JUDICIAL SPECIALIZATION, LITIGANT INFLUENCE, AND SUBSTANTIVE POLICY: THE COURT OF CUSTOMS AND PATENT APPEALS

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Several courts of limited jurisdiction currently exist in the federal judicial system, and new specialized courts have been proposed. Opponents of some specialized courts have pointed to the potential policy implications of judicial specialization, and their arguments merit attention. In this article the effects of specialization on the influence of litigant groups over judicial decisions and on the substance of judicial policy are analyzed in general terms. These effects are then examined in greater depth through a case study of the U.S. Court of Customs and Patent Appeals. The findings are complex, but they indicate that specialization may have a significant impact on judicial behavior. This impact should be taken into account in decisions whether to create courts of limited jurisdiction.

I. INTRODUCTION

The business of the federal judicial system is transacted primarily in courts of general jurisdiction, and it is appropriate that these courts have received the preponderance of attention from students of the federal judiciary (Goldman and Jahnige, 1976). However, significant policy-making roles also are played by the five major courts of limited jurisdiction in the federal system.[1] Moreover, proposals have been advanced for the creation of several other specialized courts, including an administrative court (Minor, 1958; Lorch, 1967), an environmental court (Whitney, 1973a, 1973b), a labor court (Kintner, 1961), and a court of tax appeals (Friendly, 1973:161-67; Brown and Whitmire, 1966).[2] The existence of the present specialized courts and of the proposals for additional ones suggests that specialization as a characteristic of federal courts merits more concerted examination than it has received thus far.[3]

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1. These are the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals, the Tax Court, and the Court of Military Appeals. On the general characteristics of the first four courts, see Bator *et al.* (1973:48-49). On the Court of Military Appeals, see Summerford (1973). Other specialized courts have functioned in the past, including the Commerce Court (Dix, 1964) and the Emergency Court of Appeals (Laws, 1944).
2. There also have been proposals for a Trade Court (Berger, 1960) and for a Patent Court (Friendly, 1973:155-59).
3. The literature on the federal courts of limited jurisdiction is not extensive and is concerned primarily with specific procedural and substantive doctrines (*Georgetown Law Journal,* 1966; Johnson, 1954). A few studies

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Federal courts of limited jurisdiction have been proposed and created chiefly to serve what might be called "policy-neutral" goals (Hurst, 1950:432-33; Frankfurter and Landis, 1928: ch. 4; Henke, 1966; Nathanson, 1975). These goals have included relief of caseload pressures on existing courts, development of judicial expertise to handle legal questions of special complexity, and achievement of uniformity in the interpretation of the law. Proponents of specialized courts implicitly assume or explicitly argue that the removal of a class of litigation to such a court can achieve these kinds of goals without affecting the relative advantages of interest groups involved in that litigation (Friendly, 1973:153-67; Whitney, 1973b).

In contrast, some opponents of particular specialized courts have argued against their creation precisely because they feared that such courts would produce undesirable patterns of outcomes for the groups affected by their decisions. Opponents of the short-lived Commerce Court predicted that this court would favor the railroad interests that appealed to it from decisions of the Interstate Commerce Commission (Rightmire, 1918:97-120; Frankfurter and Landis, 1928:160-73).[4] Similar objections have been raised about proposed courts of limited jurisdiction (Oakes, 1973; U.S. Congress, Senate, 1909:4185-4225).

These arguments have been directed at individual courts, and the premises on which they are based have been left largely unspecified. However, they suggest a broad thesis about the policy impact of judicial specialization: courts of limited jurisdiction will produce patterns of decision different from those that would be produced by generalist courts, because specialization increases judicial susceptibility to influence by litigant interest groups.[5]

This thesis merits examination because of its implications for the decision to create specialized courts. If specialized and generalist courts distribute benefits and burdens very differently, then policy-makers should identify and evaluate these differences

provide some information on the decisional processes and policy tendencies of these courts (Summerford, 1973: chs. 4-5; Worthy, 1971). Nathanson's discussion of the behavior of specialized federal courts (1975) and Shapiro's analysis of specialization as a variable in judicial behavior (1968:52-54) both offer implicit hypotheses about the impact of specialization.

4. Indeed, the Commerce Court was abolished in part because many members of Congress came to believe that this prediction had been borne out (Dix, 1964).

5. It also has been suggested that specialization may affect judicial policies in other ways, e.g., by giving judges confidence in their own expertise (Friendly, 1973:187-88) or by producing a narrowness of outlook on an area of law (Rifkind, 1951). These theses merit attention, but the analysis in this paper will be limited to the influence hypothesis just advanced.

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before they increase the jurisdiction of the former at the expense of the latter.

This paper is an exploration of the consequences of judicial specialization for litigant influence over court decisions and for patterns of judicial decisions, particularly federal courts of limited jurisdiction. In the next section, I will discuss in general terms the thesis that I have drawn from the arguments against specialized courts. In the following section I will examine this thesis empirically through a case study of the federal Court of Customs and Patent Appeals.

II. JUDICIAL SPECIALIZATION, LITIGANT INFLUENCE, AND POLICY OUTPUTS

The thesis actually consists of two connected arguments. First, courts of limited jurisdiction tend to be subject to greater influence by litigant interest groups than are courts of general jurisdiction. Second, this difference in influence will cause specialized courts to produce patterns of decision different from those that would be produced by generalist courts handling the same cases.

A. Specialization and Influence

In order to examine the first argument, we first must define litigant interest groups and litigant influence. The term "litigant interest group" refers to a set of litigants, or to their legal representatives, who share a preference for a particular kind of judicial policy. In the criminal trial court, prosecutors, defendants, and the defense bar all may be considered litigant interest groups. In civil courts litigant groups include, among others, creditor merchants, tenants challenging landlord actions, and particular government agencies. Although none of these groups is perfectly homogeneous, the members of each share a general policy preference in their litigation activities: for example, merchants' preference for policies that facilitate the collection of debts.

The federal courts of limited jurisdiction interact chiefly with three kinds of interest groups.[6] The first includes the government agencies that come to court to defend their own decisions or other government interests, such as the Internal Revenue Service in the Tax Court, the Customs Service in the Customs Court, and the Patent and Trademark Office[7] in the Court of Customs and Patent

6. The Court of Military Appeals will be excluded from this discussion because the contending interests in that court are somewhat different in kind from those in the other four specialized courts.

7. The Patent Office became the Patent and Trademark Office in 1975. For convenience, the name Patent Office will be used in the remainder of the paper.

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Appeals.[8] The second consists of the parties that bring actions against the government, such as importers in the Customs Court and claimants against the government in the Court of Claims. Finally, there are the sets of attorneys who represent these private litigants, in most cases members of distinctive segments of the bar: the tax bar in the Tax Court, the patent bar in the Court of Customs and Patent Appeals, the customs bar in the Customs Court. The preferences of the second and third groups can be expected largely to coincide.[9]

Adapting Dahl (1963:40), we may define litigant-group influence as a relationship between a group and a court in which the group causes the court to produce decisions that it would not otherwise produce in the same cases. Influence over a court's decisions may arise from direct interaction between judges and members of an interest group. Influence also may occur indirectly; perhaps the most important form is influence over the selection of a court's membership.[10] Our discussion will consider both direct influence over judges and influence over a court's composition.

Does judicial specialization foster litigant influence? There is no logical basis for a direct linkage between the two variables. However, we will contend that specialization does tend to increase group influence through the effects of an intervening factor: specialization increases the "concentration of judicial business," which in turn increases the potential for influence.

What we have called the concentration of judicial business actually refers to two variables. The first is the extent to which a group's litigation activities occur in a single court; the second is the extent to which a court's caseload is dominated by actions that involve a particular interest. A high level of one kind of concentration is not inevitably accompanied by a high level of the other, but the two kinds of concentration generally covary; the greater the proportion of a group's litigation heard by a given court, the more that litigation fills the court's docket.

The relationship between judicial specialization and the concentration of business is fairly strong. It is true that many courts

8. The Internal Revenue Service and Patent Office are represented by their own legal staffs in court. The Customs Service, however, is represented by the Civil Division of the Justice Department.
9. The kinds of real and potential conflicts of interest between attorneys and clients that exist in criminal law (Blumberg, 1967b) and in automobile-accident litigation (Ross, 1970; Rosenthal, 1974:95-116) do not appear to exist in the kinds of cases that come before the specialized federal courts.
10. Another important form of indirect influence, which we will not consider here, seeks to change the legislation under which courts operate. See, for instance, Lemert (1970) and Mosier and Soble (1973). Also excluded from our discussion, because it falls outside the definition of influence employed here, is the ability to bring litigation to a court (Vose, 1958, 1972).

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ordinarily considered generalists, like justice courts and criminal trial courts, rank high in one or both kinds of concentration. However, specialization is virtually a sufficient condition for high concentration: a court of limited jurisdiction by its nature hears cases involving only a limited range of interest groups, and usually it hears the preponderance of cases in which these groups are involved. More important, the creation of a court of limited jurisdiction usually produces a condition of high concentration that did not exist previously. If a Court of Tax Appeals were established, for instance, tax cases would be removed from the eleven circuit courts of appeals, for which they represent a small minority of cases, to a single court that heard nothing else.

The significance of the specialization-concentration linkage lies in the effect of concentration on the potential for group influence of court decisions. On a very general level, we may think of group influence over policy-makers as depending on two variables, the extent of a group's efforts to exert influence and the effectiveness of the efforts that it does undertake.[11] High concentrations of judicial business tend to foster both.

First, high concentration of a group's business in a particular court tends to increase the group's efforts to influence that court by increasing its stake in the court's decisions. For example, insurance companies may have relatively little incentive to seek a role in the selection of judges to any federal district court. But if all insurance cases were heard in a single court, the insurance companies' incentive to influence that court's composition would be very high. The concentration of business certainly is not the only variable that helps to determine the extent of efforts at influence, but it constitutes one important factor.

Second, high concentration of both types may enhance a group's effectiveness in exerting influence. In the selection of judges, the fact that a group's litigation dominates a court's caseload may give legitimacy to its demands for a role in the choice of court personnel. In part because of this kind of legitimacy, groups that dominate the business of regulatory agencies have established important roles in the selection of regulatory commissioners (Kolhmeier, 1969:36-61). Analogous groups may be able to claim comparable roles in the judicial arena, particularly if they can assert an expertise in the field of a court's jurisprudence.

Direct influence over a court also is facilitated by concentration of business. A group whose members come before a court

11. On the determinants of group influence generally, useful sources include Truman (1951), Milbrath (1963), McConnell (1966), and Zeigler and Baer (1969).

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frequently obtains a relatively good opportunity to shape judges' perceptions and values. Continual interaction between regulatory officials and their clienteles helps to produce agency sympathy toward the problems and needs of the clientele groups (U.S. Senate, 1960:71; Bernstein, 1955:158). A similar process seems to occur in some courts whose judges deal continually with certain litigant groups, such as the criminal trial court (Blumberg, 1967a; Foote, 1956) and the small claims court (Jacob, 1969:100).

Moreover, a group whose litigation constitutes most of a court's business has a relatively good opportunity to establish a profitable exchange relationship with that court. Many courts have goals whose achievement depends in large part on cooperation by litigants; the more that a group dominates a court's caseload, the more dependent the court is on it for aid, and the greater the inducements that it may offer for that aid. Some justice courts participate in a particularly direct exchange relationship with litigants; the justice of the peace who is paid by the number of cases heard sometimes adopts policies favorable to merchants and police, the two groups that bring the preponderance of cases to JPs, to secure their business (*Virginia Law Review*, 1966; Gorton, 1974). The relationship between the Supreme Court and the Solicitor General is more subtle; the Solicitor General, who controls a large volume of potential appeals to the Court, helps to ease the Court's caseload problems and earns its gratitude by exercising great restraint in his requests for certiorari (Scigliano, 1971:161-96). High concentration of a court's business is neither necessary nor sufficient for the development of such relationships, but it greatly facilitates their development when other conditions are favorable.

In one respect the concentration of business might limit rather than enhance group influence. Over time a court that hears a large number of cases in a particular area is likely to develop some expertise in that area. This expertise in turn will limit judges' dependence on litigants for an understanding of cases. But the development of expertise is a process that results primarily from education by litigants in a succession of cases. In effect, a court that hears many cases of a particular type becomes independent of current group arguments largely because it has been influenced by past group arguments. For this reason we would expect the development of expertise to detract only marginally from the positive relationship we have posited between concentration and influence.

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Certainly variables other than the concentration of judicial business play important roles in the determination of group influence. Among these are other characteristics of courts, such as their caseloads and staff resources; characteristics of judges, such as their expertise, security, and ambitions; and characteristics of litigants, such as their politically relevant resources. Because of the effects of these variables, some courts with low concentrations of business may be subject to considerable litigant influence.[12] Similarly, characteristics of particular courts with high concentrations may limit the potential for influence of their judges.[13] But in the universe of courts we should find a significant relationship between the concentration of business and litigant influence. Thus the opponents of judicial specialization had a basis for their expectation of a relationship between specialization and influence.

B. Specialization and Policy

The existence of a relationship between judicial specialization and policy outcomes would seem to follow from the linkage between specialization and influence. If we define influence in terms of effect on policy, then courts subject to different levels of influence might be expected to produce different policies. But this need not be the case, because there is a distinction between "gross" and "net" influence. If groups on both sides of an issue achieve high levels of influence over judicial decisions, then the net effect of their efforts may be very limited. Some opponents of specialized courts have argued or assumed that these courts would be subject to strong influence from only one side (U.S. Congress, Senate, 1909:4185; House, 1910:5159), but such a result does not necessarily follow.

It is difficult to generalize about the net influence of interest groups on particular courts for several reasons: the complexity of the variables that help to determine influence, the great variation

12. Thus, for instance, political party organizations in some areas exert considerable influence over judges on courts with low concentrations of party-related business because of the characteristics of these judges; selected because of party loyalty, they support the party because of their gratitude and, in the state systems, desire to maintain their positions (Sayre and Kaufman, 1960: ch. 14; Goulden, 1974:114-57).

13. Thus, the fact that judges on most specialized federal courts enjoy lifetime terms with fixed salaries at fairly high levels limits the means by which these judges may be influenced. (Judges on the Tax Court serve fifteen-year terms, but they are regularly reappointed.) Unlike their counterparts on some regulatory agencies (Bernstein, 1955:83; Fellmeth, 1970:20-21), judges on the specialized courts generally have not shown interest in private employment after judicial service. However, these conditions do not preclude influence based upon desire for personal gain. The power of the Justice Department over judicial promotions might serve as a source of influence over judges interested in promotion (Chase, 1972:199-200), and occasionally federal judges are susceptible to bribery (Borkin, 1962).

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in the characteristics of courts and of the sets of groups interested in their decisions, and the paucity of empirical data about group influence on courts. However, it is possible to point to some of the factors that may distinguish among groups in their capacity to influence courts, and we will relate these factors specifically to the federal courts of limited jurisdiction.

Influence, we have suggested, depends first of all on the extent of a group's efforts to exert it. Mancur Olson (1965) has emphasized organization as a requisite for such efforts. Some influence over judicial decisions is possible without good organization: individual members will press the group's case on judges by arguing for personal victories in court.[14] But the well-organized group is better able to muster the resources needed for effective argumentation in court.[15] Moreover, influence efforts outside the courtroom are likely to require group organization. For some large groups, like consumers, effective organization traditionally has been difficult (Nadel, 1971), and such groups will be at a disadvantage in contests with better organized groups.

In the federal courts of limited jurisdiction, organization of groups on both sides is relatively good. Most of the groups that challenge government decisions, such as claimants against the government and patent applicants, are poorly organized or not organized at all. However, most of the segments of the bar that represent these litigants are organized as "by-product" groups (Olson, 1965: ch. 6), to serve nonpolitical functions. The government agencies that appear in the specialized courts constitute single entities that do not require organization.

Beyond the problem of organization, groups' efforts to influence courts depend largely on the stake that their members have in the decisions of particular courts. Certainly all groups of litigants would prefer favorable judicial policies to unfavorable ones. But the importance of favorable policies to the achievement of individual and group goals may vary considerably, and the group's efforts to influence court decisions will generally vary with that importance.[16]

The stakes of the groups that contest cases in the specialized federal courts are difficult to ascertain without empirical investi-

14. A good example of effective courtroom influence, largely without organized group involvement, is the success of business entities in securing favorable judicial policies prior to the 1930s (Twiss, 1942).
15. Indeed, members of a poorly organized group who lack monetary resources and legal expertise as individuals may be unable to defend their interests even to the extent of appearing in court and presenting effective arguments for their positions.
16. However, Salisbury (1969) has shown that efforts by organized groups to exert influence may be disassociated from the interests of group members.

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gation. Litigants who bring cases to these courts have a financial interest in the outcome, but the importance of this interest to the litigants' broader goals is variable and uncertain. The same is true of the interest of the litigants' attorneys in securing favorable judicial policies. Agency stakes in court success may depend in part on whether losses carry financial consequences; for this reason the Patent Office, which yields patents rather than dollars, may have less interest in influencing court decisions than do other agencies. But these stakes can be understood fully only in terms of the agencies' goals and situations as organizations, about which we know rather little.

The relative effectiveness of group efforts at influence is a matter as complex as the extent of their efforts. Most groups cannot exercise meaningful influence in the selection of judges because they lack sufficient access to the relevant decision-makers, or because those decision-makers are not receptive to their claims. The organized bar has had the greatest success in achieving these requisites for influence (Grossman, 1965; Watson and Downing, 1969). At the federal level, groups on both sides of civil rights issues, as well as labor unions, have exercised considerable influence over appointments on occasion (Navasky, 1971: ch. 5; Grossman and Wasby, 1971). Those few groups that can help to shape the composition of courts possess a real advantage over opponents who lack this means of influence.

Influence over appointments to federal courts depends upon the receptivity of senators and relevant Justice Department officials. In the selection of judges to the specialized courts, these actors are particularly interested in "placing" favored politicians (Chase, 1972:45-47). However, the affected interest groups may argue for the selection of judges drawn from their ranks on the basis of expertise in a court's field of activity. The chances of success for such an argument would seem greatest for courts whose litigation involves a difficult body of law (the Tax Court) or technical factual situations (Customs and Patent Appeals). If a court is composed chiefly of "expert" judges but these judges are drawn equally from the competing groups, then their policy preferences will tend to balance and the net effect of their selection may be very limited. If, however, the experts are chosen predominately from one side, their selection may give a great advantage to that side in obtaining favorable policies from the court involved.[17]

17. To shed some light on this subject, biographical data on members of the specialized courts were gathered from editions of the Congressional Directory. The data for the Court of Customs and Patent Appeals will be discussed in the following section. The other courts show mixed pat-

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The effectiveness of efforts to influence judges directly depends on a variety of factors. Certainly assets like financial resources, legal competence, and prestige enhance a group's ability to shape judicial perceptions of policy questions and to engage in profitable exchange relationships with courts. Where one competing group has a great advantage over its opponent in the magnitude of these assets, this advantage may lead to an extreme disparity in influence and thus to a pattern of policy highly favorable to the advantaged group. The bias of small claims courts in favor of creditors, for instance, results from a disparity in group influence as well as from other advantages of creditors (Moulton, 1969). In terms of these assets, however, the competing groups in the specialized federal courts are fairly well matched. Certainly both sides have the capacity to present cases effectively to those courts.

Another important factor is the distinction between "one-shotters" and "repeat players" (Galanter, 1974). Galanter has shown that those who appear in court frequently have an advantage over those who litigate only occasionally, part of which derives from the enhanced opportunity to influence judges effectively (Galanter, 1974:97-104). In terms of our analysis, the repeat player is best able to maximize the favorable position of the group with a high concentration of business in a particular court.

In this respect the administrative agencies that defend government interests in the specialized courts have a significant advantage over their opponents. The agencies represent single actors, defended by a small group of attorneys. Their adversaries typically consist of a wide range of individuals and businesses represented by a large number of attorneys.[18] Thus government agencies possess at least a potential advantage in efforts to influence judges on the specialized courts.

Our discussion of the determinants of relative influence over court decisions has not been comprehensive, but the areas that we

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terns. Appointments to Claims and Customs have been divided between politicians without apparent expertise in these courts' work and persons with some experience in these areas; the latter have gained their experience primarily in government service. Appointees to the Tax Court have been overwhelmingly tax specialists, especially in recent decades; these specialists have come from private practice and government service in approximately equal numbers. Particularly in view of our findings on the impact of appointments to Customs and Patent Appeals, the selection of specialized-court judges merits far more attention than it has received thus far.

18. Data were gathered on the appearances of attorneys for private parties in the specialized federal courts; for each court, one early term and one recent term were analyzed. The findings on the CCPA are discussed in note 25. In the other three courts, appearances were distributed among many attorneys; though multiple appearances were common, no attorney came close to monopolizing representation of private litigants.

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have examined illustrate the complexity of the relationship between gross and net influence. The relative susceptibility of specialized courts to litigant influence does not necessarily translate into an advantage for either side in a policy conflict. Depending on the characteristics of the groups involved and other relevant variables, a high level of group influence may have a net effect on judicial policies that ranges from overwhelming to minimal.

For the specialized federal courts as one set of courts, the picture is only marginally less complex. Agencies and their opponents appear to be basically equal in their potential for influence. To the extent that either side possesses a systematic advantage, it seems to lie with the federal agencies as repeat players. However, the relative strength of agencies and their opponents is likely to vary among the specialized courts, and the balance in any specific court is difficult to predict without empirical investigation. In the following section we will undertake such an investigation of the Court of Customs and Patent Appeals.

III. THE COURT OF CUSTOMS AND PATENT APPEALS

A. Background and Methodology

The U.S. Court of Customs and Patent Appeals (CCPA) is a five-member court that sits primarily in Washington, D.C.[19] Its judges are nominated by the President and confirmed by the Senate for lifetime terms. From 1910 to 1929, as the Court of Customs Appeals, it heard appeals from decisions of the Customs Court. Until 1929, jurisdiction over appeals from decisions of the Patent Office lay alternatively with the Supreme Court of the District of Columbia (the predecessor of the present district court) or with the Court of Appeals for the District (Ditlow, 1971). In that year, because of the backlog of cases in the Court of Appeals and the low caseload of the Court of Customs Appeals, jurisdiction over appeals from the Patent Office was transferred to the latter. There was little concern with the potential policy consequences of the change, which was perceived as a housekeeping measure (U.S. House of Representatives, 1928; Fenning, 1931).[20]

Since the 1929 legislation, the CCPA's jurisdiction has included customs appeals and three kinds of appeals from the Patent

19. The discussion of the CCPA in this section is based upon published sources, analysis of the court's decisions and opinions, and interviews with twenty-one persons who have been associated with the court or who have observed its activities. Where sources for statements about the CCPA are not cited, these statements are based on interview data.

20. Nor has the CCPA been a subject of controversy among observers of the federal courts in the half-century of its patent jurisdiction (but see U.S. Congress, 1973:12810).

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Office: trademark cases, "interferences" between competing applicants for patents, and ex parte appeals from Office decisions by disappointed applicants. Of these, the last produces the largest number of cases[21] and is by far the most significant; our analysis of CCPA policies will deal solely with this category of cases. In the ex parte cases an applicant appeals from a decision that denied him a patent or granted him one more limited than he desired. Formally, the appeal is from the rejection of certain "claims" in the patent application, each of which concerns an aspect of the invention in question. Appeal to the CCPA remains one of two routes of redress for the dissatisfied patent applicant, who alternatively may initiate a civil action against the Patent Office in the District Court for the District of Columbia (Dunner, 1972).

In deciding ex parte appeals, the CCPA may determine that none, some, or all the patent claims in dispute are patentable. These outcomes are designated respectively as affirming, modifying, and reversing the Patent Office decision.[22] Either the applicant or the Patent Office may appeal from the CCPA to the Supreme Court by writ of certiorari.[23]

The CCPA's decisions in ex parte appeals reflect the court's position on what is called the standard of patentability. There has been a continuing controversy as to the rigor with which the statutory criteria for the award of patents should be applied (Kaysen and Turner, 1959:162-78; Vaughn, 1956; Kayton, 1970). The relative willingness of the CCPA to overturn Patent Office decisions at any given time reflects its judges' positions in this controversy: the more lenient their standards, the more likely they are to overturn Patent Office decisions against applicants. For this reason, the CCPA's policy position can best be summarized in terms of its operative standard of patentability.

The CCPA rules on considerably fewer than one percent of all applications for patents, but its decisions help to shape the policies of the Patent Office. Because of the CCPA's legitimacy as interpreter of the law, and because administrators desire to avoid reversal, the Office standard of patentability is influenced by CCPA rulings (Reynolds, 1960). In turn, the Office standard largely determines the size and shape of the patent system. It is for this

21. In the 1970-71 term, ex parte patent cases constituted 57 percent of the CCPA's decisions.
22. The CCPA follows "standard" appellate procedure in its decisional process. It should be noted that each case is assigned to a single judge, who has major responsibility for its treatment. For this reason, the policy positions of individual judges may be gauged from the decisions they write.
23. The Supreme Court was given certiorari jurisdiction over CCPA decisions only in 1948 (McDonnell, 1963) and did not exercise that jurisdiction until 1966. Altogether, the Court has heard only three appeals from the CCPA through the 1975-76 term.

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reason that the CCPA's decisions in ex parte patent cases are important.

The forces that seek to overturn Patent Office decisions consist of two interest groups, patent applicants and the private patent bar. Most patent applicants are corporate employees who represent their employers.[24] However, the interest of corporations in lenient CCPA standards is limited by two factors. First, leniency may work against the interest of a particular corporation if it helps a competitor to obtain patents. Second, patents tend to be less important to corporations than several other types of government policy. For these reasons, patent applicants would be unlikely to—and do not—make significant efforts to influence CCPA decisions.

Such efforts, however, might well be expected of the patent bar. This group of approximately four thousand lawyers constitutes a particularly distinct specialization within the legal profession. Its members are organized into a section of the American Bar Association, as well as into separate bar associations (Dienner, 1950). Members of the patent bar hold a de facto monopoly over the representation of applicants in the CCPA, although this monopoly is divided among a large number of attorneys, none of whom has a significant share of the market.[25]

The patent bar as an aggregate strongly favors a lenient standard of patentability. This position stems from several sources. One is a shared belief in patents as incentives for invention. The second is the interest of patent attorneys in securing patents for clients as frequently as possible.[26] Finally, the issuance of a maximum number of patents "enlarges" the patent system and thereby maximizes the business of patent attorneys in all phases of their work. Thus, the interest of the patent bar in CCPA policies is a strong one.

As defender of its decisions, the Patent Office itself constitutes one interest group before the CCPA. In every ex parte appeal, the Office is represented by attorneys from its Solicitor's Office. The Office's interest in minimizing reversal of its decisions is not over-

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24. By statute all patents must be issued in the name of the inventors, but they may be assigned on issuance to other parties. Between 1939 and 1955, 59 percent of all patents issued were assigned to corporations by the time of their issuance (U.S. Senate, 1957).
25. Data were gathered on appearances of private attorneys in ex parte patent cases in the 1935-36 term and in the 1971-72 term. In 1935-36, only one attorney appeared more than twice, and he appeared six times. In 1971-72, no attorney appeared more than twice.
26. The patent bar is divided into two segments: the attorneys who specialize in the "prosecution" of applications for patents in the Patent Office and in the reviewing courts; and the attorneys who specialize in negotiation and litigation involving issued patents. The first group tends to be more favorable to the establishment of lenient standards of patentability than the second.

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whelming, because reversal has rather limited material consequences for the agency.[27] However, that interest is a real one, because reversal represents an implicit rebuke of the Office and a defeat for its legal staff. Certainly the Office vigorously defends its decisions in proceedings before the CCPA.

To probe both arguments within the thesis that I have developed, I will examine group influence and patterns of policy in the CCPA. The measurement of group influence, of course, is a difficult task that students of interest-group politics have not mastered (Zeigler, 1969; Froman, 1966; Scott and Hunt, 1965). The measurement problem is aggravated by the scarcity of available information on historical patterns of influence in the CCPA. As a result, the hypothesized linkage between court specialization and substantive policies is more susceptible to analysis than the linkage between specialization and influence. Thus our discussion of the CCPA will focus first on its policies and their relationship to its specialized status; then, using this first analysis as a base, we will undertake a cautious exploration of the role of group influence in shaping the court's policies.

To probe the specialization-policy argument, we will determine the policies of the CCPA on the standard of patentability by analyzing the court's patterns of decision and its doctrinal positions. These policies will be compared with those of generalist federal courts that also take positions on the standard of patentability. Special attention will be given to the relationship between CCPA policies and the policies of the District Court for the District of Columbia, which shares jurisdiction over appeals from Patent Office decisions. The results of this analysis will not determine whether the CCPA's specialization has affected its policies, but the extent of the differences between CCPA policies and those of the generalist courts will suggest the impact of limited jurisdiction on the CCPA's behavior.

Following this analysis, we will explore the influence of litigant groups over CCPA decisions. We will look for evidence that suggests the role of groups in shaping CCPA policies, particularly evidence from the judgments of those who have participated in or observed the court's decision-making process. Attention also will be given to other factors that may have shaped the court's policy

27. It also should be noted that the Office and bar are basically allies outside the reviewing courts. There is considerable interchange of personnel between the two groups; their policy preferences are similar; the Patent Office generally follows a lenient standard of patentability in its own decisions (U.S. Senate, 1961); and, most notably, Office and bar frequently work together to secure legislation desired by both. This alliance, of course, does not prevent members of the patent bar from appealing Patent Office decisions or the Patent Office legal staff from defending those decisions.

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positions. Through this exploration it will be possible to reach tentative conclusions about influence by litigant groups over CCPA decisions and the net impact of that influence on the court's policies.

B. Policies of the CCPA

Data on CCPA decisions in ex parte patent cases are presented in Table 1. The data portray a dramatic change in the court's willingness to overturn Patent Office decisions. Prior to the mid-1950s, the CCPA affirmed more than three-quarters of the decisions it reviewed, and full reversals were fairly rare. Since that time the proportion of reversals has doubled, and about two-fifths of Patent Office decisions have been disturbed. These data suggest a decline in the rigor of the CCPA standard of patentability.

TABLE 1

DECISIONS IN EX PARTE PATENT CASES, COURT OF CUSTOMS AND PATENT APPEALS, 1929-75

Years[a]	Number of Decisions[b]	Percentage Reversed	Percentage Reversed or Modified
1929-34	478	10.0	22.4
1934-39	392	13.3	19.7
1939-44	341	12.0	21.7
1944-50	426	12.0	19.3
1950-56	231	13.9	24.3
1956-62	261	28.0	40.6
1962-68	614	28.2	38.8
1968-75	580	28.6	40.9

a. Years commence at the beginning of the court term in October.
b. Dismissals excluded.
Sources: *Court of Customs and Patent Appeals Reports* (1929-72); *The United States Patents Quarterly* (1972-75).

Analysis of the court's doctrinal positions confirms this impression. Prior to the mid-1950s the CCPA was neither highly innovative nor highly consistent in its pronouncements of legal doctrine. However, its positions on doctrinal questions tended to support rigorous standards of patentability. For example, those who favor lenient standards stress the commercial success of an invention as a positive indicator of patentability, but the "early" CCPA usually downgraded the significance of this indicator (*In re Goldman*, 99 F.2d 765, C.C.P.A., 1938).

The later doctrinal positions of the CCPA, in contrast, have generally favored lenient standards of patentability. Since the late 1950s the court has adopted new positions on many important questions, positions more favorable to patent applicants than

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those that prevailed in the early CCPA (Rehberg, 1972; Moore, 1967). Indeed, the court has become the prime innovator on patentability doctrine (Lieberstein, 1969).[28]

Ideally, the policies of the CCPA could be compared with those of its generalist counterpart through quantitative analysis of decisional tendencies. Unfortunately, even minimally acceptable data on decisions by the District Court for the District of Columbia in ex parte patent cases do not exist for the period prior to the late 1950s.[29] However, it is possible to compare the policies of the two courts less systematically through an examination of doctrinal positions and of the data available on the district court's decisional record in the past two decades.

Doctrinally, the district court and its superior circuit court of appeals have supported rigorous standards with some consistency since the late 1930s. Early in that period the court of appeals argued strongly for a skeptical treatment of patent claims (*Columbia Law Review*, 1945), and district judges followed suit (*Caille* v. *Kingsland*, 73 F. Supp. 921, D.C.D.C. 1947). These two courts maintained their support for rigorous standards while the standards of the CCPA were becoming more lenient. As a consequence, by the 1970s the CCPA's positions on several important questions were more favorable to patent applicants than the comparable positions of the generalist courts in the District of Columbia (*Georgetown Law Journal*, 1964; Lipscomb, 1968; *In re Fielder*, 471 F.2d 640, C.C.P.A. 1973).

The district court also overturned Patent Office decisions less frequently than did the CCPA in the 1960s and 1970s. In fiscal years 1961-75 the district court affirmed 74.2 percent of all ex parte decisions; if the decisions of a retired CCPA judge are excluded from the district-court totals, the proportion of affirmances was 81.2 percent (Dunner, 1976). Thus the district judges have disturbed Patent Office rulings against patent applicants only about half as often as has the CCPA during the same period.

28. Also important is the strong opposition of the CCPA to Supreme Court decisions that support a rigorous standard of patentability. Such decisions are interpreted narrowly on the bench (*In re Fielder,* 471 F.2d 640, C.C.P.A. 1973) and criticized off the bench by the specialist judges (Rich, 1972:41-44, 1968:12-13). Although the early CCPA was not enthusiastic about the Supreme Court's preference for rigorous standards (see note 35, *infra*), judges on the later CCPA have gone much further in resisting the Court.

29. Published opinions of the district court constitute an incomplete and highly biased sample of all decisions in ex parte patent cases. The annual report of the Patent Office (U.S. Patent Office, 1941-75) supplies data on district court decisions, but the ex parte decisions are aggregated with inter partes patent decisions and, until 1959, with trademark decisions. Dunner (1972, 1976) has collected data on ex parte patent decisions beginning with fiscal year 1961, and we will make use of his data; however, even these data appear to suffer from minor inaccuracies.

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Not surprisingly, disappointed applicants have almost abandoned the district court as a locus of appeal,[30] a course strongly advocated by authorities in the patent bar (Dunner, 1976).

Although the CCPA shares jurisdiction over Patent Office appeals with only one court, other federal courts deal with the standard of patentability when they determine the "validity" of issued patents in infringement suits. Taking the lead, the Supreme Court has laid down rigorous standards for the determination of patent validity (*Cuno Eng'r Corp.* v. *Automatic Devices Corp.*, 341 U.S. 84, 1941; *Graham* v. *John Deere Co.*, 383 U.S. 1, 1966). Moreover, the Court ruled against patent holders in fully 81 percent of its decisions on patent validity in the period from 1929 through 1975.[31]

In general, the lower courts have shared the Supreme Court's support for stringent standards of patentability. Between 1931 and 1973 the district courts held invalid approximately 60 percent of the patents they adjudicated, the courts of appeals approximately 70 percent. In no five-year period did the proportion of invalidity rulings fall to 50 percent. These data are remarkable in light of the statutory presumption that an issued patent is valid. The doctrinal positions of the lower courts generally have supported highly rigorous standards for patents, often taking their cue from decisions of the Supreme Court (*Picard* v. *United Aircraft Corp.*, 128 F.2d 632, 2d Cir. 1942; *Ashcroft* v. *Paper Mate Mfg. Co.*, 434 F.2d 910, 9th Cir. 1971). Not surprisingly, members of the patent bar have perceived the federal courts as an adversary (Fortas, 1971; Davis, 1972).

The basic pattern that emerges from analysis of the courts' policies is consistent support for rigorous standards of patentability. The CCPA basically shared this support prior to the mid-1950s, as evidenced by its decisional record and its doctrinal positions. After that time it diverged from the judicial "mainstream" in its support for relatively lenient standards.

Thus CCPA policies offer conflicting evidence on the linkage between specialization and judicial policy. The early CCPA made decisions whose central tendency was similar to that of generalist courts. If specialization made the CCPA particularly susceptible to

30. In fiscal years 1960-61, 145 patent appeals were instituted in the district court, while 143 ex parte patent cases were instituted in the CCPA. In 1974-75, 29 patent appeals were filed in the district court, while 148 ex parte patent appeals were filed in the CCPA (U.S. Patent Office, 1960-61, 1974-75).

31. These data were compiled by the author directly from decisional records in the Official Gazette of the Patent Office and *The United States Patents Quarterly*.

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litigant influence, the net impact of that influence appears to have been minimal.

Since that time, the CCPA's policies have differed from those of most other courts. We may not infer from this difference the influence of the patent bar on CCPA policies. However, the pattern of decisions in this court suggests that specialization and its effect on litigant influence helped to steer the CCPA on its own course. We will investigate this possibility in our discussion of influence on CCPA decisions.

C. Influence over CCPA Policies

Some of the sources of influence that are effective in other courts are likely to have little relevance to the CCPA. Its members hold office for life and have treated their positions as permanent ones; accordingly, they have evinced no interest in opportunities for future employment. Nor is there evidence of any judicial interest in other material benefits that litigants might offer. For most of its history the court's caseload was light, and no single litigant or attorney "holds" enough potential appeals to affect that caseload significantly.[32] If the CCPA is to be influenced by litigants, that influence almost certainly must come through the selection of judges or through the shaping of sitting judges' attitudes and perceptions of cases. I will examine these bases for influence within a broader discussion of the context of CCPA policies.

An understanding of the policies of the early CCPA must begin with the character of the appointments to the court in that period. Prior to 1956, seats on the CCPA were treated primarily as political rewards; particularly favored were members of Congress who sought what one observer has called a "retirement home." Ten men sat on the CCPA between 1929 and 1956, including holdovers from the Court of Customs Appeals. Seven had served in Congress, one was an Assistant Attorney General, and another was a national party official. Two judges had experience in customs law prior to their appointment, but none had any visible experience in patent law or patent policy.[33] Neither the patent bar nor the Patent Office apparently engaged in efforts to influence the selection process. Leaders of the patent bar reportedly eschewed such efforts because they assumed that appointments inevitably would be used for partisan purposes.

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32. See the data in note 25. The Patent Office, of course, does not appeal cases to the CCPA. Until 1966 the Office did not even engage in settlement negotiations after an appeal to the CCPA had been instituted, thereby depriving itself of even this limited influence over the court's caseload (Dunner, 1976:8-44 to 8-45).

33. Biographical data are taken from Liebman (1955) and from editions of *Who's Who in America*. On the effects of the judges' lack of expertise, see Stringham (1934).

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Firm conclusions about direct influence on the CCPA in this period are impossible, but some tentative judgments can be made. First, as judges with no expertise in patent questions, members of the CCPA were particularly susceptible to influence in their perceptions of cases. In this respect they were similar to other federal judges; the technology associated with patents has frightened even Frankfurter (*Marconi Wireless Telegraph Co.* v. *United States*, 320 U.S. 1, 60-61, 1943) and Learned Hand (*Parke-Davis & Co.* v. *H.K. Mulford Co.*, 189 Fed. 95, 115, S.D.N.Y. 1911).[34] However, because of the CCPA's specialization, group opportunities to shape judges' perceptions of cases were considerably greater than in other courts that handled patent cases. The CCPA's unique acceptance of one important policy position shared by the Patent Office and patent bar suggests that these opportunities were utilized successfully.[35]

Second, the influence of the Patent Office and the patent bar through their argumentation probably was about equal, since no conditions existed to give an advantage to either side. It is true that the CCPA's policies were more congenial to the Patent Office than to the patent bar. But this outcome seems to have resulted chiefly from traditional judicial deference to administrative decisions, a deference magnified by the perceived technicality of patent cases (*In re Whertz*, 110 F.2d 854, C.C.P.A. 1944) and by the "safety" gained by a court lacking confidence through upholding expert decisions rather than overturning them. This deference was shared by the District Court for the District of Columbia (*Turchan* v. *Marzall*, 94 U.S.P.Q. 305, D.C.D.C. 1952), and it is not surprising that the two courts produced similar policies.[36] The CCPA's relatively rigorous standards of patentability represented a response to the Patent Office as administrative agency, not to the Patent Office as litigant.

34. The CCPA did have the services of law clerks trained in patent law, and these clerks reportedly played an important role in strengthening the court's work.

35. This position was a narrow interpretation of the Supreme Court decisions of the 1940s that urged a rigorous standard of patentability (*In re Shortell,* 142 F.2d 292, C.C.P.A. 1944; *In re Crawford,* 154 F.2d 670, C.C.P.A. 1946; *In re Rossman,* 194 F.2d 711, C.C.P.A. 1952). The CCPA's acceptance of this position was notable not only because the court was unique in this acceptance but also because the CCPA's own standard of patentability had been consistent with that advocated by the Supreme Court.

36. Clearly this strong deference to Patent Office decisions was not shared by the courts that determine the validity of issued patents. Attorneys who represent accused infringers have been successful in attacking the validity of patents in part because they convince judges that the Patent Office's own standards are too lenient (Fortas, 1971; Will, 1972). More broadly, attorneys for accused infringers—although members of the patent bar—provide judges with a skeptical view of patents that is offered by neither side in CCPA. In that court, judges are addressed by two "pro-patent" groups that disagree in their arguments in the CCPA but that share broad premises about the patent system.

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As we have seen, the CCPA underwent a striking policy change in the mid-1950s. One plausible source for this change was a rewriting of the patent statute in 1952, sponsored by the patent bar with the intention of establishing a more lenient standard of patentability (Shapiro, 1968:204-13; Rich, 1963). However, judges on the generalist courts differed in their interpretations of the statute (Sayko, 1967), and their decisional records did not become more favorable to patent applicants and patent holders. Eventually the Supreme Court ruled that no change had been wrought in the statutory standard of patentability (*Graham* v. *John Deere Co.*, 383 U.S. 1, 1966), blunting the force of the 1952 statute in the generalist courts. Because only the CCPA's standards of patentability permanently became more lenient after 1952, the statutory change can be dismissed as explanation of the recent CCPA's policies.

Other potential bases for change in the CCPA's policies include changes in the appeal practices of patent applicants, in the character of patent applications, or in Patent Office policies. However, there was no visible change in any of these factors. Therefore they may be dismissed as potential explanations for policy change.

Rather, the CCPA's change in direction clearly followed from a change in the court's composition. In 1956 the first patent attorney was appointed to the court. A second "specialist" appointment was made in 1959, and since that time at least two of the five members of the court have been patent attorneys. The judges selected in 1956 and 1959 were members of the private patent bar who strongly supported lenient standards of patentability, and they also shared an activist philosophy that encouraged questioning of Patent Office decisions and policies.

The 1956 appointee was Giles Rich, already active in the politics of patents (Rich, 1963), who was determined to change the CCPA's character and policies (Rich, 1968).[37] He succeeded in the latter goal almost immediately. The proportion of Patent Office decisions disturbed by the CCPA rose substantially upon Rich's accession to the court. As Table 2 shows, this rise followed both

37. Walter Murphy (1964) has described what might be called the ideal type of a judge whose goal is to achieve a particular set of policy objectives, epitomized for Murphy by Chief Justice Taft. Giles Rich perhaps fits the ideal type even more closely. As a judge, he has striven continually to gain acceptance for his views of the law throughout the world of patent adjudication. These efforts have achieved considerable success. Rich has been the prime mover in the transformation of the CCPA, and he also has had impact on judges in other courts (*Research Eng'r & Mfg. Co.* v. *Brenner,* 291 F. Supp. 727, D.C.D.C. 1968; *Comm'r of Patents* v. *Deutsche Gold-und-Silber-S.*, 397 F.2d 656, 667, D.C. Cir. 1968). Moreover, he continues to work with the patent bar to secure legislative changes supportive of his preferences (*BNA Patent Journal,* 1974).

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from Rich's own high "reversal rate" and from the change that occurred in the decisional tendencies of his colleagues.

The data in Table 2 also indicate a relative stability in the court's pattern of decisions since the 1956-59 period. Opinions by nonspecialist judges continue to overturn Patent Office decisions at a rate considerably higher than the rate that prevailed prior to 1956. At the same time, even those nonspecialists appointed since 1960 have been distinctly more willing to affirm the Office than have their patent-attorney colleagues. Indeed, considerable dissensus developed between the two groups in the 1960s, marked by a relatively high dissent rate for the CCPA[38] and long and bitter dissents in decisions on major doctrinal questions (*In re Nelson*, 280 F.2d 172, C.C.P.A. 1960; *In re Kirk*, 376 F.2d 936, C.C.P.A. 1967). Still, the decisional changes that occurred in the late 1950s never were reversed, and the patent-bar judges obtained sufficient support from other judges to secure majorities for new doctrinal positions more congenial to the patent bar.

TABLE 2

DECISIONS IN EX PARTE PATENT CASES, COURT OF CUSTOMS AND PATENT APPEALS, BY BACKGROUND OF JUDGE WRITING OPINION OF COURT[a]

	Percentage Reversed		*Percentage Reversed or Modified*	
Years	Patent Attys.	Others	Patent Attys.	Others
1950-56	—	13.9	—	24.3
1956-59	40.6[b]	26.8	43.8[b]	42.3
1959-62	28.0	24.1	41.3	37.4
1962-68	36.2	22.3	47.3	33.1
1968-75	34.4	24.0	46.3	38.4
1956-75	34.5	23.5	45.3	36.2

a. Dismissals and per curiam decisions excluded. Beginning 1973-74, a large proportion of cases was decided by per curiam memorandum decision.
b. Based on small number of opinions (N = 32).
Sources: Court of Customs and Patent Appeals Reports (1950-72); *The United States Patents Quarterly* (1972-75).

If the CCPA's policy change can be explained by its altered composition, that alteration in turn resulted chiefly from the bar's influence. In the Eisenhower administration, both the President and the Justice Department officials involved in the selection of judges were sympathetic to the organized bar's interest in judicial

38. Dissent reached a height in the 1966-67 term, with twenty-six dissenting votes in 94 cases. All of the sixteen dissents in favor of the applicants were by patent-attorney judges; eight of the ten dissents against applicants were by the court's nonspecialists.

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appointments (Grossman, 1965:69-75). Perceiving this sympathy, the patent bar undertook its first concerted campaign for the selection of CCPA judges with patent expertise. The CCPA's patent specialization undoubtedly lent legitimacy to the patent bar's campaign, and the first Eisenhower appointment to the court was Giles Rich. The second appointment was of a close political associate of the President. In 1959, however, the bar secured the selection of Arthur Smith, a patent attorney in Michigan.

The patent bar had no success with the Kennedy and Johnson administrations, which were relatively unsympathetic to the organized bar's claims generally (Grossman, 1965:78-80). Each president had one vacancy to fill on the CCPA, and both selections were based on the "political" criteria that had been dominant prior to the Rich appointment. However, the Nixon administration was more receptive to the bar, including the patent bar, and two of its three appointees were patent attorneys. It has been suggested that the Rich and Smith appointments created a precedent that helped the patent bar in its arguments to the Nixon administration.

The patent bar, then, has not established a principle that judges on the CCPA must be patent attorneys. But it has secured some acceptance of patent specialization as an important qualification for selection. Under receptive administrations, the result has been the selection of a mixed group of patent attorneys and politicians with some claims on the appointing administration. This pattern seems likely to continue in the future.

In seeking the selection of patent attorneys to the CCPA, the patent bar has not been motivated solely by a desire to change the court's policies. But each of the patent specialists appointed to the court has shared the policy preferences that dominate the bar. The result has been the policy change that we have seen in the CCPA over the past two decades.[39]

The direct influence of the patent bar and Patent Office has changed at least marginally as a result of the court's change in composition. A more self-sufficient court needs to place less reliance upon the arguments of litigant groups than did its predecessor. At the same time, the bar functions as a continuing reference group for its members on the court, and this fact undoubtedly gives it an additional advantage over the Patent Office. This ad-

39. The Patent Office apparently has not attempted to influence appointment to the CCPA. It is not clear why this is the case, because judges appointed from the Office's own legal staff might be more favorable to the Office than are private patent attorneys. However, this difference may be too uncertain, and the Office's power and interest in winning appeals too limited, to induce efforts to secure appointments from within the Office.

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vantage is reinforced by the interaction that occurs between some judges and the patent bar outside of court (Smith, 1961; *APLA Bulletin*, 1965; *BNA Patent Journal*, 1973, 1974). But these changes clearly are secondary to and dependent upon the change in the court's composition.

D. Discussion

In the half century of its patent jurisdiction, the CCPA, in effect, has been two different courts. Prior to the mid-1950s, the CCPA's position on the standard of patentability was similar to that of generalist courts. If the CCPA was particularly susceptible to the influence of interest groups in patent cases, the groups that came before it tended to balance each other's efforts. The court's policies were based largely on the deference to administrative decisions that also motivated the District Court for the District of Columbia in similar cases.

The change in the pattern of appointments to the CCPA beginning in 1956 brought about a fundamental change in the court's policies. The patent specialists on the court, appointed through the efforts of the patent bar, have led the CCPA to adopt a line of policy significantly different from the patent policies that prevail in most of the federal judiciary. The CCPA's specialization ultimately has been responsible for the court's distinctive path in the past two decades; because of the CCPA's importance to the patent bar and the centrality of patent litigation in the court's functioning, the bar had a powerful incentive to influence appointments of judges, and appointing officials were receptive to patent lawyers' interest in appointments.

We would not expect to find the recent history of the CCPA replicated in all other specialized courts. In part this is because of the fortuitous element in the patent bar's success—the receptivity of certain administrations to the bar's claim for a role in the selection process. More fundamentally, the configuration of litigant groups in the CCPA is particularly favorable to the patent bar's influence. The patent bar is rather unified in its policy preferences, and members of the bar are very concerned with CCPA policies. In the selection of judges for the CCPA, the patent bar faces significant resistance only from selecting officials' desire to reward political allies with judicial appointments; no group argues for a different pattern of appointments with the intensity of the patent bar. Where less favorable conditions exist, a counterpart of the patent bar is less likely to enjoy similar success in the selection process.

The case of the CCPA, then, does not establish that specialized courts necessarily will behave differently from generalists. Rather,

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it indicates only that specialization may create conditions that cause a court to take a distinctive path.

IV. CONCLUSION

The general analysis and case study reported in this paper have suggested that the relationship between judicial specialization and policy outputs is complex. Specialization tends to increase the influence of litigant groups over judicial decisions, and that increased influence may lead to policies that differ significantly from those made by generalist courts. But the relationship between specialization and policy is mediated by a number of other significant variables and therefore may vary widely in particular situations, as the history of the Court of Customs and Patent Appeals demonstrates.

The CCPA's behavior since the mid-1950s provides one piece of firm evidence that judicial specialization is not policy-neutral. Creation of a specialized court may promote "neutral" goals, but it also may change the pattern of outcomes in the class of cases transferred to that court. Thus, my findings indicate that policy-makers faced with proposals for courts of limited jurisdiction should consider the potential policy consequences of adopting those proposals.

My analyses, of course, offer little help to policy-makers who wish to predict the policy consequences of specialization in particular instances; we may say confidently only that specialization might make a difference. To provide more meaningful aid to policy-makers, we need to specify more clearly the linkage between specialization and substantive policy. That goal demands further attention to a segment of the federal judicial system about which our knowledge remains too limited.

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