

# Patent Litigation Committee

## A Resolution on District Court Specialization

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# Subcommittee Members

✦ George Medlock    Co-chair

✦ Tony Zeuli        Co-chair

✦ James Newman

✦ Mark Schuman



# Background

- ✦ 10-1-05: A proposed bill from Representative Issa (R. Cal.) was sent to the Patent Litigation Committee with a request for a resolution by the 2006 Mid-Winter Meeting
- ✦ 10-31-05: A subcommittee was formed
- ✦ 12-12-05: A Straw vote was taken
- ✦ 1-20-06: The resolution was



# Strategy

Phase I: Consider Representative Issa's proposed bill

Phase II: Consider other issues related to district court efficiency such as interlocutory appeals from Markman rulings or legislating the standard of review for Markman determinations



# Phase I



# Proposed Bill

(a) Establishment. -- There is established a program, in each of the United States district courts designated under subsection (b), under which --

(1) those district judges of that district court who request to hear cases under which one or more issues arising under any Act of Congress relating to patents or plant variety protection must be decided, are designated [by the chief judge of the court] to hear those cases; and

(2) **no district judge of that district court, other than those designated under paragraph (1) will hear any case** described in paragraph (1).

(b) Designation. -- The Director of the Administrative Office of the United States Courts shall[, not later than 30 days after the date of the enactment of this Act,] designate not more than **2 United States district courts** in which the program established under subsection (a) will be carried out.

(c) Duration. -- The program established under subsection (a) shall terminate **1 year** after the end of the 30-day period described in subsection (b).

(d) Applicability. -- The program established under subsection (a) shall apply only to cases commenced on or after the date of the enactment of this Act.



# Proposed Bill Continued

(e) Report To Congress. -- Not later than 10 months after the date of the enactment of this Act, the [Director of the Administrative Office of the United States Courts, in consultation with the chief judge of each of the district courts designated under subsection (b),] shall submit to the Committee of the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the pilot program established under subsection (a). The report shall include an analysis of --

- (1) [the extent to which the program has succeeded in developing expertise in patent cases among the district judges of the district courts so designated;]
- (2) [the extent to which the program has improved the efficiency of the courts involved by reason of such expertise; and]
- (3) [whether the pilot program should be extended to other district courts, or should be made permanent and apply to all district courts.]



# Straw Vote on Proposed Bill

- ✂ 87 out of 304 voted
- ✂ 59% or 50 voted in favor
- ✂ 38% or 32 voted against
- ✂ 3% or 3 abstained



# Comments

"The proposal does not go nearly far enough to force the district courts to develop any real expertise in handling patent cases."

"[The pilot program] should be extended initially to at least 5 courts, for 5 regions of country. [V]ery good and needed idea."

"I am inclined to disapprove any bill which would restrict a plaintiff's choice of forum differently than plaintiffs of a different class."

"I think that the bill is a good idea. I question whether the 12-month trial period is actually long enough to be able to evaluate it. It seems to me that that trial period should last for at least 24 months in order to determine whether this program is worthwhile."

"As a general rule, expertise is helpful and I would like to see such a change. As the bill currently stands, however, there does not appear to be any quantifiable measure of success. Furthermore, patent cases typically take 2-5 years, thus a one-year program is unlikely to be helpful in determining whether the new program would be useful. A three - five year test plan in a single district that receives a larger than average number of patent cases would be interesting - assuming that there are Judges that are interested in becoming patent experts."

"I believe every member of the federal trial bench should be expected and encouraged to handle all matters within the scope of their jurisdiction. To start a process that could lead to carving up the federal bench into a series of specialized courts on this or any issue sets a risky course. I expect that people would perceive the "patent" judges as smarter and, correspondingly, the non-patent judges as somehow less able. Further, it is my view that the inability of a federal judge to "get it" in a patent case is the fault of the attorney(s), not the judge. [name omitted]"

"Two comments: bill curtails power and shopping. The Chief Judge in each district now gets to decide which Judges handle which cases. 28 U.S.C. §§ 136(b), 137 (note too, §292(b)). Taking any of this statutory power away often is resisted. Also, cases are assigned by vicinage in many districts, and the "pilot" Judge might be in the distant vicinage but the case was filed at the



# Comments

"I think it is useful to have various judges of each court involved in patent issues. Specialization within existing district courts also seems likely to encourage forum shopping more so than now."

"While I vote approve, it is only for a one year pilot program. I think it important that guidelines be provided to the Chief Judges in the various District Courts for the judge in the district to be selected for the program. No one factor should be mandatory but the selection should be based on an overall weighing of them. The factors should include: existing substantial experience in patent trials as a judge or before becoming a judge; training or knowledge in science or engineering which need not be a formal degree; or demonstrated enthusiasm for patent cases."

"The pilot program should be for a longer period (maybe 2 years) so that it would be reasonable to expect some cases filed under the program to progress through trial."

"I think the pilot should last longer, say 1.5-2 years; and the designated districts should have the option of continuing the pilot until a decision is made whether the program will be made permanent or abolished."

"I am fundamentally against specialized patent trial judges. I am therefore convinced this pilot program would be a waste of time, even though it does not specify specialized patent trial judges directly."

"I generally favor the pilot program. However, one year is an insufficient length of time to evaluate the effectiveness of the proposed program. The statute provides that the program only applies to cases filed on or after the date the program starts. After one year, it is probable that not a single case in the program will have proceeded to trial. Two years would be more effective in offering an opportunity for evaluation, as it might allow some patent cases to be litigated from start-to-finish. I also wonder whether there should be a minimum number of judges designated in each district, to hear patent cases, based on caseload. The proposed statute appears to be based on volunteers, but one of only one judge volunteers (or none). However, I do not have a ready suggestion as to how to implement this idea, other than to relate the number of judges hearing patent cases to the size of the patent docket in the designated districts. Overall, I think this could be an interesting approach, but I would oppose an effort to create a specialized patent trial court in a limited number of jurisdictions. As long as patent cases may be filed in any jurisdiction, having one or more judges in each district "specialize" in hearing patent cases would be an idea worth trying and



# Comments

"Simply because disinterested judges exist amongst the interested judges does not mean that the whole system needs to be changed. Patent litigation is an area of law just as complex as many others. Yet calls for specialized antitrust or complicated product liability judges are not being raised to the level of changing the judicial system for those cases. I am in favor of leaving patent cases in the general Federal judicial system."

"The proposed 1 year duration of the pilot program is too short. Most patent cases have a life longer than a year and so the new specialized judge will not even see the end of the first cases run under this proposal, let alone, see a number of cases to conclusion. I would support a longer program."

"This is hardly profound, but it seems to me that specialization by Judges in patent cases could be very helpful in terms of facilitating the administration of justice in those cases and ensuring a fair outcome. The unfamiliarity of many judges with this specialized area of law can be an impediment to both plaintiffs and defendants in patent cases."

"It is essential that the pilot program be organized to include all Districts. As with rules proposals (i.e., mandatory disclosure), without experience from all Districts, data will be clouded. I would be happy to work on this project. [name omitted]"

"I don't have a problem with the bill per se, but a 1-year time frame for evaluation is not long enough for cases to move along to the point where any determination could be made as to whether the program is successful. I think you would need 2-3 years to make such an evaluation."

"Many of the best district court judges may rather not take patent cases; this would allow them to avoid taking the cases."



# Proposed Resolution

- ✦ Approve the bill in principle
- ✦ Expand the pilot program from 1 year to 3-5 years



# Why a Longer Pilot?

- ✦ 21 months for average civil case ([www.uscourts.gov/caseload2005/contents.html](http://www.uscourts.gov/caseload2005/contents.html))
- ✦ 12 months for appeal (call with CAFC clerk's office)
- ✦ Allow a judge to see at least one case start to finish (and likely more)
- ✦ Provides more data for analysis



# Final Resolution Vote

- ✦ 158 out of 304 voted (Quorum)
- ✦ 59% or 93 voted in favor
- ✦ 37% or 58 voted against
- ✦ 3% or 4 abstained



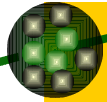
# Current Version of Representative Issa's Bill

- ✦ In deciding which courts will be in the pilot program, the courts that handle the largest volume of patent cases should be considered
- ✦ 5 year duration
- ✦ Reports from 21 months to 5 years, 11 months
- ✦ \$2M for technical law clerks



# Future Work (Phase II)

- ✦ Interlocutory appeals from Markman rulings
- ✦ Higher standard of review for Markman determinations



The End