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Acting Like an Administrative Agency: The Federal Circuit En Banc

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Ryan G. Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 Mo. L. Rev. 733 (2011).

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Acting Like an Administrative Agency: The Federal Circuit En Banc

*Ryan Vacca**

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I. INTRODUCTION

When Congress created the Federal Circuit in 1982,¹ it intended to create a court of appeals.² Little did it know that it also was creating a quasi-administrative agency that would engage in substantive rulemaking and set policy in a manner substantially similar to administrative agencies.³ In this Article, I examine the Federal Circuit's practices when it orders a case to be heard en banc and illustrate how these practices cause the Federal Circuit to look like an administrative agency engaging in substantive rulemaking. The

* Assistant Professor of Law, University of Akron School of Law. For helpful comments, I thank the participants at the *Missouri Law Review* Symposium on Evolving the Court of Appeals for the Federal Circuit and its Patent Law Jurisprudence, as well as Elizabeth Reilly, Sarah Cravens, Bill Jordan, Kyle Passmore, and Hiram Meléndez-Juarbe. I am especially grateful to Dennis Crouch for inviting me to participate at the Symposium.

1. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended in scattered sections of 28 U.S.C.).

2. See *infra* notes 12-14 and accompanying text.

3. See *infra* Part III.

number and breadth of questions the Federal Circuit agrees to hear en banc and the means by which it hears them go beyond the limited role of a court – to decide the case before it.⁴ Instead of exercising restraint and addressing only what it must, the Federal Circuit raises wide-ranging questions and makes broad pronouncements of law that set or change patent policy.⁵

Congress traditionally has delegated policy setting to administrative agencies that must comply with the Administrative Procedure Act (APA),⁶ particularly the notice and comment provisions.⁷ Despite being an appellate court not subject to the notice and comment requirements,⁸ the Federal Circuit appears to comply with these requirements when it orders cases to be heard en banc.⁹

And although some commentators object to the en banc Federal Circuit acting like an administrative agency by engaging in substantive rulemaking and policy setting, I argue that the Federal Circuit is in the best position to do so. However, other governmental bodies can and should play a larger role in shaping patent policy.¹⁰

Part II of this Article describes the Federal Circuit's en banc practices since its creation in 1982, focusing on how the Federal Circuit compares to the other federal appellate courts in terms of the frequency of en banc decisions, how the Federal Circuit orders cases to be heard en banc, the number and scope of the questions presented for en banc consideration, and the use of amici curiae in the briefing stages of the case. Part III examines the Federal Circuit's en banc practices in light of how administrative agencies engage in substantive rulemaking under the APA and suggests that the Federal Circuit's en banc practices mimic those of administrative agencies. Part IV then takes a normative look at the en banc Federal Circuit by analyzing objections to its en banc practices. In response, Part IV evaluates alternatives to the Federal Circuit for directing patent policy and evaluates whether these alternative bodies are better suited than the Federal Circuit sitting en banc.

4. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 303-04 (1979).

5. See *infra* Part IV.C.5.

6. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 552-59, 701-06 (2006)); 5 U.S.C.A. § 551 (West Supp. 2011).

7. 5 U.S.C. § 553 (2006).

8. See 5 U.S.C.A. § 551 (“‘[A]gency’ . . . does not include . . . the courts of the United States . . .”).

9. See *infra* notes 70-91 and accompanying text.

10. See *infra* Part IV.C.

II. THE FEDERAL CIRCUIT EN BANC

In 1982, Congress created the Court of Appeals for the Federal Circuit¹¹ to serve as the appellate body for cases “arising under any Act of Congress relating to patents”¹² and appeals stemming from decisions of the Patent and Trademark Office’s (PTO) Board of Patent Appeals and Interferences “with respect to patent applications and interferences.”¹³ Proponents of the Federal Circuit’s creation hoped that channeling patent cases to a single appellate body would result in a uniform patent law with increased certainty and predictability that would “foster technological growth and industrial innovation.”¹⁴

But despite its specialized subject matter and unique jurisdiction, the Federal Circuit is, at the end of the day, a federal appellate court like other regional circuit courts. Its purpose is to resolve disputes between parties by interpreting and applying the law. Likewise, the Federal Rules of Appellate Procedure and other federal legislation empower and restrict the Federal Circuit.¹⁵

One such power appellate courts possess is the ability to hear cases en banc.¹⁶ Although three-judge panels decide most cases before circuit courts, the full court of active service judges within the circuit and senior judges who served on the three-judge panel deciding the case may convene to hear and decide the case together.¹⁷ Once decided, the en banc court’s ruling becomes the decision and the earlier panel’s decision is vacated.¹⁸ However, en banc

11. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended in scattered sections of 28 U.S.C.).

12. See 28 U.S.C. § 1295(a)(1) (2006) (granting the Federal Circuit “exclusive jurisdiction” over appeals in cases where a district court’s jurisdiction “was based, in whole or in part, on section 1338 of this title”); *id.* § 1338(a) (2006) (granting district courts “original jurisdiction of any civil action arising under an Act of Congress relating to patents”). *But see* *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (holding that a counter-claim is insufficient to “arise[] under” an Act of Congress relating to patents), *vacating* 13 F. App’x 961 (Fed. Cir. 2001); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988) (holding that a defense based on patent law did not constitute a case “aris[ing] under” an Act of Congress relating to patents).

13. 28 U.S.C. § 1295(a)(4)(A); *see also* 35 U.S.C. § 141 (2006).

14. Robert W. Kastenmeier, Remarks at the Ninth Annual Judicial Conference of the Court of Customs and Patent Appeals (May 25, 1982), in 94 F.R.D. 347, 358; *see also* Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2056-59 (2007).

15. *See generally* 28 U.S.C. §§ 41-49 (2006 & Supp. 2009).

16. FED. R. APP. P. 35(a).

17. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 213-214 (1999); *see also* 28 U.S.C. § 46(c).

18. George, *supra* note 17, at 214.

decisions make up only a small percentage of appellate decisions.¹⁹ Nonetheless, en banc hearings and decisions are important as they are reserved for situations involving significant value. In particular, an en banc hearing “will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”²⁰ As Judge Douglas Ginsburg has pointed out, the latter standard of “‘exceptional importance’ is in the eye of the beholder,” and therefore it “expresses more of an attitude than a standard.”²¹

The Federal Circuit has, like all of the circuit courts, ordered cases to be heard before it en banc. The remainder of this section examines the Federal Circuit’s en banc presence by examining the proportion of the Federal Circuit’s docket that is heard en banc, how often the Federal Circuit orders en banc hearings sua sponte, the number and scope of the questions presented to the Federal Circuit for en banc consideration, and the use of amici curiae in the briefing stage of en banc review.

A. *Disproportionality of the Federal Circuit’s En Banc Practice*

Since its creation in 1982, the Federal Circuit has ordered en banc hearings in forty-six patent cases.²² The Federal Circuit’s en banc cases represent 0.10% of the total number of cases terminated from 1982-2010.²³ When not

19. *Id.* at 214 n.5 (citing to several studies showing that en banc decisions make up a small percentage of circuit courts’ caseloads and decisions).

20. FED. R. APP. P. 35(a).

21. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1022 (1991).

22. See Appendix for the list of cases. These cases do not include those where the Federal Circuit vacated a panel’s decision and had the panel replace its earlier decision with another decision by the same panel. See, e.g., *Elan Pharms., Inc. v. Mayo Found. for Med. Educ. & Research*, 346 F.3d 1051 (Fed. Cir. 2003) (en banc). These cases also do not include those where the Federal Circuit decided to hear the case en banc, but subsequently decided not to hear it en banc. See, e.g., *Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, 892 F.2d 73 (Fed. Cir. 1989).

23. The 0.10% calculation uses the forty-four cases that were heard en banc before 2011 (i.e., all cases in the Appendix except for *Akamai Tech., Inc. v. MIT* and *McKesson Tech. Inc. v. Epic Systems Corp.*). The total number of cases terminated that was used in this calculation was the sum of the total cases terminated during the calendar years ending on December 31 from 1982 through 2010. See generally *Federal Judicial Caseload Statistics*, U.S. COURTS, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx> [hereinafter *Caseload Statistics*] (last visited June 11, 2011) (for 2001-2010); *Statistical Tables for the Federal Judiciary*, U.S. COURTS, available at <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary.aspx> [hereinafter *Statistical Tables*] (last visited June 11, 2011) (for 2001-2010); see

counting the cases that had not been decided yet en banc during this period²⁴ or were not decided en banc at all,²⁵ the number of cases drops to forty, which represents 0.09% of the total cases. However, this total number of cases terminated is not limited to patent cases. The Federal Circuit also has jurisdiction to hear cases involving international trade, government contracts, trademarks, claims against the U.S. government, veterans' benefits, and others.²⁶ In fact, only about one-third of the Federal Circuit's docket is comprised of patent cases. From 2006 through 2010, patent cases comprised 28% to 42% of the Federal Circuit's docket, averaging 33%.²⁷ By reducing the total number of cases terminated proportional to the average number of patent cases

also Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ending December 31, U.S. CT. OF APPEALS FED. CIRCUIT, (Table B-8 (for 1991-2010), Table A (for 1986-1990), and Table 1 (for 1982-1985)). The only exceptions were 1992 and 1993, which used the total number of cases terminated during the twelve month period ending on March 31 of the subsequent year. See *Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ending March 31*, U.S. CT. OF APPEALS FED. CIRCUIT (Table B-8 (for 1993-1994)); *Caseload Statistics, supra*; *Statistical Tables, supra*. Although a small handful (six) of the patent en banc cases used were not terminated en banc during this period or were withdrawn before decision, the reason for using this benchmark for the denominator is that similar data is available for comparison purposes to other U.S. Courts of Appeals. See *Caseload Statistics, supra*; *Statistical Tables, supra*.

24. *E.g.*, *Therasense, Inc. v. Becton, Dickinson & Co.*, Nos. 2008-1511, 2008-1512, 2008-1513, 2008-1514, 2008-1595, 2011 WL 2028255 (Fed. Cir. May 25, 2011) (en banc); *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011) (en banc); *Akamai Techs., Inc. v. MIT*, Nos. 2009-1372, 2009-1417, 2009-1380, 2009-1416, 2011 WL 1518090 (Fed. Cir. Apr. 20, 2011) (decision pending); *McKesson Tech. Inc. v. Epic Systems Corp.*, No. 2010-1291, 2011 WL 2173401 (Fed. Cir. May 26, 2011) (decision pending).

25. *E.g.*, *Tafas v. Doll*, 559 F.3d 1345 (Fed. Cir. 2009), *vacated by* 328 F. App'x 658 (Fed. Cir. 2009) (per curiam); *King Instrument Corp. v. Perego*, 72 F.3d 855 (Fed. Cir. 1995) (not decided en banc because *Rite-Hite Corp. v. Kelly Co.*, 56 F.3d 1538 (Fed. Cir. 1995) was decided en banc and answered the questions there).

26. 28 U.S.C.A. § 1295 (West 2001 & Supp. 2011).

27. See *Appeals Filed, by Category, FY 2006*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings06.pdf> (last visited June 11, 2011); *Appeals Filed, by Category, FY 2007*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings07.pdf> (last visited June 11, 2011); *Appeals Filed, by Category, FY 2008*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings08.pdf> (last visited June 11, 2011); *Appeals Filed, by Category, FY 2009*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/images/stories/the-court/statistics/ChartFilings09.pdf> (last visited June 11, 2011); *Appeals Filed, by Category, FY 2010*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_by_Category_Appeals_Filed_2010.pdf (last visited June 11, 2011).

constituting the Federal Circuit's docket the percentage of en banc cases represents 0.32% (counting forty-four cases) and 0.29% (if counting only forty cases) of the total cases.

Looking only at the data from 2001-2009, the percentages for the Federal Circuit are 0.30% (counting all cases ordered to be heard en banc (14)) and 0.23% (counting only cases decided en banc (11)).²⁸ To put these percentages in perspective, from 2001-2009, the other U.S. Courts of Appeals averaged 0.10% of en banc cases, with a range of 0.01% to 0.23%. The specific breakdown of the other circuit courts is below.²⁹

Sorted By Circuit		Sorted by Percentage	
Court	En Banc Cases	Court	En Banc Cases
D.C. Circuit	0.15%	Second Circuit	0.01%
First Circuit	0.10%	Eleventh Circuit	0.07%
Second Circuit	0.01%	Seventh Circuit	0.07%
Third Circuit	0.07%	Third Circuit	0.07%
Fourth Circuit	0.09%	Fifth Circuit	0.08%
Fifth Circuit	0.08%	Fourth Circuit	0.09%
Sixth Circuit	0.13%	First Circuit	0.10%
Seventh Circuit	0.07%	Sixth Circuit	0.13%
Eighth Circuit	0.23%	Ninth Circuit	0.14%
Ninth Circuit	0.14%	D.C. Circuit	0.15%
Tenth Circuit	0.19%	Tenth Circuit	0.19%
Eleventh Circuit	0.07%	Eighth Circuit	0.23%

Based on this comparison, the Federal Circuit appears to decide more cases en banc than does any other circuit.³⁰ One could argue that because the

28. See Appendix for the list of cases ordered to be heard en banc and cases decided en banc. The total number of cases terminated by the Federal Circuit from 2001-2009 is 14,270, see *Statistical Tables*, *supra* note 23, and estimating that 33% were patent cases, see sources cited *supra* note 27; this yields 4,709 patent cases terminated from 2001-2009.

29. These percentages were calculated by using the total number of en banc cases terminated from 2001-2009 as the numerator. See *The Judicial Business of the United States Courts of the Seventh Circuit*, U.S. CT. OF APPEALS FOR THE SEVENTH CIRCUIT (2010), available at <http://www.ca7.uscourts.gov/rpt/statistics.htm>. The denominator was calculated using the total number of cases terminated from 2001-2009 as reported by the U.S. Courts' Statistical Tables for the Federal Judiciary. See *Statistical Tables*, *supra* note 23.

30. *But see* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 816-17 (2010) (finding the Federal Circuit has a lower rate of en banc cases than some other circuits, but using a different methodology for calculating the rate and not limiting the study to patent cases in the Federal Circuit).

active judges on the Federal Circuit sit in only one location,³¹ the court is in a better position to hear cases en banc than the regional circuits whose judges are spread over a larger geographic area.³² Although the relative convenience of sitting en banc may explain some of the differences between the Federal Circuit and the regional circuits, it does not explain the difference between the Federal Circuit and the D.C. Circuit, which also sits in only one location.³³

B. The Federal Circuit Acting Sua Sponte

Another interesting aspect of the Federal Circuit's en banc practice is the number of times the Federal Circuit has sua sponte ordered a case to be heard en banc. Of the forty-six cases the Federal Circuit ordered to be heard en banc, I have found documentation for thirty-nine of the cases indicating whether one or more of the parties petitioned for the en banc order or whether the Federal Circuit sua sponte ordered the en banc hearing.³⁴ Of these thirty-nine cases, the Federal Circuit has ordered en banc hearings sua sponte in twenty-two of them (56%).³⁵ Even assuming one or more of the parties petitioned for an en banc hearing in the remaining seven cases, the result is that the Federal Circuit sua sponte ordered 48% of the en banc cases, a surprisingly high number. As discussed *infra*, the significance of the Federal Circuit's sua sponte usage of en banc orders is important in understanding how the Federal Circuit establishes broad patent rules on its own initiative and acts more like a policymaker than an adjudicator.³⁶

31. See *Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited June 17, 2011) (stating that the court is located and court sessions are generally held in Washington, D.C.).

32. See, e.g., *Courtroom Information*, U.S. CT. OF APPEALS FOR THE EIGHTH CIRCUIT, <http://www.ca8.uscourts.gov/> (last visited June 17, 2011) (stating that oral arguments may be heard in both St. Louis, Missouri and St. Paul, Minnesota).

33. See *E. Barrett Prettyman United States Courthouse and William B. Bryant Annex*, U.S. CT. OF APPEALS FOR THE D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL++Courthouse++Directions+and+Map2> (last visited June 17, 2011) (listing the location of the sole courthouse in Washington, D.C.).

34. There are seven cases for which such information could not be found. See *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006), *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359 (Fed. Cir. 2003), *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998), *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171 (Fed. Cir. 1990), *Wyden v. Comm'r of Patents & Trademarks*, 807 F.2d 934 (Fed. Cir. 1986), *Paulik v. Rizkalla*, 760 F.2d 1270 (Fed. Cir. 1985), and *Gardner v. TEC Sys., Inc.*, 725 F.2d 1338 (Fed. Cir. 1984).

35. See Appendix.

36. See *infra* text accompanying note 98.

C. The Scope of the Questions

More striking and more important than the number of en banc cases the Federal Circuit orders and how they are ordered are the number and scope of the questions the en banc court hears. Of the Federal Circuit's forty-six en banc cases, I have obtained the en banc orders or other supporting documentation in twenty-five of them which indicate the number of questions that the en banc court would address. Of these twenty-five cases, seventy-seven questions have been addressed to the court en banc.³⁷ These numbers represent an average of 3.1 questions per case.³⁸ Assuming only one question was asked in each of the twenty-one remaining cases, the total number of questions posed becomes ninety-eight, with an average of 2.1 questions per case.³⁹

In the past decade, the number of questions in en banc orders has increased. Of the seventy-seven questions that the Federal Circuit definitely asked in its twenty-nine year history, fifty-three (69%) are from orders the court issued from 1999-2011, with an average of 3.5 questions per case or 2.9 questions per case assuming one question per case for the cases without documentation. Thus, the Federal Circuit, as of late, is being asked – either by itself or by the parties – to sit en banc to answer an increasing number of questions concerning patent law.

Despite the sheer number of questions the en banc Federal Circuit poses, the most striking feature of the en banc orders is their scope. The questions presented to the Federal Circuit address a wide variety of issues related to a particular doctrine or statutory requirement. For example, in *Phillips v. AWH Corp.*, the Federal Circuit asked for additional briefs directed to the following seven questions:

1. Is the public notice function of patent claims better served by referencing primarily to technical and general purpose dictionaries and similar sources to interpret a claim term or by looking primarily to the patentee's use of the term in the specification? If both sources are to be consulted, in what order?
2. If dictionaries should serve as the primary source for claim interpretation, should the specification limit the full scope of claim language (as defined by the dictionaries) only when the patentee has acted as his own lexicographer or when the specification reflects a clear disclaimer of claim scope? If so, what language in the specification will satisfy those conditions? What use should be made of general as opposed to

37. This count is based on how the Federal Circuit numbers the questions. The actual number of questions is higher because some questions actually contain several questions. See, e.g., *infra* text accompanying note 40 (Question 2) (listing five questions as one).

38. Seventy-seven questions divided by twenty-five cases.

39. Ninety-eight questions divided by forty-six cases.

technical dictionaries? How does the concept of ordinary meaning apply if there are multiple dictionary definitions of the same term? If the dictionary provides multiple potentially applicable definitions for a term, is it appropriate to look to the specification to determine what definition or definitions should apply?

3. If the primary source for claim construction should be the specification, what use should be made of dictionaries? Should the range of the ordinary meaning of claim language be limited to the scope of the invention disclosed in the specification, for example, when only a single embodiment is disclosed and no other indications of breadth are disclosed?

4. Instead of viewing the claim construction methodologies in the majority and dissent of the now-vacated panel decision as alternative, conflicting approaches, should the two approaches be treated as complementary methodologies such that there is a dual restriction on claim scope, and a patentee must satisfy both limiting methodologies in order to establish the claim coverage it seeks?

5. When, if ever, should claim language be narrowly construed for the sole purpose of avoiding invalidity under, e.g., 35 U.S.C. §§ 102, 103 and 112?

6. What role should prosecution history and expert testimony by one of ordinary skill in the art play in determining the meaning of the disputed claim terms?; and

7. Consistent with the Supreme Court's decision in *Markman v. Westview Instruments, Inc.*, and our en banc decision in *Cybor Corp. v. FAS Technologies, Inc.*, is it appropriate for this court to accord any deference to any aspect of trial court claim construction rulings? If so, on what aspects, in what circumstances, and to what extent?⁴⁰

The order in *Phillips* attempts to leave no stone unturned with respect to claim construction. The Federal Circuit posed questions concerning the tools to be used in claim construction, how claim construction should relate to the requirements for patent protection, and the deference accorded to the lower courts.⁴¹

Similarly, in *Therasense v. Becton, Dickinson & Co.*, the Federal Circuit requested briefs on the following six questions:

40. 376 F.3d 1382, 1383 (Fed. Circ. 2004) (per curiam) (citations omitted) (order granting petition for rehearing en banc).

41. *See id.*

1. Should the materiality-intent-balancing framework for inequitable conduct be modified or replaced?
2. If so, how? In particular, should the standard be tied directly to fraud or unclean hands? If so, what is the appropriate standard for fraud or unclean hands?
3. What is the proper standard for materiality? What role should the United States Patent and Trademark Office's rules play in defining materiality? Should a finding of materiality require that but for the alleged misconduct, one or more claims would not have issued?
4. Under what circumstances is it proper to infer intent from materiality?
5. Should the balancing inquiry (balancing materiality and intent) be abandoned? [; and]
6. Whether the standards for materiality and intent in other federal agency contexts or at common law shed light on the appropriate standards to be applied in the patent context.⁴²

The order in *Therasense* is also a seemingly comprehensive list of questions relating to the doctrine of inequitable conduct. The court entertains the possibility of abandoning its prior tests or standards concerning inequitable conduct but also considers how best to structure the replacement for this void or partial void, including how the factors of this test will operate and how they relate to other approaches to similar issues.

Even en banc orders with fewer questions have broad inquiries. For example, in *Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.*, the Federal Circuit posed two questions:

1. Whether 35 U.S.C. § 112, paragraph 1, contains a written description requirement separate from an enablement requirement? [; and]
2. If a separate written description requirement is set forth in the statute, what is the scope and purpose of the requirement?⁴³

Although the court's order contained only two questions, the scope of the questions was broad and substantial.⁴⁴ Does an element of patentability that was thought to be required actually exist? And, if it does exist, why does

42. 374 F. App'x 35, 35-36 (Fed. Cir. 2010) (per curiam) (citations omitted).

43. 595 F.3d 1329, 1330 (Fed. Cir. 2009) (per curiam) (order granting petition for rehearing en banc).

44. *See id.*

it exist and how does it work? In short, the Federal Circuit is not addressing a single, narrow issue that will dispose of the case. Instead, it is crafting rules about many of the details constituting a particular legal doctrine.

D. *Amici Curiae Briefing in the Federal Circuit*

The final aspect of the Federal Circuit's en banc practice to examine is its use of amici curiae in the briefing stages. The Federal Rules of Appellate Procedure allow for amici curiae to file briefs but require leave of the court or consent of all parties.⁴⁵ Unless the court grants leave in its en banc order, amici curiae first must file a motion for leave or go through the process of obtaining consent of the parties before filing a brief.⁴⁶ Many of the Federal Circuit's recent orders permit amici curiae to file briefs without leave of court.⁴⁷ In some cases, the Federal Circuit specifically invites the United States or the PTO to file an amicus brief.⁴⁸ A survey of recent en banc orders from other circuits reveals that other circuits do not use similar language regarding amici.⁴⁹ While these other circuits may permit amici to file briefs in

45. FED. R. APP. P. 29(a).

46. *Id.*

47. *E.g.*, *Therasense, Inc.*, 374 F. App'x at 36 (“[A]ny such amicus briefs may be filed without leave of court”); *TiVo Inc. v. EchoStar Corp.*, 376 F. App'x 21, 22 (Fed. Cir. 2010) (per curiam) (“Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without leave of court”); *Hyatt v. Kappos*, 366 F. App'x 170, 171 (Fed. Cir. 2010) (per curiam) (“Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without leave of court”); *Princo Corp. v. ITC*, 583 F.3d 1380, 1381 (Fed. Cir. 2009) (per curiam) (“Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without leave of court”); *Ariad*, 595 F.3d at 1330 (“[A]ny such amicus briefs may be filed without leave of court”); *In re Bilski*, 264 F. App'x 896, 897 (Fed. Cir. 2008) (per curiam) (“[Amicus] briefs may be filed without leave of court”); *Phillips v. AWH Corp.*, 376 F.3d 1382, 1383-84 (Fed. Cir. 2004) (per curiam) (“Amicus curiae briefs may be filed by bar associations, trade or industry associations, government entities, and other interested parties.”) (italics omitted).

48. *E.g.*, *Therasense, Inc.*, 374 F. App'x at 36 (“The United States Patent and Trademark Office is invited to participate as amicus curiae.”); *Ariad*, 595 F.3d at 1330 (“The United States is invited to submit an amicus brief.”); *Phillips*, 376 F.3d at 1383-84 (“In particular, the United States Patent and Trademark Office is invited to submit an amicus curiae brief.”) (italics omitted).

49. *See, e.g.*, *Morgan v. Swanson*, 628 F.3d 705 (5th Cir. 2010) (no language regarding amici; implying amici must file for leave or obtain the consent of the parties); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 623 F.3d 1054 (9th Cir. 2010) (same); *United States v. Skoien*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) (same); *United States v. Cobb*, 595 F.3d 1202 (10th Cir. 2010) (same); *Greenberg v. Nat'l Geographic Soc'y*, 497 F.3d 1213 (11th Cir. 2007) (same); *see also* *United States v. Textron, Inc.*, 560 F.3d 513 (1st Cir. 2009) (“Amici are welcome to file amicus briefs, also not to exceed 20 pages per brief, on the same schedule, *but must seek leave of court.*”) (emphasis added).

the case, the recurring invitation to amici to file briefs in the Federal Circuit's en banc cases suggests a stronger attitude of inclusiveness than exists in the other circuits.

The Federal Circuit's rationale for liberally allowing amicus briefs comes as no surprise. It seeks to benefit from the advice of those with knowledge of patent law and the advancement of technologies.⁵⁰ That is, the Federal Circuit seems to rely on this practice of soliciting the views of stakeholders so it can make informed decisions on how to shape and interpret patent law, taking multiple viewpoints and interests into consideration.

III. ANALOGIZING TO ADMINISTRATIVE SUBSTANTIVE RULEMAKING

As discussed in Part II, the Federal Circuit sitting en banc has many distinct features. This Part examines the Federal Circuit's en banc practices in light of administrative agencies' substantive rulemaking procedures and argues that when the Federal Circuit sits en banc, it acts similarly to an administrative agency.

In today's administrative state, agencies engage in a variety of functions, one of which is to issue substantive legislative rules when Congress has delegated its policymaking duties to the agency. As the Supreme Court described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more

50. *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1302 (Fed. Cir. 2009) (Newman, J., dissenting).

than ordinary knowledge respecting the matters subjected to agency regulations.⁵¹

As acknowledged by the Court in *Chevron*, Congress cannot and does not always address all policy considerations when it legislates.⁵² The main reasons for Congress's failure to address every policy consideration in its legislation include lack of expertise in the area, lack of time, and lack of foresight to address future issues that may develop.⁵³ When authorized by Congress, agencies are either required or permitted to develop substantive rules and consequently set policy to fill these gaps.⁵⁴ For example, in *Chevron*, Congress amended the Clean Air Act to require the states to regulate "'new or modified major stationary sources' of air pollution."⁵⁵ The Environmental Protection Agency (EPA) promulgated a regulation allowing the states to define "stationary source" as a collection of pollution-emitting devices all within the same single "bubble."⁵⁶ The Supreme Court held that the EPA's interpretation was a permissible construction of the legislation and would not allow the D.C. Circuit to substitute its policy judgment.⁵⁷

The Patent Act, although specific in some instances,⁵⁸ is a broadly worded act leaving several policy voids.⁵⁹ Prime examples of these voids include section 101's categories of patentable subject matter⁶⁰ and section 103(a)'s obviousness requirement.⁶¹ Both of these requirements of patent-

51. 467 U.S. 837, 843-44 (1984) (citations omitted) (internal quotation marks omitted).

52. I RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 160 (5th ed. 2010); see also Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 412 (2009) ("Agencies are especially important when legal directives are required to guide people's behavior but neither Congress nor the courts are able to regulate with sufficient clarity.").

53. I PIERCE, *supra* note 52, at 160; see also Mazzone, *supra* note 52, at 412 ("Congress often lacks the institutional capacity (or the will) to determine how a statute will apply on the ground and in a variety of contexts.").

54. I PIERCE, *supra* note 52, at 502 ("Sometimes, however, Congress explicitly requires an agency to resolve some issues through issuance of legislative rules."); see also Mazzone, *supra* note 52, at 412 ("Administrative agencies fill these voids.").

55. *Chevron*, 467 U.S. at 839-40.

56. *Id.* at 840.

57. *Id.* at 864-66.

58. See, e.g., 35 U.S.C. § 115 (2006) (describing the oath the patent applicant must make and before whom the oath may be given).

59. Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1751 (2011).

60. 35 U.S.C. § 101 (listing patentable subject matter as covering processes, machines, manufactures, or compositions of matter, or any new and useful improvement thereof).

61. *Id.* § 103(a) ("A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject

bility left inventors, the patent bar, and technological industries searching for answers as to what these statutory provisions meant and what limits could be placed on them.⁶² These are two of the many gaps in patent law that must be fleshed out.⁶³

Although Congress has left it to the courts and not administrative agencies to fill these voids in the Patent Act,⁶⁴ these gaps are similar to the gaps in other legislative acts, which Congress delegates its authority to administrative agencies to fill. For example, in the National Traffic and Motor Vehicle Safety Act of 1966,⁶⁵ Congress delegated its authority to regulate motor vehicle safety standards to the National Highway Traffic Safety Administration.⁶⁶ Congress's statutory guidance to the agency was that "[e]ach such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms."⁶⁷ Congress also directed that the agency should consider relevant motor vehicle safety data; should consult with the Vehicle Equipment Safety Commission and, if appropriate, other agencies; should consider whether the standard is reasonable, practicable, and appropriate and should consider how the standards will carry out the purpose of the Act.⁶⁸

The benefit of permitting Congress to delegate policymaking and rule-making to agencies is that Congress, which cannot be expected to have intimate knowledge in every area that it regulates, gets to take advantage of

matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.").

62. See Michael Risch, *Everything is Patentable*, 75 TENN. L. REV. 591, 639-40 (2008) (describing the patentable subject matter categories of section 101 of the Patent Act as vague or ambiguous); see also Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1593-94 & n.8 (2011) ("The basic rule of nonobviousness is easy enough to recite But the apparent simplicity of the requirement belies the complexities and difficulties that have historically bedeviled the doctrine.").

63. Even though the Supreme Court has recently addressed both of these issues, in *Bilski v. Kappos*, 130 S. Ct. 3218, 3227 (2010) and *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007), these decisions have not provided any more meat on the bones of the Patent Act. Arguably, they undid some of the fleshing out that the Federal Circuit had previously done.

64. Burstein, *supra* note 59, at 1751.

65. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718.

66. *Id.* § 103, 80 Stat. at 719-20 (via further delegation by the Secretary of Commerce).

67. *Id.* § 103(a), 80 Stat. at 719.

68. *Id.* § 103(f), 80 Stat. at 719.

agencies' expertise in their particular fields.⁶⁹ Thus, the agency with expertise in the field can craft rules and implement policies that best reflect the needs of that field and its stakeholders.

For an agency to issue a rule that has the force and effect of law and be binding on the courts and the public, Congress must have delegated to the agency legislative authority to issue the rule,⁷⁰ and the agency must have complied with the notice and comment provisions of section 553 of the APA.⁷¹ For present purposes, only the notice and comment procedures need be addressed. The authority to issue legislative rules will be addressed later.⁷² Section 553 of the APA sets forth a three-part process for informal substantive rulemaking:⁷³ (1) issuing a notice of proposed rulemaking, (2) receiving and considering comments on the proposed rule, and (3) issuing the final rule incorporating a statement of its basis and purpose.⁷⁴

The Federal Circuit's numerous en banc hearings to set forth rules regarding a wide range of issues and sub-issues, and which consequently set patent policy, are analogous to administrative agencies' procedures for informal substantive rulemaking. When an agency issues notice of a proposed rulemaking, the agency must provide notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."⁷⁵ Typically, when the Federal Circuit hears a case en banc, it issues an order for rehearing en banc letting the parties and public know it will be addressing an issue or several issues.⁷⁶ Of course, the Federal Circuit does not announce its proposed rule in the order, but its statement of subjects and issues appears to satisfy the APA's requirements. *Phillips*, *Therasense*, and *Ariad*, discussed *supra*, are good examples of meeting this standard.⁷⁷

In addition, an agency's notice must establish the time, place, and nature of the rulemaking proceeding.⁷⁸ Again, the Federal Circuit's orders for re-

69. See *Mazzone*, *supra* note 52, at 412 ("Congress often lacks the institutional capacity (or the will) to determine how a statute will apply on the ground and in a variety of contexts.").

70. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979).

71. 5 U.S.C. § 553 (2006).

72. See *infra* notes 118-24 and accompanying text.

73. See 5 U.S.C. § 553. Formal rulemaking is similar to informal rulemaking but requires the agency to conduct an oral evidentiary hearing. I PIERCE, *supra* note 52, at 558. Informal rulemaking is the most common form of administrative rulemaking. Formal rulemaking is increasingly rare. *Id.*

74. 5 U.S.C. § 553(b)-(c); see also I PIERCE, *supra* note 52, at 406.

75. 5 U.S.C. § 553(b)(3).

76. See, e.g., *Therasense, Inc. v. Becton, Dickinson & Co.*, 374 F. App'x 35 (Fed. Cir. 2010) (per curiam); *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 595 F.3d 1329 (Fed. Cir. 2009) (per curiam); *In re Bilski*, 264 F. App'x 896 (Fed. Cir. 2008) (per curiam); *Phillips v. AWH Corp.*, 376 F.3d 1382 (Fed. Cir. 2004) (per curiam).

77. See *supra* text accompanying notes 40-43.

78. 5 U.S.C. § 553(b)(1).

hearing en banc would meet this requirement by letting the parties and amici know that they may submit briefs to the court in support of their proposed rule and giving the timeline for when the briefs are due.⁷⁹ Finally, the agency's notice must give legal authority for the rule.⁸⁰ This requirement calls for the reference to "apprise interested persons of the agency's legal authority to issue the proposed rule."⁸¹ Although the Federal Circuit does not cite to the Federal Courts Improvement Act of 1982 as giving the Federal Circuit authority to hear patent appeals,⁸² no one seriously doubts the Federal Circuit's authority to create patent rules to give meaning to the Patent Act. In short, the notice requirement's purpose is to give interested members of the public an opportunity to comment in a meaningful way.⁸³ The Federal Circuit's practice of issuing an en banc order specifying the questions the court seeks to address and permitting the parties and amici to file briefs accomplishes this goal.

After an agency has issued proper notice, the agency must give interested parties the opportunity to participate in the rulemaking process by submitting their views or arguments with or without an opportunity for oral presentation.⁸⁴ The Federal Circuit's en banc practice mimics this APA requirement for informal substantive rulemaking. By freely permitting amici to file briefs without seeking leave of the court⁸⁵ and to present oral arguments in limited circumstances,⁸⁶ the Federal Circuit has opened its patent rulemaking and policy setting procedure to the public and seeks their participation as it determines what rule or rules should be adopted.

After considering the public's comments, an agency must incorporate into its rule a concise general statement of its basis and purpose.⁸⁷ The Federal Circuit performs the equivalent of this function when it issues its en banc

79. See, e.g., *Therasense, Inc.*, 374 F. App'x at 36 ("Appellants' en banc brief is due 45 days from the date of this order. The en banc response brief is due within 30 days of service of the appellants' new en banc brief, and the reply brief within 10 days of service of the response brief."); *In re Bilski*, 264 F. App'x 896 ("The parties shall file simultaneous supplemental briefs which are due in the court within 20 days from the date of filing of this order, i.e., on March 6, 2008. . . . Any amicus briefs will be due 30 days thereafter.").

80. 5 U.S.C. § 553(b)(2).

81. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 29 (1947).

82. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 163(b)(2), 96 Stat. 25, 50 (codified as amended in scattered sections of 28 U.S.C.).

83. I PIERCE, *supra* note 52, at 571.

84. 5 U.S.C. § 553(c).

85. See *supra* text accompanying notes 47-48.

86. See Oral Argument, *In re Bilski*, 264 F. App'x 896 (2007-1130), available at <http://oralarguments.cafc.uscourts.gov/Audiomp3/2007-1130-2.mp3> (permitting oral argument by Professor John Duffy and William Lee as amici).

87. 5 U.S.C. § 553(c).

opinion in the case. The opinion describes the rule the court has adopted,⁸⁸ describes how it arrived at its rule,⁸⁹ and describes what purpose the rule serves.⁹⁰

In sum, like the agencies that promulgate rules and consequently establish or change policy in their fields, the Federal Circuit's en banc announcement of broad rules establishes and forms patent policy. And like the agencies who must follow the APA's requirements for their rules to have the force and effect of law, the Federal Circuit seems to follow those same procedures when hearing a case en banc.⁹¹

IV. A NORMATIVE EVALUATION

Having now established that when the Federal Circuit hears cases en banc its course of conduct looks strikingly similar to substantive rulemaking by agencies, the question becomes a normative one – should the Federal Circuit be doing this? This Part first examines two objections to the Federal Circuit's en banc practices: a separation of powers concern and a lack of meaningful review of the Federal Circuit's rules. Next, this Part examines the alternative choices to determine if they would be better at directing patent policy than would the Federal Circuit.

A. Separation of Powers

The primary objection to the Federal Circuit's en banc conduct is a separation of powers concern – that courts should not set policy. Judge Plager, of the Federal Circuit no less, has emphasized strongly that even when courts are called on to interpret broadly worded statutory provisions that may have policy implications, a court's "choices are constrained by the central policies reflected in the basic legislative scheme, as well as by the self-imposed defer-

88. See, e.g., *In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007) ("In sum, we hold, as a general proposition, that asserting the advice of counsel defense and disclosing opinions of opinion counsel do not constitute waiver of the attorney-client privilege for communications with trial counsel.").

89. See, e.g., *id.* at 1372-75 (recognizing different approaches and citing to an analogous Supreme Court case for support).

90. See, e.g., *id.* at 1374 (describing the purpose of the attorney-client privilege and how waiver of the privilege with respect to opinion counsel should not be deemed waiver of the privilege with respect to trial counsel because communication with trial counsel would have little relevance to the issue of pre-litigation willfulness).

91. To be sure, agencies can also make "rules" and set policy via case-by-case adjudication. I PIERCE, *supra* note 52, at 495. And although the Federal Circuit adjudicates cases in a way similar to agencies adjudicating cases, what makes the Federal Circuit's en banc practices more analogous to traditional agency rulemaking is that it engages in this notice and comment-like activity.

ence to the policy-fulfilling role of the executive branch.”⁹² Judge Plager describes the court’s limited role in the policy-setting arena as exercising some judgment in discerning Congress’s purpose, while emphasizing that the court’s role is “not to assess the extent to which the congressional policy is responsive to current problems or to determine how well-tuned the statute is to subtle changes in people’s behavior or market conditions.”⁹³

With respect to the Federal Circuit setting patent policy, Judge Plager asserts that the Federal Circuit exists to apply the law and not balance the policy levers because the Federal Circuit is without the proper tools for doing so.⁹⁴ In making his point, Judge Plager raises the following rhetorical questions:

Suppose the judges of the Federal Circuit come to the conclusion that the balance Congress has struck is wrong with regard to a particular field of endeavor Suppose [the Federal Circuit] conclude[s] that [the relevant provision] is stifling competition, and needs tweaking How are the judges to make this assessment? Read newspaper and law review articles? *Hold public hearings? Ask litigants to brief and argue the question?*⁹⁵

The Federal Circuit seems to have answered affirmatively the last two rhetorical questions, at least with respect to cases heard en banc.⁹⁶ The Federal Circuit, in announcing broad questions and inviting the parties and amici to file briefs, appears to be doing exactly what Judge Plager says the court cannot and should not do. The fact that the court sua sponte orders cases to be heard en banc 48-56% of the time⁹⁷ underscores Judge Plager’s concern. To be sure, the percentage of cases heard en banc and ordered sua sponte do not, in and of themselves, indicate that the Federal Circuit is engaging in policymaking. But these factors, combined with the exhaustive scope or number of questions the Federal Circuit seeks to address, strongly suggests that the Federal Circuit sets patent policy.

Still, Judge Plager raises a valid separation of powers objection to courts refusing to exercise self-restraint in deciding matters of policy. But regardless of whether it is desirable or undesirable for appellate courts to set policy,

92. S. Jay Plager & Lynne E. Pettigrew, *Rethinking Patent Law’s Uniformity Principle: A Response to Nard and Duffy*, 101 NW. U. L. REV. 1735, 1737 (2007).

93. *Id.* at 1737-38 (noting that during oral arguments in *Microsoft Corp. v. AT & T Corp.*, Justice Breyer chastised the Federal Circuit for trying to bring the Patent Act up to date with technology).

94. *Id.* at 1741-42.

95. *Id.* at 1742 (emphasis added).

96. *See supra* Part III.

97. *See supra* Part II.

it is well accepted that they do so.⁹⁸ Thus, we should look beyond, but not forget, the separation of powers concern and examine other avenues of evaluating the Federal Circuit's en banc practices.

B. Lack of Review

Another critique of the Federal Circuit's en banc rulemaking and consequent policy-setting is that, unlike administrative rulemaking, no meaningful backstop of judicial review for the Federal Circuit exists. If an agency engages in substantive rulemaking to flesh out a broadly-worded legislative rule, then those entities with standing have the ability to challenge the agency's rules and can have the courts analyze them to ensure the agency has not overstepped its bounds.⁹⁹ This same level of protection does not exist when the Federal Circuit engages in the same type of activity. Of course, the parties involved in an en banc hearing have the option of filing a petition for a writ of certiorari with the Supreme Court,¹⁰⁰ but this alternative is inadequate. The Supreme Court is not accessible to everyone with an interest like the lower courts are.¹⁰¹ Almost all appeals to the Supreme Court are now granted by means of the discretionary writ of certiorari.¹⁰² Of the Supreme Court's approximately eighty to ninety cases it decides annually, it averages about one or two patent cases.¹⁰³

98. See judicialnetwork, *Sotomayor: Judges make policy*, YOUTUBE (May 12, 2009), http://www.youtube.com/watch?v=zXS6AoNCr_Q ("court of appeals is where policy is made . . . and I know I should never say that because we don't make law, [followed by laughter erupting from the audience] . . . I'm not promoting it, I'm not advocating it, I'm . . . you know [followed by more laughter]").

99. See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983). In *State Farm*, State Farm challenged the National Highway Traffic Safety Administration's regulation revoking its prior regulation requiring passive restraints in vehicles. *Id.* at 39-40. The Supreme Court held that the revocation was arbitrary and capricious. *Id.* at 46.

100. Judiciary Act of 1925, 68 Pub. L. No. 415, § 237, 43 Stat. 936, 937-38.

101. See generally 28 U.S.C. §§ 1251-59 (2006).

102. 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4001, 4004 (2d ed. 1996 & Supp. 2011).

103. During the 2010-2011 Term, the Supreme Court decided three patent cases – *Microsoft Corp. v. i4i Limited Partnership*, 131 S. Ct. 2238 (2011), *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 131 S. Ct. 2188 (2011); and *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). During the 2009-2010 Term, the Supreme Court decided one patent case – *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). During the 2008-2009 Term, the Supreme Court did not decide any patent cases. See David Carlson, *Supreme Court 2008-2009 Term Highlights*, CORNELL U. L. SCH., http://topics.law.cornell.edu/supct/supreme_court_2008-2009_term_highlights (last visited July 14, 2011). During the 2007-2008 Term, the Supreme Court decided one patent case – *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617 (2008). The 2006-2007 Term had more Supreme

C. Alternative Choices

Despite the separation of powers concerns and the lack of review of the Federal Circuit's en banc rulemaking and policy-setting, a need undoubtedly exists for an entity to set patent policy. Looking at the other players in the patent policy arena, the Federal Circuit may be the best candidate, and its en banc approach to setting patent policy may not be that objectionable. This section examines the abilities of Congress, the Supreme Court, the district courts, and the PTO to shape patent policy as alternatives or complements to the Federal Circuit sitting en banc.

1. Congress's Capability for Patent Policy

From a separation of powers perspective, Congress ideally would step in and set patent policy. But since its enactment in 1952, Congress has shown little interest in amending the Patent Act. When it has shown interest, the amendments have pertained primarily to procedural or administrative issues.¹⁰⁴ For the past several years, Congress has introduced patent reform legislation but has never passed it.¹⁰⁵ The 112th Congress again introduced patent reform legislation¹⁰⁶ and was finally able to pass this legislation in both

Court involvement in patent cases, but still it only decided three cases – *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437 (2007), *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

104. Clarisa Long, *The PTO and the Market for Influence in Patent Law*, 157 U. PA. L. REV. 1965, 1968 (2009).

105. *See, e.g.*, S. 515, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-515> (reported by the committee, but never voted on by the Senate); S. 610, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-610> (referred, but not reported by the committee); H.R. 1260, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-1260> (referred, but not reported by the committee); S. 3600, 110th Cong. (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-3600> (referred, but not reported by the committee); H.R. 1908, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1908> (passed the House, but not voted on by the Senate); S. 1145, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-1145> (reported by the committee, but never voted on by the Senate); S. 3818, 109th Cong. (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-3818> (referred, but not reported by the committee); H.R. 2955, 109th Cong. (2006), available at <http://www.govtrack.us/congress/bill.xpd?bill=h109-2955> (reported by the committee, but never voted on by the House).

106. *See* S. 23, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bill.xpd?bill=s112-23>; Leahy-Smith America Invents Act, H.R. 1249, 112th Cong. (2011) (passed by the Senate on September 8, 2011), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h112-1249>.

chambers in September of 2011.¹⁰⁷ And although President Obama has now signed it into law, the reform will play a minor role in addressing the larger, looming patent policy issues. The amendments do make some major changes to patent law, including moving the United States to a first-to-file system,¹⁰⁸ eliminating the best mode requirement as a basis for asserting invalidity of a patent,¹⁰⁹ and eliminating tax strategies from being patentable.¹¹⁰ Although these reforms are significant policy changes, they are only a small part of the tremendous amount of patent policy issues that need to be addressed. In sum, although Congress has recently passed patent reform after several years of being unable to muster the political will to do so, much work remains to be done.

2. The Supreme Court's Capability for Patent Policy

The next potential body that could set patent policy is the Supreme Court. Although the Supreme Court has shown an increased interest in patent cases over the past decade,¹¹¹ it is an ineffective body to direct patent policy. First, as discussed *supra*, the Supreme Court hears only a small handful of patent cases each Term.¹¹² Second, the Supreme Court has little expertise in patent law and is therefore not the most knowledgeable institution in terms of the nuances of patent law and the ramifications its rules may have.¹¹³ In short, unless the Supreme Court significantly and consistently increases the number of patent cases it hears each Term, a highly unlikely event, it cannot play a major role in developing patent policy.

3. The District Courts' Capability for Patent Policy

Another policy-setting body could be the federal district courts, which are also unlikely to be a good choice. The most obvious problem with using

107. Dennis Crouch, *Smith-Leahy America Invents Act to Become Law – Senate Passes H.R. 1249 Without Amendment*, PATENTLY-O BLOG (Sept. 8, 2011, 5:48 PM), <http://www.patentlyo.com/patent/2011/09/smith-leahy-america-invents-act-to-become-law-senate-passes-hr-1249-without-amendment.html>.

108. H.R. 1249 § 3.

109. *Id.* § 15.

110. *Id.* § 14.

111. See Ryan Vacca, IP and the Supreme Court: A Historical Perspective at 5 (Table 1) (unpublished manuscript) (Nov. 5, 2010) (on file with the author) (illustrating that from 2001-2010 1.9% of the Supreme Court's docket has consisted of patent cases (2.0% when including the 2010-2011 Term) compared with 0.8% from 1991-2000 and 0.3% from 1981-1990).

112. See *supra* note 103 and accompanying text.

113. John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 688-89 (2009).

district courts is structural; they have no authority to bind other district courts, the Federal Circuit, or the Supreme Court. Moreover, like the Supreme Court, district court judges infrequently hear patent cases.¹¹⁴ This lack of experience makes them ill-suited to set patent policy.

Earlier this year, Congress passed and President Obama signed House Bill 628, which establishes a ten-year pilot program for some district court judges electing to hear patent cases; the bill allows judges to gain further experience by channeling patent cases to them.¹¹⁵ Although some hope exists that these district court judges will, over time, become more knowledgeable about patent law, there is cause for concern that this pilot program is not going to create the level of specialization that was anticipated. In its original form, the bill annually appropriated \$5,000,000 for educational and professional development about patents for the participating district judges and for compensation for law clerks with expertise in technical matters.¹¹⁶ However, as passed, the appropriations provision was removed.¹¹⁷ Although some district court judges may elect to specialize in patent cases within their district, the fact that additional funds are unavailable to educate these judges on matters relating to patent law makes it less likely that these district court judges will, in fact, become specialists.

4. The PTO's Capability for Patent Policy

The final potential candidate in the patent law arena for setting patent law policy is the PTO. Although Congress regularly delegates its rulemaking and policy-setting authority in highly complex areas to administrative agencies, Congress has not delegated this authority to the PTO.¹¹⁸ Currently, the PTO's only rulemaking authority is to set regulations governing the conduct of proceedings in the PTO.¹¹⁹ The Federal Circuit repeatedly has rejected claims that the PTO has authority to engage in substantive rulemaking.¹²⁰

114. Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1097 & n.277 (2003) ("estimating that the average judge has only one patent trial every 6 to 8 years") (internal quotation marks omitted).

115. *See* Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011).

116. H.B. 628, 111th Cong. § 1(f)(1) (2009).

117. *See* 124 Stat. 3674.

118. Rochelle Cooper Dreyfuss, *The Federal Circuit as an Institution: What Ought We to Expect?*, 43 LOY. L.A. L. REV. 827, 838 (2010).

119. *See* 35 U.S.C. § 2(b)(2)(A) (2006).

120. *See* *Merck & Co. v. Kessler*, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (quoting *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 930 (Fed. Cir. 1991)) ("As we have previously held, the broadest of the PTO's rulemaking powers . . . authorizes the Commissioner to promulgate regulations directed only to 'the conduct of proceedings in the [PTO]'; it does NOT grant the Commissioner the authority to issue substantive

The House of Representatives attempted to grant the PTO authority to issue substantive rules in the Patent Reform Act of 2007 by granting the Director of the PTO the power to “promulgate such rules, regulations, and orders that the Director determines appropriate to carry out the provisions of this title or any other law applicable to the United States Patent and Trademark Office or that the Director determines necessary to govern the operation and organization of the Office.”¹²¹ Despite this effort to give the PTO the ability to engage in substantive rulemaking and help set patent policy, the Senate never voted on the Patent Reform Act of 2007; consequently, the Act never became law.¹²² The current patent reform legislation does not contain a provision granting substantive rulemaking authority.¹²³ As a result of this lack of Congressional authority, any substantive rules the PTO promulgates do not have the force and effect of law but are interpretive rules that may be persuasive when viewed in light of “the thoroughness of its consideration and the validity of its reasoning.”¹²⁴

The PTO’s lack of substantive rulemaking authority may be reasonable. Certainly, the PTO has a vast amount of experience with patents. It works directly with innovators and spends much of its time applying the Patent Act’s provisions to patent applications.¹²⁵ Nonetheless, the PTO may lack an institutional competence for patent policymaking. The bulk of the PTO’s expertise is technological in nature¹²⁶ and not in establishing patent policy. This technical expertise does not imply that the PTO would be better at setting patent policy than the Federal Circuit sitting en banc.¹²⁷ Until last year, the PTO did not employ any economists, whose expertise could be particularly helpful in establishing patent policy.¹²⁸ Therefore, although an administra-

rules.”); *see also* *Tafas v. Doll*, 559 F.3d 1345, 1352 (Fed. Cir. 2009) (“We agree with the district court that § 2(b)(2) ‘does not vest the USPTO with any general substantive rulemaking power.’”), *vacated by* 328 F. App’x 658 (Fed. Cir. 2009).

121. H.R. 1908, 110th Cong. § 11 (2007) (as introduced in the House).

122. *See* Long, *supra* note 104, at 1979.

123. *See* S. 23, 112th Cong. (2011), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s112-23>; H.R. 1249, 112th Cong. (2011), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h112-1249>.

124. *Merck & Co.*, 80 F.3d at 1550.

125. Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 192 (2000) (“PTO employees undoubtedly gain a ‘hands-on’ view of the patent system by reviewing hundreds of thousands of patent applications every year . . .”).

126. *See* Burstein, *supra* note 59, at 1787-88.

127. *Id.* (“[I]t is unclear how this experience places the PTO in a better position than anyone else to evaluate what changes in legal rules will best encourage research.”); *see also* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 792-93 (2004).

128. Rai, *supra* note 114, at 1132 (arguing that “there are reasons to be wary about granting the PTO substantive rulemaking authority.”). In March 2010, the USPTO established the Office of Chief Economist and appointed Dr. Stuart Graham

tive agency exists in the patent field, there may be less reason to defer to its ability to establish patent rules, and consequently, to strike a proper balance between protection of and access to innovation.

Despite the PTO's perceived lack of institutional competence to establish substantive rules and set patent policy, the PTO has had an impact on the Federal Circuit's rulemaking and policy setting. The PTO has issued guidelines and interpretive rules, which the Federal Circuit tends to give deference to when crafting its rules. For example, in 1995 and again in 2001, the PTO issued its Utility Examination Guidelines¹²⁹ to govern its internal practices for determining whether the applicant had satisfied the utility requirement under section 101.¹³⁰ During an appeal from the PTO's rejection of an application for lack of utility, the Federal Circuit noted that the guidelines were not binding but could be "given judicial notice to the extent they do not conflict with the statute."¹³¹ Finding that the guidelines were consistent with precedent, the Federal Circuit used them to support its holding that no specific utility existed.¹³²

Thus, the PTO may be fulfilling its unauthorized role as an agency setting patent policy; and therefore, it may be complementing or balancing the Federal Circuit's en banc role. Nonetheless, the lack of authority and ability to have its guidelines or interpretations necessarily afforded the force and effect of law renders the PTO a secondary player in the patent policy arena.

Of course, this is not to say that the PTO, if given the authority and resources to employ capable personnel, could not do a good job or even a better job at setting patent policy than the Federal Circuit could do.¹³³ In fact, the PTO (or even a different agency) might be preferable in terms of setting patent policy. Agencies have the ability to engage in more substantial fact-

as its first Chief Economist. *Office of Chief Economist*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/ip/officechiefecon/index.jsp> (last visited July 14, 2011). This is a step in the right direction if it is determined that the PTO should be setting patent policy.

129. Utility Examination Guidelines, 66 Fed. Reg. 1092 (Jan. 5, 2001).

130. *In re Fisher*, 421 F.3d 1365, 1372 (Fed. Cir. 2005).

131. *Id.* (quoting *Enzo Biochem v. Gen-Probe*, 323 F.3d 956, 964 (Fed. Cir. 2002)).

132. *Id.* at 1372-73. ("Indeed, we note that Example 9 of the PTO's 'Revised Interim Utility Guidelines Training Materials' is applicable to the facts here. In that example, a cDNA fragment disclosed as being useful as a probe to obtain the full length gene corresponding to a cDNA fragment was deemed to lack a specific and substantial utility. Additionally, the MPEP particularly explains that a claim directed to a polynucleotide disclosed to be useful as a 'gene probe' or 'chromosome marker,' as is the case here, fails to satisfy the specific utility requirement unless a specific DNA target is also disclosed.") (citation omitted).

133. Burstein, *supra* note 59, at 1787-88 ("The PTO is set up primarily to perform the tasks of patent examination, which . . . are distinct from policymaking. But it does not follow from these observations that no agency properly constituted could make patent policy successfully.").

finding than courts, which can place them in a superior position to set policy.¹³⁴ But as with any administrative agency, the risks of "tunnel-vision" and "capture" exist.¹³⁵ With tunnel-vision, the regulators, who encounter the same issues over time, lose their ability to think outside the box or rethink established rules.¹³⁶ With capture, the concern is that over time regulators will move toward the interests of those they regulate because of the resources used by the regulated industries.¹³⁷ Several commentators believe capture exists at the PTO, while others believe the powerful players on all sides of patent policy questions tend to cancel out the influence by the others.¹³⁸

5. The Federal Circuit's Capability for Patent Policy

Having eliminated Congress, the Supreme Court, and the district courts as options to be effective patent policymakers, and by Congress failing to give the PTO authority to do so, we are left with slim pickings. By process of elimination, the Federal Circuit is the only entity remaining. Despite the separation of powers and lack of review objections, the Federal Circuit as patent policymaker may not be a horrible choice. Unlike the Supreme Court and district courts, 30 to 40% of the Federal Circuit's docket is comprised of patent cases, resulting in it hearing several hundred patent cases per year.¹³⁹ And unlike Congress, based on the Federal Circuit's practices over the last twenty-nine years, the Federal Circuit appears as though it is willing and interested in setting patent policy, especially recently.¹⁴⁰ But perhaps most important is that by using its en banc procedure and regularly inviting the parties and amici to file briefs, the Federal Circuit is establishing patent rules and setting patent policy in an inclusive way.

Expertise and inclusiveness are the two most desirable characteristics in administrative rulemaking.¹⁴¹ The Federal Circuit's en banc practice in the patent context seems to embody these desirable characteristics and further democratic principles in light of Congress's delegation of its policymaking duty to the courts via their adjudicatory role. Despite these positive characteristics, policymaking by the Federal Circuit is no panacea. Just as with agencies, concern exists that the Federal Circuit is subject to capture and tunnel vision.¹⁴²

134. *Id.* at 1785-88.

135. *Id.* at 1795-96.

136. *Id.* at 1795.

137. *Id.* at 1795-96.

138. *Id.* at 1796-97.

139. *See supra* note 27 and accompanying text.

140. *See supra* Part II.

141. *See supra* note 69 and accompanying text (expertise); I PIERCE, *supra* note 52, at 571 (inclusiveness). Expertise has been explained, but inclusiveness seems to reflect some degree of democracy when compared to policymaking via adjudication.

142. Burstein, *supra* note 59, at 1797-98.

V. CONCLUSION

Congress may have thought it was creating an appellate court when it established the Federal Circuit. Instead, Congress created a court that, when it sits en banc, has administrative agency-like tendencies. To a certain extent, this result was Congress's own doing. By drafting a broadly-worded Patent Act, it delegated its duty to set rules and policies. By not giving the PTO authority to promulgate substantive rules and by not taking an interest in or having the institutional capacity to do so itself, Congress left it to the courts to flesh out rules and direct patent policy. The Supreme Court's limited experience and shrinking docket render it an inapt body, and the district courts do not fare any better given their limited experience with patent cases and their position within the judicial hierarchy.

As a result, the only institution that could handle the task was the Federal Circuit. Fortunately, it has been willing to undertake this responsibility, and when sitting en banc, it undertakes this obligation in a responsible and inclusive way. Although the Federal Circuit's en banc practices strongly resemble an agency's procedure for substantive rulemaking, these characteristics are ones that are admired in today's administrative state. That being the case, the Federal Circuit is not always consistent in following the notice and comment procedures.¹⁴³ Given the benefits of the notice and comment procedures being followed and the objections to the Federal Circuit's rulemaking and policy setting, the Federal Circuit would be wise to continue its notice and comment-like practices for all en banc cases. In fact, it may be advisable for the Federal Circuit to sit en banc more frequently.

To be sure, more changes in patent law and policy are on the horizon. Congress, the Supreme Court, the district courts, and the PTO may, and perhaps should, have a larger role in how these changes come about. But until structural changes are made or enough political will is garnered, the Federal Circuit hearing cases en banc is not a bad solution to the ever-present problem of changing circumstances in patent law.

143. *See, e.g.,* *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1301 (Fed. Cir. 2009) (Newman, J. dissenting) ("The court has given no notice of this impending en banc action, contrary to the Federal Rules of Appellate Procedure and contrary to the Federal Circuit's own operating procedures. The en banc court has received no briefing and held no argument, although the Federal Rules so require. The communities of inventors, innovators, and the public who may be affected by this change of law have had no opportunity to be heard. The court has received no information concerning the effect on patents that were granted based on this long-established practice, no advice on what kinds of inventions may now lie fallow because they are unprotected. Nor does the court explain its suspension of the standards of judicial process.") (emphasis omitted).

APPENDIX

**Chronological List of Federal Circuit Cases Ordered or Heard En Banc:
1982-2011¹⁴⁴**

No.	Case Name	Year	Sua Sponte or Petitioned	No. of Questions
1	<i>Atari, Inc. v. JS & A Group, Inc.</i>	1984	sua sponte	2
2	<i>Gardner v. TEC Systems, Inc.</i>	1984	unknown	unknown
3	<i>In re Bennett</i>	1985	sua sponte	unknown
4	<i>In re Etter</i>	1985	sua sponte	2
5	<i>Paulik v. Rizkalla</i>	1985	unknown	unknown
6	<i>SRI International v. Matsushita Electric Corp. of America</i>	1985	sua sponte	unknown
7	<i>Wyden v. Commissioner of Patents and Trademarks</i>	1986	unknown	unknown
8	<i>Pennwalt Corp. v. Durand-Wayland, Inc.</i>	1987	sua sponte	unknown
9	<i>Woodard v. Sage Products, Inc.</i>	1987	petitioned	unknown
10	<i>Gavin v. Star Brite Corp.</i>	1988	sua sponte	unknown
11	<i>Kingsdown Medical Consultants, Ltd. v. Hollister Inc.</i>	1988	sua sponte	4
12	<i>In re Roberts</i>	1988	sua sponte	unknown
13	<i>Racing Strollers, Inc. v. TRI Industries, Inc.</i>	1989	petitioned	1

144. This list of cases excludes *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) and *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982), which was the first opinion from the Federal Circuit and which adopted as precedent the decisions of the Court of Claims and Court of Customs and Patent Appeals. *Midwest* has been excluded because it is more of a trademark case rather than a patent case. See *Midwest Indus., Inc.*, 175 F.3d at 1357. *South Corp.* has been excluded because, although it has patent ramifications, the case itself is not a patent case. See *S. Corp.*, 690 F.2d at 1369. Also excluded from this list are *Wyden v. Commissioner of Patents and Trademarks*, 807 F.2d 934 (Fed. Cir. 1986) (deciding an issue concerning the regulation of patent agents rather than a substantive patent issue) and *In re Roberts*, 846 F.2d 1360 (Fed. Cir. 1988) (addressing the ability of the Federal Circuit to direct a district court to ignore an order from the Court of Appeals for the Seventh Circuit).

14	<i>Aerojet-General Corp. v. Machine Tool Works, Oerlikon-Buehrle Ltd.</i>	1990	sua sponte	1
15	<i>Beatrice Foods Co. v. New England Printing and Lithographing Co.</i>	1990	unknown	unknown
16	<i>In re Dillon</i>	1990	petitioned	unknown
17	<i>A.C. Aukerman Co. v. R.L. Chaides Construction Co.</i>	1992	sua sponte	3
18	<i>In re Alappat</i>	1994	sua sponte	3
19	<i>In re Donaldson Co.</i>	1994	petitioned	unknown
20	<i>Hilton Davis Chem Co. v. Warner-Jenkinson Co.</i>	1995	sua sponte	3
21	<i>Markman v. Westview Instruments, Inc.</i>	1995	sua sponte	4
22	<i>King Instrument Corp. v. Perego</i>	N/A	sua sponte	unknown
23	<i>Rite-Hite Corp. v. Kelley Co.</i>	1995	sua sponte	unknown
24	<i>Cybor Corp. v. FAS Technologies, Inc.</i>	1998	sua sponte	unknown
25	<i>In re Zurko</i>	1998	petitioned	1
26	<i>Nobelpharma AB v. Implant Innovations, Inc.</i>	1998	unknown	unknown
27	<i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. (Festo 2000)</i>	2000	petitioned	5
28	<i>Johnson & Johnston Associates Inc. v. R.E. Service Co.</i>	2002	sua sponte	2
29	<i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. (Festo 2003)</i>	2003	unknown	4
30	<i>Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.</i>	2004	sua sponte	4
31	<i>Honeywell International Inc. v. Hamilton Sundstrand Corp.</i>	2004	sua sponte	unknown
32	<i>Phillips v. AWH Corp.</i>	2005	petitioned	7
33	<i>DSU Medical Corp. v. JMS Co.</i>	2006	unknown	unknown
34	<i>In re Seagate</i>	2007	sua sponte	3

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35	<i>Egyptian Goddess, Inc. v. Swisa, Inc.</i>	2008	petitioned	3
36	<i>In re Bilski</i>	2008	sua sponte	5
37	<i>Abbott Laboratories v. Sandoz, Inc.</i>	2009	sua sponte	unknown
38	<i>Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.</i>	2009	petitioned	1
39	<i>Tafas v. Doll</i>	N/A	petitioned	unknown
40	<i>Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.</i>	2010	petitioned	2
41	<i>Princo Corp. v. ITC</i>	2010	petitioned	unknown
42	<i>Hyatt v. Kappos</i>	2010	petitioned	4
43	<i>Therasense, Inc. v. Becton, Dickinson & Co.</i>	2011	petitioned	6
44	<i>TiVo, Inc. v. Echostar Corp.</i>	2011	petitioned	4
45	<i>Akamai Technologies, Inc. v. MIT</i>	N/A	petitioned	1
46	<i>McKesson Technologies Inc. v. Epic Systems Corp.</i>	N/A	petitioned	2