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ABSTRACT

In 1982, Congress created the United States Court of Appeals for the Federal Circuit. Often referred to as an experiment, the Federal Circuit has flourished. Born again from the ashes of its predecessors, the aptly nicknamed Phoenix Court continues to grow in significance, stature, and strength. As it grows, however, the court remains rooted in its history and in its unique nature. This Article explores the Federal Circuit's structure and its impact on the development of Federal Circuit jurisprudence. The Federal Circuit is distinguishable by more than its national jurisdiction – the very essence of the court sets it apart from its sister circuit courts of appeals.

I. INTRODUCTION

The United States Court of Appeals for the Federal Circuit was established on October 1, 1982, as an "intermediate appellate court whose jurisdiction was defined by subject matter rather than geography, and whose decisions would establish nationwide precedent on subjects as to which it had exclusive appellate jurisdiction."[1] The Federal Courts Improvement Act of 1982[2] established two new courts: the United States Court of Appeals for the Federal Circuit (Federal Circuit) and the United States Court of Federal Claims[3] while terminating two courts: the United States Court of Customs

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1. Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 544, 547 (2003).

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

3. The United States Court of Federal Claims has been described as a successor to the Court of Claims. Seamon, *supra* note 1, at 544 n.3 (The United States Court of Federal Claims was called the 'Claims Court' when it was created in the Federal Courts Improvement Act. Federal Courts Improvement Act of 1982, § 105(a), 96 Stat. at 27. It was renamed the United States Court of Federal Claims in 1992.). As can be seen from the discussion in this article, this characterization may be a simplistic way of viewing the relationship among these four courts.

and Patent Appeals (CCPA)[4] and the United States Court of Claims.[5] The Federal Circuit issued its first opinion on October 28, 1982, and in that opinion held binding as precedent "the holdings of our predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals, announced by those courts before the close of business September 30, 1982."[6] In its first opinion the Federal Circuit established that it was unique in many ways.

These differences underlie the evolution of the Federal Circuit and its jurisprudence. Part II addresses the national jurisdiction and specialized nature of the Federal Circuit. Part III highlights the strict residency requirements imposed on the judges of the Federal Circuit. Part IV discusses the statutory authority granted the Federal Circuit to sit in expanded panels. Part V focuses on the requirement that Federal Circuit panels be chosen to ensure that each judge hears a representative sampling of all fields of law under the jurisdiction of the Federal Circuit. Part VI underscores the point that the location of the court need not dictate the location of the panel sittings. Finally, Parts VII and VIII spotlight some of the more academic differences resulting from the creation of the Federal Circuit, namely the ability of the Federal Circuit to terminate judges on the Court of Federal Claims and the criminal sanctions applicable to Members of Congress arguing before the Federal Circuit.

Engraved on the wall of the Federal Circuit's courthouse[7] are President Lincoln's words establishing the Federal Circuit's predecessor: "It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."[8] The Federal Circuit today balances its role as the only circuit court whose decisions "have precedential effect throughout the country" with its desire to honor the mission of promptness fundamental to its existence. This balance

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4. The United States Court of Customs Appeals was established in 1909 as a five-judge court and first convened in Washington, D.C., on April 22, 1910. *History of the Federal Judiciary: U.S. Court of Customs and Patent Appeals (Successor to the Court of Customs Appeals), 1910-1982*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_cpa.html (last visited June 14, 2011). In 1929, the court was renamed the CCPA and its jurisdiction expanded to include appeals from the United States Patent and Trademark Office. *Id.*

5. In 1855, Congress established the Court of Claims "to provide a tribunal to hear claims brought by individuals and corporations against the Federal Government for money damages, and to report its recommendations to Congress." Strom Thurmond, *Introduction*, 40 CATH. U. L. REV. 513, 513 (1991).

6. S. Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc).

7. Byrum v. Office of Pers. Mgmt., 618 F.3d 1323, 1333 n.6 (Fed. Cir. 2010).

8. Abraham Lincoln, First Annual Message (Dec. 3, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 51 (James D. Richardson ed., Washington D.C., Government Printing Office 1897).

and the differences innate to the Federal Circuit have played an important role in the evolution of the jurisprudence of the court.[9]

II. JURISDICTION

The most significant difference between the Federal Circuit and its sister circuit courts is its jurisdiction, which is defined not by territory but by subject matter.[10] Congress granted exclusive jurisdiction over certain subject

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9. *Id.* ("Although the workload per judgeship will be lighter here than in the other circuits, a reduced number of appeals is desirable for this court. The Court of Appeals for the Federal Circuit will be considering cases that are unusually complex and technical. Consequently, its cases will be extraordinarily time-consuming, and fewer of them will be appropriate for summary disposition than is true of the cases that make up the dockets of the regional courts of appeals. In addition, it is important that the newly created court with nationwide jurisdiction not be initially overloaded. Decisions of this court will have precedential effect throughout the country; it is important for the judges of the court to have adequate time for thorough discussion and deliberation.").

10. The jurisdiction of the Federal Circuit is set forth in 28 U.S.C. § 1292(c) as quoted below:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –
> (1) of an appeal 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, except that a case involving a claim arising under any Act of Congress relating to copyrights, exclusive rights in mask works, or trademarks and no other claims under section 1338(a) shall be governed by sections 1291, 1292, and 1294 of this title;
> (2) of an appeal 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 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;
> (3) of an appeal from a final decision of the United States Court of Federal Claims;
> (4) of an appeal from a decision of –
> (A) the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent

interference, and any such appeal shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;
(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or
(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;
(5) of an appeal from a final decision of the United States Court of International Trade;
(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);
(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);
(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);
(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;
(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1));
(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;
(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;
(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and
(14) of an appeal under section 523 of the Energy Policy and Conservation Act.
(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. 609(b)). The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.
(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appro-

matter to the Federal Circuit to ensure that "the judgments of all district courts in the land, in particular fields of law, are reviewable by one intermediate appellate court. . . . The expectation is that a uniformity and reliability in the interpretation and application of the involved statutes will result."[11] The most notable result of this statutory delegation is the Federal Circuit's patent law jurisprudence, a primary force behind formation of the court.[12]

The Federal Circuit is more, however, than a "patent court" – it is a national court, and its judges are quick to point this fact out.[13] "[A]t a 1988 nationwide meeting of all circuit judges, a panel moderator, himself a judge, called the Federal Circuit a 'specialized patent court.' Chief Judge Howard Markey then rose to his feet and fairly shouted from the rear of the large meeting room that [the] court was no such thing."[14] A survey of the court's docket supports Judge Markey's claim. Only around 31% of the Federal Circuit's docket is intellectual property cases, nearly all of which involve patents.[15] Administrative law cases, specifically personnel and veterans claims, represent 55% of the docket, while cases asking for money damages from the United States government compose 11% of the docket.[16]

The Federal Circuit's website provides interesting insights into the unique challenges faced by its judges.[17] For example, while most of the court's intellectual property cases involve patents, the Federal Circuit also hears copyright and trademark cases.[18] The Federal Circuit has jurisdiction

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priate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

28 U.S.C. § 1292(c) (2006).

11. Howard T. Markey, *The Phoenix Court*, 10 APLA Q. J. 227, 230-31 (1982) [hereinafter Markey, *Phoenix Court*].

12. Pauline Newman, *The Federal Circuit: Judicial Stability or Judicial Activism?*, 42 AM. U. L. REV. 683, 684-85 (1993) ("Thus the twofold purpose of this novel judicial structure included the experimental one whereby a national appellate court would receive appeals from all of the district courts of the nation, accompanied by the intended stabilizing effect of this structure on the law supporting industrial innovation. Both of these aspects were premised on the court's patent jurisdiction . . . .").

13. *Id.* (The Federal Circuit "has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims.").

14. Paul R. Michel, *Past, Present, and Future in the Life of the U.S. Court of Appeals for the Federal Circuit*, 59 AM. U. L. REV. 1199, 1200 (2010) [hereinafter Michel, *Past, Present, and Future*].

15. *See Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited June 14, 2011) [hereinafter *Court Jurisdiction*].

16. *Id.*

17. *See id.*

18. *Id.*

over all appeals from the Court of Federal Claims, which include suits against the government for infringement of copyright, rights relating to protected plant varieties, mask works and other protected designs.[19] The Federal Circuit also has jurisdiction over appeals from the United States Patent and Trademark Office, which includes appeals from denials of trademark registrations.[20] Additionally, the Federal Circuit hears government contract, tax, personnel, international trade, veterans' benefits and vaccine compensation cases among other areas of its jurisprudence.[21]

National in its jurisdiction and rich in its subject matter, the Federal Circuit has proven an apt venue for time-consuming, complex cases.[22] While the Federal Circuit is best known for its patent jurisdiction, the court's national jurisdiction is its defining feature. This national jurisdiction has yet to result in uniformity of decision, but the Federal Circuit is young. And the experiment in subject matter specialty is an ongoing and successful one.[23]

III. THE BALDWIN RULE: 28 U.S.C. § 44(C)

Another aspect of the Federal Circuit that distinguishes it from its sister circuits is the strict residency requirement to which its judges are subject. The "Baldwin Rule," as the residency requirement informally is known,[24]

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19. 28 U.S.C. § 1498 (2006).

20. *Id.* § 1295(a)(4).

21. *See, e.g.*, Paul R. Michel, *The Challenge Ahead: Increasing Predictability in Federal Circuit Jurisprudence for the New Century*, 43 AM. U. L. REV. 1231, 1232 (1994); *Appeals Filed and Adjudicated, by Category, FY 2010*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Table_of_Data_2010.pdf (last visited July 29, 2011) [hereinafter *Appeals Filed and Adjudicated, by Category, FY 2010*].

22. *See supra* note 9 and accompanying text.

23. *See, e.g.*, Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 788-89 (2008) ("The Federal Circuit is now a quarter-century old and has proved to be a success in many important ways.").

24. *See, e.g.*, Harold C. Wegner, *The Federal Circuit at Age 25, Reinventing the Invention Court: Part I – The "Baldwin Rule"*, 2 n.3, (2007) (unpublished manuscript) (on file with author) ("The goal of the Baldwin Rule was to block the succession to Chief Judge of the Hon. Phillip Baldwin, who was a sitting member of the CCPA who had been appointed at a very young age by President Lyndon B. Johnson. . . . Since Judge Baldwin resided in Texas and was unlikely to move back to Washington, D.C., the anti-Baldwin rule was put into place."); Marcia Coyle, *Slot Opens on Federal Circuit, More on the Way?*, THE BLT: BLOG OF THE LEGALTIMES, (Aug. 26, 2009, 03:54 PM) [hereinafter Coyle, *Slot Opens*], http://legaltimes.typepad.com/blt/2009/08/slot-opens-on-federal-circuit-more-on-the-way.html ("The historical origin of the residency requirement is not known precisely, but many practitioners and scholars credit the view of one intellectual property practitioner present at the circuit court's birth in 1982 – Harold Wegner, partner in D.C.'s Foley & Lardner. Wegner

mandates that judges must live within fifty miles of the District of Columbia in order to serve on the Federal Circuit.[25] No other circuit has such a stringent residency requirement.[26] In all other circuits, the residency requirement only demands residential representation of every state in the circuit judiciary.[27] Once that requirement is met, circuit judges may live where they choose.[28] For instance, Judge Karen LeCraft Henderson, of the United States Circuit Court for the District of Columbia, lives in South Carolina. The court setting national precedent for patent infringement litigation has not a single jurist who resides or has resided in Silicon Valley.[29] Prior to the creation of the Federal Circuit, the judges of its predecessor court, the CCPA, were not subject to these residency requirements, which allowed Judge Baldwin to

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dubbed the residency requirement the "Baldwin Rule," the goal of which was to block the eventual succession of Judge Phillip Baldwin of Texas to chief judge of the new circuit. Baldwin was a judge on the U.S. Court of Customs and Patent Appeals which was merged with the appellate division of the U.S. Court of Claims into the new Federal Circuit. Baldwin was unlikely to move from his Texas home to D.C., according to Wegner, hence the anti-Baldwin rule."); Zusha Elinson, *Ohio District Court Judge the Front-Runner for Federal Circuit Seat, Say Sources*, THE RECORDER, Mar. 5, 2010, http://www.law.com/jsp/article.jsp?id=1202445593550 &slreturn=1&hbxlogin=1 ("The rule comes from Judge Phillip Baldwin, who famously preferred his native climes of Texas to the Beltway."); Scott A. Herbst, *On the Horizon: A New Federal Circuit – Part II*, LAW 360, Jan. 27, 2010, http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=4f69b9aa-1781-490b-9200-02b525d3c595 ("That requirement has often been referred to as the "Baldwin Rule" – a coined term, according to . . . George Hutchinson, who served as Clerk of the U.S. Court of Customs and Patent Appeals (one of the Federal Circuit's two predecessor courts) and as the first Clerk of the Federal Circuit.").

25. 28 U.S.C. § 44(c) ("Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service. While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of the Federal Courts Improvement Act of 1982, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia. In each circuit (other than the Federal judicial circuit) there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit.").

26. The Court of Federal Claims, an Article I court, is also subject to a similar residency requirement. *Id.* § 175(a)-(b) ("The official duty station of each judge of the United States Court of Federal Claims is the District of Columbia. . . . After appointment and while in active service, each judge shall reside within fifty miles of the District of Columbia.").

27. *Id.* § 44(c).

28. *Id.*

29. *See, e.g.*, Zusha Elinson, *California Judge Said to be on Short List for Federal Circuit,* THE RECORDER, Jan. 4, 2010, http://www.law.com/jsp/article.jsp?id=1202437343598&slreturn=1&hbxlogin=1 ("Will Silicon Valley finally get a judge on the high court of patent law?").

reside in Texas and Judge Almond to serve from his residency in Virginia, outside the fifty mile radius.[30]

This clause has been the topic of debate over the years, and recently there have been several proposals to repeal the Baldwin Rule.[31] There is a large pool of national talent from which the Federal Circuit has the potential to draw, but the Baldwin Rule limits nominations to those willing to "pick up and move to Washington."[32] There is a concern that worthy candidates are not being appointed because of their reluctance to relocate to Washington, D.C.[33] Some academics and practitioners argue that a court national in jurisdiction should be national in residency as well.[34] Advocates for this change argue that this will lead to "increased Senatorial accountability" and allow the Federal Circuit to gain a better understanding of its national jurisdiction.[35] Proponents of the Baldwin Rule, however, argue that "proximity helps newer judges learn the many unfamiliar legal subjects they must master. It also helps all of [the] active judges work together more closely, collegially, and continually than if the twelve were geographically dispersed across twelve different states."[36] Judge Paul Michel, an opponent of repealing the Baldwin Rule, has noted larger concerns with eliminating the residency requirement:

> Of course, no one knows whether or how much the impressive level of talent now on the Federal Circuit might potentially be elevated if the residency requirement were removed. It is simply impossible to assess the relative strengths of these competing claims in an objective or factual manner. In my own opinion, however, the losses from such a change might well outweigh any gains, just as I would expect if Supreme Court Justices were dispersed to nine different states scattered across the land.[37]

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30. *See, e.g.*, Wegner, *supra* note 24, at 3 n.4.

31. *See, e.g.*, Jonathan W. Parthum & Philippe J.C. Signore, *Patent Reform: The Debate Continues Into 2010*, 997 PLI/PAT 355, 388 (2010); Coyle, *Slot Opens*, *supra* note 24.

32. Marcia Coyle, *Lawmakers May Revise Federal Circuit's Residency Rule*, 7 THE DAILY REPORT (Georgia) 13, July 13, 2007 (quoting an unnamed "scholar of the court").

33. Jonathan W. Parthum, Philippe J.C. Signore, & Stephen G. Kunin, *Patent Reform: The "Never-Pass" Reform?*, 1037 PLI/PAT 319, 343 (2011) ("Some judges are reluctant to move and it is thought that this change will not only provide an incentive to consider a term on the Federal Circuit but also provide for a better selection of qualified judges to deal with the complexity common to patent law.").

34. *See, e.g.*, Wegner, *supra* note 24.

35. Wegner, *supra* note 24, at 3.

36. Michel, *Past, Present, and Future*, *supra* note 14, at 1203.

37. *Id.*

Many of the judges on the Federal Circuit lived elsewhere before their nomination. For example, Judge Kathleen O'Malley lived in Ohio,[38] Judge Alan Lourie resided in Pennsylvania,[39] and Judge Jay Plager lived in Indiana.[40] While the majority of judges lived within the fifty mile restriction at the time of their nomination, they still brought with them their rich and varied personal histories.[41] Furthermore, no candidate has turned down a nomination for residential purposes, and no candidate has proffered the Baldwin Rule as a reason to decline being vetted for a position on the Federal Circuit.

IV. PANEL SIZE

There are thirteen circuit courts: twelve regional circuits and the Federal Circuit.[42] Panels of judges hear cases appealed to the circuit courts.[43] The majority of these panels are comprised of three judges.[44] Additionally, regional circuit courts can sit en banc to hear cases. In every jurisdiction except for the Ninth Circuit, [45] en banc decisions are heard by all active judges and

38. *Kathleen M. O'Malley, Circuit Judge*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http:.//www.cafc.uscourts.gov/judges/Kathleen-m-omalley-circuit-judge.html (last visited May 25, 2011).

39. *Alan D. Lourie, Circuit Judge*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/judges/alan-d-lourie-circuit-judge.html (last visited May 25, 2011).

40. *S. Jay Plager, Circuit Judge*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/judges/s-jay-plager-circuit-judge.html (last visited May 25, 2011) (Judge Plager served as Dean of the Indiana School of Law).

41. *See Judges – Biographies*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/judges/ (last visited May 25, 2011) (containing biographies of the current judges on the Federal Circuit); *see also* Michel, *Past, Present, and Future*, *supra* note 14, at 1201 ("Consider the varied backgrounds of the present eleven nonpatent law judges: one judge was a tax lawyer; two were Assistant Solicitors General; one a law school dean; another a civil appeals specialist; three . . . came to the court with varied experiences that included drafting legislation as Senate staffers; another had a civil practice in a distinguished law firm; and another litigated for the United States before becoming a special assistant to the then-Attorney General. In addition, three judges had clerked for Supreme Court Justices, and a fourth served as Special Assistant to the Chief Justice of the United States after graduating from West Point and seeing combat duty in Vietnam, experiencing private practice, and serving as Acting U.S. Special Counsel and a judge on the Claims Court.").

42. *See* 28 U.S.C. § 41 (2006) (listing the circuit courts).

43. *Id.* § 46(b) ("In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges . . . .").

44. *See also* Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547, 549 (2009) (noting that most court of appeals cases begin with an assignment to a three-judge panel).

45. 9TH CIR. R. 35-3 ("The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges

often by any senior judges who took part in the original decision.[46] En banc decisions allow a majority of the circuit court judges to issue a ruling and clarify the circuit holding. The Federal Circuit, unlike the regional circuit courts, also has the ability to sit in an expanded panel format.[47]

The Federal Circuit has sat in an expanded panel format, most often as a five-judge panel,[48] several times since its formation. It is unclear why the Federal Circuit picked five-judge panels as the preferred expanded panel size, but from the beginning, according to Judge Raymond Clevenger, "five-judge panels were used from time to time [on the Federal Circuit]."[49] In discussing what the formation of the Federal Circuit would be, Judge Markey wrote that while "panels of [seven] and [nine] judges are . . . authorized, they are likely to be rare. Scheduling five judge panels obviously reduces productivity below that achievable if scheduling were limited to three judge panels."[50] Judge Giles Rich dates the practice to the CCPA, describing the CCPA as a "nice little five-judge court" that always sat en banc.[51] Judge Rich thought that the Federal Circuit might rely on this precedent to sit in "five-judge panels especially in important patent cases" but described the five-judge panels as a "vanishing practice," stating that "[a]lthough the CAFC has the unique authorization to fix size of its own panels, a five-judge panel is manpower-expensive and decreases the amount of work the court can do. All other circuits sit in three's. I expect we will."[52]

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to be drawn by lot from the active judges of the Court."). There is an additional provision allowing for an en banc appeal from the en banc court, which would consist of "a review by the full court" but this "has never happened since the limited en banc rule was adopted by the Court in 1980." Orin Kerr, *Ninth Circuit Considers Super-En Banc for Comprehensive Drug Testing*, THE VOLOKH CONSPIRACY (Nov. 5, 2009, 05:39 P.M.), http://volokh.com/2009/11/05/ninth-circuit-considers-super-en-banc-for-comprehensive-drug-testing/.

46. 28 U.S.C. § 46(c) ("Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.").

47. *Id.* § 46(b) ("The United States Court of Appeals for the Federal Circuit . . . may determine by rule the number of judges, not less than three, who constitute a panel."); FED. CIR. R. 47.2(a).

48. *See, e.g.*, Kinzenbaw v. Deere & Co., 741 F.2d 383 (Fed. Cir. 1984) (sitting as a five-judge panel).

49. Haldane R. Mayer, *United States Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference*, 217 F.R.D. 548, 583 (April 8, 2002) (Judge Clevenger went on to say "I don't know why they picked five. The statute says it could have been seven or nine.").

50. Markey, *Phoenix Court*, *supra* note 11, at 229.

51. Giles S. Rich, *Thirty Years of this Judging Business*, 14 AIPLA Q.J. 139, 147 (1986).

52. *Id.* at 148.

As previously mentioned, when the Federal Circuit was formed, two other courts, the CCPA and the Court of Claims, were terminated. The power to sit in expanded panels apparently was derived from the structure of those courts. The CCPA, per statute, could not issue a decision unless three judges concurred.[53] Sitting en banc as a full court of five judges allowed for decisions to be issued, even when the panel did not agree, as often three out of five judges would agree. Agreement of three judges was required to achieve a majority decision, and three judges concurring allowed decisions to issue. The Court of Claims also had a long history of sitting en banc. From 1855, when the Court of Claims was first created, until 1966, the Court of Claims sat as a full court for every oral adjudication, initially a court of three, the Court of Claims expanded to have five judges.[54] In 1966, the Court of Claims expanded again, with the addition of two judges bringing the size of the bench to seven, and was "direct[ed] . . . to sit in panels of three, unless the court or Chief Judge ordered an en banc hearing. Two judges would, henceforth, constitute a majority vote on a panel and suffice to constitute a quorum, whereas when the court had five judges, three constituted a quorum."[55] Before 1966, the law required that a "concurrence of three judges was necessary to any decision – which in effect meant that all cases must be heard en banc."[56]

Despite this history, the Federal Circuit's practice of sitting as an expanded panel has become uncommon in recent years.[57] Such panels were historically more frequent, due in part to a local rule that required the Federal Circuit to sit as a five-judge panel on all appeals from three-judge Court of International Trade panels. Since 1997,[58] the unstated policy of the Federal Circuit has been to hear cases in three-judge panels unless the cases were heard en banc.[59]

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53. Act of June 25, 1948, ch. 646, § 215, 62 Stat. 899 (repealed 1982) ("Three judges of the Court of Customs and Patent Appeals constitute a quorum. The concurrence of three judges is necessary to any decision.").

54. WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY; PART II: ORIGIN-DEVELOPMENT-JURISDICTION 1855-1978, at 122-23 (1978).

55. *Id.* at 122.

56. *Id.* at 123.

57. Kenneth R. Adamo et al., *Survey of the Federal Circuit's Patent Law Decisions in 2000: Y2K in Review*, 50 AM. U. L. REV. 1435, 1631 n.1602 ("Although several of the Federal Circuit's early cases, such as Kinzenbaw, involved five-judge panels, that practice – though still authorized by statute and by court rule – has fallen into disuse in the past several years.").

58. *U.S. Shoe Corp. v. United States* was the last case decided under Local Rule 47.2. 114 F.3d 1564, 1568 (Fed. Cir. 1997) (five-judge expanded panel) ("We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that 'appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges.'").

59. Mayer, *supra* note 49, at 583 ("[A]fter [*United States Shoe Corp.*] was heard, the court decided to abolish the specific rule that provided for five-judge panels and to

The Federal Circuit has not followed this policy in two notable instances. In 2007, in *Cienega Gardens v. United States*, the Federal Circuit sat as a seven-judge panel, explaining that "because two separate panels heard the prior appeals, we heard this appeal as a seven-judge panel pursuant to our statutory authority."[60] Interpreting its statutory power to sit in expanded-panel format, the Federal Circuit enacted local rules that require all panels to consist of an odd number of judges.[61] To comply with the local rules in the *Cienega Gardens* appeal, an additional judge joined the six members of the two three-member panel decisions from which the appeal was taken.[62] In 2009, the Federal Circuit sat as a five-judge expanded panel in *Martek Biosciences Corp. v. Nutrinova, Inc.*, with no explanation given.[63]

The complicated nature of many of the cases being considered by the Federal Circuit was one of the driving forces behind the provision allowing the court to sit in expanded panels. In its nascent years, the Federal Circuit's use of expanded panels exposed its judges to "legal areas relatively new to some of them" and allowed judges to gain experience working together.[64] The first Chief Judge of the Federal Circuit thought that expanded panels would give the Federal Circuit gravitas that its age could not grant. Chief Judge Markey wrote that "[d]ecisions in sensitive cases new to the court may be better received and more readily accepted by litigants and the bar if made by five judges."[65] As the Federal Circuit has matured; gaining experience, prominence, and acceptance by the bar; these concerns have diminished. The trend toward only sitting in three-judge panels is likely to continue.

V. PANEL SELECTION

The Federal Circuit is the only court mandated by statute to rotate its "judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard."[66] The statute is implemented in the United States Court of Appeals for the Federal Circuit's Rules of Practice, which requires case assignment to be made so as to correspond with the stat-

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retreat to the current rule that simply says we can sit in panels of not less than three. . . . The court's policy now is to sit in panels of three unless we are sitting *en banc*.").

60. 503 F.3d 1266, 1278 n.11 (Fed. Cir. 2007) (sitting as a seven-judge panel).

61. FED. CIR. R. 47.2(a) ("Cases and controversies will be heard and determined by a panel consisting of an odd number of at least three judges, two of whom may be senior judges of the court."); *see also* 28 U.S.C. § 46(c) (2006).

62. *See Cienega Gardens*, 503 F.3d at 1269.

63. 579 F.3d 1363, 1368 n.2 (Fed. Cir. 2009) (sitting as a five-judge expanded panel).

64. Markey, *Phoenix Court*, *supra* note 11, at 229.

65. *Id.*

66. 28 U.S.C. § 46(b).

ute.[67] The strict interpretation of this mandate would require an analysis of the cases assigned to each panel as well as the judges' prior seating records, to ensure that each of the judges on the Federal Circuit has the opportunity to sit on a panel hearing any given topic.[68] The Federal Circuit's Internal Operating Procedures, however, do not allow for this strict interpretation, instead mandating that the clerk's office randomly will assign available judges to every three-judge panel.[69] Judge Rich once described the practice:

> As you have been told many times, panels are made up arbitrarily without regard to case assignments and cases are compiled for panels without knowing which panels will get which cases. The chance factor is very great. So remember that when you are faced with a choice between settlement and an appeal. I assume you keep track of who the judges on the court are. Calculate your chances on the basis of the least favorable panel you can devise. You will not know who it will be, normally, until the morning of argument.[70]

In fact, this practice is similar to the procedure used by other circuit courts whose panel composition is not regulated statutorily.[71]

The random process works for those types of cases that the Federal Circuit hears often, but not for the cases that are less frequent, such as vaccine cases, cases brought by Native Americans, or cases on spent nuclear fuel.[72] If

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67. FED. CIR. R. 47.2 (b) ("Assignment of cases to panels will be made so as to provide each judge with a representative cross-section of the fields of law within the jurisdiction of the court.").

68. For instance, twelve appeals involving vaccine related injuries were filed in 2010, nine of which were adjudicated by merit panels. *Appeals Filed and Adjudicated, by Category, FY 2010*, *supra* note 21. A strict interpretation of this statute would require the court to rotate judges across these panels, so that each judge would sit on at least one panel hearing a vaccine-related injury case.

69. *Internal Operating Procedures*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, 11 (Nov. 14, 2008) *available at* http://www.cafc.uscourts.gov/images/stories/rules-of-practice/IOP.pdf ("The clerk's office runs a computer program that randomly generates three-judge panels for each month, subject to the judges' availability.").

70. Rich, *supra* note 51, at 148.

71. *See, e.g.*, 9TH CIR. R. E(2), *available at* http://www.ca9.uscourts.gov/datastore/uploads/rules/rules.htm ("Under the direction of the Court, the Clerk sets the time and place of court calendars, taking into account, for at least six months in advance, the availability of judges, the number of cases to be calendared, and the places of hearing required or contemplated by statute or policy. The random assignment of judges by computer to particular days or weeks on the calendars is intended to equalize the workload among the judges. At the time of assigning judges to panels, the Clerk does not know which cases ultimately will be allocated to each of the panels").

72. *See, e.g.*, *Appeals Filed, By Category, FY 2010*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/

these rarer causes of action were assigned to expanded panels, then the statute could be honored. On the other hand, if the analysis of Federal Circuit jurisdiction is broken into the three larger fields of intellectual property, administrative law, and money suits against the government,[73] then the policy reasons for the statute may be satisfied sufficiently with a random assignment of judges to panels.

A court based on subject matter jurisdiction creates the concern that certain judges will become specialists in different areas of the law. Instead of creating uniformity across the court, the result would be that one judge, for example, is a patent specialist and another a specialist in veterans affairs. The rotation of judges through panels in a more systematic fashion than randomness could:

> (1) Ensu[re] that all judges are enabled to sit with all other judges and entirely avoid[] 'set' panels of particular judges; (2) Enabl[e] all judges with sufficient seniority to preside over both three and five judge panels; (3) Equaliz[e] to the extent possible the size and workload among judges; (4) Ensur[e] that all judges sit in appeals from all types of tribunals within the court's universe; (5) Ensur[e] that the assignment of judges to panels is made objectively and without regard to case substance; (6) Ensur[e] that cases are calendared for hearing without knowledge of or regard for which judges will be sitting.[74]

The random formation of panels currently used does not meet these goals, but the Federal Circuit's Internal Operating Procedures render it nearly impossible for a judge to specialize in one area of subject matter.[75] Additionally, the unusual "procedures for processing precedential decisions" may ensure that the policy behind the statute is met:[76]

> All precedential opinions of the Federal Circuit receive the scrutiny of all judges of the court before issuance. A large portion of the

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Caseload_by_Category_Appeals_Filed_2010.pdf (last visited July 9, 2011) [hereinafter *Appeals Filed, By Category, FY 2010*] (Appeals Filed, by Category 2010 – 1% Spent Nuclear Fuel, 1% Vaccine, 0.5% Native American).

73. *Id.* (Appeals Filed, by Category 2010 – 44% Intellectual Property, 37% Administrative Law, 18% Money Suits Against United States).

74. Markey, *Phoenix Court*, *supra* note 11, at 229-30.

75. One predecessor court to the Federal Circuit, the Court of Claims, utilized specialist judges. Joseph V. Colaianni, *Patent Litigation Before the New Claims Court*, 32 CLEV. ST. L. REV. 25, 32-38 (1983-84) (Between 1966 and 1982, the Court of Claims divided all of their patent cases, with few exceptions, "between two patent-trained trial judges.").

76. Helen W. Nies, *Foreword* to THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, A HISTORY: 1982-1990, at xiii (Marion T. Bennett, ed. 1991).

> work of a judge of the Federal Circuit is the review of draft opinions before issuance to ensure that intra-circuit conflicts are not created. Conflicts between our own decisions would defeat a major *raison d'être* for the court's creation. Unfamiliar with this procedure, many [judges sitting on the Federal Circuit by designation] were surprised and not always pleased to receive suggestions from nonpanel judges for language changes in an opinion the visitor had drafted. However, once our objective was understood, [such visiting judges] unanimously praised the court for its efforts to maintain uniformity. Indeed, the view was expressed that this procedure is a major advance in the jurisprudential effectiveness of an appellate court and that it should be the obligation of all circuits to follow the procedure so that a trial judge has clear guidance, not conflicting directions.[77]

Every judge, therefore, is exposed to every precedential case before an opinion is issued.[78] Furthermore, every judge reads every opinion and often comments on everything from the holding to the wording of the decision.[79] This practice results in an increased number of cases that the Federal Circuit decides *sua sponte* to take en banc and helps minimize conflicts between panel decisions.[80]

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77. *Id.* at xiii-xiv.

78. This may, at least in part account for the high rate of cases taken en banc by the Federal Circuit acting *sua sponte.* Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc,* 76 MO. L. REV. 733, 736 (2011). In Professor Vacca's article, he analyzes all patent cases taken en banc by the Federal Circuit and finds that of the 38 cases for which he could find documentation, "the Federal Circuit has ordered en banc hearings sua sponte in twenty-two of them (56%)." *Id.* at 739. There were seven cases that Professor Vacca could not document, and Professor Vacca says:

> [e]ven assuming one or more of the parties petitioned for an en banc hearing in the remaining seven cases, the result is that the Federal Circuit sua sponte ordered 48% of the en banc cases, a surprisingly high number. As discussed *infra*, the significance of the Federal Circuit's sua sponte usage of en banc orders is important in understanding how the Federal Circuit establishes broad patent rules on its own initiative and acts more like a policymaker than an adjudicator.

Id.

79. Nies, *supra* note 76, at xiii.

80. George Quillin & Jacqueline Wright, *Rare Success Upon Filing Petitions For Rehearing By the Panel or En Banc at the Federal Circuit vs. Certiorari at the Supreme Court,* CORPORATE COUNSEL, July 2004, at A6, A7, *available at* http://www.foley.com/files/tbl_s31Publications/FileUpload137/2090/Quillin%20-%20Wright%20FINAL.pdf ("[S]tatistics indicate that a losing party may have a slightly better chance of being heard by the Supreme Court, as compared to being reheard by the original panel at the Federal Circuit, and certainly as compared to

VI. LOCATION

The Federal Circuit holds oral arguments once a month, usually in the Howard T. Markey National Courts Building in Washington, D.C.[81] Its statutory mandate dictates that the Federal Circuit must sit in the District of Columbia and can choose to sit regularly in any city in which another regional circuit court sits.[82] For each regional circuit court, Congress has set forth cities in which the court of appeals shall hold regular sessions.[83] For instance, the Fourth Circuit must sit in Richmond and Asheville regularly.[84] Once that has been satisfied, all circuit courts can sit "at such other places within the respective circuit as each court may designate by rule."[85] The Federal Circuit has not designated another city to sit in regularly, but instead, reflecting its national jurisdiction, the Federal Circuit travels and has sat in many cities across the United States, including Houston, Texas; San Diego, California; Charlottesville, Virginia; and Albuquerque, New Mexico.[86] The Federal Circuit, as a national circuit court, travels to meet the needs of litigants in other parts of the country and to secure "reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable."[87]

Frequent sittings in other cities helped expose the Federal Circuit to its national jurisdiction.[88] As the Federal Circuit has matured, it has not traveled

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being reheard en banc. After considering the process for rehearings at the Federal Circuit, such findings are perhaps not so surprising after all.... [A]ll active judges at the Federal Circuit read every precedential opinion before it is released to the public. If any judge believes that the case is worth considering further by the panel or taking en banc, that judge may send a memorandum to all the judges suggesting such action. Moreover, if active judges reach a consensus, the court may sua sponte decide to hear the case en banc.")

81. *See* COWEN ET AL., *supra* note 54, at 124-31 (providing a fascinating history of how the National Courts Building came to be).

82. *See* 28 U.S.C. § 48 (2006).

83. *Id.*

84. *See id.*

85. *Id.*

86. The Court has historically sat as often as once or twice a year in cities across the United States. *See Out of Washington Sessions*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT (Mar. 31, 2010), http://www.cafc.uscourts.gov/images/stories/the-court/courtsessions07-83.pdf.

87. 28 U.S.C. § 48(d); *see also Court Jurisdiction*, *supra* note 15.

88. The statute was cited as the reason for these travels by the first Chief Judge of the Federal Circuit, Howard T. Markey. Howard T. Markey, *The Court of Appeals for the Federal Circuit: Challenge and Opportunity*, 34 AM. U. L. REV. 595, 598 n.19 (1985) (discussing 28 U.S.C. § 48(d)). In the first few years of the court, "panels of the court [sat frequently] in cities other than Washington, D.C. Panels of the court have thus far sat twice in California and once each in Illinois and Alabama. This spring panels will sit in California, Colorado, and Louisiana." *Id.* at 598.

as often and has not kept pace with the lofty vision of Chief Judge Markey who believed the Federal Circuit would sit "in various locations throughout the land" because of its "responsibility under the statute of accommodating the needs of litigants outside Washington."[89] No circuit takes into account, for purposes of its setting the locations of its sessions, the travel costs that litigants incur to participate in their appeal. Such consideration should be taken into account by a court that hears a number of cases specifically seeking money damages from the United States government. Clearly, the costs to litigants could be reduced by encouraging the Federal Circuit to sit elsewhere more often.

One model is the Court of Claims, a predecessor to the Federal Circuit and the Court of Federal Claims, which reduced litigants' costs through a variety of measures. Initially, trial commissioners of the Court of Claims were located across the country.[90] In 1925, Congress reduced the number of trial commissioners, increased their powers, and instituted the first residency requirement.[91] Required to live in Washington, D.C., the trial commissioners continued to travel throughout the nation, conducting trials "where the witnesses and evidence could most conveniently be gathered. . . . They [had] their own courtrooms in the courthouse in Washington and in New York City, Chicago, Los Angeles, and San Francisco."[92] If another location was more convenient, to save costs, the trial commissioners "use[d] the United States district court facilities or, when necessary, use[d] state or local courtrooms."[93] Additionally, during their travels, the trial commissioners were not "accompanied by supporting personnel."[94]

The Court of Federal Claims' practices provide another model for reducing costs. This court holds a majority of its trials outside of Washington, D.C. and allows non-dispositive motions to be "argued by telephone conference call."[95] Under 28 U.S.C. § 173, "[t]he times and places of the sessions of the Court of Federal Claims shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Court of Federal Claims with as little inconvenience and expense to citizens as is practicable."[96] The Court of Federal Claims' travels and reliance on technology help fulfill this mandate.

The Federal Circuit must lower litigation costs to fulfill its statutory mandate. Sitting in Washington, D.C., and requiring all litigants to travel is convenient and inexpensive for the court, but not for all litigants. The Feder-

89. Markey, *Phoenix Court*, *supra* note 11, at 235.

90. COWEN ET AL., *supra* note 54, at 93-94.

91. Act of Feb. 13, 1925, ch. 229, § 13, 43 Stat. 936.

92. COWEN ET AL., *supra* note 54, at 94.

93. *Id.*

94. *Id.*

95. Robert Meltz, *Takings Claims Against the Federal Government*, SE18 ALI-ABA 475, 478 (1999).

96. 28 U.S.C. § 173 (2006).

al Circuit must examine its docket and travel more than once or twice a year across the nation and do so "with enthusiasm and dispatch wherever and whenever it arises."[97] The increased reliability of technology also must be taken into consideration in reducing the inconvenience to litigants before the Federal Circuit. The Second, Third, Eighth, Ninth, and Tenth Circuit allow arguments by videoconference,[98] while many courts allow appearances by telephone.[99] In the interest of decreasing litigation costs, particularly the costs of citizens suing the United States government for money damages presently due, exploration of these alternatives must occur.

VII. REMOVAL OF UNITED STATES COURT OF FEDERAL CLAIMS JUDGES

The Federal Circuit is the only circuit court that has the ability to remove trial court judges over whose decisions it has exclusive appellate jurisdiction.[100] The Federal Circuit can order the removal of a judge whose opinions are appealed directly to the Federal Circuit for "incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."[101] A majority of all Federal Circuit judges, though, must "concur in the order of removal."[102] The Federal Circuit has not exercised such power, but this statute gives the Federal Circuit the ability to discipline a Court of Federal Claims judge who consistently and flagrantly disregards binding decisions[103] from the Federal Circuit.[104] The implication of such power is breathtaking.

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97. Markey, *Phoenix Court*, *supra* note 11, at 235.

98. *Advantages of Videoconferencing Grow with Use*, THIRD BRANCH (Aug. 2006), http://www.uscourts.gov/news/TheThirdBranch/06-08-01/Advantages_of_Videoconferencing_Grow_with_Use.aspx.

99. *See* Robert V. Alvarado, Jr. & Mark S. Wapnick, *Telephonic Court Appearances: Reduce Litigation Costs the Easy Way*, AM. BANKR. INST. J., May 2006, at 34.

100. *See* 28 U.S.C. § 176 ("Removal of a judge of the United States Court of Federal Claims during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability. Removal shall be by the United States Court of Appeals for the Federal Circuit, but removal may not occur unless a majority of all the judges of such court of appeals concur in the order of removal.").

101. *Id.*

102. *Id.*

103. Pursuant to Rule 40.3 of the Rules of the United States Court of Federal Claims, complaints may be filed against "any judge of the court who has . . . engaged in conduct prejudicial to the effective and expeditious administration of the business of the court . . . ." FED. CIR. R. 40.3.

104. The power of removal is limited pursuant to 28 U.S.C. § 176. In 1997, a petitioner brought a claim before the Federal Circuit, sitting en banc, purportedly under 28 U.S.C. § 178, but failed "to present any cogent argument to support his

Removal of a federal judge from office traditionally is a power reserved for the legislative branch of the government.[105] In doing so, "[i]t is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge."[106] Vesting the power of removal in the Federal Circuit is possible only because the judges on the Court of Federal Claims are appointed under Article I of the Constitution.[107] As Article I judges on a "legislative" court, judges on the Court of Federal Claims are appointed for a term of fifteen years[108] rather than to a lifetime appointment, as is granted to Article III judges.[109]

Article I courts,[110] including the Court of Federal Claims, sometimes are referred to as "legislative courts."[111] While the Constitution does not reference "legislative courts," it gives Congress the power to "constitute Tribunals inferior to the Supreme Court."[112] Rather than referring to such courts as "inferior courts," Article I courts historically have been deemed "legislative courts," a tactful practice deriving from an opinion of Chief Justice Mar-

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request for 'impeachment.' Indeed, [the] petition is incoherent and incomprehensible. Thus, [the] petition is dismissed as frivolous." *In re* Petition for Removal of Certain Current and Former Judges of the Court of Fed. Claims, 135 F.3d 772, 772 (Fed. Cir. 1997) (per curiam).

105. Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 643 (1988).

106. Saikrishna Prakesh & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74 (2006).

107. 28 U.S.C. § 171 (2006) ("The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Court of Federal Claims. The court is declared to be a court established under article I of the Constitution of the United States.").

108. *Id.* § 172(a) ("Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years."); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 344 (1991) ("Their statutory terms are the longest in government.").

109. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

110. 28 U.S.C. § 171(a).

111. Glidden Co. v. Zdanok, 370 U.S. 530, 544 (1962) ("The distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy."); Williams v. United States, 289 U.S. 553, 560 (1933) ("The Comptroller General, as the basis for his ruling, took the view that the Court of Claims is a 'legislative' court, and not a 'constitutional' court created under article 3, s 1, of the Constitution"), *abrogated in part by* Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (plurality opinion); *see also* 32 AM. JUR. 2D *Federal Courts* § 6 (2007) (describing legislative courts).

112. *Zdanok*, 370 U.S. at 543.

shall.[113] The Court of Federal Claims is one such legislative court – one "invested with judicial power . . . not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument."[114] Legislative courts, despite lacking the imprimatur of Article III, "possess and exercise judicial power – as distinguished from legislative, executive, or administrative power – although not conferred in virtue of the third article of the Constitution."[115]

Article I status is a defining aspect of the Court of Federal Claims because of one unique feature of its jurisdiction. The Court of Federal Claims provides advisory decisions to Congress.[116] "In the court's advisory capacity, bills – typically private bills for monetary relief outside a preexisting statutory entitlement – are referred to the court by a resolution of either house of Congress. The court conducts what amounts to a full trial to determine the factual merits of the claim for relief."[117] Advisory opinions, opinions lacking force as judicial judgments, may not be issued by Article III courts.[118] In order to issue advisory opinions, therefore, the Court of Federal Claims must remain a legislative court.[119] One commentator explains the constitutional distinctions of government bodies, including courts, by stating that:

> Separation of powers analysis usually places particular officers "in" one branch of government or another according to statutory provisions controlling their appointment, responsibilities, salary, and removal, and associated doctrines concerning their amenability to supervision by other officers. Hence, a statement that an adjudicator belongs with the core judiciary of Article III, the "legislative" courts of Article I, or the executive officers of Article II implies a set of preexisting conclusions about the particular attributes of the office in question.[120]

Hence, an Article I court has different responsibilities and can operate in a different fashion than an Article III court.

Despite the lack of de jure lifetime tenure, judges on the Court of Federal Claims have de facto lifetime tenure. Their term appointments of fifteen years are the longest in government, and upon the end of a judge's term, the judge may elect to take senior status, receive the same pay as regular judges,

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113. *Id.* at 544 (citing Am. Ins. Co. v. Canter, 7 L.Ed. 242 (1828)).

114. *Williams*, 289 U.S. at 565-66.

115. *Id.* at 566.

116. *See* 28 U.S.C. § 1492 (2006).

117. David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 326 (2007).

118. *Williams*, 289 U.S. at 569 (quoting *Ex Parte* Bakelite Corp., 279 U.S. 438, 454) (1929)).

119. *Id.*

120. Bruff, *supra* note 108, at 342.

and continue to hear a full caseload.[121] However, the difference between de jure and de facto lifetime tenure is important, because it is what renders constitutional the power of the Federal Circuit to remove judges from the Court of Federal Claims. The Constitution contains an Appointments Clause,[122] but does not provide a removal clause.[123] However, Congress has established a removal method for the legislative officers of the Court of Federal Claims, vesting that ability in the Federal Circuit.[124] The Federal Circuit is unique in holding this power.[125]

The security of judges on the Court of Federal Claims can be contrasted with that of another Article I court, the United States Tax Court.[126] Judges on the United States Tax Court "may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."[127] In other words, the United States Court of Appeals for the District of Columbia, which hears appeals from the United States Tax Court,[128] does not have the ability to remove judges from the United States Tax Court.

The reason the Federal Circuit holds this power of removal over the United States Court of Federal Claims is unclear.[129] It may have found its way into the Federal Courts Improvements Act of 1982 because of the history of trial commissioners on the Court of Claims. In 1855, Congress established the Court of Claims and gave the first three judges the power to "appoint commissioners to take depositions and issue subpoenas."[130] These trial

121. *See* 28 U.S.C. § 178.

122. U.S. CONST. art. II, § 2, cl. 2.

123. Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 851 (1993).

124. 28 U.S.C. § 176.

125. Bruff, *supra* note 108, at 345 (Unique as the power may be, it is probably nothing more than a point of academic interest, for as commentators have indicated, "[f]ear of removal cannot cause many sleepless nights for any legislative judge who eschews conduct that would impeach a federal judge. Statutory removal restrictions remain undefined due to a void of litigated removals. And process protections flowing from statute or due process make it unlikely that the authority possessing removal power will think the battle worth the effort. After all, the judge's tenure will eventually expire, even if the judge does not.").

126. 26 U.S.C. § 7441 (2006).

127. *Id.* § 7443(f).

128. *Id.* § 7482.

129. It is within the power of Congress to grant the Federal Circuit the ability to remove Court of Federal Claims judges, as they are federal officers. Glidden v. Zdanok, 370 U.S. 530, 534 (1962) ("[I]t is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress.").

130. *History of the Federal Judiciary, Court of Claims 1855-1982*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_coc.html (last visited May 20, 2011) [hereinafter *History of the Federal Judiciary, Court of Claims 1855-1982*].

commissioners were employees of the Court of Claims and became an essential part of the Court of Claims' practice.[131] As the Court of Claims grew in stature, its reliance on the commissioners increased,[132] and "in 1925 Congress authorized the court to appoint seven commissioners, who would hear evidence and report on their findings of the facts."[133] The Court of Claims judges appointed the trial commissioners, and the judges also could remove the trial commissioners.[134]

Challenges to the commissioners' findings could be brought before the Court of Claims.[135] The growing importance of the appellate practice of the Court of Claims led to its designation as an Article III court by Congress in

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131. *Id.* The Court of Claims was established in 1855. *Id.* Article 3 of the Act establishing the Court of Claims

> authorized the court to appoint commissioners to take testimony and investigate claims. The commissioners could issue subpoenas to require the attendance of witnesses and were authorized to receive sworn testimony. . . . They were not lawyers but merely compiled a transcript of the testimony, which was then sent to the judges for consideration. Benjamin Harrison, who would later become the country's 23rd President, served as a commissioner when he was a young man.

COWEN ET AL., *supra* note 54, at 16. "The commissioners performed in much the same manner until 1925, when legislation expanded their function and authority. The resulting metamorphosis . . . transformed 'commissioners' into 'trial judges.'" *Id.* at 39.

132. *See* Marion T. Bennett, *The United States Court of Claims, a 50-Year Perspective*, 29 FED. BAR J. 284, 293 (1970) ("The commissioners shall serve as the trial judges of the court to the extent of the authority therefor prescribed by statute and these rules. . . . In all cases referred to him, the commissioner shall be responsible in the first instance (1) for all orders requisite to the joinder of issue on the pleadings; (2) for the disposition of procedural motions; (3) for the direction and conduct of pretrial proceedings (including discovery and depositions); (4) for the trial of issues of fact; (5) for making and reporting findings of fact; and (6) unless otherwise directed by the court, for submitting his opinion and recommendation for the conclusion of law . . . .") (citing COURT OF CLAIMS R. 13 (1969 ed.)); Franklin M. Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle Over the* Wunderlich *Case*, 67 HARV. L. REV. 217, 228 (1953) ("The Court of Claims' commissioner system provides the full panoply of pleading, proof, and argument provided in a federal district court . . . .").

133. *History of the Federal Judiciary, Court of Claims 1855-1982*, supra note 130.

134. "The Court of Claims may appoint fifteen commissioners who shall be subject to removal by the court . . . ." 28 U.S.C. § 792 (repealed 1982); Bennett, *supra* note 135, at 292 n.40 ("No Commissioner appointed pursuant to section 792 of Title 28, United States Code, shall be removed from office by the Court except for inefficiency, neglect of duty, or misconduct.").

135. *History of the Federal Judiciary, Court of Claims 1855-1982*, *supra* note 133.

1953.[136] This designation was a formal recognition of the bifurcated system developed by the Court of Claims "whereby trial commissioners heard cases and made recommendations to judges in the appellate division who had the sole authority to render dispositive judgments."[137] The judges were Article III judges, while the trial commissioners were employees.[138]

Upon the Court of Claims' termination in 1982, Congress acknowledged this bifurcated system and "reorganized the trial and appellate divisions of the United States Court of Claims."[139] The trial commissioners were appointed to the United States Court of Federal Claims, an Article I court.[140] The Court of Claims judges were appointed to the Federal Circuit, an Article III court, and apparently brought with them the power to remove the trial commissioners, now judges, from office.[141]

Regardless of how it became law, "[t]he Federal Circuit has the power, on majority vote, to remove from office for good cause shown a judge of the Claims Court."[142] Even though this power is constitutional, permitting the Federal Circuit to remove judges over which the Federal Circuit has exclusive appellate review is not a power that should be exercised.[143] Part of the power of an appellate system is the separation between the trial tribunal and the appellate court. Fear of removal, however unjustified, impacts that separation to the detriment of litigants. The history behind this power remains unclear, but the future of this power should be the termination of the Federal Circuit's right to remove judges from the Court of Federal Claims. That power rightfully belongs with the legislative or executive branch, not with the judicial branch.

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136. Glidden Co. v. Zdanok, 370 U.S. 530, 531-32 (1962) (citing Act of July 28, 1953, ch. 253, 67 Stat. 226 (Court of Claims); Act of Aug. 25, 1958, 72 Stat. 848 (Court of Customs and Patent Appeals); Act of July 14, 1956, 70 Stat. 532 (Customs Courts)) ("Congress has [provided] as to [the Court of Claims and the CCPA] that 'such court is hereby declared to be a court established under article III of the Constitution of the United States.'").

137. Thurmond, *supra* note 5, at 513.

138. Colaianni, *supra* note 75, at 29.

139. *Id.*

140. Seamon, *supra* note 1, at 545 ("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.").

141. *Id.* at 562-63. There may be a question about the appropriateness of a checks and balances system whereby the Appellate Court has the ability to remove judges from the trial court directly underneath them for misconduct.

142. Markey, *Phoenix Court, supra* note 11, at 229.

143. *See id.*

VIII. CRIMINAL SANCTIONS

A Member of Congress practicing before the Court of Federal Claims and the Federal Circuit is subject to the assessment of criminal sanctions.[144] In no other court is this true. The statutory language states that a Member of Congress may be imprisoned or fined for receiving compensation for representing a party

> in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission.[145]

In fact, the very jurisdiction of the Court of Federal Claims means that the United States will be a party to all matters brought before the Court.[146] Consequently, having a blanket injunction against a Member of Congress practicing in the Court of Federal Claims sends a strong message about the conflict of interest inherent in having a Member of Congress appear in a case directly involving the United States.

Members of Congress can appear, without fear of punishment, in courts other than the Court of Federal Claims or the Federal Circuit, if they do not take compensation or if acting "as agent or attorney for or otherwise representing his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary."[147] The more narrowly tailored language regarding the Court of Federal Claims prevents all practice by a Member of Congress, paid or unpaid, before the Court of Federal Claims, with no exceptions.[148] Again, for the Court of Federal Claims that prohibition may make sense because of the jurisdiction of the Court of Federal Claims.

No additional sanctions should be imposed on a Member of Congress who practices before the Federal Circuit. In 2010, 34% of the Federal Circuit's docket comprised patent infringement actions,[149] and in the vast majority of these cases the United States was not a party. It makes little sense to

144. 18 U.S.C. § 204 (2006); *id.* § 216.

145. *See* 18 U.S.C. § 216(a) (providing for criminal penalties); *id.* § 203.

146. *See* 28 U.S.C. § 1491 (2006) ("The United States Court of Federal Claims shall have 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, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.").

147. 18 U.S.C. § 203.

148. *Id.* § 204.

149. *See Appeals Filed, By Category, FY 2010*, *supra* note 72.

allow a Member of Congress to represent a spouse in a charge of trespass on real property, but not in a charge of trespass on intellectual property. This discrepancy may be a legislative drafting oversight from the transition from the appellate division of the Court of Claims to the United States Court of Appeals for the Federal Circuit, but the anomaly should be addressed. Coverage by 18 U.S.C. § 203 is sufficient for the remainder of the jurisdiction in the Federal Circuit, and there is no reason why it, and the spousal exception, should not cover the Federal Circuit. Alternatively, 18 U.S.C. § 204 could be amended so that the exception also extends to appeals from and cases before the Court of Federal Claims.

IX. CONCLUSION

Often referred to as an experiment, the Federal Circuit has flourished. Born again from the ashes of its predecessors, the Phoenix Court continues to grow in significance, stature, and strength. As it grows, however, it remains rooted in its history and in its connection to President Lincoln's founding words.[150] The court struggles to balance its mission of promptness with the desire of Congress for Federal Circuit judges to "have adequate time for thorough discussion and deliberation" of all decisions.[151] This balance is critical for a court establishing national precedent and along with promptness, unique powers of termination, panel composition, location, and jurisdiction differentiate the Federal Circuit and inform its jurisprudence.

150. *See* Lincoln, *supra* note 8, at 51.

151. S. REP. NO. 97-275, at 6 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 17 (capitalization altered from original source).