

## On the Horizon: A New Federal Circuit—Part II

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### Abstract

Part I of this piece reported that there could be as many as *nine* new judges appointed to the Federal Circuit by the end of 2012. Here, the authors consider how the Obama administration's philosophy on judicial appointments and its past nominees to the other Federal appellate courts provide clues as to how the Federal Circuit bench may be reshaped in the next few years. The authors expect that, as in the past, only highly-qualified individuals will be nominated and confirmed, and believe that the President should appoint jurists who can bring to the court a fresh set of prior experiences and perspectives relevant to its jurisdiction.

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### How President Obama Might Diversify the Federal Circuit

The Federal Circuit's relatively lower level of visibility among the general legal community (compared to, *e.g.*, the Ninth and the D.C. Circuits) has helped make it the Circuit court of choice for some in key decision-making positions (*e.g.*, members of the Senate Judiciary Committee) seeking to help a high-level staffer or other colleague land an appointment to the Federal bench. Another factor is the court's unique jurisdictional mandate. The court's geographic reach is national, not regional, making the Federal Circuit much less susceptible to certain types of political battles that often impact nominations involving the twelve regional sister courts. Regional Circuit court appointments are often plagued by "turf wars"—Senators from the particular region's constituent States or Commonwealths expect and sometimes demand substantial involvement in the nomination process. The Federal Circuit, in contrast, has no such "home-state" Senators.

Nevertheless, there is little doubt that the judges of the Federal Circuit—past and present—have served the public's and the nation's interests very well. Nor is there any reason to doubt that the President and the Senate want to at least maintain, if not improve upon, the quality that has marked the court's jurisprudence since its inception in 1982. That goal can best be attained, the authors believe, through appointments designed to cultivate a more-diverse bench.

While the court's decisions in high-profile patent cases generally garner the most press, the Federal Circuit is not just a "patent court." Indeed, speaking in terms of broad categories, intellectual property ("IP") law cases made up only 39% of the appeals filed

in FY 2009,<sup>1</sup> with the other 61% of its docket last year involving either administrative law (45%)<sup>2</sup> or monetary suits against the Federal government (16%).<sup>3</sup> Those numbers are not an aberration; the majority of the court's appeals have traditionally involved non-IP cases, a trend that shows no signs of abating. Accordingly, though we are patent lawyers, we are also former Federal Circuit clerks who appreciate the importance of the court's non-patent jurisdiction. The Obama administration should not overlook those other areas when selecting its nominees.

In its first year, the President focused his administration's resources not on filling court vacancies, but on passing legislation to help abate the recession and address other important and complicated legislative issues such as healthcare reform. That focus makes it harder to predict where the Federal Circuit may be headed in terms of the make-up of its bench. In fact, the Obama administration had, by the end of 2009, named only twelve Circuit court nominees.<sup>4</sup> Those nominees do, however, provide some useful clues about the types of characteristics that might help someone land a nomination to a Federal court of appeals.

One widely-discussed (and sometimes criticized) aspect of President Obama's judicial decision-making philosophy is his view regarding the role of empathy in judging. The authors believe that new jurists espousing that philosophy could, in the long term, impact those cases that have a decidedly "human" component, even though the Federal Circuit has somewhat limited power to revise the decisions it reviews in these areas of the law:

- **Federal personnel cases:** In FY 2009, the court received almost 400 appeals from the Merit Systems Protection Board ("MSPB").<sup>5</sup> In these cases (which include whistle-blowing actions), the court reviews adverse employment decisions such as removals, suspensions, reductions in grade or pay, as well as decisions of the Office of Personnel Management regarding entitlement to retirement benefits. The Federal Circuit has never had the benefit of a jurist who, when appointed, had significant prior experience involving Federal personnel issues.
- **Veterans affairs issues:**<sup>6</sup> A significant portion of the court's caseload involves reviewing decisions on military service-connected compensation claims. Appeals from the U.S. Court of Appeals for Veterans Claims will certainly increase over the next few years, as claims by military personnel returning from the Iraq and Afghanistan wars wind their way through the system. The Office of Veterans Affairs renders initial compensation decisions, which can be appealed first to the Board of Veterans' Appeals, then to the Court of Appeals for Veterans Claims, and from there to the Federal Circuit.<sup>7</sup>
- **Vaccine injury cases:** The court handles appeals implicating requests for compensation under the National Childhood Vaccine Injury Act, which Congress passed in 1986. The Act provides a scheme for compensating those who can prove injury caused by government-sanctioned vaccination programs. Special Masters issue decisions regarding these claims that may be challenged first in the Court of Federal Claims, adverse judgments of which can then be appealed to the Federal Circuit.

Additionally, the President's track record on regional Circuit nominees strongly suggests that by the end of his current term, the Federal Circuit will likely be more ethnically diverse. Of the twelve nominees already sent to the Senate, 50% are minorities representing a variety of ethnic backgrounds. Right now, the Federal Circuit currently has no minority judges, and the court has never had an African-American judge, nor a judge of Hispanic descent. And the last appointment of an Asian-American judge occurred at the court's inception in 1982, when Judge Shiro Kashiwa was reappointed to it from the U.S. Court of Claims.

### **Public Whispers Regarding Potential Federal Circuit Nominees**

As for specific potential nominees, numerous academicians as well as industry/private practice attorneys have already been mentioned for the current vacancy on the court, or the vacancy expected to arise on May 31, 2010, when Chief Judge Michel

retires. Those named include: (i) John F. Duffy (Professor of Law at The George Washington University Law School); (ii) Mark Lemley (Professor of Law at Stanford Law School); (iii) Arti K. Rai (Professor of Law at Duke Law School); (iv) John M. Whealan (Associate Dean for Intellectual Property Law Studies at The George Washington University Law School); (v) Beth Brinkman (Deputy Assistant Attorney General, Appellate Civil Division, Department of Justice); (vi) Chip Lutton (Apple, Inc.'s Chief Patent Counsel); and (vii) Beth Noveck (Deputy Chief Technology Officer, White House Office of Science and Technology Policy).<sup>8</sup> Of course, the last appointment to the court (Judge Kimberly Moore, in 2006) came from academia. So it seems unlikely that President Obama will pull the next nominee from academia, particularly since his track record to date suggests a clear preference for elevating from within the judiciary. In fact, all but one of his regional Circuit court nominees have significant prior judicial experience.

The Federal Circuit would benefit from the appointment of a currently-sitting U.S. District Court judge who has significant jury trial experience.<sup>9</sup> For years, the patent bar has pushed for such a nominee. Experienced judges who have been identified as potential Federal Circuit jurists include U.S. District Court Judges Jeremy Fogel (Northern District of California), Kathleen O'Malley (Northern District of Ohio), Patti Saris (District of Massachusetts), Gregory Sleet (U.S. District Court of Delaware), and Mary Ellen Coster Williams (Court of Federal Claims).

Any of those judges would be an excellent choice—each has significant trial experience, and many have substantial expertise in patent law and/or have had the opportunity to sit with the judges of the Federal Circuit by designation. Judges Fogel, O'Malley and Sleet are rumored to be on the short list for the slot vacated by Judge Schall. Of that group, Judge Sleet may have the best odds. Not only is he the current Chief Judge of the patent-savvy Delaware District Court, he would be the first African-American Federal Circuit judge, and his original appointment to the federal judiciary had the support of then-Senator Joe Biden, who likely wields substantially more influence as Vice President.

### **Endnotes**

<sup>1</sup> The 39% figure breaks down as follows: (i) 30% were patent appeals from the Federal District Courts; (ii) 4% involved patent appeals from the U.S. Patent and Trademark Office ("USPTO"); (iii) 2% were patent appeals from the U.S. International Trade Commission; and (iv) 3% involved trademark appeals from the USPTO.

<sup>2</sup> The court's administrative law docket represented (i) Federal personnel cases (29%); (ii) veteran's affairs (12%); and (iii) decisions from the U.S. Court of International Trade (4%).

<sup>3</sup> Suits against the government included, *inter alia*: (i) appeals from the Boards of Contract Appeals (5%); (ii) tax cases (2%); (iii) takings cases (1%); and (iv) vaccine injury compensation cases (0.7%).

<sup>4</sup> Contrast that with President George W. Bush, who sent the Senate 28 Circuit nominees in his first year in office. Fortunately, there seems to be a "quality not quantity" theme playing out. The ABA Standing Committee on the Federal Judiciary has rated nine of President Obama's nominees "unanimously well qualified."

<sup>5</sup> In FY 2009, MSPB appeals were second in number only to patent appeals from district courts, of which there were approximately 450.

<sup>6</sup> The President has familiarity with veteran-care issues from his work as a Senator on the Veterans' Affairs Committee. Notably, he was a Committee member when the Walter Reed Army Medical Center neglect scandal became public.

<sup>7</sup> In his remarks at the 25th Annual Dinner of the Federal Circuit Bar Association (Nov. 20, 2009), Chief Judge Michel noted that none of the current judges on the court "has a lifetime of experience or any appreciable expertise [in] veterans benefits laws," one of the court's "huge chunks" of jurisdiction.

<sup>8</sup> Several of the individuals named above live far outside of the Washington, D.C., area, and thus would have to relocate in order to satisfy a statutory residency requirement unique to the Federal Circuit. 28 U.S.C. § 44 ("each active judge . . . , when appointed, shall reside within fifty miles of the District of Columbia," where the court is physically situated). That requirement has often been referred to as the "Baldwin Rule"—a coined term, according to our colleague George Hutchinson, who served as Clerk of the U.S. Court of Customs and Patent Appeals (one of the Federal Circuit's two predecessor courts) and as the first Clerk of the Federal Circuit. What did matter, he explained, was having all the judges of the new national court live in one area.

<sup>9</sup> As Chief Judge Michel recently noted, "we have no judge who has presided over jury trials on an extensive basis, no former district judge on our Court." Remarks of Chief Judge Michel, 25th Annual Dinner, Federal Circuit Bar Association (Nov. 20, 2009).

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