

Federal Circuit Bar Association Bench and Bar Conference

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STATE OF THE COURT

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United States Court of Appeals for the Federal Circuit

Good morning, ladies and gentlemen. I'm very pleased to be here at your conference and am sorry you are stuck with me instead of our new chief judge. Judge Prost had been planning to attend, but, as you know, she just got a new job, and one with a new job doesn't usually waltz off to a fancy mountain resort after a couple of weeks in the job, even if she actually has no boss. So at a time of change in the court, she felt that she was needed more back home and she asked me to appear in her place.

Someone once said, "Nothing is as constant as change." And if no one in fact had said it, I just did. We have a new chief judge, six new judges in the past several years, and now another opening for a new appointment. That is change.

But change does not mean disorganization or turmoil. The Federal Circuit is very healthy and is operating well. Organizational change has not affected our ability to decide cases in accordance with our best judgments in a timely fashion.

You should know that Judge Prost is universally supported by the court. She is highly respected as a judge and, not to overstate the point, personally, she has the benefit of a large well of affection by all. She has taken effective control of the administrative machinery of the court, with the able assistance of our circuit executive, Admiral Dan O'Toole. As the insurance company says, we are in good hands.

And before we leave the subject of the chief judgeship, it is important to take note of the fact that our long-time colleague and chief judge, Judge Rader, is leaving the court. We thank him for his collegiality through the years and his many contributions to the court, both as a judge and as chief judge. We all wish him well in his future endeavors.

We have absorbed six new judges in three and a half years. While each new judge changes the mix, as we tend to say, we old-timers have all welcomed and built

warm relationships with our new colleagues and have seen that they have not only decided cases ably and efficiently, but have also contributed to the development of the law in a healthy way. We highly respect their abilities and knowledge. Some in the press have forecast big changes in our court's law and precedent, but we'll see. The rest of us are still around.

In other circuits one might take note of a possible political or doctrinal shift when half the active court is replaced. But not on our court. As you know, we do not see each other as liberals or conservatives, or Republicans or Democrats. That is largely due, not to a special nobility on our part, but because for the most part we do not hear the constitutional or civil rights cases that often divide the other circuits.

We also of course have a very strong bench, to use a sports term to apply to our judicial bench. We have six senior judges who are intelligent, sharp, and experienced in our work, and they sit from one-fourth to one-half of a normal load. In no way are they less able or less qualified to do our work because of their having opted to take senior status when their age plus service entitled them to. We value their contributions greatly. So we are well staffed.

Our case load had been dropping for a couple of years, and it still varies with the type of appeal, but for the last twelve months our overall caseload is up 4.5%. The patent cases have certainly been increasing. In the last 12-month period for which we have data, total patent cases from the district courts, the Patent Office, and the ITC have crept up to 55% of our case load. I think that is a historic high.

Recent data show that for the latest 12-month period, we have had over 550 appeals from the district courts. Cases from the PTO are up 28% and we expect to have many more appeals from the PTO because of their new reexamination procedures.

That may also occur with veterans appeals resulting from claims relating to the Iraq and Afghanistan wars. But, for the last twelve months, veterans appeals have been down more than 8%. Some of you may know why that is so. I do not. They were 11% of our docket last year.

Government employee cases from the Merit Systems Protection Board for the last 12 months have been about 15% of our docket. They used to exceed patent cases, but have dropped off considerably in recent years. We do expect a significant increase in appeals from the Board in the near future because of the government's sequestration furloughs. In that connection one may recall the air traffic controllers' appeals just before I joined the court.

Claims cases, which encompass a variety of fields—government contracts, takings, taxes—were 11% last year. Trade cases dropped to under 3%, but that is surely aberrational.

Currently we have only two cases en banc, one relating to imposition of a penalty by customs for failure to report truthfully importation of products from a foreign country, and another relating to inducement of infringement in the context of Section 337 of the Tariff Act. Our *Lighting Ballast* claim construction decision recently issued, which we had hoped would put to rest a long-smoldering issue, but of course the Supreme Court has recently taken the *Teva* case and they may have something to say on the subject.

That brings me to an aspect of our work that has drawn attention in recent years—the increasing review of our cases by the Supreme Court. In fact, this year the Court has taken at least a half dozen of our cases for review. You will soon hear from experts various views as to why the Court has been so interested in our cases.

Those speculations range from that they are interesting, they often involve a lot of money—as a large part of our economy involves products and services that are subject to patents—and the Court’s caseload has been low, enabling the justices to review cases that a decade ago might have overcrowded their docket. Perhaps owing to the high profile and economic impact of our cases, leading appellate advocates are now not only arguing cases initially before our court, but are also authoring petitions for certiorari, embodying their skill in knowing how to present a case to appeal to the Supreme Court for review.

It has also been noted that, except for tax cases, we have exclusive jurisdiction in most of the fields in which we review cases. In other fields, the Court often sees a circuit split as a reason to take a case. Thus, if the Court is interested in an issue outside of our jurisdiction, it might take a case from any of 12 circuits. On the other hand, if the justices want to review a case in one of our fields, they have only one court to take the case from. We’re it.

Finally, it must be noted that it isn’t only the patent cases that have drawn the Supreme Court’s interest. The Court has also in recent years reviewed cases involving attorney fees under the Vaccine Act, takings resulting from floods, the Little Tucker Act, Indian claims, equitable tolling in veterans cases, and government contracts. When the federal government is involved, the Supreme Court is often interested.

I haven't mentioned a last reason why the Supreme Court might be taking so many of our cases. It is that perhaps the justices just think we are so often wrong. Well, I won't wade into that murky question or assume a defensive pose.

I will just say, as one judge on the court, that the Supreme Court is entitled to look at any case differently from the way any appellate court does. It isn't necessarily a question of right or wrong. It may simply be that, given their role, the justices simply have a different vantage point and hence a different approach. We accept that. As one of their number once said, they are not final because they are infallible, but are infallible because they are final. It is their right to decide cases differently from the way we do. Besides, reasonable minds can differ. They are just at the top of the pyramid. And, as the court of last resort they are entitled to have the last word in all fields of law, even those in which we have exclusive jurisdiction among the courts of appeals.

But before we leave the Supreme Court, it is important to note that they do not always reverse us. In *Bilski*, a Section 101 case, the Court affirmed us, but stated that the rule we used to decide the case, while a useful clue, was not a rigid one. In *Global Tech*, the inducement case, the Court affirmed us. In the *i4i*, *Roche*, *Hyatt*, and *Monsanto* cases, they affirmed us. In *Myriad*, they affirmed us in part and reversed in part, although the reversal certainly got the most notoriety. So I don't consider that we are in their doghouse. I think they just want to have a say in our case law.

Commentators have noted sharp divisions in some of our decisions and have used language indicating that we are "hopelessly divided." It has been said by writers in criticism that our court has failed to resolve issues and provide adequate guidance for practitioners and lower courts. Some of that is surely correct. But, we are not a team tasked with the goal of coming together at halftime and "winning" before the clock runs out. And we are not a legislature trying to write rules. We are judges with the responsibility of deciding specific cases as they arise, difficult ones, often raising new issues. We are all independent actors with our own commissions, obligated by our oaths to give our best intellectual efforts in deciding cases according to the law, the facts, and the standard of review.

That is what we do and I personally think we generally perform quite well, which is not to say that we all agree with everything that goes out. We do not. But we do not take political positions or oppose others' positions for partisan reasons, or any reasons other than on the merits.

One should not forget that the Supreme Court decides many important cases by 5-4. Close votes by our en banc court are therefore not aberrational and

irresponsible. The common law works case by case. If we can't resolve an issue in a case before us, as opposed to deciding the case, which we always must do, the next one may provide an opportunity to do so. If the Supreme Court snatches it away from us, preferring to intervene rather than let an issue percolate, that is its right. But, when we decide an important en banc case with a close vote, with no majority opinion, that is not a failure; it is hard-working judges doing their best to do the job they were appointed to do.

It has been said by a few commentators that our exclusive jurisdiction in patent cases has not succeeded and that other circuits should also be able to decide patent cases. More viewpoints would be better for the law. Well, I, for one, think that our court has succeeded in its original mission. And, if the suggestion that other minds on other circuits are needed to resolve difficult issues, our own internal divisions, which some criticize, actually reflect such independent thinking in dealing with difficult problems. One can't criticize conflict within the court and at the same time call for more differing views on issues. We are not all cut from the same cloth. We have our own internal diversity which, while frustrating at times when we do not decisively and crisply decide an issue, does provide percolation through debate.

Most of what I have just said reflects facts, as a State of the Court address properly should. But some of what I have said are my own views that may or may not be shared by other members of the court, including the chief judge. But I trust that I have not exceeded my mandate.

Finally I want to thank the bar association for hosting this event and inviting us to it. It provides an opportunity for judges and lawyers who appear before us to interact informally as people, away from the formality of our usual interaction. And the presence of other guests you have invited, including judges of tribunals whose decisions we review, has the same beneficial effect.

Once again, I'm sorry Chief Judge Prost was not able to be here. But, I guarantee you, when you next hear her speak for the court, you will be as pleased as we are that she is our chief judge.