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Andrew P. Morriss

Texas A&M University School of Law, amorriss@law.tamu.edu

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COMMENT:
A PUBLIC CHOICE PERSPECTIVE ON
THE FEDERAL CIRCUIT

Andrew P. Morriss[†]

The Federal Circuit is different from other federal courts in important ways. Professor Dreyfuss has done pioneering work on the Federal Circuit as an institution¹ and her article in this Symposium² extends that work. As a nonexpert on patent law, my contribution to this Symposium is not to offer a substantive critique of the Federal Circuit's patent law jurisprudence. Instead, I will apply the public choice perspective to this particular judicial institution. This perspective includes some background thinking about how the federal judiciary works as an institution and about how judicial background affects how judges decide things.

I. PUBLIC CHOICE AND THE COURTS

While the Federal Circuit is a unique instance of specialization within the federal judiciary, it is a court that is nonetheless part of the general framework of federal courts. It is worth starting by considering what we know about federal courts and why they are successful. This will help us understand where the Federal Circuit experiment is headed.

[†] Galen J. Roush Professor of Business Law and Regulation & Director, Center for Business Law and Regulation, Case Western Reserve University and Senior Associate, Property & Environment Research Center, Bozeman, Montana. A.B. 1981, Princeton; J.D., M. Pub. Aff. 1984, University of Texas at Austin; Ph.D. (Economics) 1994, Massachusetts Institute of Technology.

¹ Rochelle Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

² Rochelle Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 769 (2004).

In two path-breaking articles, Judge Richard Posner³ and Professor Richard Epstein⁴ separately set out to examine the institutional constraints on the federal judiciary and to ask why the federal courts are a success. They did so by asking the question of what a self-interested judge would do to maximize his or her individual returns from office. They then looked to see how the design of the judiciary prevents judges from doing that in a socially undesirable manner. Both authors concluded that the federal judiciary is a successful institution in large measure because it prevents judges from expressing their self-interest in harmful ways.⁵

I am not going to spend time defending self-interest as a means of explaining human behavior, except to note that people are generally self-interested.⁶ We do not need to have a complete description of individual motives for it to make sense to worry about self-interest. As James Madison noted with respect to the Constitution: We design institutions for human beings rather than for angels.⁷ In describing judges as self-interested, I do not mean to malign the judiciary in any way—to say judges are self-interested is simply a claim that judges can be assumed to be no better (and no worse) than members of Congress, administrative agency staff, or individuals in the private sector.

With some qualifications, the institutional structure achieves the goal of a judiciary that possesses relatively few of the political incentives of Congress and the executive branch. The judiciary is based on an institutional design that recognizes the forces of self-

³ Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

⁴ Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827.

⁵ According to Professor Epstein,

The structure of the “independent” judiciary is designed to remove judges from the day-to-day pressures and temptations of ordinary political office, and with some qualifications it achieves that end. It is a strategy that recognizes the forces of self-interest, regards them as potentially destructive, and then takes *successful* institutional steps to counteract certain known and obvious risks.

Id. at 831-32; see also Posner, *supra* note 3, at 2 (“[A]lmost the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives—to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human action in an economic model.”).

⁶ See Epstein, *supra* note 4, at 828 (“There is today a single dominant social science paradigm for the analysis of individual and group behavior—one that argues that individuals in all their roles act to maximize their individual self-interest under conditions of uncertainty.”); Posner, *supra* note 3, at 3-4 (“Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest.”).

⁷ THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2003) (“If men were angels, no government would be necessary.”).

interest. This design takes successful institutional steps to counteract known, obvious risks.⁸

How does the structure of the federal courts constrain the exercise of self-interest by judges? The constraints we have on the federal judiciary include, to summarize quickly, that judges:

- cannot talk about pending business with people outside the court;
- cannot reveal decisions to outsiders before they disclose them to the public generally;
- may not have any private connection or interest that even appears to influence a case; and
- must recuse themselves when a conflict of interest or appearance of a conflict of interest appears.⁹

These constraints limit the potential for corruption by banning judges from involvement in cases where their conduct might benefit themselves. As Professor Epstein summarized, “The elaborate prohibitions make it difficult, if not impossible, to yield to the normal kinds of financial and electoral pressures other public officials experience because the usual highways of exploitation are effectively controlled.”¹⁰

Further, additional constraints prevent judges from controlling which cases they will hear, and so prevent litigants from predicting which judges will hear their cases in many instances. Cases are randomly assigned to judges within courts, or otherwise assigned to judges according to neutral rules. We have courts of general jurisdiction generally, so it is very hard to predict who is going to hear your case. Most of the appeals courts do not disclose which judges will be presiding until a time relatively shortly before oral argument. In multi-judge district courts there is random assignment to district judges. That randomness, when enforced, is sometimes a reasonably transparent mechanism. You go to the clerk’s office and get your assignment based on something you can observe happening. All these mechanisms make it hard to corrupt the judiciary. When we do have parties accused of forum shopping¹¹

⁸ See Posner, *supra* note 3, at 2-4 (recognizing that judges are not immune to self-interest); Epstein, *supra* note 4, at 831-32 (noting structure is designed to insulate judges from political pressures).

⁹ This is not an exhaustive list and both Posner and Epstein examine these constraints in more detail. See Epstein, *supra* note 4, at 833-35, and Posner, *supra* note 3, at 4-7, for more extensive discussion of these constraints.

¹⁰ Epstein, *supra* note 4, at 837.

¹¹ See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 892 (2001) (“Forum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably.”).

or complaints about the random assignment being violated,¹² we usually see a fairly universal condemnation of such efforts.

Finally, we have a set of constraints on the political branches to prevent them from controlling judges. Congress cannot reward or punish individual judges by raising or lowering their salaries: They must set salaries across the board or leave all salaries alone. If Congress wants to punish a judge, it must act on all judges of that rank. Members of Congress may voice disapproval of a judge's actions, but there is little they can do to punish an individual judge.

While we often take this for granted today, these constraints create an institution that is quite different from other judicial institutions we have had in the past. In particular, it is worth considering the differences between nineteenth century territorial judges and the modern federal judiciary.¹³ The territorial courts were quite different from modern federal courts in many respects. Legal historian John Guice suggested these were courts that "strained to the utmost the human frailties of the men on the bench."¹⁴ Montana Territorial Chief Justice Decius Wade said that the territorial court's structure "made official life in the Territories" into "a personal warfare, which is neither pleasant to the officer nor beneficial to the people."¹⁵

Although territorial judges had wide-ranging jurisdiction and authority, they served at the pleasure of the president, giving them almost no job security. They were far less independent than our modern federal judiciary. The individuals appointed were rarely financially independent, and as judges, earned less than half of what good lawyers in the territories earned. Territorial legislatures would sometimes supplement their pay, thus giving the legislature a mechanism for rewarding compliant judges.¹⁶ Judges were generally appointed from outside the territories; as a result, they had no connection with the people for whom they were serving as judges, isolating them from the community.

¹² See *Grutter v. Bollinger*, 288 F.3d 732, 753-58, 810-14 (6th Cir. 2002) (recounting controversy over allegations of non-random assignments to panel), *aff'd*, 539 U.S. 306 (2003).

¹³ This discussion draws from Andrew P. Morriss, *Judicial Removal in Western States and Territories*, in *LAW IN THE WESTERN UNITED STATES* 86 (Gordon Morris Bakken ed., 2000) [hereinafter *Judicial Removal*] (discussing judicial selection in Western States and territories), and Andrew P. Morriss, *Legal Argument in the Opinions of Montana Territorial Chief Justice Decius S. Wade*, 1 NEV. L. J. 38 (2001) [hereinafter *Legal Argument*] (discussing Justice Wade's contributions to Montana law).

¹⁴ JOHN D.W. GUICE, *THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING 1861-1890*, at 11 (1972).

¹⁵ Decius S. Wade, *Self Government in the Territories*, 6 INT'L REV. 229, 307 (1879).

¹⁶ See *Legal Argument*, *supra* note 13, at 42.

Legislators could retaliate against judges in a variety of ways. Salary supplements could be taken away. Also, judges could be “sagebrushed” into undesirable districts.¹⁷ For example, the Montana legislature sent two members of that court to what was described as unorganized and uninhabited districts to punish them for their votes in particular cases.¹⁸

Other institutional flaws included that, until about 1886, judges served as both the trial judge and on the appellate panel that heard the appeal, giving at least one vote for affirmance in most cases.¹⁹ When we compare the nineteenth century territorial courts to the current federal judiciary, it is clear how successful the federal judiciary has been as an institution.

State courts also offer a basis for comparison that often reflects well on the design of the federal judiciary. Ohio, for example, today has a particularly dysfunctional method of picking the judges: We have a partisan primary and an effectively nonpartisan general election.²⁰ We thus deny voters the signal of party identification that might serve some value to them in choosing, while enhancing the candidates’ need to appeal to their party base to win the primary. The federal judiciary is not perfect, but it generally looks good compared to these alternatives.

Indeed, most of the empirical work on decision-making methods of federal judges, including some done by Professor Gregory Sisk, Professor Michael Heise, and myself, suggests there is not a lot of explanatory power to be had from the types of variables we look at when we try to explain how Congress and the legislature operate.²¹ We do not see the traditional socioeconomic background variables or ideological background variables (such as a judge being appointed by a particular President) having very much explanatory power, at least below the Supreme Court level. That is consistent with anecdotal evidence as well. My experience as a

¹⁷ See *Judicial Removal*, *supra* note 13, at 87-88 (describing a practice where judges were “sent to remote areas to keep them out of trouble”).

¹⁸ EARL S. POMEROY, *THE TERRITORIES AND THE UNITED STATES 1861-1890*, at 57 (American Library Paperbacks 2d ed. 1970) (1947).

¹⁹ See *Legal Argument*, *supra* note 13, at 43.

²⁰ See Am. Judicative Soc’y, *Judicial Selection Methods in the States*, at http://www.ajs.org/selection/sel_state-select-map.asp#OHIO (last visited February 8, 2004) (“Ohio primary elections are partisan, but in general elections, party affiliations are not listed on the ballot.”).

²¹ See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decision*, 65 OHIO ST. L.J. (forthcoming 2004); see also Epstein, *supra* note 4, at 839-40 (noting how models of Supreme Court behavior depend on “key historical facts which are likely to shape the values that judges bring to their decisions” rather than on maximizing behavior).

law clerk, and that of most law clerks I have spoken with, suggests that ideology plays a remarkably small role in cases at the district and appellate level.

This brief summary suggests that the overall design of the federal judiciary is a robust one which has provided us with an institution resistant to corruption and to political pressure.

II. INTRODUCING SPECIALIZATION

This raises the question: What is different about the Federal Circuit? How can our understanding of the success of the federal courts' institutional design help us think about the difference? The obvious difference between the Federal Circuit and other federal courts is the semi-specialization²² of the Federal Circuit.

The rationale for semi-specialization was to dilute the specialization.²³ The concern raised by specialization is that it leads to pressure to capture the institution on behalf of particular interest groups. Such interest groups might be patent holders, patent users, or somebody else. For example, if the Federal Circuit heard only patent cases, we would expect the repeat players concerned with patents to invest in the judicial selection process to gain appointments of candidates they thought would favor their position. We might see large pharmaceutical companies, venture capitalists, engineering professional associations, or whoever, invest in judicial selection.²⁴ By diluting the Federal Circuit's patent jurisdiction, we have reduced the value of capturing those judgeships for patent-related special interests. I think we have at least some indication that we reduced the value of control low enough that people have not invested that much in trying to capture the court. Moreover, by creating other areas of specialization, we created other interest groups concerned with what the Federal Circuit is doing, thus making capture by patent law special interests more difficult. The intent, and it appears to have been successful, was to create a balance between the benefits of specialization and fears of capture that specialization created. In general, it appears that we have succeeded in doing so. All is well, or so it seems.

²² By semi-specialization, I mean the court's jurisdiction includes areas in addition to patent law where there is no case to be made that any of those areas enhance the understanding of patent law.

²³ Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN L. REV. 329, 334-35 (1991) ("In forming the CAFC, Congress sought to avoid overspecialization and capture by creating 'a varied docket spanning a broad range of legal issues.'").

²⁴ There are lots of ways to invest in the selection process, the most obvious being campaign contributions to senatorial and presidential candidates.

III. PERFORMANCE ISSUES

In her article, Professor Dreyfuss summarizes the issues that have arisen regarding the performance of the Federal Circuit.²⁵ As someone who is not competent to comment on the substance of the doctrine, I can react here only to how those performance issues affect the public choice analysis of the institution's design.

First, is the Federal Circuit articulating the law at the appropriate level of detail? Professor Dreyfuss points out what might be an overly large number of non-precedential opinions that do not add to the body of law.²⁶ This may or may not be "too many"—it depends on how we define the optimal number. Even if the Federal Circuit is issuing a large number of non-precedential opinions, what does that tell us?

I think it tells us only that the patent bar is unhappy about the number of opinions, or at least the number of precedential opinions. It does not establish that there are "too few" from a social point of view. "Too few" opinions might mean any of a number of things, including that the court is being cautious about laying down hard and fast rules, engaging in a discovery process through adjudication, or it might mean that the judges are taking too many vacations. Without some additional evidence, we cannot tell which explanation fits better. Moreover, one of the few avenues open to judges to gain additional rewards from their job is to seek prestige by writing opinions.²⁷ Given the personal incentives to write, we should be particularly skeptical of claims that judges are not writing "enough." There is just not enough evidence, in my opinion, to take this complaint seriously at this time.

In addition, the idea that there are too few precedents is an unusual complaint from the bar. The more frequent complaint from lawyers about the courts generally is that there are too many opinions. Indeed, lawyers have been complaining there are too many precedents for a long time.²⁸ The first American complaint I found was by Joseph Story in 1831,²⁹ and Sir Matthew Hale complained in 1671 there were too many precedents in England.³⁰

²⁵ Dreyfuss, *supra* note 2, at 772-86.

²⁶ Dreyfuss, *supra* note 2, at 772-75.

²⁷ Epstein, *supra* note 4, at 838 ("[A]mbitious judges could seek to maximize their 'influence' and 'prestige,' which are normally achieved by excellence in argument and writing."); Posner, *supra* note 3, at 13-15 (noting the role of prestige and reputation).

²⁸ Andrew P. Morriss, *Codification and Right Answers*, 74 CHL.-K. L. REV. 355, 369-71 (1999) (summarizing the nineteenth century debate over common law and codification, and claims that there were too many precedents).

²⁹ See John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMPLE L.Q. 13, 14 (1949) (mentioning the complaint filed by Justice Story in 1831).

³⁰ See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 141 (1965).

There are obviously many more precedents today than in 1831. If the patent bar thinks there are too few precedential opinions, that is something quite new and different from the usual complaints of the bar about judicial output, and so one that makes me suspicious of its merits.

The second issue is internal consistency.³¹ There is a concern about the failure to agree on core policy and failure to construe patents in the same way in different cases. This is actually two concerns. One is the consistent interpretation of patents from case to case. We generally do not impose on courts the requirement that they interpret the same documents in a similar fashion from one case to the next. What we do have is a rather elaborate body of law that governs whether issue preclusion takes place or not.

If we allow patent holders to establish a binding precedent about their patent in one suit, they may well invest in having a lawsuit that, through deliberately bad lawyering, would establish an interpretation of the patent useful to them in a later case. Of course, there are judicial doctrines that would hinder such a strategy, but it is still a danger. If there is a prior interpretation of a patent, there are incentives for the parties to bring it to the court's notice. Both parties have every incentive to argue whether the prior interpretation should govern. So I do not think we need to be too worried about this issue either.

The larger critique is that the court is not trying to achieve a consensus on patent law principles.³² The differences between the Federal Circuit and the rest of the judiciary may explain this. In other areas of the law, we have circuit splits that sometimes go on for an extended periods of time. We even allow agencies to refuse to follow binding precedents in some circumstances, even within circuits, under the doctrine of nonacquiescence.³³ We also tolerate a lot of this kind of ambiguity and difference among jurisdictions. There are fifty states plus the District of Columbia, and they all approach a number of legal questions differently in tort law, property law and so on. Historically, the common law grew up in a competitive environment.³⁴ In short, we have a whole host of examples where we were not focused on certainty. We tolerate un-

³¹ Dreyfuss, *supra* note 2, at 775.

³² Dreyfuss, *supra* note 2, at 775.

³³ See, e.g., Erin Margaret Masson, Note, *Social Security Administration Nonacquiescence on the Standard for Evaluating Pain*, 36 WM. & MARY L. REV. 1819 (1995).

³⁴ See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 520 (1983) (tracing how legal systems developed through "competition of policies").

certainly because of the benefits of competition in finding the best rule.

By bringing most patent law cases into a single court, we gave up the chance for competition in developing the doctrine. Perhaps having some competition for rules within the Federal Circuit is not such a bad thing. If the Federal Circuit is thus slower to reach a conclusion about doctrine than other courts, this may simply be an appropriate reaction to the lack of competition in producing those conclusions. Again, we need more evidence that there is a problem before reaching a firm conclusion.

Another critique is the external consistency issue, i.e., whether the Federal Circuit has fallen out of step with general jurisprudence.³⁵ Professor Dreyfuss's article offers a compelling example of antitrust law in which the Federal Circuit and the Ninth Circuit reached different conclusions.³⁶ Again, I am not sure it is a problem for patent law because patent law is itself a specialization, which means patent opinions are less likely to cite outside cases than, say, Title VII cases. Similarly, outside courts will not have as frequent opportunities to cite Federal Circuit cases on patent law as they will other circuits on other questions. If the Federal Circuit is out of step with the other circuits, the question is whether this is somehow different from, for example, the Fifth and the Ninth Circuits reaching different conclusions in a non-patent area of the law. We do not rush to resolve these inconsistencies, but allow the Supreme Court to decide when to end circuit splits. No compelling reason has been given for why splits between the Federal Circuit and other circuits are in need of speedier resolution than other circuit splits.

The problems identified in the literature and summarized by Professor Dreyfuss thus appear to me to be quite minor. Some do not reflect institutional design flaws, but are the natural result of the design of the court. Others reflect the desire of the patent bar for results that meet its interests. Unless more compelling evidence of the existence of problems can be found, "solving" these "problems" seems as likely to cause new problems as to improve the Federal Circuit.

IV. SOLUTIONS

Professor Dreyfuss identifies six corrections for these problems that have been proposed in the literature. She criticizes three

³⁵ Dreyfuss, *supra* note 2, at 778.

³⁶ Dreyfuss, *supra* note 2, at 778-79.

of them as bad ideas, a conclusion I share because all three dilute the gains from specialization.³⁷

The other three corrections are interesting: (1) increasing the number of outside judges sitting by designation; (2) filling the Federal Circuit vacancies with more outsiders to patent law, including district judges and economists; and (3) changing venue rules to allow concentration of patent cases in a smaller number of district courts.³⁸

Bringing in more outside judges reinforces the characteristics of the existing federal court structure that prevents the parties from predicting who is going to be on the panel.³⁹ Greater randomness in the recruitment of those judges would be a way to further increase the benefit. Invitations might be given at random, for instance, preventing any sense of burden or reward from creeping into the process. Recruiting more district judges to the Federal Circuit bench brings in people who are committed to the institution and who have interesting perspectives that may enhance the Federal Circuit. Similarly, developing district court expertise in patent law through venue rules is a great idea.

However, despite being an economist, I am a little skeptical about the idea of more economists on the bench. Increasing economic literacy on the bench, among the bar, and anywhere for that matter, is good. George Mason University has been doing that for thirty years at the Law and Economics Center. Professor Henry Butler has had the same goal through what is now the American Enterprise Institute for Judges. There are important differences between judicial behavior and economist behavior, however, that should make us worry about putting too many economists on the bench. There may be a case to be made that good judges and good economists share important characteristics, but the completely different training necessary to make a good judge and a good economist suggest that the burden of proof rests on those proposing such a change.

³⁷ These are: 1) altering the breadth of the Federal Circuit's jurisdiction; 2) circuit-based choice-of-law rule; and 3) enhancing the PTO's authority, and having the Federal Circuit pay more attention to that authority. Dreyfuss, *supra* note 2, at 786-94.

³⁸ Dreyfuss, *supra* note 2, at 974-800.

³⁹ There are concerns about the impact of district judges on a circuit's internal consistency. See Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 371 (1995).

CONCLUSION

To conclude, the Federal Circuit strikes me, an outsider, as a successful experiment in at least one important dimension: It did not screw up another more important experiment, the federal judiciary as a whole. It also seems to have successfully brought some of the benefits of specialization to bear on patent law. Indeed, most of the complaints in the literature about the Federal Circuit, ably surveyed by Professor Dreyfuss, strike me to be signs of the health, rather than problems. Solving these “problems,” to the extent they require solving, should be done with sensitivity to the institutional structure of the federal judiciary as a whole, and to the features that make it work as well as it does.

