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THE WORK OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT: AN UNSEEN INFLUENCE

THE HONORABLE HOWARD T. MARKEY*

The creation of the Court of Appeals for the Federal Circuit presents both challenge and opportunity. The court was created as an exercise of substantial pioneering by the Congress in court structuring and therefore presents, I think, a particularly outstanding opportunity to make lasting contributions to the administration of justice in this beloved land.

The first challenge lies in the need to remember always that it is not the Markey court. As its Chief Judge, I am but the servant of the servants of the law. Nor is it the judges' court. Nor the government's court. Nor is it properly described by naming one area of its jurisdiction. It is not the Patent Court nor the Government Claims Court nor the Court of International Trade nor the Merit Systems Court nor the Government Contracts Court. It is, of course, like all courts, property of the people who pay for it. It exists to serve the people, litigants and non-litigants, all of whom have a right to know what the law is. Still so new, its influence is as yet unseen and but dimly noted.

The court was formed by merging the old Court of Claims and the old Court of Customs and Patent Appeals. It has 12 judgeships, seven from the Court of Claims, five from the Court of Customs and Patent Appeals. It has a staff of just 61 people, including the three persons who serve each judge, that's 36, and 25 in the court clerks' office, the administrative services office, and the senior technical assistants' office.

In meeting the challenge of our mission, like all appellate courts, we must first decide the issues presented. And second, though of no less importance, we must explain our decisions. The judges have adopted a series

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of standard operating procedures governing every function within the court building. One of those provides that the court will issue an opinion in every single case. In every case, the loser will be given reasons why he or she lost. We will not of course publish every opinion. We couldn't possibly do that today and meet our responsibilities.

As you may know, last year 30,000 appeals were filed in the federal courts of appeals. There are 40 three-judge panels of active judges. We have about another 15 possible panels, when we add senior judges who are serving as a labor of love. Without them we would have collapsed long ago. And if present trends continue, and there's no indication that they aren't going to continue, we will collapse. I will give the system, at present rates, perhaps five years.

The uniqueness of the new court presents a particular challenge. Because it results, as I said, from a bit of Congressional pioneering, the court will be and should be watched. The Bar, the law schools, other courts, the Executive Branch, and the Congress will and should evaluate the performance of the court in the light of the considerations which impelled its creation. Like war and generals, courts are too important to leave to judges. Hence, as we confront the challenge, we welcome watchers.

There are, of course, numerous similarities between the Court of Appeals for the Federal Circuit and the pre-established Regional Circuit Courts of Appeals. We follow the same Constitution and, of course, the same Supreme Court. We meet and determine the same kinds of procedural and due process issues. We have adopted the Federal Rules of Appellate Procedure, making only minor modifications mandated by our mission.

We do differ organizationally. We have no lower courts, the administration of which falls within our control. We have no circuit council as such and no circuit executive. You're looking at the circuit executive!

The basis for the uniqueness and the great opportunity it represents lies in our jurisdiction. Geographically, it is nationwide. There is nothing new about that. The Court of Claims and the Court of Customs and Patent Appeals both had a nationwide geographic jurisdiction. The court's substantive jurisdiction is exclusive in the fields of international trade, claims for damages against the government, patents, government contracts, and Merit System Protection Board cases.

Many international trade cases involve the classification of products. Is this, for example, a glass, a drinking implement, a container, a household article, or a work of art. Obviously, it is all of those, but it must in law be one. The government may insist, for example, that when this product was imported it was a container on which the duty is, say, ten cents. The importer, on the other hand, is insisting that it is a drinking glass, on which the duty is one cent. The court must decide. The reason we have

one court deciding such cases is because uniformity is needed. Before 1909, when the original court of Customs Appeals was formed, that identical product could have been classified under any or all those headings, depending on which port it arrived at in the United States. Now each imported product has one classification no matter where it comes into the United States.

Another big area in international trade about which you may have been reading involves the anti-dumping and countervailing duty cases. Currently, you may have read of the case of the steel industry. In these cases an American industry alleges that an exporter from another country ships its good into the United States and sells them at less than their value as measured by certain criteria. The United States may add to the normal duty on that product an anti-dumping duty to make up the difference. Similarly, if another government is assisting its exporters to the United States with governmental aid, subsidy and/or favored treatment, the United States is authorized under our laws to apply what is called a countervailing duty, and additional duty sufficient to make up for the governmental assistance those exporters received.

You're familiar with claims against the government, which include everything from Indian claims, claims for refund of taxes paid, et cetera.

When we come to the patents, we find real congressional pioneering in creating the court. For the first time in the almost 200-year history of our country, we now have judgments of district courts throughout the land in particular fields of law coming to one permanent court of appeals. As you know, primarily all final judgments of a district court would be appealable to the local circuit overseeing that court. That remains true of every case except patent cases and what are called "Little Tucker Act" cases (suits against the government for less than \$10,000). Judgments of the district courts throughout the land in those two areas are now appealable only to this new court of appeals.

I am told that government contracts constitute the biggest business in the world in dollar volume, and that the amount involved in government contracts is almost twice the total business done by the Fortune 500. There are many, many issues that arise in those cases.

Merit systems protection is an important area. It has to do with fair treatment of federal government employees. It is presently the largest part of our business volume of appeals. Almost every employee who has suffered any adverse action feels the need for recompense and files an action with the Merit Systems Protection Board and then appeals the Board's decision to us.

I mentioned earlier that the court should not be called the "Patent Court". Some people, because Congress recognized that the patents were being differently interpreted and the patent law was being differently applied throughout the country, think of it as a patent court. Yet only one-

third of our cases so far have involved patents. That might engender some questions, and it is questions I hope to encourage in these remarks.

The court hears appeals from 116 tribunals, on which sit 885 decision-makers. Its universe is thus the largest of any court of appeals in the land.

You might say, "Well, how are you doing?" I am a born optimist. You know what an optimist is — that is a fellow who falls off an 18-story building and, as he goes by each floor on the way down, he says, "Well, everything's all right so far." So everything's all right so far.

The court has heard every case within 30 days of its coming ready to be heard. As Wilfred mentioned, the interval from filing to disposition is the best measure, because everything else either adds to or subtracts from that. Given a continuing quality of decision, that interval is the main consideration. We cut it at the Court of Customs and Patent Appeals from three years to seven months and have held this new court at seven months so far. The lawyers take five months to get the case ready, the court has heard it within the sixth month, and has decided it within the seventh month. That is probably an irreducible minimum, but I will never be satisfied. Somebody said that Markey wants to decide every appeal before it is filed. That is not quite true. The next day after filing maybe, but not before it's filed.

Seriously on that point, however, I don't think, and I don't think our judges think, that there is any necessary conflict between efficiency and justice. On the contrary, there may well be injustice in inefficiency. Nowhere is it written that due process must be sloppy process. As I indicated, the nature of our work is somewhat unique, but we are not "a specialized court" anymore than any other court is. You know, there were some folks called Founding Fathers who wrote a Constitution and who spent days and weeks arguing over whether we should even have a federal judiciary. They finally decided to have one only when reassured that the jurisdiction of those courts would be controlled by Congress. I don't think any of them in their wildest, most fearful moments, could have foreseen the day when some people are asserting that the courts are virtually running the country and that the Congress and the Executive have stepped aside. But it is still true, it is still the law, it is still in the Constitution that federal district and appellate courts have the basic jurisdiction Congress gives them, and that is all they have.

That we have been given exclusive jurisdiction puts an extra burden on us, because in the areas of substantive law, at least, there is no other court to which we might look for other views, and we are fully aware of the need for extra care that burden entails.

In our Court there is a confluence of law and science, the two major servants of man. Science, which points to new and higher plateaus of technological progress, and law, which determines whether that science

shall lead to healthier, happier, equally free lives or to burning bodies in furnaces, making lampshades out of human skin, and other forms of perverted science.

Today's technology depends on science's successful search for knowledge of physical facts. But the only thing that mankind has to control science, to direct the technological juggernaut, is the law.

That brings me full circle. I said at the outset how happy I was to be here. And it's true, for lots of reasons, but mainly because it is always a pleasure, anytime, anywhere, to visit with men and women who share the privileged joy of working at the heartbeat of a free society, the law. What a privileged joy it is to make each day a contribution to a free society's most precious asset, the administration of justice. I can't wait to get out of bed in the morning. I know that day I am likely to make only a teeny-weeny contribution, but make it I will, and make it I will with joy.

You know, a snowflake is about as near to nothing as you can get and still have something. Hardly subject to gravity, it is so light and airy and tiny. But it can get a few of its fellow snowflakes together and grind a city to a halt, close all the schools, and stop diesel trains in their tracks.

We must never say, "What can one person do?" That cancerous phrase! So I truly mean it when I say it is a pleasure to have a chance to visit for a little while with those who share what I call the privileged joy of working with the law.

For if each of us remains dedicated to that statuesque blindfolded lady of justice, if each of us gives of ourselves each day to the extent that our God-given talents enable us and our status and duties of state and life permit, if each of us gives all we can, then when our time has run and our work is done, and we meet some other romancers of that blindfolded lady, like Holmes and Brandeis, Cardozo, and Learned Hand, they may say to each of us, "Well done!"

MR. CARON: Well, I know that I appreciate and that we all appreciate Chief Judge Markey's presence, manifested in a number of ways. But the one thing I really didn't know, because I didn't have the pleasure of hearing him too often, was that he has such a great sense of humor. Now, the Chief Judge did say that he'd answer questions. I'm going to hold that for a minute. And I see J.P. rising. J.P. Dowers of Austin, Texas, Your Honor.

MR. DOWERS: Can your unpublished opinions be cited as authority?

CHIEF JUDGE MARKEY: No.

MR. DOWERS: Your little bit that you give to justice each day can then be hidden, is that right?

CHIEF JUSTICE MARKEY: The second question seems to carry its own answer. Like every process conducted by humans, the process of issuing unpublished opinions is subject to abuse. Of course it is. It is possible

that judges could say, "Well, we really can't decide this one. It is such a tough one, let's not go on record with it. We will put it in an unpublished opinion and hide it." It's possible. Thus far at least, I've never seen any proof that that has happened, and it wouldn't be difficult to prove. If that did happen, that would be the danger or the injury to justice, not the fact of unpublished opinions per se.

There are only two choices. We could go back to publishing a full-blown citable opinion in every case. We could do that, but you would get your case heard and decided in our court, near as we can figure, in about six years. In another circuit, it would take about 12 to 14 years. So that's just impossible. That's number one.

Number two, we don't have shelf space. Even with every court operating an unpublished opinion system, there were 96,000 opinions published last year.

Number three, you shouldn't be able to cite an unpublished opinion because it doesn't say anything. A proper unpublished opinion merely tells the loser what the court's reasoning was, why he or she lost. There are no facts set forth. Why tell the parties what they already told us? They know the facts. There is no reference to specific arguments. The parties know what they argued.

Unpublished opinions are public records. They are not "hidden." Anyone can walk into the clerks' office and pick up every one of our unpublished opinions. They are not secret. Because they don't say anything to those not familiar with the case, you could get the briefs, also public records, you could read the briefs and the unpublished opinion, and then see if there had been anything in the case that would have warranted publication and citation.

There really is no point in a court on Monday saying that two and two are four in a big, strong, published, citable opinion and then on Tuesday writing another such opinion to again say that two and two are four. And then doing the same thing on Wednesday, and on Thursday.

It is very simple and complete on Tuesday to say, "Judgment affirmed in the light of the court's opinion in *Jones v. Smith* published yesterday." *Jones v. Smith* is, of course, fully citable. There is no point in merely repeating what was said earlier.

It hurts the ego of some judges to be told "Few are reading you." Lafayette Square is not crammed with people clamoring to read every opinion that comes out of our court.

MR. DOWERS: Forgive my ignorance, but does your court have jurisdiction over federal tort claim appeals?

CHIEF JUDGE MARKEY: Not as such, no. They go to the district courts and then on to the regional circuits. I said "as such" because every once in a while there is a fight over whether this is in fact a tort claim suit or claim for damages against the government. The latter would go to the

Claims Court and be appealable to us.

MR. FLYNN: My name is Jim Flynn. I'm from Evansville, Indiana, and I was shocked by the statistics you gave us on the number of government contracts cases that you handle. Would you please specify more about government contracts cases? You related to the Fortune 500 companies, but more specifically, how many government contracts come before you and how many don't?

CHIEF JUDGE MARKEY: I can answer the first. I am not very good on the second, because we never see those, and nobody tells us how many went through the Boards of Contract Appeals but were not appealable to us. There are 12 Boards of Contract Appeals. Each of twelve different agencies has its own Board of Contract Appeals.

We have not had very many contract appeals as yet, because we acquired that exclusive jurisdiction only 20 months ago. I think we have had only about 25 or 30 appeals, and there must have been hundreds that didn't come to us, where the board's decision turned out to be final. Nobody challenged it by bringing it to us for appeal. But I don't have a figure on those.

I don't want to mislead. The figure I was given on the size of the business of government contracts is a ballpark, overall figure. And when you think about it, if you spent \$1,000 dollars a day, every single day since the birth of our Lord Jesus Christ, every single day for 1,984 years, you would still not have spent three-quarters of one billion dollars. This town spends a billion dollars every two hours or so. So it shouldn't surprise you if government contracts are the biggest business in the world.

The figure doubtless includes many things besides procurement contracts. There are many service contracts, study contracts, which are not procuring products or weapons, but services.

I mentioned it only because if you just learn that this court hears appeals in contract cases, you might say "So what?" But when you realize its decisions will affect and govern parts of the biggest business in the world, it tends to put a little different slant on it and to dramatize the court's unseen influence.

MR. FLYNN: I believe you said that the judicial system would be in some sort of trouble if it continues on the way it was, unless something was done in the next five years. What reforms would you suggest or do you see as necessary?

CHIEF JUDGE MARKEY: I am not reporting that information as something I discovered because I am so smart or anything like that. Everybody in academe and the judiciary has been discussing the problem. Each year we ask, "How much longer can we keep doing this?" And each year we keep coming up with some little gimmick to try to solve the problem or at least to chip away at it. Someone said that it is like shoveling sand against the tide because it just keeps getting worse and worse.

We have cut time for oral argument. In our court, it averages 15 minutes. Many times it is ten minutes. As earlier indicated, we have done away with publishing every opinion and writing full-blown opinions in every case. The judges have been given additional law clerks. The senior judges have been helping. There has been a pretty broad denial of *en banc* hearings. There have been a lot of steps taken, some of which are not ideal, to meet the problem. But there will have to be more.

Adding judges doesn't do it. Adding judges like rabbits will produce more rabbits, but not necessarily more judges. Frankfurter said that adding judges reduces the judicial currency. And he was right. Further increasing the judges' staff would make each chamber a little bureaucracy, would make the judge a manager and administrator, and less a judge. At least he or she would have put an awful lot of time into administration that should be put into judging. It has already been asserted that some judges have become editors of opinions written by young lawyers just out of law school.

What do I think is going to happen? If I could predict the future, I would go to the racetrack and be a millionaire. So I can't predict. But I can report one recent step to meet some of the problem. The courts are beginning to do something about frivolous appeals. Rule 38 has always been there; but it has been honored more in the breach or disregard by the courts.

The problem is, how do you say what is frivolous? This man's frivolousness is that man's world-shaking appeal. *Gideon v. Wainwright*, someone could have argued, was frivolous. But, as you know, it resulted for the first time in assurance of counsel to the indigent. Pretty important. You have to be very, very careful in saying, "This is frivolous." Perhaps it is like obscenity. As Justice Stewart said, "We cannot define it, but we know it when we see it." That may be true of frivolity also. It is hard to define, but you pretty well know it when you see it.

More and more courts in the last year, including our own, have applied sanctions under Rule 38. As you know, it can include damages, attorney fees, and so on.

We do need some changes in the law. There is one prisoner in this country, I am told, who has filed some 400 habeas corpus petitions, each of which could involve a hearing and investigation by the district court and an appeal to the court of appeals. There ought to be a limit somewhere. Though a prisoner's petitions may be denied as totally unfounded, he has nothing else to do but prepare and file more. Not only does he waste judicial resources and taxpayers' money, but, he jams the courthouse down against entry by deserving citizens.

You do have to tread softly. We should do nothing that would effectively weaken or destroy the "great writ" of habeas corpus, or make it unavailable to the person who really needs it, for whom it was designed

and created in the first place.

MR. FLYNN: I'm interested in your description of the staff of the court. In the patent cases, do you have experts in technology to assist you in arriving at a decision?

CHIEF JUDGE MARKEY: Yes. Each judge is authorized to engage one law clerk, non-technical, and one law clerk, technical, who is a law clerk with a law degree, passed the bar and so on, but one who also has a scientific degree of some kind (in biology, chemistry, physics, electrical engineering, whatever), or the judge can have two law clerks or two technical law clerks. It is up to the judge to choose. Most so far have chosen one of each.

Now, some lawyers would worry that this fellow with a law degree and a scientific degree may be testifying to the judge without the benefit of cross-examination. Like everything in life, I suppose it is possible, but we guard against it religiously. The judges are watching for it. Intrinsically, it is not that different from a law clerk advising a judge on the law.

I tell my law clerks right in the first briefing when they come in to go to work for me, "I want you to argue with me, because you're getting paid for it. If you aren't going to argue with me, I don't need you. I want you to take opposite positions. In fact, I'll give you the last word. The last word is 'yes sir.'"

MR. CARON: I think we should, with your permission, Your Honor, if we could make this the last. Would that be all right?

MR. MURPHY: My name is Bill Murphy. I'm from Providence. And your remarks about frivolous appeals more or less anticipate this question. Are you aware of any studies or comparisons that have been made between our federal appellate system and the appellate systems in other common law countries like Great Britain, Australia, New Zealand, Canada; and if so, what conclusions, if any, have been drawn about speed, efficiency, quality of appeals that are actually taken?

CHIEF JUDGE MARKEY: Very good question, and it wasn't planted, believe it or not. There have been some efforts. I don't know as you would call them studies along the same lines as Mr. Murphy indicated, but there are numerous comparisons in which some of the same elements have been brought forth.

In July, an American team of judges, lawyers and professors are going to England in what's called the Anglo-American Exchange. And then when September comes, they will send a similar team over here for exchange of views along some of the lines that Mr. Murphy was mentioning. But you see, many of those studies are not very valid unless you take into account what underlies them, namely the educational and basic historical system of the other country.

First, as you know, in England you have barristers and solicitors. The barristers, and only the barristers, are in court. They are briefed by solici-

tors who do the actual meeting with clients. All of them have been members of one of the four Inns of Court. They studied in an Inn, lived in an Inn, grew up in an Inn, worked with experienced lawyers who were Masters of the Bench while they were in the Inn and after. Therefore, their background is quite different from the American lawyer to start with and I'm sorry to say, their respect for and adherence to highly ethical code is greater.

For example, just recently a lawyer and barrister in England had a policeman as a witness, a bobby. The policeman witness was discharged from the police force about two weeks before he was due to testify. The lawyer told him to wear his uniform in court. The lawyer was disbarred. Without any question, disbarred. He didn't lie himself, but he obviously dissembled.

I suspect in many American legal circles, it would be considered a coup, a smart thing to do. Because after all, "my client's interests come first." I keep screaming when I hear that, "Compared to what?" Compared to what? The interests of the judicial process? The interests of the law? The interests of uniformity and clarity in the law? The interests of ethics? And finally, if you need it, the long-range interests of the profession? Is the client's interest paramount to all of that? If it is (and it is to some people), we have a very serious problem.

And you have your own problems, one of which is that I talk too much — so I will subside.