U.S.C.C.A.N. at 14; S. REP. NO. 96-304, at 10; *cf.* H.R. REP. NO. 97-312, at 20-23 (discussing need for increased uniformity in patent law and predicting that Federal Circuit would produce "a uniform body of patent law"); H.R. REP. NO. 96-1300, at 18-21 (same).

226 S. REP. NO. 97-275, at 7, *reprinted in* 1982 U.S.C.C.A.N. at 17; S. REP. NO. 96-304, at 14; *see also* H.R. REP. NO. 97-312, at 20 (stating that the Federal Circuit "will provide nationwide uniformity in patent law"); H.R. REP. NO. 96-1300, at 18 (same).

227 S. REP. NO. 97-275, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 15 (discussing evidence that there was a special need for uniformity in patent law); H.R. REP. NO. 97-312, at 20-23 (devoting a separate section to discussing "The Need for Increased Uniformity in Patent Law"); H.R. REP. NO. 96-1300, at 18-21 (same); S. REP. NO. 96-304, at 12 (discussing evidence that there was a special need for uniformity in patent law).

228 S. REP. NO. 97-275, at 5 & nn.7-8, *reprinted in* 1982 U.S.C.C.A.N. at 15; H.R. REP. NO. 97-312, at 20-23; H.R. REP. NO. 96-1300, at 18-21; S. REP. NO. 96-304, at 11-12 & nn.17-18.

229 S. REP. NO. 97-275, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 15; H.R. REP. NO. 97-312, at 21-22; H.R. REP. NO. 96-1300, at 19-20; S. REP. NO. 96-304, at 12.

230 H.R. REP. NO. 97-312, at 20; H.R. REP. NO. 96-1300, at 18; *see also* H.R. REP. NO. 97-312, at 28 (stating that one focus of the subcommittee's hearings during the last three Congresses was "the role of this country's patent system . . . in promoting industrial innovation"); 1980 *House Hearing, supra* note 94, at 1 (statement of Rep. Kastenmeier) (stating that the purpose of the hearing was "to explore the relation between industrial innovation and the need to reform our patent laws").

231 H.R. REP. NO. 97-312, at 23; H.R. REP. NO. 96-1300, at 20.

232 S. REP. NO. 97-275, at 6, *reprinted in* 1982 U.S.C.C.A.N. at 16; S. REP. NO. 96-304, at 12.

cialization within the Federal judicial system.”²³³ Similarly, the House reports remarked:

By combining the jurisdiction of the two existing courts along with certain limited grants of new jurisdiction, the bill creates a new intermediate appellate court markedly less specialized than either of its predecessors and provides the judges of the new court with a breadth of jurisdiction that rivals in its variety that of the regional courts of appeals.²³⁴

Although the committee reports focused on the need for uniformity in patent law, they also mentioned that the Federal Circuit would hear “all federal contract appeals in which the United States is a defendant.”²³⁵ This reference to “federal contract appeals” reflected that, before the FCIA was enacted, some appeals in cases involving contract claims against the government went to the regional circuits. Those were cases involving claims of \$10,000 or less brought in federal district court under the Little Tucker Act.²³⁶ Under a provision added to the FCIA proposal in committee, the FCIA would channel appeals in all nontax Little Tucker Act cases—including those cases involving contract claims against the government—to the Federal Circuit.²³⁷ This ensured that the Federal Circuit, unlike the Court of Claims, would hear all Tucker Act appeals. As the committee reports reflected, the FCIA thus centralized not only appeals in patent cases but also appeals in nontax Little Tucker Act cases—including “federal contract appeals”—in the Federal Circuit.²³⁸

The Supreme Court cited the reports’ reference to this aspect of the FCIA when concluding, in *United States v. Hohri*,²³⁹ that the FCIA was intended to promote uniformity in “[n]ontort claims against the Federal Government.”²⁴⁰ Indeed, the Court in *Hohri* found that those claims constituted “one of the principal areas in which Congress sought” to achieve uniformity.²⁴¹ Even so, I have found no evidence in the committee hearings suggesting that there was disuniformity in appeals of Little Tucker Act cases.²⁴²

²³³ S. REP. NO. 97-275, at 6, *reprinted in* 1982 U.S.C.C.A.N. at 16; S. REP. NO. 96-304, at 13 (1979).

²³⁴ H.R. REP. NO. 97-312, at 19; H.R. REP. NO. 96-1300, at 17.

²³⁵ H.R. REP. NO. 97-312, at 18; H.R. REP. NO. 96-1300, at 16; *see also* S. REP. NO. 97-275, at 7, *reprinted in* 1982 U.S.C.C.A.N. at 17 (observing that the Federal Circuit would hear not only all patent appeals but also all “appeals in federal contract cases”); S. REP. NO. 96-304, at 13 (same).

²³⁶ *See* 28 U.S.C. § 1346(a)(2) (Supp. V 1981) (quoted in relevant part, *supra* note 44) (amended 1982 and 1992); *id.* § 1294 (2000).

²³⁷ Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 127(a), 96 Stat. 25, 37 (codified as amended at 28 U.S.C. § 1295(a)(2) (2000)).

²³⁸ *See United States v. Hohri*, 482 U.S. 64, 72–73 & n.4 (1987) (observing that the committee report’s reference to “contract appeals” was incomplete, because claims under the Little Tucker Act are not limited to contract claims).

²³⁹ *Id.* at 64.

²⁴⁰ *Id.* at 72.

²⁴¹ *Id.*

²⁴² *Cf.* S. REP. NO. 97-275, at 5 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 15 (stating that the Court of Claims and the CCPA “have performed well with the cases that have been assigned to them through the years”); S. REP. NO. 96-304, at 11 (1979) (same).

Perhaps Congress inferred that disuniformity existed based on evidence that, as a general matter, the regional circuits had trouble achieving uniformity. In any event, the focus of the committee hearings and reports was uniformity in patent, not Little Tucker Act, appeals.²⁴³

Like the FCIA's supporters, the committee reports summarized the legislation as making "only a modest change in the federal appellate court structure."²⁴⁴ Highlighting the modest nature of the change, the House reports emphasized that the Federal Circuit responded to a need for uniformity in only certain areas of law, such as patent law.²⁴⁵ Similarly, the Senate reports emphasized that the Federal Circuit would get jurisdiction only over "cases where there is a felt need for uniformity in the national law."²⁴⁶ The Senate reports added that future expansion of the Federal Circuit's jurisdiction would require careful consideration and additional legislation.²⁴⁷

b. *Creation of the Claims Court*

Like the records of the committee hearings, the committee reports did not give as much space to the creation of the Claims Court (today's COFC) as they did to the creation of the Federal Circuit. This reflected, as the House reports stated, that "[t]he essence of the propos[ed]" legislation "is the provision for a new intermediate appellate court."²⁴⁸ Even so, the House report on the 1981 bill containing the FCIA proposal said that the creation of the new trial court and the creation of the new appellate court were "equally important."²⁴⁹ Furthermore, all of the reports said that one purpose of the legislation was to "provide an upgraded and better organized trial forum for government claims cases."²⁵⁰

This purpose would be achieved, the reports explained, primarily by giving trial responsibilities to judges who could enter final judgments.²⁵¹ The reports observed that, under the existing system, the trial function of the Court of Claims was "exercised largely by the commissioners of that

²⁴³ Cf. WHITE COMMISSION REPORT, *supra* note 8, at 72 (describing patent cases as a "major category" of cases that go from federal district courts to Federal Circuit).

²⁴⁴ S. Rep. No. 97-275, at 7, *reprinted in* 1982 U.S.C.C.A.N. at 17; H.R. Rep. No. 97-312, at 27 (1981); H.R. Rep. No. 96-1300, at 23 (1980); S. Rep. No. 96-304, at 14.

²⁴⁵ H.R. REP. NO. 97-312, at 20-23, 27; H.R. REP. NO. 96-1300, at 18-21, 24.

²⁴⁶ S. REP. NO. 96-304, at 14; *see also* S. REP. NO. 97-275, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 12 ("creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity").

²⁴⁷ S. REP. NO. 97-275, at 4, *reprinted in* 1982 U.S.C.C.A.N. at 14 (stating that "any additional subject matter for the . . . Federal Circuit will require not only serious future evaluation, but new legislation"); S. REP. NO. 96-304, at 10 (same); *see also* H.R. REP. NO. 97-312, at 41 (addressing "[f]ears" that that Federal Circuit would "appropriate for itself large elements of Federal law" under its grant of jurisdiction to hear district court cases in which jurisdiction was based in whole or in part on 28 U.S.C. § 1338).

²⁴⁸ H.R. REP. NO. 97-312, at 18; H.R. REP. NO. 96-1300, at 16.

²⁴⁹ H.R. REP. NO. 97-312, at 24.

²⁵⁰ S. REP. NO. 97-275, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 12; H.R. REP. NO. 97-312, at 17; H.R. REP. NO. 96-1300, at 15; S. REP. NO. 96-304, at 8.

²⁵¹ S. REP. NO. 97-275, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 18; H.R. REP. NO. 97-312, at 25-26; H.R. REP. NO. 96-1300, at 22-23; S. REP. NO. 96-304, at 14-15.

court.”²⁵² The reports identified three benefits of giving that function, instead, to Article I judges who could enter final judgments. First, this would better “assur[e] the independence of the trial function,” compared to the use of commissioners who “serve[d] at the pleasure of the judges reviewing their decisions.”²⁵³ Second, the judges’ ability to render final judgments would “reduce delay in individual cases.”²⁵⁴ Third, and more broadly, the judges’ final-judgment power would “produce greater efficiencies in the handling of the court’s docket by eliminating some of the overlapping work.”²⁵⁵

In addition to discussing the benefits of the new trial court, the committee reports discussed its remedial powers, a subject that does not appear to have been addressed in the hearings. Some of the bills embodying the FCIA would empower the new trial court to grant declaratory and equitable relief on a government contract claim “brought before the contract is awarded.”²⁵⁶ These provisions, which concerned what are called “bid protest” cases, were ultimately enacted.²⁵⁷ An alternative provision—which was apparently first added by Senator Dole to the Senate bill embodying the FCIA proposal while the bill was in committee—would have given the new trial court much broader equitable power.²⁵⁸ Senator Dole’s provision would have empowered the Claims Court to grant declaratory and equitable relief in *all* “controversies within its jurisdiction.”²⁵⁹ This provision did not survive enactment,²⁶⁰ apparently because of opposition from the DOJ.²⁶¹

²⁵² S. REP. NO. 97-275, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 18; S. REP. NO. 96-304, at 14; *see* H.R. REP. NO. 97-312, at 24 (“In practice, the trial function of the Court [of Claims] is discharged by commissioners appointed by the Court.”); H.R. REP. NO. 96-1300, at 22 (same).

²⁵³ H.R. REP. NO. 97-312, at 25; H.R. REP. NO. 96-1300, at 22; *see* S. REP. NO. 97-275, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 18 (noting that “[p]resently, the commissioners of the Court of Claims are appointed by the article III judges of that court” and that the judges of the new Claims Court, who were to be appointed by the President, would be “truly independent”); S. REP. NO. 96-304, at 15 (same).

²⁵⁴ S. REP. NO. 97-275, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 18; H.R. REP. NO. 97-312, at 26; H.R. REP. NO. 96-1300, at 23; S. REP. NO. 96-304, at 15.

²⁵⁵ S. REP. NO. 97-275, at 8, *reprinted in* 1982 U.S.C.C.A.N. at 18; H.R. REP. NO. 97-312, at 26; H.R. REP. NO. 96-1300, at 23; S. REP. NO. 96-304, at 15.

²⁵⁶ S. 1700, 97th Cong. § 133, 127 CONG. REC. 29,849 (1981); H.R. 4482, 97th Cong. § 126(d), H.R. REP. NO. 97-312, at 9 (1981).

²⁵⁷ 28 U.S.C. 1491(a)(3) (1994), *amended by* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874–75 (codified as amended at 28 U.S.C. § 1491(b) (2000)). *See generally* Frederick W. Claybrook, *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions—Learning Lessons All Over Again*, 29 PUB. CONT. L.J. 1 (1999).

²⁵⁸ 125 CONG. REC. 23,477 (1979) (remarks of Sen. Dole).

²⁵⁹ S. 1477, 96th Cong. § 341(a), 125 CONG. REC. 23,463, 23,471 (1979); *see also* S. REP. NO. 96-304, at 38 (explaining that “this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the Government”). Senator Dole’s provision also appeared in the Senate bill introduced in the Ninety-seventh Congress. *See* S. 1700, 97th Cong. § 133(a), 127 CONG. REC. 23,089 (1981).

²⁶⁰ *See* 127 CONG. REC. 29,849 (1981) (reproducing committee amendments to 1981 Senate version of the FCIA bill, among which were amendments that deleted Senator Dole’s provision giving broad equitable power to the Claims Court, and replaced it with more limited power to grant declaratory and injunctive relief in bid protest cases); *id.* at 29,863 (recording Senate approval of committee amendments).

²⁶¹ 1981 House Hearing, *supra* note 152, at 212–13 (reproducing Letter from Michael W.

4. Congressional Debate on The FCIA Proposal

As mentioned above, bills embodying the FCIA proposal were introduced in both the Ninety-Sixth and Ninety-Seventh Congresses.²⁶² In each Congress, the debate was minimal and echoed the themes that had sounded during the hearings and in the committee reports.

Supporters described the proposal primarily as an appellate reform.²⁶³ More particularly, they claimed that it would improve the predictability of, and reduce appellate forum shopping in, patent law cases.²⁶⁴ Returning to the larger concern, they then predicted that this appellate reform would encourage industrial innovation.²⁶⁵ They anticipated the scant opposition that the bills would encounter in Congress²⁶⁶ by emphasizing that the new appel-

Dolan, United States Department of Justice, Office of Legislative Affairs, to Representative Peter Rodino (Apr. 29, 1981)) (objecting to portion of House Bill 2405 that gave broad equitable power to the Claims Court); *see also* 125 CONG. REC. 23,463, 23,471 (1979) (reproducing committee amendment to Senate Bill 1477 that would amend 28 U.S.C. § 1491(a)(2) to give the Claims Court broad equitable power).

²⁶² *See supra* notes 147, 153.

²⁶³ *See, e.g.*, 127 CONG. REC. 27,792 (1981) (remarks of Rep. Railsback) (describing House Bill 4482 as “the bill to help improve our patent system by . . . [creating] a single appellate court with expanded jurisdiction”); *id.* at 29,861 (remarks of Sen. Thurmond) (supporting Senate Bill 1700 because it would create a new appellate court); 126 CONG. REC. 25,364 (1980) (remarks of Sen. Kastenmeier) (identifying two “very important reasons” for House Bill 3806, both of which related to the new appellate court); *id.* at 25,366 (remarks of Rep. McClory) (emphasizing two features of House Bill 3806: its achievement of court reform by merging two courts to handle patent appeals and the effect of this reform on “industrial innovation”); *id.* (remarks of Rep. Rodino) (“The essence of the proposal is the creation of a new intermediate appellate court”); 125 CONG. REC. 23,461–62 (1979) (remarks of Sen. Kennedy) (including the creation of new appellate court, but not the creation of new trial court, among the “key features” of Senate Bill 1477); *id.* at 23,462 (remarks of Sen. DeConcini) (stating that Senate Bill 1477 “represents a tremendous step forward in assisting our Federal appellate forums perform their duties,” but not mentioning creation of a new trial court). *But cf.* 127 CONG. REC. 29,887 (1981) (remarks of Sen. Grassley) (praising Senate Bill 1700 because it would “enhance clarity and reliability in the law, reduce specialization in the courts, and the expense and delay of forum shopping, provide an upgraded and better organized trial forum for Government claims cases and reduce costs for industry, for litigants, and for the taxpayer”); 125 CONG. REC. 23,477 (1979) (remarks of Sen. Dole) (stating that the bill “would accomplish two salutary purposes”: creating a new appellate court and a new trial court).

²⁶⁴ *See, e.g.*, 127 CONG. REC. 29,861 (1981) (remarks of Sen. Thurmond) (praising Senate Bill 1700 because it would give the Federal Circuit exclusive jurisdiction over patent appeals); *id.* (remarks of Sen. Leahy) (“I support S. 1700 because I believe that patent law stands apart from virtually every other legal discipline both in its extreme focus on science and technology and its need for uniformity in decisionmaking.”); *id.* at 27,792–93 (remarks of Rep. Railsback) (describing House Bill 4482 as “the bill to help improve our patent system by merging the U.S. Court of Claims and the [CCPA] into a single appellate court with expanded jurisdiction”); *id.* at 29,887 (remarks of Sen. Schmitt) (describing Senate Bill 1700 as an “initiative to improve as well as expedite patent litigation”).

²⁶⁵ *See, e.g.*, *id.* at 29,861 (remarks of Sen. Thurmond) (urging passage of Senate Bill 1700 “not only to accomplish the immediate goal of creating a new court, but to stimulate the inventiveness and innovation that have long marked the industrial and scientific development of this country”); *id.* at 27,792 (remarks of Rep. McClory) (emphasizing the effect that House Bill 4482 “is going to have on industrial innovation”).

²⁶⁶ It appears that only three members of Congress spoke in opposition to the FCIA proposal. Senator Baucus opposed Senate Bill 1700 on the ground that it would “creat[e] a centralized specialty court” for patent appeals. *Id.* at 29,861. Similarly, Senator Simpson opposed

late court would be less specialized than either of the courts from which it would be created.²⁶⁷

Most of the members of Congress who mentioned the new trial court that would be created by the FCIA echoed the committee reports. They said that the Claims Court would provide an “upgraded” and more efficient trial forum for claims against the government.²⁶⁸ They traced this improvement to the replacement of commissioners by Article I judges with final-judgment power.²⁶⁹

5. *Congressional Passage of Bills Embodying FCIA Proposal*

The bills that embodied the FCIA passed both Houses of the Ninety-Seventh Congress in 1981 by wide margins. The Senate bill passed by a vote of 83-to-6,²⁷⁰ and the House bill by a vote of 321-to-76.²⁷¹

D. *Distillation of the Purposes of the FCIA*

The legislative history of the FCIA reflects that the FCIA had three purposes. As described in the committee reports, two of those purposes were specific: “to provide an upgraded and better organized trial forum for government claims cases” and “to improve the administration of the patent law by centralizing appeals in patent cases.”²⁷² The third was more general: “to

Senate Bill 1700 on the ground that it would “create[] practical problems for litigants and make[] substantial inroads against the diversity of opinion that has characterized our legal system since the early days of our Nation.” *Id.* at 29,888. Finally, Representative Sensenbrenner opposed House Bill 4482 because he believed that (1) it would not relieve appellate docket congestion; (2) patent cases did not require specialized treatment; (3) the new Federal Circuit might become “a dumping ground” for future categories of cases; and (4) the bill was a “Trojan horse” inasmuch as its objective of minimizing inconsistent decision making would justify wholesale restructuring of the judicial system. *Id.* at 27,794.

²⁶⁷ See, e.g., *id.* at 29,859 (remarks of Sen. Dole) (“The Court of Appeals for the Federal Circuit will not be a ‘specialized court,’ as that term is normally used.”); 126 CONG. REC. 25,364 (1980) (remarks of Rep. Kastenmeier) (responding to “those who would argue that we have created a specialized court” by stating that, “[t]o the contrary, what we have done is take two specialized courts and combine them into a larger, more generalized court”).

²⁶⁸ 127 CONG. REC. 27,791 (1981) (remarks of Rep. Kastenmeier) (“The creation of [the Claims Court] provides an upgraded and better organized trial forum for Government claims cases.”); *id.* at 29,859 (remarks of Sen. Dole) (stating that “status” of Claims Courts judges would be “upgraded” and that court would function more efficiently and with less delay than under existing system).

²⁶⁹ See *id.* at 29,859 (remarks of Sen. Dole) (stating that the Claims Court judges’ Article I status would make them “truly independent” and that their ability to enter final judgments would reduce delay and increase efficiency); 126 CONG. REC. 25,367 (1980) (remarks of Rep. Rodino) (stating that greater efficiency would result from Claims Court judges’ ability to enter “dispositive orders”).

²⁷⁰ 127 CONG. REC. 29,888 (1981).

²⁷¹ *Id.* at 27,985–86.

²⁷² S. REP. NO. 97-275, at 2 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 12; S. REP. NO. 96-304, at 8 (1979); see also H.R. REP. NO. 97-312, at 17 (1981) (stating that the bill would provide for an upgraded and better organized trial forum for government claims); *id.* at 21 (stating that the Federal Circuit “will provide nationwide uniformity in patent law”); H.R. REP. NO. 96-1300, at 15 (1980) (stating that the bill would provide for “upgraded and better organized trial forum for government claims”); *id.* at 18 (stating that Federal Circuit “will provide nationwide uniformity in patent law”).

fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity.”²⁷³

The first and second purposes would have been enough to make the FCIA significant legislation, given the importance of both patent cases and government claims cases. It is the third purpose, however, that cemented the FCIA’s landmark status. That purpose reflected a congressional judgment that the existing system of regional, intermediate appellate courts overseen by a Supreme Court of limited capacity had a “basic weakness” that had created a “void”—the void being a lack of capacity to “provide reasonably quick and definitive answers to legal questions of nationwide significance.”²⁷⁴ Although the FCIA may have been (to use the committee reports’ word) a “modest” response to this problem,²⁷⁵ the problem itself could hardly be more fundamental. Moreover, because Congress enacted the FCIA as a response to this problem, the FCIA furnishes legislative precedent for future departures from—and perhaps even eventual abandonment of—the 110-year-old, regional appellate system.²⁷⁶

III. Gauging the Success of the FCIA

This is a paper about the provenance of the FCIA. The paper would therefore be exceeding its jurisdiction if it dwelt too much on evaluating the success of the legislation. Besides, there are other commentators, including others participating in this symposium, who are much better equipped than I to gauge the success of the FCIA. Even so, some discussion of whether the purposes of the Act have been fulfilled is appropriate in a discussion of the provenance of the Act. At this twenty-year mark, a historical discussion of the FCIA should attempt to assess its historical significance; and its historical significance depends in part on whether the FCIA has been—and has been perceived to have been—a success. This part concludes that, judged by the purposes identified in its legislative history, the FCIA has indeed been successful.

²⁷³ S. Rep. No. 97-275, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 12; S. Rep. No. 96-304, at 8; *see also* H.R. Rep. No. 97-312, at 27 (“[T]he proposed court will increase the capacity of the federal judicial system for definitive adjudication of patent and other issues falling within its jurisdiction.”); H.R. Rep. No. 96-1300, at 24 (same).

²⁷⁴ S. REP. NO. 97-275, at 3, *reprinted in* 1982 U.S.C.C.A.N. at 13; S. REP. NO. 96-304, at 9.

²⁷⁵ S. REP. NO. 97-275, at 7, *reprinted in* 1982 U.S.C.C.A.N. at 17; S. REP. NO. 96-304, at 14.

²⁷⁶ *See* Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826 (establishing regional circuits); HART & WECHSLER, *supra* note 32, at 37 (commenting that the Evarts Act “substantially fixed the framework of the contemporary system”); FRANKFURTER & LANDIS, *supra* note 83, at 56–145 (describing the history of the circuit courts leading up to, including, and immediately following the Evarts Act); *see also Addendum to 1979 Senate Hearing, supra* note 116, at 44 (testimony of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that creation of the Federal Circuit “does signal the wave of the future in our thinking about appellate structure nationwide”).

A. “[T]o provide an upgraded and better organized trial forum for government claims cases”²⁷⁷

Congress had a modest aim in the FCIA for the trial forum for government claims: to provide a forum that was “upgraded” and “better organized.”²⁷⁸ Congress achieved this aim easily: by the creation of the COFC. The modesty of Congress’s aim and the ease with which Congress achieved it, however, do not reflect a congressional judgment that only modest reform was needed to the system for trying claims against the government. Rather, they reflect that the FCIA was conceived as an appellate reform, and appellate reform remained its focus.

The “essence” of the FCIA was its creation of a new appellate court.²⁷⁹ That entailed merging two courts, one of which—the Court of Claims—had trial functions as well as appellate functions. Therefore, it was inevitable, as a result of the appellate modification, that a new trial court had to be created to assume the Court of Claims’s trial functions.

Fortuitously, the trial functions of the Court of Claims needed reform. Before the FCIA, those functions were carried out primarily by sixteen commissioners who were appointed by the Court of Claims.²⁸⁰ A commissioner could make only a recommended decision, and that recommendation then had to be reviewed by the Court of Claims judges, even if none of the parties objected to the commissioner’s decision.²⁸¹ This was inefficient.²⁸²

The FCIA achieved Congress’s aim of creating an “upgraded” and “better organized” trial forum simply by creating the COFC and staffing it with Article I judges with final-judgment power. Certainly, the status of those judges was “upgraded” compared to that of the commissioners. Moreover, those judges’ ability to enter final judgments ensured greater efficiency, because of better organization, than was possible under the commissioner system.

In light of the history already discussed, however, the FCIA cannot be construed to have made all of the changes to the system for trying government claims that Congress thought necessary. With two possible exceptions, discussed below, Congress did only what it thought was necessary in order to create a new intermediate appellate court that could handle patent appeals and withstand the charge of overspecialization. Thus, the FCIA does not “estop” Congress or judicial reformers from considering and urging changes

²⁷⁷ *E.g.*, S. REP. NO. 97-275, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 12; S. REP. NO. 96-304, at 8.

²⁷⁸ *See* sources cited *supra* note 277.

²⁷⁹ *E.g.*, 126 CONG. REC. 25,366 (1980) (remarks of Rep. Rodino) (“The essence of the proposal is the creation of a new intermediate appellate court.”); *see also* H.R. REP. NO. 97-312, at 18 (1981) (to the same effect); H.R. REP. NO. 96-1300, at 16 (1980) (to the same effect).

²⁸⁰ *See, e.g.*, 1981 Senate Hearing, *supra* note 152, at 239–40 (statement of Clarence T. Kipps, Jr., on behalf of the DC Bar).

²⁸¹ *See, e.g.*, 1981 Senate Hearing, *supra* note 152, at 275–76 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims) (observing that because the governing statute provided only that the “Court of Claims” could “render judgments,” *see* 28 U.S.C. § 1491 (1976) (amended 1982 and 1992), commissioners’ decisions could not be treated as final).

²⁸² *See, e.g.*, 1981 Senate Hearing, *supra* note 152, at 276–77 (statement of Hon. Daniel M. Friedman, Chief Judge, Court of Claims).

to the system for trying claims against the government, even if those changes were needed at the time of the FCIA.

One possible exception concerns Congress's assignment of Article I, rather than Article III, status to the COFC's judges. Clarence Kipps and other witnesses testified at congressional hearings that the COFC's judges should have Article III status.²⁸³ Thus, the issue was raised during the legislative process. Nonetheless, it is hard to argue that "Congress," in any corporate sense, considered, much less rejected, Article III status for the COFC's judges. The issue is not mentioned in the committee reports or the congressional debate. On balance, it does not appear that Congress really considered this issue, and it may well merit further congressional attention.

Much the same analysis applies to another aspect of the COFC: its limited power to grant injunctions and declaratory relief. As discussed above, Senator Dole persuaded the Senate committee to amend the bills embodying the FCIA to empower the COFC to grant declaratory and equitable relief in all controversies within its jurisdiction, but that amendment was not included in the bill that was enacted, apparently because of opposition from the DOJ.²⁸⁴ This issue seemed to receive more congressional attention than did the issue of whether COFC judges should have Article III status. Even so, it appears that the issue did not get a fair hearing. As against DOJ's opposition, none of the witnesses supported Senator Dole's amendment at congressional hearings. Moreover, Congress was so focused on appellate reform, especially for patent appeals, that no trial-level change that related to government claims, and that was as significant and controversial as Senator Dole's, had a realistic chance of adequate consideration, much less enactment.

In addition to the status of the COFC's judges and the scope of the COFC's remedial powers, many other issues exist that Congress could usefully consider if it wished to make more improvements in the system for trying claims against the government. I cannot improve on Judge Bruggink's assessment that the current system is "not readily comprehensible," and that any coherence or pattern in it is "inadvertent."²⁸⁵ Nor can I improve on his identification of the issues that need congressional attention.²⁸⁶ Judge Bruggink traces the incoherence of the system to the haphazard way in which it has developed.²⁸⁷ I believe that the problem is compounded by the government's deep and historical ambivalence to letting itself be sued.

In considering future reforms of the system for trying claims against the government, Congress has a handicap that it did not have when it considered the FCIA proposal. Namely, Congress does not have the sustained, scholarly

²⁸³ See *id.* at 239–42 (statement of Clarence T. Kipps, Jr., on behalf of the DC Bar); 1981 House Hearing, *supra* note 152, at 160–66 (statement of Steven C. Lambert & Clarence T. Kipps, Jr., on behalf of the DC Bar); 1979 Senate Hearing, *supra* note 83, at 511 (reproducing Letter from Angelo A. Iadarola, former Chairman, DC Bar, Court of Claims Comm., to Representative Kastenmeier (June 13, 1979)).

²⁸⁴ See *supra* notes 258–61 and accompanying text.

²⁸⁵ Bruggink, *supra* note 27, at 529.

²⁸⁶ See *id.* at 532–43.

²⁸⁷ *Id.* at 529.

attention to the problem that it had back then thanks to Dean Meador, the OIAJ, and the many people on whose work they built. Accordingly, Judge Bruggink is certainly right, and I join him, in suggesting the need for a special advisory group to study the current system.²⁸⁸

B. “[T]o improve the administration of the patent law by centralizing appeals in patent cases.”²⁸⁹

The FCIA’s centralization of patent appeals in the Federal Circuit made one immediate improvement: It stopped the appellate forum shopping that had occurred when patent appeals were heard by each of the regional circuits.²⁹⁰ The elimination of appellate forum shopping, however, does not guarantee that patent appeals will be decided accurately and consistently. That depends on what happens inside the single forum that decides those appeals: the Federal Circuit. This section examines whether the Federal Circuit has achieved accuracy and consistency in the view of Congress, the Supreme Court, and the commentators.

Congress has not responded to the Federal Circuit’s patent decisions very often. The most recent legislation overturned the Federal Circuit’s decision in *In re Portola Packaging, Inc.*²⁹¹ According to the sponsors of the bill, the *Portola* decision too narrowly construed the scope of the authority of the Patent and Trademark Office to reexamine patents.²⁹² Before this, Congress appears to have responded only twice to a Federal Circuit decision in a patent case.²⁹³

Similarly, the Federal Circuit’s patent decisions seem to have fared well in the Supreme Court. I estimate that the Court has issued decisions on the merits in eleven patent or patent-type cases from the Federal Circuit.²⁹⁴ In

²⁸⁸ See *id.* at 543.

²⁸⁹ S. REP. NO. 97-275, at 2 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 12; S. REP. NO. 96-304, at 8 (1979).

²⁹⁰ Cf. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001) (discussing forum shopping among district courts in patent cases).

²⁹¹ *In re Portola Packaging, Inc.*, 110 F.3d 786 (Fed. Cir. 1997).

²⁹² See H.R. 1866, 107th Cong. (2001), 147 CONG. REC. H5358 (2001); see also 148 CONG. REC. S5850 (2002) (reflecting that House Bill 1866 has been reported in Senate); 147 CONG. REC. H5359 (2001) (statement of Rep. Sensenbrenner) (“H.R. 1866 is intended to overturn the 1997 *In re Portola Packaging* case by the United States Court of Appeals for the Federal circuit.”); *id.* (reporting passage of the bill in House of Representatives). The substance of House Bill 1866 was incorporated into a later bill in the same Congress, House Bill 2215, which was enacted in November 2002 as the Patent & Trademark Office Authorization Act of 2002, Pub. L. No. 107-273, § 13105(a), 116 Stat. 1758 (codified at 35 U.S.C.A. §§ 303, 312 (West 2003)).

²⁹³ See *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 669–72 & n.3 (1990) (describing amendment codified at 35 U.S.C. § 271(e) as having been prompted by *Roche Prods., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858 (Fed. Cir. 1984)); *Telectronics Pacing Sys., Inc. v. Ventritex, Inc.*, 982 F.2d 1520, 1524–25 (Fed. Cir. 1992) (indicating that amendments of 35 U.S.C. §§ 271(e), 355(i) responded to issues addressed in *Roche*); 141 CONG. REC. S15,222 (1995) (remarks of Sen. Hatch) (describing bill that, upon enactment, amended 35 U.S.C. §§ 103(b), 282, as responding to the line of Federal Circuit decisions that included *In re Durden*, 763 F.2d 1406 (Fed. Cir. 1985)).

²⁹⁴ *Holmes Group, Inc., v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (vacating and remanding); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002)

four of those eleven cases, the Court has affirmed the Federal Circuit's decision.²⁹⁵ This 36.4% affirmance rate appears to be better than average.²⁹⁶ This would be consistent with the Court's recognition of the Federal Circuit's "comparative expertise" in patent law.²⁹⁷

Academic commentary on the Federal Circuit's handling of patent cases has been generally positive. Many commentators have praised the court for bringing clarity and predictability to significant areas of patent law.²⁹⁸ There

(vacating and remanding); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (affirming); *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) (reversing); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (reversing); *Dickinson v. Zurko*, 527 U.S. 150 (1999) (reversing); *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55 (1998) (affirming); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997) (reversing); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (affirming); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993) (vacating and remanding); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (affirming).

²⁹⁵ See cases cited *supra* note 294.

²⁹⁶ According to statistics published annually in the *Harvard Law Review*, from the 1982 Term through the 2000 Term, the Court issued 3,467 opinions on the merits, of which 740 affirmed the decision under review. This makes for a 21.3% affirmance rate. See *The Supreme Court, 2000 Term: The Statistics*, 115 HARV. L. REV. 546 (2001); *The Supreme Court, 1999 Term: The Statistics*, 114 HARV. L. REV. 397 (2000); *The Supreme Court, 1998 Term: The Statistics*, 113 HARV. L. REV. 407 (1999); *The Supreme Court, 1997 Term: The Statistics*, 112 HARV. L. REV. 373 (1998); *The Supreme Court, 1996 Term: The Statistics*, 111 HARV. L. REV. 436 (1997); *The Supreme Court, 1995 Term: The Statistics*, 110 HARV. L. REV. 372 (1996); *The Supreme Court, 1994 Term: The Statistics*, 109 HARV. L. REV. 345 (1995); *The Supreme Court, 1993 Term: The Statistics*, 108 HARV. L. REV. 376 (1994); *The Supreme Court, 1992 Term: The Statistics*, 107 HARV. L. REV. 376 (1993); *The Supreme Court, 1991 Term: The Statistics*, 106 HARV. L. REV. 382 (1992); *The Supreme Court, 1990 Term: The Statistics*, 105 HARV. L. REV. 423 (1991); *The Supreme Court, 1989 Term: The Statistics*, 104 HARV. L. REV. 363 (1990); *The Supreme Court, 1988 Term: The Statistics*, 103 HARV. L. REV. 398 (1989); *The Supreme Court, 1987 Term: The Statistics*, 102 HARV. L. REV. 354 (1988); *The Supreme Court, 1986 Term: The Statistics*, 101 HARV. L. REV. 366 (1987); *The Supreme Court, 1985 Term: The Statistics*, 100 HARV. L. REV. 308 (1986); *The Supreme Court, 1984 Term: The Statistics*, 99 HARV. L. REV. 326 (1985); *The Supreme Court, 1983 Term: The Statistics*, 98 HARV. L. REV. 311 (1984); *The Supreme Court, 1982 Term: The Statistics*, 97 HARV. L. REV. 298 (1983); see also LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 212 tbl.3-6 (1996) (listing reversal rates for 1946 through 1994); Harold J. Spaeth & Jeffrey A. Segal, *The U.S. Supreme Court Judicial Data Base Providing New Insights Into the Court*, 83 JUDICATURE 228, 234 fig.4 (2000).

²⁹⁷ *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999). I recognize that the discussion in the text is a simplified—and perhaps simplistic—treatment of a tricky subject: success in the Supreme Court. For example, many people could quibble with the cases that I included among the eleven relating to patents. That number does not, but arguably should, include a case arising under the Plant Variety Protection Act, Pub. L. No. 91-577, 84 Stat. 1542 (1970) (codified as amended in scattered sections of 7 U.S.C.), *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995), and a case in which the Court reviewed a decision of the Florida Supreme Court but in effect reversed a decision of the Federal Circuit, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Furthermore, I did not try to determine whether any of the instances in which the Court vacated and remanded a decision of the Federal Circuit should be considered at least partially successful because of the Court's substantial agreement with the Federal Circuit's legal analysis.

²⁹⁸ See, e.g., ADVISORY COMM'N ON PATENT LAW REFORM, A REPORT TO THE SECRETARY OF COMMERCE 3 (1992) ("The Federal Circuit, through its interpretation of the patent laws, has provided a much-needed clarification of standards for interpreting patent rights and increasing predictability in the application of the patent laws."); Donald W. Banner, *Witness at the Creation*, 14 GEO. MASON L. REV. 557, 571 (1992) (concluding that the Federal Circuit "without doubt" has "brought stability to significant areas of the patent law"); Dennis DeConcini, *The Federal*

has been some academic criticism, however. First, some commentators assert that the court does not follow its own precedent and is unpredictable in its decision making.²⁹⁹ Second, some commentators contend that the court is biased in favor of the patent holder.³⁰⁰ Third, some commentators say that the court is “hyperactive” because it performs functions more properly performed by district courts or administrative officials.³⁰¹

Assuming these criticisms contain a germ of truth, a matter that I cannot judge, they are nonetheless to some extent in the eye of the beholder. First, some would see disagreement among panels of the Federal Circuit as reflecting an internal “percolation” of views that may be a good substitute for percolation among the circuits.³⁰² Moreover, continuing uncertainty in the patent law partly reflects the substance of the law, not the judges who interpret it.³⁰³ Finally, judicial “hyperactivity” may partly reflect the Federal Circuit’s large patent caseload and the court’s compliance with Congress’s intent that the Supreme Court clarify patent law.³⁰⁴

Courts Improvement Act of 1982: A Legislative Overview, 14 GEO. MASON L. REV. 529, 534 (1992) (“The Federal Circuit has brought uniformity to patent law.”); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 5 (1989) (concluding that the Federal Circuit “has made an important contribution in reforming and unifying patent law”); Thomas G. Field III, *The Role of Stare Decisis in the Federal Circuit*, 9 FED. CIR. B.J. 203, 204 (1999) (concluding that in patent cases the Federal Circuit “generally shows ample deference to stare decisis and has made great inroads into uniquely difficult terrain”); William C. Rooklidge & W. Gerard von Hoffmann, III, *Reduction to Practice, Experimental Use, and the “On Sale” and “Public Use” Bars to Patentability*, 63 ST. JOHNS L. REV. 1, 2 (1988) (“[T]he prevailing view is that the Federal Circuit has been generally successful in achieving reasonable uniformity and certainty within its own [patent] precedents.”).

²⁹⁹ See Paul R. Michel, *The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1191 (1999) [hereinafter Michel, *Federal Circuit Must Evolve*] (noting this criticism); Paul R. Michel, *The Challenge Ahead: Increasing Predictability in Federal Circuit Jurisprudence for the New Century*, 43 AM. U. L. REV. 1231, 1232–33 (1994) [hereinafter Michel, *The Challenge Ahead*] (same); Carl Tobias, *The White Commission and the Federal Circuit*, 10 CORNELL J.L. & PUB. POL’Y 45, 58 n.92 (2000) (same).

³⁰⁰ Cf. ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 1135 (5th ed. 2001) (reporting that, statistically, it is harder for an accused infringer than it is for a patent holder to get an adverse decision reversed on appeal to the Federal Circuit).

³⁰¹ William C. Rooklidge & Mathew F. Weil, *Judicial Hyperactivity: The Federal Circuit’s Discomfort With Its Appellate Role*, 15 BERKELEY TECH. L.J. 725 (2000); see also *Control Res., Inc. v. Delta Elec., Inc.*, 133 F. Supp. 2d 121, 123–25 (D. Mass. 2001) (introductory survey of criticism of Federal Circuit); Scott H. Segal, *Fuel for Thought: Clean Gasoline and Dirty Patents*, 51 AM. U. L. REV. 49, 70 (2001) (describing the Federal Circuit as “interventionist” in patent cases). But cf. Randall R. Rader, *The United States Court of Appeals for the Federal Circuit: The Promise and Perils of a Court of Limited Jurisdiction*, 5 MARQ. INTELL. PROP. L. REV. 1, 3–9 (2001) (responding to the charge of “hyperactivity”).

³⁰² Cf. Newman, *supra* note 179, at 683 (stating that “the occasional ‘percolation’ of divergent views illustrates the vigor of the judicial search for truth”).

³⁰³ Cf. Paul R. Michel, *A View From the Bench: Achieving Efficiency and Consistency*, 19 TEMP. ENV’T L. & TECH. J. 41, 50–51 (2000) (discussing whether Congress or courts are better able to address the lack of clarity and the inconsistencies in patent law).

³⁰⁴ See ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT ix (5th ed. 2001) (describing the “job” with which Congress charged the Federal Circuit as “increas[ing] doctrinal stability in the field of patent law” and stating that “the only complaint on that score—if it may be called a complaint—is that the court may have attacked its job with perhaps a touch too much evangelical fervor”).

The last paragraph should not be read to discount the value of commentary on the Federal Circuit's patent decisions. On the contrary, to the extent that the Federal Circuit continues to be successful in deciding patent cases accurately and consistently, success partly depends on critical commentary concerning the court's patent decisions and on the court's awareness of that commentary. This is important because the Federal Circuit does not have the benefit of other appellate courts' views on patent law. In this way, the Federal Circuit is unique. The other intermediate courts of appeals can look to sister circuits for guidance on almost every legal issue.³⁰⁵ Even the Supreme Court can look to the Federal Circuit for guidance on issues of patent law. Lacking similar guidance, the Federal Circuit benefits from commentary on its work in a way that the other courts do not.³⁰⁶

C. “[T]o fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity.”³⁰⁷

Congress created the Federal Circuit to expand the appellate system's “capacity” for deciding types of cases in which there was a special need for national uniformity.³⁰⁸ Congress had created similar courts, to fill a similar need, in the past—such as the Temporary Emergency Court of Appeals—but they had been temporary.³⁰⁹ Congress wanted in the FCIA to create a preexisting appellate forum to which Congress could assign cases in which there was a special need for uniformity.³¹⁰ The Federal Circuit appears to fill that role.

³⁰⁵ The Federal Circuit is not the only circuit that has exclusive appellate jurisdiction in certain cases. The D.C. Circuit sometimes does, too. See, e.g., 8 U.S.C. § 1535 (2000) (review of decisions related to removal of alien terrorists); 15 U.S.C. § 780(i)(5) (2000) (review of certain SEC regulations); 42 U.S.C. § 300j-7(a)(1) (2000) (review of national drinking water standards).

³⁰⁶ See Michel, *The Challenge Ahead*, *supra* note 299, at 1255–57.

³⁰⁷ S. REP. NO. 97-275, at 2 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 12; S. REP. NO. 96-304, at 8 (1979).

³⁰⁸ See, e.g., S. REP. NO. 97-275, at 3–4, *reprinted in* 1982 U.S.C.C.A.N. at 13–14 (finding that the existing federal appellate system “lack[ed] the capacity, short of the Supreme Court, to provide reasonably quick and definitive answers to legal questions of nationwide significance” and that “the capacity of the federal appellate courts to provide a nationwide answer to legal questions could be expanded through the establishment of new courts of appeals whose jurisdiction is defined on a topical rather than a geographical basis.”); S. REP. NO. 96-304, at 9–10 (same).

³⁰⁹ See S. REP. NO. 97-275, at 4 & n.4, *reprinted in* 1982 U.S.C.C.A.N. at 14 (stating that Congress had been compelled “in the past to create particular courts to handle a narrow category of cases” and citing the Temporary Emergency Court of Appeals as one example); see also HART & WECHSLER, *supra* note 8, at 41 n.95 (listing federal courts that have been created on an ad hoc basis from time to time).

³¹⁰ See S. REP. NO. 97-275, at 4, *reprinted in* 1982 U.S.C.C.A.N. at 14 (“The creation of the [Federal Circuit] provides” a forum organized on “a topical rather than a geographical basis” that can hear “appeals from throughout the country in areas of law where Congress determines that there is special need for national uniformity.”); see also 1979 Senate Hearing, *supra* note 83, at 42 (testimony of Daniel J. Meador, Assistant Attorney General, OIAJ) (stating that the Federal Circuit would give Congress “a readily available forum to which other categories of cases can be routed as needs and procedure and perceptions change during the years”); WHITE COM-

One piece of evidence for this conclusion consists of the post-FCIA legislation expanding the Federal Circuit's jurisdiction. Congress has expanded the Federal Circuit's jurisdiction in four significant areas since 1982. In 1987, Congress gave the Federal Circuit jurisdiction over cases arising under the national compensation program for childhood vaccine injuries.³¹¹ In 1988, Congress empowered the Federal Circuit to review regulations of the Secretary of Veterans Affairs and decisions of the newly created United States Court of Veterans Appeals (now known as the United States Court of Appeals for Veterans Claims).³¹² In 1992, Congress gave the Federal Circuit jurisdiction over appeals that previously went to the Temporary Emergency Court of Appeals.³¹³ Finally, in a series of statutes enacted during the 1990s, Congress has given the Federal Circuit jurisdiction over certain employment-related claims, including discrimination claims against the Senate, the House of Representatives, the White House, and various federal agencies.³¹⁴

As against these expansions, Congress has never taken jurisdiction away from the Federal Circuit. There are, however, bills pending in Congress that would force the Federal Circuit to share jurisdiction that is currently exclusive.³¹⁵ The bills would amend the statutory provision that gives the Federal Circuit exclusive jurisdiction to review decisions of the Merit System Protections Board ("MSPB").³¹⁶ As amended, the Federal Circuit would share jurisdiction with the regional circuits over review of MSPB decisions.³¹⁷ The bills appear to reflect the view that sometimes the Federal Circuit has construed the statutory protections for whistleblowers too narrowly.³¹⁸

MISSION REPORT, *supra* note 8, at 73 ("In creating this new court, Congress recognized that it was not only acting to meet existing conditions and needs but that it was also providing the federal appellate system with a resource it had not previously had—a court that could be vested with exclusive appellate jurisdiction over other categories of cases litigated in the district courts as to which in the years to come there would be a perceived need for centralized, nationwide review.").

³¹¹ Vaccine Compensation Amendments of 1987, Pub. L. No. 100-203, § 4307(3)(C), 101 Stat. 1330-221, 1330-224, *amended by* Pub. L. No. 100-360, § 411(o)(2), 102 Stat. 683, 808 (1988), (codified as amended at 42 U.S.C. § 300aa-12(f) (2000)).

³¹² Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, §§ 102(a)(1), 301(a), 102 Stat. 4105, 4106, 4120-21 (codified at 38 U.S.C. § 502 (2000) (authorizing Federal Circuit review of regulations promulgated by the Secretary of Veterans Affairs) and 38 U.S.C. § 7292 (authorizing Federal Circuit review of Court of Veterans Appeals decisions)).

³¹³ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 102, 106 Stat. 4506, 4507 (codified in relevant part at 28 U.S.C. § 1295(a)(11)-(a)(14) (2000)).

³¹⁴ Presidential and Executive Office Accountability Act of 1996, Pub. L. No. 104-331, §§ 2(a), 3(a), 110 Stat. 4053, 4063, 4068-69 (codified at 3 U.S.C. §§ 425(c)(5), 454(b)(3) (2000); 28 U.S.C. § 1296(a) (2000)); Congressional Accountability Act of 1995, Pub. L. No. 104-1, §§ 210(d), 215(c)(5), 220(c)(3), 407(a), 109 Stat. 3, 14, 17, 20, 35-36 (codified at 2 U.S.C. §§ 1331(d)(4), 1341(c)(5), 1351(c)(3), 1407(a) (2000)); Uniformed Services Employment and Re-employment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3167 (codified in relevant part at 38 U.S.C. § 4324(d)(2000)); Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 309(a), 320(a)(3)(A), 105 Stat. 1071, 1093, 1097 (codified at 2 U.S.C. §§ 1209(a), 1219(a)(3)(A) (2000)).

³¹⁵ S. 1358, 108th Cong. § 1(k) (2002); S. 1229, 108th Cong. 1(l) (2002); *see also* H.R. 2588, 107th Cong. § 1(e) (2001); S. 995, 107th Cong. § 1(e) (2001).

³¹⁶ 5 U.S.C. § 7703(b)-(c) (2000).

³¹⁷ S. 1358 § 1(k); S. 1229 § 1(l); *see also* H.R. 2588 § 1(e); S. 995 § 1(e).

³¹⁸ *See* 149 CONG. REC. S8749 (2003) (statement of Sen. Akaka) (discussing the Federal

Several times Congress has enacted substantive (as distinguished from jurisdictional) legislation in response to Federal Circuit decisions in matters other than patent cases.³¹⁹ Some enactments have “overruled” the Federal Circuit’s decisions in whistleblower cases.³²⁰ Other enactments have responded to Federal Circuit decisions about bid disputes and veterans’ claims.³²¹ Yet another post-1982 statute “corrected” a Federal Circuit holding about judicial review of claims under the Fair Labor Standards Act.³²² On the flip side, Congress has at least twice amended statutes to ratify Federal Circuit decisions.³²³ Overall, Congress’s substantive responses to the Federal Circuit’s decisions do not evince any pattern of disagreement that would cast doubt on the success implied by Congress’s expansions of the court’s jurisdiction.

Arguably another measure of the Federal Circuit’s success is the extent to which its decisions have been reviewed and reversed or vacated by the Supreme Court.³²⁴ I estimate that petitions for writs of certiorari have been

Circuit whistleblower decisions that the bill was designed to overrule); 147 CONG. REC. S5970 (2001) (statement of Sen. Akaka) (“[T]he Federal Circuit continues to disregard clear statutory language that the [Whistleblower Protection] Act covers disclosures such as those made to supervisors, to possible wrongdoers, or as part of an employee’s job duties.”); see also S. 3190, 106th Cong. (2000) (substantially similar to the pending bills discussed in text).

³¹⁹ See *supra* notes 291–93 and accompanying text (discussing legislative responses to patent cases).

³²⁰ See *Horton v. Dep’t of the Navy*, 66 F.3d 279, 282–84 (Fed. Cir. 1995) (discussing legislation enacted in 1988 and 1994 to reverse Federal Circuit whistleblower decisions).

³²¹ Legislation on bid protests was enacted as the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C., 41 U.S.C., and 42 U.S.C.); see 139 CONG. REC. S14,385 (1993) (statement of Sen. Glenn) (amendments were designed to clarify the power of the General Services Administration Board of Contract Appeals in light of several Federal Circuit decisions); S. REP. NO. 103-258, at 9–10 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2569–71 (to the same effect). Legislation on veterans’ claims was enacted as the Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (codified at 38 U.S.C.A. § 7261 (West 2003)); see 148 CONG. REC. S11,334 (2002) (statement of Sen. Rockefeller) (amendment “would overrule” Federal Circuit’s decision in *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000)).

³²² See Federal Employee Fairness Act of 1994, Pub. L. No. 103-424, § 9, 108 Stat. 4365 (codified at 5 U.S.C. § 7121(b) (2000) (amending 5 U.S.C. § 7121(b)); H.R. REP. NO. 103-599, pt. I, at 56 (1994) (stating that the amendment clarifies congressional intent and “correct[s] an erroneous decision” of the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990)).

³²³ One statute ratified the Federal Circuit’s decision in a case involving veterans’ claims. See 140 CONG. REC. S15,015 (1994) (reproducing “Joint Explanatory Statement on H.R. 4386 [103rd Cong.], The Veterans’ Benefits Improvements Act of 1994”) (indicating that the Veterans’ Benefits Improvements Act of 1994 amended 38 U.S.C. § 1113(b) to clarify congressional intent in light of the erroneous understanding reflected in *Combee v. Principi*, 4 Vet. App. 78 (1993), *rev’d sub nom.*, *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994)); 140 CONG. REC. H11,357 (1994) (same); H.R. REP. NO. 103-668, at 8, 27–28 (1994) (same). Another statute ratified the Federal Circuit’s decision in a trade case. See Trade Act of 2002, Pub. L. No. 107-210, § 5203, 116 Stat. 933, 1048–49 (amending the Harmonized Tariff Schedule of the United States); H.R. CONF. REP. NO. 107-624, at 192 (2002), reprinted in 2002 U.S.C.C.A.N. 649, 723–24 (explaining that the Trade Act of 2002 amended the Harmonized Tariff Schedule of United States to ratify the Federal Circuit’s decision in *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001)).

³²⁴ See PROCEEDINGS OF THE ELEVENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 153 F.R.D. 177, 182 (1993) (Rehnquist,

filed in 1,722 cases from the Federal Circuit (including patent cases).³²⁵ The Court has granted certiorari in 48 of those cases, for a “grant rate” of about 2.8%. The Court has issued 42 opinions on the merits in the 48 cases in which it has granted certiorari, and the Court has affirmed the Federal Circuit’s decision in 12 of the 42 cases.³²⁶ This makes for an “affirmance rate” of about 28.6%. The 2.8% grant rate appears to be much lower—i.e., better—than average.³²⁷ The affirmance rate of 28.6% also appears to be better

C.J.) (stating his opinion that “the relative infrequency of Supreme Court review [of Federal Circuit decisions] may help demonstrate whether Congress’s intent in creating this national court of appeals has been fulfilled.”).

³²⁵ I arrived at this figure by performing two searches in the Westlaw “SCT” database on July 8, 2002. The first, designed to find the number of cases in which certiorari has been denied, was (“PETITION*” /2 “WRIT”) & (“WRIT*” /2 “CERTIORARI”) & “UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT” & (CIRCUIT /2 DENIED). This yielded 1,674 documents. I did a second search that was identical to the first except that I replaced the word “DENIED” with “GRANTED.” This search yielded 48 documents. I added 1674 and 48 to estimate the total number of petitions for a writ of certiorari (namely, 1,722) that have been filed in cases decided by the Federal Circuit: 48 divided by 1,722 equals 0.0278745, or ~ 2.8%.

³²⁶ I have already cited eleven of the forty-two opinions because they decided patent or patent-related cases. See *supra* note 294. The other opinions and the dispositions are as follows: *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (reversing); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001) (vacating and remanding); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (vacating and remanding); *United States v. Hatter*, 532 U.S. 557 (2001) (affirming in part, reversing in part, and remanding); *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000) (reversing); *United States v. Haggard Apparel Co.*, 526 U.S. 380 (1999) (vacating and remanding); *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (affirming); *LaChance v. Erickson*, 522 U.S. 262 (1998) (reversing); *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (affirming and remanding); *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843 (1996) (affirming); *Hercules, Inc. v. United States*, 516 U.S. 417 (1996) (affirming); *Shalala v. Whitecotton*, 514 U.S. 268 (1995) (reversing); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995) (reversing); *Brown v. Gardner*, 513 U.S. 115 (1994) (affirming); *Keene Corp. v. United States*, 508 U.S. 200 (1993) (affirming); *United States v. Hill*, 506 U.S. 546 (1993) (reversing); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (affirming); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990) (reversing); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (reversing); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (reversing); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) (vacating); *Dep’t of Navy v. Egan*, 484 U.S. 518 (1988) (reversing); *United States v. Fausto*, 484 U.S. 439 (1988) (reversing); *United States v. Gen. Dynamics Corp.*, 481 U.S. 239 (1987) (reversing); *United States v. Am. Bar Endowment*, 477 U.S. 105 (1986) (reversing); *United States v. Hughes Props., Inc.*, 476 U.S. 593 (1986) (affirming); *United States v. Am. Coll. of Physicians*, 475 U.S. 834 (1986) (reversing); *United States v. City of Fulton*, 475 U.S. 657 (1986) (reversing); *Cornelius v. Nutt*, 472 U.S. 648 (1985) (reversing); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768 (1985) (reversing); *United States v. Morton*, 467 U.S. 822 (1984) (reversing).

³²⁷ The leading treatise on Supreme Court practice reports that, from 1970 to 1988, the grant rate for “paid cases”—i.e., cases in which the petitioner was not granted *in forma pauperis* (“*ifp*”) status and therefore did not qualify for a waiver of the filing fee—was about 6 to 8%. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 59 (8th ed. 2002). The same treatise reports that, from about 1989 to the present, the rate began falling and is now about 3.5%. *Id.* at 60. Because criminal defendants or prisoners file the vast majority of *ifp* petitions, *id.* at 493, and because the Federal Circuit hears only civil cases, we can reasonably assume that few *ifp* petitions have sought review of decisions by the Federal Circuit. On that assumption, the Federal Circuit’s grant rate of about 2.8% for the past 20 years compares favorably even to the current average of 3.5% for paid cases. Furthermore, the Federal Circuit’s 2.8% grant rate is much lower than the 7.2% average grant rate for paid cases from the 1982 Term through the 2000

than average.³²⁸

Commentary on the Federal Circuit generally confirms the apparent evidence of success suggested by Congress's and the Supreme Court's actions. Indeed, most commentators have described the Federal Circuit as a success.³²⁹ There is some commentary criticizing the Federal Circuit's case law on "whistleblower" claims.³³⁰ Other commentary argues that the Federal Circuit's jurisdiction should be expanded—or a new appellate court modeled on the Federal Circuit should be created—to hear appeals in more types of cases, such as tax cases and social security cases.³³¹

Two recent, influential, studies take a cautious approach to the question of whether the Federal Circuit's jurisdiction should be altered. The Judicial Conference recommended in its 1995 Long Range Plan for the Federal Courts that "[t]he federal appellate function should be performed primarily in: (a) a generalist court of appeals established in each regional judicial circuit; and (b) a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas."³³² This recommendation apparently endorses the Federal Circuit's creation and the idea that its jurisdiction might usefully be expanded. At the same time, the recommendation appears to

Term. I base the 7.2% figure on Harvard Law Review statistics. According to those statistics, from the 1982 Term through the 2000 Term the Court granted 2,836 appeals or petitions for review, and 36,531 appeals or petitions for review were denied, dismissed, or withdrawn. See *The Supreme Court, 2000 Term: The Statistics*, 115 HARV. L. REV. 546, tbl.II(B) (2001); *The Supreme Court in the Nineties: A Statistical Retrospective*, 114 HARV. L. REV. 402, tbl.I (2000); *The Supreme Court in the Eighties: A Statistical Retrospective*, 104 HARV. L. REV. 367, tbl.I (1990). I arrived at the 7.2% figure by adding 2,836 and 36,531 to yield a total of 39,367 appeals and petitions acted upon; 2,836 divided by 39,367 equals 0.07204, or ~ 7.2%.

³²⁸ See *supra* note 296 (reporting a 21.3% affirmance rate from the 1982 Term through the 2000 Term).

³²⁹ See, e.g., Michel, *Federal Circuit Must Evolve*, *supra* note 299, at 1178 (1999) (stating that "most scholars and practitioners" would agree that the Federal Circuit was successful); John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent With That of the District Courts?*, 32 HOUS. L. REV. 67, 71 (1995) ("The Federal Circuit . . . is considered a success."); see also, e.g., Daniel R. Levinson, *The Federal Circuit and Federal Personnel Law*, 14 GEO. MASON L. REV. 537, 556 (1992) (reaching "a highly positive assessment of how federal personnel law has matured during the first ten years under the FCIA"); *supra* notes 298–301 and accompanying text (discussing commentary on the Federal Circuit's patent decisions).

³³⁰ See Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 578–79 (1999).

³³¹ See Paul D. Carrington, *The Obsolescence of the United States Court of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & POL. 515, 515–16 (1999) (arguing that the Federal Circuit should have jurisdiction to review tax cases and that an Article I court should be created for social security cases); Chris J. Katopis, *The Federal Circuit's Forgotten Lessons?: Annealing New Forms of Intellectual Property Through Consolidated Appellate Jurisdiction*, 32 J. MARSHALL L. REV. 581 (1999) (arguing that the Federal Circuit should be given exclusive appellate jurisdiction over additional types of intellectual-property cases); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 607 (1989) (arguing that the regional organization of federal intermediate appellate courts should be changed "by increasing the categories of appeals routed to non-regional appellate fora").

³³² JUDICIAL CONF. OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 43 (1995) (Recommendation 16).

implicitly oppose the creation of new appellate courts modeled on the Federal Circuit.

Similarly noncommittal is the Report of the White Commission. The White Commission Report discussed the Federal Circuit with apparent approval of the concept of an appellate court with nationwide jurisdiction defined by subject matter.³³³ Furthermore, the Report included, for Congress's consideration, a discussion of "two types of cases that have been frequently discussed as potential candidates for the Federal Circuit's jurisdiction:" namely, tax cases and social security cases.³³⁴ Ultimately, however, the White Commission Report makes "no specific recommendations as to additional categories of cases that might usefully be placed within the Federal Circuit's jurisdiction."³³⁵

One issue relevant to gauging the Federal Circuit's success appears not to have been studied. The issue is how well the existing components of the court's jurisdiction interact. Commentators on the work of the Federal Circuit concentrate on discrete substantive areas of law, such as patent law. There has been little, if any, commentary on how best to compose the contents of a nonspecialized, topically organized court. Such a broader perspective would be useful if, for example, Congress considers creating future courts whose subject-matter is defined to include multiple topics.

D. Summary: An Experiment That Has Been Successful So Far

On this twentieth anniversary of the FCIA's enactment, many people in the legal community either have forgotten or do not realize that the Act was regarded by many as experimental.³³⁶ Perhaps the fading of its experimental character from our collective memory is as good evidence as any of the FCIA's success so far. The new trial court and the new appellate court created by the FCIA are successful alternatives to both geographically organized courts and specialized courts. They have thereby changed our conception of how the federal judicial system can be organized.

IV. Lessons for The Future

The FCIA's success can inform future judicial-reform efforts in three ways. First, the FCIA's successful enactment can teach us how to design future reform proposals so that they will be enacted. Second, by determining what reforms the FCIA has made, we can identify some aspects of the judicial system that still need reform. Third, by determining how the FCIA has accomplished its goals, we can consider whether it provides a model for the shape that future reforms might take.

³³³ WHITE COMMISSION REPORT, *supra* note 8, at 72-73.

³³⁴ *Id.* at 73.

³³⁵ *Id.*

³³⁶ See, e.g., PROCEEDINGS OF FOURTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 112 F.R.D. 439, 489 (1997) (remarks of Hon. Loren A. Smith, Chief Judge, COFC) (referring to the creation of the COFC as an "amazingly successful experiment"); Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 AM. U. L. REV. 385, 394 (1984) (describing the Federal Circuit as an "experiment").

A. Successfully Enacting Judicial Reform

No one can review the history of a significant judicial-reform law such as the FCIA without appreciating how hard it is for such laws to get enacted. Because the FCIA was one of those rare successes, it is useful to try to identify the reasons for its success.

As discussed, I believe that the key to the FCIA's success was the idea of merging two existing courts.³³⁷ For one thing, this made the FCIA easy to explain. It also made the FCIA appear to build on, rather than to break with, the past. In addition, the merger idea enabled the FCIA to be characterized as a streamlining measure and, perhaps most importantly, the merger idea enabled the FCIA to withstand the charge of overspecialization. In sum, the FCIA measure was simple, nonradical, and efficiency-enhancing, while deftly crafted to skirt a controversy.

The FCIA benefited from more than just the merger idea. The FCIA was built on a clear concept: namely, that the regional circuits could not promptly reach definitive nationwide resolution of issues as to which there was a special need for uniformity.³³⁸ That concept was backed up by more than a decade of studies and scholarship.³³⁹ Equally important, the FCIA had a constituency, which consisted of (1) business interests that believed that industrial innovation was being stifled by the inconsistency in patent law; (2) practitioners before the affected courts; and (3) students of judicial reform. This strong, tripartite support for the FCIA existed largely because of the FCIA's timing; it followed detailed studies of the federal appellate structure and the Court of Claims, and it was caught up in national concern over a "crisis" in "industrial innovation."³⁴⁰

Many good, timely ideas die in the halls of Congress. The FCIA avoided that fate because it had leadership in the executive branch. The leadership came from Dean Meador and the rest of the OIAJ, which secured the backing of the DOJ and the president.³⁴¹ With that support in place, the FCIA gained congressional leadership in both houses.³⁴²

This profile of a successfully enacted judicial reform raises at least two important questions for judicial reformers. Are all of these conditions necessary for a judicial reform to be enacted? Are other necessary conditions suggested by the history of the FCIA? The twentieth anniversary of the FCIA is an appropriate occasion for discussing those questions.

B. Undone Reforms

Judicial reform, like other types of reform, usually occurs one step at a time. This is true of the FCIA. It was designed to, and did, improve some—and not other—aspects of the court system. Careful identification of not only

³³⁷ See *supra* notes 141–44, 193–200, 232–34 and accompanying text.

³³⁸ See *supra* notes 165–73, 220–23, 273 and accompanying text.

³³⁹ See *supra* notes 85–107 and accompanying text.

³⁴⁰ See *supra* notes 162–64, 178–79 and accompanying text.

³⁴¹ See *supra* notes 108, 154–64 and accompanying text.

³⁴² See Meador, *supra* note 109, at 619–20.

what the FCIA improved but also what it left alone can guide future judicial reform.

Although Congress discerned a “basic weakness” in the federal appellate system, the FCIA addressed that weakness only for patent cases and nontax Little Tucker Act cases. Other matters inside and outside the Federal Circuit’s jurisdiction may need future attention. First, the “basic weakness” to which the FCIA responded presumably still exists for appeals outside the Federal Circuit’s jurisdiction. Second, as already discussed, attention has yet to be given to the specific issue of what impact, if any, patent appeals have on other appeals heard by the Federal Circuit, or to the general issue of how to combine the topics to be assigned to topically organized, nonspecialized courts.³⁴³

Because the FCIA was primarily an appellate-court reform, it left the federal trial level largely unaffected except insofar as alteration was necessary to create the Federal Circuit. Creation of the Federal Circuit entailed creation of the COFC and channeling appeals from the district courts in patent cases and in nontax Little Tucker Act cases from regional circuits to the Federal Circuit. Left largely unexamined, however, were the remedial powers of the COFC, some blurry jurisdictional lines between the COFC and the district courts, and the complexity of the overall system for trying claims against the federal government.

In sum, the FCIA made the improvements that Congress intended but left plenty of room, especially at the trial level, for future improvement.

C. The Shape of Future Reform

The FCIA’s success raises the question whether the success can be replicated. The key feature of the courts created by the FCIA is that their subject-matter jurisdiction is defined topically, not geographically, and it encompasses many topics. A key question therefore is: Is this the wave of the future? I pose the question without even pretending to attempt an answer.

Even if the answer is yes—i.e., nonspecialized, topical courts are the wave of the future—future changes to the judicial system could take at least two forms. One would be continued expansion of the Federal Circuit’s jurisdiction. Another would be the creation of more appellate courts like the Federal Circuit. Probably, neither development will occur until Congress identifies more areas of law in which there is a special need for uniformity. As suggested above, if Congress does discover such “special needs” but continues to want to avoid specialized courts, it should consider how the multiple topics of law to be included in a new court’s jurisdiction will interact.

Similar future developments could occur at the trial level. Congress could expand the COFC’s jurisdiction or its remedial powers (or both) in light of “special needs” for uniformity or simplification of the system. Congress also could create new trial-level courts whose jurisdiction is defined topically and includes multiple topics. Similar to the appellate context, with

³⁴³ See *supra* Part III.C.

trial level courts, a mere desire to promote judicial uniformity while avoiding undue judicial specialization does not resolve the proper jurisdictional mix for the COFC or new topically organized trial courts.

Congress should also consider the best relationship between the trial-level courts and other entities, on the one hand, and intermediate appellate courts, on the other hand. Congress might get useful information on this by studying the relationship between the Federal Circuit and the entities whose decisions are reviewed by the Federal Circuit. It might be worthwhile, for example, to study the effects, if any, of the fact that the Federal Circuit is sometimes less specialized—and at other times more specialized—than the entity whose decision is under review. To cite another possibly fruitful subject of study, perhaps the regularity or exclusivity of the Federal Circuit's review makes a difference. To be specific, a particular federal district judge will only rarely have his or her decisions reviewed by the Federal Circuit. In contrast, a COFC judge has his or her decisions reviewed by the Federal Circuit all the time. One has to wonder whether this makes a difference in, for example, the trial-level judges' interpretation and application of Federal Circuit precedent.

Conclusion

This paper has traced the history of the FCIA and concluded that, true to its name, the Act has improved the court system. The Act has done so by creating two nonspecialized, topically organized courts with nationwide jurisdiction. Those courts have done what Congress created them to do, and they have thereby demonstrated the viability of an alternative to regionally organized courts.

This assessment of the FCIA and the history underlying that assessment are necessarily incomplete. The FCIA and the courts it created are likely to be around for a long time, constantly changing to meet new needs and concerns. The only thing that will stay constant is the need to change the court system to take into account changes outside the system. Such changes to the court system are most likely to be successful if they are informed by the history of prior changes and attempted changes. The people behind the FCIA understood that concept, and the history of their achievement, in turn, has much to teach.