

On the Horizon: A New Federal Circuit—Part I

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Abstract

A single federal Circuit court enjoys national and exclusive jurisdiction over appeals from all district courts in cases which arise under the patent laws. However, that court's jurisdictional base is not singular. It also has exclusive nationwide jurisdiction over a diverse mix of other important subject matter areas, such as veterans' affairs, international trade, government contracts, federal personnel, and monetary claims against the government including tax refunds and vaccine injury compensation. That court, situated in Washington, D.C., is the U.S. Court of Appeals for the Federal Circuit.

This article (the first of two) is unlike most because it is not about some recent watershed ruling from that court. Instead, it is about the Federal Circuit *itself*, and how that institution is, in the next few years, very likely to undergo a massive and unprecedented change in terms of the judges who make up the court. In October 2009, Judge Alvin Schall assumed "senior" status, creating an immediate vacancy on the court. A second vacancy will arise after the current Chief Judge, Paul R. Michel, leaves the judiciary on May 31, 2010, as he recently announced. Four other active judges are eligible right now to assume senior status, and three others will become senior-eligible before the end of President Obama's current term.

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The Federal Circuit, born in 1982, is an anomaly of sorts. It is equal in stature to the twelve regional Circuit courts, yet its jurisdiction—being strictly limited in terms of subject matter but unlimited geographically—is unique. When it created the Federal Circuit, Congress tasked the court with virtually all appeals taken in patent cases—whether from the United States Patent and Trademark Office, the U.S. International Trade Commission, or the Federal District Courts. It also exclusively reviews decisions from a number of other specialized tribunals, including the U.S. Court of Federal Claims, the U.S. Court of International Trade, the Merit Systems Protection Board, various Boards of Contract Appeals, and the U.S. Court of Appeals for Veterans Claims.¹

Because the Federal Circuit enjoys exclusive nationwide jurisdiction over many important substantive areas of the law, a change in the makeup of the court like the one looming on its horizon is a noteworthy event. Those directly affected by the court's decisions are most interested in judicial appointees who may be sympathetic to their business and legal interests, especially those interests relating to patent law.²

Imminent Changes at the Federal Circuit

The Federal Circuit can have up to twelve "active" judges,³ and the court has been operating at full capacity for several years. That changed, however, on October 5, 2009, when Judge Schall elected to retire from active service but retain office.

What Judge Schall did is codified as "retirement in senior status." See 28 U.S.C. § 371(b)(1). If the age and service eligibility requirements are met,⁴ the retiring judge can stay on the bench and can "continue to receive the salary of the office" so long as certain reduced workload requirements are met. *Id.*; see also *id.* at § 371(e). Senior status does, however, have some downsides. For example, although a senior judge need only handle a fraction of the work that an active judge does (about 25%), she must do so with less help (one law clerk, instead of three or four). Perhaps most important is the diminished influence: a senior judge generally forfeits the ability to participate in any activity relating to *en banc* cases—including voting on cases to determine if they will be heard by the full court⁵—which are reserved for the most significant legal issues and are the only way for the court to change its precedent.⁶

While a vacancy resulting from an active judge assuming senior status is not uncommon, the Federal Circuit is facing a potentially dire situation. In addition to the current vacancy created by Judge Schall's retirement,⁷ the court will suffer another vacancy in June 2010 when now-Chief Judge Michel retires.⁸ Beyond those two known vacancies, *four* additional vacancies could arise at any moment because Judges Pauline Newman, H. Robert Mayer, Alan D. Lourie, and Arthur J. Gajarsa are currently eligible to assume senior status. And to make matters worse, three others—Judge William C. Bryson, Judge Timothy B. Dyk, and Judge Richard Linn—will become senior-eligible by April 2012.

The following table, showing each active judge's senior-eligible status, along with his/her age, service date,⁹ and the appointing President, summarizes the situation at the Federal Circuit:

Name	Age	Senior Eligible?	Nominated By	Commission Date
Paul R. Michel* (Chief Judge)	68	Currently Eligible	President Reagan	March 8, 1988
Pauline Newman	82	Currently Eligible	President Reagan	May 7, 1984
H. Robert Mayer	68	Currently Eligible	President Reagan	June 19, 1987
Alan D. Lourie	75	Currently Eligible	President G. H.W. Bush	April 11, 1990
Randall R. Rader	60	April 21, 2014	President G. H.W. Bush	August 14, 1990
William C. Bryson	64	August 19, 2010	President Clinton	October 7, 1994
Arthur J. Gajarsa	68	Currently Eligible	President Clinton	September 12, 1997
Richard Linn	65	April 13, 2012	President Clinton	January 1, 2000
Timothy B. Dyk	72	June 9, 2010	President Clinton	June 9, 2000
Sharon Prost	58	October 3, 2016	President G. W. Bush	October 3, 2001
Kimberly A. Moore	41	June 15, 2033	President G. W. Bush	September 8, 2006

*In order of seniority on the court, with the exception of Chief Judge Michel.

All told, President Obama may be presented with the rare opportunity to replace as many as *nine* Federal Circuit jurists during his current term (or more if he is re-elected or if other vacancies arise unexpectedly). Notably, as shown above, five of the judges who could create these vacancies were appointed by Republican presidents.

The Line of Succession to the Chambers of the Chief Judge

Considering the various relevant factors,¹⁰ Judge Randall R. Rader is next in line to be the Chief Judge of the Federal Circuit. That much is certain. Far less certain is who will inhabit the chambers of the Chief Judge thereafter. If Judge Rader stays at the helm for the full seven-year term to which he is entitled (*i.e.*, through May 2017),¹¹ Judge Kimberly A. Moore would take over from him and be eligible to serve a full seven-year term. For Judge Sharon Prost to inherit that position after Judge Rader, he would have to step down a bit early, *i.e.*, before May 23, 2016.¹² If that happened, Judge Moore would become Chief after Judge Prost and still be eligible to serve for seven years.

At this point, not much can be said about who will succeed Judge Moore. We can, however, comfortably predict that (i) it will no doubt be someone who is not currently on the court and (ii) it will be whoever the Senate confirms as Judge Schall's replacement, unless that person leaves the court before the end of Judge Moore's tenure as Chief or is otherwise ineligible to assume the role (*e.g.*, he is over the age of sixty-five when Judge Moore vacates the post). In other words, the President's first appointment to the Federal Circuit will likely be a future Chief Judge of that court.

Endnotes

¹ See, *e.g.*, 28 U.S.C. § 1295(a); 38 U.S.C. § 7292 (providing Federal Circuit jurisdiction in Veterans Claims cases).

² Based on recent statistics available from the Federal Circuit's Web site, the court receives approximately 1300-1600 new appeals each fiscal year, with roughly one-third of its caseload stemming from its patent jurisdiction.

³ 28 U.S.C. § 44.

⁴ Under the so-called "Rule of 80," to be eligible for senior status, a circuit judge must (i) be at least the age of 65, and (ii) have served on the bench for 15 years. One less year of service is required for each additional year of age past 65 (*e.g.*, a 67-year old judge who has 13 years on the bench is eligible for senior status), but a minimum of 10 years of service is required. 28 U.S.C. § 371(c).

⁵ A Senior judge may participate in an *en banc* decision only if she was a member of the original panel. See, *e.g.*, Fed. Cir. R. 35 Practice Note ("If a senior judge participated in the original hearing and disposition of a case for which rehearing *en banc* is granted, that senior judge may participate in the rehearing.").

⁶ See, *e.g.*, *Barclay v. U.S.*, 443 F.3d 1368, 1373 (Fed. Cir. 2006) ("Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*.").

⁷ Judge Schall joined the Federal Circuit's four other senior judges: Judges Daniel M. Friedman, Glenn L. Archer, S. Jay Plager, and Raymond C. Clevenger. Section 371 does not limit the number of senior judges that the Federal Circuit (or any other Circuit) can have.

⁸ That departure will undoubtedly have a more dramatic effect on the court in terms of its "time to decision" statistics because, unlike Judge Schall (and most other judges who opt to retire), Chief Judge Michel is leaving the judiciary altogether. As the Chief explained in a recent speech, he sees a "huge need for someone to be able to speak out on behalf of the court system generally," a role he intends to fill and allow himself to pursue by fully retiring from the bench. Remarks of Chief Judge Michel, 25th Annual Dinner, Federal Circuit Bar Association (Nov. 20, 2009). Even though he will be leaving the judiciary, Judge Michel is eligible to "receive an annuity equal to the salary he was receiving at the time he retired" for "the remainder of his lifetime." 28 U.S.C. § 371 (a).

⁹ In compiling this list, the authors relied primarily on information found in *The United States Court of Appeals for the Federal Circuit: A History 1990-2002* book.

¹⁰ For example, a judge must be under the age of sixty-five to become Chief. See 28 U.S.C. § 45(a).

¹¹ See 28 U.S.C. § 45(a)(3)(A) (with some exceptions, "the chief judge of the circuit ... shall serve for a term of seven years"). Although not a concern for Judge Rader, the general rule is that no Chief can serve past the age of seventy. *Id.* at § 45(a)(3)(C) ("No circuit judge may serve or act as chief judge of the circuit after attaining the age of seventy years.").

¹² Judge Prost turns sixty-five on May 24, 2016. She could serve as Chief until May 24, 2021 (her 70th birthday), but not past that date.

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