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THE SIXTH ABRAHAM L. POMERANTZ LECTURE: COMMENTARY ON THE PAPER BY PROFESSOR DREYFUSS*

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Professor Dreyfuss expertly leads us through the Delaware paradox, where the Chancery court bears the subtle taint of being "specialized" because of the weight of its corporate law docket, yet because of this specialization the quality of the judicial product is deemed to be unmatchably high.

This quality may well be due, as Professor Dreyfuss suggests, to the confluence of unique circumstances in Delaware: the diverse mix of subject matter jurisdiction, the large number of cases in the field of corporate governance, the well organized bar, the homogeneity of a small state, the movement of judges among courts—circumstances that I agree are not reproduced in Pennsylvania and New York. Yet there are some interesting parallels to the Court of Appeals for the Federal Circuit, a court having a diverse mix of subject matter jurisdiction, concentration in a few major fields of law, a well organized bar, and a diversity of judicial backgrounds.

The experience of the Federal Circuit well supports the steps of court restructure that are being undertaken in Pennsylvania and New York, as they have been explained by Professor Dreyfuss. Our experience is that efficiency and consistency in dispute resolution can directly affect commerce and the interested public, with benefits to trade and industry. New York and Pennsylvania are preeminent industrial and financial states; if their courts have not been able to keep pace with the litigation activity that accompanies commercial activity, then change is indeed desirable. That these states have chosen to create new courts of special jurisdiction, instead of simply enlarging their existing courts, may be simply a

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pragmatic recognition of pressing need. Or it may be a step into the future. It is appropriate to maintain a receptive attitude to changes in state as well as federal judicial structure, for in recent times much has changed in the demands of commerce upon all areas of government, including the judiciary.

A valid criticism of courts and legislatures is that courts often find themselves leading the way in evolving areas of law, for disputes must be resolved when they arise, while legislative attention tends to lag until consensus is reached. This judicial leadership role is more likely to be successfully performed by a court that is steeped in the law that is being probed. I suppose that the new corporation and commercial law courts in New York and Pennsylvania will find themselves in this challenging position, as has the Federal Circuit in the areas of law assigned to it. It is probably unavoidable. Indeed, the nuances of new issues in a field of law, and their portents, are more likely to be recognized by judges that are experienced in the field.

Of course if a centralized court misdirects the evolution of the law, the ensuing injury is immediate and far-reaching. This possibility sharply focuses the arguments for and against centralized courts with exclusive subject matter jurisdiction. These arguments can not be fully explored in this brief commentary, but they underlie the ongoing debate about court restructure, as overload and complexity tax the existing structure. I enter this debate only to draw on the experience of the Federal Circuit, and to consider whether there are lessons to be learned from it.

I assume that the need for change was deemed to be pressing in Pennsylvania and New York, for the formation of the Federal Circuit required a fairly severe illness before remedy in the form of court restructure was seriously contemplated. The Federal Circuit was formed not as a model or test of judicial organization, but for reasons quite outside of traditional concepts of dispute resolution and its management. The impetus was not to improve judicial efficiency, or to relieve the Supreme Court of intercircuit conflict. The impetus came from the users of the patent system, from inventors and investors, from technology-based industry and from research institutions. The target was industrial innovation, not change

of law.

The technologic research and industrial interests that initiated formation of the Federal Circuit believed that the lack of "coherence" in the patent law, using Professor Dreyfuss' term, was having a direct negative impact on the nation's industrial vigor, in turn affecting our national strength and international leadership. "Coherence," in Professor Dreyfuss' meaning, refers to the development of the law in the way that serves the policy of the law. Technology-based industry believed that the patent law, as applied by the courts, was no longer serving the policy of the law. The solution was to create a national forum for patent appeals that would, it was expected, apply the law as it was enacted, free of the policy misunderstandings that pervaded the decisions of the regional circuit courts. As a minimum, it was expected that the consolidation of all patent appeals in one national court would eliminate the forum-dependency of the outcome of litigation, for there were marked differences in circuit law, and these differences had received scant attention from the Supreme Court.

SOME HISTORY

How did this judicial restructure come to pass? In 1978 President Carter convened a major policy review of industrial innovation, to focus on the nation's burgeoning economic problems. This was an unhealthy time in the economy; perhaps you remember the high inflation, the closings of industrial plants, the layoffs of scientists and engineers (and many others), the increasing trade deficit. The goal of this policy review was the recovery of technology-based industry; indeed this was the only industrial area in which the balance of trade was favorable.

The review was conducted by an Advisory Committee of industry leaders; the charge was to stimulate industrial innovation by providing new incentives and reducing existing disincentives. The study was of broad scope. It included federal tax policy, trade policy, labor policy, environmental and other regulatory policy, competition policy, procurement policy, research and development support policy, and patent policy.[1]

[1] ADVISORY COMMITTEE ON INDUSTRIAL INNOVATION, DEPARTMENT OF COM-

The patent policy advisors (of which I was one) believed that the utility of the patent system had been greatly diminished in recent years, and that patents did not achieve their potential as an incentive to technological research, increased productivity, and capital investment. The Committee identified two major causes: the unreliable work product of the Patent Office, and the inconsistent judicial product of the courts. These were not, of course, the only problems affecting industrial innovation in the nation, but they were problems that could be ameliorated.

As a result, several major changes were initiated by the Carter administration. A goal was that the Patent Office would issue only patents that would be likely to stand up if challenged in court, and thus that could be relied on by industry to support investment in the development and commercialization of new products and processes. It was thus deemed important to enable the correction of inadequately examined patents, and the administrative invalidation of improperly granted patents. As a major step in this direction, the Advisory Committee's proposal to authorize the reexamination of issued patents, a procedure that had not previously been permitted, was enacted in 1980. The intent was to provide an inexpensive mechanism whereby patentees and the interested public could reinforce valid patents and remove invalid ones, even in the absence of a case of actual controversy.

The other principal focus of the Advisory Committee's recommendations was the courts. The differences among the regional circuits in patent adjudication were extreme, perhaps more so than in any other field of law. Some of the circuits invalidated patents close to 100 percent of the time, and some were on the other side of the scale. The race to choose the forum was the principal strategy in patent litigation. Industry blamed the diminished value of the patent system—the unreliability of the patent grant as an investment incentive—on this judicial inconsistency. There was concern within the patent user community as to whether judges adequately understood the patent system and how it served the economy. The concern was for loss of an industrial incentive, at a time when incentives were sorely needed. In those dark economic times,

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MERCE, FINAL REPORT (1979).

industry's voice was heard.

I don't know whether industry's voice alone would have achieved this change in judicial structure, as rapidly as it actually occurred, for the proposed change was quite controversial. However, there was a fortuitous congruence with another ongoing activity, wherein Professor Daniel Meador and a group in the Justice Department were studying the structure of the federal courts. Then, as now, there was concern about the rapid increase in federal litigation and the growing number of unresolved conflicts among circuits. The Meador study had been preceded by studies led by Professor Paul Freund of Harvard[2] and Senator Roman Hruska of Nebraska,[3] whose committees had produced voluminous reports but whose proposals for change had not found favor.

The Meador group had suggested combining the Court of Claims and the Court of Customs and Patent Appeals to form a national court that would be enlarged to handle all environmental, tax, and trademark appeals. This proposal was vigorously opposed by the bars serving these areas of law, and was not supported by any branch of government. However, the concept received new life with the Advisory Committee's recommendation for a national court of patent appeals. The combination of the Court of Claims and the Court of Customs and Patent Appeals was particularly felicitous for this purpose.

This proposal was supported by the Carter administration and by the Judicial Conference. There was strong national support from the industrial and research establishments. There was organized opposition from the American Bar Association. The birth of the Federal Circuit was not uneventful; but that's another story.[4]

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[2] FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

[3] COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE, AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195 (1975).

[4] *See, e.g.*, Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 GEO. MASON U. L. REV. 513 (1992).

JURISDICTION

As the structure of the Federal Circuit was being developed, its supporters as well as its opponents accepted the traditional negative view of "specialized" courts. It was deemed quite important that the new court would have sufficiently diverse subject matter jurisdiction to avoid the dangers of specialization. The aversion to specialized courts is deeply rooted, for the reasons that Professor Dreyfuss has discussed. Thus the excursion into forbidden territory by both Pennsylvania and New York engenders a craving for more knowledge than I have about the problems that these states are confronting. Is the system simply overloaded, or has it broken down? The proposals for federal restructure in the 1970s were directed to solving judicial overload, and were rejected; no change occurred until the system was deemed to have broken down in its handling of patent disputes.

Let us pause to review the jurisdiction of the Federal Circuit, as it was formed and as it has changed since its formation.

The Court of Claims and the Court of Customs and Patent Appeals were themselves national courts, having exclusive appellate jurisdiction of their assigned subject matter. From the Court of Claims the Federal Circuit acquired the exclusive jurisdiction of appeals of all monetary claims against the government that are founded in contract, act of Congress, executive regulation, treaty, or the Constitution. This is the business of government, whether dredging channels, or making uniforms, or building airstrips in Kuwait, or felling trees, or subsidizing agriculture, or designing electronic data systems. These cases are tried in the Court of Federal Claims (a new trial court that succeeded the trial division of the Court of Claims), in the district courts of the nation (depending on the amount of the claim), or in the various agency boards of contract appeals. The variety of subject matter is as great as the reach of government.

Constitutional claims, Fifth Amendment taking and eminent domain cases, are also tried in the Court of Federal Claims or the district courts, and appealed to the Federal Circuit. Takings cases are on an upcurve, as federal regulation

impinges on private property interests. Native American claims, which were assigned to the Court of Claims as successor to the Indian Claims Commission, are also of diverse nature; they include treaty rights, water and property rights, and many other issues. Federal wage laws, tax treaties and tax refunds, some military appeals, savings and loan issues, and many other forms of monetary claims, are the exclusive appellate province of the Federal Circuit.

We're also the appellate court for most federal employment cases, including adverse actions, retirement issues, whistleblower protection, and other aspects of the Civil Service Reform Act and other employee statutes. These appeals reach us from the Merit Systems Protection Board, arbitrators' decisions, and a few other tribunals, and comprise almost half of our cases.

From the Court of Customs and Patent Appeals, the Federal Circuit acquired exclusive jurisdiction of appeals from the International Trade Commission on unfair trade practices of various sorts; and appeals from the Court of International Trade on customs classification, dumping and countervailing duty cases, and a variety of related trade issues such as surety problems and free trade zones. Appeals from the Patent and Trademark Office tribunals are taken directly to the Federal Circuit, as well as appeals from the district courts involving Patent and Trademark Office decisions.

With this base, the Federal Circuit was assigned appeals of all cases tried in the district courts that arise in whole or in part under the patent law. We also acquired jurisdiction of appeals under the Plant Variety Protection Act, from decisions of the Department of Agriculture or from the district courts in infringement actions. For the first few years of our existence, patent cases were one fourth to one third of our total caseload. In recent years the ratio of patent cases has diminished significantly, due to a higher rate of increase in other areas. For example, when the Court of Veterans Appeals was formed in 1989, all appeals from that court were directed to the Federal Circuit. Cases under the recently enacted Childhood Vaccine Injury Act are tried in the Court of Federal Claims and appealed to us; actions under this Act raise questions of epidemiology and causation of injury, adding to the variety of our appellate concerns. Recently the jurisdiction of the Temporary

Emergency Court of Appeals was added to ours, assigning to the Federal Circuit the appeals from the district courts under the Economic Stabilization Act, the Natural Gas Policy Act, and several other statutes. The enactment of the Congressional Accountability Act of 1995 and certain predecessor statutes, placing legislative branch employees under the civil service and anti-discrimination laws, assigned appeals from several newly formed boards to the Federal Circuit.

The sources of our appeals for calendar year 1994 were as follows: about 15.3% of the total were from the Court of Federal Claims and the various agency boards of contract appeals; 48.9% were federal employment appeals; 5.2% were from the Court of International Trade; 6.3% were from the Court of Veterans Appeals; 17.7% were from the district courts, of which 15.9% were patent appeals; 4% were from the boards of the Patent and Trademark Office; and the remainder were from the International Trade Commission and a few other sources.

This mixture of generally unrelated areas of law can be viewed either as diluting the court's opportunity to acquire specialized expertise in any of them, or as avoiding the evils of specialization—depending on one's viewpoint. Yet in this breadth one may find analogy to the Delaware Chancery court, with its broad equity jurisdiction yet with concentration in the heavily litigated areas of corporate governance. In turn, this breadth provides little guidance for evaluating the more restricted scope to which the new courts in New York and Pennsylvania appear to be limited. However, let us pursue the comparison.

EVALUATION

The decision to form the Federal Circuit was made on pragmatic commercial grounds. The new courts in Pennsylvania and New York surely also reflect a pragmatic commercial need. On this basis I strongly encourage them, for our experience is that stability in specific areas of law can indeed have an economic impact, and that stability is aided by concentration of decisionmaking in one subject matter court.

Or is it? Is it really possible that simply by providing a centralized court, there is a direct effect on the industrial econ-

omy? Is not the economy too complex for so simplistic a solution? I have seen no solid economic studies of the effect of our court on the areas of law assigned to us, although there is a growing amount of anecdotal evidence. A study that would measure the effect of the Federal Circuit on industrial innovation and international competitiveness, if such a study could be reliably designed, would be of value not only to industry but to the planners of judicial structure. Lacking sufficient economic data, the perceptive attention of observers such as Professor Dreyfuss is invaluable, for a forum that produces inconsistent jurisprudence is indeed of concern to the nation's commercial well-being. Critical assessment is important to the future, as to the past.

Professor Dreyfuss has provided an elegant analytic mechanism for the evaluation of courts. She analyzes substantive performance in terms of accuracy, precision, and coherence of the law. For procedural performance she analyzes quality, efficiency, and process. I have applied her criteria to the Federal Circuit, insofar as this experience may help to understand the risks and benefits of courts of defined subject matter jurisdiction.

A. *Accuracy*

Professor Dreyfuss' first criterion is accuracy: is the law more likely to be objectively correct. As she discusses for the Delaware Chancery court, there is an important advantage to a court that receives a large number of cases in a specialized area. It helps the court to spot, and to avoid, departures from the correct, the accurate, path of the law, departures that might be missed when a court sees only an occasional case. Whether the path is marked by statute or by judge-made law, increased exposure to an issue under varied conditions is of benefit to accuracy.

In the areas of law where the Federal Circuit is unencumbered by the precedent of the regional circuit courts, we are able to select the best thinking of the past. That is a heady and satisfying activity, but I suppose it is unavailable to Pennsylvania and New York, for both states already have well-developed bodies of corporation and commercial law. I think that in most cases, although perhaps not all, the Federal Circuit

has done well on the substance of the patent law under this criterion. And in those areas in which I find room for improvement, I need only recall the pre-Federal Circuit era to realize that we probably owe no apology—even when we are wrong.

The development of an accurate body of law requires the opportunity for correction, by the Supreme Court or by Congress. Indeed our errors are conspicuous because of the concentration of our jurisprudence, and invite the attention of the several specialized bars we serve. Thus our mistakes, or flaws we may make manifest in the statutes we administer, are more, not less, visible.

The concern that has been expressed by Professor Dreyfuss and others that Federal Circuit decisions receive less attention from the Supreme Court because of the absence of intercircuit conflict, has not been borne out in practice. The Supreme Court has taken a reasonable share of petitions from our decisions, and we have had our share of reversals. These petitions have extended throughout our subject matter, and have included tax cases, veterans' appeals, employment law, vaccine injury, as well as patent cases. In addition, the Court has given wise attention to the procedural problems flowing from our presence in the judicial structure. For example, in *Christianson v. Colt Industries Operating Corp.*,[5] the Court stopped the bouncing of an appeal between the Federal Circuit and the Seventh Circuit, holding that when there was a plausible basis for the jurisdictional decision of the first court to decide it, that was the law of the case.

It has been rare in recent years for the Court to review the technologic substance of patent cases. I discern no change now that all such cases are under the aegis of the Federal Circuit. Thus the new courts of Pennsylvania and New York should hearken to the responsibility that goes with exclusivity: the burden remains on the court, its bar, and the interested public, to control inaccuracy of result. A concerned public is the best guardian of not only the accuracy of the law, but of whether the court adequately understands and implements the policy underlying the law.

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[5] 486 U.S. 800 (1988).

B. *Precision*

Precision is defined by Professor Dreyfuss as a court's provision of reproducible results in equivalent cases. Consistency and predictability are essential to the effective operation of a system of laws. Although there are grey areas at the edges of every body of law, in the commercial arena conflicting or uncertain precedent is a deterrent to the taking of business risk, thus inhibiting commercial activity.

When you move a specified area of law from twelve geographically and jurisprudentially separate circuits into one national circuit, you necessarily enhance the precision of the ensuing decisions. However, the judges of the Federal Circuit are not all of one mind, and occasionally differences erupt, manifested in dissenting opinions and *en banc* sittings. These differences are, in microcosm, the "percolation" that scholars feared would be lost by a national court at the circuit level. We do our percolation in-house. Although it is sometimes burdensome to the parties along the way, we have explored some important issues by this process, distilling the arguments with the aid of amici curiae. Precision is thereby obtained; and if accuracy or coherence is lacking, the bar and the interested public can readily determine whether correction is warranted.

C. *Coherence*

I have mentioned that "coherence," as Professor Dreyfuss defines it, is whether the court's development of the law is in harmony with the policy of the law. This criterion is, I believe, particularly relevant when evaluating the Federal Circuit, for this court was formed because inaccurate and imprecise jurisprudence was defeating coherence in the patent law.

It may be too early in our existence to decide whether we have provided sufficiently coherent, nuanced, and sound jurisprudence in all of our areas of jurisdiction. However, the large number of cases in each of the major areas assigned to the Federal Circuit presents an opportunity for wise evolution of the law, in the common law tradition. Professor Dreyfuss raises the concern that the accompanying sense of commitment may lead to judicial bias or capture by special interests. Surely

vigilance is appropriate. At the same time, courts with exclusive subject matter jurisdiction are more likely to attract a vigilant bar and an interested public. Thus Professor Dreyfuss' observation that Delaware has an organized and active corporate law bar is well taken. The Federal Circuit is equally well served.

D. *Quality*

The quality of decisionmaking is a subtle factor, usually hard to evaluate without full immersion in the cases and the decisions. Yet the question is important: how does specialization in subject matter areas affect quality?

One hears the criticism that judges risk becoming so expert that they apply the law in accordance with personal predilection, rather than applying the letter of the law as Congress wrote it. And one hears criticism based on the opposite theory: that specialists become so attached to the letter of the law that they lose sight of the policy underlying the law. All judges are probably subject to, and resistant to, both criticisms. Thus I am less skeptical than is Professor Dreyfuss about whether New York and Pennsylvania can achieve an appropriately high quality of decision in corporation and commercial law. Professor Dreyfuss has nicely aired the arguments on all sides of this debate. I add my observation that the diversity of experience of the Federal Circuit judges has worked to the greater benefit of all of the fields for which we are responsible.

Most of our judges had prior experience in some of the areas assigned to the Federal Circuit, although surely none in all of them. I have no doubt that experience is valuable; and I have also observed that there is great value in the fresh look of the wise generalist. The combination on our court appears to be particularly well suited to our mix of subject matter.

E. *Efficiency*

Professor Dreyfuss has flagged the inefficiency of satellite litigation, particularly about jurisdiction, when a new court is carved out of existing structures. The Federal Circuit faced a moderate amount of such litigation. For example, in *United*

States v. Hohri,[6] the Supreme Court made an important contribution to efficiency in ruling that when cases involve areas of law in addition to those assigned exclusively to the Federal Circuit, the appeal should not be split and the Federal Circuit must take the entire appeal.

My advice to New York and Pennsylvania is to foresee and legislate as many procedural and jurisdictional issues as possible. For example, the Federal Circuit's enabling legislation benefited from the example of the Temporary Emergency Court of Appeals. That court was operating under "issue" jurisdiction, and had created unintended problems of duplication, delay, inefficiency, and loss of appeal rights. The Federal Circuit was structured to avoid this problem, by providing by statute for "arising under" jurisdiction.

F. *Due Process*

As Professor Dreyfuss recognizes, a variety of due process concerns may arise when a new judicial structure supersedes the old. I add only that due process concerns may be exacerbated or alleviated by a court of subject matter jurisdiction. For example, complex law or complex subject matter may receive more effective process in a dedicated court that comprehends its intricacies.

CONCLUSION

The judicial restructure undertaken in Pennsylvania and New York appears to arise from a deep concern for improved decisionmaking—the goal of all of these criteria. Professor Dreyfuss raises many important issues. I commend the thoroughness of her analysis and the depth of the perception. The evolution of optimum judicial structure, federal and state, requires a full understanding of the past, in order to support a useful prescience for the future.

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[6] 482 U.S. 64 (1987).