

DOES PRACTICE MAKE PERFECT?
AN EXAMINATION OF CONGRESS'S PROPOSED
DISTRICT COURT PATENT PILOT PROGRAM

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Over the past few years, patent law reform has been a hot topic of congressional debate. The cost and complexity of patent litigation and the frequency with which district judges are getting reversed on questions of claim construction are often cited as cause for alarm. Heeding the calls for reform, a patent pilot program for district courts was recently unveiled in the U.S. Congress in an attempt to address both of these concerns. The pilot program sailed through the U.S. House of Representatives without opposition. The U.S. Senate has yet to consider the companion bill. This Comment introduces the pilot program and examines whether the concept of judicial specialization through an increased patent caseload is likely to result, as the bill's proponents argue.

Judicial specialization for patent cases is popular in other countries; however, it has yet to catch on at the trial court level in the United States. While judicial specialization has a number of associated benefits, negative aspects, such as a likely increase in forum shopping, cannot be ignored. After exploring the costs and benefits of specialization, this Comment reviews the mechanics of getting into the pilot program. It then presents an original empirical case study that examines whether district court judges who currently hear the most patent cases are better at claim construction, as evidenced by reversal rates, than those who hear very few patent cases. The Comment then suggests ways to strengthen the pilot program so that it will be capable of bringing about true reform. Finally, it concludes by considering other options if the program is not ultimately adopted by Congress.

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INTRODUCTION

It has been recognized that “[o]ne of the most significant problems facing the United States patent system is the spiraling cost and complexity associated with the enforcement of patent rights.”¹ This quotation does not come from the halls of the 110th U.S. Congress, however. The statement is from a report by the Advisory Commission on Patent Law Reform given to the U.S. Secretary of Commerce in 1992. Fast forward to 2008. What has happened in the sixteen years since that report was issued? The costs and complexities of enforcing patent rights have continued to spiral out of control, as has the patent caseload for federal judges. Patent case filings have nearly doubled in the past ten years, and these cases make up a disproportionate share of all complex cases.² The combination of the intricate science and technology, the unique patent procedures and laws, the right to a jury trial, the division of labor among courts and their dockets, and the multiple methods available for dealing with issues raised by patent litigation all make improving the patent adjudication system a “uniquely complicated and difficult task.”³

1. *Improving Federal Court Adjudication of Patent Cases: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) [hereinafter *Patent Hearing*] (statement of Rep. Lamar Smith, Chairman, H. Subcomm. on Courts, the Internet, and Intellectual Property), available at <http://judiciary.house.gov/media/pdfs/printers/109th/23816.pdf> (quoting a 1992 Advisory Commission on Patent Law Reform Report to the U.S. Secretary of Commerce).

2. *Id.* Patent cases currently make up about 1 percent of all cases filed, yet they represent about 10 percent of all complex cases. *Id.* Complex cases are defined as those that require twenty or more days of trial. *Id.*

3. *Id.* at 2 (statement of Rep. Howard Berman, Member, H. Subcomm. on Courts, the Internet, and Intellectual Property).

A new patent pilot program has been proposed in Congress that aims to select three district judges in each of five district courts to become patent specialists. The selected judges will take patent cases reassigned from other judges in their district who do not wish to hear patent cases. This Comment examines Congress's proposal to establish such a program to encourage the enhancement of judicial expertise in patent cases. Part I explores the patent court specialization that currently exists, both in the United States at the federal appellate level and in many other countries in the courts of first instance. The costs and benefits often raised regarding such specialization will briefly be laid out. Part II discusses the mechanics of the patent pilot program and looks at the impetus behind it: improving the claim construction crisis. Part III provides an in-depth analysis of the proposed program, including qualifications for admission and an application of the costs and benefits laid out in Part I. Next, the Comment analyzes patent cases from 2002 through 2006 for evidence of whether patent specialization by judges, as a driver for more reliable claim construction, is likely to succeed. Part III also compares affirmance patterns for the top district court patent judges on issues of claim construction, by volume of patent cases heard and volume of subsequent appeals, to that of judges who have rarely handled such patent issues. Finally, the Conclusion offers ideas regarding what changes the pilot program ultimately may bring as well as the other options available if the program does not make it through Congress.

I. PATENT SPECIALIZATION

Although the patent pilot program under consideration by Congress does not propose the creation of a specialized patent trial court, such a suggestion has been made numerous times.⁴ Considering the patent specialization that has already occurred in the United States at the appellate level, however, as well as the specialization implemented in many other countries at the trial court level, a discussion of this pattern of increased specialization informs the debate on the merits of the pilot program looking forward. Insight into the goals and successes of these courts, as well as arguments

4. See, e.g., James F. Holderman, *Judicial Patent Specialization: A View From the Trial Bench*, 2002 U. ILL. J.L. TECH. & POL'Y 425; John B. Pegram, *Should There Be a U.S. Trial Court With a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765 (2000); Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877 (2002); Gregory J. Wallace, *Toward Certainty and Uniformity in Patent Infringement Cases After Festo and Markman: A Proposal for a Specialized Patent Trial Court With a Rule of Greater Deference*, 77 S. CAL. L. REV. 1383 (2004).

underlying the costs and benefits of converting to a specialized court, help shed light on whether the patent pilot program will be able to achieve its goals of consistency and efficiency through specialization.

A. Special Treatment for U.S. Patent Appeals

In 1800, around the time when federal courts were given exclusive jurisdiction of patent cases, there were 17 district court judges.⁵ There are currently 678 judgeships across all federal district courts.⁶ Initially, patent appeals were heard in the same appellate court as all other federal cases from the same geographic district. This changed in 1982 with the creation of the U.S. Court of Appeals for the Federal Circuit (CAFC), which was designed to take appeals based on subject matter, not geography.⁷ The CAFC was created to address a number of widely recognized problems, including a lack of uniform application of patent law among the various regional circuit courts of appeal. This varied application of the law created rampant forum shopping opportunities and the need to create stability in patent law.⁸

This year, patent appeals became the largest category of cases on the CAFC's docket.⁹ This change significantly affects the judges' workload, not because of the change in proportions, but because of the rise in "complexity, size and difficulty of the technology in these cases."¹⁰ The patent cases the CAFC receives on appeal are, on average, ten times more difficult than the average patent case received during the mid-1980s after the creation of the court.¹¹ This suggests that district judges, too, are dealing with much more difficult cases.

5. Pegram, *supra* note 4, at 767–68.

6. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURT—JUDICIAL CASELOAD PROFILE (2006) [hereinafter AOC CASELOAD PROFILE], <http://www.uscourts.gov/cgi-bin/cmsd2006.pl> (select "ALL DISTRICT COURTS" from drop-down menu, then click the "Generate" button).

7. Pegram, *supra* note 4, at 770–71. The court was established under the Federal Court Improvements Act by merging the existing Court of Customs and Patent Appeals and the appellate division of the Court of Claims. *Id.* at 770. In addition to encompassing all patent appeals, the court hears matters on international trade, government claims, and taxes. *Id.* at 770–71. No new judgeships were required and the court stayed in the same building. *Id.* at 771.

8. *Id.* at 770.

9. Marcia Coyle, *Critics Target Federal Circuit: Reversals Cast Patent Court in Harsh Light*, NAT'L L.J., Oct. 16, 2006, at 1, 20 (discussing remarks made by Chief Judge Michel of the U.S. Court of Appeals for the Federal Circuit (CAFC)).

10. *Id.* (quoting remarks of Chief Judge Michel to the Federal Circuit Bar Association during the summer of 2006).

11. *Id.*

Notwithstanding the increased difficulty for both trial and appellate judges, it is generally accepted that the CAFC is better equipped to deal with patent cases than generalist district judges, which is one possible reason for the climbing rate of claim construction reversals.¹² Claim construction is the process undertaken by courts to measure the exclusive right conferred by a patent; claim construction must be done in order to determine whether infringement has occurred. In construing a patent's claim(s), courts consider the literal meaning of the words in the claim, as well as the prior art¹³ and the prosecution history of the patent in the U.S. Patent and Trademark Office (PTO). When parties disagree with a district court's interpretation of a patent's claim(s), they can appeal the decision to the CAFC for a determination of whether the claim construction was proper.¹⁴

Whether the CAFC is successful in its mandate generally depends on who you ask.¹⁵ To some extent, the court has been praised for achieving the consistency and predictability in patent law that it was created to establish; on the other hand, the court increasingly has been criticized for inconsistency in applying its own precedent.¹⁶ Unpredictability is especially problematic when the court hears appeals regarding claim construction, because a high reversal rate means parties cannot necessarily determine infringing behavior prior to a lawsuit, and any such lawsuit will be

12. It is worth noting that of the twelve judges on the CAFC, only five of them have technical backgrounds (including Kimberly Moore, who was appointed last fall by George W. Bush to fill the twelfth seat on the CAFC). Eight of them (including Moore) have "patent experience." See Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 18 nn.71–72, 26 n.97 (2001). The CAFC judges do, however, have significantly more experience with issues concerning claim construction than even the top district judges (as measured by the number of claim construction issues heard). *Id.* at 20–22, 23 tbl.3 (figures as of April 2001). For further discussion on the data regarding the most experienced district court judges, see discussion *infra* Part III.C.

13. Prior art is the universe of sources including other patents or publications from anywhere in the world and things known, used or invented in the United States, which are used to analyze whether the subject matter claimed in a patent or patent application meets the statutory requirements required for a valid patent. 1 DONALD S. CHISUM, CHISUM ON PATENTS, GI-18 (2007).

14. 5A CHISUM, *supra* note 13, § 18.01.

15. According to one patent scholar, the CAFC stepped in and provided certainty. See Coyle, *supra* note 9, at 20 ("Patents became stronger [and] a presumption of validity was more recognized." (quoting patent scholar Lee Petherbridge)). See also The Claim Construction Project, <http://www.claimconstruction.com>, a production of the Federal Circuit Assessment Project, for empirical studies conducted by scholars on the CAFC's success and other related analysis.

16. Paul M. Janicke, *On the Causes of Unpredictability of Federal Circuit Decisions in Patent Cases*, 3 NW. J. TECH. & INTELL. PROP. 93, 93 (2005). This inconsistency is frequently attributed to CAFC interpanel philosophical differences regarding how to approach claim construction. *Id.* See *infra* text accompanying note 62 for another example of CAFC inconsistency.

incredibly long and expensive.¹⁷ Other countries have dealt with similar issues by creating a specialized patent court at the trial level.

B. Special Treatment for Patents in Foreign Trial Courts

In the United States, generalist judges rely on specialized attorneys for their legal expertise; in Europe, generalist attorneys rely on specialized judges for their legal expertise. Although courts in most of Europe are still labeled “general jurisdiction,” they are broken down into special subject-matter divisions. The notion is that, over time, judges will develop expertise in these specific areas of the law.

The degree of specialization in patent courts varies from country to country. England has both a Patents Court and a Patents County Court.¹⁸ The former heard all patent cases until 1990, when the latter was created in response to concerns about the cost of patent litigation.¹⁹ Costs are kept down through speedier case processing and a reliance on written evidence, rather than typical discovery, which requires leave of court.²⁰ Competition has also begun to emerge between the two courts, which in turn creates an efficiency driver.²¹ In Japan, 75 percent of patent cases are heard by panels of three judges at the intellectual property divisions of the district courts in Osaka and Tokyo.²² These judges also have technical assistants (similar to U.S. PTO examiners) who help them with various case matters.²³ In Germany, only twelve district courts are authorized to hear patent cases and the judges are experienced in intellectual property matters.²⁴ The district court in Dusseldorf alone tries five to six hundred patent cases per year.²⁵ Moreover, Germany can boast that most district court proceedings are rendered within one year, which would be considered a “rocket docket”

17. See Moore, *supra* note 12, at 25–26 (showing a high reversal rate).

18. Pegram, *supra* note 4, at 774.

19. *Id.*

20. *Id.* at 775. Costs can also be kept down by using patent agents to handle the case instead of an expensive barrister that one would have to hire to go before the Patents Court. See *id.*

21. *Id.*

22. *Id.* at 776–77.

23. *Id.*

24. *Why You Should Choose Germany for Patent Litigation*, MANAGING INTELL. PROP., July 1, 2005, at S43, available at <http://www.westlaw.com>.

25. Reinhardt Schuster, *Germany: German Patent Disputes Newly Spiced*, LEGAL WK. GLOBAL, Sept. 16, 2004, reprinted in MONDAQ BUS. BRIEFING, Dec. 2, 2004, http://www.mondaq.com/article.asp?articleid=29507&email_access=on (requires free registration).

by U.S. standards.²⁶ The European Commission is also very close to implementing a continent-wide patent court system that will be based in Luxembourg and offer up to eight satellite courts.²⁷

A number of arguments are frequently raised in favor of such specialized courts of first instance. First, efficiency is achieved by removing a certain specialty of law from generalist judges, because they no longer have to remain current on that area of law. The judge who receives specialty cases increases efficiency by specializing in the limited issues presented in that particular area of the law. Moreover, cost and delay can be significantly reduced because lawyers will not have to spend as much time laying a foundation educating the judge in this area of law. Second, specialized courts promote uniformity—a very strong benefit, because as uniform principles of law are formed, predictability increases. This likely would lead to a decrease in litigation overall as litigants become more able to predict outcomes. A lack of uniformity also has the potential to create serious forum shopping problems, as was recognized prior to the creation of the CAFC. Third, judges' case management ability may improve when procedural rules are specifically formulated to facilitate handling the type of cases with which the specialist judge is charged.

The positive features of specialized courts should not be examined without fair consideration of the corresponding negative aspects. While efficiency stands to be a benefit, inefficiency is a likely detriment. If outcomes become so predictable that litigants seek to avoid unfavorable verdicts, forum shopping may arise in a different way: Litigants may look for other issues surrounding those at the heart of the case and seek jurisdiction outside the specialty court. Litigation may also take longer if the specialty court does not hear all of the issues necessary to resolve one particular case. Second, isolation may occur in that the most talented judges may not want to serve on specialty courts because of the narrowness of the work and the limited doctrinal scope. This may be especially true of patent cases in the United States, because such cases often carry the reputation of being

26. The term “rocket docket” originally referred to the Eastern District of Virginia. See *infra* note 63 and accompanying text (explaining the practices that led to the origination of this term); see also *infra* notes 64–65 and accompanying text (discussing newer “rocket dockets”).

27. Erik Larson, *Special IP Trial Courts a Bad Idea, Lawyers Say*, IP LAW360, Feb. 1, 2006, <http://www.iplaw360.com/secure/ViewArticle.aspx?id=5183> (subscription required). Besides the United Kingdom and Japan, Singapore, South Korea, Thailand, and Turkey have also set up completely specialized intellectual property (IP) trial courts. *Id.*

disliked by district judges.²⁸ As a result of isolation, judges who accept specialty positions may lose the opportunity for cross-pollination of ideas among the judiciary, which may improve on ideas or spur novel approaches. Third, undue influence by the specialized bars, such as the patent bar, might result in the loss of public confidence in the courts' objectivity. Legal lobbyists might eventually gain too much sway over the court.²⁹

These factors represent some of the considerations that must play a part in the decision of whether to shape judges into patent specialists at the trial court level in the United States, even without the formal creation of a specialized court. Later, Part III provides an in-depth discussion of the proposed program and applies these cost-benefit considerations.

II. PATENT ADJUDICATION IN PRACTICE

Proposals to reform patent adjudication are not new. The history of proposals for patent reform is plagued by inertia in Congress and a lack of consensus among the major players on what exactly should be changed and how these changes should be carried out.³⁰ While patent law may not be unique in these respects, the most critical aspect of patent adjudication, claim construction, is completely unique to this field. It thus deserves summarizing here, both to introduce the source of most of the controversy surrounding the handling of patent cases at the district court level, and to understand what the proposed patent pilot program hopes to achieve.³¹

28. Avern Cohn, Presentation at the Proceedings of the 2000 High Technology Summit Conference: A Federal Court Perspective on Extraterritorial Enforcement of Intellectual Property (2000), in *RETHINKING INTERNATIONAL INTELLECTUAL PROPERTY* 31, 32 (6 CASRIP Publ'n Series 2001), available at <http://www.law.washington.edu/Casrip/Symposium/Number6/Cohn.pdf>.

29. These benefits and costs are further analyzed in Part III in the context of the judicial specialization sought by the proposed patent pilot program. For a discussion of the arguments for and against setting up a specialized court, see The American Bar Association Central and East European Law Initiative (CEELI), Concept Paper on Specialized Courts (June 25, 1996), <http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/spc1c.html>.

30. For a look back on whether the U.S. Congress has actually managed any reform of the patent system in the past, as well as a look forward at some possible neutral reform principles, see Donald S. Chisum, *Reforming Patent Law Reform*, 4 J. MARSHALL REV. INTEL. PROP. L. 336 (2005).

31. The patent pilot program was originally introduced in 2006. See H.R. 5418, 109th Cong. (2006). It passed unanimously in the Judiciary Committee and passed in the U.S. House of Representatives in September 2006. See *id.* A companion bill, S. 3923, was introduced in the last Congress by Senators Feinstein and Hatch. S. 3923, 109th Cong. (2006). The U.S. Senate bill did not restrict the program to districts with at least ten judgeships, and it did not require participation from at least three judges per court. See *id.* The Senate bill languished at the end of the session. The bill was revived in the 110th Congress on January 4, 2007, and it was passed by a voice vote in the House on February 12, 2007. See H.R. 34, 110th Cong. (2007). The approved bill was received by the Senate on February 13,

A. Claim Construction and the *Markman* Hearing

Patents confer an exclusive right on their holders to prevent others from making, using, or selling the patented invention. This exclusive right is measured by the claim language. U.S. patent law has placed an ever-increasing emphasis on the importance of this language in determining where to draw the lines of infringement.³² In a watershed case, *Markman v. Westview Instruments, Inc. (Markman I)*,³³ the CAFC held that the scope of the claim language is a matter of law to be determined by a trial judge, not a jury. Therefore, on appeal, the CAFC must review a trial judge's interpretations of the claim language de novo.³⁴ Because claim construction determinations are reviewed de novo, they are not given as much deference as other district court determinations reviewed under a lesser standard.³⁵

In a unanimous opinion, *Markman v. Westview Instruments, Inc. (Markman II)*,³⁶ the U.S. Supreme Court agreed with the CAFC and held that the "construction of a patent, including terms of art within its claim, is exclusively within the province of the court."³⁷ The Court concluded that claim construction is an issue of law, though one with factual underpinnings.³⁸ To arrive at this decision, the court consulted (1) post-Seventh Amendment precedent (after 1791); (2) "the relative interpretive skill of judges and juries"; and (3) "the statutory policies that ought to be furthered" by deciding whether

2007, and was referred to the Senate Committee on the Judiciary. See 153 CONG. REC. S1901 (daily ed. Feb. 13, 2007). Senator Leahy, who is allegedly not fond of the bill, and Senator Feinstein, a supporter of the bill, are reportedly working on a companion bill. See C. Erik Hawes, Fulbright & Jaworski, Remarks at Loyola Law School Symposium: Special IP Focus Series: Specialized Patent Courts (Apr. 27, 2007) (attended by this author). See *infra* Part III.A for a detailed discussion of the current restrictions for getting in the program. According to lawyers following the matter, passage in the Senate is expected to be delayed, and changes are likely to be made to the text of the bill. See Hawes, *supra*. There is currently a grassroots lawyers' movement in Texas out of concern for the possible exclusion of all Texas districts (the Northern District and Southern District reportedly would have been eligible had the bill passed during 2006; the Eastern District is cut out under the House version based on size). See *id.*

32. 5A CHISUM, *supra* note 13, § 18.02.

33. 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff g* 772 F. Supp. 1535 (E.D. Pa. 1991).

34. 5A CHISUM, *supra* note 13, § 18.02. For a good discussion of what implications this has for CAFC review, see Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn From Administrative Law*, 95 GEO. L.J. 269, 301 (2007) (discussing how the CAFC turns facts into law in order to avoid deferential review altogether). For a perspective on what de novo review has done to claim construction affirmances, see Moore, *supra* note 12, at 29–30 (discussing the impact of the *Cybor* case and arguing that district court judges do not hear enough patent cases to develop expertise with the law).

35. See Benjamin & Rai, *supra* note 34, at 300–01 (mentioning the "no deference" approach).

36. 517 U.S. 370 (1996).

37. *Id.* at 372.

38. *Id.* at 384–85.

judges or juries should interpret patent claims.³⁹ The Court found that “[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors.”⁴⁰ The court also thought uniform treatment in patent cases was another important reason to allocate the duty of claim construction to judges.⁴¹

In 1996, with the new guidelines in place, many believed that trial judges would go through a period of adjustment, followed by a period of normalization during which claim construction reversals would decline.⁴² Among other changes, judges would likely hold more *Markman* hearings, a proceeding conducted by a trial judge before trial that is used to help the judge determine the proper meaning of each claim term.⁴³ The assumption was that after holding a few *Markman* hearings, during which the judge analyzed the claims from the standpoint of a person skilled in the relevant art,⁴⁴ the judge would get the hang of it and begin to reliably construe the claims so as to withstand appeal. Although this is likely what the Supreme Court and the CAFC had in mind when they took the duty away from jurors, statistics show that about one in three claim construction determinations appealed to the CAFC is reversed.⁴⁵ The claim construction undertaken in a *Markman*

39. *Id.* at 379–91.

40. *Id.* at 388.

41. *Id.* at 390.

42. Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231, 245–46 (2005).

43. *Markman I* listed four sources for the judge to consult in making her determination: (1) the written description accompanying the patent claims, which is the most relevant source; (2) the documentation of the history of the patent as it went through the application; (3) standard English dictionaries; and finally, if all else fails, (4) expert testimony from experts “skilled in the art” that is at issue in the particular case. 5A CHISUM, *supra* note 13, § 18.03.

44. *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1361 (Fed. Cir. 2004). Rather than employing the familiar “reasonable person” standard, the judge must put herself in the shoes of an inventor who, at the time of the invention, is skilled in the particular art pertaining to the case. *Id.* This art could be anything from chemical engineering to gene splicing and everything in between.

45. See generally Moore, *supra* note 42 (discussing how Moore’s empirical study reveals that *Markman* has created confusion, not guidance, in claim construction cases). Moore concluded that the confusion is getting worse, as evidenced by a rising reversal rate by the CAFC in recent years. *Id.* Moore also discussed the various ways in which commentators have calculated the reversal rate by the CAFC and explained why these other methods are faulty in one way or another. *Id.* Although arguments may be raised as to why one of the other methods should be favored over Moore’s, her approach is accepted for the purposes of this Comment because the congressional sponsors of the pilot program seem to have adopted her figures. See 153 CONG. REC. H1430, 1431 (daily ed. Feb. 12, 2007) (statement of Rep. Berman). Although various studies have calculated the reversal rate by the CAFC to be between 25 and 50 percent, Moore, *supra* note 42, at 234, it is not necessary to debate whether Moore’s numbers are too low, because 34.5 percent clearly has been enough to get Congress to respond to the growing criticism surrounding the excessive claim construction reversal rate, see *Patent Hearing*, *supra* note 1, at 4 (statement of Rep. Darrell Issa, Member, H. Subcomm. on Courts, Internet, and Intellectual Property) (stating that the reversal rate is at least 35 percent).

hearing is often regarded as the most critical point in a patent case. Thus, the high reversal rate on claim construction issues typically decided early in a case is frequently cited as one of the primary reasons a pilot program to increase judicial specialization could lead to more consistency and reliability in decisions.⁴⁶

B. An Overview of the Program

Without predictability as to court decisions, businesses cannot properly have confidence in their intellectual property.⁴⁷ The patent pilot program that recently was passed by the House⁴⁸ aims to lay the groundwork for predictability by increasing judicial expertise at the district court level. Based on assertions that the reversal rate is due to “judicial inexperience and misunderstanding of patent law,” the bill’s sponsors claim that increased familiarity with these issues will increase the timeliness and quality of judicial decisions.⁴⁹ The program will last for ten years, and it initially will be optional for district courts and judges. District judges can request to opt in to the program and, provided certain conditions are met, their court may be selected to participate.⁵⁰ In addition, provisions exist to preserve the randomness of case assignment as well as the ability of an opt-in judge who receives a case assignment under the program to request reassignment or transfer based on the preexisting rules of the court.⁵¹ The sponsors of the bill also assert that limiting participation to courts with a certain sized pool of judges will deter forum shopping because selecting a particular court will not ensure selection of a particular judge.⁵² Table 1 lays out the path a district court must take to become a participant in the pilot program (steps 1a–1d). Table 1 also lays out the path a patent case will take after it is filed in a pilot court (steps 2a–2d), following the decision of the Director of the Administrative Office of the U.S. Courts (AOC) to admit a court into the program.

46. See *Patent Hearing*, *supra* note 1, at 4 (statement of Rep. Darrell Issa) (discussing the likelihood that the reversal rate will not get any better unless Congress takes action).

47. *Id.*

48. For a complete history of H.R. 34, 110th Cong. (2007), including prior incarnations, see *supra* note 31.

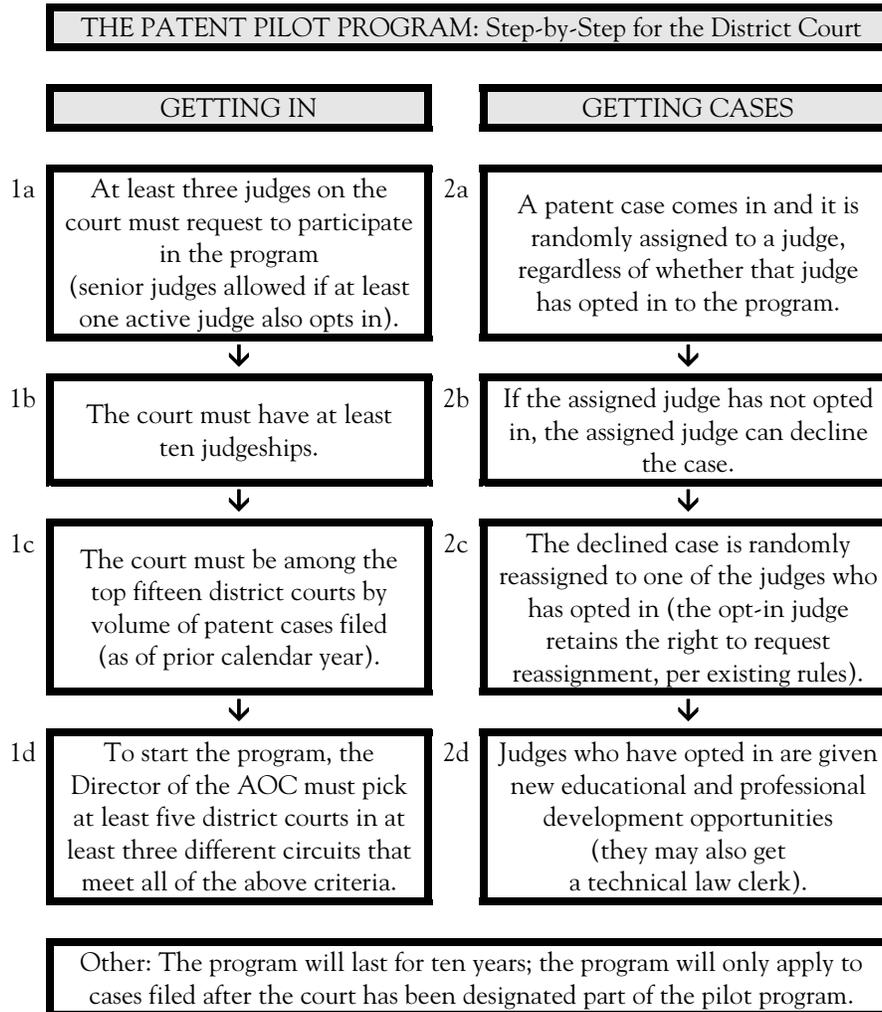
49. 153 CONG. REC. H1430, 1431 (daily ed. Feb. 12, 2007) (statement of Rep. Berman).

50. See H.R. 34 (listing the conditions).

51. *Id.* § (a)(1)(B), (a)(1)(D)(3).

52. 153 CONG. REC. H1430, 1431 (statement of Rep. Berman). However, parties still have freedom over whether they file in a court that is participating in the program or a court that is not.

TABLE 1



The exact cost of the pilot program appears to be minimal. The bill calls for a minimum of \$5 million per fiscal year, in addition to “any other funds made available,” to carry out Congress’s requirement of additional training for judges as well as the ability to hire law clerks with technical backgrounds.⁵³ One major cause for concern is the lack of guidance on the use of these funds. If three

53. See H.R. 34 § (f) (discussing authorization of training and clerkships); H.R. REP. NO. 109-673, at 6–7 (2006), available at <http://judiciary.house.gov/media/pdfs/109-673.pdf> (an estimate and comparison prepared by the Director of the Congressional Budget Office is attached with respect to H.R. 5418).

judges per court are selected across five courts, each judge will have about \$333,000 at their discretion annually for ten years. There are no rules governing the sorts of training conferences on which these funds may be spent. Other administrative costs associated with data tracking and reporting presumably will be low because existing court structures will be used and the AOC already tracks data similar to that required by the bill.

As a means of measuring success, the bill requires periodic reporting to Congress on the level of judicial expertise achieved and the extent to which that expertise improves court efficiency.⁵⁴ Additional reporting requirements include a comparison of the two groups of judges (those who opt in and those who do not) in areas such as the reversal rate by the CAFC on issues of claim construction and the time elapsed between filing and the start of trial or other disposition of the case.⁵⁵ Evidence of forum shopping and analysis of whether the program should be made permanent in the courts that opted in (or in all courts) also must be disclosed.⁵⁶ In light of this overview of the program itself, the next step is to discuss the mechanics of how courts get into the program.

III. IF THE BILL BECOMES LAW: THE PROGRAM IN ACTION

A. Getting in: Passing All the Hurdles

Before applying the cost-benefit principles discussed in Subpart I.B, it is necessary to discuss the mechanics of court selection for the pilot program. It is also helpful to analyze the restrictions imposed by H.R. 34, in light of the current system, to determine whether the pilot program can feasibly be grafted onto the existing district court system.

Although it has been said that this bill does not serve as a cushion for judges who want to “shy away from patent law,”⁵⁷ there are no provisions in the bill that indicate how such behavior would be tracked. It is likely that some district judges will welcome this program as a means of staying as far away from patent cases as possible.⁵⁸ After a court has been designated a member of the pilot program, judges are free to decline patent cases as

54. H.R. 34 § (e)(1)(A)–(B).

55. *Id.* § (e)(1)(C)(i)–(ii).

56. *Id.* § (e)(1)(D)–(E).

57. 153 CONG. REC. H1430, 1431 (statement of Rep. Berman).

58. See *VAE Nortrak N. Am., Inc. v. Progress Rail Serv. Corp.*, 459 F. Supp. 2d 1142, 1142 (N.D. Ala. 2006) (Acker, J.) (lamenting about not having the pilot program passed sooner because had it been enacted, not only would his court have chosen not to participate, but he also would have expressly requested that the case be reassigned to an opt-in judge in one of the pilot courts).

they wish, allowing the cases to be reassigned to judges who opted in to the program. The more judges who decline randomly assigned patent cases, the better chance specialization has of working. Therefore, it seems likely that judges in participating courts who never want to see a patent case again may achieve that goal under the program.

This leads to a discussion of the steps listed in Table 1 regarding how a court becomes designated as a participant of the pilot program.⁵⁹ The criteria set forth by the bill immediately eliminates 85 percent of district courts, including all courts from the Fourth and Tenth Circuits, based on the requirement that designated courts be in the top fifteen courts by volume of patent cases filed during the prior year. We do not necessarily know from the text of the bill what exactly constitutes a “patent case.” Patent issues are sometimes tangentially involved in the context of a larger case. Further, not all cases involving patents will have claim construction issues at the heart of the case (for example, a case involving trade secrets as well as unfair competition in regard to a contract pertaining to a patent license). The AOC currently reports on patent cases by district, and it seems likely that they will continue to use their own figures to determine the top fifteen patent courts, since the language of the bill does not offer any alternative guidelines. Table 2 presents statistics for the top fifteen patent courts. For the purposes of Table 2, use of the AOC data in selecting the courts will be presumed.⁶⁰

59. See *supra* p. 756 tbl.1 (steps 1a–1d).

60. Although the courts will be selected based on the volume in the “prior calendar year,” the most current data from the Administrative Office of the U.S. Courts (AOC) available as of the writing of this Comment are for the twelve-month period ending September 30, 2006. ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 83 tbl.S-23 (2006), <http://uscourts.gov/judbus2006/tables/s23.pdf> (“Civil Cases, Filed, Terminated, and Pending, by Nature of Suit and District”). For illustrative purposes, this data will be used to identify the current top fifteen courts. However, it should be noted that this exact data set would not be used even if the program were enacted during 2007, because the bill calls for using data from the prior calendar year. For example, if the bill is enacted on November 1, 2007, the data that will be used span from January 1, 2006, to December 31, 2006.

TABLE 2

PATENT CASES BY DISTRICT ⁶¹	# Cases Filed	Circuit	# Judges
California, Central	281	9	28
Texas, Eastern	216	5	8
California, Northern	163	9	14
New Jersey	145	3	17
Delaware	139	3	4
Illinois, Northern	138	7	22
New York, Southern	135	2	28
Massachusetts	80	1	13
Georgia, Northern	77	11	11
Florida, Southern	69	11	18
Minnesota	67	8	7
Pennsylvania, Eastern	66	3	22
Michigan, Eastern	61	6	15
Texas, Northern	58	5	12
California, Southern	55	9	13
National Totals	2830		
Notes to Table 2:			
<ul style="list-style-type: none"> • The Fourth Circuit and the Tenth Circuit are not eligible to participate (based on the number of patent cases filed). • The District of Delaware, the District of Minnesota, and the Eastern District of Texas are not eligible to participate (based on the number of judgeships). • The actual list of courts used to determine eligibility for the program will be constructed based on data from the twelve-month calendar period prior to the year that the bill is enacted. 			

In addition to the volume restriction, at least five district courts, with a minimum of ten judgeships each, are needed in three different circuits. Each of these restrictions has a different exclusionary effect. As previously

61. According to statistics obtained from AOC CASELOAD PROFILE, *supra* note 6 (select the desired district from drop-down menu, then click the “Generate” button).

mentioned, the Fourth Circuit and the Tenth Circuit would not currently be considered.⁶² In addition, based on the three-circuit requirement, certain combinations of district courts requesting to be in the initial group may be precluded. For example, the combination of the Northern, Central, and Southern Districts of California (Ninth Circuit), plus the Eastern District of Pennsylvania and the District of Delaware (Third Circuit), only spans two circuits and would therefore not be allowed. It is also likely that if only five district courts are selected, no two will be from the same circuit. This could create friction in places like California, where both the Central District and the Northern District are top patent courts nationwide; the bill lacks guidance for how to choose between qualified neighboring courts.

Regarding the minimum number of judgeships, the Eastern District of Texas, known as a rocket docket, is disqualified because it currently only has eight judgeships. The District of Delaware, commonly known for handling complex patent cases and including many of the top judges by volume based on the study presented in Part III.C, is similarly excluded, with only four judgeships. The District of Minnesota, with only seven judgeships, is also out. The picture looks even worse for popular patent courts that did not make the top fifteen list. For example, the Eastern District of Virginia, famously known as the original rocket docket,⁶³ currently ranks twenty-fourth on the list, and the Western District of Wisconsin, recently dubbed another rocket docket, currently ranks thirty-second on the list and only

62. The District of Colorado is currently only a few cases away from being the fifteenth court by volume, possibly displacing the Southern District of California by the time this program is enacted. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 60, at 83 tbl.S-23.

63. See T.S. Ellis III, Presentation at the Proceedings of the 1999 Summit Conference on Intellectual Property: Quicker and Less Expensive Enforcement of Patents: United States Courts (1999), in STREAMLINING INTERNATIONAL INTELLECTUAL PROPERTY 11, 12–14 (5 CASRIP Publ'n Series 2000), available at <http://www.law.washington.edu/casrip/symposium/Number5/pub5atcl2.pdf>. Judge Ellis explained the three main ingredients to a rocket docket: a fixed and immutable trial date that is set early on in the case; a discipline accepted as part of the local legal culture among both judges (quickly handling cases) and litigants (understanding dates cannot be moved so they will not even ask); and having a master docket. *Id.* at 12–13. A master docket is one in which judges do not have individual dockets. *Id.* at 13. Cases can be reassigned for trial if a particular judge is out of town or another trial goes longer; everyone who is available will be assigned duties as they arise. *Id.* The Eastern District of Virginia is the only district in the country that utilizes this system, and though all judges participate, it is completely optional for the judges. *Id.* All cases go from birth to death in six to eight months regardless of the nature or complexity of the case. *Id.* at 14. Unlike most other cases before the court, patent cases have the same judge preside over the whole case. *Id.* at 17–18. This rocket docket has been in place since the 1950s, largely as a result of the efforts of Judge Bryan, who is now a senior district judge on the court. *Id.* at 13–14.

has two judgeships.⁶⁴ With only twelve eligible courts in the top fifteen remaining, a minimum of five of these must have at least three judges opt in (with at least one of those an active judge), in order to comply with all of the bill's restrictions.

Although some judges dislike patent cases, others have shown an affinity toward handling such cases.⁶⁵ Assuming that among the combination of courts previously described we also have three judges per court willing to opt in, how will their transformation into patent specialists be achieved? The provision inserted into the bill to preserve randomness might serve this goal. With the extremely low number of patent cases filed in comparison to the total docket, less than 1 percent,⁶⁶ judges may be indifferent to an occasional patent case, leaving the judges who have opted in with only an occasional patent case. On the other hand, if judges who dislike patent cases happily decline them, which seems to be the more likely scenario, the randomness of assignments is likely to be illusory. A case assignment that starts out as random, but ends up on the fast track to rejection based on its initial assignment to a certain judge, is random only in form, not substance. When the case is rejected and then sent to one of the three judges participating in the program, a party will still be randomly assigned to one of those three. However, knowing you will receive one of three patent judges goes against the Judicial Conference's "longstanding position favoring the random assignment of federal cases."⁶⁷ Therefore, even if the bill passes, this is one aspect of the program that may be strongly criticized if Congress seeks to make the pilot program permanent.

64. See Gina Carter, "Rocket Docket" Speeds Patent Infringement Suits, WIS. TECH. NETWORK, Mar. 14, 2007, <http://wistechnology.com/printarticle.php?id=3771>.

65. These judges include Judge T.S. Ellis III, Eastern District of Virginia; Judge T. John Ward, Eastern District of Texas; and Judges John Shabaz and Barbara Crabb, Western District of Wisconsin. See Ellis, *supra* note 63, at 15–20; Tresa Baldas, *IP Hotbed—For Now*, NAT'L L.J., Dec. 20–27, 2004, at 26, 26, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1103549728998>; Carter, *supra* note 64.

66. For the twelve-month period ending September 30, 2006, filed patent cases made up 0.0087 percent of the total docket and 1.1 percent of the civil docket. For total patent cases filed, see ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 60. For total cases filed (civil and criminal), see ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL FACTS AND FIGURES, at tbl.6.1 (2006), <http://www.uscourts.gov/judicialfactsfigures/2006/Table601.pdf> ("Total Civil & Criminal Cases Filed, Terminated, Pending (Includes Transfers)"). For total civil cases filed, see *id.* at tbl.4.1, <http://www.uscourts.gov/judicialfactsfigures/2006/Table401.pdf> ("U.S. District Courts. Civil Cases Filed, Terminated, Pending").

67. *Legislation Update: Bills Focus on Security, Cameras and Patents*, THIRD BRANCH, Apr. 2007, at 4, 4, available at <http://www.uscourts.gov/ttb/2007-04/legislation/index.html>. Note that the Judicial Conference has not formally taken a position on the current legislation proposing the patent pilot program.

Following the case assignment, judges who have opted in should experience an increase in the percentage of patent cases on their dockets. This in turn will generate the data Congress is looking for regarding the length of case adjudication and reversal rates on appeal. Assuming that the mechanics of the program begin to run smoothly, it is now appropriate to evaluate the costs and benefits of the program in operation.

B. The Rollout: Realistic Costs and Benefits

This Subpart assesses whether, under the principles discussed above,⁶⁸ the attempt at judicial specialization of patent cases is likely to result in a net benefit. This analysis is informed by the main goals of the program: to reduce the number of claim construction reversals by the CAFC, to reduce the length of time to trial or other disposition, and to lower overall litigation costs.

1. Efficiency

Depending on how well the case assignment process functions at getting patent cases in front of opt-in judges, the increase in patent cases and the probable decrease in other types of cases likely will create judicial efficiencies on the procedural level, as the judges become more familiar with the basic motions that may be filed and with conducting *Markman* hearings. Although the pilot program seems to seek substantive specialization as well, this will be difficult to achieve in practice, as patent cases will rarely ever be exactly the same. While the underlying patent law is the same, the technologies vary widely. Moreover, it is the actual patent and its claims that serve as the most critical piece of analysis when a judge is tasked with claim construction. On the positive side, the CAFC judges most certainly have not attained substantive specialization on all technologies either, and yet they are still widely regarded as being much more successful at accurate claim construction.⁶⁹ Thus, although

68. See *supra* Subpart I.B.

69. See *supra* note 12 and accompanying text (discussing how CAFC judges do not all have technical or patent backgrounds). But see Moore, *supra* note 12, at 16–25 (discussing claim construction by the CAFC). Moore gave an example of two different cases on the exact same technology in which the panel in the later case did not follow the construction of the panel in the earlier case. *Id.* She did, however, present empirical data through 2001 indicating that the panels of the CAFC have very little disagreement among themselves—about 3 percent. *Id.* Frequency in handling claim scope analysis seems to result in higher levels of accuracy in reviewing lower court decisions. *Id.*

the technologies differ, it can be argued that, to some degree, a routine process exists for judges to approach each case in a logical and precise manner; and this process itself enhances judges' abilities in patent cases over time.

It is unlikely that judges who did not opt in will gain any particular efficiency by seeing their patent caseload decrease or disappear. They no doubt will still be faced with other forms of complex litigation, as well as myriad cases from different areas of law, simply because the generalist-judge model lies at the heart of our judicial system.

Regarding the decrease in costs and the length of time to trial, procedural familiarity may require less education of the judge by the lawyers; however, it seems that addressing these cost factors in a concrete way would better serve the pilot program. As an example, the patent rocket docket in the Eastern District of Virginia did not set out to resolve patent cases speedily; it set out to resolve *all* cases speedily. Working from a master docket, cases are still randomly assigned and no judges have opted in to any particular case as a means of specialization.⁷⁰ However, it is the strict legal culture of the court that sends a message to litigants: Deadlines are not flexible and trial dates are immutable.⁷¹ The pilot program could similarly benefit by recognizing the simple principle: Time is money. Rather than leaving time to trial or other disposition as a periodic reporting requirement, the program should proactively address this issue. Other courts have successfully achieved this by instilling procedural and cultural requirements. The pilot program is looking for specialization first with reduced cost as a result. It would be a mistake, however, not to consider other means of reducing costs alongside the growth of specialization.

Continuing to handle the disposition of an entire case or controversy is unlikely to be a problem, because the judges who opt in are still likely to have a caseload of which patent cases are a small minority. Even with some degree of specialization, it is unlikely that any inefficiencies will result from judges handling nonpatent cases. This is because judges will remain overwhelmingly generalist in their practice, notwithstanding an increase in patent caseload. This is similar to the way the CAFC must handle an appeal in its entirety rather than excise the patent issues from the remaining issues.

Under the program, it is possible that technical law clerks will have too much influence over the judges. While technical clerks might be a blessing to nontechnical judges, they are likely to become a cause of anxiety

70. See Ellis, *supra* note 63, at 13–14.

71. *Id.* at 13.

for patent attorneys. A clerk with a mechanical engineering background discussing a gene sequencing case with the judge behind closed doors could produce variable and unwanted results.⁷² Moreover, it is virtually impossible to be technically trained in all areas that patent law touches. There may be other concerns regarding the ability of one of the parties to influence the clerk based on researching a particular clerk's background. A party might seek to hire an expert that the clerk will perceive as friendly, perhaps someone that worked with the clerk prior to when the clerk joined the court, although the clerk would probably have to disclose this to the judge.

A final concern regarding efficiency is that judges may begin to rely heavily on experts, appearing more efficient by having someone else paint a picture of what is going on, but not actually becoming specialized. While experts may be appropriate to help judges in certain instances, excessive reliance on them likely would lead to erosion of the judge's perspective. This loss of perspective may prevent the judge from looking at each case with a fresh pair of eyes.

2. Uniformity

One of the biggest questions that looms for the pilot program is whether an increased number of patent cases will produce specialization that in turn will increase predictability through the development of uniform principles of law. Subpart III.C below examines the data over the last five years to look for signs that increased patent caseloads can lead to such specialization and uniformity. It may also be helpful to categorize why judges are getting reversed on claim construction. For example, are there instances in which a judge makes a procedural change, such as conducting more in-depth analyses or using certain special masters, in order to better understand the questions of law? Do such actions lead to fewer appeals or higher rates of affirmance? The data analysis in Subpart III.C is conducted in a result-based manner, looking at the outcome of cases by individual judges. However, a methodology-based study may be more telling as to what procedures enable certain judges to skillfully adjudicate claim construction matters (and conversely, what procedures lead to higher reversal rates).

72. According to a veteran patent attorney, this situation could be similar to when a single juror asserts he knows something about the technology at hand and subsequently ends up influencing the entire verdict. Robert W. Dickerson, Jones Day, Remarks at Loyola Law School Symposium: Special IP Focus Series: Specialized Patent Courts (Apr. 27, 2007) (attended by this author).

The goals of specialization cannot be achieved without the cooperation of patent litigants. Unless litigants buy in to this program by filing in the designated courts, judges will not have the patent case volume needed to increase specialization.⁷³ Two factors already point in favor of the pilot program in this respect. First, the program has received the support of many industries and intellectual property organizations, so it would seem that resistance to the program by litigants also may be low.⁷⁴ Second, the requirement making only the top fifteen patent courts by case volume eligible will limit participation to courts in which litigants have already voluntarily consolidated; therefore, they likely will not have to change their filing patterns.

If the pilot program is able to reduce the number of reversals, it probably will reduce the number of appeals as well, because litigants may begin to trust outcomes. Currently, with about a one in three chance that a case could be reversed on appeal, the odds probably appear favorable to litigants with millions of dollars on the line who are unsuccessful at the trial level. As the chances of reversal become slimmer, litigants may be less likely to appeal.

Fewer reversals also might lead to a decrease in overall litigation as potential plaintiffs become better able to predict which cases have merit, or potential defendants become better positioned to assess whether their actions will be deemed to infringe a third-party patent. While fewer reversals likely will lead to predictability, actually achieving fewer reversals as a result of the pilot program is probably hardest to predict at this stage because the strength of the correlation between increasing a judge's patent caseload and an improved ability to adjudicate patent cases remains unclear.

Another critical concern with regard to uniformity is forum shopping. Even though patent cases are already consolidated in a handful of courts

73. A relevant analogy can be found in Pennsylvania, where the government has signaled a policy change to litigants: It plans to develop a commercial court to compete with the Court of Chancery in Delaware. Jennifer Widner, *Are Specialized Courts the Right Approach to Effective Adjudication of Commercial Disputes in Developing Areas?* (Feb. 2000) (unpublished manuscript), <http://www.worldbank.org/wdr/2001/wkshppapers/berlin/widner.pdf>. Unless Pennsylvania makes the playing field more attractive to litigants, and in turn those litigants voluntarily begin to file more cases in the Pennsylvania court, the new commercial court will not have the chance to gain specialization in this area.

74. According to Rep. Darrell Issa, the bill "is supported by software, hardware, tech and electronics companies, pharmaceutical companies, biotech companies, district court judges, the American Intellectual Property Law Association, and the Intellectual Property Owners Association among others." 153 CONG. REC. H1430, 1433 (daily ed. Feb. 12, 2007) (statement of Rep. Issa).

nationwide, the courts at the top of the list are not always the same.⁷⁵ As the first five courts are chosen to participate in the program, their reputations will begin to solidify with litigants, and trends likely will emerge as to which forums parties like or dislike. This type of behavior can be seen in recent examples from the Western District of Wisconsin and the Eastern District of Virginia. The Western District of Wisconsin, dubbed another rocket docket, was recently named most favorable to plaintiffs in a study of federal intellectual property cases conducted by PricewaterhouseCoopers.⁷⁶ Plaintiffs won 63 percent of the time overall, and 91 percent of the time if they survived summary judgment.⁷⁷ At the original rocket docket in Virginia,⁷⁸ as patent case filings crept up toward sixty per month, the court began assigning patent cases filed in Alexandria to other divisions of the court on a random, rotating basis.⁷⁹ Since the court adopted that process, the number of patent filings has decreased.⁸⁰ This is probably because parties sent to other divisions are faced with completely different local procedures, which can make a significant difference.⁸¹ For example, if they are assigned to Norfolk or Richmond, parties cannot simply notice a motion for any Friday; they must request a hearing date based around a particular judge's availability.⁸² Parties in these divisions also lose the opportunity to be assigned to the judges most familiar with patent cases, such as Judge Ellis.

In the pilot program, something similar may happen if one of the courts has or creates local rules that, on their own, provide for faster trials; one example would be to issue a standing *Markman* order. This might make litigants go out of their way to file in that court, but if cases start to get bogged down, parties will probably go elsewhere. This is already occurring in another rocket docket, the Eastern District of Texas, where local rules

75. In recent testimony before Congress, Moore discussed the phenomenon of this consolidation and how recent shifts in patent filings revealed that "forum shopping is alive and well" at the district courts level. *Patent Hearing*, *supra* note 1, at 6 (statement of Kimberly A. Moore). Moore plans to articulate this information and accompanying statistics in greater detail in an upcoming paper called "Patent Lemmings." *Id.*

76. Carter, *supra* note 64.

77. *Id.* The corresponding nationwide figures are 35 percent and 61 percent, respectively. *Id.*

78. See *supra* note 63.

79. Timothy S. Ellis III, Remarks at the Seventh National Advanced Forum on Litigation Patent Disputes (Feb. 5, 2001), cited in Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, VA. LAW., Apr. 2002, at 20, available at <http://www.vsb.org/publications/valawyer/apr02/mcdaniel.pdf>.

80. *Id.*

81. Dabney J. Carr, IV & Robert A. Angle, *Traps for the Unwary: Litigating Intellectual Property Cases in the Rocket Docket*, MEALEY'S LITIG. REP.: INTELL. PROP., Apr. 7, 2003, at 1, available at <http://www.troutmansanders.com/mc/art-carr03.pdf>.

82. *Id.*

adopted by Judge Ward have been put in place to streamline complicated patent cases.⁸³ Judge Ward requires parties to turn over relevant information immediately and he sanctions them if they do not comply; both sides are also forced to find claim terms on which they can agree so fewer are left for dispute in court.⁸⁴ Any judge in the pilot program who adopts such streamlined rules likely will become a magnet for plaintiffs. Moreover, litigants who favor Judge Ward's rules presumably will still file there even though the court is not eligible for the pilot program.

There are other reasons why certain designated courts may become more popular forums. For example, if one of the courts only has ten judges and three of those judges opt in (both are required minimums), then a plaintiff has a 30 percent chance of getting her case initially assigned to an opt-in judge. The chances increase as the other seven judges on the court begin to develop reputations for frequently declining patent cases. If the party's alternative is the Southern District of New York, where there are forty-four active and senior judges, filing becomes less favorable because getting a certain judge is less predictable. The situation will only intensify as the program further develops because, over time, individual judges will develop track records that litigants can evaluate; moreover, courts can also add new procedural mechanisms to reduce both time to trial and costs, in order to compete with other courts for more patent cases.⁸⁵

The flipside of this situation is negative forum shopping to avoid the designated courts. Nothing in the program restricts choice of forum or

83. Susan Decker, *Texas District Is Heaven for Patent Holders Under Siege*, SEATTLE TIMES, May 1, 2006, at C3, available at http://seattletimes.nwsourc.com/html/business/technology/2002963706_btpatentheaven01.html?syndication=rss.

84. *Id.*; see also Baldas, *supra* note 65, at 26. Judge Ward recently had to shift some of the patent workload to two other judges; he now handles 60 percent, a second judge takes 35 percent, and a third judge 5 percent. Baldas, *supra* note 65, at 26. Lawyers say that Ward's strongest trait may be that he actually likes patent cases; one attorney claimed that he started using the court when the Eastern District of Virginia began taking too long. *Id.* Some fear the Eastern District of Texas is becoming similarly bogged down, but lawyers seem to be saying that it is only a matter of time before they start searching for the next "hot new venues." *Id.*

85. This would be similar to what England has experienced with its two patent courts as well as what Europe in general has experienced with countries such as Germany and the Netherlands touting their benefits to attract patent litigants. See *supra* Part I.B. Recently, a pair of decisions in Europe effectively ended the availability of cross-border enforcement as a remedy for infringement. A plaintiff now must choose which country to file in first. This has made the initial decision of where to file increasingly more important. See Beth Z. Shaw, *Court Rules Against Cross-Border Enforcement of "European" Patent Rights*, LEGAL OPINION LETTER, Oct. 6, 2006, at 1, <http://www.wlf.org/upload/100606shaw.pdf>.

While U.S. litigants are not dealing with selecting a court among cross-border options, sophisticated patent litigants are clearly used to looking at subtleties when determining where they have the best chance at success.

requires litigants with patent cases to file in a pilot court. As the reputations of the opt-in judges and the procedural rules of the various courts become widely known, as described above, a pattern may also develop of litigants purposefully staying out of the pilot courts. Further consolidation in some of the busiest district courts in the country, such as the Central District of California and the Southern District of New York, could actually lead to longer case delays. Moreover, because these courts know they will be on Congress's radar for at least ten years, they may become stricter with litigants and more unfriendly toward plaintiffs. Or, perhaps in order to keep their time to disposition statistic down, they may choose to frequently grant summary judgment for defendants, thereby forcing an earlier appeal and getting the CAFC's input on claim construction sooner. Claim construction will undoubtedly be another statistic watched closely under the program.

3. Case Management Ability

As previously mentioned,⁸⁶ this Comment recommends that the pilot program adopt procedural rules that are specifically formulated to facilitate patent cases. Although specialization might lead to an incremental reduction in the length of time to trial, this is likely to be a very slow process. Strong case management abilities in existing courts tend to arise from some other cause with specialization as the effect. In addition to the master docket in the Eastern District of Virginia mentioned earlier, the Delaware Court of Chancery is another excellent example. In Delaware, the division of equity and law courts, modeled after courts in England, was preserved.⁸⁷ Because businesses frequently sought remedies in equity rather than at law, over time, the judges became more adept at matters of corporate law.⁸⁸ In turn, the Court of Chancery has become widely known for its ability to deal with corporate disputes. While specialization was the result, it was preceded by a structural decision regarding the court system that drew corporate plaintiffs to Delaware.

Courts designated under the pilot program can learn from these examples. By making a structural or procedural change, a court can much more effectively realize the goal of specialization. The current setup of district courts does not lend itself to specialization, even if a few judges hear a handful more patent cases. Besides setting quick trial dates, another

86. See *supra* Part III.B.1.

87. Widner, *supra* note 73, at 4 n.7.

88. *Id.*

way to create procedural benefits would be to adopt a specific approach for dealing with damages calculations. This is a matter of great controversy in patent law, and the way it is handled is frequently criticized.⁸⁹ However, if parties knew up front how the court would resolve this issue, it would likely eliminate a lot of debate, saving both time and money.

A word of caution regarding the impact of specialized procedures or a specialized structure: Such changes may impose costs on the court as a whole if the changes tie up other resources. This could generate resentment from other judges who may lose much-needed, presumably scarce resources. Although the pilot program provides new funding for designated courts to hire technical law clerks, this could create tension among the three opt-in judges if they have to share one or two clerks; alternatively, it could create tension among the other judges who feel that their complex workloads also deserve an extra clerk. As mentioned previously,⁹⁰ if only five courts are chosen, the stakes are high. An opt-in judge could get an extra \$333,000, while judges not in the program would receive no additional funding, including those who continue to hear the patent cases they are assigned. The pilot program should outline how the clerk(s) will function among the three or more opt-in judges, and it should also specify whether the new clerk(s) will prevent the judges from hiring as many regular clerks as they were previously allocated. The bill does not state whether judges would trade nontechnical clerks for higher paid technical clerks, or instead gain an extra technical clerk.

4. Isolation and Capture

Although it does not seem likely that less talented judges would end up handling the most patent cases under the program, two points are worth examining. Given that patent cases sometimes have a reputation for being less desirable than other cases, it is important to ensure that participating judges are opting in out of a genuine desire to hear more patent cases. The bill does not describe how judges will be recruited or made aware of

89. See Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not To)*, 48 B.C. L. REV. 149, 166 (2007). Although courts do not calculate damages by completely taking into account contributions people other than the patent owner have made to a product, they may start to do so. The Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005), takes steps in this direction by requiring a patent owner to demonstrate that “the royalty is attributable to the patentee’s inventive contribution, as distinguished from all the other aspects of the product being sold.” *Id.* § 6(1)(B).

90. See *supra* Part II.B.

the program or how the AOC should handle these procedures.⁹¹ A set of guidelines may help ensure enthusiastic recruitment. There is also no provision for participating judges to exit the program if they get burned out from the complexity and limited doctrinal scope of these cases. Although judges ideally would be required to participate for the duration of the program for data collection purposes, it would not benefit the program to retain a judge who was unable or unwilling to perform the duties required under the goals of the program.

Another possible concern regarding specialization is the loss of cross-pollination opportunities among judges. This is more of a concern at the appellate level, as was frequently argued during the debates about the CAFC;⁹² however, the CAFC presently addresses this concern by pointing out that the diversity of judges on the court allows for intracircuit cross-pollination of novel ideas.⁹³ This likely would not present much of a concern to the pilot program because of the provisions requiring a minimum of three judges per court spread over a variety of circuits. The program also does not guarantee that all patent cases will go to opt-in judges, which would point to further opportunities for exchanging new ideas on how to approach these cases.

Rarely do all groups affected by a proposed change to patent law agree to support it. Recent calls for patent reform have met stiff resistance from industries with the largest vested interest in the outcome of the reform.⁹⁴ The pilot program, however, has garnered wide support from big-industry and small inventors alike.⁹⁵ Patent holders, regardless of size,

91. According to one veteran patent attorney, when he asked a senior judge and a newly appointed judge in the Central District of California, neither had even heard of the program. Dickerson, *supra* note 72.

92. The American Bar Association (ABA) argued that a national appellate court would lose the benefit of divergent viewpoints among the regional circuits. See Pauline Newman, *Foreword: The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 823 (2005), available at <http://www.wcl.american.edu/journal/lawrev/54/newman.pdf>.

93. See Coyle, *supra* note 9, at 21 (reporting Chief Judge Michel's rejection of suggestions that the CAFC is insular). This intracircuit diversity of ideas and views is also blamed for the interpanel unpredictability and philosophical differences of the CAFC. See Janicke, *supra* note 16, at 93.

94. Even after a retreat from the original Patent Reform Act of 2005, in which provisions relating to injunctive relief, continuation practice, and second-window postgrant opposition procedures were eliminated and the damage apportionment provision was attenuated, the biotechnology and pharmaceutical industries still strongly opposed the bill. See Christopher M. Holman, *Biotechnology's Prescription for Patent Reform*, 5 J. MARSHALL REV. INTELL. PROP. L. 318, 322 (2006).

95. See Press Release, ACT Online, *Issa/Schiff Patent Bill Should Help Patent Courts Get It Right the First Time* (May 19, 2006), available at <http://www.actonline.org/press-releases/060513issapatentbill.html> (providing analysis that the bill will reduce costs for small firms

presumably will benefit from more predictability and lower costs. The question arises, however, whether some of these parties will have more sway after the program has been rolled out. The patent bar is not incredibly large. As patent cases are further consolidated, repeat litigants likely will appear many times before a handful of specialized judges, making it increasingly important to maintain public confidence in the judges' objectivity toward these parties.

* * *

Although likely benefits exist, such as procedural efficiency, continued judicial cross-pollination, and the notion of improved patent specialization (with the CAFC as an example), the courts and Congress must still be mindful of creating a situation that may encourage forum shopping and possibly affect judicial objectivity and the sharing of judicial resources. Given the uncertainty underlying the notion that specialization will work, it is helpful to look at case data for specific judges, including the number of patent cases heard and appeal and affirmance rates.

C. The Empirical Data

The purpose of this study was to identify whether a relationship exists between the number of patent cases heard by a particular district court judge and that judge's rate of claim construction appeals and affirmances. Based on the premise of the patent pilot program, the more experience a judge has, the less frequently she should be reversed on claim construction. Therefore, a correlation should already exist given the current consolidated filing patterns in patent cases.⁹⁶ I used a result-based approach to focus on

and stimulate investment in innovation); Letter from Cal. Healthcare Inst. to Rep. Darrell Issa (June 5, 2006), available at http://www.chi.org/uploadedFiles/News/News_Items/hr%205418%20-%20patent%20pilot%20project%20-%20letter.pdf (strongly supporting the program); *supra* note 74 (citing wide support of the pilot program). *But see* Larson, *supra* note 27. Detractors say that specialty IP courts would break the balance of having one set of laws and one set of standards for all cases. *Id.* Patent lawyers are skeptical of this type of proposal because they do not like to be considered outside of the mainstream. *Id.* A small group of judges hearing all patent cases would be "a pretty inbred system, which would make it difficult to get new ideas . . . injected into the system." *Id.* (quoting Steven J. Goldstein, chairman of the Intellectual Property Department at Frost Brown Todd LLC). The delay in patent cases can mean that attorneys are doing their jobs the best way possible; emphasis should be placed on patent attorneys as teachers to the judges and juries. *Id.*

96. *See supra* p. 759 tbl.2. The top fifteen district courts in the United States handled approximately 62 percent of all patent cases filed for the period ending September 30, 2006. *See id.*

outcome data by judge, reviewing all precedential and nonprecedential patent appeals involving issues of claim construction during the period 2002–06.⁹⁷

This approach has two main limitations that should be considered when assessing the weight of the data. First, the study did not include Rule 36 summary affirmances. Rule 36 allows courts to dispose of cases without an opinion or any indication of why the court is affirming.⁹⁸ This exclusion likely will have an impact on the data regarding how often judges are affirmed.⁹⁹ However, it is worth noting that in a prior study, claim construction issues were less likely to be affirmed by Rule 36 summary affirmances than other patent appeals.¹⁰⁰ Second, the study was based on cases available in electronic format using LexisNexis searches.¹⁰¹ The scope

97. The CAFC issues three types of rulings on all patent cases. Precedential opinions are citable as precedent and represent only a fraction of the decisions appealed from the trial courts. Nonprecedential opinions, until recently, were not citable as precedent. When issuing this type of opinion, the court basically affirms that the case does not add significantly to the body of law. FED. CIR. R. 47.6 (b) (“Opinion and Order of the Court; Nonprecedential Opinion or Order”). This practice recently changed with the implementation of Rule 32.1(a) of the Federal Rules of Appellate Procedure, which states that parties cannot be prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007. See FED. R. APP. P. 32.1(a). This change is likely to lead to an increase in the third type of rulings, the Rule 36 summary affirmance. See Letter from Chief Judge Haldane Robert Mayer to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Proposed Changes to the Federal Rules of Appellate Procedure (Jan. 6, 2004), available at http://www.secretjustice.org/pdf_files/Comments/03-AP-086.pdf.

98. FED. CIR. R. 36 (“Entry of Judgment—Judgment of Affirmance Without Opinion”). There are no summary reversals. According to Chief Judge Michel of the CAFC, Rule 36 summary affirmances are used most frequently for pro se cases that are brought as a matter of “wishful thinking.” *Proceedings of the Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 300 (1999) (remarks of Chief Judge Michel). Controversy does exist, however, regarding whether this is truly the only circumstance in which Rule 36 affirmances are being used. See Harold C. Wegner, *The Non-Precedential Claim Construction Black Hole* 12–14 (Aug. 14, 2006) (unpublished manuscript), http://www.patenthawk.com/blog_docs/060814_BlackHoleClaimConstruction_Wegner.pdf.

99. For a good explanation of how this exclusion can affect data on claim construction reversal rates, see Moore, *supra* note 42, at 234–36. In Moore’s study, the reversal rate was shown to be 40.8 percent when Rule 36 summary affirmances were excluded (they accounted for 15.5 percent of claim construction terms). *Id.* at 236. When the affirmances were included, the reversal rate dropped to 34.5 percent. *Id.*

100. *Id.* at 237. Because the CAFC has recently been reversing more claim construction issues, there have been fewer Rule 36 summary affirmances. But see Wegner, *supra* note 98, at 8–9, for an explanation of why this pattern is likely to change.

101. When selecting CAFC cases to review, the following search terms were entered using the Federal Circuit—U.S. Court of Appeals Cases database on LexisNexis (File Name = CAFC): patent and claim! /s interp! or constru! and date(geq (1/1/2002) and leq (12/31/2006)). After generating a list of 693 cases, the cases involving appeals regarding claim construction (almost always among other appealed substantive patent issues) were isolated. Next, the outcome and relevant prior history data, including district judge and court, were recorded. This analysis generated a universe of 248 district court judges. In order to get the number of patent cases heard by each judge, the following search terms were entered using the Federal Court Cases—Combined database

of this study is clearly limited by which published and unpublished cases are made electronically available by both the CAFC and the individual district courts.¹⁰²

It also should be noted that reporting on the identified cases was done based on case outcome rather than by affirmance or reversal of individual claim terms. In other words, while some studies calculate reversal rates based on the number of claim terms construed and upheld, this study examined overall case outcomes in order to view what is happening from a different angle. This was done because if the specialization argument holds true, in the bigger picture, the judges handling the most patent cases should have the highest chance of getting upheld on all questions of claim construction.¹⁰³

This study focused on the disposition of claim construction issues by the CAFC, which are identified as follows:

- If the CAFC affirmed the claim construction but reversed on other grounds, the case was coded as “AFFIRMED.”
- If the CAFC found harmless error in the claim construction and decided it would not change the outcome (that is, the district court’s construction was overly broad and it still did not find for the plaintiff), the case was coded as “AFFIRMED.”
- If the CAFC reversed (or vacated) some of the claim construction while upholding other parts of the claim construction, the case was coded as “AFFIRMED IN PART” or “REVERSED IN PART” (or “VACATED IN PART”).

in LexisNexis (File Name = COURTS): OPINIONBY (FIRST w/2 LAST) and patent and claim! /s interp! or constru! and date(geq (1/1/2002) and leq (12/31/2006)). The terms “FIRST” and “LAST” were replaced with each individual judge’s first and last name. The search results were reviewed for only the patent opinions and orders that involved claim construction.

102. According to Harold Wegner, former director of the Intellectual Property Law Program and Professor of Law, George Washington University Law School and Partner, Foley & Lardner LLP, roughly one third of all district court dispositions has an electronically available option. Wegner, *supra* note 98, at 24.

103. This does not take into account individual claims per case but only the total number of patent cases. Therefore, a judge who heard only one patent case but construed ten claims would be compared in the same category as another judge who heard only one patent case and construed five claims. The reason for this categorization is that the pilot program does not seek to distinguish certain types of patent cases and assign them to certain courts based on the appearance of difficulty or average number of claims (for example, if technology X patents are known to require the most claim construction, then only pilot courts 1 and 2 will hear them). Rather, the pilot program seeks to improve patent adjudication overall. This study is not meant to be exhaustive of the myriad ways this data could be expanded on and further analyzed. The current limitations were dictated by time and cost constraints. Additionally, it should be noted that individual judicial practices (such as more frequent publication), combined with individual case specifics (the possibility of settlement) and variations in online availability, will impact the consistency of the data recorded under the category of number of patent cases.

- If all claims were reversed (or vacated), the case was coded as “REVERSED” (or “VACATED”).

After recording the disposition of all relevant CAFC cases, I reviewed the patent case history for each district court judge identified among the relevant CAFC appeals.¹⁰⁴ The results were organized by volume of patent cases per district judge. In order to compare the patterns based on volume and appeals and affirmances, the top fifteen judges were broken into the three groups, depicted in Tables 3A, 3B, and 3C.¹⁰⁵

TABLE 3A

THE TOP 5 JUDGES BY VOLUME OF PATENT CASES AT THE DISTRICT COURT	MEDIAN	MEAN	MIN	MAX
# PATENT CASES	20	20.8	15	28
% CASES APPEALED	20%	28%	10%	46%
% CASES AFFIRMED (AFF.)	67%	64%	27%	100%
% CASES AFF. OR AFF. IN PART	100%	86%	64%	100%
<u>Court Composition:</u> Four are from D. Del. and one is from E.D. Tex.; D. Del is a top fifteen court by volume. However, neither court qualifies because each has fewer than ten judgeships (see Notes to Table 2).				

Although some of the statistics for the top five district court judges point toward specialization at work (see the percent of cases appealed¹⁰⁶ and percent of cases affirmed), the wide range (see MIN and MAX) of the percentage of cases affirmed and the percentage of cases affirmed or affirmed in part is striking. Even among the ranks of the judges who handle the

104. If a district court judge was never appealed during the relevant timeframe or if a district court judge was appealed but the appeal was summarily affirmed or was not made available electronically, such a judge would not be captured by this study.

105. Tables 3A, 3B, and 3C, accounting for the top fifteen judges, cover the period from January 1, 2002, through December 31, 2006. Table 3D, presented later in this Part, tracks the same time period.

106. The numbers for percentage of cases appealed regarding claim construction do not capture soft data such as a judge's reputation. For example, if a judge has never presided over a trial resulting in a defense verdict (or, likewise, the judge has never handed down a defense verdict during a bench trial), this sort of reputation may push defendants to settle more often. This behavior would result in fewer cases appealed under consideration in the overall data. For certain judges, the percentage of cases appealed will not be solely reflective of their actual talent at performing claim construction, but perhaps reflective of other forces not captured by the data.

most cases involving claim construction, an individual judge in the group was still appealed on claim construction about 45 percent of the time with only 27 percent of his appealed cases completely affirmed.

TABLE 3B

THE TOP 6–10 JUDGES BY VOLUME OF PATENT CASES AT THE DISTRICT COURT	MEDIAN	MEAN	MIN	MAX
# PATENT CASES	11	11.6	11	14
% CASES APPEALED	18%	22%	9%	45%
% CASES AFFIRMED (AFF.)	60%	45%	0%	100%
% CASES AFF. OR AFF. IN PART	100%	86%	50%	100%
<u>Court Composition:</u> Two are from N.D. Cal., one is from D. Mass, one is from N.D. Ill., and one is from D. Minn.; all five are from top fifteen courts by volume. However, D. Minn. does not qualify because it has fewer than ten judgeships (see Notes to Table 2).				

The next group of judges has a median volume of just over half that of the top five judges in Table 3A. Even with this sharp drop, the median percentage of cases appealed is slightly lower; and, notably, the range in the volume of cases is much more consistent. The median percentage of cases affirmed went down by about 7 percent, which again may point toward some specialization at higher volumes. However, the range within this category is interesting. Two of the judges in this group were affirmed 0 percent of the time; yet, both of those judges were only appealed twice (approximately 18 percent of the time), and one was affirmed in part both times.

TABLE 3C

THE TOP 11–15 JUDGES BY VOLUME OF PATENT CASES AT THE DISTRICT COURT	MEDIAN	MEAN	MIN	MAX
# PATENT CASES	9	9.4	9	10
% CASES APPEALED	33%	36%	11%	56%
% CASES AFFIRMED (AFF.)	40%	52%	20%	100%
% CASES AFF. OR AFF. IN PART	60%	56%	20%	100%
<u>Court Composition:</u> Four are from N.D. Cal, and one is from D. Minn.; all five are from top fifteen courts by volume. However, D. Minn. does not qualify because it has fewer than ten judgeships (see Notes to Table 2).				

In the group of judges rounding out the top fifteen, the case volume drops only slightly, but the median percentage of cases appealed jumps and the median percentage of cases affirmed drops again as it did between Table 3A and Table 3B. It should also be noted that among the judges in Table 3C, the range of the percentage of cases affirmed or affirmed in part is closer to the range in Table 3A than in Table 3B, with huge variation and no clear pattern (20–100 percent).

Of the 247 judges identified across the appellate cases, 58 of them had a volume of zero patent cases at the district court level. This means that a single appeal (for 53 judges) or appeals (for 5 judges) identified in the study occurred after January 1, 2002, but the original district court case(s) either was disposed of prior to January 1, 2002, or was not available electronically. These judges also provide insight on whether judges with the most volume are more specialized than judges with the least volume (see Table 3D).

TABLE 3D

58 JUDGES WITH 0 PATENT CASES AT THE DISTRICT COURT	MEDIAN	MEAN	MIN	MAX
# CASES APPEALED	1	1	1	3
% CASES AFFIRMED (AFF.)	100%	59%	0%	100%
% CASES AFF. OR AFF. IN PART	100%	77%	0%	100%
<u>Court Composition:</u> Only twenty-six of the fifty-eight judges, or 45 percent, would qualify for the program based on the court on which they sit (see Table 2).				

The judges in this group provide a good example of what seems to be the randomness of getting affirmed. About 60 percent of the judges were affirmed on a single appeal, while the other 40 percent of the judges were not affirmed on a single appeal. It is interesting to note that the mean percentage of cases affirmed in this group is actually higher than in Tables 3B and 3C, and only 5 percent lower than in Table 3A. Without further research, however, it is hard to explain what is causing the 60–40 split in this group as to whether a judge hearing only one patent case will be affirmed (five judges in this group had two or three patent cases).

The data for this group, with an average of 77 percent of cases affirmed or affirmed in part, would seem to strengthen the argument that these judges are doing only slightly worse than the top ten judges by patent case volume. In arguing for specialization, however, it is possible that the 55 percent of these judges who do not sit on a top fifteen court may be getting less complex patent matters. Assuming the most complex patent cases are filed in places like the Northern District of California and the Eastern District of Texas, where litigants may feel like they know what they are getting, it is possible that an occasional patent case filed somewhere else is not as complex and, therefore, is more likely to be affirmed. Even if every judge at the top of the list did not display a steady affirmance pattern, some relationship could possibly still be discerned, in that nearly all of the top judges perform consistently better than those judges without a patent case in the last five years. Consider the top ten judges who were affirmed or affirmed in part at the following rates and the following case volumes in Table 3E.

TABLE 3E

	AFF. OR AFF. IN PART	# PATENT CASES
JUDGE 1	100%	28
JUDGE 2	64%	25
JUDGE 3	100%	20
JUDGE 4	100%	16
JUDGE 5	67%	15
JUDGE 6	100%	14
JUDGE 7	100%	11
JUDGE 8	100%	11
JUDGE 9	50%	11
JUDGE 10	80%	11

Although the mean percentages for cases affirmed or affirmed in part between Tables 3A, 3B, and 3D were not too far apart, it seems likely that litigants would prefer to file with judges who can get nearly a dozen or more cases right all of the time, rather than judges who have a record of getting one case right 60 percent of the time and zero cases right the other 40 percent of the time. Moreover, outside of the claim construction arena, a positive relationship between experience and reversal rates relating strictly to procedural matters may be more likely to exist. As judges hear more patent cases, it seems plausible that they would become better able to reliably handle matters such as jury instructions and verdict forms.¹⁰⁷ Although this does not seem to be an area of huge concern, it is one less issue for the parties to worry about appealing.

It is unknown whether the sponsors of the pilot program have done any studies to extrapolate the projected number of patent cases likely to be handled

107. At a recent ABA-sponsored conference, Judge Linn of the CAFC weighed in on this suggestion:

“There is a big difference, when a case comes to us on appeal from a court that has experience in these matters, and a case that comes to us when a judge has little or no experience. I don’t fault the judge, [but] I think that the system has to be adjusted somehow. I don’t know quite what the answer is, but I think that it’s a very important area.”

Neil E. Graham, *Panel Discusses Role of Supreme Court, Economics, in the Development of Patent Law*, 71 PATENT TRADEMARK & COPYRIGHT J., Nov. 4, 2005, <http://ipcenter.bna.com/pic2/ip.nsf/id/BNAP-6HSKJ7?OpenDocument> (quoting Judge Linn’s remarks at the October 27 seminar sponsored by the American Intellectual Property Law Association in Washington, D.C.).

by potential opt-in judges based on current consolidation patterns.¹⁰⁸ Notwithstanding the limitations of the above data, it would seem that even the volume heard by the top five judges is not enough to achieve and sustain the level of specialization the program seeks. Although the one in three chance of reversal cited by Congress¹⁰⁹ is based on individual claim terms, and this study is based on complete case outcomes, some similarity may exist. The median chance of getting affirmed among the top five judges is about two out of three, which is the same as a one in three chance of reversal or partial reversal.

In order to round out the study, data would also be needed on the district court judges who did not have any appeals during 2002–06. It is quite plausible that some judges only heard one case and it was never appealed. Given the small number of average patent cases heard per judge, it seems less plausible that a particular judge heard dozens of cases and none was appealed. Nearly all of the judges mentioned in this Comment as having a history of patent-heavy caseloads appeared in the study and were at least partially reversed at some point. Perhaps the reporting aspects of the pilot program will allow for more thorough and nuanced tracking of the statistics analyzed by this study, as well as other helpful data.

CONCLUSION

As H.R. 34 is currently written, significant concerns remain about whether it will successfully reduce claim construction reversal rates and litigation costs. Although the Senate version of the bill may ultimately speak to some of the remaining issues, they should be considered prior to the enactment of the program.

First, the pilot program does not appear to alleviate two concerns addressed by the House sponsors. The random assignment of cases is not

108. A study conducted by LegalMetric attempted to test whether experience helped affirmance rates. The study showed that judges with at least one hundred patent cases have an affirmance rate on appeal that is identical to the affirmance rate for all judges in patent cases, which is 60 percent (sample size: > 1400 appeals). Press Release, LegalMetric LLC, LegalMetric Finds Judges' Experience Does Not Help in Patent Cases (Aug. 22, 2006), available at <http://www.e-worldwire.com/pressreleases/15326>. Experience did not point to predictability. However, it should be noted that this study appears to have looked at overall patent case outcomes, not claim construction issues specifically. The exact definition of "patent case" was not provided. The study did show slightly higher affirmance rates for judges with a B.S. or M.S. degree, and even higher rates for judges graduating from an Ivy League school. See *id.*

109. See Moore, *supra* note 42, at 233 (explaining the study on which Congress based its figures); see also text accompanying note 42.

likely to be preserved at the level envisioned because many judges are likely to use this program as an opportunity to remove patent cases from their dockets. Senior judges who currently do not want to hear such cases already frequently pass them along to junior judges. A similar pattern likely will emerge here, with nonprogram judges passing cases along to those participating in the program. The program also does nothing to deter forum shopping. If plaintiffs' favorite courts are not eligible for the program, they likely will still go wherever the fastest trials with the most predictable results are available. Moreover, when the list of program judges is established, litigants will probably calculate their chances of getting a particular judge and file accordingly, based on the favorability of the odds. As the program goes forward, factors such as time to trial or other disposition and judicial reputations likely will also affect filing patterns and forum shopping.

Second, the bill leaves many questions unanswered with respect to how the program will be rolled out. Intracircuit, or within certain states, there probably will be disagreement about which court(s) should be selected, because the bill does not provide any guidance to the AOC. After districts are selected, no criteria are provided on how judges should be recruited and selected. With no clear operational guidance, it is likely that the first five courts to participate will roll the program out in five different ways. Each court or judge may decide on widely divergent ideas of how to spend their hundreds of thousands of dollars for training and law clerks.

Moreover, the bill seems to ignore an opportunity to require (or at least recommend) proactive measures to address common problems with patent cases. No provision exists for the adoption of local rules to address problematic procedural issues such as time to trial and if, when, and how *Markman* hearings will be conducted. Although the program seeks judicial specialization, the bill does not seem to have learned from the history of other specialized courts that have proven to be successful, or courts that have developed procedural efficiencies.

Neither the study I completed nor any other available study identifies a clear link between judicial experience with patent cases and affirmance rates. The track record of certain judges, however, does create some optimism that, in the long run, benefits of this sort of specialization may be attained. With only a ten-year life, it is unlikely that the program will reach the desired level of specialization and predictability in outcomes. Nevertheless, the results at the end of the pilot period could provide insight into what the next steps should be. The general stance of the

current Supreme Court—that patent law should not be taken out of the mainstream—also may affect whether the pilot program, if enacted, would have the lasting power to be extended permanently.¹¹⁰

If the pilot program is not signed into law, what other options exist? Some would argue that the elusive reversal rate is actually due to the CAFC running “amok” and that more deference should be paid to the lower courts.¹¹¹ After all, the Supreme Court has been paying more attention to the CAFC of late, and in recent years the CAFC has been reversed in patent cases at an alarming rate.¹¹² Another argument is that nothing should be done because the system is not really broken; perhaps “[g]eneralist people can do this, and can understand it.”¹¹³ The CAFC may be the

110. See *MedImmune, Inc. v. Genentech, Inc.*, No. 05-608, slip op. at 7–9 (U.S. Jan. 9, 2007) (rejecting the CAFC’s interpretation of jurisdictional requirements under the Declaratory Judgment Act and holding that jurisdiction can be found where the controversy is “definite and concrete” in patent cases as in all other cases); *eBay Inc. v. MercExchange, L.L.C.*, No. 05-130, slip op. at 2–4 (U.S. May 15, 2006) (declining to replace traditional equitable principles with a rule that allows for automatic injunctions in patent cases). These decisions may indicate that the Court would like to stay away from special treatment for patent cases while Congress seems to be pushing for it.

111. *Patent Hearing*, *supra* note 1, at 27 (statement of Chris J. Katopis, Counsel, Drinker, Biddle & Reath, LLP). Katopis posited that maybe the cases are “too close to call” and that appeals are necessary to justify the inventive rights awarded. *Id.*; see also *id.* at 211 (letter from the Honorable T.S. Ellis III to the Honorable Lamar Smith in the appendix of material submitted for the hearing record) (offering a suggestion for narrowing the CAFC’s scope of review from *de novo* to a more deferential standard).

112. See Coyle, *supra* note 9, at 20. From 1990 to 2001, certiorari was granted eight times, eight cases were heard, and the CAFC was upheld half of the time. *Id.* In contrast, from 2002 to present, certiorari was granted nine times, seven cases were heard, and the CAFC was not upheld on a single case. *Id.* Disquiet with the CAFC and patent reform on the radar screen are likely to cause the Supreme Court to keep an eye on the CAFC. See *id.* (reporting the views of patent scholar Timothy R. Holbrook).

113. *Patent Hearing*, *supra* note 1, at 57 (testimony of the Honorable T.S. Ellis III, United States District Judge, Eastern District of Virginia). Judge Ellis stated that *Markman* reversal rates were down in the twenties by 1998, and it is only recently that they have crept up again. *Id.* at 50. Judge Ellis thinks that the CAFC is still getting organized about the rules of claim construction and how to resolve disputes over using dictionaries (note that this comment was made before the decision in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), in which the CAFC moved away from extrinsic evidence offered by dictionaries to a more specification-focused inquiry in claim construction). *Patent Hearing*, *supra* note 1, at 51. Judge Ellis posited that the reason for the high reversal rate is the expansive claim language and the changing definitions. *Id.* at 57. The U.S. Patent and Trademark Office (PTO) should require clearer language and lexicography from applicants. It is important to remember the reversal rate for all areas of law is around 35 percent. Judge Ward from the Eastern District of Texas, who is also skeptical of the pilot program, recently stated, “I really think there are a lot of skills trial judges have that are very helpful in the overall disposition of a case that really doesn’t involve any patent expertise, such as how to manage a docket.” Graham, *supra* note 107 (quoting Judge Ward).

one that needs to change their ways by providing clear canons of claim construction to assist district court judges.¹¹⁴

If the pilot program is adopted in some iteration, it likely will become one factor among many that litigants consider when filing. Certain judges seem poised to take an ownership interest in the program; however, it is hard to predict whether the judges who opt in will be pro-patent or on a mission to fix the PTO's mistakes. As currently drafted, the pilot program does not seem robust enough to provide an actual remedy to the commonly cited issues surrounding patent adjudication. Perhaps combined with other, more powerful patent reform, it could reduce litigation costs and improve the predictability of case outcomes.

114. See Moore, *supra* note 42, at 247 (arguing that the fault for high reversal rates lies with the CAFC because they are not providing sufficient guidance and clear canons of claim construction). *But see* Moore, *supra* note 12, at 29 (citing KIMBERLY PACE MOORE ET AL., PATENT LITIGATION & STRATEGY 206–13 (W. Group, Am. Casebook Series 1999) (identifying and discussing nine canons of claim construction)). In her earlier article, Moore stated that since *Markman*, the CAFC has in fact created many “canons of claim construction,” which should serve as tools for claim interpretation for the district judge. *Id.*