

## **ANALYSIS OF THE FEDERAL CIRCUIT**

### **A. Number of Authorized Judges and Current Requests for Additional Judges**

The Federal Circuit is currently authorized a complement of 12 judges. At present, 11 of the 12 authorized judgeships are filled and five senior judges remain active in helping with the circuit's caseload. Former Chief Judge Glenn Archer testified that the allocation of 12 judgeships was "about right" for the job with which the Federal Circuit is entrusted. Judge Archer also indicated that the vacancy which would be created by his impending retirement should be filled despite his testimony that in recent years the circuit has effectively handled larger caseloads with less than the full complement of authorized judges.

### **B. Discussion of Federal Circuit Caseload**

The Federal Circuit was formed in 1982, with the merger of the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals. The court was given nationwide appellate jurisdiction in such fields as patents, international trade, government contracts and monetary claims against the government that do not involve torts. The court also deals with a wide range of personnel-related cases, including all government employee adverse action cases, whistleblower cases, pension appeals for government employees, veterans' benefit appeals and the Vaccine Act appeals.

Judge Archer noted that even though filings have decreased significantly in recent years (from 1875 filings in 1995 to 1338 filings in 1996), filings rose slightly in 1997. Despite this, 1997 filings in the Federal Circuit were 14.4% lower than in 1993, 14.3% lower than 1994 levels, and represented a 22% decrease from 1995 filings. Judge Archer attributed the downward trend to a decline in appeals from the Merit Systems Protection Board, but believed that the decrease in filings had not translated into a decreased workload.

Judge Archer attributed some of the 1997 caseload increases to the restructuring of the Postal Service. The Congressional Accountability Act of 1995 and the Presidential and Executive Office Accountability Act were also cited for adversely impacting the Federal Circuit workload. Judge Archer noted that the general decrease in filings has not affected patent infringement cases from the U.S. Patent Office and the district courts, which have continued to increase. He also indicated that a commission recommended that the Federal Circuit handle military personnel appeals from their boards.

### **C. Federal Circuit Case Management**

According to Judge Archer, 3-judge panels consider and decide each case, including pro se cases, non-argued cases, and counseled and argued cases. At the time of the Subcommittee hearing, Judge Archer testified that over 50% of Federal Circuit cases that go to decision are fully briefed and argued. Of all Federal Circuit cases, 35% are pro se cases which are always heard by a 3-judge panel. The mean disposition time of a case has varied from 5.9 months in 1994 when it was at its lowest, to 8 months in 1996, when it was at its highest.

**Court Schedule and Recess Period:** In the Federal Court, oral arguments are heard throughout the year for 3 to 5 days out of every month. Each active judge is expected to maintain a full argument calendar for at least 10 months out of the year. For the first week of each month, the court hears arguments which occasionally continue into the second week. During argument week, each active judge normally will sit on 12 to 16 argued cases and have 10 to 15 cases submitted on the briefs. The 3-judge panels for each argument are selected randomly by computer, and a representative mix of cases is assigned to each panel. Also, each active judge participates on a motions panel for approximately 3 months out of the year and serves as the lead motions judge once a year.

**Use of Staff Attorneys:** Staff attorneys are not involved in screening cases or preparing draft opinions, nor do they assist in merit decisions. The Federal Circuit has 8 staff attorneys, 4 who are technically oriented and 4 who handle motions practice.

**Use of Senior Judges:** The Federal Circuit currently has 5 senior judges.

**Use of Mediation Programs:** The Federal Circuit does not make use of any formal mediation or alternative dispute resolution programs. However, parties do conduct their own settlement discussions.

#### **D. Federal Circuit Use of Other Court Efficiencies**

Judge Archer testified that the Federal Circuit judges are learning to use computers and are trying to automate as much as possible. Through automation, the Federal Circuit has already been able to operate with 3 law clerks and only one secretary, whereas other circuits have two. The circuit is exploring video arguments, so that practitioners around the country will not have to travel to Washington, DC for oral argument. Judge Archer suggested that, in order to increase efficiencies, in certain areas of the law such as in the areas of merit systems and social security, the administrative types of appeals could be final appeals.

Judge Archer believed that a reasonable amount of travel is necessary for judges for educational purposes, and he did not feel that the Federal Circuit judges engaged in an excessive amount of travel. With respect to non-judicial travel, Judge Archer believed that it was important to make speeches throughout the country because the Federal Circuit is a national court for Federal Circuit judges. He noted that while a number of judges do quite a bit of speaking, they are still able to do work while they travel.

#### **E. Conclusion**

While Judge Archer testified that the Federal Circuit could operate efficiently with a full complement of 12 judges, he warned that additional judges may be necessary if new areas of jurisdiction are allocated to the court and significantly increase its court's caseload. He believed that increased reliance on staff attorneys is not desirable, and that it is necessary to keep the court staffed with at least 12 judges.

However, based on the Federal Circuit's declining caseload and court statistics, serious consideration should be given to whether this court can do its work with a smaller complement of judges. For example, in February 1996, when there were 1875 filings, 66.7% of responding judges to the 1996 Judicial Questionnaire described their caseload and backlog as "manageable." Not one judge indicated that the 1995 caseload was unmanageable. And in 1997, case filings fell to 1462, a full 22% below the "manageable" 1995 levels.

Looking at the last 5 years, the Federal Circuit's caseload has decreased since 1993, its mean disposition time is the lowest of any circuit court, only 30% of its docket consists of time-consuming patent cases, and approximately 10% of its Merit Protection Board cases are heard orally. As such, the Federal Circuit's arguments for obtaining a full complement of judges are solely based on what hypothetically may happen to its caseload in the future. Importantly, in the last several years Congress has not significantly increased the Federal Circuit's jurisdiction.

Judge Archer admitted that the Federal Circuit could do more to increase efficiencies. Based on hearing testimony, formal mediation efforts and alternative dispute resolution techniques did not appear to play a determinative role in handling the court's workload. In fact, the Federal Circuit appears to make no real use of any formal alternative dispute resolution or similar mediation program. As a result, the Federal Circuit has failed to take advantage of a mechanism proven to be a very successful means of alleviating court dockets. Thus, instead of filling the current judicial vacancy, it would be prudent leave the seat empty, thereby creating an incentive for the Federal Circuit to implement such cost-effective and case efficiency measures. Given the above reasons, it is clear that the Federal Circuit's current complement of 12 judges should not be increased. In fact, the current status of the circuit actually supports the argument that the court could do its job with a smaller complement of 11 judges. As such, the case has not yet been made that the current vacancy should be filled.

## ATTACHMENT A

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## FILINGS BY SOURCE

TRIAL COURT OR BOARD	FISCAL YEAR					TOTAL
	1993	1994	1995	1996	1997	
Secretary of Agriculture						
Boards of Contract Appeals	91	83	58	72	71	375
Court of International Trade	61	88	68	50	83	350
Court of Federal Claims	221	175	173	152	151	872
Secretary of Commerce						
Court of Veterans Appeals	138	118	75	59	84	474
U.S. District Courts	338	330	373	385	400	1826
Department of Veteran's Affairs		2	3	9	3	17
International Trade Commission	8	5	5	7	7	32
Merit Systems Protection Board	713	810	970	475	545	3513
Office of Personnel Management	1				4	5
Office of Senate Fair Employment Practices, GAO - Personnel Appeals		5	2	2	1	10
Patent and Trademark Office	105	62	85	89	72	413
Other Appeals	32	27	35	38	41	173
TOTAL	1708	1705	1847	1338	1462	8060
Pro Se	967	643	718	412	490	3230
% of Total	34.9%	42.6%	43.7%	34.3%	35.8%	

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUITMEAN DISPOSITION TIME  
IN MONTHS

FISCAL YEAR	TOTAL CASES	MEAN DISPOSITION TIME
1993	1625	6.2
1994	1544	5.9
1995	1780	6.9
1996	1536	8.0
1997	1408	7.8