

The Federal Circuit: Standing in the Breach

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My work-in-progress relates to the relationship between the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court.

The Federal Courts Improvement Act uniquely specified the Federal Circuit's jurisdiction in terms of subject matter rather than geography. As part of the legislative history of the Act, Congress indicated that it sought to create a single court to hear appeals in patent cases for numerous reasons: to strengthen the U.S. patent system, to foster technological growth and industrial innovation, to make rules applied in patent litigation more predictable, to eliminate forum shopping among regional courts of appeal, and to increase uniformity and reduce uncertainty in substantive patent law. In short, Congress established the Federal Circuit as a specialized court to achieve goals the Supreme Court singularly failed to achieve.

But, as the Supreme Court reminds the Federal Circuit from time to time, the Supreme Court still exists. During the Federal Circuit's early years, the Supreme Court did not grant many petitions for writ of certiorari to the Federal Circuit. In recent years, however, the Court has done so with increasing frequency. Moreover, it fairly consistently has reversed the Federal Circuit in patent cases.

In my article I study how the Federal Circuit has developed patent law over the last thirty years, and how the Supreme Court's supervision of that development has changed over that time period. I assess whether the Federal Circuit, as supervised by the Supreme Court, is succeeding in the goals set for it by Congress. And I defend the radical position that the Federal Circuit's recently exposed bent toward rule-based formalism—an adjudicatory approach roundly criticized by the Supreme Court itself and practically all other previous commentators—reflects not only the expected but also the preferred practice of a specialized court.