

# THE WHITE COMMISSION AND THE FEDERAL CIRCUIT

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## INTRODUCTION

The Commission on Structural Alternatives for the Federal Courts of Appeals, or White Commission,<sup>1</sup> ("the Commission") recently issued a report and recommendations for Congress and the President after studying the appellate courts for a year.<sup>2</sup> The Commission investigation emphasized the United States Court of Appeals for the Ninth Circuit, as Congress had instructed. The centerpiece of the Commission's recommendations was a divisional arrangement for the Ninth Circuit and the remaining appellate courts as their caseloads increase.<sup>3</sup> Notwithstanding

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<sup>1</sup> It is referred to as the White Commission because Retired Supreme Court Justice Byron R. White chaired it.

<sup>2</sup> See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998) available at <http://app.comm.uscourts.gov/final/appstruc.pdf> [hereinafter COMMISSION REPORT]; see also *id.* at 93-99 (providing "proposed statutes to implement Commission recommendations" on which senators based S.253, 106th Cong. (1999)). For analysis of the Commission report and recommendations, see Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 299-312 (1999).

<sup>3</sup> See COMMISSION REPORT, *supra* note 2, at 40-50, 60-62. For critiques of the divisional arrangement which the Commission recommended, see Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV.

this focus on the Ninth Circuit, the commissioners compiled a substantial amount of objective empirical data and some subjective information on the other regional circuits, while proffering additional prescriptions, such as two-judge and district court appellate panels for those courts.<sup>4</sup>

The Commission also studied and collected considerable material on the United States Court of Appeals for the Federal Circuit. The Commission members assessed "two types of cases that have frequently been discussed as potential candidates for the Federal Circuit's jurisdiction, including the key reasons advanced for centralized review."<sup>5</sup> The commissioners submitted these to Congress, without recommendation, "for its use as it examines the needs of the federal appellate system in the future."<sup>6</sup>

The Commission characterized the legislative creation of the Federal Circuit in 1982 as "the most significant and innovative structural alteration in the federal intermediate appellate tier since its establishment."<sup>7</sup> Moreover, the commissioners observed that Congress intended the Federal Circuit to have exclusive jurisdiction over categories of appeals as to which there would be "a perceived need for centralized, nationwide review" in the future.<sup>8</sup> This essay analyzes those aspects of the Commission's investigation, report, and prescriptions that are applicable to the Federal Circuit.

Part I evaluates the background of the Commission on Structural Alternatives for the Federal Court of Appeals and the analysis that the entity performed. Part II explores the features of the commissioners' investigation that implicate the Federal Circuit. I find that the information which the Commission assembled does not permit conclusive determinations about any of the appellate courts, including the Federal Circuit. However, the commissioners examined tax and social security appeals for the benefit of senators and representatives, because they may be appropriate, albeit controversial, candidates for Federal Circuit review. Additional categories of cases might warrant similar review. Part III, therefore, provides suggestions for the future.

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377, 381-93 (2000); *Federal Courts—Proposed Changes to the Ninth Circuit and the Federal Courts of Appeals*, 113 HARV. L. REV. 822, 824-27 (2000) [hereinafter *Critique*].

<sup>4</sup> See COMMISSION REPORT, *supra* note 2, at 62-66.

<sup>5</sup> See *id.* at 73.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 72; see also Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, tit. 1, 96 Stat. 25 (1982) (codified as amended at 28 U.S.C. § 41 (1994)). See generally 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4104 (Supp. 1999). For numerous articles discussing the Federal Circuit, see *United States Court of Appeals for the Federal Circuit Tenth Anniversary Commemorative Issue*, 41 AM. U. L. REV. 559-1074 (1992).

<sup>8</sup> COMMISSION REPORT, *supra* note 2, at 73.

## I. BACKGROUND: THE COMMISSION AND ITS WORK

The origins and development of the Commission on Structural Alternatives for the Federal Courts of Appeals require limited assessment in this essay, because that background has received considerable scrutiny elsewhere.<sup>9</sup> Nevertheless, some examination is appropriate, as the Commission's history is relevant to the investigation undertaken by the Commission, particularly its evaluation of the Federal Circuit.

Senators and representatives authorized the Commission principally in response to continuing controversy that involved the United States Court of Appeals for the Ninth Circuit.<sup>10</sup> The enormous magnitude of the Ninth Circuit has prompted calls for the court's realignment almost since Congress established the appellate system in 1891.<sup>11</sup> Over the course of the last eighteen years, members of Congress have orchestrated a number of campaigns to restructure the Ninth Circuit.<sup>12</sup> Despite these concerted efforts, Congress authorized an assessment in November 1997.<sup>13</sup> The legislation accorded the commissioners one year to study the "structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit," and to write a report with recommendations for those "changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."<sup>14</sup>

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<sup>9</sup> See, e.g., Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887, 892-94 (1999); Jennifer E. Spreng, *Three Divisions in One Circuit? A Critique of the Recommendations from the Commission on Structural Alternatives for the Federal Courts of Appeals*, 35 IDAHO L. REV. 553, 554-60 (1999); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 196-214 (1997).

<sup>10</sup> COMMISSION REPORT, *supra* note 2, at 33. See generally Hellman, *supra* note 3, at 378-81; NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. RES. 104-197, 104th Cong. (1995).

<sup>11</sup> See COMMISSION REPORT, *supra* note 2, at 33. See generally Critique, *supra* note 3, at 822; Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L. J. 1357, 1363-64 (1995).

<sup>12</sup> See, e.g., S. 431, 105th Cong. (1997); S. 956, 104th Cong. (1995); S. 948, 101st Cong. (1989); see also COMMISSION REPORT, *supra* note 2, at 33-34. See generally Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 876-879 (1998); Tobias, *supra* note 2, at 280-94.

<sup>13</sup> See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 305, 111 Stat. 2491 (1997) [hereinafter Agencies Appropriations Act]. See generally Hellman, *supra* note 3, at 378-81; Hug, *supra* note 9, at 892-94; Spreng, *supra* note 9, at 560.

<sup>14</sup> Agencies Appropriations Act § 305(a)(1)(B). See generally Tobias, *supra* note 9, at 206-11.

The commissioners carefully discharged their responsibilities in studying the federal appellate courts.<sup>15</sup> During 1998, the Commission solicited written public input and conducted six public hearings.<sup>16</sup> However, the 89 witnesses who testified in those proceedings recommended no major reforms for the Federal Circuit.<sup>17</sup> The commissioners also received considerable assistance from the Federal Judicial Center ("FJC")<sup>18</sup> and the Administrative Office of the United States Courts ("Administrative Office")<sup>19</sup>, the federal courts' principal research and administrative arms, which Congress empowered the Commission to consult.<sup>20</sup> Judicial Center employees undertook a number of assessments and helped develop surveys that the commissioners circulated to federal appeals and district court judges and appellate lawyers, seeking their perspectives on circuit operations.<sup>21</sup> The Commission also assembled, analyzed, and synthesized a significant amount of statistical information, such as the percentage of cases decided in which the courts hear oral arguments or publish an opinion, the amount of time the courts require to decide cases, and the measures the courts use to deal with docket pressures.<sup>22</sup>

The commissioners reviewed all of the material that they had collected or received and in October 1998 published a tentative draft report and recommendations.<sup>23</sup> The Commission solicited public comments on

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<sup>15</sup> In this paragraph, I rely substantially on COMMISSION REPORT, *supra* note 2, at 1-6; Tobias, *supra* note 2, at 295-98.

<sup>16</sup> See COMMISSION REPORT, *supra* note 2, at 2-3. See generally Joseph N. Akrotirianakis et al., *Jerry-Building the Road to the Future: An Evaluation of the White Commission Report on Structural Alternatives for the Federal Courts of Appeals*, 36 SAN DIEGO L. REV. 355, 362 (1999). The Commission conducted no hearing in Washington, D.C. where the Federal Circuit is located; instead members of the Commission met with judges of the Federal Circuit and the U.S. Court of Appeals for the D.C. Circuit and with representatives of the Department of Justice and the White House Counsel's Office, to seek their views on the Federal Circuit. See COMMISSION REPORT, *supra* note 2, at 2-3.

<sup>17</sup> See generally Spreng, *supra* note 9, at 562-63. The hearing transcripts indicate also that no judges of the Federal Circuit testified. See also Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers 343-344 (1998) [hereinafter WORKING PAPERS].

<sup>18</sup> 28 U.S.C. § 620 (1994) (authorizing the FJC).

<sup>19</sup> 28 U.S.C. § 601 (1994) (authorizing the Administrative Office).

<sup>20</sup> See COMMISSION REPORT, *supra* note 2, at 2-4; see also Agencies Appropriations Act, *supra* note 13, at § 305(a)(4)(D); Hug, *supra* note 9, at 893.

<sup>21</sup> See COMMISSION REPORT, *supra* note 2, at 4; WORKING PAPERS, *supra* note 17, at 3-91. See generally Akrotirianakis et al., *supra* note 16, at 362.

<sup>22</sup> See COMMISSION REPORT, *supra* note 2, at 21-25, 39; see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter FCSC REPORT] (stating that caseload increases have transformed the circuits).

<sup>23</sup> See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, TENTATIVE DRAFT REPORT (Oct. 7, 1998) [hereinafter COMMISSION TENTATIVE DRAFT REPORT]. See generally Hug, *supra* note 7, at 893-94; Spreng, *supra* note 12, at 877-78; Tobias, *supra* note 2, at 298.

the report over a 30-day period.<sup>24</sup> However no judges of the Federal Circuit tendered comments, and very few individuals or institutions submitted responses that specifically addressed the court.<sup>25</sup> After assessing the public comments, the Commission issued a final report and suggestions that differed only minimally from the tentative report.<sup>26</sup> The linchpin of the commissioners' suggestions was a divisional arrangement for the Ninth Circuit and the remaining regional circuits as their caseloads increase.<sup>27</sup> Particularly relevant to the issues treated in this paper, however, was the Commission's decision to remove copyright appeals from its examination of cases that frequently have been mentioned as possible candidates for exclusive Federal Circuit jurisdiction.<sup>28</sup> This was the most significant difference between the final and draft reports.<sup>29</sup>

The commissioners retained, essentially intact, the tentative draft report's assessment of tax and social security matters as classes of appeals that might be added to the jurisdiction of the Federal Circuit, and transmitted the analysis to Congress, without recommendation, for lawmakers' use in evaluating the future needs of the federal appellate system.<sup>30</sup> The commissioners also gathered considerable information on the Federal Circuit. The next section of this essay examines the discussion of the Federal Circuit in the Commission report and the material the commissioners assembled on the Federal Circuit.

## II. ANALYSIS: THE COMMISSION'S WORK ON THE FEDERAL CIRCUIT

The Commission's information-gathering and report focused primarily on the twelve regional circuits.<sup>31</sup> In fact, the Working Papers com-

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<sup>24</sup> See Tobias, *supra* note 2, at 298.

<sup>25</sup> For comments on the Commission Report, see <http://app.comm.uscourts.gov/report/comments.html>.

<sup>26</sup> See COMMISSION REPORT, *supra* note 2.

<sup>27</sup> See COMMISSION REPORT, *supra* note 2, at iii., 40-47, 59-76. See generally Hug, *supra* note 9, at 897-98; Spreng, *supra* note 9, at 577-86; Tobias, *supra* note 2, at 304-10.

<sup>28</sup> Copyright cases had received a paragraph of discussion in the tentative draft report. See COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 64-65. That discussion was omitted in the final report. See COMMISSION REPORT, *supra* note 2, at 73-74. See generally Paul Michel, *The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1182 (1999).

<sup>29</sup> The American Intellectual Property Law Association strongly opposed extending Federal Circuit jurisdiction to include copyright appeals. See Letter from Michael E. Kirk, Executive Director, American Intellectual Property Law Association, to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), at <http://app.comm.uscourts.gov/report/comments/PropLaw.htm> (on file with the Cornell Journal of Law and Public Policy).

<sup>30</sup> See COMMISSION REPORT, *supra* note 2, at 72-74. See generally Michel, *supra* note 28.

<sup>31</sup> See COMMISSION REPORT, *supra* note 2, at 72. This emphasis comported with the Commission's statutory mandate. See also Agencies Appropriations Act, *supra* note 13.

missioned by the commissioners included very little empirical data on the Federal Circuit.<sup>32</sup> Nevertheless, the Commission assembled some empirical data and additional subjective information on the Federal Circuit, and provided a relatively brief discussion on the Federal Circuit, in its report.<sup>33</sup>

#### A. DESCRIPTIVE ANALYSIS

##### 1. *Discussion of the Federal Circuit in the Commission Report*

In the introductory paragraph of Chapter Five of the Commission Report, titled "Appellate Jurisdiction," the Commission stated that it made "no recommendations on *what* matters should come into the federal courts."<sup>34</sup> However, one Commission member, Circuit Judge Gilbert S. Merritt, joined by the Commission chair, Retired Supreme Court Justice Byron R. White, wrote separately to propose the substantial modification of diversity jurisdiction.<sup>35</sup> Moreover, the Commission proffered several important "recommendations on *where* and *how* appellate review of some of those matters might be best structured."<sup>36</sup>

Even though the commissioners stated that the report emphasized the twelve regional circuits, the Commission lauded the Federal Circuit as the most important and creative structural modification in the federal intermediate appellate system since its establishment.<sup>37</sup> The Commission explained that the Federal Circuit lacks geographical boundaries and

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<sup>32</sup> See, e.g., WORKING PAPERS *supra* note 17, at 93 tbls.1-3. For discussions of increasing interest in the Federal Circuit, see Michel, *supra* note 28, at 1180-81, 1186-87, 1194; Jonathan Ringel, *Still Standing, He Finally Takes a Seat*, LEGAL TIMES, June 5, 2000, at 10.

<sup>33</sup> See COMMISSION REPORT, *supra* note 2, at 21, 72-74.

<sup>34</sup> *Id.* at 67 (emphasis in original). The Commission recognized that "significant changes need to be made in the jurisdiction of the federal district courts," but a majority of the commissioners seemed constrained by the "statutory charge [against making] recommendations in that regard." The Commission did, however, admonish Congress to exercise "restraint in conferring new jurisdiction on the federal courts." *Id.* at 6.

<sup>35</sup> See *id.* at 77-84; see also Letter from Chief Justice William H. Rehnquist to Justice Byron R. White (Oct. 22, 1998), at <http://app.comm.uscourts.gov/report/comments/chiefj.pdf> (commending the Commission on Structural Alternatives for the Federal Courts of Appeals' Draft Report) (on file with the Cornell Journal of Law and Public Policy). For discussions of limitations on federal jurisdiction, see generally FCSC REPORT, *supra* note 22, at 35-53; JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 21-39 (1995) [hereinafter LONG RANGE PLAN]; JUDITH MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 141-53 (1993).

<sup>36</sup> COMMISSION REPORT, *supra* note 2, at 67 (emphasis in original). See generally LONG RANGE PLAN, *supra* note 35, at 134-35 (discussing alternatives for limiting federal jurisdiction).

<sup>37</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally WRIGHT, MILLER & COOPER, *supra* note 7, at § 4104; Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U.L. REV. 1 (1989) (discussing origins of Federal Circuit); Daniel J. Meador, *The Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).

that its jurisdiction is defined in two distinct ways.<sup>38</sup> First, the Federal Circuit exercises exclusive appellate jurisdiction over determinations issued by a number of lower courts and administrative entities, including the Court of Federal Claims, the Court of International Trade, the Court of Veterans Appeals, and the Merit Systems Protection Board.<sup>39</sup>

Second, the Federal Circuit has exclusive jurisdiction over cases involving specific subject matter that arise from all 94 of the federal district courts.<sup>40</sup> The principal category is comprised of suits for patent infringement.<sup>41</sup> Otherwise, the Federal Circuit is organized similarly to the remaining appellate courts: it has twelve legislatively authorized appellate judgeships, a clerk of court, and a support staff which includes a comparatively small number of central staff attorneys.<sup>42</sup> The Federal Circuit is the only appeals court that Congress has specifically authorized to employ a staff of technical advisors to assist the judges in resolving the complicated issues that patent disputes frequently involve.<sup>43</sup>

The commissioners also explained why Congress had created the Federal Circuit in 1982.<sup>44</sup> They stated that senators and representatives were not only providing for then-current conditions but also affording the federal appellate system a new resource: an appeals court in which Congress could vest exclusive appellate jurisdiction over additional classes of cases as to which the need for centralized review might subsequently

<sup>38</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally *Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Second and Eighth Circuits and the First, Third, and Federal Circuits: Hearings Before the Subcommittee On Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 104 (1998) (statement of Federal Circuit Chief Judge Glenn L. Archer, Jr.) [hereinafter *Archer Statement*].

<sup>39</sup> See COMMISSION REPORT, *supra* note 2, at 72; see also Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 101, 96 Stat. 25 (1982) (codified as amended at 28 U.S.C. § 41 (1994)). See generally CHARLES E. GRASSLEY, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS, ANALYSIS OF THE FEDERAL CIRCUIT 1 (1999) [hereinafter *FEDERAL CIRCUIT ANALYSIS*]; Michel, *supra* note 28, at 1178-79.

<sup>40</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally *Archer Statement*, *supra* note 38, at 104; WRIGHT, MILLER & COOPER, *supra* note 7, at § 4104.

<sup>41</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally *Archer Statement*, *supra* note 38, at 104; LONG RANGE PLAN, *supra* note 35, at 43 (recognizing that centralized review is beneficial with regard to technical subject matter); Michel, *supra* note 28, at 1180-81 (detailing a significant increase in patent cases heard per year from the early 1990s to the late 1990s); Victoria Slind-Flor, *Federal Circuit Judged Flawed*, NAT'L L. J., Aug. 3, 1998, at A1 ("The nation's dependence on technological innovation has pushed the once obscure U.S. Court of Appeals for the Federal Circuit center stage.").

<sup>42</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally *Archer Statement*, *supra* note 38, at 104-05 (discussing Federal Circuit staff's small size); *FEDERAL CIRCUIT ANALYSIS*, *supra* note 39, at 2.

<sup>43</sup> See COMMISSION REPORT, *supra* note 2, at 72. See generally *Archer Statement*, *supra* note 38, at 105 (setting out obligations of technical advisors); Slind-Flor, *supra* note 41 (noting presence and role of technical advisors).

<sup>44</sup> See COMMISSION REPORT, *supra* note 2, at 73.

arise.<sup>45</sup> The Commission observed that an important recommendation included in the 1995 Long Range Plan prepared by the Judicial Conference of the United States urged that the appellate function be performed “primarily in a generalist court of appeals established in each regional circuit; and a Court of Appeals for the Federal Circuit with nationwide jurisdiction in certain subject-matter areas.”<sup>46</sup>

The commissioners proffered no particular prescriptions regarding other categories of cases that Congress could usefully assign to the Federal Circuit.<sup>47</sup> The commissioners did, however, examine tax and social security appeals as two specific classes of cases that are often “discussed as potential candidates for the Federal Circuit’s jurisdiction” and analyzed the principal reasons that observers of the federal courts have traditionally articulated for centralized review of these cases.<sup>48</sup> The Commission transmitted these ideas, absent recommendation, to lawmakers to employ when scrutinizing the future needs of the federal appellate system.<sup>49</sup>

The commissioners first discussed tax cases, observing that at least since the mid-twentieth century, judges, attorneys, and legal scholars have proposed that appeals in civil matters “arising under the Internal Revenue Code be concentrated in one court of nationwide scope.”<sup>50</sup> Lawyers and litigants currently take their appeals to the regional appel-

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<sup>45</sup> See COMMISSION REPORT, *supra* note 2, at 72-73. See generally Meador, *supra* note 37 (detailing the origins of the Federal Circuit). Congress has assigned the Federal Circuit exclusive jurisdiction over decisions of the Court of Veterans Appeals and transferred to the Federal Circuit the authority of the Temporary Court of Emergency Appeals (“TECA”) after abolishing that court. See COMMISSION REPORT, *supra* note 2, at 72-73; see also FCSC REPORT, *supra* note 22, at 73 (recommending that TECA cases be reassigned to the Federal Circuit, which Congress subsequently did). See generally WRIGHT, MILLER & COOPER, *supra* note 7, at § 4105 (discussing the jurisdiction of the TECA).

<sup>46</sup> COMMISSION REPORT, *supra* note 2, at 73, citing LONG RANGE PLAN, *supra* note 35, at 43 (declining to propose that Congress create “new specialized or subject-matter courts in the judicial branch” in part because their benefits would generally be less than the “well-known dangers of judicial specialization”); see also 28 U.S.C. § 331 (1994) (stating that the Judicial Conference is the federal courts’ policymaking arm).

<sup>47</sup> See COMMISSION REPORT, *supra* note 2, at 73. See generally Michel, *supra* note 28, at 1182-83.

<sup>48</sup> COMMISSION REPORT, *supra* note 2, at 73-74. The final Commission report includes essentially verbatim the material the Commission had incorporated in the tentative draft report. Compare *id.* at 72-74 with COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 63-65.

<sup>49</sup> See COMMISSION REPORT, *supra* note 2, at 73. For a similar examination, and more specific recommendations, see LONG RANGE PLAN, *supra* note 35, at 43.

<sup>50</sup> COMMISSION REPORT, *supra* note 2, at 73. Examples include Oscar E. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); H. Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975); Roger John Traynor, *Administrative and Judicial Procedure for Federal Income and Estate Gift Taxes - A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938). But see James P. Holden, *The Federal Courts Study Committee Has Not Made the Case for Its Proposed Overhaul of the Tax Litigation Process*, 40 CATH. U. L. REV. 639, 639-40 (1991).



late courts from the 94 federal district courts and the Tax Court.<sup>51</sup> Critics' primary concern with this arrangement is the inequities produced by permitting parties to pursue appeals in all twelve regional circuits.<sup>52</sup> For instance, citizens in different areas of the United States may sometimes be subject to differing tax liabilities.<sup>53</sup> Planning is concomitantly complicated because infrequent Supreme Court review of tax cases often leaves the interpretation of the tax law unsettled for years.<sup>54</sup>

In 1979, the United States Senate Judiciary Committee conducted extensive hearings on proposed legislation that would have created a Court of Tax Appeals and generated substantial support for the idea.<sup>55</sup> Moreover, the Federal Courts Study Committee's 1990 report suggested that civil tax appeals be centralized in an Article III appellate division of the Tax Court.<sup>56</sup> The commissioners admonished, however, that the Federal Circuit's existence obviates the necessity to create special tribunals of this type.<sup>57</sup> Should senators and representatives decide to centralize tax cases, the Commission concluded, the Federal Circuit would provide a readily available forum. The court already adjudicates appeals in tax matters that come to it from the Court of Federal Claims<sup>58</sup> and could

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<sup>51</sup> See COMMISSION REPORT, *supra* note 2, at 73. The Commission denominated this review structure as the "inverted pyramid." *Id.* See generally ROSWELL MAGILL, *THE IMPACT OF FEDERAL TAXES* 206 (1943); Louis A. Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFF. L. REV. 5 (1962-63).

<sup>52</sup> See COMMISSION REPORT, *supra* note 2, at 73; see also Sandra Jo Craig, *Federal Income Tax and the Supreme Court: The Case Against a National Court of Tax Appeals*, 1983 UTAH L. REV. 679; Miller, *supra* note 50, at 230. *But see* Holden, *supra* note 50, at 639-40, 644.

<sup>53</sup> See COMMISSION REPORT, *supra* note 2, at 73; see also Craig, *supra* note 52; Del Cotto, *supra* note 51, at 6.

<sup>54</sup> COMMISSION REPORT, *supra* note 2, at 73; see also Del Cotto, *supra* note 51; Miller, *supra* note 50. *But see* Holden, *supra* note 50, at 639-40, 644.

<sup>55</sup> See COMMISSION REPORT, *supra* note 2, at 73; see also *Federal Courts Improvement Act of 1979: Hearings on S.677 and S. 678 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong. 46-72 (1979) (statements of Erwin Griswold, former Solicitor General and former dean, Harvard Law School; M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice; and Daniel J. Meador, Assistant Attorney General, Office for Improvements in the Administration of Justice, Department of Justice); Meador, *supra* note 37, at 610-14 (surveying the relevant history and asserting that because of the controversial nature of the Court of Tax Appeals proposal and the threat that it might prevent creation of the Federal Circuit, Congress deleted the proposal from the bill authorizing the Federal Circuit).

<sup>56</sup> See COMMISSION REPORT, *supra* note 2, at 73-74. "Article III" judges serve with life tenure. See FCSC REPORT, *supra* note 22, at 69; see also Holden, *supra* note 50, at 639. For a discussion of the proposal to create an Article III division of the Tax Court and dissenting statements, see FCSC REPORT, *supra* note 22, at 69-72.

<sup>57</sup> See COMMISSION REPORT, *supra* note 2, at 74. See generally LONG RANGE PLAN, *supra* note 35, at 43.

<sup>58</sup> COMMISSION REPORT, *supra* note 2, at 74. *But cf.* Michel, *supra* note 28, at 1181, 1183 (questioning the propriety of expanding Federal Circuit jurisdiction generally, and to include tax appeals specifically).

absorb tax appeals from the Tax Court or all 94 of the federal district courts.<sup>59</sup>

The Commission examined social security appeals as a second category of cases that Congress might place within the exclusive jurisdiction of the Federal Circuit.<sup>60</sup> Judges, administrators of the system, and other observers had frequently recommended that Congress assign judicial review in social security cases – after final administrative agency action – to an Article I court, which would relieve federal district courts of the task.<sup>61</sup> The Commission stated that it had reviewed these proposals but made no recommendations, except that “they deserve the serious consideration of Congress.”<sup>62</sup> Should lawmakers decide to establish an Article I court for this purpose, the Commission reasoned, they might wish to evaluate “placing exclusive appellate jurisdiction over that court in the Federal Circuit.”<sup>63</sup> The Commission seemed to consider this prospect worthwhile, as the Federal Circuit already exercises jurisdiction over determinations of the Court of Veteran Appeals, an Article I court which hears all appeals of adverse administrative action by the Veterans Administration.<sup>64</sup> The commissioners found that similarities between social security and veterans’ claims would make the placement of appellate review over them in one forum both “sensible and efficient.”<sup>65</sup>

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<sup>59</sup> See COMMISSION REPORT, *supra* note 2, at 74. In contrast, the American Bar Association Section of Taxation opposed centralization of tax appeals in one court. See Letter from Stefan F. Tucker, Chair, ABA Commission on Taxation, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts (Nov. 6, 1998), at <http://app.comm.uscourts.gov/report/comments/ABA-ST.pdf>. See generally Michel, *supra* note 28, at 1183.

<sup>60</sup> See COMMISSION REPORT, *supra* note 2, at 74. See generally JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (evaluating effectiveness of adjudication of social security disability benefit claims); *infra* notes 80-86 and accompanying text (analyzing the two studies of social security appeals that the Commission commissioned).

<sup>61</sup> See COMMISSION REPORT, *supra* note 2, at 74. The Federal Courts Study Committee proffered a similar recommendation. See FCSC REPORT, *supra* note 22, at 55-58. See generally Thomas Wilinsky, *Mending the Safety Net's Safety Net: The Federal Courts Study Committee's Proposal for Reforming the Social Security Disability Benefits Review Process*, 18 N.Y.U. REV. L. & SOC. CHANGE. 1079 (1990/1991).

<sup>62</sup> COMMISSION REPORT, *supra* note 2, at 74. For examples of proposed legislation, see H.R. 4419, 99th Cong. (1986); H.R. 4647, 99th Cong. (1986).

<sup>63</sup> See COMMISSION REPORT, *supra* note 2, at 74. See generally Susan Haire & Stefanie Lindquist, *An Agency and 12 Courts: Social Security Disability Cases in the U.S. Courts of Appeals*, 80 JUDICATURE 230 (1997) (analyzing lack of uniformity among circuits and nonacquiescence by Social Security Administration in treating social security appeals).

<sup>64</sup> See COMMISSION REPORT, *supra* note 2, at 74. See generally 38 U.S.C. § 502 (1994).

<sup>65</sup> COMMISSION REPORT, *supra* note 2, at 74. If Congress so provided, the “standard of review for veterans’ appeals,” which is limited to questions of constitutional and statutory interpretation, would appear appropriate for social security matters. *Id.* But cf. Michel, *supra* note 28, at 1181-1183 (questioning the propriety of expanding Federal Circuit jurisdiction).

In the tentative draft report, the Commission also discussed copyright cases as a potential candidate for Federal Circuit jurisdiction.<sup>66</sup> The tentative draft report observed that patents and copyrights are linked in Article I of the Constitution, which provides for Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>67</sup> Senators and representatives have invoked this authority to pass legislation that governs patents and copyrights, while observers have frequently emphasized the desirability of having nationally uniform law cover both of these important areas.<sup>68</sup> Indeed, the commissioners remarked that a perceived need for greater uniformity in the patent area was a principal motivating factor in the Federal Circuit’s creation.<sup>69</sup> Since that time, technological developments, including computers and electronic data processing, storage, and communication, have caused dramatic changes in patents and copyrights, bringing “them together in ways that were unknown seventeen years ago.”<sup>70</sup> These developments have led some observers to suggest that the same court be assigned exclusive jurisdiction over patent and copyright claims.<sup>71</sup> This discussion of copyright cases, however, was omitted from the final report.<sup>72</sup>

## 2. *Discussion of the Federal Circuit in the Commission Working Papers*

The Federal Circuit received only limited examination in the Working Papers compiled by the Commission, especially in comparison with

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<sup>66</sup> See COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 64-65.

<sup>67</sup> U.S. CONST. art. I, § 8; see also COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 64-65. See generally 1 WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 22-25 (1994) (outlining history of the copyright clause in the Constitution).

<sup>68</sup> See COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 65. For recent examples, see Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L. J. 717 (1999); Allan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545 (1997) (criticizing Federal Circuit’s bias toward patent holders and claiming that the circuit fails to achieve uniformity).

<sup>69</sup> See COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 65; Meador, *supra* note 37, at 588.

<sup>70</sup> COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 65 (“Today patents are issued for computer software programs that often are also the subject of copyrights.”); Michel, *supra* note 28, at 1184-85.

<sup>71</sup> COMMISSION TENTATIVE DRAFT REPORT, *supra* note 23, at 65. See generally Landau & Biederman, *supra* note 68, at 774-784 (advocating a national copyright court modeled on the Federal Circuit). But cf. Michel, *supra* note 28, at 1181, 1183 (questioning the propriety of expanding Federal Circuit jurisdiction generally, and to include copyright appeals specifically).

<sup>72</sup> See COMMISSION REPORT, *supra* note 2, at 72-74.

the amount of empirical data gathered on the twelve regional circuits.<sup>73</sup> Nevertheless, the Commission did assemble some empirical information on the Federal Circuit and commissioned two studies of social security appeals, which it published in the Working Papers.<sup>74</sup> Moreover, the commissioners collected considerable subjective material on the Federal Circuit, partly by circulating the Commission survey to judges of the court and attorneys who practice before it.<sup>75</sup>

A memorandum prepared by a Federal Judicial Center employee and included in the Working Papers explained certain case management practices in the courts of appeals.<sup>76</sup> The memorandum showed, for example, that the Federal Circuit is the only circuit in which the staff appears to play no role in nonargument decision making.<sup>77</sup> The Federal Circuit typically affords plaintiffs and defendants fifteen minutes for oral arguments, a figure similar to the time allotted by numerous other appeals courts.<sup>78</sup> The Federal Circuit is one of four appellate courts that have "strict noncitation rules" governing the citability of unpublished opinions.<sup>79</sup>

The commissioners also called for two studies of social security appeals. The first analysis considered whether cases that arise from "denials of social security benefits might be removed from the litigation track" that results in their appeal to the twelve regional circuits.<sup>80</sup> The assessment's findings were essentially inconclusive. However, the study found that the number of federal appeals involving Social Security cases is small today, but that "policy shifts and administrative oversight initiatives" could substantially increase these cases.<sup>81</sup> Therefore, creation of a

<sup>73</sup> See *supra* note 31. See generally WORKING PAPERS, *supra* note 17.

<sup>74</sup> See WORKING PAPERS, *supra* note 17, at 245.

<sup>75</sup> See COMMISSION REPORT, *supra* note 2, at 3-4.

<sup>76</sup> See Judith McKenna, *Summary of Case Management Practices and Related Issues*, in WORKING PAPERS, *supra* note 17, at 101-16; see also Michel, *supra* note 28, at 1186 (noting Judge Michel's opinion that "the court seems to be operating in an increasingly well-organized and efficient manner" partly by employing "a variety of efficiency measures to cope with a substantial caseload").

<sup>77</sup> See McKenna, *supra* note 76, at 106-107. See generally *Archer Statement*, *supra* note 38, at 104-106 (describing role of Federal Circuit staff and noting impact of increased jurisdiction on staffing requirements).

<sup>78</sup> See McKenna, *supra* note 76, at 109; see also FED. CIR. R. 34, Practice Notes.

<sup>79</sup> McKenna, *supra* note 76, at 116; see also Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 916-19 (1986) (affording views of a Federal Circuit judge on selective publication and citation practices); Michel, *supra* note 28, at 1186-87 (presenting another Federal Circuit judge's views on these and related matters); Letter from Federal Circuit Chief Judge Haldane Robert Miller to Circuit Judge Will Garwood, Chair, Advisory Committee On Appellate Rules (Feb. 25, 1998) (presenting the Federal Circuit's views on these and related matters).

<sup>80</sup> Kent Sinclair, *Appeals in Social Security Cases*, in WORKING PAPERS, *supra* note 17, at 245, 247.

<sup>81</sup> *Id.* at 322.

new court structure might be seen as insurance against the possibility of expanding Social Security appeals. The study expressed ambivalence, however, about whether insulation from the prospect of burgeoning cases through this new structure would be sufficient to motivate congressional action.<sup>82</sup>

The second assessment essentially examined the prospect of creating an Article I court which would resolve social security cases.<sup>83</sup> The study discussed relevant statistical information; analyzed how the federal courts address Social Security appeals under the present regime; considered numerous systemic problems, such as the lack of reliable and consistent precedent; and concluded that a single appellate court could better administer the corpus of Social Security law.<sup>84</sup> The evaluation then reviewed the Federal Courts Study Committee's recommendation that Congress create an Article I court for Social Security claims<sup>85</sup> and further limited this committee's suggestions by proposing that appeals from this court to the federal appellate courts be permitted only in cases involving constitutional questions.<sup>86</sup>

The Commission also assembled considerable subjective material on the Federal Circuit by surveying judges who serve on the court and lawyers who practice before it.<sup>87</sup> Federal Circuit judges generally expressed satisfaction with the number of judges Congress now authorizes<sup>88</sup> and with the performance of the Federal Circuit's en banc process.<sup>89</sup>

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<sup>82</sup> See *id.*

<sup>83</sup> See *Comments of Judge John C. Godbold on Creation of an Article I Social Security Court*, in *WORKING PAPERS*, *supra* note 17, at 325.

<sup>84</sup> The study, while not "a formal survey," was based upon interviews with magistrate judges, a court of appeals clerk, and a court of appeals chief staff attorney, as well as research and the author's "own perceptions." *Id.* at 325; see also *id.* at 325-30.

<sup>85</sup> See *id.* at 330; see also *FCSC REPORT*, *supra* note 22, at 55-56.

<sup>86</sup> The jurisdiction would be more limited in terms of the types of claims and in terms of the issues that could be appealed. See *Godbold*, *supra* note 83, at 330-31. See generally *LONG RANGE PLAN*, *supra* note 35, at 43 (discussing possible additions to and subtractions from Federal Circuit jurisdiction); *supra* notes 60-65 and accompanying text.

<sup>87</sup> See *WORKING PAPERS*, *supra* note 17, at 15-35, 72-91.

<sup>88</sup> See *WORKING PAPERS*, *supra* note 17, at 18-21 (surveying judges' opinions). See generally *Archer Statement*, *supra* note 38, at 106 (suggesting that "the authorized 12 judgeships for the Federal Circuit is about right at this time for the job with which [it] is entrusted."). But see *FEDERAL CIRCUIT ANALYSIS*, *supra* note 39, at 3 (stating that "based on the Federal Circuit's declining caseload and court statistics, serious consideration should be given to whether this court can do its work with a smaller complement of judges").

<sup>89</sup> See *WORKING PAPERS*, *supra* note 17, at 23-25. See generally *Slind-Flor*, *supra* note 41 (presenting positive and negative opinions of judges and lawyers regarding the Federal Circuit).

Attorneys who responded to the questionnaire voiced considerable satisfaction with the performance of the Federal Circuit.<sup>90</sup> For example, among all the appeals courts, the Federal Circuit had the smallest percentage of respondents who indicated that they had a moderate or greater problem securing needed oral argument or with the court's reliance on visiting judges on argument panels.<sup>91</sup> However, the proportion of attorneys who considered the "difficulty of discerning circuit law due to conflicting precedents" as significant was nearly the highest in the Federal Circuit, second only to the Ninth Circuit.<sup>92</sup> Moreover, the percentage of respondents who suggested that "restriction on citation to unpublished opinions was a moderate or greater problem" was fourth highest in the Federal Circuit.<sup>93</sup>

## B. CRITICAL ANALYSIS

The Commission on Structural Alternatives for the Federal Courts of Appeals collected some objective and considerable subjective material on the Federal Circuit, which improves understanding of the court today. The commissioners provided much relevant data and many valuable insights, implying that the Federal Circuit dispenses justice and operates well by expeditiously resolving cases.<sup>94</sup> Despite this helpful contribution, however, the study lacks the requisite refinement and breadth to support definitive determinations about the Federal Circuit. Much of the data which could most convincingly show the court delivers justice or functions well in fact remains unclear. For example, that attorneys find the Federal Circuit holds oral arguments in an adequate number of appeals offers little guidance about how the court operates.<sup>95</sup> Comparing these ideas and material among all the appeals courts seems equally uninformative, because the cases, resources, and responses to docket growth differ in each circuit. The peculiar nature of the technical issues

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<sup>90</sup> See WORKING PAPERS, *supra* note 17, at 72-91; see also *supra* note 17 and accompanying text.

<sup>91</sup> See WORKING PAPERS, *supra* note 17, at 105 tbl.3c, 108 tbl.6b.

<sup>92</sup> *Id.* at 86, Item 20g; see also *id.* at 87, Item 20j (showing that the court was second highest in the category in which "unpredictability of results until the panel's identity is known" is a "grave problem"). For additional discussion of these issues, see Hellman, *supra* note 3, at 398-99; Paul R. Michel, *The Challenge Ahead: Increasing Predictability in Federal Circuit Jurisprudence for the New Century*, 43 AM. U. L. REV. 1231 (1994); Michel, *supra* note 28, at 1191-93; Slind-Flor, *supra* note 41, at A1, 16.

<sup>93</sup> WORKING PAPERS, *supra* note 17, at 113 tbl.12; see also *supra* note 79 and accompanying text (suggesting that the Federal Circuit's "strict noncitation rules" might explain this survey result); Michel, *supra* note 28, at 1186-87 (discussing those rules); Hellman, *supra* note 3, at 399 (suggesting the "need for caution in interpreting the survey results").

<sup>94</sup> See WORKING PAPERS, *supra* note 17, at 77, Item 13; accord Michel, *supra* note 28, at 1186.

<sup>95</sup> See WORKING PAPERS, *supra* note 17, at 86, Item 20h.

often raised by appeals in the Federal Circuit also complicates this situation.<sup>96</sup>

The Commission aptly observed that the varied amount of detail in “without comment” dispositions and diverse record-keeping methods prevent reliable comparisons of the appeals courts along this dimension using nationally reported data.<sup>97</sup> Even if the existing information were clearer, the material might not accurately capture overall circuit operations which encompass a spectrum ranging from rather mundane daily court administration, to the esoteric concept of judicial collegiality.<sup>98</sup> The Federal Circuit’s present condition, thus, might resist precise characterization without the collection, analysis, and synthesis of additional and more refined material through, for example, the scrutiny of numerous cases.<sup>99</sup>

In fairness, the commissioners did not claim that they thoroughly examined individual courts or considered all relevant empirical data. Instead, the Commission explored some benefits and disadvantages of enlarging Federal Circuit jurisdiction without proffering recommendations.<sup>100</sup> For example, it is useful to have opinions that the Federal Circuit performs effectively and that tax and social security appeals might be assigned to the court. However, these perspectives are somewhat controversial and could be tested empirically or more easily understood with carefully assembled empirical data.

The objective information and the subjective material which the commissioners collected lack sufficient refinement and comprehensiveness to support concrete determinations about how the Federal Circuit operates and whether the court’s jurisdiction warrants expansion. Nonetheless, this information is adequate to substantiate several specific recommendations for future action.

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<sup>96</sup> See Michel, *supra* note 28, at 1186; see also Ringel, *supra* note 32, at 10 (quoting U.S. Chamber of Commerce’s characterization of the comparison between caseloads of the Federal Circuit and the regional circuits as “apples to oranges”).

<sup>97</sup> WORKING PAPERS, *supra* note 17, at 111. This phenomenon and diverse case complexity suggest the need to refine data. The Commission refines some data. For instance, the commissioners do not consider a circuit’s senior judges as visitors. See *id.* at 108 tbl.6a.

<sup>98</sup> See generally FRANK M. COFFIN, ON APPEAL 215 (1994) (offering a “hornbook” definition of collegiality); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-64 (1998) (describing role of collegiality in decisional processes); Deanell Reece Tacha, *The “C” Word: On Collegiality*, 56 OHIO ST. L. J. 585 (1995) (analyzing impact of collegiality on judicial decision making).

<sup>99</sup> For claims that the court works well under the current system, see Michel, *supra* note 28, at 1186. But cf. Helen Wilson Nies, State of the Court, Address Before the Eleventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (June 18, 1993), in 153 F.R.D. 177, 185 (1993) (discussing both positive and negative aspects of the work of the court).

<sup>100</sup> See COMMISSION REPORT, *supra* note 2, at 72-74.

### III. SUGGESTIONS FOR THE FUTURE

The Commission provides a balanced, albeit rather circumscribed, analysis of the benefits and disadvantages of including new categories of appeals within Federal Circuit jurisdiction. The commissioners' decision to discuss two candidates absent suggestion is informative, but treatment in greater detail could have further advanced the inquiry. For example, several important developments will apparently foster much patent law litigation in the near future. These include rapid, dramatic change in numerous areas of technology, including electronic commerce and biotechnology, as well as a broader interpretation of statutory subject matter, leading to controversial patents for biotechnology, software, and business methods.<sup>101</sup> The Commission was, and Congress should be, cautious about expanding the jurisdiction of a court that may soon experience substantial docket growth.<sup>102</sup>

Transferring cases to the Federal Circuit would probably afford certain general benefits. For instance, diverting a number of appeals from the twelve regional circuits would somewhat relieve their burgeoning dockets. Moreover, vesting jurisdiction over these cases in the Federal Circuit may capitalize on specialized expertise that judges of this court now have or would secure by virtue of having a comparatively narrow caseload. This approach might, however, afford minimal gain and even entail certain disadvantages. Transferring appeals to the Federal Circuit from the regional circuits would effect no actual reduction in filings; the appellate judiciary as a whole would continue processing the identical total number of cases. The new cases may concomitantly burden the Federal Circuit at a time when it is experiencing docket growth.

Judges of the Federal Circuit have no particular expertise in resolving social security disputes and have limited expertise in deciding tax matters. Both social security and tax appeals differ significantly from those cases that the court currently receives. Therefore, vesting the Federal Circuit with jurisdiction over these two categories of cases may not expedite appeals, yield systemic economies, or be fairer to litigants.<sup>103</sup> If

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<sup>101</sup> See, e.g., *AT&T v. Excel Communications, Inc.*, 172 F. 3d 1352, 1357 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 946 (1999) ("[A] mathematical algorithm may be an integral part of patentable subject matter such as a machine or process if the claimed invention as a whole is applied in a 'useful' manner"); *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F. 3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) (rejecting the notion that business methods and computer algorithms are unpatentable per se); *Animal Legal Def. Fund v. Quigg*, 932 F. 2d 920 (Fed. Cir. 1991). See generally Landau & Biederman, *supra* note 68 (discussing the complexities of copyright for courts); Michel, *supra* note 28, at 1184-85 (noting that scientific and business advances will elicit calls for increased specialization of the Federal Circuit).

<sup>102</sup> See Michel, *supra* note 28, at 1181-83, 1193-94.

<sup>103</sup> See U.S. Department of Justice, Comment on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), at <http://>



Congress expands the jurisdiction of the Federal Circuit, it might include cases most similar to those the court presently resolves. In short, although social security and tax controversies are oft-mentioned candidates, they may not be the best prospects; Congress might want to assess them more closely or explore other possibilities.<sup>104</sup>

The Commission's decision to delete from the final report its discussion of copyright cases in the tentative draft report seems sensible.<sup>105</sup> Judges of the Federal Circuit have little specialized expertise in this field, which minimally overlaps with patent law, while the twelve regional circuits, and in particular the Second Circuit, have traditionally resolved copyright cases.<sup>106</sup> Moreover, technological growth in the internet and software, as well as the increasing complexity of Title 17 of the United States Code, mean that there will be greater and increasingly complicated copyright litigation in the future.<sup>107</sup> Given the Federal Circuit's current areas of expertise, Congress should probably not give it responsibility for these complex cases.

The Federal Circuit and Congress might also consider implementing additional actions. Because the commissioners devoted so much attention to the remaining appeals courts, especially the Ninth Circuit, the Federal Circuit warrants greater study. Further analysis would help determine the propriety of vesting in the court jurisdiction over tax, social security, and other cases. Indeed, the Judicial Conference Long Range Planning Committee admonished that the "need for centralized review by the Federal Circuit in any subject area might be reevaluated from time to time in light of developments in the law and changes in the workload and structure of the other courts of appeals."<sup>108</sup> The Federal Circuit and lawmakers may wish to assess those areas in which the court might perform better, as suggested by responses to the Commission survey.<sup>109</sup> Consistency and predictability in circuit law should be considered, al-

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app.comm.uscourts.gov/report/comments/DOJ.htm. See generally Tobias, *supra* note 8, at 234 (reviewing past and present external reforms in the federal appellate system); Wilinsky, *supra* note 61, at 1087 (noting that vesting federal jurisdiction would not necessarily help social security benefits litigants).

<sup>104</sup> Cases involving intellectual property law are one possibility.

<sup>105</sup> See *supra* note 28 and accompanying text.

<sup>106</sup> See Douglas Y' Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTELL. PROP. L. 285, 285 (1999).

<sup>107</sup> See *supra* note 69 and accompanying text. Of course, placing jurisdiction in the Federal Circuit would be responsive to the concerns about inconsistency and forum shopping that plagued patent attorneys when the Hruska Commission surveyed them in 1975. See, e.g., Littman, *supra* note 68; see also *supra* note 69.

<sup>108</sup> LONG RANGE PLAN, *supra* note 35, at 43.

<sup>109</sup> See WORKING PAPERS, *supra* note 17, at 5-91.

though they are somewhat elusive notions. Several studies of these concepts, particularly in the Ninth Circuit, should be instructive.<sup>110</sup>

If evaluation shows that the Federal Circuit presently encounters difficulties requiring remediation, evaluators must attempt to delineate exactly why. This will facilitate the careful tailoring of solutions to existing circumstances. For instance, should analysis reveal that circuit law is not uniform or predictable; the court may want to implement or refine promising approaches. These include the circulation of opinions to all circuit judges before a final opinion is published, which some regional circuits have successfully employed.<sup>111</sup> The court might also consider experimenting with additional measures that may promote efficiency, such as the "pilot reforms" explored by Judge Michel.<sup>112</sup>

#### IV. CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals has collected considerable objective and subjective information on the Federal Circuit. However, that material is neither sufficiently refined nor thorough to permit definitive conclusions about the court. Therefore, Congress and the Federal Circuit judges should continue studying the Federal Circuit, particularly by exploring potential candidates for inclusion within the court's jurisdictions.

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<sup>110</sup> See McKenna, *supra* note 76, at 93-95; Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 55-90 (Arthur Hellman ed., 1990); Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029 (1999).

<sup>111</sup> See, e.g., 3D CIR. I.O.P. 5.6; 4TH CIR I.O.P. 36.2; see also Slind-Flor, *supra* note 41 (noting that the circuit uses prepublication circulation among technical advisors); NINTH CIR. EVALUATION COMM., INTERIM REPORT 8-12 (2000) (pointing out that case management attorneys in the 9th Circuit circulate pre-publication reports daily).

<sup>112</sup> Michel, *supra* note 28, at 1200-02. Judge Michel suggests a number of "pilot reforms," including unsigned or per curiam opinions that tersely declare the essential rationale agreed to by the three members of the panel (which would reduce the delays of lengthy, signed opinions), and shorter oral opinions from the bench, supplemented later by more detailed written opinions. *Id.*