

# FOREWORD

## THE FEDERAL CIRCUIT: A MICROCOSM OF CHANGES IN THE LEGAL LANDSCAPE

HONORABLE JUDGE JIMMIE V. REYNA\*

On April 2, 1982, Congress established the United States Court of Appeals for the Federal Circuit through the Federal Courts Improvement Act of 1982, which merged the United States Court of Customs and Patent Appeals with the appellate division of the United States Court of Claims.<sup>1</sup> The Federal Circuit has just surpassed forty years of appellate jurisprudence.

The core drive behind the court's creation was "to bring certainty and predictability to the patent system and thus to provide enhanced incentive to invention and innovation, by assuring that the same law is applied in all tribunals."<sup>2</sup> This is an ambitious goal for any court. But it is especially true with respect to the Federal Circuit, given its daily dose of highly technical and complex cases, stemming from its significantly diverse subject matter jurisdiction.

The Federal Circuit is perhaps best known as "the nation's patent court." But that description overlooks the fact that the court sits in a legal universe of ever-expansive, contorting, exciting, exclusive subject matter jurisdiction. Consider that the court absorbs all appeals from the U.S. International Trade Commission, U.S. Court of Federal Claims, U.S. Court of International Trade, U.S. Court of Appeals for

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\* Jimmie V. Reyna is a Circuit Judge on the U.S. Court of Appeals for the Federal Circuit. He is grateful to H. Rachael Million-Perez for her invaluable assistance on the Foreword. The comments of this Foreword are of Judge Reyna's alone and should not be taken, understood, or inferred to reflect the views of his colleagues or that of the Federal Circuit.

1. Pub. L. No. 97-164, § 127(a), 96 Stat. 25 (1982).  
2. *Healthcare v. Kappos*, 697 F.3d 1367, 1381 (Fed. Cir. 2012) (Newman, J. additional views).

Veterans Claims, U.S. Trademark Trial and Appeal Board, U.S. Patent Trial and Appeal Board, Boards of Contract Appeals, U.S. Merit Systems Protection Board, Office Congressional Workplace Rights, and Government Accountability Office Personnel Appeals Board. Add to that mix the patent cases taken from district courts throughout the nation.

The number of cases before the court is not insubstantial. From 2012 to date, the court has heard nearly 17,500 cases. A little over 10,000 were in the context of patent cases. The remainder is composed of the court's substantive areas of exclusive subject matter jurisdiction, including appeals involving esoteric sources such as the Vaccine Injury Compensation Act, the Plant Variety Protection Act, Economic Stabilization Act of 1970, Emergency Petroleum Allocation Act of 1973, Natural Gas Policy Act of 1978, Energy Policy and Conservation Act, rails to trails, legal takings and expropriations, trade, customs, antidumping, countervailing duties, government contracts, and taxation.<sup>3</sup>

I once heard counsel remark about the day she sat in the courtroom waiting for her case to be called for argument. She said she was amazed at how the three cases that preceded hers involved an odd mixture of legal issues, statutes, and standards of review, all with their own distinctive legal lexicons. I imagine that some lawyers would view the Federal Circuit's subject matter jurisdiction as disjointed. They may even find little value in understanding or following portions of the court's jurisprudence that falls outside the scope of their self-selected expertise. That is a misjudgment. Exposure to and comprehension of the broader legal landscape is the crux of appreciating how and why laws and legal principles develop.

Identifying this phenomenon is not easy. First, a lawyer must seek to understand the legal character of that lawyer's legal discipline. Second, the lawyer must be exposed to various, diverse areas law. One way to earn this valuable multi-faceted view of the law is to read worthy articles that address the development of legal landscapes. This volume provides that very opportunity.

In my pioneering years as a legal practitioner, my practice was solely limited by who crossed the threshold of my office door. I mastered countless, distinct areas of state and federal law. I experienced how the law—at large—is like a tide that rises and falls, revealing an

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3. 28 U.S.C. § 1295(a) (jurisdiction of the United States Court of Appeals for the Federal Circuit).

everchanging landscape of enlightenment and darkness. That experience flavored my foray into international trade law and has been of great assistance to me as a Federal Circuit Judge.

Shortly after I became a Federal Circuit Judge, I wrote that “I was surprised to discover the extent to which patent law implicates international issues.”<sup>4</sup> I was impressed, again, with how a changing legal landscape is essential to the evolution of law. Changes in seemingly unrelated areas of law merge to create waves that reverberate at distant shores. There are few places that offer a better view of the development of law than the cases before the Federal Circuit. This volume, and the various articles in it, speak to such developments.

Looking at the articles in this volume, Professor Arthur Duan’s article, *On the Appeal of Drug Challenges*, examines whether biases exist in challenges associated with *inter partes* review of drug-related patents.

Professor Shawn P. Miller’s article, *It Takes Two to Incorporate: The Role of Patent Co-Ownership in Inventor Choice of Business Forum*, analyzes how and why the business form adopted by an inventor may have serious implications on real-world concerns related to patents and patent litigation strategy.

Professors Christine Haight Farley and Lisa P. Ramsey’s article, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, examines the constant friction between free speech and trademarks.

Professor H. Tomás Gómez-Arostegui and Sean Bottomley’s article, *Patent-Infringement Suits and the Right to a Jury Trial*, surveys historical English sources from the late 18th century to answer whether the Seventh Amendment of the U.S. Constitution affords a right to a jury trial in suits in which the owner of the patent seeks only equitable relief against an accused infringer.

Dr. Klint W. Alexander’s article, *The 2022 U.S. Steel/Aluminum Tariff Ruling: A Legal Reckoning for the United States and the WTO over the National Security Exception in International Law*, analyzes the World Trade Organization’s (“WTO”) December 9, 2022 decision in four high-profile cases brought by China, Norway, Switzerland, and Turkey against the United States, which declared that hikes in tariffs on imports of steel and aluminum—made under the national security exception—to be in violation of WTO rules. It goes on to examine the implications, both legal and political, of the WTO’s decision.

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4. The Honorable Jimmie V. Reyna, *The Tariff and the Patent: A New Intersection*, 62 AM. U. L. REV. 779, 779 (2013).

This volume displays the Federal Circuit's interesting and exciting subject matter jurisdiction and changes in the law that will continue to transform well into the future.