JOURNAL OF

THE FEDERAL CIRCUIT HISTORICAL SOCIETY

VOLUME 5, 2011

901 New York Avenue, NW
Suite 9181
Washington, DC 20001

www.federalcircuithistoricalsociety.org

ISSN 1942-9487

JOURNAL OF THE FEDERAL CIRCUIT HISTORICAL SOCIETY

VOLUME 5, 2011

TABLE OF CONTENTS

II. IN HIS OWN WORDS: JUDGE FRIEDMAN ON THE UNITED STATES COURT OF CLAIMS AND THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

On January 22, 2003, and February 10, 2003, as part of the Oral History Project of the Federal Circuit Historical Society, Judge Friedman, then a Senior Circuit Judge of the U.S. Court of Appeals for the Federal Circuit and former Chief Judge of the U.S. Court of Claims, discussed his life and career with his colleague, Circuit Judge Timothy Dyk, and Barbara Benoit, one of his former law clerks. The full two-part interview covers a range of topics, including Daniel Friedman's life growing up in New York City, his education and work prior to becoming a judge, his family life, and many impressions of mentors and colleagues. In this selective, edited version of the transcript, we present Judge Friedman's insights on the creation of the Federal Circuit and the operations of the Court of Claims and the Federal Circuit.

CREATION OF THE FEDERAL CIRCUIT

MS. BENOIT: Judge, can you tell us about the establishment of the [Federal Circuit]?

JUDGE FRIEDMAN: The first time I got any information that there might be something other than the Court of Claims was about a year and a half or so after I became the Chief Judge of the Court of Claims. I was told that a couple of lawyers from the Justice Department and the Office for Improvements in the Administration of Justice would like to interview me and talk to me. I didn't know what it was about, but they came over and they told me about this proposal to merge the Court of Claims and the Court of Customs and Patent Appeals into a new court. And they described a little bit about it and they asked me what I thought of it, and I said, it was news to me. I didn't know anything about it. Before giving any opinion I thought I should talk to my fellow judges. Which I did, and they were quite enthusiastic about the idea. I suspect some of them liked the idea because it meant that henceforth, instead of being known as Judges of the Court of Claims, they would be Judges of the Court of Appeals. So I then got back to the people from the Justice Department and told them that our judges were in favor of this.

The next thing that happened was we got a draft of a proposed bill creating the court, and when we looked at it, we found some problems with it. The first problem was that I had been appointed by the President as the Chief Judge of the Court of Claims and Judge Markey had been appointed by the President as the Chief Judge of the Court of Customs and Patent Appeals. The question was, if you're going to merge the two courts into a single court, what will you do with the two Chief Judges? Well, the initial solution [of] the Justice Department was that we would have two Chief Judges of the new court. One would be in charge of administration, and the other one would be in charge of presiding at court sessions and such things. Both Judge Markey and I, without ever consulting with each other, told the people at the Justice Department

that that was just no good. It would not work. You had to have one person in charge of the court and they accepted that.

The next version of the statute provided that the President would select from between the two Chief Judges who would be the new Chief Judge of the Court. And that seemed all right. Between that time and the final version of the bill, that was changed to provide that the new Chief Judge of the new court would be the one of the two Chief Judges of the constituent courts who had been the Chief Judge the longest, and since Chief Judge Markey, at that point, had been Chief Judge for ten years, and I had been Chief Judge for only four years, Judge Markey would be the new Chief Judge of the new court. And as the bill went through, some of the colleagues on my court realized that if the bill went through that way, I would drop from being the senior judge in the Court of Claims to being about number eight or nine in seniority on the new court. So the bill was amended to provide that the judge who was not selected as Chief Judge would be second in seniority on the new court as long as that judge remained an active judge. And he would cease having that seniority when he took senior status.

We worked fairly closely with the Congress in the drafting of the legislation. Because of the fact that the new court would have much broader patent jurisdiction than either of the old courts had, we sort of informally worked out an arrangement with the Court of Customs and Patent Appeals that we took responsibility for the portions of the bill that related to non-patent matters, and the patent court, I guess primarily Chief Judge Markey, took responsibility for the portions of the bill that dealt with patent matters.

JUDGE DYK: Was the scope of the original bill broad enough to encompass tax matters?

JUDGE FRIEDMAN: The original bill provided that the new court would have exclusive jurisdiction in tax matters. That was an old proposal Dean Griswold [of the Harvard Law School] had made in an article in the *Harvard Lawyer* many years ago that instead of the regional circuits deciding tax appeal, there should be one central court for tax appeals. And it was proposed that this new court would have that jurisdiction. That proposal was strongly objected to by the tax bar and by the Treasury Department, and in a second version of the bill, it disappeared. There was also a proposal to give the new court some jurisdiction over, not all environmental cases, but some environmental cases, and that also disappeared.

MS. BENOIT: How did the legislation fare as it was pending before Congress? Did it take a long time to pass?

JUDGE FRIEDMAN: The legislation moved through Congress pretty quickly. I'd say maybe a year, a year and a half, and indeed, one interesting story about the history of the legislation is that the bill was originally scheduled to be enacted about a year before it was actually enacted. The bill had passed the House and was scheduled to be taken up by the Senate. Then, we got word that Senator Bumpers of Arkansas was planning to attach to the bill as a rider one of his favorite proposals, which was colloquially known as the Bumpers Amendment. It would have provided that no court, in interpreting a statute, could consider the interpretation of that statute by the agency involved. . . . You looked to see what the agency charged with administering the statute has said it means. And Senator Bumpers didn't like that. His proposal would have required all courts to decided all questions of statutory interpretation themselves, and not give any weight to the interpretations by the agencies that were enforcing the statutes. That was, as you can imagine, a rather controversial provision, and there was a lot of opposition to it. The concern was that if the Senate took the bill up and Senator Bumpers attached his Amendment—and of course the Senate doesn't have any [rule that amendments have to be germane to the bill under consideration], so you can attach any amendment to any bill—that might have led to either a defeat of the legislation, because of the opposition to Senator Bumpers' proposal, or possibly a veto. So it was decided the safest thing to do was to take the bill off the calendar. It was finally considered in the next session of Congress, at which point something had been worked out with Senator Bumpers.

In the consideration of the legislation before Congress, both Judge Markey and I testified in support of the legislation and explained the reasons for it and also answered various questions. It was a rather uncontroversial proceeding. The hearing before the Committee didn't last very long. There were no hostile questions, just a few statements by both of us.

JUDGE DYK: How about the role of Dan Meador?

JUDGE FRIEDMAN: Dan Meador played an important and major role in the creation of the court. He was the Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice. He had been for many years a professor at the University of Virginia Law School and had also been interested in and had taught judicial administration down there. Dan Meador is an extraordinarily able person and remarkable fellow and he played a major part in the way the legislation evolved. He was very helpful and also you could talk to him. If you pointed out to him things that weren't as they seemed to be, and as they should be, he would make whatever changes were necessary.

JUDGE DYK: Did the legislation create Article III courts out of two courts which had previously been Article I courts?

JUDGE FRIEDMAN: No. The bill did not create a new Article III court out of one of the two prior Article I courts. There is a Supreme Court decision some years before that had established that the Court of Claims and the Court of Customs and Patent Appeals were Article III courts. That issue was decided because of sort of a peculiar quirk that senior judges frequently sit with other courts. A senior judge of the Court of Customs and Patent Appeal [who] had sat as a district judge in the District of Columbia presided at a criminal case, and another senior judge of the Court of Claims had sat with the Second Circuit, I believe. And in each case, the unsuccessful party, the convicted criminal in the one case, argued that they had been denied due process [because] they had not had a trial before a bench consisting solely of Article III judges. So the Supreme Court took this case and said there was nothing to their claim, because in fact, the Court of Customs and Patent Appeals, and the Court of Claims were both Article III courts. There was an amicus brief filed in the Supreme Court on behalf of the judges of the Court of Claims, arguing that yes, they were Article III judges, which had been prepared by a prominent member of the local bar to try to support them on that.[1]

TRANSITION OF THE JUDGES TO THE NEW FEDERAL CIRCUIT

MS. BENOIT: Judge, when the Court of Claims judges became judges of this court, how did they transition to learn about patent law? Were there special measures taken to help them get up to speed?

JUDGE FRIEDMAN: The transition of the Court of Claims to be suddenly hearing a large number of patent cases took some work. To begin with, the Court of Claims itself had heard a small number of patent cases when suits were brought against the government for infringement of a patent. But we retained, brought in someone, we didn't pay him, a professor from George Washington who [was] in charge of the patent program, and he gave a lecture for about two hours that all the judges attended, in which he tried to explain to us in as simple terms as possible all about patent law. He taught us about how claims are done, what the rules are, and so on and that was very helpful.

Now, the Court of Customs and Patent Appeals has always for many years had as its law clerks what they called technical advisors, who were trained in scientific matters. They had all had scientific backgrounds, and a number of the former Court of Claims judges decided that they would follow that practice, and hire as their law clerks, at least initially, some people who had a technical background. And that's what they did and that helped some of the judges in handling patent cases. Let me say for my own self, I found a lot of technology in this patent cases far beyond my comprehension. I had no scientific background. I had a first year course in nonorganic chemistry in college, and that's as far as I got in science, and some of these cases were very difficult. I

remember I once was very fortunate. We had a patent case involving the method of implanting lenses following the removal of a cataract, and I was assigned to write that opinion, but my law clerk that year was a fellow who had been a former physician. He had been a physician and then went to law school. So he was able to write me a draft explaining how the eye functions and how surgeons implant lenses following cataract surgery, and I put out an opinion that I think didn't look like gibberish. I don't know how persuasive it was, but at least it was comprehensible in terms of the techniques and technologies.

JUDGE DYK: The jurisdiction of the new court was in some major respects new for the judges of the Court of Customs and Patent Appeals, also, wasn't it? I mean first of all, they had had no previous jurisdiction over infringement cases.

JUDGE FRIEDMAN: Well the jurisdiction of the new court did provide a lot of new stuff for the judges of the Court of Customs and Patent Appeals. They had not had any jurisdiction over infringement cases, and that involved the question of infringement, questions of damages. All sorts of questions. They had had considerable experience in claim construction and various issues like that as a result of their review of the decisions of the Patent Office.

They also, of course, had reviewed extensively a lot of decisions of the former Customs Court that is now the Court of International Trade. But they suddenly found themselves [with cases] that were totally foreign to them: government contract cases, tax cases, government employment cases, Constitutional cases, Takings cases. They had to figure those out and I don't know to what extent some of them may have hired as law clerks people who were not patent trained or scientifically trained people. Those days in the early days of the Court, the judges had only two law clerks, not three that they now have. So I don't know what they did, but they seemed to manage reasonably well.

JUDGE DYK: Was it a harder adjustment for the Court of Claims judges or for the Court of Customs and Patent Appeals judges?

JUDGE FRIEDMAN: I don't know whether the adjustment was harder for the judges of the Court of Claims or the Court of Customs and Patent Appeals. It was a difficult adjustment for me because of the scientific issues that were raised in patent cases. I don't think patent law is that much more difficult than government contract law or administrative law or tax law or anything else. But I don't know how difficult it was. Our judges seemed to be able pretty quickly to pick up patent stuff. And the judges for the Court of Customs and Patent Appeals often seemed able to pick up on our jurisdiction.

MS. BENOIT: Was there any consideration given to recruiting panels of judges to hear cases based on judges' expertise?

JUDGE FRIEDMAN: Yes, there was. The original legislation had proposed that judges should be assigned to panels based on their backgrounds. So if you had a group of government contract cases, presumably, you would have created a panel consisting of three former judges of the Court of Claims. Once again, both Judge Markey and I said that would be a terrible mistake. We thought it was important that all judges should become familiar with the full subject matter jurisdiction of the court. And we didn't want to get into a situation of having judges who became too specialized. It was also a concern that if the same judges tended to sit together, case after case, say, on all government contract cases or in all federal employment cases, they might begin to think in very narrow terms and you wouldn't get the breadth of vision that we wanted the court to have.

THE MAKE-UP OF THE NEW COURT AND THE FEDERAL CIRCUIT PANELS

JUDGE DYK: Were there any new appointments that needed to be made to the combined court, or was the membership composed entirely of judges from each of the predecessor courts?

JUDGE FRIEDMAN: When the court was created, it was created with a vacancy. The bill had provided that the new court would consist of the existing judges of the two courts. The court was created

on October 1, 1982, but in the spring of that year, Judge Kunzig died after some surgery. So there were only eleven existing and sitting judges at the time the court was created [and] that left a vacancy. Judge Newman was the first judge to be appointed [to] the Federal Circuit.

MS. BENOIT: Is there a provision in the legislation to allow the court to sit geographically elsewhere besides Washington from time to time?

JUDGE FRIEDMAN: I don't think there's a specific provision, but I think it was implied. There was a provision in the legislation, unique to this court, which says that the court shall sit in panels of at least three. All other courts of appeals the statute says they shall sit in panels of three. But ours is in at least three. And the theory behind that provision was that there would be some cases that the Supreme Court probably would not want to get into, but nevertheless would be sufficiently important that more than three judges should hear it. And early on, [the] Federal Circuit did sit in panels of five. The very first case we decided was an *en banc* case in which we said we would treat as precedent for the new court all the decisions of the Court of Claims and the Court of Customs and Patent Appeals.[2] But early on, as an experiment really, to see how it worked, there were one or two times when we had panels of five and heard sort of assorted cases and they worked it out.

Some years ago, the air traffic controllers went on strike. And after they had gone on strike, President Reagan told them they had 48 hours within which to return to work, and if they didn't return to work, they would all be fired, and at that time, there still is a statute that made it a crime for Federal Employees to strike against the government. Well, they didn't return to work and as a result, thousands of them were fired. And they brought a large number of lawsuits and we had something like 800 or 900 cases filed by individual air traffic controllers saying they had been improperly fired. It presented a real problem—how were we going to deal with this mass of litigation? And what was done, was the court appointed two five-judge panels and each five-judge panel heard ten cases and each member of a panel wrote two opinions, all dealing with different aspects of the air traffic controllers' claims. The cases that were selected to be heard by these five-judge panels were cases that seemed to us to present common questions of law. It was the hope that once those cases were decided, a large number of the remaining cases would either be dismissed or could be settled fairly easily. We heard these cases and we came down with twenty lead cases, which decided most of the legal issues, but not all, and then there were a few more cases came down, and after that, the bulk of those cases were either settled or disposed of rather easily.

The air traffic litigation led to one of the few instances in which this court has seriously sanctioned a lawyer. There was a lawyer in New York who represented a large number of air traffic controllers—more than a hundred. And he filed more than a hundred separate briefs on their behalf. He didn't inform the court, however, that apart from slight changes in the facts related to each particular air traffic controller, the legal argument in each of those briefs, which occupied thirty or forty pages, was identical. So the panels that were hearing these cases had to read brief after brief because they didn't know what was in them. And he lost, I believe, all of them.

In some of the cases, the panel sanctioned him. But when it was all over, the court decided that this had been rather improper conduct, and it brought a proceeding against him to show cause why he shouldn't be disbarred or suspended from practice. Senior Judge Bennett, who had formerly been the Chief of the Trial Division of the Court of Claims, . . . conducted the hearing. A couple of experts testified on behalf of [the lawyer], saying that what he had done may have not been the best practice, but [they] didn't think it was professionally improper. [Judge Bennett] recommended that he be suspended from practice for two years, but that the suspension itself should be suspended. The court heard this case *en banc*. I wrote the opinion in which we suspended him for one year and did not suspend the suspension. After that, he had an unhappy career. He was eventually indicted and convicted in New York City of stealing funds from his clients and I'd heard that as a result of this, the fund that the New York City Bar Association had created to help clients whose funds had been taken

by lawyers was depleted to zero because he had taken so much from so many of his clients.

Since the air traffic controller cases, the court has not sat in panels of more than three. It was proposed a couple of times [that the court sit in panels of five] and the court felt it didn't want to do it. And of course under the statute, we're not required to sit in panels of five. We could sit in a panel of seven or nine or any number up to the twelve authorized judges. It's rather interesting that because of the death of Judge Kunzig, it would have been possible to create a court of eleven judges and still comply with the theory that the new court should be comprised of all the existing judges. And if that had happened, we wouldn't have had the possible difficult situation of an *en banc* court consisting of an even number of judges and then it splits six to six, as a result, there is no decision of the court, even though the case was considered sufficiently important to warrant an *en banc* consideration.

When the Court of Claims had only five judges, as the Court of Customs and Patent Appeals did, it heard every case *en banc*. And then, at some point, this was before I came to the court, the number of judges was increased to seven, and the statute also provided that the court could sit in panels of three. The panel would sit for a day and a half and we'd hear a total of six cases, and then the next panel would take over. And because [the] number of judges was not enough to enable us to keep totally current on our work with each panel sitting just once in the argument week, from time to time, judges would have to sit on two panels. We'd have to hear a total of twelve cases over a period of three days and the judges whose lot it was to get that kind of a load were always very complaining. They thought they were dreadfully overworked to hear twelve cases. It was too much for many of them and they used to complain about it. The court would take off and not sit in the months of July and August. Its last sitting would be in the beginning of June and it would resume sitting in the beginning of September. So over the two summer months, the judges could catch up on some of their work, or take a nice cavort as they saw fit.

MS. BENOIT: Having a longer argument of an hour, one half hour per side, [which was the practice in the Court of Claims,] do you think that that was more helpful than the current common format [at the Federal Circuit] of fifteen minutes or a half hour per case?

JUDGE FRIEDMAN: No, I don't think so. What sometimes would happen [at the Court of Claims] was the longer the time a lawyer had to argue, the more stuff he'd throw out. And of course they'd talk about the facts a great deal and go on. I think fifteen minutes is more than, I won't say more than adequate, but is adequate in most cases if the lawyer properly prepares. It forces the lawyer, I think, if you know you only have fifteen minutes, to really zero in on the case and one of the critical points. I don't think the oral arguments were any better and any more helpful to the court in the old days when the lawyer had half an hour, than now, when the lawyer has only fifteen minutes. And occasionally, of course, even in those days, we would give lawyers more time. And we did from time to time, sit *en banc* in the Court of Claims when we had cases that seemed sufficiently important.

SERVICE AS CHIEF JUDGE OF THE COURT OF CLAIMS

MS. BENOIT: So you were appointed as Chief Judge of the Court of Claims.

JUDGE FRIEDMAN: Yes.

MS. BENOIT: What was your role as Chief Judge?

JUDGE FRIEDMAN: Well, a lot of it was what I would call fairly ministerial things. For example, the trial judges of the Court of Claims had no authority to enter final judgments. They could only present recommended decisions. Every couple of weeks, a man who was called Secretary to the Court would come up with a batch of Orders for me to sign. If there was no appeal taken from a recommended decision of the trial judge, it was automatically approved as the decision of the Court of Claims, but I had to sign a judgment. I kept signing my name numerous times.

I moved very slowly in making changes. I didn't believe in the bull in the china shop theory. After a while, I made a couple of changes in the court's internal procedures that just seemed to me to make common sense. One of the things that I did was that before I came there, the practice had been that each panel would sit and hear the cases, but they wouldn't discuss them and vote on them until the court conference the following Monday after court week. So all seven judges would come into the conference, and then each panel would decide the cases and vote on them. And the others would sit around, usually saying nothing. Occasionally, someone would comment on something, and after several months of this, that seemed to me a rather futile thing to do. So I suggested, why didn't each panel, after it had finished its session, vote and decide the cases and assign the opinions to be written.

JUDGE DYK: And that's what happened.

JUDGE FRIEDMAN: That's what happened, yes. I think the old practice was a hangover from the days when the Court of Claims had only five judges. And when they'd had only five judges, it always sat *en banc*, It never sat empaneled but subsequently, the statute was amended to add two more judges and said the court could sit in panels.

JUDGE DYK: Who were your colleagues when you joined the Court?

JUDGE FRIEDMAN: Well, there were two senior judges, Judge Cowen and Judge Skelton. And then the most senior judge, Oscar Davis. And then there were Philip Nichols, Marion Bennett, Robert Kunzig, and Shiro Kashiwa. And then I joined the court and Ed Smith joined about two or three months after I did. Unlike [me], Judge Smith had no investiture. He and his wife and children came up to my chambers and I administered the oath to him. He said he preferred it that way, so I deferred to that. And Judge Kunzig died in the spring of 1982, before the courts had merged. He had been in the hospital and had some lung surgery and seemed to be doing very well, and in fact, he was expecting to be released in a day or two, and then suddenly, with no advance warning, he suddenly died.

OPERATION OF THE COURT OF CLAIMS

MS. BENOIT: Did any of the judges at the Court of Claims have special expertise?

JUDGE FRIEDMAN: Well, in the trial division, we did follow that practice [of assigning judges having special expertise]. The trial division, among other things, heard a number of patent infringement cases brought against the government, where it was alleged either that the government or one of its contractors was infringing a patent and we always had two patent judges among our core of trial judges. They could not devote themselves solely to patent work, because the volume of patent cases was more than one judge could handle, but not enough to keep two judges busy. So they handled the patent cases, plus other types of cases and we followed that practice of appointing a patent judge whenever a patent judge vacancy occurred.

JUDGE DYK: Was the assignment of cases to the panels of the Court of Claims and the assignment of judges to panels completely random?

JUDGE FRIEDMAN: It was completely random. Let me tell you how we did it. And it worked out. I assigned the judges to the panels. The Clerk's Office, with no participation by me, or as far as I knew by any of the other judges, assigned the cases to panels. Shortly before creating the panels for the next session, the Clerk would tell me that they needed so many panels the next month. And I would then appoint a group of judges. I would say these three judges on Panel A and these three judges on Panel B, and so on, and since there only seven judges, it was not difficult to rotate them so that each judge sat with the remaining judges as often as possible. And what I would finally do, then, is [say]to the Clerk's Office, here is the paneling for March. And it would be Panel A, Panel B, Panel C, and [the Clerk] then, in turn, would take the cases assigned to these panels, whose identity he didn't know when he made the assignments, and just send the briefs up to the judges' chambers for each panel.

Each panel heard six cases in a day and a half. We allowed a half-hour per side, for oral argument, so that each case had an hour for oral argument. And we heard two in the morning and two in the afternoon, and then two the following morning. And then to keep up with the workload, every three or four months, judges had to sit on two panels. That'll be a total of twelve cases and when that happened, we thought we were outrageously overworked, and it was most unfair. But it worked out pretty well.

There was another practice the Court of Claims had, which I didn't particularly care for, and that was it disposed of a large number of argued cases by adopting the recommended decision of the trial judge. There would be a recommended decision by the trial judge; there'd be an appeal from that. The court would hear oral argument, then the court would enter an Order saying they adopt the decision of the trial judge so and so as our decision in this case. I didn't like it because when you adopted a decision that way, you adopted every single sentence in it and every single sentence and every footnote, and I had an experience on one occasion when I had to deal with one of those Orders that had adopted a decision of the trial judge. There was a lengthy footnote in that decision, and tucked in the middle of that footnote was a sentence that said exactly the opposite of the way we planned to come out in this case. I had to do a lot of fancy dancing to try to get around that footnote. So I didn't favor that. I much prefer to say we decide something on the basis of the opinion of the trial judge.

We also had another practice in the Court of Claims. Something called *Speaking Orders*. [They] are reported at the end of each volume of the *Court of Claims Reports*. They were little opinions, about two or three pages, in cases that didn't seem to warrant a major opinion. They were not argued. They were done by panels, but, and this is something that a lot of people do not realize, the Court of Claims treated those so-called Speaking Orders as precedents. They were binding precedents, and the court frequently cited them. Sometimes most of the authority cited in a published opinion consisted of those Speaking Orders.

We also had a system of our own reports. We had a court reporter and we were always a couple a years behind like so many courts were. But when the new court was created, it was decided we didn't need a Federal Circuit Reporter.

THE COURTS IN THE HOWARD T. MARKEY NATIONAL COURTS BUILDING

JUDGE DYK: Was the Court of Claims in the Markey [National Courts] Building, when you joined it?

JUDGE FRIEDMAN: Yes, it was. The Court of Claims for many years had been in the building on 17th and Pennsylvania Ave., which is now the museum [(the Renwick Gallery)] down the street from [the Federal Circuit]. But the Court of Claims had to vacate that building, because it was deemed unsafe. And they had to remodel it and rebuild it. Then the Court of Claims got some space on K Street, where it stayed for several years. This building [now the Howard T. Markey National Courts Building,]was built, and both the Court of Claims and the Court of Customs and Patent Appeals moved in here. I was told that the major credit for having this building built went to the then Chief Judge of the Court of Claims, Marvin Jones, who had been a very important member of the House of Representatives before he was appointed judge. He was chairman of the Agriculture Committee. He came from Texas and had very good connections, and he played a very major role in getting this structure constructed for the two courts.

JUDGE DYK: Which floor was the Court of Claims on?

JUDGE FRIEDMAN: The Court of Claims had the entire 9th Floor and then the Court of Customs and Patent Appeals had the entire 8th floor, and the 6th and 7th floors were occupied by the trial division of the Court of Claims. Downstairs, there [were] the Clerk's Offices [for] both the Court of Customs and Patent Appeals and the Court of Claims. Then there were the courtrooms for both. The Court of Claims had the two courtrooms on the second floor that we now have, including the small one, which had all the fur-

niture from the original Court of Claims over in the old building. The bench was the original. The Court of Customs and Patent Appeals had the 4th Floor courtroom.

* * *

As I mentioned, the Court of Customs and Patent Appeals, always sat *en banc* with its five judges. And from time to time, a judge from the Court of Customs and Patent Appeals would recuse himself, or herself, and then Chief Judge Markey would call me and say, "Can you give me a judge for the first Tuesday in May. I need a judge, because one of the judges has recused." So I would call one of our judges who liked to do this, and they would sit there and Judge Markey always assured me that the judge who would be selected for this assignment wouldn't have to write anything because the case had been pre-assigned. They had a practice in the Court of Customs and Patent Appeals of pre-assigning all cases to different judges.

In order to facilitate this interchange [of judges between the Court of Claims and the Court of Customs and Patent Appeals], every year, at the beginning of the term, the Supreme Court put out an order, signed by the [Chief Justice], authorizing all of the judges of each court to sit with the other court. Instead of doing what you do when you have a senior judge assigned, being a special order issued for that assignment, this was a blanket order covering all the judges of the Court of Claims to sit with the CCPA and all the judges of the CCPA to sit with the Court of Claims. Occasionally, a CCPA judge would sit with our court. So that was another way in which the court operated.

BEING A JUDGE ON THE COURT OF CLAIMS AS COMPARED TO THE FEDERAL CIRCUIT

MS. BENOIT: Are there ways in which being a judge for the Court of Claims is different from being a judge here at the Federal Circuit?

JUDGE FRIEDMAN: Well, not really. Only in the sense that in the Court of Claims not all of our cases [were] true appeals cases. . . . A lot of the cases we heard were appeals from decisions of the trial judges. But a number of them were also cross-motions for summary judgment, and we would hear those directly. I'll tell you an amusing story that happened to me on one occasion. The trial judge had the initial responsibility for handling the case, and he would handle the briefing and so on, and then would certify the case, saying there were cross-motions presenting only issues of law and certify the case to the Court of Claims. Well, one day, I got one of these cases certified to me like that, and I discovered that the plaintiff's lawyer had filed a motion to exceed whatever it was, the 40 or 50-page limit of the court in his brief. And the trial judge had merely granted the motion; not set any limits. So the plaintiff's lawyer filed a brief of 350 pages! And I saw this and I said well, I'm not going to burden our judges to read this sort of stuff. I didn't know what to do and [then] I had a real brainstorm. I sent the case back to the trial judge to give us a recommended decision in the case, which he did, and then it came up on exceptions to the recommended decisions, so that's how I did a judicious thing, I think, to teach him a lesson. Next time, I assume this judge when he granted an extension said exactly how many pages they could file.

JUDGE DYK: How many trial judges did you have?

JUDGE FRIEDMAN: We had either 15 or 16 and they all became judges of the Court of Federal Claims when that court was created. They were all appointed by the Court of Claims, and . . . the Court had a rather peculiar system for selecting these trial judges. Each [Court of Claims] judge, in order, had the right to select a [trial] judge. So if it was my turn to select a judge, I would say, well, I think so and so would be a good person for this judge, and the other [Court of Claims] judges went along with it, of course, because they were waiting for the time in three years when they could select someone. Well, I took a rather dim view of that, and I tried to inaugurate a system instead of each judge having the prerogative to select a judge, it would be a unified thing of the whole court, and I got them to do that, and the last judge we had to appoint, we interviewed several people and finally selected, I think it was

when we selected Judge Merow, who then [was] at the Justice Department.

JUDGE DYK: What was the quality of the advocacy of the counsel in the Court of Claims when you were there?

JUDGE FRIEDMAN: I would say probably about the same level as we see now, like all courts, you get some very good advocates, and you get some fair advocates and you get some not-so-good advocates. We had one advocate who was notorious because no matter what the case was, he insisted on stating everything possible about it. A simple case, he'd file as long a brief as possible, and then he'd always file a motion to exceed the page limit. And he'd just go on and on and on. And I mean if it was a very narrow question, he'd write the maximum number of pages. He'd start with giving you every fact about the plaintiff. He could state where the plaintiff was born, and if the record had shown where the plaintiff had been educated, he'd state it. He'd state everything. There was an amendment to the rule to impose some limits on certain types of documents, designed specifically to kind of cramp his style a little bit. He did mainly military [pay] cases. We had a lot of military pay cases before the Court of Claims. There was always some retired major who claimed he'd either [be entitled to] a larger retirement than he was getting or had been underpaid during the last five years of his service. There were lots of cases, some of them highly technical and very, often very difficult to deal with.

JUDGE FRIEDMAN ON ORAL ADVOCACY

MS. BENOIT: Judge what makes a person a good oral advocate?

JUDGE FRIEDMAN: Well, I always like to say that the things we're looking for in an oral advocate are the two big Cs. Clarity and Candor. And I think what makes a person a good oral advocate is first of all that the person knows his or her case intimately, and not have to fumble around, and not say, well, does the record show that? Not to say, well, I think so, but I couldn't be positive. There's too many of them who do that. Secondly, somebody who has thought the case through and is aware of the problems in the case and doesn't try to hide the problems. It's often it's said if you've got a problem in your case, it's better to bring it out yourself than to let the judges or the your opponent bring it out. Because if you bring it out yourself, you can frame it in a way that makes it perhaps [a little better to handle]. I say make it simple and clear, talk loud enough that you can be heard. Don't talk so fast that people don't understand what you're saying, and when you're asked a question, answer that question, don't answer some other question, don't try to dodge questions by going around and so on. A good oral advocate realizes that questions are not always hostile. Sometimes they're designed to help the advocate. You know, the art of advocacy is the art of persuasion and you've got to try to convince your hearers why they should decide the case in your favor and not in favor of your opponent.

JUDGE DYK: What percentage of advocates that you've heard at the Court of Claims and in the Federal Circuit satisfy those criteria?

JUDGE FRIEDMAN: I'd have to say at most twenty-five percent. I'd have to say that there are a lot of advocates [who] sort of know the case, but they haven't really prepared it adequately. I remember one time years ago, there was some Justice Department lawyer arguing some statutory question, and he was relying on two sentences in the first paragraph of the statute. It was a long complicated statute. But there was a sentence in the second paragraph, somewhere in the middle of it, that seemed to be directly contrary, and I asked him about that. What do you say to that sentence? And it was quite clear he had never even seen it. He'd never looked beyond the first paragraph of the statute on which he based his case. And he said, well, and he kind of looked it over and he had no answer. I don't know, if he'd thought about it, maybe he'd have had an answer.

I think another thing about what is important in a good advocate [is to realize] the limited role of the appellate court. And I've seen too many advocates who try to repeat the same case they presented in the trial court and lost, and they replicate the case, and they lose again. They lose for

the same reasons they lost in the trial court. They haven't recognized that our role as an appellate court is quite different from that of a trial court. I mean a trial court, basically, finds the facts and applies the law to those facts. An appellate court's job, basically, is to determine whether the trial court committed reversible error. Not just error, but reversible error, such that its decision cannot stand. There are too many advocates [who] come up and you think, they act as though they're still in a trial court. They state the facts favorable to them, ignore the facts that are not are not favorable to them, [and] ignore largely what the trial court has said.

* * *

I [have a] favorite Supreme Court story which illustrates the point that, if you're an advocate, you should try to anticipate what the Court might want to know about a case. This concerned an order of the Federal Trade Commission that had told one of the large food companies, I think it was maybe General Foods, or some company like that, had told this company, that it could not acquire Gerber's Baby Foods. And the reason the Commission said it couldn't acquire Gerber's Baby Foods, that that acquisition would be anti-competitive, was that the food firm manufactured and sold artificial garlic and artificial onion flavors. Gerber's Baby Foods previously had been buying these artificial flavorings from some other companies and that as a result of the acquisition, those sellers of garlic will be frozen out of the market and that the acquiring company would now capture the market for artificial garlic and onion flavoring. One of the Justices, I think it was probably Justice Stewart, it sounds just like the kind of a question he could ask, put this question to the lawyer for the company. Well, I don't understand it, he said. Why on earth would Gerber's Baby Foods be buying artificial garlic and artificial onion flavoring. What do they want... Well, said the lawyer, he said, I wondered about that, too. So I asked my client, and the answer's quite simple. He said, baby food is purchased by mothers who taste the food and say, well, this is good, my baby would like that, or this doesn't taste very good, I don't think my baby would like that, and therefore, the manufacturers of the baby food flavor it not so as to please the baby, but so as to please the mothers, and that's why they have to put a little garlic and onion flavoring in the baby food to capture the mother's taste. It's an amusing story, but it also is an example of how someone thought beyond the narrow confines of the case.

JUDGE DYK: Typically, how did you prepare for oral argument at the Court of Claims, [at the Federal Circuit], and when you sat elsewhere?

JUDGE FRIEDMAN: I prepare pretty much the same for oral argument at any court. I first start by reading the decision of the trial tribunal, whatever it is. And then I read the briefs. And then, in the course of that, I'll read as much of the record as seems necessary. If it's a contract case, I'll look at the provisions of the contract. If it's a patent case, I'll look at the claims, although sometimes those provisions are included adequately in the brief. And while I'm doing this preparation, I have my notepad, and I note down issues it seems to me have not been addressed by the parties or questions that I think should be addressed, and also put down questions I think I may want to ask counsel. And then try to come to some tentative decision on the issues in the case. Now while I'm doing that, I have my law clerk do the same thing. And usually one or two days before the oral argument, I sit down with my law clerk and we discuss the cases.

I do not have my law clerks write bench memos for me, but on rare occasions, I will ask my law clerk before oral argument to look something up. My law clerk always goes to the oral argument. I take my law clerk with me when I sit out of town or if I sat again with the DC Circuit. After the oral argument and the discussion, when I come up, I tell my law clerk how we had decided the cases. And then we sort of divide them up, depending on how many there are. What I try to do is I'll write roughly half. That's another advantage of being a senior judge. I don't have as many cases, and I have only one law clerk, so it's a fair division of the work to have my law clerk do some of them and for me to do some of them. We divide them up and talk about them. I'll be quite frank to say that if I have

a case that's going to require a detailed study of the record, the chances are, I'll assign my law clerk to do that draft. But sometimes I'll do my own drafts. It depends. I do, I'd say, between a third and maybe half of the opinions.

JUDGE DYK: There was a fair amount of sanctioning of lawyers by the Federal Circuit in days gone by. Is that perception accurate, and if so, what's your comment on that?

JUDGE FRIEDMAN: Yes, I think there was a fair amount of sanctioning, because part of it was the perception [of] among others, Judge Markey, that there were a lot of lawyers that were not behaving properly. The lawyers were particularly sanctioned for cropping quotations, for failing to cite pertinent cases. That kind of thing. And I think Judge Markey's view was that that was improper conduct, and that a lawyer should know that if he tried that sort of stuff before this court, he'd be punished for it. And there seemed to be a general consensus among the judges that lawyers should be held to a high ethical standard. I, personally, of course, because we had such a high standard in the Solicitor General's Office, I would be quite annoyed when a lawyer would pull something like that. They would sometimes crop a quote and totally distort its meaning. They'd cut out qualifications, or they'd leave off the beginning or the end of a sentence.

JUDGE DYK: Did there come a time when there was less sanctioning, and if so was that just accidental or was that deliberate?

JUDGE FRIEDMAN: I think there was probably less, I mean it wasn't that frequent. It wasn't as if we had a sanction a month or something like that. It didn't happen that frequently, but since sanctioning of lawyers is relatively rare, it seemed like a lot. I think there's less of it now, and I like to think that perhaps the lawyers have learned their lesson and they're more careful now with how they present their cases.

BECOMING A SENIOR JUDGE

JUDGE DYK: How was it that you decided to take senior status?

JUDGE FRIEDMAN: Well, I think basically it was the credit or the responsibility to considerable extent was my wife, Elizabeth's doing. She said you've reached the stage now where we should spend more time doing things other than working so hard, and we've got this house now in [Martha's] Vineyard, it would be nice if we could spend more time up there and you're eligible to take senior status and why don't you do it? And she sort of urged it upon me, and finally I said I would do that, and before she had her stroke, for the last three or four years, we had a wonderful life and arrangement up there. We'd go up and spend three or four months there. And I had a fax, and my law clerks would send me up drafts and I'd work them over and type them up and send them back and so on. The other nice thing about being a senior judge is it makes it much easier if you want to sit in other circuits. . . . You can't do that if you're an active judge. If you're an active judge, if you want to sit elsewhere, that's in addition rather than in lieu of your regular work with the Court.

JUDGE DYK: Have you enjoyed sitting on the other Circuits?

JUDGE FRIEDMAN: Yes, that's been a lot of fun.

JUDGE DYK: Had you done it before you took senior [status]?

JUDGE FRIEDMAN: Not much, before I took senior status, I maybe sat once or so. During the 4 years when I was the Chief Judge of the Court of Claims, I was a member of the Judicial Conference. And the chief judges, whom I got to know there would be importuning me to come sit with them. But I said I didn't want to do it, and then after [the Federal Circuit] was formed, I waited a while, and then maybe I sat once or twice, but I only began sitting extensively in other circuits after I took senior status.

JUDGE DYK: Which circuits have you sat on?

JUDGE FRIEDMAN: Well, I'll tell you, I sat once with the First Circuit. I sat a number of times with the Second Circuit. And indeed, several years ago they gave me a certificate attesting to how much I'd contributed to their jurispru-

dence. I sat once with the Seventh Circuit. I sat a number of times with the Eighth Circuit, I sat once with the Ninth Circuit, about two and a half weeks ago. I sat twice with the Eleventh Circuit, and I sat a lot with the DC Circuit, which, in recent years, hasn't needed any assistance because their workload has dropped sufficiently that they can handle it with their existing complement of judges. That's with their existing complement, without all those now being proposed for appointment to that court.

It was fun for several different reasons. One, getting to meet other judges. Two, getting to see how other circuits operate and how they operate differently than we do or from each other, and three, getting a broader mix of cases. I found the criminal cases were interesting, and got a lot more administrative law cases that I enjoy and so on. So I found it interesting. It is sort of tiring in the sense that I found that if I went, I generally did not go very exciting places. But even if you go to an exciting place, it's difficult to take much time to do things. You go out and have dinner at nice restaurants, but other than that, I found that I spent most of my time working out there. Either getting ready for the next day session or talking about the cases and so on.

ENDNOTES

1 For a fuller discussion of this subject matter, see Mintz & Concepcion Jr., *A History of the Article III Status of the U.S. Court of Appeals for the Federal Circuit*, Journal of the Fed. Cir. Historical Society, vol. 2, pp. 151-163 (2008).

2 Judge Friedman was referring to *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982).