

Rethinking Federal Circuit Jurisdiction

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Nearly thirty years ago, Congress created the Federal Circuit to increase uniformity in patent law and to curb forum shopping in patent cases. Yet patent cases comprise less than 40% of the court's docket. A majority of the court's cases involve narrow aspects of the work of the federal government: veterans benefits, personnel disputes, and government contracts, for example. Over the past three decades, scholars in all fields covered by the Federal Circuit have independently criticized the court. Patent scholars complain about excessive formalism. Government contracts lawyers lament the court's deference to the state. And veterans law experts doubt the wisdom of one specialized court, the Federal Circuit, reviewing another specialized court, the Court of Appeals for Veterans Claims. In this article, I synthesize these varied critiques to theorize an improved jurisdictional structure for the Federal Circuit, one that better serves Congress's ultimate goal in creating the court: promoting innovation.

This is the first article to consider how the Federal Circuit's non-patent jurisdiction influences patent law. By showing how the court's jurisdictional mix can affect innovation, my article fills a gap left by previous studies of the "policy levers" embodied in Federal Circuit case law. I begin by arguing that there is no persuasive rationale for the assortment of tribunals that the court reviews. I revisit the historical record and show that the court's current jurisdiction results from political and structural concerns that, outside the field of patent law, either no longer have salience or had no salience to begin with. Moreover, many of the Federal Circuit's non-patent cases arise under complex regulations and statutes administered by bureaucratic government agencies. These cases require intricate knowledge of narrow and often technical areas of law, discrediting any claim that the court's non-patent jurisdiction helps avoid specialization.

Turning to effects on patent law, I argue that the court's non-patent cases encourage (if not require) a mechanical judicial method, a method far different than the instrumentalist approach better suited for the open-ended Patent Act. Yet, in patent and non-patent cases alike, the court's decisions reflect the same, formalist approach. The specialized nature of the court's non-patent docket, I argue, is an important factor driving the court's inattention to policy in patent law.

I conclude with a potential remedy for the patent-law problems caused by the court's non-patent jurisdiction. I propose narrowing the Federal Circuit's exclusive jurisdiction to all patent cases and all trademark cases, regardless of originating tribunal. After weighing the costs and benefits of continued specialization, I recommend redistributing the remainder of the court's docket to the regional circuits. In place of these cases, I would funnel to the Federal Circuit a cross-section of cases currently appealed only to regional circuits. By exposing Federal Circuit judges to the gamut of issues faced by federal appellate judges, Federal Circuit judges would, I contend, create a patent law that is less formalist, more policy-conscious, and more responsive to innovation needs.

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