Beyond Patents: The Supreme Court’s Evolving Relationship With The Federal Circuit

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Federal Circuit scholars have begun to notice a shift in the way the Supreme Court interacts with the Federal Circuit when it comes to patent questions. These scholars note that in recent years the Supreme Court reviews the Federal Circuit more frequently and more harshly. The Court also criticizes the Federal Circuit for being too formalistic and too eager to expand its jurisdiction. What scholars have failed to note is that these trends are occurring across the entirety of the Federal Circuit’s decisions, and not just with regards to patent questions. This suggests that there is something about the Federal Circuit, and not patents, that is creating tension between the two courts. This article suggests that the Federal Circuit’s exclusive jurisdiction creates a gulf between the Federal Circuit and the rest of the appellate judiciary on all matters, and this gulf has caused changes both in how the Federal Circuit conducts itself and in how other courts perceive it.

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Introduction:
The Federal Circuit is the only federal court of appeals with no regional jurisdiction. Instead, it hears cases based on subject area, such as cases that involve patents, trademark appeals from the Patent and Trademark Office (PTO), military affairs, and government personnel cases. Not surprisingly, as the only non-regional court of appeals, the Federal Circuit has certain idiosyncrasies, both in how it decides cases and in how it is perceived. As Part I shows, numerous scholars have studied the unique relationship between the Federal Circuit and the Supreme Court within the patent context, and have noted a tension between these two courts. These scholars note that the Supreme Court in recent years is reviewing the Federal Circuit
more frequently and more harshly. They also point out that the Supreme Court follows the Solicitor General’s advice in determining which cases are granted certiorari. Finally, scholars note that the Supreme Court criticizes the Federal Circuit’s patent jurisprudence as being overly formalistic and not sufficiently deferential to other decision-makers, such as agencies and other regional circuit courts.

However, since less than half of the Federal Circuit’s caseload is patent cases, studies looking only at the Federal Circuit’s patent jurisprudence are too narrow. And since the Supreme Court reviews the Federal Circuit’s non-patent decisions in addition to its patent decisions, studies looking only at the Supreme Court interaction with the Federal Circuit’s patent decisions suffer the same problem. This article looks more holistically at the Federal Circuit cases that the Supreme Court reviews.

As Part II demonstrates, many trends identified in the Supreme Court’s review of the Federal Circuit’s patent cases are, in fact, true of the Federal Circuit more broadly. Though not as markedly as in the patent context, the Supreme Court is increasingly reviewing Federal Circuit non-patent cases, and the Supreme Court follows the Solicitor General’s advice in determining which non-patent cases merit certiorari. Moreover, the Supreme Court has been using a harsh tone when it reviews Federal Circuit non-patent cases, and the Court criticizes the Federal Circuit for its applying formalistic rules, and for not granting sufficient deference to other institutions. Thus, the discussions that scholars are having on what about the Federal Circuit’s patent jurisprudence is creating tension with the Supreme Court is misplaced. As a result, these scholars’ conclusions about why patent law creates these tensions between the Federal Circuit and the Supreme Court are simply wrong. The Supreme Court’s relationship with the Federal Circuit’s patent jurisprudence is only a part of the Court’s broader relationship with the Federal Circuit. The proper question therefore is what about the Federal Circuit’s jurisprudence generally causes this tension.

Part III suggests that the Federal Circuit’s exclusive jurisdiction, a feature common to all of the Federal Circuit’s jurisprudence, is

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6 Though I cannot rule out the possibility that the Supreme Court identifies and is frustrated with certain Federal Circuit patent problems, and then assumes the same problems exist elsewhere.
the cause of its problems. In the areas where the Federal Circuit has jurisdiction, such as patent cases, veterans’ appeals, and contract claims against the United States, its jurisdiction is exclusive. That the Federal Circuit does not have to engage with the opinions of its sister courts and that the other circuits do not have to interact with the Federal Circuit’s opinions insulates the Federal Circuit.

This insularity affects the relationship between the Federal Circuit and the Supreme Court in several ways: some from the Supreme Court’s side and some from the Federal Circuit’s. As regards the Supreme Court, almost every sitting justice served on a regional court of appeals before joining the Supreme Court. These justices are therefore familiar with cases—and, by extension, the authors of those cases—that are relevant to regional courts of appeals. However, because of the Federal Circuit’s non-overlapping jurisdiction, regional courts have little reason to study cases that come before the Federal Circuit. Thus, the Supreme Court is less likely to be intimately familiar with the issues that the Federal Circuit regularly sees than it is with issues that other courts decide. This lack of familiarity could lead the Supreme Court to be more prone to dismiss Federal Circuit decisions as wrongheaded and to believe generalizations about the judges of the Federal Circuit—generalizations like the Federal Circuit is too formalistic or insufficiently deferential. Additionally, since the Federal Circuit has exclusive jurisdiction over certain questions, the Federal Circuit is unlikely to be involved in circuit splits, and therefore the Supreme Court must use other proxies to find cases to review.

From the Federal Circuit’s perspective, the fact that it has nationwide jurisdiction over the cases it decides means that it has the ability to create uniformity. Thus, the Federal Circuit may be more likely to try and create a clear, formal rule that will be readily replicated, since this can bring uniformity to an entire area of law. A regional court of appeals, by contrast, can only bring uniformity to one circuit. The Federal Circuit also is subject to less scrutiny if it creates a formal rule, since its decisions will not be criticized by its sister circuits.

Finally, since the Federal Circuit has exclusive jurisdiction over many areas, if it attempts to expand its jurisdiction, it is less likely to meet with resistance than if another court of appeals did.

Part IV points to one trend in Supreme Court review of the Federal Circuit that scholars have identified that seems patent-specific. Scholars note that when the Supreme Court reviews the Federal Circuit on patent questions it often modifies the decision against the patentee. Of course, since only patent cases involve patents, at

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7 See 28 U.S.C. § 1295 (defining the Federal Circuit’s jurisdiction). Only in cases which raise multiple issues, some of which are within the Federal Circuit’s jurisdiction and others which are not, does the Federal Circuit rule on a legal question that other courts of appeals also decide. See id.


some level this trend is patent specific. Yet even this reflects a broader trend in which the Federal Circuit is biased (relative to the Supreme Court) in its decisions. In patent cases the Federal Circuit is more pro-patentee than the Supreme Court. In non-patent cases, meanwhile, it has gone unnoticed that the Federal Circuit is also pro-claimant than the Supreme Court. This article contends that the Federal Circuit’s biases relative to the Supreme Court, both in patent and non-patent cases, are also a result of its insularity. Specifically, as a court of limited jurisdiction, the Federal Circuit sees patent cases and cases where claims are brought against the United States, but not their counterparts, antitrust cases and cases where the government is helping individual citizens. This may lead the Federal Circuit to overweight the importance of patent monopolies and a more liberal jurisprudence regarding claims against the United States. Additionally, as a court of limited jurisdiction, the Federal Circuit is more subject to capture.

The upshot is that when considering Federal Circuit trends and the Supreme Court’s responses to these trends, scholars must look beyond patent cases. Some trends may be unique to patents, but others clearly are not. Only by considering the broader Federal Circuit jurisprudence is it possible to evaluate which category a specific trend falls into. And only by recognizing whether a trend is patent specific or not can scholars intelligently consider what factors cause the trend.

I. Supreme Court Review of Federal Circuit Patent Decisions

In recent years, scholars, including Federal Circuit judges, have noted that the Supreme Court is increasing its scrutiny of Federal Circuit patent decisions. The Supreme Court reviews more cases, many of which do not arise from circuit splits. Scholars have also observed that in reviewing the Federal Circuit’s patent decisions the Supreme Court has adopted a harsher tone. Finally, they point to the fact that the Supreme Court is chastising the Federal Circuit for applying rigid rules and for expanding its jurisdiction.

In this part, I summarize these scholars’ observations and use my own review of the case law and data to confirm that these trends do indeed exist: the Supreme Court does review patent cases more; it relies less on circuit splits; it reviews Federal Circuit decisions more harshly; and it criticizes the Federal Circuit as too formalistic and too eager to expand its jurisdiction. However, as Part II will show, none of these trends
are linked specifically to the Federal Circuit’s treatment of patents.

**a. Frequent Review**

There are a number of ways to prove scholars’ assertions that the Supreme Court is increasing its review of Federal Circuit patent cases, but the simplest is to plot the number of Federal Circuit patent cases that the Supreme Court reviews against the year. The best fit is an upward sloping line, indicating that the rate of Supreme Court review of these cases is rising. This increase in review of Federal Circuit patent cases is occurring while the Supreme Court’s docket during this period has almost halved.\(^\text{18}\)

**b. Use of the Solicitor General**

Scholars suggest that one cause for the Supreme Court’s timidity in reviewing the Federal Circuit in the early years was that the Supreme Court no longer had circuit splits to guide it in finding good cases to review.\(^\text{19}\) Indeed, of the twenty-eight Federal Circuit patent cases that the Supreme Court has reviewed\(^\text{20}\) only eight were the subject of circuit splits (29%), which is no-


\(^\text{17}\) \(y = 0.071x – 140\) (where \(y = \) number of cases heard and \(x = \) year).

\(^\text{18}\) The number of federal courts of appeals cases that the Supreme Court has reviewed is as follows: 1983-118; 1984-123; 1985-128; 1986-110; 1987-105; 1988-104; 1989-106; 1990-93; 1991-96; 1992-79; 1993-95; 1994-66; 1995-75; 1996-67; 1997-78; 1998-80; 1999-64; 2000-66; 2001-68; 2002-74; 2003-54; 2004-71; 2005-69; 2006-60; 2007-70; 2008-58; 2009-66; 2010-73; 2011-74. The docket size was taken from http://scd.wustl.edu/\(\text{infra}\)/, searching for all decision types except decrees that originated at federal courts of appeals, the number of Federal Circuit cases was added (the database for some reason excludes those cases), and this data was analyzed to obtain the number of cases per calendar year. If the year is plotted as not the number of cases the Supreme Court hears, but as a percentage of its docket, then \(y = 0.11x – 220\) (where \(y = \) the percentage of the docket and \(x = \) year).


\(^\text{20}\) See supra, note 16. This time I exclude Lockwood, because I do not have a Supreme Court opinion to identify whether there was a circuit split below, so I could not have counted it as an example of a patent case which came without a lower circuit split. For what it’s worth, however, Judge Nies mentions a circuit split. In re Lockwood, 50 F.3d 966, 986 (1986) (Nies, J., dissenting from rehearing en banc).

tably less than the, admittedly uncertain, percentage of circuit splits in the Supreme Court’s general docket.22

Although the Supreme Court cannot easily find important cases via circuit splits, it has other proxies. As John Duffy shows, the Supreme Court looks to the Solicitor General for advice on when to grant certiorari, and often follows the Solicitor General’s advice on the merits of the case.23

c. Harsh Review

Scholars have also pointed to the harsh tone of the Supreme Court’s review of modern Federal Circuit’s patent cases.24 This is especially noteworthy when contrasted with the Supreme Court’s earlier opinions reviewing the Federal Circuit, which were more respectful. Thus, in the 1993 when the Supreme Court decided Cardinal Chemical Co. v. Morton Intern, while reversing the Federal Circuit, the Supreme Court made sure to explain how the Federal Circuit reasonably came to its conclusion.25 Other early cases also exhibit a collegial tone.26

On the other hand, in 2007, when the Supreme Court decided KSR, the Court declared that the Federal Circuit’s decision conflicted with “over a half century” of Supreme Court precedent.27 Then it proceeded to enumerate four reasons why the Federal Circuit’s primary holding was wrong and one explaining why the Federal Circuit’s alternative holding was.28 Finally, the KSR Court called the Federal Circuit’s approach “rigid” six times.29 Again, this is just one example of recent cases adopting a harsh tone.30

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22 See, e.g., David R. Stras, Book Review Essay: The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 Tex. L. Rev. 947, 983 (2007) (stating that the percentage of grants of certiorari that involved circuit splits as compared to total cases from 2003 to 2005 was 59.8%, and citing Arthur D. Hellman, The Shrunked Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403, 416, that the average percentage from 1993 to 1995 was 68.7% and between 1983 and 1985 was 44.5%). Using the Supreme Court Database categorization (which only to the explicit reason that the Supreme Court gives for granting certiorari), 7.4% of the Federal Circuit patent cases taken were due to a lower court split (i.e. circuit to circuit, circuit to state, state to state), while the average among all Supreme Court cases since 1983 (up to July 2011) was 30.5%. See The Supreme Court Database, http://scdb.wustl.edu/ (last accessed Apr. 25, 2012).


28 Id. at 420-21; 426-27.

29 See id. at 415, 419 (two times), 421, 422, 428.

30 See, e.g., Eisai Co. Ltd. v. Teva Pharmaceuticals USA, Inc. ex rel. Gate, 131 S.Ct. 2991 (2011) (granting, certiorari, vacating and remanding a Federal Circuit case with instructions citing a 1950 Supreme Court case); Bilski v. Kappos, 130 S.Ct. 3218, 3226 (2010) (suggesting that the Federal Circuit thought it had “carte blanche to impose other limitations that are inconsistent with the text and the statute’s purpose and design”); id. at 3231 (“Today, the Court once again declines to impose limitations on the Patent Act that are inconsistent with the Act’s text”) (emphasis added); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722, 739 (2002) (“The Court of Appeals ignored the guidance of [the Supreme Court’s decision in] Warner-Jenkinson, which instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community”).
**d. Critique of Formalism**

Scholars, practitioners, and even a number of Federal Circuit judges have pointed to the Supreme Court’s repeated criticism of the Federal Circuit for applying bright-line rules in patent cases instead of looking to more case-specific factors. Though there are many cases where the Supreme Court criticizes the Federal Circuit for being too rigid, for brevity’s sake, I will discuss only two. A prime example is the 2007 case, KSR, where the Supreme Court called the Federal Circuit’s approach “rigid” six times. Similarly, in the 2006 eBay case, the Supreme Court declared that the Federal Circuit “erred in its categorical grant” of injunctions for patent infringement, and that instead the court should apply a balancing test.

**e. Reversals for Lack of Deference**

Finally, one scholar has noted that Supreme Court reviews Federal Circuit patent cases “involv[ing] disputes over allocation of power between the Federal Circuit and other institutions,” and the Supreme Court reverses the Federal Circuit for arrogating power. Thus, in Dennison, the Supreme Court reversed the Federal Circuit because it might not have granted sufficient deference to the district court opinion. In Dickinson the Supreme Court reversed the Federal Circuit for not granting sufficient deference to the PTO. And in Holmes the Supreme Court held that the Federal Circuit had ruled on a case that properly belonged in a regional circuit.

**II. Supreme Court Review of Federal Circuit Non-Patent Decisions**

Scholars discuss the above trends as if they were unique to Federal Circuit patent decisions. The truth is, however, that these trends exist across the Federal Circuit’s jurisprudence. Analyzing the entirety of the Supreme Court’s review of the Federal Circuit shows that the Supreme Court has increased its review...
of non-patent Federal Circuit cases as well, again relying on the Solicitor General, and the Supreme Court has used harsher language in its review of these cases. The Supreme Court also has been criticizing the Federal Circuit for applying overly rigid rules in its non-patent cases, and has rebuked it for expanding its jurisdiction.

**a. Frequent Review**

Plotting the number of Federal Circuit patent cases that the Supreme Court reviews against the year, shows that the Supreme Court has been hearing an increasing number of Federal Circuit non-patent cases.\(^41\) Again, this pattern has emerged at the same time that the Supreme Court’s total docket during this period has almost halved.\(^42\)

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42 See supra note 18. If the review is plotted not as the number of cases the Supreme Court hears, but as a percentage of its docket, then \( y = 0.074x - 150 \) (where \( y \) is the percentage of the docket and \( x \) is year).

43 See supra, note 41.


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**b. Use of the Solicitor General**

As in the patent context, the Supreme Court’s review of Federal Circuit non-patent cases does not rely on circuit splits as much as the Court’s general docket. Of the forty-two non-patent Federal Circuit cases that the Supreme Court reviewed, only eleven came from a circuit split (26%).\(^44\)

Again, the lack of circuit splits has not meant that the Supreme Court cannot find cases to review. As in the case of patents, the Supreme Court looks to the Solicitor General’s advice for when to grant certiorari. Of the forty-two non-patent Federal Circuit cases the Supreme Court has reviewed, twenty-nine of them (69%) were appeals by the government—cases in which the Solicitor General requested certiorari.\(^45\)

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Footnote 45 continues on next page
While in patent cases the Solicitor General’s sway over the Supreme Court is not so troubling—after all, the Solicitor General is intervening as a neutral third party—in cases where the United States is a party (as is the case in the Federal Circuit’s non-patent jurisprudence) this is more problematic. The fact that the Solicitor General has the Supreme Court’s ear means that decisions against the government (where the Solicitor General might request a grant of certiorari) are much more likely to be successfully appealed than decisions in favor of the government.47

## c. Harsh Review

The Supreme Court’s tone in reviewing Federal Circuit non-patent cases has also become harsher—indeed, to my eye it seems harsher even than the Supreme Court’s language in reviewing patent cases. As in the case of review of the Federal Circuit’s patent jurisprudence, it is difficult to quantify the harsher tone, so again I will use case studies. The Supreme Court cases reviewing the early Federal Circuit cases were, for the most part, neutral. However, in recent years the Supreme Court has begun sharply criticizing the

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Footnote 45 continues from previous page


46 This is not to say that the Supreme Court’s strong reliance on the Solicitor General in its role of amicus curiae is unobjectionable. See, e.g., Omari B. Simmons, Picking Friends From the Crowd: Amicus Participation as Political Symbolism, 42 CONN. L. REV. 185, 212 (2009); David A. Strauss, The Solicitor General and the Interests of the United States, 61 L. & CONTEMP. PROBS. 165, 170-74 (1998).

47 See also Margaret H. Lemos, The Solicitor General as Mediator Between Court and Agency, 2009 Mich. St. L. Rev. 185, 189 n.14 (citing sources that on appeal the Solicitor General is likely to win).
Federal Circuit. To be clear, not every recent case is harsh, but some are.

The central case study for this section is U.S. v. Navajo Nation (2009). This section first presents the case the way the Supreme Court presented the case, and then shows how the Supreme Court’s presentation unfairly portrayed the Federal Circuit.

The Navajo Tribe permitted Peabody Coal Company to mine coal on its land. In 1984, the Tribe wanted to raise the price it charged Peabody, which, under the Indian Mineral Leasing Act (IMLA) required approval by the Secretary of Interior. The Secretary met privately with Peabody and ultimately stalled approval of the new rate, effectively forcing the Navajo to settle with Peabody for a lower rate. When the Navajo discovered this secret meeting, they sued the U.S. government for breach of trust in the Court of Federal Claims. The Court of Federal Claims held that the Navajo had not linked the breach of duty to a statutory right, and therefore granted summary judgment to the government.

The Federal Circuit reversed, holding that the IMLA created a cause of action. The Supreme Court in Navajo I disagreed about the reach of the IMLA and “remanded for further proceedings consistent with this opinion.”

On remand, the Tribe tried to create a statutory basis for its claim based on a “network” of statutes (neer quotes in the Supreme Court’s opinion). The Court of Federal Claims again ruled for the government, but the Federal Circuit again reversed. The Supreme Court, in Navajo II, again reversed the Federal Circuit, but this time it added some bite.

The Court declared that “our reasoning in Navajo I—in particular, our emphasis on the need for courts to train on specific rights-creating or duty-imposing statutory or regulatory prescriptions—left no room for that result based on the sources of law that the Court of Appeals relied upon.” To make sure the Federal Circuit got the message, the Supreme Court ended in patronizing fashion, reiterating what the Federal Circuit had done wrong and leaving detailed instructions on how to proceed: “None of the sources of law cited by the Federal Circuit and relied upon by the Tribe provides any more sound a basis for its breach-of-trust lawsuit against the Federal Government than those we analyzed in Navajo I. This case is at an end. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to affirm the Court of Federal Claims’ dismissal of the Tribe’s complaint.”

49 Id. at 291.
50 Id. at 291-92.
51 Id. at 292.
52 Id.
53 Id.
54 Id.
55 Id. at 294 (citing U.S. v. Navajo Nation, 537 U.S. 488, 514 (2003)).
56 Id. at 295 (“On remand, the Tribe argued that even if its suit could not be maintained on the basis of the IMLA, the IMDA, or § 399, a “network” of other statutes, treaties, and regulations could provide the basis for its claims.”). That the Supreme Court meant the quotes derogatively is demonstrated by the presence of quotes without a cite.
57 Id.
58 Id. at 296 (internal citations removed).
59 Id. at 302.
Reading only the *Navajo II* opinion, it seems the Federal Circuit behaved like an intransigent child, trying to wiggle past the Supreme Court’s first reversal in *Navajo I*, so that it could obtain the same result again. However, when read in context, it is the Supreme Court’s *Navajo II* opinion that is jarring because of the facts it omits.

First, though the sneer quotes in *Navajo II* suggest that the “network” theory the Federal Circuit accepted is a ridiculous cause of action, *Navajo I* explicitly endorsed the notion that “a network of other statutes and regulations [can] impose judicially enforceable fiduciary duties.” Not surprisingly, when the Federal Circuit was considering the case after *Navajo I*, it looked to precisely the language in *Navajo I* that suggested a network framework was still a viable way to show an enforceable fiduciary duty. The Federal Circuit was following explicit guidance laid in the Supreme Court’s *Navajo I* opinion, and yet, in *Navajo II*, the Supreme Court mocked the Federal Circuit for such a theory.

Second, *Navajo II* implies that the Federal Circuit was wrong to even reconsider the Navajo claims under other statutes. *Navajo II* fails to mention the procedural history of two cases that *Navajo I* called “pathmaking precedents on the question,” *U.S. v. Mitchell* (1980) and *U.S. v. Mitchell* (1983), where the Supreme Court expressly endorsed just such an approach. In *Mitchell I*, the Court of Claims (one of the two courts that four years later merged into the Federal Circuit) held that an Indian tribe could sue the government under the General Allotment Act for breach of its fiduciary duty, but the Supreme Court reversed, “remand[ing] for further proceedings consistent with this opinion.” The Court explicitly stated that the Court of Claims could consider other statutes. On remand, the Court of Claims again held that the tribe could sue the U.S., this time under other statutes, and the Supreme Court in *Mitchell II* affirmed. Not surprisingly, the Federal Circuit, in its opinion after *Navajo I*, explicitly pointed to *Mitchell II* as a basis for reconsidering the tribe’s claim using other statutes.

Third, *Navajo II* makes it seem unclear whether the government ever breached its fiduciary duty. Discussing the procedural history before the Supreme Court’s first decision, the Court says the Tribe “claim[ed],” “the Tribe alleged,” and “the complaint charged” a breach. It then summarizes the Court of Federal Claims first opinion as denying that there existed a cause of action. The Court then says that the Federal Circuit thought there was a cause of action, and the Federal Circuit,

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61 *Navajo Nation* v. U.S., 347 F.3d 1327 (Fed. Cir. 2003) (the case that remanded to the Court of Federal Claims); *Navajo Nation* v. U.S., 501 F.3d 1327 (Fed. Cir. 2007) (the case considering the Court of Federal Claims’ decision).
66 Id. at 546 n.7.
67 *Mitchell II*, 463 U.S. at 206.
70 Id. at 292.
“Finding that the Government had in fact violated its obligations reinstated the
suit.” The Supreme Court then describes
its holding in Navajo I as reversing because
it found no enforceable duty.\(^7^2\)

The Supreme Court misrepresents the
procedural history. The Court of Federal
Claims, before Navajo I, was very clear that
the government breached its fiduciary duties. It declared: “Let there be no mistake.
Notwithstanding the formal outcome of
this decision, we find that the Secretary has
indeed breached [its] basic fiduciary duties.”\(^7^3\) The Federal Circuit quoted this
language in its first opinion,\(^7^4\) and the
Supreme Court in Navajo I was also clear
on this point. It declared: “In no uncertain
terms, [the Court of Federal Claims] found
that the Government owed general fiduciary
duties to the Tribe, which, in its view,
the Secretary had flagrantly dishonored by
acting in the best interests of Peabody
rather than the Tribe.”\(^7^5\) By fudging the ear-
lier findings, Navajo II hid the fact that it
was clear that the government breached its
fiduciary duty.

Another example of the Supreme
Court’s recent harsh tone in reviewing the
Federal Circuit is Clintwood Elkhorn Min.
Co. (2008), where the Supreme Court was
deciding whether a person could bring a
claim under the Tucker Act for violations
of the Export Clause of the Constitution.\(^7^6\)
The Federal Circuit held that claims for vi-
olations of the Export Clause could be
brought under the Tucker Act’s six year
statute of limitations (as opposed to the
Internal Revenue Code’s shorter limit).\(^7^7\)
The Supreme Court reversed stating that
the “outcome here is clear.”\(^7^8\) It cited
the language of the Internal Revenue Code
that “[n]o suit . . . shall be maintained in
any court for the recovery of any internal
revenue tax alleged to have been errone-
ously or illegally assessed or collected,
or of any penalty claimed to have been col-
lected without authority, or of any sum al-
leged to have been excessive or in any
manner wrongfully collected, until a claim
for refund . . . has been duly filed with’ the
IRS.” (emphasis in the Supreme Court
opinion).\(^7^9\) The Court concluded: “Five
‘any’s’ in one sentence and it begins to
seem that Congress meant the statute to
have expansive reach.”\(^8^0\) As noted before,
there are other examples of a hostile tone
in the Supreme Court’s review of the Fed-
eral Circuit.\(^8^1\)

d. Critique of Formalism

There are a number of recent non-patent
cases where the Supreme Court stated that

\(^7^1\) Id. (emphasis added).
\(^7^2\) Id. at 294.
\(^7^4\) Navajo Nation v. U.S., 263 F.3d 1325, 1322 (Fed.Cir. 2001).
\(^7^7\) Id. at 6-7.
\(^7^8\) Id. at 7.
\(^7^9\) Id. (brackets added in the Supreme Court opinion).
\(^8^0\) Id.
\(^8^1\) See, e.g., U.S. v. Jicarilla Apache Nation, 131 S.Ct. 2313, 2322 (2011) (“Not until the decision below had a federal appellate court
held the exception to apply to the United States as trustee for the Indian tribes”); Shinseki v. Sanders, 556 U.S. 396, 412 (2009) (“It is the
Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans’ cases to enable it to make
[generalizations about what constitutes harmless error]”).
the Federal Circuit took an overly rigid approach. For the sake of brevity, I will only discuss two: Shinseki v. Sanders\(^82\) and Henderson v. Shinseki.\(^83\)

Woodrow Sanders, a veteran of World War II, claimed that a bazooka exploded near his face in 1944, later causing blindness in his right eye.\(^84\) In 1990 he asked the Department of Veterans Affairs (“VA”) to consider his claim for disability benefits.\(^85\) The VA (and formally its Secretary, now Shinseki) denied Sanders’ claim.\(^86\) Sanders appealed to the Veterans Court, claiming that the VA’s notice letter telling him that he needed further information to substantiate his claim did not tell him what information he would have to provide (as opposed to what the VA would provide).\(^87\) The Veterans Court found these errors harmless and affirmed the VA’s decision.\(^88\)

On appeal, the Federal Circuit reversed, holding that the Veterans Court should presume that a notice error is “prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication.”\(^89\) The Supreme Court reversed.\(^90\) It criticized the Federal Circuit’s framework as “complex, rigid, and mandatory.”\(^91\) In determining whether an error was harmless, courts should apply “case-specific” judgments and not “mandatory presumptions and rigid rules.”\(^92\) The Court further suggested that the Federal Circuit’s approach created an “impregnable citadel of technicality.”\(^93\)

In Henderson v. Shinseki, the Supreme Court likewise reversed the Federal Circuit for being too formalistic.\(^94\) Henderson, a veteran of the Korean War, was denied benefits and filed an appeal 135 days after the Board of Veteran’s Appeals denied his claim.\(^95\) The statute of limitations for such an appeal was 120 days.\(^96\) Though there were equitable reasons to excuse Henderson’s late filing, the Federal Circuit held that equitable tolling was not permitted for the 120 day requirement, because the requirement was jurisdictional.\(^97\) The Supreme Court rejected the Federal Circuit’s “[r]igid jurisdictional treatment of the 120–day period for filing a notice of appeal,” and held that the courts below should have made a case-specific determination whether the late appeal should be considered.\(^98\) There are numerous other examples where the Supreme Court rejected

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\(^84\) Sanders, 556 U.S. at 401-02.
\(^85\) Id. at 402.
\(^86\) Id.
\(^87\) Id. at 403.
\(^88\) Id.
\(^89\) Id. (citing Sanders v. Nicholson, 487 F.3d 881, 889 (Fed.Cir. 2007)).
\(^90\) Id. at 414.
\(^92\) Sanders, 556 U.S. at 407.
\(^93\) Id.
\(^95\) Id. at 1201.
\(^96\) Id. at 1200 (citing 38 U.S.C. § 7266(a)).
\(^97\) Id. at 1202.
\(^98\) Id. at 1206. To be fair, the Federal Circuit used to apply equitable tolling, but thought the law was changed by the Supreme Court’s decision in Boelens v. Russell, 551 U.S. 205 (2007). See Henderson, 589 F.3d 1201, 1203 (2009).
what it considered the Federal Circuit’s formalistic decisions.

To be sure, some times the Supreme Court applies a formal rule to overrule a more case-specific Federal Circuit rule. This happens both in the patent and non-patent contexts. But in recent years the trend is that the Supreme Court finds the Federal Circuit too formal.

e. Reversals for Lack of Deference

There are numerous cases where the Supreme Court reversed the Federal Circuit for expanding its jurisdiction. The Supreme Court chastised the Federal Circuit three times for not granting a reviewed agency Chevron deference, once for not granting Skidmore deference, once for not limiting its review to determining whether the agency acted in an arbitrary or capricious manner, twice for reviewing decisions it was not entitled to review, and once for deciding a case which was properly before another court.

In sum, a number of trends that scholars ascribe to the Federal Circuit’s patent j
risprudence are true of the entirety of the court’s jurisprudence.

III. Insulation and its Discontents

After first establishing that the Federal Circuit is an insular court, this Part suggests that this insularity is a cause for the Federal Circuit’s tension with the Supreme Court.\(^{108}\)

a. Insulation

The Federal Circuit’s jurisdiction is limited and exclusive. The Federal Circuit is the only court of appeals that hears, among other issues, patent cases, veterans’ appeals, and contract claims against the United States.\(^{109}\) But beyond its few enumerated areas of jurisdiction, the Federal Circuit does not review district court decisions. That the Federal Circuit does not have to engage with the opinions of its sister courts and that the other circuits do not have to interact with the Federal Circuit’s opinions insulates the Federal Circuit.

Relatedly, with only one exception, judges of the Federal Circuit have never come from a generalist court. The original Federal Circuit judges came from the Court of Customs and Patent Appeals and the Court of Claims. Of the subsequent judges who have prior judicial experience, two came from the U.S. Claims Court and one from the U.S. Court of International Trade.\(^{111}\) Appeals from these courts go to the Federal Circuit, so these courts are not part of the regional judicial system. Only Judge Kathleen O’Malley served as a judge on a regular regional district court before coming to the Federal Circuit.\(^{112}\)

b. Effects of Insulation

The Federal Circuit’s insularity may well be the cause of its tense relationship with the Supreme Court.\(^{113}\) Because of the Federal Circuit’s insularity, Supreme Court justices are less familiar with the judges and the issues that the Federal Circuit regularly faces. Additionally, the insularity may cause the Federal Circuit to be more formalistic and more prone to arrogating power. This Part will detail how the various trends mentioned in Parts I and II can, to a degree, be attributed to insularity.

1. Lack of Circuit Splits

The most obvious effect of the Federal Circuit’s insularity is that since circuit splits are rare—because of the Federal

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\(^{108}\) Importantly, this Part assumes that the Supreme Court’s critiques of the Federal Circuit are warranted. To the extent that scholars have evaluated the jurisprudence of the Federal Circuit, independent of the relationship with the Supreme Court, they have generally confirmed the Supreme Court’s critiques. See infra, Notes 155-157.


\(^{110}\) These are Randall Rader and Haldane Mayer. See United States Court of Appeals for the Federal Circuit, Judges http://www.cafc.uscourts.gov/judges.


\(^{113}\) Cf. Lucas S. Osborn, Instrumentalism at the Federal Circuit, 56 56 St. Louis U. L.J. 419, 457 (2012) (“An additional contributing explanation for the Federal Circuit’s lack of policy discussion may relate to its status as the sole appellate court for patent appeals, a fact that has received criticism of late. As the court is not ‘competing’ with other circuits for influence, it may feel less of a need to explicate policy rationales. Essentially, the only court the Federal Circuit must persuade (if it feels the desire to try to persuade) is the Supreme Court, and entering into a policy debate with a superior court can be fraught with awkwardness. Moreover, Supreme Court review is relatively rare, and may not be a strong motivator.”).
Circuit’s exclusive jurisdiction over the areas of law it decides—the Supreme Court cannot look to circuit splits to identify cases that should be reviewed. Instead, as noted before the Supreme Court looks to the Solicitor General for advice on when to grant certiorari.

2. Lack of Familiarity with the Federal Circuit’s Judges and Areas of Law

Additionally, the lack of overlap between the jurisdiction of the Federal Circuit and the regional circuits creates a situation where the regional judges are not as familiar with the Federal Circuit judges or with the issues they face. This is in notable contrast to the Federal Circuit’s predecessor courts, the Court of Customs and Patent Appeals and the United States Court of Claims that shared jurisdiction with the regional circuits. The judges on the Federal Circuit’s predecessor court were, therefore, better known in the general regional circuits. Indeed, two of the judges who transferred to the Federal Circuit from the Court of Customs and Patent Appeals, Judges Howard Markey and Jack Miller, have the rare (and perhaps exclusive) distinction of having sat by designation and written opinions for every Federal court of appeals.114 These original Federal Circuit judges were well known to the regional court of appeals’ judges and, by extension, to those future Supreme Court justices who came from the courts of appeals. It is therefore no surprise that in both patent and non-patent cases the Supreme Court has cited the original Federal Circuit judges by name, a sign of respect,115 more than twice as often as the Federal Circuit judges appointed since then.116

By extension, in the early years, it makes sense that the Supreme Court was more willing to trust the Federal Circuit to handle cases correctly, and, even where the Supreme Court disagreed, it would reverse the Federal Circuit gently. As time progressed, and the Supreme Court became less familiar with the Federal Circuit judges, the Court’s level of trust and politeness decreased.


116 On average, the original Federal Circuit judges have been cited by name 3.0 times (median 2), while the judges appointed since then have been cited 1.2 times (median 0). The number of times they each were cited by name is as follows: Laramore-2 (2 non-patent); Skelton-2 (2 non-patent); Almond-4; Cowen-0; Rich-8 (1 non-patent; 7 patent); Nichols-7 (6 non-patent; 1 patent); Kashiuwa-1 (1 non-patent); Davis-8 (8 non-patent); Bennett-2 (1 non-patent; 1 patent); Friedman-2 (2 non-patent); Miller-0; Smith-1 (1 non-patent); Markey-6 (3 non-patent; 3 patent); Baldwin-1 (1 patent); Nies-5 (1 non-patent; 4 patent); Newman-5 (1 non-patent; 4 patent); Bissell-0; Archer-0; Mayer-5 (4 non-patent; 1 patent); Michael-3 (3 patent); Plager-3 (2 non-patent; 1 patent); Lourie-1 (1 non-patent); Clevenger-0; Rader-2 (2 patent); Schall-1 (1 non-patent); Bryson-1 (1 patent); Gajarsa-0; Linn-0; Dyk-2 (1 non-patent; 1 patent); Flook-0; Moore-0; O’Malley-0; Wallach-0; Reyna-0.
3. Arrogation of Power

Professor John Golden captured an important insight in noting that the current relationship between the Supreme Court and the Federal Circuit is reminiscent of the relationship between the Supreme Court and the D.C. Circuit in the 1970s and 1980s. In the 1960s and 1970s the D.C. Circuit changed from being primarily a regional court of appeals to being a semi-specialized court—dealing with agency cases—in many ways like the Federal Circuit today. In the 1970s and 1980s the D.C. Circuit was the subject of “feroci[ous]” Supreme Court review. As an example, Golden points to Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., “one of the harshest tongue lashings in [the D.C. Circuit’s] history.” Golden limits the analogy to the fact that the Supreme Court sharply rebuked both the D.C. Circuit of the 1970s and 1980s and the Federal Circuit of today.

Golden, however, does not take the analogy far enough. Vermont Yankee is not only relevant to the Federal Circuit as an example of the Supreme Court harshly criticizing a recently specialized court. The Supreme Court in Vermont Yankee and other cases of that era criticized the D.C. Circuit harshly for exceeding the appropriate boundaries of judicial review. As then Professor Antonin Scalia noted, the D.C. Circuit had been intruding on agency’s freedoms for more than a decade before Vermont Yankee by imposing procedural restrictions on agencies. These D.C. Circuit opinions were “clearly contrary to the tenor of the Supreme Court decisions in the field.” The D.C. Circuit’s approach of

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118 See Christopher P. Banks, Judicial Politics in the D.C. Circuit 26-34 (1999) (attributing this to two factors: first, in 1970 Congress removed the D.C. Circuit’s jurisdiction over local criminal cases, so they focused their energy on agency matters, and second, mainly between 1970 and 1975, Congress passed a number of laws requiring agency action and allowing for private suits, which often happened in the D.C. Circuit).
119 See id. at 554-55 (citing sources).
120 Id. at 553.
122 Golden, supra note X at 562 (citing Jeffrey Brandon Morris, Calmly to Pose the Scales of Justice: A History of the Courts of the District of Columbia Circuit 302 (2001)).
123 Id.
124 Indeed, for Golden’s purposes Vermont Yankee’s relevance is tenuous. The D.C. Circuit, as a court, is the oldest circuit court. See John G. Roberts, What Makes the D.C. Circuit Different? A Historical View, 92 VA. L. REV. 375, 377 (2006). It was only new as an agency court. Thus, harsh as the Supreme Court review may have been, it never seriously undermined the D.C. Circuit’s stature. The Federal Circuit, by contrast, is a new court that has always been specialized. It therefore may face more serious legitimacy challenges.
127 Scalia, supra note 126, at 359. See id. at 360-62 (giving examples).
coopting agencies authority was likely a power-play, enabled by the new jurisdictional questions posed by the creation of a specialized court and by the fact that the D.C. Circuit was virtually the only court of appeals to review agency decisions.\textsuperscript{128} It therefore did not need to fear review by its sister circuits, and review by the Supreme Court is always rare (though, in the end, Supreme Court review did occur).

The Federal Circuit in recent years has followed the D.C. Circuit’s approach. As a new and specialized court, the Federal Circuit’s jurisdiction is unclear, and it is virtually unchecked by other circuits. And like with all courts of appeals, Supreme Court review is rare.\textsuperscript{129} The Federal Circuit has, consequently, attempted to minimize the deference it needs to pay lower decision makers (and sometimes its sister courts), as a way of expanding its own power. And as with the D.C. Circuit in the 1970s, the Supreme Court has been pushing back against this power-grab.

4. Formalism and Perceptions of Formalism
The Supreme Court’s claim that the Federal Circuit is prone to formalism can be attributed either to the Supreme Court’s lack of familiarity with the areas of the Federal Circuit’s jurisdiction and to the Federal Circuit itself.

Since the Supreme Court is not as familiar with the areas of law that the Federal Circuit deals with as it is with other areas, what the Supreme Court considers an overly formalistic approach, may, in fact, be a very reasonable way of handling the dozens of cases that raise the same issue. For instance, in \textit{Bilski v. Kappos} the Supreme Court rejected the Federal Circuit’s test for patentable subject matter.\textsuperscript{130} The Court declared: “Rather than adopting categorical rules that might have wide-ranging and unforeseen impact, the Court resolves the case narrowly.”\textsuperscript{131} If the question of patentable subject matter comes up only infrequently, then the Supreme Court is likely right that a categorical rule is unnecessary, and, moreover, may have “unforeseen impact.” On the other hand, if the question of patentable subject matter comes up frequently, and it does,\textsuperscript{132} then a rule that is easier to apply and more reproducible becomes far more valuable. Indeed, the Supreme Court’s “narrow” holding in \textit{Bilski} created sufficient confusion that the Supreme Court has since needed to revisit the question of patentable subject matter.\textsuperscript{133} It is possible that the Supreme Court’s \textit{Bilski} decision was based on an uninformed understanding of the potential fallout from an uncertain doctrine of patentable subject matter.


\textsuperscript{129} Even considering the fact that the Supreme Court reviewed the Federal Circuit more than any other court last term, the Federal Circuit’s rate of review per case heard was 0.64%.

\textsuperscript{130} Bilski v. Kappos, 130 S.Ct. 3218, 3229 (2010).

\textsuperscript{131} Id.


\textsuperscript{133} Mayo Collaborative Services v. Prometheus Laboratories, Inc., 132 S.Ct. 1289 (2012).
Similarly, one factor in deciding whether the Supreme Court’s decision in *Henderson v. Shinseki*—requiring that courts apply equitable tolling to the statute of limitations for appeals from the Veterans Court—was right, is how often people successfully raise such claims. If such claims are rarely raised then there is little burden on the courts in deciding whether to equitably toll the statute of limitations. If such claims are frequently raised but are generally successful, then the cost in judicial time may well be outweighed by the interests of justice that are served by allowing tolling. By contrast, if claims for equitable tolling are frequently raised and generally fail, judicial efficiency would be strongly benefited by a categorical rule preventing such tolling. As it turns out, of the 169 cases in the first seven months of 2012 that the Veterans Court decided a question of equitable tolling, plaintiffs have only prevailed 19 times (11%).

Moreover, the nineteen successful plaintiffs were only guaranteed to have their case heard. They still could lose on the merits. Thus, *Henderson* may well have created more trouble than it was worth. In other words, the Supreme Court’s insulation from the Federal Circuit’s jurisdiction may have caused it to try and avoid bright-line rules where bright-line rules would be preferable.

Separately, it is possible that the Federal Circuit’s insularity indeed causes it to be formalistic. Like any court deciding a case, the Federal Circuit must struggle between applying formal rules and applying case-specific rules. The main advantages of formal rules are that they promote uniformity and help decide cases more efficiently. The main advantage of case-specific rules is that they promote case-specific justice. Rochelle Dreyfuss describes this as a distinction between precision, where the same experiment will lead to the same result (though not necessarily the correct result), and accuracy, where an experiment gives the true answer.

The two factors promoting precise decision-making, uniformity and efficiency, should be particularly appealing to the Federal Circuit. First, unlike regional courts of appeals, because the Federal Circuit has exclusive jurisdiction over the questions of law that it decides, it can create uniformity. Indeed, when creating the Federal Circuit, the House of Representatives explained that the point of granting the Federal Circuit exclusive jurisdiction was to solve the problem of “an unusual number of complex cases in which current

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law lacks uniformity or is inconsistently applied.” Congress’s decision in 1988 to grant the Federal Circuit, and not regional courts, jurisdiction over veterans’ appeals similarly mentioned the advantages of uniformity. And Congress’s recent amendments to the Patent Act, withdrawing regional circuits’ jurisdiction over patent counterclaims, continues to pursue such uniformity. Importantly, the Federal Circuit regularly acknowledges that one consideration in its decisions is the need to create uniformity. On the other hand, even if a regional court of appeals applies a formalistic doctrine, that will only bring uniformity to one specific circuit. Forum shopping among the various circuits will still be a problem. Thus, the Federal Circuit’s exclusive jurisdiction means that if it does create formal rules, those rules are likely to create national uniformity.

The other motivation for formalism is greater efficiency in decision-making. If a doctrine requires case-specific analysis, then the original tribunal, and then the court of appeals, will have to look at each factor. A formalistic doctrine is “inquiry truncating”: only certain factors are considered. Thus, formalistic doctrines make courts’ jobs easier. While all courts have motivation to try and simplify their job, this desire is tempered by (among other things) the potential for being reviewed and critiqued as being too simplistic. The fact that the Federal Circuit’s opinions are rarely subject to scrutiny—other courts don’t decide similar cases, the Supreme Court rarely reviews anything, and lower level adjudicators are bound to apply Federal Circuit law—could also cause it to favor formal rules.

IV. Bias at the Federal Circuit

The goal of this final section is to illustrate the benefit of a more holistic view of the Supreme Court’s relationship with the Federal Circuit. Scholars have noted that when the Supreme Court reviews a Federal Circuit patent decision it tends to take an anti-patentee stance (relative to the Federal Circuit). However, it has gone unnoticed that when the Supreme Court

136 H.R.Rep. No. 97-312 at 20 (1981). This part is discussing the Federal Circuit’s jurisdiction generally, not just the patent aspects. See also U.S. v. Hohri, 482 U.S. 64, 71 (1987) (“A motivating concern of Congress in creating the Federal Circuit was the special need for nationwide uniformity in certain areas of the law”—in that case, discussing the Little Tucker Act).

137 H.R. Rep. 100-963 at 28 (1988) (explaining that the reason for vesting jurisdiction exclusively in the Federal Circuit is because “[t]he committee believes that it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts).

138 See 2011 Amendments to 28 U.S.C.A. § 1295(a)(1). Pub.L. 112-28, § 19(b). This abrogated the Supreme Court’s decision in Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826 (2002) that granted regional circuits jurisdiction over cases where patents were only raised in compulsory counterclaims. Justice Stevens, in concurrence in Holmes, explained that the Court’s decision had the benefit of creating an “occasional conflict” between circuits. Id. at 839. Evidently, Congress thought uniformity in patent law was more important.


140 See Peter Lee, Patent Law and the Two Cultures, 120 Yale L.J. 2, 7 (2010).

reviews Federal Circuit non-patent cases, the Supreme Court tends to take an anti-claimant stance (relative to the Federal Circuit). Analyzing these two trends together suggests that the Federal Circuit may institutionally be prone to bias.

There are many ways to show that the Supreme Court take a more anti-patent stance than the Federal Circuit, but the simplest is just to count cases. Nearly every instance in which the Supreme Court modifies a Federal Circuit decision can be categorized as either pro- or anti-patentee.142 Of the twenty patent cases where the Supreme Court modified the Federal Circuit’s rulings, it modified them in favor of the patentee five times (25%)143 and against the patentee fourteen times (70%).144

Scholars have offered a number of patent specific reasons why the Federal Circuit may be pro-patentee. Jonathan Masur suggests that the Federal Circuit’s jurisdiction over the United States Patent and Trademark Office (“PTO”) causes it to take a pro-patentee stand, since appeals from the PTO always claim that more patents should be granted (because the PTO will not appeal its own grant of a patent). Thus, in relation to the PTO, the Federal Circuit is a one-way ratchet: it can only decide to extend patentability, never to withdraw.145 William Landes and Richard Posner suggest that the patent bar puts more effort into exerting influence over the appointment of Federal Circuit judges, who hear all the patent cases, than they do in generalized courts.146 Moreover, the Federal Circuit, entrusted with protecting the patent system, is more likely “to identify with the statutory scheme it is charged with administering.”147 Finally, Steven Heller suggests that the fact that the Federal Circuit regularly sees patent cases but less regularly sees antitrust cases leads it to better understand the advantages of expanding the patent system (such as adding incentive to innovate) than to understanding the disadvantages of such an expansion (such as the monopolistic problems that patents create).148

Though, of course, non-patent cases cannot be categorized as pro- or anti-

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142 I say “nearly,” because, in *Carlshad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009), the question was who owned a patent, so the case cannot be categorized as pro- or anti-patentee.


147 Id.

patentee, there is an analogous trend. All of the Supreme Court cases reviewing non-patent Federal Circuit cases have the United States as a party on one side. Thus, these cases can be categorized as pro- or anti- the United States. Of the thirty non-patent cases where the Supreme Court modified the Federal Circuit’s rulings, it modified them in favor of the government twenty three times (77%) and against the government seven times (23%). Thus, relative to the Supreme Court, the Federal Circuit is biased against the government in its non-patent jurisprudence.

This suggests that in considering the bias of the Federal Circuit, it is important to look beyond its patent jurisprudence. Perhaps, broadening the theory proposed by Landes and Posner, that the Federal Circuit is a specialized court means that interest groups are better able to exert influence over the selection of its judges—in all areas. Thus, lobbyists representing veterans or tax payers exert pressure to nominate judges who favor these interest groups. Applying the second part of their theory, since the Federal Circuit is entrusted with maintaining a system where plaintiffs can sue the United States, it may inherently err on the side of favoring claimants. Or perhaps, a la Heller’s theory, in seeing exclusively claims against the United States, the Federal Circuit sees a disproportionate number of cases where the United States behaves in a questionable manner, and therefore it is more likely to find the United States liable.

I cannot say definitively what causes the Federal Circuit’s specific biases relative to the Supreme Court—indeed, a comprehensive theory is probably impossible. However, any theory that only explains patent biases is inherently suspect. It is more reasonable that some aspects of the Federal Circuit’s insular jurisdiction, a feature common to all of the Federal Circuit’s jurisprudence, are responsible for its biases.

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151 This is particularly interesting in light of the fact that some scholars view the Federal Circuit as overly pro-government in its cases. See W. Stanfield Johnson, The Federal Circuit’s Great Dissenter and Her “National Policy of Fairness to Contractors”, 40 Pub. Contr. L.J. 275, 276 (2011) (“the Federal Circuit has inappropriately moved the balance of its government contract jurisprudence toward protecting the sovereign and the public fisc”). However, it is also possible that the apparent pro-claimant bias of the Federal Circuit is, in fact, a pro-government bias in the Supreme Court. As noted in Section II(b), the Supreme Court hears many more cases in which the government is the appellant than the appellee. Thus, the Supreme Court’s general practice of modifying Federal Circuit decisions to favor the government may be reflective of the fact that it hears many more appeals by the government than against it.

152 Such an approach is not novel. In 1977, when the idea of creating the Federal Circuit was just beginning to brew, Lawrence Baum suggested broadly that "judicial" specialization does tend to increase group influence.” Lawrence Baum, Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals, 11 Law & Soc’y Rev. 823, 826 (1977). It seems, however, that after the creation of the Federal Circuit, scholars just tended to focus on biases in the Federal Circuit’s patent jurisprudence.
Conclusion
This article shows that many trends that scholars have identified in examining the Supreme Court’s relationship with the Federal Circuit are actually more broadly Federal Circuit trends. The Supreme Court reviews the Federal Circuit more often and more harshly, it finds cases to review without the aid of circuit splits, it thinks the Federal Circuit applies too rigid a jurisprudence, and it thinks the Federal Circuit is too keen on expanding its own power. Moreover, the Supreme Court is systematically more anti-patentee and anti-claimant than the Federal Circuit. Scholars have focused only on the patent cases, and this has led them to assume that patents are the cause for these differences between the Federal Circuit and the Supreme Court. However, by looking at the Federal Circuit’s docket more broadly it becomes clear that the source of these differences is broader. This article posits that the Federal Circuit’s insularity is what is creating its tensions with the Supreme Court.

What this article does not consider is whether the Supreme Court’s critiques of the Federal Circuit as being formalistic and keen to arrogate power are warranted. By examining the Federal Circuit’s patent jurisprudence generally (and not just in cases reviewed by the Supreme Court), Rochelle Dreyfuss and others have shown that Federal Circuit applies formalistic doctrines and has a pro-patentee bias. Similarly, William C. Rookledge and Matthew F. Weil and others show that in the patent context the Federal Circuit “engages in a form of decision-making at odds with traditional notions of appellate review,” thus arrogating power that properly belongs in lower courts. In the non-patent context, Professor Ralph Nash argues that the Federal Circuit believes “there are no shades of gray in contracting.” However, on veterans’


questions, Professor Michael Allen shows that the Federal Circuit applies a less rigid approach than the more specialized Veterans Court.¹⁵⁷

Still, these questions are studied by scholars interested in only one area of the Federal Circuit’s jurisprudence (generally patents). As this article shows, the Supreme Court’s review of the Federal Circuit’s jurisprudence points to systemic questions about the Federal Circuit’s jurisprudence.