INTRODUCTION

GLENN L. ARCHER, JR.*

In introducing the 1995 Federal Circuit edition of *The American University Law Review*, it is my pleasure as the Chief Judge to report on recent developments involving the United States Court of Appeals for the Federal Circuit.

At this writing, the Federal Circuit is at full strength for the first time in many years with a complement of twelve active circuit judges. The court's senior judges, with their many years of experience, are also active as they regularly participate in our judicial work. For their continuing help, the court is grateful. During the recent past, the Federal Circuit has also been assisted by several visiting judges from other federal trial and appellate courts. Even with some additions to the court's subject matter jurisdiction and expansion of caseload, the Federal Circuit continues to bring cases to oral argument and disposition expeditiously. The dedicated work of both the judges and the court's lean but efficient staff contribute importantly to this result.

First, I must note with sadness the passing of our esteemed colleague, Senior Judge Jack Miller, who died in August 1994. Judge Miller, a former Senator from Iowa, was one of the initial active judges when the Federal Circuit court was created in 1982. He took senior status in June 1985, but continued to participate in the work of the court until shortly before his death. Indicative of the friendship and respect Judge Miller earned is the fact that his former colleagues in the Senate confirmed his nomination as a federal judge in just eleven minutes, the shortest time in history.

The Federal Circuit recently welcomed its newest judge, William C. Bryson, in October 1994. Judge Bryson came to the Federal Circuit from the United States Department of Justice, where he was Acting Associate Attorney General. He served in other important capacities

* Chief Judge, United States Court of Appeals for the Federal Circuit.

during his Department of Justice career, including two stints as Acting Solicitor General, where he personally argued thirty-one cases in the Supreme Court and more than one hundred cases in the federal courts of appeal. He was a law clerk to both Justice Thurgood Marshall and Circuit Judge Henry J. Friendly.

One of the court's most noteworthy events of the last year involved a birthday. The Federal Circuit Bar Association celebrated Judge Giles S. Rich's ninetieth birthday in style at the Willard Hotel with about 300 in attendance.

Finally, on the topic of judges, the Federal Circuit received a new Chief Judge last year. Judge Helen W. Nies vacated the position of Chief Judge on March 17, 1994, and I had the honor of becoming her successor. Judge Nies served with distinction for four years as the Federal Circuit's Chief Judge. An engaging speaker, she represented this court throughout the country and in other parts of the world. Judge Nies was an efficient administrator for the court; she participated actively on the deliberations of the Judicial Conference of the United States while simultaneously carrying nearly a full active judge caseload. Judge Nies has continued as an active judge of the court but recently announced that she will take senior status by January 1, 1996.

The decisions of the Federal Circuit in the past year have contributed to the development of the many areas of law over which the court has appellate jurisdiction. As this volume demonstrates, important opinions were issued in virtually every subject area. Cases involving claims under the Vaccine Act,[1] veterans law, and patents were accepted for review by the Supreme Court.[2] The most defining feature of 1994, however, was not the number or importance of new precedential opinions, but rather the full court's willingness in its twelfth year to examine some of its existing precedents and areas of perceived conflict.

The Federal Circuit has recently been engaged in an unprecedented amount of in banc activity. The court takes a case in banc only when there is a conflict in precedent or if the question presented is of such exceptional importance that it warrants attention by the full court.[3] In 1994, the Federal Circuit sitting in banc heard oral

1. 42 U.S.C. § 300aa-1 (1988 & Supp. V 1993).

2. *See, e.g.*, Whitecotton v. Shalala, 17 F.3d 374 (Fed. Cir. 1994), *rev'd*, 115 S. Ct. 1477 (1995); Gardner v. Brown, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 115 S. Ct. 552 (1994); Asgrow Seed Co. v. Winterboer, 989 F.2d 478 (Fed. Cir. 1993), *rev'd*, 115 S. Ct. 788 (1995).

3. *See* FED. CIR. R. 35 (stating that hearing or rehearing will ordinarily not be ordered unless necessary to maintain uniformity of decisions or unless proceeding involves question of exceptional importance); FED. R. APP. P. 35 (same).

arguments in seven cases,[4] took another two cases in banc without oral argument,[5] and issued five in banc opinions (including two cases submitted the previous year).[6] In December, the court issued another order to take a case in banc and heard oral argument in early 1995.[7] An opinion was issued in that case[8] as well as in four other in banc cases argued in 1994.[9] Two other cases that had been taken in banc were returned to the original panels for disposition.[10]

This activity by the full court is a sign of a healthy court. It demonstrates that the judges in the Federal Circuit will respond to difficult legal issues, including reexamining precedent, where appropriate, to correct possible deviations, and to adjudicate with finality competing interests. This is especially important for a court that has exclusive nationwide jurisdiction over its subject areas.

Arriving at a decision that satisfies a majority of the in banc judges is a difficult feat. As the opinions *Alappat*,[11] *Markman*,[12] *Rite-Hite*,[13] and *Hilton-Davis*[14] illustrate, the judges of the Federal Circuit often have very independent, and sometimes conflicting, views on the law. Although dissents and concurrences may be vigorous, the differences should never be perceived as personal conflicts. The judges of the Federal Circuit all have great respect for one another, both on a professional and a personal level. As aptly stated by Judge Newman, "the occasional 'percolation' of divergent views illustrates the vigor of

4. *See* Hilton Davis Chem. Co. v. Warner-Jenkinson Co., No. 93-1088, 1995 U.S. App. LEXIS 21069 (Fed. Cir. Aug. 8, 1995); Pal Corp. v. Micron Separations, 62 F.3d 1402 (Fed. Cir. 1995); Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538 (Fed. Cir. 1995); Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995); Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994); Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); Winstar Corp. v. United States, 994 F.2d 797 (Fed. Cir. 1993).

5. *See* King Instruments Corp. v. Perego, 59 F.3d 163 (Fed. Cir. 1995); Texas Am. Oil Corp. v. Department of Energy, 37 F.3d 1483 (Fed. Cir. 1994).

6. Texas Am. Oil Corp. v. Department of Energy, 44 F.3d 1557 (Fed. Cir. 1995); Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994); Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); *In re* Donaldson Co., 16 F.3d 1189 (Fed. Cir. 1994); *In re* Alappat, 33 F.3d 1526 (Fed. Cir. 1994).

7. Reflectone, Inc. v. Dalton, 34 F.3d 1039 (Fed. Cir. 1994).

8. Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

9. Rite-Hite Corp v. Kelley Co., 56 F.3d 1538 (Fed. Cir. 1995); Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995); Hilton-Davis Chem. Co. v. Warner-Jenkinson Co., No. 93-1088, 1995 U.S. App. LEXIS 21069 (Fed. Cir. Aug. 8, 1995); Winstar Corp. v. United States, No. 92-5164, 1995 U.S. App. LEXIS 24416 (Fed. Cir. Aug. 30, 1995).

10. Pall Corp. v. Micron Separations, Inc., Nos. 91-1393, -1394, -1409, 1995 U.S. App. LEXIS 22306 (Fed. Cir. Aug. 14, 1995); King Instruments Corp. v. Perego, 59 F.3d 163 (Fed. Cir. 1995).

11. 33 F.3d 1526 (Fed. Cir. 1994).

12. 52 F.3d 967 (Fed. Cir. 1995).

13. 56 F.2d 1538 (Fed. Cir. 1995).

14. No. 93-1088, 1995 U.S. App. LEXIS 21069 (Fed. Cir. Aug. 8, 1995).

the judicial search for truth, the sometimes indirect progress towards justice and fairness that animate the law."[15]

The past year witnessed other ways in which the court was responsive to the concerns of those who practice before it or are affected by its decisions. For instance, the Federal Circuit Rules were amended in response, in part, to concerns and suggestions made by members of the bar. The Federal Circuit continues to enjoy the benefits of an active and informed bar. The judges value the constructive comments and suggestions regarding rules, procedures and other matters of concern to practitioners. We often receive this input at bar meetings, including the Federal Circuit Judicial Conference held annually in Washington, D.C., which all the judges of the court attend. At the most recent conference in May 1995, at the Washington Hilton Hotel, a panel of the court's judges responded to questions and comments from practitioners. This part of the program, as well as the other panels and the breakout sessions, were most successful in promoting dialogue in the areas of this court's jurisdiction.

What is in store for the future? Quite a bit, judging from the past. In terms of jurisdiction, the Federal Circuit is anticipating additional types of cases to be added to its docket as a result of new provisions in the General Agreement on Tariffs and Trade (GATT)[16] and the North American Free Trade Act (NAFTA).[17] More recently, Congress passed and the President signed the Congressional Accountability Act[18] which gives the Federal Circuit appellate jurisdiction over a wide range of discrimination, personnel, and labor issues in cases emanating from Congress, the Library of Congress, the General Accounting Office, and the Government Printing Office.

Another change is that the Federal Circuit is again holding some oral arguments in cities other than Washington, D.C. The Federal Circuit is a national court, whose jurisdiction is not confined by the geography of any particular region of the United States. The legislation creating the court provides the authority to hold special court sessions in other cities.[19]

---

15. The Honorable Pauline Newman, *The Federal Circuit: Judicial Stability or Judicial Activism*, 42 AM. U. L. REV. 683, 683 (1993).

16. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (codified at 19 U.S.C. § 3501 note (1994)).

17. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (to be codified at 19 U.S.C. § 3301 note (1994)).

18. Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C. § 1301 note (1994)).

19. *See* 28 U.S.C. § 48(a) (1988).

The court plans to finish its program of expansion into the Dolley Madison and Cosmos Club buildings. Two judges have already relocated to newly redecorated chambers in those buildings. A third chambers is currently under construction.

The judges of the Federal Circuit are benefited by scholarly journals such as this. I speak for the other judges on the court when I say that the criticisms, both positive and negative, we receive from the commentators who are attentive to our work are helpful. Thus, I appreciate this opportunity to provide the introduction to the 1995 Federal Circuit edition of *The American University Law Review*, which is dedicated exclusively to the work of the United States Court of Appeals for the Federal Circuit.