THE FEDERAL CIRCUIT’S INNOVATION POLICY

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Abstract

One of the bedrock principles of the divided nature of our Federal government is that courts are not policymakers. As with many such principles, however, this division between the judiciary and the policymakers turns out to be more hortatory than foundational. And as any student of the patent law understands, this principle is especially difficult to discern with respect to the United States Court of Appeals for the Federal Circuit: the structure and operation of the regulatory system for patents, the court’s unique role as an exclusive appellate body, and the patent doctrine itself have combined to place the Federal Circuit as the central actor in modern innovation policy in the United States.

Although there are plainly a range of concerns with this allocation of power, this Essay takes the Federal Circuit’s policymaking role as given, and proceeds to map the contours of the Federal Circuit’s work from an innovation policy perspective. The paper moves in three parts. In the first, I explore the question of how and why the Federal Circuit is widely-regarded to be the key player in innovation policy in the United States—a role in stark contrast to the general presumption against judicial policymaking. In Part II, I attempt to explain the patent law doctrine created by the Federal Circuit in innovation policy terms. And finally, in Part III, I offer some observations, analysis, and suggestions regarding how an carefully-considered “innovation policy” centric Federal Circuit might operate.

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