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ABSTRACT

In the modern administrative state, complex statutes are typically administered by an agency that possesses the power to clarify ambiguities in the statute. The Patent Act, however, is an outlier. Although the statute is administered by the U.S. Patent and Trademark Office (“PTO”), the PTO lacks substantive rulemaking authority over the Act. Instead, the semi-specialized U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) plays a powerful role in interpreting the Patent Act.

This Article presents a new model for examining the role of the Federal Circuit and posits that the court behaves like an executive branch agency and serves as the de facto administrator of the Patent Act. The Federal Circuit has traditionally engaged in a form of substantive rulemaking by issuing mandatory bright-line rules that bind the public and the PTO. In reviewing PTO appeals, the Federal Circuit acts more like an agency than a court, by manipulating standards of review and administrative law doctrines to minimize agency deference.

The Federal Circuit’s position of administrator raises several concerns. First, recent Supreme Court intervention has jeopardized the Federal Circuit’s ability to engage in rulemaking, calling into question the sustainability of its role. Furthermore, although Congress has arguably granted the Federal Circuit authority to pass bright-line rules, the breadth of power that Congress granted to the court raises separation of powers and non-delegation doctrine concerns. These problems suggest that Congress may need to employ more traditional strategies for maintaining uniformity in patent law.