My topic, "Judicial Patent Specialization: A View from the Trial Bench," is perhaps less urgent and less politically charged than yesterday's luncheon comments by Professor John Podesta. But to neglect the problem I would like to discuss with you today will continue what I perceive to be the excessive cost of patent enforcement that we have today in the United States. I do need to add the disclaimer that my remarks today are my opinions alone. I do not speak for any institution or anyone else as I appear before you today.

At the outset, I would like to acknowledge the assistance and attendance of my two law clerks, Joannie T. Wei1 and Matthew A. Bills.2 Both are University of Illinois College of Law graduates and terrific young lawyers. I would also like to mention Illinois' Deputy Governor, Matthew Bettenhausen,3 who will be addressing you later this afternoon and who is a former law clerk of mine. Deputy Governor Bettenhausen is also a University of Illinois College of Law graduate and an outstanding lawyer who has done such a wonderful job in his position that, just last week, United States Supreme Court Justice John Paul Stevens complimented Deputy Governor Bettenhausen by name in the remarks Justice Stevens made at an event here in Chicago.4 We, in Illinois, are blessed to have such a brilliant lawyer and a dedicated public servant working for us as Deputy Governor Bettenhausen, and we are fortunate to be hearing from him later this afternoon.

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4. Justice John Paul Stevens, Address at the Chicago Bar Association John Paul Stevens Award Ceremony (Sept. 25, 2002).
I will now get back to my topic, "Judicial Patent Specialization." I stand before you today humbled. You may find it rare for a District Judge, who has been appointed by the President of the United States, confirmed by the U.S. Senate, and granted life tenure, to be humble and self-effacing, but in the context of my subject, "Judicial Patent Specialization: A View from the Trial Bench," I feel humble and, perhaps, slightly embarrassed at what I perceive to be institutional ineptitude.

Within the context of my topic, I will discuss three areas: the first is an apology; the second is a confession; and the third is an endorsement of a proposal. None of these are totally mine alone. I am, however, the messenger who today presents them for your consideration with a view toward improving the way our judicial system deals with patent litigation at the trial level.

As we all know, the primary value of a patent is not the right to practice the invention but, rather, the right to exclude others from practicing the invention. From that right, the right to exclude others, economic benefits flow to the patent holder. It was recognized in the 1992 Report of the Advisory Commission on Patent Law Reform to the U.S. Secretary of Commerce that the inherent value of a patent, the right of exclusivity, can only be realized "if patent owners have effective and inexpensive access to an efficient judicial system" to enforce their patents. That leads to my apology because I am not sure U.S. patent owners "have effective and inexpensive access to an efficient judicial system" in our country. Now, I realize this statement is somewhat of an indictment against an institution of which I am a part, but I believe we have a problem that needs to be addressed.

Although I speak only my opinion and not that of any court or group of judges, my apology is to all you patent owners and patent practitioners in the United States for us, U.S. District Judges, not doing a better job at resolving the patent litigation before us. In a recent article in the *Harvard Journal of Law and Technology* entitled, "Are District Court Judges Equipped to Resolve Patent Cases?", authored by Associate Professor Kimberly Moore of George Mason University School of Law, the author reported "that district court judges improperly construe patent claim terms in 33% of the cases appealed to the Federal Circuit." The article concluded: "The 33% reversal rate of district court claim construction suggests that judges are not, at present, capable of resolving these issues with sufficient accuracy. This infuses the patent

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5. 35 U.S.C. § 154 (2002) (stating that every patent grants to the patentee the right to exclude others from making, using, or selling the invention throughout the United States for a period of 20 years, subject to the payment of the necessary fees).


system with a high degree of uncertainty until the Federal Circuit rules on claim construction."  

Somewhat in defense of my colleagues and myself, the *de novo* review standard in claim construction is the least deferential standard on appeal.  

9. Just for comparison purposes, the national reversal rate of the U.S. District Courts by the regional Courts of Appeals is in all other types of cases, both criminal and civil, less than 10%.  

10. This means that on average, in cases appealed to the regional Courts of Appeals, we get it right better than 90% of the time. Although Professor Moore's article urges the Federal Circuit to provide more guidance by taking expedited claim construction appeals, it concedes in conclusion that "ideally, the solution lies in increasing the accuracy at the trial level." I agree that this is what we must do.  

When we trial judges are not accurate, the cost of enforcing patent rights goes up. Patent litigation in the United States is already expensive compared to other countries, as well as time consuming. I could not help but notice the commentary by attorney Hillary Pearson of the Bird & Bird law firm's London office, in his written presentation entitled "Enforcing Patents in Europe" at this summer's program in British Columbia at the University of Victoria that stated:  

There may be good reasons for a North American corporation to consider bringing patent proceedings in Europe even against another North American corporation. For example, in Europe the litigation will almost always be cheaper than in the U.S.; at least in England, the Netherlands and Germany it is usually faster; there are no juries, no best mode requirement and, in contrast with the U.S. inequitable conduct doctrine, only outright fraud is a bar to enforcement.  

Looking at these other countries – England, the Netherlands, and Germany – and putting to one side the legal doctrine and the jury trial right which we enjoy here in the United States, there is a stark difference between the structure of European judicial systems in patent cases and that of North American countries – Canada, Mexico, and the United States.
States. In North America, we do not have judicial specialization in patent cases at the trial level. Most European countries, and for that matter, Asian countries such as Japan\(^{18}\) and China,\(^{19}\) have specialized patent trial courts. North America appears to be the anomaly. Although we do some things right in our patent system, having non-specialized patent trial courts is not one of them, which brings me to my confession.

As a U.S. District Judge, I am a generalist. I confess that my duties as a U.S. District Judge require that I be a generalist. As one of 665 active U.S. District Judges,\(^{20}\) I must address each of the various civil and criminal cases randomly assigned to me in our district court. Only senior judges, who are 65 years of age or older and who have voluntarily given up their positions as active judges to take senior status, can turn away cases which are otherwise randomly assigned to them. I cannot do so except in the rare instance of recusal. I must also tell you that the average pending case load of an active U.S. District Judge across this country is 447 cases.\(^{21}\) Here in Chicago, I receive approximately thirty new cases each month. I cannot try thirty cases in a month, but that is the number I must resolve in order to stay even with my caseload. Otherwise my caseload would increase beyond what it is today.

Although I personally enjoy intellectual property cases because I admire the creative genius and enjoy the challenge of understanding the technology, most of my colleagues on the district bench do not share my enthusiasm when they are assigned patent infringement cases. Most share the sentiments expressed by Justice Francis C. Muldoon of the Canadian Federal Court’s Trial Division in 1993 after he had presided over a thirty-five day patent bench trial. The trial, which was the culmination of eight years of patent litigation by the Canadian patent owners and Lever Brothers against U.S. consumer products giant Procter & Gamble Inc., was about the alleged infringement on a Canadian patent "disclosing a method and distributing agent for softening clothes in mechanical dryers" by Procter & Gamble’s “Bounce” fabric softener. I quote Justice Muldoon:

When one considers the apparent silliness of trial by a judge who is utterly unschooled in the scientific substance of a patent, hearing conflicting testimony of so-called experts who speak the antithesis


\(^{21}\) Id.
of scientific verity, and lawyers who have been engaged in the particular case for years before the trial, one knows that this field cries out for reform.\(^{22}\)

Typically, U.S. District Judges have little or no background experience in patent litigation upon which to draw as they come to the bench. I know that when my credentials were being reviewed for my position as a U.S. District Judge, the President did not ask if I had patent infringement experience. In addition to their other caseload commitments and the pressed statutory time limits of the U.S. Criminal Speedy Trial Act\(^{23}\) and the U.S. Civil Justice Reform Act,\(^{24}\) U.S. District Judges also typically feel burdened because of the time it takes to fully understand and carefully evaluate the subtle nuances of the technology and the law of patent litigation.

Nationwide, there are about 2,500 patent infringement cases filed in the U.S. District Courts each year. In fact, in the year 2000, there were exactly 2,484 filed,\(^{25}\) and in 2001, there were 2,520 filed.\(^{26}\) However, there are over 300,000 other types of cases, both civil and criminal, filed each year. In fact, the nationwide number of total district court filings in 2000 was 322,262\(^{27}\) and in 2001 was 313,615.\(^{28}\) Patent cases are less than 1% of the nationwide caseload of our district judges.

Aside from the time it takes a U.S. District Judge to learn the technology of a particular patent case, patent cases are such a small part of the court calendar addressed by each U.S. District Judge that only when a patent case comes our way do we brush up on the latest developments in the law. We do not receive the slip opinions of the Federal Circuit in chambers as we do the slip opinions of the Seventh Circuit, our regional federal appellate court here in Chicago.

Although the U.S. District Court in Chicago is historically one of the top five busiest district courts in the United States in terms of patent litigation filings,\(^{29}\) patent cases on my individual calendar have never exceeded 5% of my load. With more than 95% of judicial focus on the other areas of law, one should certainly be able to understand why U.S. District Judges are not always as in tune with recent patent law changes as we might like.

Because they are not distracted by other matters, it is, of course, easier for specialized patent judges of other countries such as those in


\(^{26}\) Id.

\(^{27}\) Id. at 175, available at http://www.uscourts.gov/judbus2001/appendices/d00sep01.pdf.

\(^{28}\) Id.

Europe or Asia to stay attuned to the patent law and technology advances at issue before them. On September 22, 2002, the European Commission outlined the framework of its proposed Central Patent Court that is dedicated to dealing with disputes over community patents of the European Union countries.\textsuperscript{30} I found the proposed court structure interesting. Under the proposals, the Central Patent Court would be located in Luxembourg with the other European courts. The Central Patent Court would have seven judges, four legal and three technical, with two legal judges and one technical judge hearing each case. Unlike the United States, however, there are no juries in patent cases. Each of the technical judges would be required to stay current on developments in a designated area of science, rather than be expected to have full knowledge of every area. According to the European Commission, the Central Patent Court would be expected to handle about 120-150 cases each year. This Commission proposal is currently being circulated among the European Union countries for discussion and consideration.

What have we done here in the United States? Other than creating the Court of Appeals for the Federal Circuit twenty years ago, our country has not adjusted our judicial patent enforcement system in order to meet the rising demands of science and technology. While the Court of Appeals for the Federal Circuit has fostered greater uniformity than when the regional United States Courts of Appeals weighed in on patent cases, I must say, sadly, that the performance at the trial level has not improved. Reform at the trial level is needed, especially as we face the difficult issues which patent litigation is going to bring to us in the very foreseeable future.

Over the past few years, commentators and scholars have offered various suggestions, such as: (1) appointing expert judges or expert magistrate judges;\textsuperscript{31} (2) designating a single judge in each district court to hear all patent cases;\textsuperscript{32} (3) using more special masters to construe patent claims;\textsuperscript{33} and (4) using educated juries and requiring technical qualifications of jurors in patent trials.\textsuperscript{34} Each of these suggestions is a good idea, but in my opinion, in order to deal with patent cases, we need a specialized trial court unencumbered by the burdens and distractions

\textsuperscript{32}. 1992 COMM'N REPORT, supra note 6, at 75.
\textsuperscript{33}. Kenneth R. Adamo, Get on Your Marks, Get Set, Go; Or "And Just How Are We Going To Effect Markman Construction In This Matter, Counsel?," PATENT LITIGATION 2000, at 175, 205 (PLI Pat., Copyrights, Trademarks and Literary Property Prac. Course, Handbook Series No. 619, 2000).
\textsuperscript{34}. See, e.g., Davin M. Stockwell, A Jury of One's (Technically Competent) Peers?, 21 WHITN L. REV. 645 (2000) (arguing in favor of technical qualifications for jurors in patent cases); Franklin Strier, The Educated Jury: A Proposal for Complex Litigation, 47 DEPAUL L. REV. 49 (1997) (proposing use of educated jurors in patent litigation because lay jurors are ill-equipped to deal with the complexity of the issues being tried).
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faced by generalist judges. I realize it would be politically difficult, given all the other more pressing problems facing Congress, to have Congress create a new Article III patent trial court. Congress would have to resolve questions including: (1) where would this new court sit, and (2) which Senators would have the political prerogative of recommending persons to fill its judicial vacancies? It would be difficult indeed to resolve the issues that would arise.

This now brings me to my proposal endorsement. I say endorsement because I cannot take credit for thinking of the proposal. The credit for that goes to intellectual property ("IP") attorney John Pegram, a principal in the law firm of Fish & Richardson in New York. Mr. Pegram's proposal, which I endorse for consideration and further discussion, is to modify the responsibilities of the U.S. Court of International Trade ("CIT"). Mr. Pegram's proposal, which first appeared in his 1995 law review article, is to have that existing Article III court take on the special responsibility of patent infringement litigation at the trial level concurrent with the present district court system. Politically, it appears feasible because all Congress would be asked to do is to give additional duties and responsibilities to an existing court – something Congress already seems to do to the U.S. District Courts every legislative session.

I was unfamiliar with the CIT, which is headquartered in Manhattan at Foley Square, until I read Mr. Pegram's articles and spoke with him by phone. Since then, I have examined the information contained on the CIT's Web site and have spoken with the CIT's Chief Judge, The Honorable Gregory W. Carman. Though stating he was not speaking for his court, Chief Judge Carman said that he was familiar with Mr. Pegram's proposal. He related that he, along with the other active and senior judges of the CIT, have background experience beyond the resolution of international trade disputes and could certainly develop the necessary expertise in patent law if called upon to do so. Chief Judge Carman also told me that he and the other judges have presided over other litigation, which included jury trials, by designation in various district courts, including those in Chicago. Whether the division of labor in patent cases between the CIT and the U.S. District Courts would be by the litigants' choice or by some other system remains to be worked out.

40. Telephone Interview with Chief Judge Carman, U.S. Court of International Trade (Sept. 30, 2002).
But the CIT taking on patent cases concurrent with the district courts would give us all an opportunity to evaluate a specialty court's handling of patent cases.

The CIT already is a court governed by the law of the Federal Circuit rather than by any regional Court of Appeals and, as I have said, its judges are Article III judges granted all the powers of district court judges. The CIT does not have a criminal or tort docket. Although the CIT courthouse, chambers, and clerk's office are in New York, CIT judges can and do sit all over the country. Because of its existing international trade docket, the CIT would not be solely a patent court, but its judges would have the potential to develop expertise in patent law through greater exposure to patent cases than the average district judge has. As current CIT judges retire or take senior status, thus creating a judicial vacancy on that bench, new judges with patent law expertise—a criterion not typically considered for the appointment of a new U.S. District Court judge—could be used.

The CIT already has jurisdiction to permit a demand for a jury trial and has jury facilities in courtrooms at its courthouse. The fact that the CIT has the power to adopt its own procedural rules may simplify experimentation with different procedures for the most efficient and accurate way to resolve patent cases. The CIT has nationwide personal jurisdiction with respect to its existing subject matter jurisdiction. As to venue, the United States Code already provides that the CIT may conduct a trial or hearing at any place within the United States.

I learned from the CIT Web site that it is joining a handful of other "pilot" federal courts, such as our district court here in Chicago, in taking the lead in implementing electronic filing known as the "Case Management/Electronic Case Files Project." This will provide access to view and receive CIT court documents as well as instantaneously file documents with the CIT, electronically, twenty-four hours a day and seven days a week from anywhere in the world via the Internet. Quick, inexpensive access to the judges of the CIT, which could be renamed the "Court of Patents and International Trade," could be provided by teleconferencing and video conferencing, which is something we courts

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46. 28 U.S.C. §§ 256(a), 1581-1584 (granting nationwide personal jurisdiction and defining the CIT's subject matter jurisdiction).
47. 28 U.S.C. § 256(a) (2002) (allowing the CIT to conduct a trial or hearing anywhere in the United States).
should be doing anyway to enhance counsels’ access to the court no matter where counsels’ offices are located.

In conclusion, if our country — indeed, if our continent — is to provide the value which our patent holders deserve from our judicial systems, we must provide a judicial system which is as accurate, inexpensive and efficient as possible in patent cases. Here in the United States, we took the first major step, at the appellate level, with the creation of the United States Court of Appeals for the Federal Circuit, but the United States judicial system needs to improve at the trial level and, in my opinion, needs to do so now. I endorse the proposal of judicial patent specialization at the trial level made by IP attorney John Pegram. I believe that increasing the responsibility of the U.S. Court of International Trade, making it the Court of Patents and International Trade, is the best method to achieve the goal of providing United States patent holders with “effective and inexpensive access to an efficient judicial system.”50 The advantages, in my opinion, are many. The discussion remains open. I implore you, IP practitioners and IP scholars, to consider the question so that improvements in our current system are sought and made for the benefit of us all.

50. See 1992 COMM’N REP., supra note 6 and accompanying text.