The Trial Courts of the Federal Circuit: Diversity by Design

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Introduction

My presentation today is designed to set the stage for a panel discussion by eminent jurists representing each of the four courts whose judgments are reviewable by the United States Court of Appeals for the Federal Circuit: the United States Court of Federal Claims, the United States District Courts, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. My assigned task is to provide a brief summary of the origin, jurisdictional authority, and legislative purpose in creating the individual courts and then to place each of them into a larger context.

First, I will provide something of a “primer” on each of these courts. Such a synopsis likely will convey little or no information that is new or enlightening for those who practice regularly before a particular court and who thus, by experience, necessarily are well acquainted with its purpose, jurisdiction, and practices. Rather, I seek here to offer a general and accessible introduction for those who are unfamiliar with one or another of these tribunals.

Second, I will endeavor to identify a theme or point of mutuality among these four judicial entities. That is, I will try to explain what ties them together, and thus explains, the designation of a single Court of Appeals—the Federal Circuit—as the shared destination for further appellate review. To put it another way, this phase of my presentation could be compared to the children’s game in which a series of objects are shown in a picture and the child is supposed to identify the pattern.

Given the obvious differences among these courts, the second task initially seems more difficult than the former; indeed, it proves to be downright

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impossible. To be sure, as I will note in talking about each of the four courts, they do all share the dubious distinction of having been the target of suggestions that each court, or at least its jurisdiction over claims that come within the appellate purview of the Federal Circuit, should be abolished.

Beyond that, however, the attempt to find a single, unifying substantive connection among these courts is doomed to failure. But, as I will conclude, this is no cause for despair. The absence of a pattern among the substantive fields of law adjudicated by these various tribunals falling under the appellate review of the Federal Circuit is not an accident, nor is it attributable to a thoughtless, random assignment of disparate matters to variant forums by Congress. Rather, this diversity occurs by design and serves to strengthen the position of the Federal Circuit among its sister courts of appeals in the federal judicial system.

I. The United States Court of Federal Claims

I commence my primer on the trial courts of the Federal Circuit by looking at the United States Court of Federal Claims (COFC). I begin here for two reasons. First, due to my prior scholarly work focusing upon litigation with the federal government, this is the forum with which I am most familiar and to which I have given the most thought in terms of its jurisdiction and scope of authority. Second, the COFC is a direct descendant from the former Court of Claims, which in turn was a predecessor to the Federal Circuit itself.

The concept of “sovereign immunity”—that is, the immunity of the federal government from suit without its express permission and subject to such limitations as incorporated into the statutory waiver—underlies and permeates the subject of litigation against the federal government. What today is the COFC “shared its birth with that of the first significant grant of permission by the sovereign United States to its citizens to seek relief against [the federal government] in [the] courts.”

The original Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts. Prior to 1855, individuals with contract or other monetary claims against the federal government were barred by

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sovereign immunity from seeking redress in court and thus were left to petition Congress to enact legislation, in the form of “private bills,” appropriating funds to pay those claims.  As originally conceived, the Court of Claims had authority only to make recommendations to Congress to pay claims, thereby serving as an advisor to Congress regarding the merits of such claims.  President Lincoln urged the Congress to give the “power of making judgments final” to the Court of Claims, arguing that “[i]t 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.” As President Lincoln requested, and “under the deluge of Civil War claims,” Congress acted in 1863 to grant the Court of Claims power to make binding and final judgments, with appellate review by the Supreme Court.

In 1886, Representative John Randolph Tucker introduced a bill in Congress to revise the jurisdiction and procedures of the Court of Claims and to replace the earlier 1855 and 1863 statutes.  The Tucker Act, enacted in 1887, remains the “foundation stone” in the adjudication of money claims against the United States.  This statute confirmed the powers and nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and also expanded that court’s authority to hear suits based upon the Constitution.

In 1972, Congress enacted the Remand Act as an amendment to the Tucker Act, which permits the court to grant certain types of equitable relief “incident of and collateral to” a money judgment, such as reinstatement of an employee to a position or correction of records.  In 1996, the Tucker Act was

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4 Seamon, supra note 2, at 175.
8 Act of Mar. 3, 1863, ch. 92, § 5, 12 Stat. 765, 766; see also Dees, supra note 7, at 546; Seamon, supra note 2, at 176.
11 Dees, supra note 7, at 546.
12 Seamon, supra note 2, at 176–77.
amended to grant the COFC jurisdiction, including the power to issue declaratory and injunctive relief as well as money damages, over protests arising from solicitations of bids for government contracts, a field of litigation that has become a sizable part of the court’s docket. 14

With these and other minor exceptions, the substance of the Tucker Act has been remarkably stable during the past century. 15 During the past quarter-century, however, the Tucker Act has been revised in two important structural ways, 16 and the former Court of Claims has been reconstituted once and renamed twice.

First, “[p]rior to 1978, contract disputes with the government generally fell under [that] provision of the Tucker Act covering claims founded on contract.” 17 Since 1978, the now-Court of Federal Claims has had exclusive original court jurisdiction of all contract claims covered by the Contract Disputes Act (CDA) of 1978 (shared with the non-court agency Boards of Contract Appeals). 18 Whether the case is heard by the COFC or an agency Board of Contract Appeals, either the contractor or the government may seek appellate review in the United States Court of Appeals for the Federal Circuit. 19

Second, under the Federal Courts Improvement Act (FCIA) of 1982, 20 the original Court of Claims was bifurcated into two separate but related judicial entities. 21 The Court of Claims was an Article III court, with its judges being appointed for life tenure, as with judges on most other federal courts. 22 As part of the FCIA, Congress established the slightly re-named Claims Court as the trial court for Tucker Act and CDA claims, and then created the new United States Court of Appeals for the Federal Circuit to hear appeals involving these

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15 Seamon, supra note 2, at 178 n.111 (“There has been no significant alteration of the Tucker Act’s substance since its enactment more than 100 years ago.”).
17 Sisk, Litigation with the Federal Government, supra note 1, at 518.
22 See Glidden Co. v. Zdanok, 370 U.S. 530, 584 (1962) (declaring that the Court of Claims was an Article III court).
and other claims. The Claims Court was designated by Congress as an “article I” court, that is, a court created by Congress pursuant to its legislative powers under Article I of the Constitution and whose judges do not have the life-tenure protection guaranteed to members of the regular federal judiciary by Article III of the Constitution. Appellate review by an Article III court, however, was preserved through the creation of the Federal Circuit.

In many respects, the division of trial and appellate authority between the now-Court of Federal Claims and the Federal Circuit is merely a continuation of existing adjudication practice in the former Court of Claims. Before enactment of the FCIA in 1982, Congress had authorized trials to be conducted before non-Article III trial commissioners, with appellate review by the Article III judges on the Court of Claims. As Senator Strom Thurmond of the Senate Judiciary Committee explained at a later conference on the court, “Congress reorganized the trial and appellate divisions of the United States Court of Claims to streamline the two-tier court”; what is now the COFC “represents the trial division of the former Court of Claims” and “[t]he appellate section of the Court of Claims was combined with the Court of Customs and Patent Appeals to become the new United States Court of Appeals for the Federal Circuit.” In 1992, the Claims Court was renamed the “United States Court of Federal Claims,” the denomination that it bears today.

Recently, both in academic discourse and the popular press (namely, the Washington Post), attention has been drawn to the provocative proposition

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24 Federal Courts Improvement Act § 105(a) (codified at 28 U.S.C. § 171(a) (2000)).
25 Seamon, supra note 2, at 178 n.111; see also Thurmond, supra note 21, at 513 (noting that the Claims Court judges have fifteen year terms).
26 Federal Courts Improvement Act §§ 105(a), 133(a) (codified at 28 U.S.C. §§ 171(a), 1295(a)(3) (2000)).
27 28 U.S.C. § 2503 (1976) (relevant language amended 1982); see generally Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1565 (Fed. Cir. 1990) (stating that “the split of trial and review functions under both systems is substantially similar”); Dees, supra note 7, at 546–47.
28 Thurmond, supra note 21, at 513.
offered by Professor Steven Schooner that the COFC is “Neither Fish Nor Fowl,” that its jurisdiction covers a hodgepodge of claims that allows neither for generalization nor specialty, that it shares authority with other tribunals over nearly every type of claim that it hears, and thus that the court is neither distinctive nor necessary.

In my view, any suggestion that the COFC is dispensable fails to appreciate the expertise of the court on matters affecting the public treasury and mistakenly equates statistics on the number of cases heard by the court in a particular category with the degree of impact that the court makes to jurisprudence in these areas of the law. The greatest strength of the COFC lies in its expertise in understanding appropriations and other money-mandating statutes, perceiving when a money remedy against the federal government is appropriately recognized in a dispute between the government and its citizens, and providing a uniform national voice on claims by citizens for compensation from the public fisc. Thus, the present jurisdictional line that directs cases involving claims upon the United States Treasury to the COFC is one that turns upon the category of case, even though the classification may not be measured by the field of substantive law.

Moreover, the voice of the COFC appropriately dominates in important areas of the law, such as government contract formation issues (for which the court has exclusive authority), military employment claims, Indian trust claims, vaccine claims, and takings of private property. On these and other matters, the COFC speaks in a manner and with a distinction that cannot be captured in a reductive analysis based on caseload statistics.

To be sure, the authority and integrity of the COFC has been under a cloud for the past fifteen years, due to an unfortunate Supreme Court decision that blurred the clear lines of demarcation between equitable-type non-monetary claims properly brought in District Court under the Administrative Procedure Act (APA) and monetary claims properly reserved to the COFC under the Tucker Act. In *Bowen v. Massachusetts*, a majority of the Court held that certain types of monetary claims, which it characterized as seeking specific relief in the form of money rather than money “damages,” could be pursued under the APA rather than through the Tucker Act. Instead of drawing a bright-line between money and non-money claims, and thus a clearly-defined jurisdictional border between the United States District Courts and the COFC, the Supreme Court adopted an amorphous case-by-case approach, allowing plaintiffs to frame some claims for monetary relief as falling within

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33 Sisk, *The Tapestry Unravels*, *supra* note 2, at 688.
36 *Id.* at 891–901.
the APA framework rather than under the purview of the Tucker Act. As I have written about at great length elsewhere, the Supreme Court in *Bowen v. Massachusetts* thereby sowed seeds of chaos into the initial jurisdictional determination for cases that seek a monetary remedy.

Fortunately, the slip-and-slide away from the exclusive authority of the COFC over monetary claims against the government has been halted by the Federal Circuit. Just two years ago, the Federal Circuit took a bold but well-considered step forward in restoring jurisdictional clarity and stability in assignment of claims between judicial institutions, in a manner that respectfully accounted for *Bowen v. Massachusetts* while narrowly confining it to its specific context as defined by the terms of its own reasoning.

In *Consolidated Edison Co. of New York v. United States*, the Federal Circuit noted that the Supreme Court’s *Bowen v. Massachusetts* decision had “emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program” in concluding that the District Courts were better suited for such disputes. Thus, when a case does not involve “a complex ongoing federal-state interface,” the COFC should be able to supply an adequate remedy through a money judgment. In sum, the Federal Circuit reasoned, the Supreme Court’s decision in *Bowen v. Massachusetts* was linked to “a specific set of circumstances” that defines the scope of its reach.

If the Federal Circuit stands firmly by its thoughtful and sensible decision in *Consolidated Edison*, including the limitation of *Bowen v. Massachusetts* to the peculiar circumstances of an ongoing federal-state financial relationship, then the pernicious effects of that decision may soon be arrested and the jurisdiction of the COFC will be stabilized.

**II. The United States District Courts**

Because the United States District Courts share concurrent authority with the COFC over smaller money claims against the federal government, I turn next to this set of tribunals. While most claims tried before the United States District Courts are reviewed on appeal by the applicable regional circuit Court of Appeals, two major categories of claims, though held to trial jurisdiction in a geographic area before a particular District Court, are centralized for

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37 Id. at 900–01.
40 Id. at 1383.
41 Id.
42 Id. at 1384.
appellate review before the Federal Circuit. These two categories are (1) Little Tucker Act claims for money against the federal government, and (2) patent claims.

Trial court jurisdiction over “Big” Tucker Act claims against the United States is assigned to the United States Court of Federal Claims by 28 U.S.C. § 1491(a)(1).44 District Courts retain concurrent jurisdiction over Tucker Act claims for $10,000 or less under 28 U.S.C. § 1346, which is commonly known as the “Little” Tucker Act.45 The Big Tucker Act and the Little Tucker Act differ only in terms of the designated forum. The substance of the statutory waiver of sovereign immunity and the limitations on relief are the same whether a Tucker Act claim is heard in District Court or in the COFC.

Whether a claim is brought under the Big Tucker Act in the COFC or in District Court under the Little Tucker Act, all Tucker Act case appeals are within the exclusive appellate jurisdiction of the Federal Circuit.46 Through the FCIA,47 Congress intended that the Federal Circuit would exercise exclusive appellate jurisdiction over nontax Tucker Act claims “to provide reasonably quick and definitive answers to legal questions of nationwide significance.”48 Specifically, 28 U.S.C. § 1295(a)(3) grants to the court jurisdiction over all appeals from the COFC.49 Additionally, § 1295(a)(2) confers appellate jurisdiction over District Court decisions “if the jurisdiction of that court was based, in whole or in part, on section 1346[(a)(2)] of this title.”50

In 1987, in United States v. Hohri,51 the Supreme Court held that the Federal Circuit, rather than the regional Court of Appeals, has exclusive jurisdiction over an appeal of a District Court’s decision of a “mixed” case raising both a Little Tucker Act claim and a Federal Tort Claims Act claim.52 Thus, for purposes of locating appellate jurisdiction, the Court gave priority to the presence of a Tucker Act claim, notwithstanding the joinder of other claims in the case.53 In making this determination, the Supreme Court

45 Id. § 1346(a)(2).
50 Id. § 1295(a)(2).
52 Id. at 75–76.
53 Id. at 75.
examined the comprehensive framework of the FCIA and noted the strong congressional expressions of the need for uniformity in the area of Tucker Act jurisprudence.\(^{54}\)

The second category of District Court jurisdiction that implicates the appellate review of the Federal Circuit is that over claims that arise under the patent laws of the United States. When Congress created the Federal Circuit, its primary animating concern was to ensure uniform adjudication of patent law matters before an appellate forum with national scope.\(^{55}\) Under 28 U.S.C. § 1295(a)(1), the Federal Circuit has exclusive jurisdiction over “an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on [28 U.S.C. §] 1338,” with certain exceptions (that effectively limit jurisdiction to appeals in cases involving patent or plant variety protection claims).\(^{56}\) Section 1338 in turn grants District Courts original jurisdiction “of any civil action arising under any Act of Congress relating to patents.”\(^{57}\)

When a patent claim is raised in the plaintiff’s affirmative complaint before the District Court, the breadth of exclusive Federal Circuit appellate jurisdiction is broad and general. In *Christianson v. Colt Industries Operating Corp.*,\(^{58}\) the Supreme Court held that the Federal Circuit’s jurisdiction extends to cases in which patent law either creates the cause of action or the “right to relief necessarily depends on resolution of a substantial question of federal patent law.”\(^{59}\) When a patent law claim is presented as part of the plaintiff’s well-pleaded complaint, Federal Circuit jurisdiction vests over the entire case, including all appeals on any matter or aspect of the case, and not merely over trial court judgments on the patent law claim.\(^{60}\)

However, as the Supreme Court held last year in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*,\(^{61}\) the Federal Circuit’s appellate jurisdiction disappears if the patent law issue is raised by the defendant by means of a counter-claim in the answer.\(^{62}\) The Court reached this conclusion by applying the same analysis that governs for District Court federal question jurisdiction, under which the “well-pleaded complaint” rule demands that the

\(^{54}\) Id. at 71–73.


\(^{57}\) Id. § 1338.

\(^{58}\) 486 U.S. 800 (1988).

\(^{59}\) Id. at 809.


\(^{62}\) Id. at 830.
jurisdictional claim be found in the affirmative pleading and plead as a necessary element.63

The United States District Courts are the forum of choice for a variety of claims implicating the patent law, with the typical patent claim being one alleging infringement of a patent (with the exception of allegations that the federal government has infringed a patent, where the COFC assumes exclusive jurisdiction64). As described by practitioner Stephen Nagin, infringement of a patent essentially is a tort, giving rise to a federal cause of action for a form of trespass.65 When infringement of a patent is alleged, the District Court judge must determine the scope of the claim and the meaning of the language in the claim as a matter of law, in what is referred to as a Markman proceeding.66 Thereafter, the trier of fact, whether it be the jury or the judge, determines whether the defendant has trespassed upon the patent as so defined and under the factual circumstances of the case.67

The authority of the District Courts over claims that fall within the exclusive appellate jurisdiction of the Federal Circuit has been the subject of much debate. While no one of course has suggested abolition of the District Courts, the continuation of concurrent Little Tucker Act jurisdiction may be questioned and the competence of these courts to decide patent matters has been challenged.

Given that appellate review over all Tucker Act claims—Big or Little—are reserved to a nationwide forum, one might appropriately ask whether all trial court jurisdiction over this category of claims should be gathered into the COFC as a similar nationwide tribunal. Although, as will be seen, I am skeptical of most proposals for removing or limiting authority of the four courts represented on this panel, I submit that this limited excision is meritorious. For four reasons, I suggest that the Little Tucker Act is an historical anachronism that serves no continuing purpose.

First, the Little Tucker Act’s $10,000 amount in controversy limitation on District Court jurisdiction, while defining a fairly substantial sum of money in 1887, is so small today as to be unlikely by itself to generate much significant litigation. The failure of Congress in more than a century to ever raise the amount in controversy limitation suggests a lack of political interest

63 Id.
67 See Netword, LLC v. Centraal Corp., 242 F.3d 1347, 1350 (Fed. Cir. 2001); Texas Instruments, Inc. v. United States Int’l Trade Comm’n, 805 F.2d 1558, 1562 (Fed. Cir. 1986); see also Nagin, supra note 65, § 21.22.
in preserving this small territory of District Court jurisdiction over non-tort money claims against the federal government. Moreover, even if a lawsuit states a claim for less than $10,000 when it is initially filed in District Court, the Federal Circuit has held that the District Court loses jurisdiction and the lawsuit must be transferred to the COFC as soon as the amount accrues above $10,000.68

Second, the Little Tucker Act was designed to allow plaintiffs with relatively small claims to litigate in the local federal trial court rather than being required to travel to the nation’s capital. In contrast with the circumstances in 1887, travel across the country today is relatively easy and inexpensive. Moreover, for the convenience of litigants, the COFC routinely sits throughout the country to hear cases.

Third, to the extent that the Little Tucker Act was intended to excuse small claimants from having to learn the intricacies of special procedures in an unfamiliar forum, those concerns have dissipated over time. The procedures of the COFC parallel those familiar to practitioners in federal District Court, and a user-friendly clerk’s office ensures that the irregular litigant in the COFC is not left at any practical disadvantage.

Fourth, the Little Tucker Act creates opportunities for jurisdictional and substantive confusion that make its preservation not worth the candle. Because small claims may be heard outside of the COFC, the expertise of that tribunal on matters affecting the public treasury is undermined, although to a small degree. Disputes about the amount in controversy and the potential that a small claim will accrue above the $10,000 limitation further create unnecessary complications, particularly in matters involving small financial stakes.

District Court authority over patent claims has also been challenged. Professor Kimberly Moore has raised the perhaps impertinent question of whether District Court judges are “equipped” to accurately resolve patent cases.69 Indeed, given the technical complexity of patent matters, the fact that a District Court judge on average will try one patent case every 6–8 years,70 and the heavy demands on judicial resources, District Courts frequently refer the complex claim construction process to a magistrate judge or a special master; more recently, use of a technical advisor to the judge has also emerged.71

71 Nagin, supra note 65, § 21.22.
During congressional consideration of what became the FCIA, witnesses expressed concern that the findings of the trial courts should receive the customary deference on appeal, notwithstanding the specialized expertise of the then-proposed Federal Circuit; in other words, that patent cases should not be retried on appeal.\(^2\)

In practice today, however, the central element in patent cases is determined by the trial judge as a matter of law and is reviewable on appeal de novo, where that determination is frequently reversed. The definitive issue in most patent cases—the claim construction—was assigned to the judge for disposition by the Supreme Court in *Markman v. Westview Instruments, Inc.*\(^3\) which held that claim construction was not subject to trial by jury.\(^4\) Moreover, the Federal Circuit has held the claim construction matter to be a question of law reviewable de novo.\(^5\)

As a result, some report that between one-third and forty percent of District Court claim constructions are modified on appeal.\(^6\) One District Court judge in frustration told the parties to a patent case that every patent judgment he had entered had been reversed by what he called the “people wearing propeller hats” at the Federal Circuit, and that he fully expected to be reversed again in the matter at hand. (Ironically, that judge was affirmed on that particular occasion.)\(^7\)

Based upon these developments and reversal statistics, Professor Moore concludes that District Court “judges are not, at present, capable of resolving these issues with sufficient accuracy.”\(^8\) In the end, she does not call for removal of patent jurisdiction from the District Court, but rather thoughtfully proposes a policy of expedited appeal to the Federal Circuit of summary judgment or other reasonably final dispositions of claim construction issues.\(^9\)

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\(^2\) See Thomas H. Case & Scott R. Miller, Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. Cal. L. Rev. 301, 311 (1984) (“Critics argue that as the CAFC becomes more confident of its patent expertise, it will disregard district court findings of fact more often. This tendency, according to the argument, will be encouraged as litigants attempt to retry cases at the appellate level because of the court’s presumed expertise.”) (footnote omitted)

\(^3\) 517 U.S. 370 (1996).

\(^4\) Id. at 391.

\(^5\) Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1454 (Fed. Cir. 1998).

\(^6\) Compare Nagin, supra note 65, § 21.5, with Moore, supra note 69, at 1–2.

\(^7\) Moore, supra note 69, at 9 & n.45 (quoting O.I. Corp. v. Tekmar Co., No. 95-CV-113 (S.D. Tex. June 17, 1996) (Kent, J.), aff’d, 115 F.3d 1576 (Fed. Cir. 1997)).

\(^8\) Id. at 32.

\(^9\) Id. at 3, 31.
Practitioner John Pegram likewise finds fault in the current process for adjudication of patent claims. Yet, he also stops short of calling for removal of patent claims from District Courts altogether, although his remedy is to create a specialized patent trial court by conferring parallel patent claim jurisdiction over another body with national scope—the Court of International Trade.80

Which brings me to the discussion of the next court represented on this panel today.

III. The United States Court of International Trade

The Federal Circuit as an appellate court was born from the ashes of the former Court of Claims and the Court of Customs and Patent Appeals, thus meriting Chief Judge Howard T. Markey’s contemporary description of it as the “Phoenix Court.”81 Just as the Court of Customs and Patent Appeals was perpetuated in the Federal Circuit as an appellate court, the Court of International Trade (CIT) as a trial court is the successor, although in an enlarged scope and with more potent authority, of the Customs Court.

The importance of international trade, and regulation thereof, to our national well being is as old as the history of the United States and as new as today’s global economy, in which the prosperity of every nation is necessarily tied to that of the world community. The historical pedigree of the CIT is long, and that of the subject that it adjudicates even longer.

The Tariff Act of 1789 was the second piece of legislation enacted by the new Congress after ratification of the Constitution.82 The resort to litigation followed soon thereafter. As the CIT reports on its website, “[t]he first case tried before the first judge appointed to the first court organized under the Constitution of the United States involved a dispute arising from an importation into the new nation.”83

The present CIT traces its roots back directly to the Board of General Appraisers (Board), which was established in 1890 to afford review of determinations made by customs officials on the duties assessed against imported merchandise.84 Although the Board was an administrative entity

80 Pegram, supra note 70, at 782–83.
operating within the Department of the Treasury, the Board members were appointed by the President, confirmed by the Senate, and could be removed only for cause.85 Given that the Board effectively was a judicial entity despite its bureaucratic designation, Congress’s substitution of the United States Customs Court in 192686 as an Article I court was more a change in name than in nature.87 Subsequently, in 1958, Congress re-established the Customs Court as an Article III tribunal whose judges were appointed with constitutionally-protected life-time tenure,88 thereby fully “integrat[ing the Court] into the federal judicial system of the United States.”89

In 1980, Congress re-designated this body as the United States Court of International Trade (CIT), which, as Chief Judge Gregory Carman has observed, “is the only national trial court established under Article III of the Constitution.”90 The Customs Courts Act of 1980 (1980 Act) enhanced and clarified both the scope of the court’s jurisdictional authority and its remedial powers.91

In terms of its jurisdictional sweep, the reach of the congressional intent reflected in the legislative history and the apparent breadth of the text of the statute are remarkable. As stated in the Report of the House Judiciary Committee, the 1980 Act was designed for:

The re-emphasis and clarification of Congress’ intent that the expertise and national jurisdiction of the Court of International Trade . . . be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws, thereby eliminating the present jurisdictional conflicts between [the Court of International Trade] and the federal district . . . courts.92

Under 28 U.S.C. §§ 1581–1585, the CIT’s jurisdiction encompasses civil actions involving such matters as classification and valuation of imported merchandise, charges or exactions by the Department of Treasury, exclusion of items from entry under customs laws, and administrative determinations under the antidumping and countervailing duty laws.93

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85 Customs Administrative Act § 12, 26 Stat. 136.
87 See generally Williams v. United States, 289 U.S. 553 (1933) (concluding that the Customs Court has been created by Congress pursuant to its Article I, § 10 constitutional authority over duties on imports).
89 Re, Re & Babb, supra note 84, § 13332, at 443.
The statutory catalogue of specific bases for the CIT’s jurisdiction is concluded with a residual clause in § 1581(i) that confers exclusive jurisdiction over civil actions commenced against the federal government arising out of: revenue from imports or tonnage; tariffs, duties, fees, or taxes imposed on imported merchandise for reasons other than raising revenue; embargoes or restrictions on imports for reasons other than public health or safety; and administration and enforcement of the trade matters covered by the foregoing jurisdictional grants. As explained in the Senate Report,

The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This residual jurisdictional provision should make it clear that all suits of the type specified are properly instituted only in the Court of International Trade and . . . will ensure that in the future these suits are heard on their merits.

As expressed in the legislative history of the bills that ultimately culminated in the 1980 Act, Congress intended “to provide for a comprehensive system of judicial review of matters directly affecting imports, utilizing, wherever possible, the specialized expertise” of what became the CIT and the Federal Circuit.

As noted with a couple of examples below, however, confusion persists regarding jurisdictional lines between the CIT and the District Courts. Despite congressional intent that the court’s jurisdiction generally “encompasses civil actions arising from import transactions,” and the antipathy of Congress toward the “patchwork” of jurisdictional statutes that applied before 1980, multiple exceptions remain. Also, despite its apparent breadth, the residual jurisdictional provision in § 1581(i) has been interpreted narrowly and may be invoked only under exceptional circumstances.

In terms of remedial authority, Congress, through the 1980 Act, also intended to “grant . . . all judicial powers in law and equity to the Court of International Trade . . . thereby completing the full transformation of the Customs Court to an Article III court.” The House Report described the conferral of power to the CIT to issue injunctive relief as “one of the major accomplishments” of the legislation.

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94 Id. § 1581(i).
96 Customs Courts Act: Hearing on S.2857 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary, 95th Cong. 3 (1978).
97 Re, Re & Babb, supra note 84, § 13341, at 448.
99 Carman, supra note 90, at 162.
Former Chief Judge Edward Re of the CIT, in closing remarks at the final judicial conference of the Court of Customs and Patent Appeals in 1982, spoke to the enhancement of the court’s power to do justice:

It is a matter of great personal satisfaction for me to realize that this body of international trade law is becoming more and more a body of the law in the mainstream of the law itself, that is, part and parcel of American law. Also, that in the development of American international trade law, we are beginning to infuse general principles of equity. That was not so until recently. The most disheartening single experience that I encountered as a judge was when I was told that I could not do equity in the particular case because the court simply did not have equity power. Now the principles of equity have been infused in the body of international trade law, so that the Court now may issue equitable remedies . . . and consider all equitable factors in determining a particular case.102

Has the promise of the CIT been met in the ensuing twenty years? That question ultimately must be answered by those of you with experience and expertise in the field of international trade. But some observers offer a negative answer to the question, although their proposals to rectify the situation approach the problem from opposite ends.

As with the other courts represented on this panel, the CIT has been the target of at least one proposal for abolition, on the theory that only one layer of judicial review on trade law issues—in the Federal Circuit—should be sufficient, while most trial-level activities could be reassigned to administrative law judges.103 As another commentator has noted, however, it is doubtful whether administrative processes in this context are sufficiently formal to permit bypassing a trial court for direct appellate review, although perhaps administrative reforms could partially address this flaw.104

More importantly from my general perspective as a scholar on litigation against the federal government, proposals to rely more heavily upon administrative action to replace court review strike me as a retreat backward in time and counter to the modern trend away from sovereign immunity.

A better question to ask, in my view, would be why the jurisdiction of the CIT should not be augmented to more completely fulfill the promise of unifying judicial authority over trade and import disputes. Despite the sweep of matters brought within the exclusive jurisdiction of the CIT, nagging cracks remain in the court’s jurisdictional edifice, particularly when actions are brought to protect private rights concerning fair trade.

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For example, in *K Mart Corp. v. Cartier, Inc.*,\(^{105}\) the Supreme Court held that a prohibition on importation of “gray-market” goods was not in fact an “embargo” within the meaning of the residual jurisdictional clause and thus was not subject to the CIT’s jurisdiction.\(^{106}\) The Supreme Court distinguished an embargo, by which the government restricts the quantity of an item being imported, from an import prohibition, which is merely a mechanism by which a private party may “enlist the Government’s aid in restricting the quantity of imports in order to enforce a private right.”\(^{107}\) The Supreme Court emphasized that “Congress did not commit to the Court of International Trade’s exclusive jurisdiction every suit against the Government challenging customs-related laws and regulations,”\(^{108}\) although the Court later confessed in that same opinion that there was “no obvious reason” why Congress would have sent embargo claims to the CIT while diverting import prohibitions, now separately defined, to the District Courts.\(^{109}\)

Likewise, consider the matter of direct challenges by American companies to the “dumping” of foreign items into the United States at lower prices than in the company’s home country, which may distort the market to the harm of domestic producers.\(^{110}\) Such a direct action is permitted in theory (although proven rarely effective in practice) under the Anti-Dumping Act of 1916,\(^{111}\) but jurisdiction over such a claim lies in District Court, not the CIT.

I leave it to those studying and practicing in the field of international trade to evaluate the wisdom of creating robust private causes-of-action for unfair trade practices such as dumping or importation of gray-market goods, but surely any such cause of action should be placed within the CIT’s purview and not left as an anomalous exception to its exclusive jurisdiction over import matters.\(^{112}\) The Customs and International Trade Bar has thoughtfully identified many such haphazard and illogical gaps in the CIT’s jurisdiction that deserve congressional attention.\(^{113}\)

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106 Id. at 179, 183–89 (examining the scope of 28 U.S.C. § 1581(i)(3) (1982)).
107 Id. at 185.
108 Id. at 188.
109 Id. at 189.
113 See generally id. (proposing several areas where the CIT’s jurisdiction should be expanded).
Finally, as Chief Judge Gregory Carman has highlighted, a growing challenge for the Court of International Trade may be found in the establishment of binational and transnational dispute settlement panels.\textsuperscript{114} By statute, the CIT generally is stripped of authority over cases involving antidumping and countervailing duties when a matter has been submitted to a binational panel under the North American Free Trade Agreement (NAFTA).\textsuperscript{115} In addition to the binational panel settlement process under chapter 19 of NAFTA,\textsuperscript{116} international panels may be convened under the dispute settlement provisions of the World Trade Organization.\textsuperscript{117}

Thus, while trade disputes by their nature have always had transnational implications, litigation alleging unfair trade practices increasingly is becoming international in forum as well.\textsuperscript{118} Also, assuming the constitutionality of the reassignment of disputes from constitutional Article III courts to non-constitutional international entities—a nagging question that remains to be disposively addressed by the courts\textsuperscript{119}—the quantity and quality of matters submitted to the CIT could be seriously depreciated.

The challenge is to envision a continuing and energetic role for the CIT in this new environment and to integrate its work into the NAFTA and other binational and multilateral mechanisms. First, the CIT retains certain special advantages by virtue of the fact that it is a court, and thus has the power, for example, to enjoin a government agency from further unlawful action.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{115} 19 U.S.C. § 1516a(g)(2) (2000).
  \item \textsuperscript{119} See Burton, \textit{supra} note 110, at 1532 (concluding that, while a close question, the NAFTA binational panel system likely is constitutional given the foreign policy context); Gregory W. Carman, \textit{Resolution of Trade Disputes by Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality}, 21 FORDHAM INT’L L.J. 1, 8 (1997) (noting, without stating opinion, that constitutional questions about the binational panel system create uncertainty); Jim C. Chen, \textit{Appointments With Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement}, 49 WASH. & LEE L. REV. 1455, 1456–57 (1992) (concluding that provision by treaty for binational panels offends the constitutional separation of powers, undermines the integrity of Article III courts, and violates the constitutional requirements for appointment of officers).
  \item \textsuperscript{120} Seastrum & Getlan, \textit{supra} note 118, at 897.
\end{itemize}
Second, at least as seen from the perspective of an outsider such as myself, no obvious reason exists as to why the CIT could not be made an integral part of these international processes, perhaps by fostering cross-national judicial cooperation. For example, rather than affording only limited and extremely deferential review to a panel under NAFTA through the Extraordinary Challenge Committee process, a more vigorous form of judicial review should be considered, perhaps with judicial representation from all countries involved. In other words, rather than seeing the binational panel system as a “substitute” for federal court review, perhaps means are available by which federal courts could become full partners in the international process.

In any event, the trend must be addressed. Even if some international organizations may decline in influence and importance in the wake of the recent war in Iraq, every reason remains to believe that internationalization of trade matters will only increase in the future.

IV. The United States Court of Appeals for Veterans Claims

While the United States Court of Appeals for Veterans Claims may be the youngest of the tribunals represented on this panel, the matters that it addresses are among the oldest concerns for our Republic. The First Congress, meeting from 1789–1791, enacted a series of three statutes funding pensions for the veterans of the Revolutionary War. Today, Congress recognizes the nation’s continuing obligations to those who have served their country in our armed forces by providing a variety of benefits to veterans and their dependents through the Department of Veterans Affairs. While those benefits include pensions, health care, educational benefits, vocational rehabilitation, home loan guaranties, life insurance, and burial benefits, the benefit that most frequently is the subject of dispute and potential litigation is entitlement to monthly compensation when a veteran establishes a service-connected disability.

If the story of litigation against the federal government is a tale of the gradual lowering of the shield of federal sovereign immunity, then the Court of Federal Claims is a crucial part of the beginning of that story and the Court of Appeals for Veterans Claims is an essential element of the ending.

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121 Burton, supra note 110, at 1545.
124 Id. at 1283.
The first significant statutory waiver of sovereign immunity came just before the Civil War with the authorization of contract claims in the newly-created Court of Claims. However, when Congress enacted the Tucker Act in 1887 to authorize statutory claims for money against the federal government to be pursued by citizens in the Court of Claims, Congress expressly exempted pension claims, which effectively excluded veterans’ claims from the court. More than a century later, one of the last plates of that armor of sovereign immunity was shattered when Congress authorized judicial review of claims by veterans for statutory benefits and created a new forum for those claims—what is now denominated as the Court of Appeals for Veterans Claims.

Until very recently, the bar of sovereign immunity from veterans claims was most persistent and, as expressed in the text of the statute, rather absolute, although as Chief Judge Kenneth Kramer noted, the courts in fact had created a number of exceptions so as to afford “Judicial Review of the Theoretically Non-Reviewable.” Indeed, the number of judicially-created exceptions to the statutory prohibition appeared to be rising inexorably, as the courts increasingly resisted the bar, most notably—but not only—when constitutional challenges were raised. Nonetheless, the courthouse doors remained closed to the simple and ordinary claim by the veteran alleging basic error in the denial of an individual request for benefits.

The primary reason for resistance to court processes for veterans claims, asserted both by the government and by most organized veterans groups, was that the veterans benefits system was intended to be nonadversarial, thus supposedly obviating the need for lawyers. The fear was that inserting a layer of judicial review would both add the expense of requiring lawyers and defeat the informal and accommodating administrative process to the ultimate detriment of veterans. The system was supposed to be pro-veteran.

129 See, e.g., id. at 101–20 (discussing circumstances when courts have allowed judicial review of veteran claims); Johnson v. Robison, 415 U.S. 361, 366–74 (1974) (concluding that challenges to the constitutionality of veteran benefit laws are subject to judicial review).
130 Feldman, supra note 127, § 13401, at 617.
132 See id.
Indeed, the Department of Veterans Affairs by law is required to assist the veterans in “develop[ing] the claim to its optimum before deciding it on the merits,” thus ideally alleviating the risk of erroneous denial of benefits.

In retrospect, however, the collapse of the wall of sovereign immunity for veterans benefits was inevitable. As Professor Robert Rabin noted, the Veterans Administration stood in “splendid isolation as the single federal administrative agency whose major functions [were] explicitly insulated from judicial review.” Given the general presumption today that the federal government both be held responsible for its obligations and be subject to judicial review to ensure that those obligations are legally satisfied, the area of veterans benefits was increasingly removed from the trends that had swept the field of federal government relations, along with the people subject to or affected by its authority. Whenever government officials are allowed to exercise judgment regarding a claim made by a citizen, judicial supervision has become a hallmark of our system of government, with exceptions being crafted only in those circumstances where a purported cause of action filed in court improperly asks a court to evaluate the wisdom rather than the legality of a policy decision by government officials. Accordingly, in 1988, leading members of Congress concluded that the time had come to establish “an avenue of independent review for [VA] claimants” victimized by egregious bureaucratic errors.

In 1988, through the Veterans’ Judicial Review Act, Congress dropped the sovereign immunity shield. Not only did Congress reverse the prohibition on judicial review, but it created a new forum denominated as the United States Court of Veterans Appeals. Effective in 1999, Congress changed the name to the United States Court of Appeals for Veterans Claims (CAVC). As with the COFC, the CAVC was established under Congress’s Article I powers, with judges appointed by the President and confirmed by the Senate for terms of 15 years.

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133 Feldman, supra note 127, § 13401, at 619.
134 Cf. O’Connor, supra note 123, at 1289 (describing the non-adversarial and pro-claimant nature of the veterans benefits system).
138 Id. § 301, 102 Stat. at 4113.
Although I have referred generally today to the four courts represented on this panel as trial courts subject to review by the Federal Circuit, to be more accurate, the CAVC is not a trial court. Rather, the CAVC provides a judicial forum for appellate review of final decisions by the Board of Veterans’ Appeals (BVA), which is a non-judicial agency tribunal within the Department of Veterans Affairs. \(^{141}\)

Congress granted the CAVC the necessary authority to resolve all legal questions, whether involving a rule of law, a constitutional command, or a statutory provision, raised in veterans’ benefits disputes. \(^{142}\) At the same time, given that it is an appellate court, one would expect institution of a deferential standard of review to the factual findings made at a lower level. This, indeed, is the case under 38 U.S.C. § 7261, which empowers the CAVC to set aside or reverse the factual findings made by the BVA only if “clearly erroneous” and further provides that those findings of fact are not subject to trial *de novo* by the court. \(^{143}\) However, the CAVC is the first stage of judicial adjudication and is intended to be an important safeguard against error at the administrative level, so persistent questions have been raised as to just how deferential the court should be toward the resolution of factual disputes by the BVA, at least insofar as those factual findings do not favor the petitioning veteran.

Just a few months ago, in the Veterans Benefits Act of 2002, \(^{144}\) Congress signaled that it wished to see somewhat less deference accorded by the court to the BVA, although the legislation as enacted is more in the nature of a subtle rewording of the existing standards than a radical substitution of new rules, and the CAVC has not yet had an opportunity to construe the recent amendments. Although earlier legislative proposals would have eliminated the clearly erroneous standard in favor of the substantial evidence standard commonly applied in judicial review of administrative rulings, \(^{145}\) the compromise bill eventually passed by Congress retained the clearly erroneous standard. \(^{146}\) Congress, however, added statutory language requiring that the CAVC in each case “review the record of proceedings before the Secretary and Board of Veterans’ Appeals,” giving due account to the pro-veteran “benefit of the doubt” rule. \(^{147}\) Congress further clarified that only findings of fact

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\(^{141}\) See id. § 7104.


\(^{146}\) 148 CONG. REC. S11337 (daily ed. Nov. 18, 2002) (setting forth the compromise bill and accompanying joint explanatory agreement of the Senate and House Committees on Veterans’ Affairs); 148 CONG. REC. H9006 (daily ed. Nov. 14, 2002) (providing the same information regarding the compromise bill).

\(^{147}\) 38 U.S.C.A. § 7261(b) (West Supp. 2003); see also 148 CONG. REC. S11337.
“adverse to the claimant” are reviewable (meaning that those adverse to the
government cannot be challenged before the CAVC.)

Given that the deferential clearly erroneous standard is preserved intact in
the new legislation, that the new statutory language mandating a review of the
record below merely reiterates a basic expectation of judicial diligence that
would apply whether or not explicitly stated to any court review of adminis-
trative proceedings, and that the “benefit of the doubt” rule is a longstanding
principle of veterans’ benefits law, the actual textual changes to the statute
enacted last fall appear to mandate moderate but nonetheless meaningful
adjustment by the CAVC on a case-by-case basis, rather than revolutionary
change. While, in a literal sense, Congress may have said little or nothing in
this new legislation that was not already implicit in the former statutory
provision, a fundamental principle of statutory interpretation is that a change
in statutory language presumptively effects a change in meaning. Consistent
with the discussion above suggesting congressional intent to effect a sensitive
fine-tuning of the process, the Joint Explanatory Statement of the Senate and
House Committees on Veterans’ Affairs that was entered into the Congress-
ional Record during final passage of the legislation in both houses explains
that, while “the formula of the standard of review” in the CAVC is not altered,
the changes are “intended to provide for more searching appellate review of
BVA decisions, and thus give full force to the ‘benefit of doubt’ provision.”

After initial judicial oversight by the CAVC as an appellate tribunal, further
review by the Federal Circuit is more circumscribed, so as to prevent undue
duplication of appellate efforts. Accordingly, under 38 U.S.C. § 7292, the
Federal Circuit’s appellate review primarily is limited to questions involving
statutes, regulations, and rules of law, but generally does not include review
of factual matters or the application of a statute or regulation to the facts of
a particular case.

Despite its comparative youth as a court, the CAVC apparently is not so
fresh and new as to escape yet another proposal for the demise of a court. In
particular, Professor James O’Reilly, summoning the Shakespearean quota-
tion about coming to “bury Caesar” rather than to “praise him,” has called for
abolition of the CAVC. O’Reilly contends that the court has failed to
ensure that veterans’ claims receive an accurate disposition, are processed in
an efficient and timely manner, and are reviewed with fairness. His
alternative proposal is to substitute a new administrative process utilizing

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150 38 U.S.C. § 7292(a) (2000); see generally Feldman, supra note 127, § 13402.
151 James T. O’Reilly, Burying Caesar: Replacement of the Veterans Appeals Process is Needed
152 Id. at 227.
administrative law judges as the initial stage, followed with review by a national administrative appeals council, and then subject to judicial review rising to the regional circuits from whence the veteran hails.\footnote{See id. at 243–47.}

Given that Professor O’Reilly identifies the source of the problem as mishandling at the bureaucratic level,\footnote{Id. at 229.} I suggest that his cure might prove worse than the disease. To begin with, as Charles Mills has said in response to the O’Reilly proposal, “[i]t is hard to see how a mere substitution of one agency for another will correct the problems of non-compliance by the offices of original jurisdiction.”\footnote{Charles G. Mills, \textit{Is the Veterans’ Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?}, 17 \textit{Touro L. Rev.} 695, 730 (2001).} Also, if a compelling need exists for strong judicial oversight of an agency in dereliction of duty, it would be exactly the wrong move to dilute the energy and focus of court supervision by dissipating claims among a multitude of courts that will necessarily lack a global vision of the process.

Moreover, if more forceful judicial supervision is required, the answer is not to balkanize veterans claims across the entire geographic span of the country’s federal court system, but rather to strengthen the hand of the existing tribunal. When Congress created the CAVC, the key legislative report emphasized that this was to be an “independent” court.\footnote{H.R. Rep. No. 100-963, at 4, reprinted in 1988 U.S.C.C.A.N. 5782, 5785.} If true independence is desired, together with the greater judicial confidence that is afforded, then elevation of the judges of the CAVC to full Article III stature is warranted. As is also true for the judges of the COFC, there is every good reason to make these jurists full partners in the federal judicial system.

Finally, I would counsel patience, given that this experiment is little more than a decade in operation. While problems may persist, at least some empirical evidence suggests that judicial review has had a concrete effect, given that the denial rate of veterans claims by the BVA now subject to court correction has dropped from 70 to 40 percent since the creation of the CAVC.\footnote{Russo, \textit{supra} note 131, at 28.} When looking at the history of litigation with the federal government over the past 150 years, ten years is hardly long enough to provide a basis for a firm conclusion.

**Conclusion**

Having thus outlined the nature of each of these four courts, the remaining question that I promised to address at the outset was what joins them together for purposes of appellate review by the Federal Circuit. In sum, what shared
feature or substantive motif can be identified that makes these courts partners in adjudication?

Aside from the fact that there always seems to be someone from some quarter calling for abolition of each of these courts, there frankly is not much else in common. While litigation targeting the sovereign federal government may describe most of the work of most of these tribunals, it cannot explain everything. Most significantly, the District Courts in hearing patent infringement disputes among private entities resolve matters that, while dependent upon the workings and regulation of the government, are not claims against the sovereign itself. Nor are these four tribunals unified by the nature of the relief granted. Although, for example, monetary claims are foundational to the COFC and it possesses only limited equitable authority, the District Courts as a counter example have broader equitable powers in addressing patent claims. Likewise, while claims pending before the CAVC certainly have consequences for the public treasury, not every claim is for the type of past-due, retrospective monetary relief that is a quintessential element in a case within the Tucker Act jurisdiction of the COFC.

In the end, I contend that asking what makes these courts alike is the wrong question and erroneously assumes that some purported pattern of similarity must be imposed upon these divergent tribunals before common review by a single Court of Appeals can make good sense. Instead, the diversity of the courts whose judgments flow up to the Federal Circuit is not an accident, but an integral part of the design. Those who expressed the greatest skepticism about the Federal Circuit at the time of its creation were those who opposed what they viewed as undue specialization of the judicial function. 158 Judge Richard Posner, for example, argued that specialization of the appellate judge’s work would diminish objectivity, promote instability in the law, and undermine the separation of powers. 159

For that reason, the Federal Circuit purposely was designed to be a generalist court, one whose subject matter jurisdiction was defined by claim types rather than geography to be sure, but whose docket was sufficiently diverse to ensure the benefits of cross-fertilization, dynamic reasoning, and a broader perspective by the judges. As Professor Daniel Meador, one of the fathers of the Federal Circuit, has explained, from the very beginning of the design of the court those working on proposed legislation sought to “pull the sting from the anticipated charge of specialization” by spelling out “an array” of “legal issues that would come before the new court” that was “far richer than


might meet the eye from a mere catalog of the categories of jurisdiction to be allotted to it.”160

Indeed, the four courts represented on this panel are only a small part of the review constituency of the Federal Circuit, which also hears appeals from the Patent and Trademark Office,161 the Merit Systems Protection Board,162 and the agency Boards of Contract Appeals.163 Chief Judge Markey reported not long after its inauguration that the Federal Circuit heard “appeals from a massive universe of 116 tribunals on which sit 885 decision-makers.”164 That universe has only expanded in the ensuing years.

For this reason alone, I submit that the Federal Circuit and the practitioners who are a part of the Federal Circuit legal community owe a continuing debt of gratitude to these four courts. If the authority of these courts subject to review in that venue is unwisely reduced in any meaningful way, the losers will include the Federal Circuit, because the breadth of its jurisdiction and the diversity of its work will be correspondingly reduced.

Accordingly, proposals for abolition of this or that court or removal of this or that matter should be treated with skepticism and with the great burden of proof placed upon the proponent. While proposals for radical revision of court structures may provoke more attention, I believe that prudence and caution remain the better course of action. The most successful court reforms have been those that are well grounded in practical experience and that build upon foundations that already have been laid, such as the combination of the Court of Customs and Patent Appeals and the appellate division of the Court of Claims into the Federal Circuit. History not only cannot be escaped, it should be embraced so that any changes are successfully integrated into the existing structure. Only with a stable foundation, and one necessarily grounded in the historical evolution of these courts and the fields of law that they represent, may we construct a more refined and updated edifice.

In conclusion, to maintain the integrity and broad perspective of the United States Court of Appeals for the Federal Circuit as an appellate court, the integrity, broad scope, and exclusive authority of those courts that enter initial judgments subject to its review must be protected as well.

160 Meador, supra note 158, at 593.
162 See id. § 1295(a)(9).
163 See id. § 1295(a)(10).