INTRODUCTION

THE FEDERAL CIRCUIT:
A COURT FOR THE FUTURE

The Honorable Helen Wilson Nies*

This year we will celebrate the tenth anniversary of the United States Court of Appeals for the Federal Circuit. To many, the history of the court is merely current events. Other experienced lawyers—and ten years qualify—have lived under no other system. While some of the court's opinions have been criticized, a fair game, there has developed a surprising, almost uniform approval of the system of providing a single court below the Supreme Court with exclusive jurisdiction over a number of fields of law. Given the novelty of the concept, the court was deemed an experiment and was not without detractors. The crucible of ten years of operations has ended the experimental phase of the court. The court has proved itself to be a valuable component of the overall federal judicial system.

Structured from the beginning as a non-specialist court, the court's work has blown away the dark clouds of fear that it would be captured by special interests. As a collegial body, the court has had objectives but not an agenda. The overriding objective has been to bring reasoned, uniform decisions to the areas of the law in which we are effectively the court of last resort.

Rightfully, the formative years of the court will always be known as the "Markey Court." Howard Markey's contributions to the court, from its procedures to substantive law, established the foundation for the court's work. He cannot be honored enough for his strong leadership in launching the Federal Circuit. Beside him were the jurists who had served on the United States Court of Claims and the United States Court of Customs and Patent Appeals, all dedicated to building a uniform, stable body of precedent as was the

* Chief Judge, United States Court of Appeals for the Federal Circuit.
mandate of the Federal Circuit. To this end, the judges adopted the precedential decisions of its predecessors and agreed to be controlled by any prior decision of a panel of the court. Thus, the first decision issued by this court on a point of law is the precedential decision. A later decision, should it appear contrary to the first, would control only the result in that case. In the Federal Circuit, a controlling prior statement of law can be overturned only by an in banc court. This concept of the first case establishing binding precedent surprises those who practiced before the United States Court of Customs and Patent Appeals. The decisions of that court, however, were always rendered in banc and the last one was, thus, always precedential.

To maintain uniformity, precedential decisions of the court are circulated to all members of the court prior to issuance for their comment so that statements which may appear to conflict with a prior decision or might cause confusion may be called to the attention of the panel. Any judge of the court may make comments on the content of circulating opinions and frequently a judge will do so. Indeed, the author provides everyone else with a standard form for that purpose. Rarely are comments made on the result of the case unless there is a persuasive dissent. The most common type of comment is that a statement of law may be overly broad with the commentator suggesting a situation that should not be foreclosed by the opinion. It is difficult to write a tight opinion, which, at the same time, doesn't restrict itself just to the facts of the case. The appellate function does include providing guidance for other cases.

Our senior technical advisor also has the responsibility to point out decisions of the court that may not have been cited and appear to conflict with the circulating opinion. The panel, however, retains entire control over the case and its disposition. Only if the judges call for in banc rehearing is the matter taken from a panel.

Our in banc cases present an interesting mix. While the number of in banc cases have been fairly evenly split between appeals from the district courts and the Merit Systems Protection Board, with those from other tribunals making up the final third, the decisions in all of these areas have dealt most frequently with issues of jurisdiction rather than substantive law.

Since its inception, the court has operated under procedures that ensure that the judges do not become specialists in a particular field of law. The court sits in panels of three to hear each case. During hearing week, the panels are changed each day so that the judges sit with all other judges of the court regularly throughout the year.
The panels of the court are set up by the Chief Judge with this in mind. The cases, however, are not assigned by the Chief Judge, or by anyone, to a known group of judges. Rather, the Clerk of the Court arranges the ready cases in groups corresponding to the number of panels required to hear them. The Chief Judge then sets up the necessary number of panels. The panels and sets of cases are identified only by code and are matched without knowing what cases are assigned to which judges. Thus, no judge is selected to hear particular cases. We are currently working on computerization of both panelling and case assignment. The authoring assignment for a panel opinion is made by the presiding judge of the panel unless the presiding judge dissents.

A variation from the anonymity rule occurs when an enlarged panel is set to hear a particular case. The court has employed enlarged panels infrequently, only one five-judge panel having sat within the last two years. With enlarged panels, the judges are assigned by rotation. Another variation occurs when a panel has rendered a decision in a particular case and, after a remand, the case comes up a second time. In that event, without knowing the case name, the Chief Judge will assign the second appeal to the same panel if it is sitting when the second appeal is ready, or to one whose composition most reflects the composition of the original panel.

I have mentioned these procedures in detail because I think they are significant to the work of the court. To draw an analogy, many countries have a Bill of Rights that equals in language the words of the first ten amendments to our Constitution. However, it is not merely words on paper that gives meaning to the Bill of Rights in our system. It is the structure of our governmental system that has been a significant difference in the implementation of the objectives stated therein. The same is true with our court. The structures we have adopted for its operation contribute to the objective of developing a uniform body of law for the court.

Of the active judges of the original bench only two remain, the venerable Judge Giles Sutherland Rich and myself. We will always appreciate having had the opportunity of knowing and working with our departed colleagues Judges Oscar Davis, Philip Nichols, and Jean Bissell. Senior Judges Wilson Cowen, Byron Skelton, Marion Bennett, Jack Miller, Daniel Friedman, and Edward Smith continue to make substantial contributions to the work of the court. Their participation has enabled us to keep our hearing docket current. In addition, Senior Judge Bennett carried the entire responsibility for
the publication of the recently issued volume on the history of the court.

Eight exceptionally able lawyers have been appointed to our bench since 1984. In their prior lives:

- Judge Pauline Newman was educated as a scientist, worked as a research chemist, obtained a number of patents for her discoveries, studied law, launched into a highly successful corporate career in patent law, received wide recognition for her distinguished service on governmental advisory committees and at the United Nations, and with an abiding interest in furthering combined education in the sciences and law, has maintained a close relationship with academia;

- Judge Glenn L. Archer, Jr., began his legal career in the Judge Advocate General's Office of the Air Force, spent twenty-five years in private practice specializing in taxation and corporate law, served in numerous positions in bar associations, and was Assistant Attorney General for the Tax Division of the Department of Justice at the time of his appointment;

- Judge Haldane Robert Mayer, with a scientific, legal, and military background, served as law clerk to Judge John D. Butzner, Jr., of the Fourth Circuit and as a special assistant to Chief Justice Warren Burger, was in private practice in corporate law and litigation, became Special Counsel of the United States Merit Systems Protection Board, and served on the United States Claims Court for five years;

- Judge Paul Michel has extensive experience as a prosecutor, held a number of positions in the Senate including counsel to the Senate Intelligence Committee, served in executive positions at the Department of Justice, and is a teacher of law and a student of Thomas Jefferson;

- Judge S. Jay Plager, former distinguished law professor and law school dean, also a Visiting Scholar at universities in the United States and England, served as counselor to the Under Secretary of the Department of Health and Human Services, was appointed to a succession of high level executive positions in the Office of Management and Budget, and has engaged in wide ranging public service activities, both before and after appointment to the bench;

- Judge Alan Lourie began his professional career as a chemist but was drawn to the field of patent law, was an officer in numerous professional organizations, has served as patent and international trade consultant to the government and as delegate to international conferences, and was in private industry in the position of
Vice President and Associate General Counsel of a major corpora-
tion at the time of his appointment;
• Judge Raymond C. Clevenger, III, first went into banking, then
attended law school, served as law clerk to Justice Byron R. White,
and then joined a major law firm where he enjoyed a diverse prac-
tice abroad and in the United States, particularly in federal admin-
istrative law, for more than twenty years;
• Judge Randall R. Rader served in staff positions in the House of
Representatives, for nearly nine years was counsel on the United
States Senate Judiciary Committee, particularly, the Subcommit-
tees on the Constitution and on Patents, Copyrights and Trade-
marks, and brought to the Federal Circuit the valued experience
of a legislative expert and as a trial judge on the United States
Claims Court.

The extended vacancies on the bench have placed enormous bur-
dens on the judges, which they have admirably carried. The court is
constituted as a bench of twelve judges by statute. We have, at this
writing, two long-standing vacancies. Only for a period of a few
months in 1985 has the court enjoyed a full complement of judges.
Turning a disadvantage into an advantage, the court has been able
to secure the temporary assignment of district court judges to serve
with the court. The experience has been rewarding in both direc-
tions. The regular members of the court benefitted from extended
informal discussions with those on the front line and gained a better
understanding of the problems they faced in trying cases. We have
also reached out to district court judges to participate in our Judicial
Conference this past year. The court trusts that building individual
bridges will strengthen the judicial system as a whole.

In addition to district court judges, our visitors have included cir-
cuit court judges from other circuits who have generously contrib-
uted their service. A highlight of the fall term was the appearance of
Justice Thurgood Marshall on our bench for a day of hearings.

I have said the Federal Circuit is a court for the future. Its juris-
diction has gradually expanded since 1982 to cover additional areas
of law. It became the appellate court for the United States Court of
Veterans Appeals upon the creation of that court in 1989. Our ju-
risdiction over personnel cases was expanded to additional federal
employees in 1989. The Civil Rights Act of 1991 specified the Fed-
eral Circuit as the appellate court for discrimination cases lodged by
Senate employees and by Presidential appointees. In addition,
under proposed legislation, we will assume the pending cases of the
Temporary Emergency Court of Appeals upon its demise. Our
judges are generalists in the tradition of our judicial system with experience in deciding a wide range of cases from the complex, technical disputes between mega-giants of business, to the socially significant claims of monetary injury by native Americans, to those cases involving the very personal traumas of federal employees who have lost their jobs and infants who have been injured by vaccines.

From its tentative beginnings, the court now stands ready as an established institution to take on whatever additional tasks Congress may choose to assign. This collegial group provides a strong resource for rendering decisions principled in legal scholarship and tempered by the diverse backgrounds of its judges.

The court would wish me to acknowledge with much appreciation the work of those outside the court who have greatly assisted its endeavors over the past ten years. The Federal Circuit Advisory Committee has been of great assistance in formulating the rules and procedures of the court. The Federal Circuit Bar Association supports every function of the court from educational programs to endowing us with portraits of our beloved judges. *The American University Law Review* is particularly valued by us because it concentrates on the work of the court and provides us with much valuable insight. With this continued support, we can march from a position of strength into the future.