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# The Phoenix Court

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*United States Court of Appeals for the Federal Circuit*

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# PREFATORY REMARK

## THE PHOENIX COURT\*

HOWARD T. MARKEY\*\*

**L**ike the famed Phoenix, the United States Court of Appeals for the Federal Circuit rose on October 1, 1982,<sup>1</sup> from the ashes of two former courts. On that day, the 127 year old United States Court of Claims and the 73 year old United States Court of Customs and Patent Appeals went out of existence,<sup>2</sup> leaving a history of outstanding contributions to the administration of justice.

Though every federal court serves the role on numerous occasions, the Court of Appeals for the Federal Circuit should in a special way earn the title of "The Conscience of the Government." In perhaps ninety percent of the cases coming before the court, the government will be a party, having been most often a defendant in the tribunal from which appeal has been taken. By "conscience" it is not meant, of course, that the court will decide automatically against the government, or even that it will, or should lean in that direction. On the contrary, it is as much a matter for the governmental conscience to know what it can and must do in meeting its duty to govern as it is to know what it cannot do in justice. It is enough to note that the judges and staff of the Court of Appeals for the Federal Circuit have the opportunity, with dedication and diligence, to set the court on a steady course of administering justice in the relationship of the government and the people.

That a citizen may sue his government is not overly common in the world. Indeed, it took Americans until 1855 to get around to the idea. James Madison had said the two difficulties in establishing a government of men over men were the need to enable the government to control the governed and the necessity of obliging the government to control itself. The Court of Appeals for the Federal Circuit will serve a major role in meeting those difficulties if it always remembers the words of Abraham

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\* This prefatory remark is based on an address delivered to the Boston Patent Law Association on May 14, 1982.

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<sup>1</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 402, 92 Stat. 25, 57 (codified throughout sections of titles 2, 5, 7, 10, 15, 16, 18, 19, 22, 25, 26, 28, 30, 31, 33, 35, 40, 41, 42, 44, 45 and 50 app. U.S.C. (1982)).

<sup>2</sup> Federal Courts Improvement Act, § 105(a), 28 U.S.C. § 171(a).

Lincoln carved in stone on the wall of the court's lobby: "It is as much the duty of the government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals."

The Federal Courts Improvement Act, signed into law by President Reagan on April 2, 1982, formed the twelve judge<sup>3</sup> Court of Appeals for the Federal Circuit out of the existing courts, transferring to the new court the seven article III judges of the Court of Claims and the five article III judges of the Court of Customs and Patent Appeals. At the same time, the Act formed a United States Claims Court, a trial forum for claims against the government, composed of sixteen article I judges serving fifteen-year terms.<sup>4</sup> Although the present trial commissioners employed by the Court of Claims are "grandfathered" into office as article I judges,<sup>5</sup> the Act provides that their first terms shall end on a date fifteen years from the date of their initial employment by the Court of Claims or October 1, 1986, whichever comes first.<sup>6</sup> The Act provides for continuation in office until a successor is appointed when an article I judge completes a term and is not reappointed, and limits service as an active article I judge to those seventy years old and younger.<sup>7</sup> The Act calls on the President to appoint the chief judge of the Claims Court.<sup>8</sup>

The old Court of Claims was unique in that it employed commissioners to conduct trials of claims against the government. The commissioners submitted recommendations to the judges, who, after oral argument, would either adopt, modify, reverse, or return that decision. Because only a judge may decide a case, all dispositive motions submitted at the trial level had to be transmitted for decision to the judges. The Federal Courts Improvement Act creates, for the first time in the Claims Court, a true, independent decisionmaking trial forum for claims against the government. The judgments of the Claims Court, either on dispositive motion or after trial, will stand if not appealed.<sup>9</sup>

Similarly, the former judges of the Court of Claims will no longer perform the trial level function of deciding dispositive motions de novo or review recommended decisions, but will function purely as appellate judges.<sup>10</sup>

The Act thus makes a major contribution in structuring a system for consideration and disposition of claims against the government. Each case

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<sup>3</sup> *Id.* § 102(a), 28 U.S.C. § 44(a).

<sup>4</sup> *Id.* § 105(a), 28 U.S.C. § 171(a).

<sup>5</sup> *Id.* § 167(a), 28 U.S.C. § 171 note.

<sup>6</sup> *Id.* § 167(b), 28 U.S.C. § 171 note.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* § 105(a), 28 U.S.C. § 171(b).

<sup>9</sup> *Id.* § 139(d)(2), 28 U.S.C. § 2505.

<sup>10</sup> *Id.* § 127(a), 28 U.S.C. § 1295.

will be tried by an article I judge<sup>11</sup> of the Claims Court with full authority to dispose of the case in the normal manner of a trial court.<sup>12</sup> The Claims Court judges will conduct trials at various locations throughout the country.<sup>13</sup> The decisions will be reviewable on appeal to the Court of Appeals for the Federal Circuit,<sup>14</sup> in the same manner as are appeals from district court judgments to regional circuit courts of appeal. The remainder of this prefatory remark will be directed to the Court of Appeals for the Federal Circuit.

First, the new appellate court's geographic jurisdiction extends across the nation, encompassing all the states and territories of the United States.<sup>15</sup> Although it is a national appellate court, it should not be confused with any of the courts envisaged in proposals for a "National Court of Appeals." The latter would be established on a new tier between the regional circuit courts of appeal and the Supreme Court. This new court, on the other hand, is on the same tier as the regional appellate courts.

Panels of three or of five judges of the new appellate court will, from time to time, sit in cities other than Washington, D.C. Although both the Court of Claims and the Court of Customs and Patent Appeals had adopted the practice of doing just that at least once a year, the Act mandates that it be done by the new court.<sup>16</sup> The time and location of out-of-Washington sittings will depend on availability of sufficient cases in the area to support at least three days of hearings.<sup>17</sup> Though exceptions may arise, the cost of the trip would not be justified normally if the judges were to sit only one or two days.

Reference to three- and five-judge panels arises because panels of more than three are specifically authorized by the Act.<sup>18</sup> Though panels of seven and nine judges are thus authorized, they are seen now as unlikely. Scheduling five-judge panels obviously reduces productivity below that achievable if scheduling were limited to three-judge panels. Yet the achievement of two major goals is likely to result if five-judge panels are used often during at least the early years of the court's life: (1) decisions in sensitive cases new to the court may be better received and more readily accepted by litigants and the bar if made by five judges; and (2) the judges will gain experience more quickly in legal areas with which some may not have dealt previously.

The court is preparing a set of paralleling processes designed to achieve a number of desirable goals: (1) ensuring that all judges are able to sit

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<sup>11</sup> *Id.* § 105(a), 28 U.S.C. § 171(a).

<sup>12</sup> *Id.* § 139(d)(2), 28 U.S.C. § 2505.

<sup>13</sup> *Id.* § 105(a), 28 U.S.C. § 173.

<sup>14</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(3).

<sup>15</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a).

<sup>16</sup> *Id.* § 104, 28 U.S.C. § 48.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 103(b), 28 U.S.C. § 46(b)(3).

with all other judges and avoiding "set" panels of particular judges; (2) enabling all judges with sufficient seniority to preside over both three-and five-judge panels; (3) equalizing to the extent possible the workload among judges; (4) ensuring that the assignment of judges to panels is made objectively and without regard to case substance; (5) ensuring that cases are calendared for hearing without knowledge of or regard for which judges will be sitting. Of course, direction of sensitive cases to five-judge panels will require foreknowledge that a five-judge panel will be available, but the make-up of that panel will not be known at the time of calendaring. The court is currently investigating the potential for employment of a programmed computer in the paneling-calendaring processes. Whether done by computer or manually by two separated offices, however, the processes will be conducted objectively.

All taxpayers will be pleased to note that the formation of the Court of Appeals for the Federal Circuit and the Claims Court will not cost the government one additional penny. The appropriations made for operation of the existing courts will be applied to, and will be fully adequate for, operation of the two new courts. The present judges and commissioners will remain in their respective chambers and offices and will use the courtrooms that they use presently. The building at 717 Madison Place, N.W., Washington, D.C. has housed the existing courts since it was built for that purpose in 1967. It will now house the two new courts; the only required structural modification necessary was a change of the signs on the front of the building and the extension of the bench in one courtroom for en banc sittings of the Federal Circuit Court.

Perhaps the most fundamental change lies in the area of substantive jurisdiction. For the first time in our history, the judgments of all district courts in the land, in particular fields of law, are reviewable by one intermediate appellate court.<sup>19</sup> Where jurisdiction in the district court was based in whole or in part on the patent infringement portion of title 28 section 1338,<sup>20</sup> or on certain subsections of section 1346 relating to claims,<sup>21</sup> judgments will be appealable exclusively to the Court of Appeals for the Federal Circuit.<sup>22</sup> The expectation is that a uniformity and reliability in the interpretation and application of those statutes will result. It is certain that forum shopping among appellate circuits in patent cases will cease. Judgments of the district court on review of Patent and Trademark Office decisions are also appealable only to the new appellate court.

The Federal Circuit Court also has exclusive jurisdiction over appeals from the Merit Systems Protection Board.<sup>23</sup> Those appeals were heard in

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<sup>19</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a).

<sup>20</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(1).

<sup>21</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(2).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(9).

the regional circuit courts and in the Court of Claims. Further, all of the present substantive jurisdiction of the Court of Claims and of the Court of Custom and Patent Appeals has been transferred to the Court of Appeals for the Federal Circuit.

The new appellate court will be hearing appeals from a number of trial level tribunals: (1) the district courts;<sup>24</sup> (2) the Court of International Trade;<sup>25</sup> (3) Boards of Appeals in the Patent and Trademark Office;<sup>26</sup> (4) the Claims Court;<sup>27</sup> (5) the Merit Systems Protection Board;<sup>28</sup> (6) Boards of Contract Appeals;<sup>29</sup> and (7) the International Trade Commission.<sup>30</sup>

Although the new appellate court's name includes the term "Circuit," and its judges will be circuit judges, there are many differences between it and the established circuit courts. The new court, for example, has no administrative responsibility for, or administrative authority over, any lower tribunal. This is unlike each circuit court's relationship with the district and bankruptcy courts within its circuit. The new court does not have a Circuit Council, and a Circuit Executive is not needed. Although the Federal Circuit has the power, on majority vote, to remove a judge of the Claims Court from office for good cause shown, that is the sole relationship, other than one of appellate review, that the new appellate court has with any trial tribunal. It can be expected, of course, that exercise of the removal power will be rarely if ever required. Under the All Writs Act, it may be necessary in a particular case to issue an appropriate order to a lower tribunal to preserve the jurisdiction of the court, but that is not, of course, an exercise of general administrative authority.

The judges who constitute the United States Court of Appeals for the Federal Circuit are: Howard T. Markey, Chief Judge, and Circuit Judges Daniel M. Friedman, Giles S. Rich, Oscar H. Davis, Philip Nichols, Jr., Phillip B. Baldwin, Shiro Kashiwa, Marion T. Bennet, Jack R. Miller, Edward S. Smith, and Helen W. Nies. Senior Judges Wilson Cowen, Byron G. Skelton, Don Nelson Laramore, and J. Lindsay Almond have also been transferred to the new appellate court.

The new appellate court will not be the Markey court, or the judges' court. It belongs, of course, to the people. It has great plans for doing its important work in an outstanding manner. Nonetheless, it will always welcome any and every suggestion on how it might perform even better. All interested citizens should, therefore, speak up and tell the court what is liked and disliked. After all, it is our citizens who are paying for it.

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<sup>24</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(1), (2).

<sup>25</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(5).

<sup>26</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(4).

<sup>27</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(3).

<sup>28</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(9).

<sup>29</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(10).

<sup>30</sup> *Id.* § 127(a), 28 U.S.C. § 1295(a)(6).

