

# Welcome To The Next Era Of The Federal Circuit

By [Dani Kass](#)

Law360 (April 26, 2021, 12:58 PM EDT) -- The Federal Circuit is heading into a significant period of change, with a pending judge nomination that would be a landmark moment for diversity, a new chief judge taking over next month and several active judges eligible to retire at any moment.

President Joe Biden has already named [Perkins Coie LLP](#) partner Tiffany P. Cunningham to the Federal Circuit, a move that could pave the way for the appeals court's first Black judge, but that nomination is expected to be just the beginning of fresh additions to the bench. Attorneys also say Judge Kimberly A. Moore, who is set to become the circuit's chief judge May 22, is likely to bring a new level of energy to the top role.

"The court is going through an evolution," [Holland & Knight LLP](#) partner Robert K. Tompkins said of the 39-year-old court. "It hasn't gone through too many shifts before, just because it hasn't been around that long. It'll be interesting to see how this plays out."

Biden [named Cunningham](#) for the court on March 30, after Judge Evan J. Wallach said he'd be [taking senior status](#) at the end of May. Cunningham is a litigator at Perkins Coie, whose work involves intellectual property cases for companies in both life sciences and technology.

"She will bring a real amount of intellectual rigor to the position," said [Fish & Richardson PC](#) principal Ahmed J. Davis. "I think that had she been a white man, she would have been a perfect choice for this position given her experience and her background and her knowledge. The fact that she's a Black woman just makes it fantastic."

Cunningham, Davis and [Polsinelli PC](#) shareholder Jonathan R. Spivey had all clerked together at the Federal Circuit in 2001, which Davis said was the "high-water mark for Black

law clerks." He said the fact that the court hasn't had a Black judge in its 40-year history is a "glaring omission."

"Once she's confirmed, she's going to need law clerks who are bright and intelligent," Davis said. "Those people come in all sizes, shapes and colors, but having a Black judge will increase the number of Black law clerks that we see. They'll leave the court, be practitioners, have cache from their clerkship, and have more opportunities to practice before the court."

Beyond the benefit her appointment will have for diversity, attorneys had high praise for Cunningham's work as a litigator and the experience she'll bring to the court as a practicing attorney.

"Most of the other judges have really not been IP litigators by training, and most of the cases they deal with involve IP litigation," said Polsinelli partner Fabio E. Marino. "Having more judges with that background will improve the collective experience level of the Federal Circuit."

Marino also touted the fact that Cunningham's clients cross industries, which should help her familiarity with the range of subject matters that come before the appeals court. The nominee's technical experience, including her undergraduate degree from the [Massachusetts Institute of Technology](#), will also help on technical Patent Trial and Appeal Board appeals, he said.

Davis stressed that real-world experience means she understands the "tremendous role" the Federal Circuit plays in clients' day-to-day business.

[Venable LLP](#) partner Christopher E. Loh likewise said "she'll have a very good first-hand appreciation of the practical effects of recent Federal Circuit rulings," such as the inconsistencies in the court's patent eligibility rulings.

Overall, Davis described her as "considerate," a listener and a "hard worker."

Our job, our mandate from Congress is to create a clear, uniform body of patent law. Our inability to do so in the § 101 space has not been a mess of our making. But, the unfairness, confusion and uncertainty that will be caused by this opinion is all us.

**JUDGE KIMBERLY A. MOORE**

July 2020 dissent in American Axle

"I also believe that she will arrive at the court with enough confidence and gravitas in her own abilities that if there are issues that need to be fully aired out, she'll exercise her independent judgment to do that," he said.

While adding an intellectual property litigator would be great for patent attorneys, the Federal Circuit doesn't just handle patent appeals.

Tompkins, who leads Holland & Knight's government contracts practice, said attorneys who don't focus on IP know "that's always been a way of life at the Federal Circuit."

"The judges have done a good job of gaining an understanding of government contracts law," he said. "Frankly, it's our job as litigators to educate them on the law as we prepare our briefs and make our arguments."

[Akin Gump Strauss Hauer & Feld LLP](#) international trade counsel Devin Sikes said Cunningham "appears to be imminently qualified," but that it's frustrating the court is about to replace Judge Wallach, one of its few trade experts, with an IP pro.

"With Wallach going senior, the court will have one less active judge with trade experience," said Sikes, who had clerked for Judge Wallach. "My hope is the judges will continue to seek Judges [Jimmie V.] Reyna and Wallach's guidance on trade cases when they need it. Judges Reyna and Wallach have brought quite a bit of clarity and consistency to the trade portion of the court's docket, and with all hope, that will continue in the years ahead."

But there's a good chance Biden will get to appoint others to the Federal Circuit, attorneys say.

"I hope that everyone that is currently sitting on the court, active and senior, remain healthy and strong, but the reality is that there's an active judge in her 90s, and there are two active judges in their 80s," Davis said. "Roughly half the bench is 70 and older. It would not surprise me if Biden had another opportunity to appoint a judge to the Federal Circuit in 2021."

There are four judges currently eligible to take senior status, including Judge Timothy B. Dyk, who Cunningham clerked for.

"Judge [Pauline] Newman has been eligible since '96, but she's phenomenal and well reasoned," said [Katten Muchin Rosenman LLP](#) partner Deepro Mukerjee. "It really does come down to those individual judges and what they decide to do."

Judge Reyna, among others, will be able to take senior status soon, and Sikes said he hopes the lack of active trade judges will be taken into account if the judge does so.

One of the court's youngest members, Judge Moore, next month will replace Judge Sharon Prost as chief. Prost will turn 70 on May 24 and will be eligible to take senior status.

"Judge Moore, based on prior decisions and the way she conducts herself on the bench, is going to be more of an activist," Polsinelli's Marino said. "She definitely has issues that she's very interested in, so I would expect her to play a more active role as chief judge than her immediate predecessor."

For example, he pointed to the court's body of law on Section 101 related to patent eligibility

Mukerjee, who said Judge Moore has "distinguished herself in the patent world," likewise said he expected her to be vocal about Section 101. He particularly pointed to her [impassioned dissent](#) in [American Axle v. Neapco](#), a contentious patent eligibility case where her fellow panel members invalidated a car driveshaft patent for only claiming a natural law.

"Our job, our mandate from Congress is to create a clear, uniform body of patent law," she wrote in July. "Our inability to do so in the §101 space has not been a mess of our making. But, the unfairness, confusion and uncertainty that will be caused by this opinion is all us."

In addition to patent eligibility, Moore has been active on issues of venue and forum shopping, according to Marino. In one [February order](#), Judge Moore told Judge Alan Albright in Texas — whose refusal to transfer patent cases has repeatedly been challenged at the appeals court — that waiting eight months to decide a transfer motion was an "egregious delay and blatant disregard for precedent."

Attorneys repeatedly praised Judge Moore's [fiery questioning](#) during oral arguments and her passionate approach.

"She's a very energetic person, and I expect she'll bring an enormous level of energy to the chief role," Sikes said.

--Editing by Kelly Duncan.