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*Jonas Anderson**

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INTRODUCTION

Judge Rodney Gilstrap has a lot of patent cases on his docket. In fact, in 2015 there were 1,686 patent cases that were filed and assigned to Judge Gilstrap, an astronomical number for a single judge.¹ Judge Gilstrap—one of eight federal judges who sit on the Eastern District of Texas—is so popular with patent plaintiffs that over one-fourth of all patent cases in the country are filed with him.² Many of these cases never get near trial, instead they settle out of court quickly after the complaint is filed. But many are time-consuming affairs that not only require

* Associate Professor of Law, American University Washington College of Law. This Article is based on a speech given at the Loyola University Chicago School of Law at the *Loyola University Chicago Law Journal*'s symposium on judicial decision making. I would like to thank the staff of the *Loyola University Chicago Law Journal* for all of their efforts in shaping this article. I would also like to thank Matthew Sag, Greg Reilly, and Dan Klerman for helpful comments. As always, thanks to my wife Jenn for her support.

1. Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, MOTHERBOARD (May 5, 2016, 9:00 AM), <http://motherboard.vice.com/read/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases>. See Brian Howard, *Lex Machina 2015 End-of-Year Trends*, LEX MACHINA: LEXISNEXIS COMPANY (Jan. 7, 2016), <https://lexmachina.com/lex-machina-2015-end-of-year-trends/> (explaining that 2,540 patent cases (over 43 percent of the nation's patent cases) were filed in Judge Gilstrap's home district, the Eastern District of Texas).

2. Along with Judge Gilstrap, Judges Marcia Crone, Amos Mazzant, Robert Schroeder, Richard Shell, Thad Heartfield, Michael Schneider, and Ron Clark (Chief Judge) are the other judges currently sitting on the Eastern District of Texas. *District Judges*, U.S. DIST. COURT E. DIST. OF TEX., <http://www.txed.uscourts.gov/page1.shtml?location=info> (last visited Nov. 18, 2016).

hundreds of hours of the litigants' time, but demand the attention of Judge Gilstrap as well.³ Many of the patent cases that end up on Judge Gilstrap's docket involve multi-billion dollar corporations such as Apple, Microsoft, and Google.⁴ And while many of the cases involving these large corporations eventually settle, a significant number do not and must be tried. Judge Gilstrap presides over these cases at whichever stage they are in litigation: from recently filed cases which have little more than a complaint filed, to trials in front of the notoriously generous juries of the Eastern District of Texas.⁵

How could one judge possibly handle the enormous amount of patent cases that Judge Gilstrap handles? First of all, he has help. Unlike most federal district court judges who only have the funding to hire two law clerks every year, Judge Gilstrap hires an additional third law clerk.⁶ Judge Gilstrap's clerks are usually recent law graduates who demonstrated excellence in law school, just like the majority of federal judicial clerks.⁷ Unlike the majority of federal law clerks, however, Judge Gilstrap's clerks often possess a technical background in addition to their law degree. These clerks possess aptitude in a certain technical field or with the theoretical background to more efficiently handle patent cases.⁸ These clerks undoubtedly make Judge Gilstrap's job easier,

3. See generally J. Jonas Anderson, *Nontechnical Disclosure*, 69 VAND. L. REV. 1573, 1579 (2016) (noting that disclosure—one patent doctrine among many—is fact intensive and “fraught with difficulty”).

4. Consider the \$533 million decision against Apple over a patent owned by Smartflash, LLP. Susan Decker, *Apple Wins New Trial Over \$533 Million Patent Damage Award*, BLOOMBERG: TECH. (July 8, 2015, 10:36 AM), <http://www.bloomberg.com/news/articles/2015-07-08/apple-wins-new-trial-over-533-million-patent-damage-award>.

5. As others and I have noted elsewhere, the Eastern District of Texas' juries have been catnip for plaintiff's attorneys. For example, in the 1980s, it is estimated that one in three civil cases was an asbestos case—the Eastern District was targeted long before patent lawyers came to it. Deborah R. Hensler, *As Time Goes by: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1900 (2001–2002).

6. See *The Honorable Rodney Gilstrap*, U.S. DIST. COURT E. DIST. OF TEX., <http://www.txed.uscourts.gov/page1.shtml?location=info;judge&judge=17> (last visited Nov. 28, 2016) (discussing the position, title, and name of Judge Gilstrap's chamber staff); see also Ryan Davis, *Eastern Texas Judge Has Nation's Busiest Patent Docket*, LAW360 (May 13, 2014, 7:42 PM), <http://www.law360.com/articles/536886/eastern-texas-judge-has-nation-s-busiest-patent-docket> (noting that Judge Gilstrap has three law clerks, not the usual two, “which has helped to manage his docket”).

7. For example, note the profile of Leslie Honey Tronche, Judge Gilstrap's first law clerk. *Leslie Honey Tronche*, BECK REDDEN LLP: TRIAL & APP. ATTORNEYS, <http://www.beckredden.com/bios/honey-leslie> (last visited Jan. 5, 2016). She graduated from Baylor University School of Law in 2011, where she served as Executive Editor of the *Baylor Law Review* immediately before clerking for Judge Gilstrap. *Id.*

8. See *Judge Gilstrap (ED TX, Marshall) Now Hiring for March 2015 Clerkship*, TEX. LAW (Sept. 19, 2014), <https://law.utexas.edu/judicial-clerkships/2014/09/19/judge-gilstrap-ed-tx->

although a specific technical background is certainly not relevant in all 1,686 patent cases spanning all manner of technologies.

In addition to an extra law clerk, Judge Gilstrap also relies quite heavily on magistrate judges to handle certain aspects of his caseload. For example, magistrates might assist him with claim construction—the most contentious issue in many patent cases⁹—by handling the pretrial *Markman* hearing.¹⁰ Additionally, his magistrates assist him with other aspects of litigation, including handling, scheduling, and nondispositive motions.¹¹

In addition to magistrate judges and law clerks, Judge Gilstrap, like all federal district court judges, enjoys the assistance of a capable group of staff and administrators that take care of many of the administrative details involved in churning through a docket of over 1,600 patent cases annually. Undoubtedly, the staff, law clerks, and magistrate judges who assist Judge Gilstrap help make the seemingly impossible task of processing such a large number of cases possible.

The second way he manages such a large patent docket is by employing notoriously strict local rules. Law clerks, magistrate judges, and staff can only do so much to assist a judge in judging. Judge Gilstrap is armed not only with an experienced support team, but also with powerful local rules that encourage settlement, minimize disputes that require the judge to intervene, and hurriedly race toward trial.¹² The

marshall-now-hiring-for-march-2015-clerkship/ (“Judge Gilstrap has the largest patent docket in the country and appreciates applicants who have a science or engineering background.”).

9. See J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. U. L. REV. 1, 3–6 (2014) (describing the importance of claim construction); J. Jonas Anderson & Peter S. Menell, *Restoring the Fact/Law Distinction in Patent Claim Construction*, 109 NW. U. L. REV. COLLOQUY 187, 197–99 (2015) (suggesting a new approach to appellate review of claim construction decisions).

10. Magistrates can issue nondispositive motions, such as *Markman* orders, in one of three ways: first, the case may be referred to a magistrate for all nondispositive motions, 28 U.S.C. § 636(b)(1)(A) (allowing magistrate judges to hear and determine pre-trial matters pending before the court); second, the case may be referred to a magistrate judge to conduct hearings and give a report and recommendation on the final outcome to the judge in the case, 28 U.S.C. § 636(b)(1)(B); third, both parties can consent in writing to have the magistrate conduct all aspects of the case, 28 U.S.C. § 636(c)(1).

11. Currently, a single magistrate judge assists Judge Gilstrap with his Marshall docket—the Honorable Roy Payne—while two magistrates split his Tyler docket—the Honorable John Love and the Honorable Nicole Mitchell. General Order Re: Divisional Assignment and Apportionment of Cases among United States Magistrate Judges 15-3 (E.D. Tex. Jan. 7, 2015), <http://www.txed.uscourts.gov/page1.shtml?location=general&all=1>.

12. See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 666–77 (2015) (highlighting the tools with which courts can compete for patent litigation); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 250–70 (2016) (illustrating the ways in which the Eastern District of Texas attracts cases).

Eastern District of Texas has earned the nickname “rocket docket” because patent trials tend to get to trial so much more quickly in Eastern Texas than other courts.¹³ The local rules of the Eastern District of Texas are modeled after similar rules in the Northern District of California that were designed to create uniform treatment of patent cases.¹⁴ But the Eastern District of Texas’ rules differ from the Northern District of California in certain key respects.¹⁵ Aside from speeding up the time to trial, the local rules of the Eastern District of Texas require the parties to resolve a number of key issues before trial. Also, scheduling orders are strict and unforgiving of delays.¹⁶ For a time, parties could not file summary judgment motions with Judge Gilstrap without previous approval.¹⁷ This tends to keep motions practice to a minimum. These two factors—speed to trial and minimized motions practice—help Judge Gilstrap maintain his docket because parties are encouraged to settle. Rather than rack up large bills trying a case all the way to a verdict, many cases settle along the way or are dismissed.¹⁸ Realistically, this is a necessity when faced with the number of patent cases on Judge Gilstrap’s docket.

Aggressive rules and an experienced staff can only do so much of the judicial work, however. Much of the credit for Judge Gilstrap’s ability to manage his docket rightly falls on his shoulders. Judge Gilstrap is a hardworking judge who is known for his preparation on the bench.¹⁹ He

13. The Eastern District of Texas is not the fastest court in the United States, but it is quick; time to trial is 2.3 years, compared to a median of 2.4 years for other patent heavy districts. Klerman & Reilly, *supra* note 12, at 267 n.147.

14. See Anderson, *supra* note 12, at 652–53 (comparing the Eastern District of Texas’ rules for case management in patent cases to the Northern District of California’s rules and noting that most cases that rise up from Silicon Valley, a technology hub, are usually filed in the Northern District of California).

15. *Id.*

16. *Id.* Sample Docket Control Order for Patent Cases Assigned to Judge Rodney Gilstrap and Judge Roy Payne, at *5 (E.D. Tex. 2016) (listing three excuses that do not warrant a continuance, including having to appear in another court on the same day).

17. Standing Order Regarding Letter Briefs, Motions in Limine, Exhibits, Deposition Designations, and Witness Lists (E.D. Tex. Apr. 23, 2014) (“Prior to filing any summary judgment motion . . . the parties must submit a letter brief . . . seeking permission to file the motion.”).

18. See, e.g., John Council, *Gilstrap Dismisses 168 Patent Cases, Considers Attorney Fees*, TEX. LAW. (Sept. 28, 2015), <http://www.texaslawyer.com/id=1202738410659/Gilstrap-Dismisses-168-Patent-Cases-Considers-Attorney-Fees> (reporting on a case in which Judge Gilstrap dismissed 168 cases filed by eDekka, LLC).

19. See *Confirmation Hearings on Federal Appointments: Hearing Before the Comm. on the Judiciary*, 112th Cong. 72 (2011) (statement of Senator Cornyn) (presenting Judge Gilstrap and praising him as “the best and brightest”); Robin Y. Richardson, *Gilstrap Tapped to Be Federal Judge*, MARSHALL NEWS MESSENGER (May 20, 2011, 2:17 AM), <https://www.marshallnewsmessenger.com/news/2011/may/20/gilstrap-tapped-to-be-federal->

has undoubtedly spent a great deal of time preparing for and conducting the trials that come his way. He reports that his experience as a litigator in Marshall, Texas prepared him for the bench: “I had a small-town practice for 30 years, where if you aren’t doing it, it didn’t get done’ the judge has said. ‘So I’m not averse to hard work; I’ve been doing it my whole life.’”²⁰

But one cannot help but ask whether society should place one-fourth of the nation’s patent cases before one jurist when there is a federal judiciary of around 700 judges who are available to take some of the burden off Judge Gilstrap’s shoulders.²¹ Should the concentration of almost one-third of the nation’s patent decision making be in one man’s hands, regardless of how skilled that judge is? This Article proposes that it should not and argues that the high concentration of patent cases is unhealthy for the patent system and for the federal judiciary in general. One, if not the primary, reason that this concentration is unhealthy for the judicial system is that it is largely the result of “judge shopping”—the ability of patent plaintiffs to choose their judge.²² Judge shopping is almost universally reviled, yet patent law generally turns a blind eye to this massive advantage for plaintiffs.

Part I discusses the current system of judge shopping that occurs in the Eastern District of Texas. Part II then moves into the arguments for and against judge shopping generally. Part II concludes that the vast majority of scholarship on the topic is against judge shopping for reasons of judicial legitimacy. In addition to the concerns about the fairness (both real and perceived) of judge shopping, this Article argues against judge shopping that is initiated or enabled by federal courts. Court-enabled judge shopping is often a sign that a court is in the business of competing for cases. It is this competition that poses the greatest threat to judicial impartiality. Part III concludes by proposing a way to root out judge shopping in patent cases. Some sort of venue reform is desperately needed in patent law. Either congressional action or changes from the Supreme Court are required to more evenly distribute the patent cases across the country.

judge/ (quoting a county commissioner’s remarks regarding Judge Gilstrap: “He was always an example of a good leader with values, and his work ethics are admirable”).

20. Jess Krochtengel, *Judge Gilstrap Keeps Eastern District’s Tight Ship Afloat*, LAW360 (Mar. 6, 2015, 7:58 PM), <http://www.law360.com/articles/628732/judge-gilstrap-keeps-eastern-district-s-tight-ship-afloat>.

21. Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It’s Not for the BBQ*, ELECTRONIC FRONTIER FOUND. (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>.

22. Anderson, *supra* note 12, at 642–45.

I. JUDGE SHOPPING IN THE EASTERN DISTRICT OF TEXAS: THE DISTRICT'S UNIQUE CASE ASSIGNMENT PROCEDURE

Before discussing the theoretical implications of judge shopping, it is important to have a firmly established picture of how judge shopping occurs in the Eastern District of Texas. Litigators report that the judge assigned to a case can be the key to winning that case.²³ Judges each have individual personalities and therefore have reputations based on those personalities, e.g., some judges are thought to be irrational, curmudgeonly, or unfair while others are viewed as evenhanded, calm, or easygoing.²⁴ Because of this, litigants prefer certain judges over others. Most districts have procedures for assigning cases that limit the ability of any particular litigant to select any particular judge.²⁵ This random selection of judges is thought to be beneficial because it enhances public confidence in the judicial selection process.²⁶ This system does not guarantee fairness, but it attempts to ensure that each case has roughly the same odds of landing before any particular judge.

But one quirk of the federal judicial system is that the power of assignment rests entirely with the court. That means that a court, usually by way of the chief judge of a district, is responsible for establishing which judge will acquire which case and how a case will be reassigned—if at all—based on workload.²⁷ This power to assign cases can be a very useful tool to redirect certain litigants toward or away from a particular court.

Two districts—the Eastern District of Texas and the Eastern District of Virginia—have tinkered with their case assignment procedures with an eye toward impacting patent litigation filings.²⁸ The Eastern District

23. One can gather proof of this maxim by recognizing that judge shopping receives universal contempt from jurists, whereas forum shopping receives mixed reviews. See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 300–01 (1996) (comparing the judicial system's differing views on forum shopping and judge shopping).

24. See Weyman I. Lundquist, *The New Art of Forum Shopping*, 11 LITIG. 21, 22 (1985) (discussing forum shopping strategies used to avoid “Judge Curmudgeon”).

25. See, e.g., *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (noting that random assignment “prevents judge shopping by any party” and therefore enhances “public confidence in the assignment process”).

26. *Id.*

27. Lynn LoPucki demonstrated that the single-judge nature of Delaware's bankruptcy court was a boon for attracting litigants in the 1990s because litigants who filed in Delaware knew the judge for their case *ex ante*. See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING BANKRUPTCY COURTS* 47–48 (2006) (noting that the single-judge nature reduces the effectiveness of the bankruptcy process and that courts would compete by reforming their rules to meet the demands of litigants).

28. See Anderson, *supra* note 12, at 651–54, 656–59 (illustrating that the two districts have

of Virginia has made alterations to its case assignment procedure that discourage patentees from filing there. The Eastern District of Virginia has three divisions: Alexandria, Norfolk, and Richmond.²⁹ Before 2002, civil litigants were randomly assigned a judge within the division where the case was filed.³⁰ Therefore, every patent case (and all other civil cases) was randomly assigned to a judge among the population of judges within the division. Most patent plaintiffs preferred to file in the Alexandria division because of its proximity to the United States Patent and Trademark Office (“PTO”) and Washington, D.C. law firms, the predictable trial management of patent cases, and the division’s experience in handling patent cases.³¹

In 2002, the Alexandria division received up to sixty patent case filings per month, a number that made it impossible for the court to maintain its speedy reputation.³² To reduce the flood of patent litigants, the Eastern District of Virginia changed its case assignment procedures.³³ The new assignment procedure stipulated that patent cases (and *only* patent cases) filed in the Alexandria division were to be randomly reassigned among the judges of all three divisions.³⁴ Other types of cases, such as criminal or copyright cases, continue to be heard by a judge within the division in which the case was filed. Therefore, a copyright case filed in the Alexandria Division can only be heard by one of the seven judges in that

changed their case assignment procedures in an effort to influence where cases are filed).

29. Dabney J. Carr, IV & Robert A. Angle, *Litigating Patent Infringement Cases in the “Rocket Docket” of the Eastern District of Virginia*, 22 INTELL. PROP. & TECH. L.J. 14, 14 (June 2010).

30. See Dabney J. Carr, IV and Robert A. Angle, *Traps for the Unwary: Litigating Intellectual Property Cases in the Rocket Docket*, 11 MEALEY’S LITIG. REP.: INTELL. PROP. 1, 7 n.3 (2003) (“Previously, the Alexandria division did not assign cases to particular judges until trial. For hearings or proceedings prior to trial, parties were assigned randomly to any of the judges in the division.”).

31. The Alexandria division has a reserved day for nondispositive motions hearings, whereas the Norfolk and Richmond divisions do not. In the Alexandria division, unlike the Richmond division, discovery and nondispositive motions are heard by magistrates. The Alexandria division, unlike the Norfolk division, always has at least one judge available to rule on emergency motions. *Id.* at 4–5.

32. Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, VA. LAW., Apr. 2002, at 20, 23 n.1.

33. Carr & Angle, *supra* note 30, at 1 (describing the assignment procedure which randomly assigns cases among the speedy Alexandria docket as well as Norfolk and Richmond); see also Lloyd Smith, *Profiles in IP Law: An Interview with Judge Gerald Bruce Lee, United States District Court, Eastern District of Virginia*, 6 A.B.A. SEC. INTELL. PROP. LAW: LANDSLIDE 7, 9 (Nov.–Dec. 2013) (“One of the reasons we decided as a court to randomly assign patent cases is because we realized we were being overwhelmed here in Alexandria—this being a preferable venue for many plaintiff’s counsel and entities that can find a way to bring their cases here. We decided to spread the cases around and it has helped us greatly.”).

34. Carr & Angle, *supra* note 30, at 2.

division, yet a patent case filed in the same courthouse can be assigned to any judge in the Eastern District of Virginia. Under the new rules, a litigant expecting to try his or her patent case before the experienced judges in Alexandria might find himself or herself litigating before a less experienced patent jurist in Norfolk or Richmond.

But this change only applied to patent cases. The changes made in 2002 increased the uncertainty of judge and divisional assignment of patent cases, and only patent cases.³⁵ The increased unpredictability of judge assignment has reduced the appeal of the district to patent litigants.³⁶ As a result, the Eastern District of Virginia has not attracted patent cases at nearly the same rate as the Eastern District of Texas in recent years.³⁷

Like the Eastern District of Virginia, the Eastern District of Texas has, over the years, modified its case assignment procedure for patent cases. Unlike its counterpart in Virginia, however, the Eastern District of Texas altered its procedures in a plaintiff-friendly manner. In essence, the District created a means of judge shopping.³⁸ The Eastern District of Texas is split into six divisions: Texarkana, Marshall, Sherman, Beaumont, Tyler, and Lufkin.³⁹ Because the Eastern District of Texas can have up to eight active judges, a random case assignment procedure would force litigants to risk assignment to a judge who has handled relatively few patent cases or who dislikes patent cases entirely.⁴⁰ To reduce the risk of drawing an unsatisfactory judge for a patent case, the Eastern District of Texas adopted a case assignment system that allows plaintiffs to select a particular judge.⁴¹

The district's case assignment system is nominally random.⁴² But the chief judge, in accordance with his powers under 28 U.S.C. § 137,

35. *Id.*

36. See Smith, *supra* note 33, at 9 (indicating that the random assignment system has served its purpose in reducing Alexandria's patent docket).

37. See Roderick McKelvie, *Forum Selection in Patent Litigation: A Traffic Report for 2006*, 19 INTELL. PROP. & TECH. L.J. 1, 3 (2007) (summarizing patent case filings to show that the Eastern District of Virginia "continues to lag behind other districts in attracting patent cases").

38. Anderson, *supra* note 12, at 635; Klerman & Reilly, *supra* note 12, at 258.

39. See *Divisions*, U.S. DIST. COURT E. DIST. OF TEX., <http://www.txed.uscourts.gov/page1.shtml?location=info> (last visited Nov. 28, 2016).

40. See Mike McKool, *Founder of McKool Smith in Dallas*, TEX. LAW., <http://www.texaslawyer.com/id=1202520214208> (last visited Nov. 28, 2016) (espousing lawyers' fear that Judge Marcia Crane would preside over their patent case given that she had little experience and seemed not to like this type of case).

41. Anderson, *supra* note 12, at 671; Klerman & Reilly, *supra* note 12, at 258.

42. Brooke Terpening, *Practice Makes Perfect? An Empirical Analysis of H.R. 5418*, 4 FIU L. REV. 287, 311 (2008).

periodically issues general orders that modify the percentage of divisional cases that are assigned to particular judges.⁴³ The patent case assignment proportions in the Eastern District of Texas differ from the general civil case assignment proportions: a particular judge might be assigned 50 percent of the general civil cases filed in Texarkana division, yet that same judge might be assigned 100 percent of the patent cases filed there.⁴⁴

Examining the most recent general order reveals numerous ways to choose a particular judge in the Eastern District of Texas. If a litigant prefers Judge Ron Clark, for example, he or she need only file the case in Beaumont because Judge Clark is assigned 100 percent of patent cases filed in Beaumont.⁴⁵ Prior to the most recent update of the district's assignment procedures in December 2014, one could file a patent case in the Tyler division and enjoy a 95 percent chance of drawing Judge Leonard Davis (the other 5 percent of patent cases were assigned to Judge Michael H. Schneider).⁴⁶ Before Judge T. John Ward, one of the most experienced patent district court jurists in the United States, stepped down from the bench, one could file in Marshall or Texarkana, where he drew 100 percent of the patent cases filed.⁴⁷

Judge Gilstrap, currently receives 80 percent of all cases filed in Marshall, whether they are patent cases or not;⁴⁸ the other 20 percent of civil cases filed in Marshall are assigned to Judge Trey Schroeder.⁴⁹ In addition to his heavy Marshall caseload, Gilstrap receives 20 percent of the civil cases filed in the Texarkana division as well as 30 percent of the patent cases filed in Tyler.⁵⁰

The result of this unique judge assignment system for patent cases is a predictable formula that litigants can use to select their preferred jurist.

43. *See id.* at 311–12 (explaining that the fixed percentage of cases the Chief Judge assigns to each judge depends on “shifting workloads, recusals, new appointments, and retirements”).

44. For examples of case assignment divisions, see General Order Assigning Civil and Criminal Actions 14-20 (E.D. Tex. Dec. 2014), <http://www.txed.uscourts.gov/page1.shtml?byYear=2014&location=general> [hereinafter General Order, Dec. 2014] (dividing the cases assigned in the various districts of the Eastern District of Texas).

45. *Id.*

46. *Id.*

47. General Order Assigning Civil and Criminal Actions 8-08-15 (E.D. Tex. Dec. 22, 2008), http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1925 [hereinafter General Order, Dec. 2008].

48. All criminal cases filed in Marshall are heard by Judge Gilstrap. *See* General Order, Dec. 2014, *supra* note 44 (assigning all Marshall criminal cases to Judge Gilstrap).

49. *Id.*

50. *Id.*

Some regular patent infringement plaintiffs, including nonpracticing entities, consistently file in a single division to have their cases heard before the same judge.⁵¹ Indeed, two divisions receive a disproportionate amount of the patent filings in the district: filings in Tyler and Marshall constitute 91 percent of all patent filings in the Eastern District of Texas.⁵² Not coincidentally, those are the two divisions that Judge Gilstrap draws from for his docket, receiving 80 percent of the Marshall civil filings and 30 percent of the Tyler patent cases.⁵³

Because the district's case assignment system permits judge shopping, many nonpracticing entities consistently select the same judge. In fact, between 1999 and 2007, DataTreasury Corporation ("DataTreasury"), Orion IP ("Orion"), and IAP Intermodal LLC ("IAP") collectively filed thirty-seven patent suits in the district.⁵⁴ Each company filed every one of its lawsuits before a single judge: Judge David Folsom heard DataTreasury's cases, Judge Davis heard Orion's cases, and Judge Ward heard IAP's cases.⁵⁵

Although the ratio of patent cases assigned to each judge constantly changes in the Eastern District of Texas,⁵⁶ it is generally true that at any particular time, at least one division will send most of its patent cases to one judge.⁵⁷ Likewise, it is almost always true that each division has no more than two judges handling the patent cases filed in any particular district.⁵⁸ The selection of a division is much less involved than one might think. When filing a complaint, the plaintiff simply selects his or her division from a drop-down menu of all of the divisions within the Eastern District of Texas.⁵⁹ Thus, all that a plaintiff needs to do to select a particular judge for his or her case (or the high probability of a particular

51. See Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 207 (2007) (discussing Judge Ward's influence on the district); see *id.* at 214 (explaining that the Eastern District of Texas has become the district of choice for patent trolls who prefer the local juries and the ability to bring almost all of their cases before the same judge).

52. *Id.*

53. *Id.*

54. *Id.* at 215 tbl.8.

55. *Id.*

56. Previous divisions of labor allowed even more blatant judge shopping. See, e.g., General Order Assigning Civil and Criminal Actions 09-20 (E.D. Tex. Dec. 17, 2009), http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2256 [hereinafter General Order, Dec. 2009] (assigning many cases from one district to only one judge).

57. Compare General Order, Dec. 2008, *supra* note 47, with General Order, Dec. 2014, *supra* note 44.

58. See General Order, Dec. 2008, *supra* note 47 (assigning patent cases by division in the Eastern District of Texas).

59. Klerman & Reilly, *supra* note 12, at 255.

judge), is look up the latest public order noting which cases the judge of his or her choice is hearing and select the corresponding division from the drop-down menu.⁶⁰

This situation permits litigants to have much more control over one of the primary motivations behind forum shopping: drawing the most advantageous judge possible. Indeed, the assignment system in the Eastern District of Texas permits litigants to move beyond forum shopping to judge shopping. Judge shopping permits litigants to select not only the most advantageous court (as does forum shopping), but also the single most important person in a trial: the judge. In contrast to forum shopping, which has both critics and defenders, judge shopping is almost universally condemned by commentators and by judges themselves.⁶¹

This divisional case assignment has engendered a lot of criticism about the Eastern District's practices. I have previously written about the competition that courts can engage in to attract litigants to their districts.⁶² I have noted that the ability to choose one's judge can be used as a way to attract or dissuade patent litigants from filing in districts, a phenomenon that has occurred in the Eastern District of Texas.⁶³ Similarly, Dan Klerman and Greg Reilly have said: "There was no particular reason why patentees should be given a choice of division, much less a choice of judge, as patent cases almost never have a greater connection to one division of the Eastern District than another."⁶⁴ Klerman and Reilly share my view that the Eastern District's assignment procedures are nothing more than "judge shopping."⁶⁵

Ultimately, the Eastern District of Texas' own rules and assignment procedures enable judge shopping. The local orders in the Eastern District of Texas assigning the patent cases from certain divisions allow litigants to effectively control which judge presides over their case. Before filing, litigants have not only checked the court's local rules, but also the proclivities and tendencies of individual judges to gauge whether they will generally be favorable to their particular dispute. For instance, with Judge Gilstrap, litigants know, *ex ante*, that he will set a scheduling conference about three months from the date of filing.⁶⁶ Then, at the

60. *Id.*

61. *See* Norwood, *supra* note 23, at 300 ("[J]udge-shopping is still 'universally condemned' by the courts." (footnote omitted)).

62. *See* Anderson, *supra* note 12, at 659–61 (finding that courts engage in competition for patent litigants).

63. *Id.* at 670–74.

64. Klerman & Reilly, *supra* note 12, at 255–56.

65. *Id.* at 255.

66. Krochtengel, *supra* note 20.

scheduling conference, he will set a trial date about eighteen months later.⁶⁷ Litigants know that all dates are hard dates, unlikely to be pushed back or delayed at the litigant's request.⁶⁸ The dates, however, are not set in stone, there is some flexibility; but that flexibility is meant to allow for changes due to the judge's, not the litigants', schedule.⁶⁹ Judge Gilstrap uses approximate dates for trial to allow jury selection to happen on a weekly basis.⁷⁰ This way, the court is able to handle settlements of various cases more efficiently and can keep churning through the cases.⁷¹

Knowing all of that, litigants can decide if they like Judge Gilstrap's procedures, and select their division accordingly. And apparently, many plaintiffs like what they see. Judge Gilstrap has become one of the most popular and clearly one of the most experienced patent judges in the world. So what is wrong with judge shopping? Part II addresses that question.

II. IS THERE ANYTHING WRONG WITH JUDGE SHOPPING?

Academic literature has generally adopted a dim view of granting plaintiffs the ability to select their judge.⁷² The legal system apparently shares the same disdain; there are many examples of attorneys being sanctioned because their actions were construed as an attempt to manipulate the system to receive a more favorable judge.⁷³ Previous scholarship discusses the perniciousness of judge shopping for the legal system and argues that judge shopping is one of the advantages that courts can dangle before potential plaintiffs in an effort to compete for their litigation business.⁷⁴ Scholars have warned that such competition between courts can lead to procedures that are overly plaintiff friendly.⁷⁵

Those in the bankruptcy field have leveled much of the academic

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 971 (1999) (stating that "forum shopping . . . has received universal condemnation" and often leads to proceedings against the attorney shopping for judges).

73. See, e.g., *No Judge Shopping Allowed*, 19 NAT'L L.J., May 5, 1997, at A8 (sanctioning an attorney for filing thirteen lawsuits for Dr. Jack Kevorkian and withdrawing all but one to secure a favorable judge).

74. See Anderson, *supra* note 12, at 670-74 (reinforcing the argument that judge shopping provides an advantage for plaintiffs).

75. *Id.*; see also Klerman & Reilly, *supra* note 12, at 254 (similarly suggesting that judge shopping is advantageous for plaintiffs).

criticism of judge shopping. In the 1980s, a good portion of large bankruptcy cases were filed in New York's courts. The dominance of the New York bankruptcy courts was short lived, however. By the early 1990s, Delaware had become the leader in big bankruptcy filings.⁷⁶ Lynn LoPucki has chronicled how Delaware's emergence as a bankruptcy court of choice was the result of the efforts of Delaware's lone bankruptcy judge, Judge Helen Balick, to attract "a major industry to her state."⁷⁷ Judge Balick's case management techniques, along with the predictability of case assignment in a one-judge district, elevated Delaware to the top district for bankruptcy filings.⁷⁸

Bankruptcy scholars have generally been critical of Delaware and New York courts' facilitation of judge shopping.⁷⁹ In a series of articles and books, LoPucki has argued that Delaware and New York bankruptcy judges competed for litigants.⁸⁰ LoPucki saves special criticism for judge shopping, however. First, he and Theodore Eisenberg have complained that judge shopping threatens the integrity of the judicial system.⁸¹ Judge shopping, according to Eisenberg and LoPucki, breeds disrespect for the judicial system as defendants are disadvantaged when the plaintiff selects a judge.⁸²

Eisenberg and LoPucki are also concerned that judge shopping undermines the very structure of government. They think that judge shopping somehow destroys the rule of law by making government

76. See Anderson, *supra* note 12, at 682 (noting that Delaware had become the leader in bankruptcy case filings in 1992).

77. *Id.* (arguing that Judge Balick actively pursued bankruptcy filings by making rulings favorable to bankruptcy filers).

78. *Id.* (noting the appeal of filing in a one-judge district). Because of the increase in filings, Delaware was awarded a second bankruptcy judge in 1993, but the district did not adopt the random case assignment model of New York. See LOPUCKI, *supra* note 27, at 74–75. The migration of big bankruptcy cases toward New York and Delaware alarmed bankruptcy professionals in other states. Beginning in Houston, members of affected cities' local bankruptcy bars approached their local bankruptcy judges and asked for changes in local rules and attorney fee rulings to make the local courts competitive. *Id.* at 125–26.

79. See David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 1 (1998) (noting that the majority of complaints regarding venue shopping have been targeted at New York and Delaware).

80. See LOPUCKI, *supra* note 27, at 74–75 (discussing the litigant competition with Delaware and New York bankruptcy judges); see also Eisenberg & LoPucki, *supra* note 72, at 983–84 (discussing the shift from New York to Delaware as the principal destination for big-case forum shopping); Lynn LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 15 (noting that from 1979 to 1988, the most commonly selected forum for bankruptcy reorganization cases was New York City).

81. Eisenberg & LoPucki, *supra* note 72, at 971.

82. *Id.*

dependent on individual personalities and proclivities rather than the rule of law.⁸³ They are clearly worried about the perception of the judiciary being damaged by the practice of judge shopping. Indeed, in the bankruptcy context there has been an outcry regarding the judge shopping practices of Delaware,⁸⁴ perhaps confirming LoPucki's concerns about judge shopping tarnishing the public image of the judiciary.

The Federal Judicial Center released a draft report about bankruptcy forum shopping in 1997 that also condemned judge shopping.⁸⁵ The report condemned Delaware's informal method of case assignment.⁸⁶ The report was also very critical of Delaware's practice of allowing debtor's counsel to discover which judge a case would be assigned to before the case was filed.⁸⁷

Kimberly Jade Norwood discusses the similar theme of judge shopping outside of the bankruptcy context.⁸⁸ According to Norwood, while there are positive views of forum shopping and jury shopping, there is no support for judge shopping.⁸⁹ Furthermore, she has chronicled how the judicial system punishes would-be judge shoppers.⁹⁰ The basis of the judicial system's dislike of judge shopping stems from the fact that the practice "impairs the integrity of the judicial system and judicial process."⁹¹ Norwood also cites case law to support her claim that judge shopping is impermissible in the United States.⁹² The impermissibility of judge shopping can be seen in a number of different ways. Key among them, according to Norwood, is the random case assignment rules which are designed to prevent judge shopping.⁹³ Like LoPucki, she is

83. *Id.* (noting that judge shopping "undermines the aphorism that 'ours is a government of laws, not men'").

84. *See, e.g.*, Ann Davis, *Delaware Lawyers to Discuss Changes with Federal Judges*, WALL ST. J., Jan. 29, 1997, at B8 (stating that Delaware's procedures for bankruptcy cases would cause a layperson to doubt "the objectivity of the process"); *Delaware's Withdrawal of the Reference: What It Means*, 30 BANKR. CT. DEC. (CCR) No. 4, at A16 (Feb. 11, 1997) (discussing a bankruptcy judge's declaration that he would not "tolerate [Delaware's] practices here").

85. *See* Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U.L. REV. 1357, 1376-78 (2000) (noting the negative opinion of the Federal Judicial Center on bankruptcy forum shopping).

86. *Id.*

87. *Id.*

88. *See supra* note 23 and accompanying text (comparing the judicial system's differing views on forum shopping and judge shopping).

89. Norwood, *supra* note 23, at 268.

90. *Id.*

91. *Id.* at 268-69.

92. *Id.* (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

93. *Id.* at 299-300.

concerned that judge shopping might “cheapen the judicial process.”⁹⁴ Ultimately, she concludes that judge shopping is “universally condemned” by courts for good reasons.⁹⁵

But, there are proponents of judge shopping in the academy, although they are more difficult to find. Robert Rasmussen and Randall Thomas argue that forum shopping and judge shopping can increase the efficiency of the Bankruptcy Code, if the timing of one’s judge selection predates financial distress.⁹⁶ For them, judge shopping can be a virtue of the system. Provided that one’s selection of a court or judge is made *ex ante*—which they define as meaning “prior to the onset of financial distress,”—they feel that judge shopping could improve the bankruptcy process.⁹⁷ Rasmussen and Thomas’ argument should be a familiar one to students of the literature about specialized courts:⁹⁸ judge shopping can be positive because it can efficiently align litigants with judges who have expertise in their cases. Thus, by allowing judge shopping, the judicial system can maximize efficiency by allowing litigants to signal which judge or court they feel will be the best at deciding their cases.⁹⁹

The problem, of course, is that choice of judge is largely made by one party: the plaintiff.¹⁰⁰ Ultimately, judge shopping is antithetical to the goals of the American legal system. Virtually every court in the United

94. *Id.* at 300.

95. *Id.* (citing *Lane v. City of Emeryville*, No. 93-16646, 1995 WL 298614, at *2 (9th Cir. May 16, 1995)).

96. Rasmussen & Thomas, *supra* note 85, at 1359.

97. *Id.* at 1363.

98. See Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 44 (1995) (arguing that one of the benefits of specialized adjudication is the ability to match judges’ interests with a subject matter); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 790–91 (1983) (recognizing the practical effects of increasing the number of specialized courts); see generally LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2011) (providing a comprehensive analysis of the growing trend toward specialization in the federal and state court systems).

99. See BAUM, *supra* note 98, at 33 (stating that the judicial system can run more efficiently with more specialization).

100. The defendants, of course, can choose to initiate a suit (and thus, choose the venue) by initiating a declaratory judgment action. In practice, declaratory judgments are relatively rare, both because they require one to bring suit to affirm that one has not infringed (an awkward position for most declaratory judgment plaintiffs) and because the Federal Circuit has heightened the standards for bringing such suits. See Megan M. La Belle, *‘Reverse’ Patent Declaratory Judgement Actions: A Proposed Solution for Medtronic*, 162 U. PA. L. REV. ONLINE 43, 47 (2013) (listing the hurdles that a declaratory judgment plaintiff must clear to file a declaratory judgment action under Federal Circuit case law). See generally Jennifer R. Saionz, *Declaratory Judgment Actions in Patent Cases: The Federal Circuit’s Response to MedImmune v. Genetech*, 23 BERKELEY TECH. L.J. 161 (2008) (discussing the Federal Circuit’s *MedImmune v. Genetech* case).

States implemented randomization of case assignment out of concern both for the public perception of judicial evenhandedness, and for actual fairness of deciding disputes.¹⁰¹ Permitting wide-spread judge shopping (similar to what occurs now in patent cases) allows plaintiffs to select the judge who is most favorable to them.¹⁰² Either because of special procedural rules, judicial temperament, or hostility to defendants, something makes that judge more attractive than every other judge. Judge shopping creates a system whereby the most plaintiff-friendly judge receives most of the cases.¹⁰³

Judge shopping has defenders, but those defenders for the most part do not reside in Congress. If the benefits of judge shopping are so strong that the system wants to encourage patentees to seek after them, Congress should so indicate. As of now, Congress has regularly opposed judge shopping (as has the Supreme Court), and has attempted to randomize intra-district assignment.¹⁰⁴ The courts would do well to follow Congress' lead in establishing their own assignment procedures.

Essentially the only argument for judge shopping is that the practice provides a way to funnel cases toward specialization. But even assuming that judge shopping could achieve that goal, it is unclear that specialization of the federal courts is an unalloyed good. Specialization of the federal district courts can have beneficial effects and there have been calls for more specialization of judges at the trial level.¹⁰⁵ Such specialization, however, should be thoughtfully produced, and should not be created haphazardly or as the result of a competition between courts. Judge Gilstrap has certainly developed an expertise over the years, but should one-fourth of the nation's patent cases be heard by this one judge whose only experience with patent law has been through his time on the bench? This specialization leads to the type of tunnel vision of which various academics have warned.¹⁰⁶ With one judge, or a handful of judges handling most of the nation's patent cases, the patent system does

101. See Norwood, *supra* note 23, at 292 (stating that the main benefits of random assignment are to “prevent judge shopping,” to enhance “public confidence” in the judicial system, and to ensure “equitable distribution” of cases).

102. Anderson, *supra* note 12, at 670–74; Klerman & Reilly, *supra* note 12, at 254.

103. Klerman & Reilly, *supra* note 12, at 254.

104. Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246, 247 (2012).

105. See, e.g., Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 39 (2001) (proposing specialized trial courts for patent cases).

106. J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1094 (2014); J. Jonas Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151, 175 (2015); Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989).

not benefit from the diverse viewpoints that most other areas of law receive.

And all of this says nothing about the erosion of the public perception of the patent system that has occurred with the rise of the Eastern District of Texas. Already the Eastern District has acquired a public reputation as a “renegade” district.¹⁰⁷ Attracting nearly half of the United States’ patent cases (largely because of the court-sanctioned judge shopping that transpires there) will only further the public’s perception of the district.

In conclusion, judge shopping is harmful to the judicial system because it: (1) undermines public confidence in the judiciary, (2) makes court an uneven playing field for litigants, (3) is a prime motivator of judicial competition for litigation, and (4) sacrifices a diversity of judicial viewpoints in setting patent policy.

III. WHAT TO DO: VENUE REFORM AND MANDATING RANDOMIZATION

Thus, reforms of some sort are needed to the venue rules of patent law or the assignment procedures of the courts. First, and most painlessly, Congress could mandate that district courts randomize assignment of patent cases within their districts.¹⁰⁸ Limiting the ability of courts, such as the Eastern District of Texas, to deviate from random assignment procedures for patent cases would eliminate one of the most effective efforts to attract, or dissuade, patent litigants from filing in a court.¹⁰⁹

The Eastern District of Texas’ case assignment procedures for patent cases allow litigants to select the judge who will preside over their case.¹¹⁰ Districts that have this nonrandom assignment appeal to litigants, but in the end, disrupt the proper functioning of the judiciary. As described in more depth above, courts that enable judge shopping are often competing for cases, a competition which often leads to plaintiff friendly procedures and rulings. This ability to “judge shop” has been uniformly decried as antithetical to notions of justice.¹¹¹ LoPucki notes that the ability to “judge shop” was one of the features of the Delaware

107. See generally Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111 (2008) (describing that “renegade” reputation).

108. This is slightly more complicated with the Patent Pilot Program, but even in that program, litigants have at best a one in three chance in getting assigned a particular judge, and often much less than that. See Klerman & Reilly, *supra* note 12, at 253 (indicating that “the norm in federal courts” is to have “random assignment among judges within a district”).

109. See Anderson, *supra* note 12, at 670 (stating that eliminating nonrandom assignment of cases will deter some of the forum shopping that occurs in patent cases).

110. See *supra* Part II (noting that the Eastern District of Texas will lure patent litigants to file their cases there because the district allows litigants to choose their judges).

111. See *supra* note 27 (listing academics and courts who have opposed judge shopping).

bankruptcy courts that initially appealed to bankruptcy filers.¹¹² Similar to the plaintiffs in bankruptcy actions, patentees are also attracted to the option of choosing who their judge will be, as the Eastern District of Texas' popularity demonstrates. The appeal any district has to plaintiffs will often be a result of law or procedure that is designed to be plaintiff friendly.

Congress could quite easily eliminate courts' ability to permit preselection of judges. Under 28 U.S.C. § 137, chief judges of district courts have the power to "assign the cases" in accordance with the rules and orders of the court.¹¹³ The statute grants chief judges broad discretion in assigning cases. Congress could amend the statute to require that district courts assign cases in a randomized manner among the judges. This modification would eliminate one of the primary judicial means of attracting litigants with very little cost, other than the political cost of passing legislation.

Congress has shown an appetite for strengthening the randomization norms of case assignment. The Patent Pilot Program ("PPP"), which allows certain districts to assign all of their patent cases to a preselected subset of judges, requires districts to assign judges in the program on a random basis.¹¹⁴ For most districts, this means using "the wheel" to assign judges to patent cases. The PPP is intended to increase certain judge's exposure to, and expertise with, patent cases while simultaneously ensuring random case assignment—albeit limited to the PPP judges of the district.¹¹⁵ But the Eastern District of Texas continues to use its unique assignment method for patent cases—in which litigants can choose the division from a drop-down menu that determines their odds of getting a certain judge.¹¹⁶

Congress could legislate this pernicious form of judge shopping out of existence. There are currently a number of bills that would amend the patent venue statute with the goal of getting litigation out of East

112. See LOPUCKI, *supra* note 27, at 47–48 (noting that Delaware's bankruptcy court was a boon for attracting litigants in the 1990s because litigants who filed in Delaware knew the judge for their case *ex ante*).

113. 28 U.S.C. § 137 (2012).

114. Klerman & Reilly, *supra* note 12, at 256 (stating that the Patent Pilot Program instructs courts to "randomly assign" cases).

115. See generally Nancy Olson, *Does Practice Make Perfect? An Examination of Congress's Proposed District Court Patent Pilot Program*, 55 UCLA L. REV. 745 (2007–2008) (discussing Congress' intent behind the Patent Pilot Program).

116. See *supra* Part II (discussing the Eastern District of Texas' method of permitting judge selection).

Texas.¹¹⁷ It is also an issue that has attracted the interest of presidential candidates. The 2016 Democratic Party presidential candidate, Hillary Clinton, had a plan to limit venue in patent cases, although the specifics of such a plan were not spelled out.¹¹⁸

The Supreme Court also has the power to change how the Eastern District of Texas assigns its cases, although indirectly. The Supreme Court has recently granted certiorari in a case that deals with patent venue: *TC Heartland LLC v. Kraft Food Brands Group LLC*.¹¹⁹ That case, which arises from a motion to transfer venue out of the District of Delaware, asks the court to clarify exactly which provision of the United States Code controls venue for patent cases, 28 U.S.C. § 1391(c) or 28 U.S.C. § 1400(b).¹²⁰ The case will present the first opportunity for the Supreme Court to directly evaluate patent venue rules.¹²¹ Although the case does not involve the Eastern District of Texas, the briefing thus far has focused almost exclusively on the practices of that court.¹²² A fundamental change to patent venue may result, which would in effect “redistribut[e] patent infringement cases.”¹²³

But an easier—and arguably more effective—means of achieving a similar goal would be to eliminate judge shopping altogether. This alteration of the Eastern District of Texas’ assignment procedures need not come from Congress. The court itself can make this assignment procedure change with a simple memo from the chief judge. A plaintiff might still choose the Eastern District of Texas, but Judge Gilstrap would

117. See, e.g., Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Cong. (2016) (proposing changes to the patent venue statute and designed to draw cases out of the Eastern District of Texas); see also J. Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961, 969–81 (2014) (showing that Congress has an active role to play in policing patent law).

118. Matthew Bultman, *Clinton Backs Patent Reform, New Venue Rules*, LAW360 (June 28, 2016, 6:13 PM), <http://www.law360.com/ip/articles/811761/clinton-expresses-support-for-patent-reform-new-venue-rules>.

119. 821 F.3d 1338 (Fed. Cir. 2016), cert. granted, 2016 WL 4944616 (U.S. Dec. 14, 2016) (No. 16-341).

120. Petition for Writ of Certiorari, *TC Heartland LLC*, No. 16-341 (U.S. Sept. 12, 2016).

121. Of course, in addition to venue, a plaintiff needs to establish personal jurisdiction to proceed with a patent suit. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945). That can be especially difficult in patent cases, where the plaintiff only has the jurisdiction where the plaintiff obtained a patent. See J. Jonas Anderson, *Hiding Behind Nationality: The Temporary Presence Exception and Patent Infringement Avoidance*, 15 MICH. TELECOMM. & TECH. L. REV. 1, 2 (2008–2009) (stating that a patentee may sue for infringement “only when that infringing act occurs in the same country in which the invention is patented”).

122. *Id.* at 17–22 (evaluating literature critical of the Eastern District of Texas).

123. Dennis Crouch, *Goodbye E.D. Texas as a Major Patent Venue*, PATENTLY-O (Dec. 14, 2016), <http://patentlyo.com/patent/2016/12/goodbye-patent-venue.html>.

receive under 20 percent of all cases filed in the district. This rebalancing of the district caseload would not only be a positive for the patent system, it would also be beneficial to the larger judicial system. In fact, it is this voluntary option which would signal to Congress, the Federal Circuit, and the Supreme Court that the Eastern District of Texas is serious about joining the majority of the federal judiciary in eliminating judge shopping.

CONCLUSION

Judge shopping is a practice that has generally been frowned upon by courts and often leads to sanctions for attorneys. But in recent years it has become a practice that is actively permitted by certain federal district courts, most notably, the Eastern District of Texas. The ability to effectively choose a judge in the Eastern District has increased the district's popularity among patent plaintiffs. Currently the Eastern District of Texas receives 43 percent of all patent cases in the nation.¹²⁴

The most popular judge among the judges of the Eastern District is Judge Gilstrap. Last year he received over one-fourth of the nation's patent cases. Judge Gilstrap is a well-respected, experienced, and serious judge. But even the best judge should not receive a quarter of the nation's patent cases in the United States. If Congress desires specialization in patent trials, they should thoughtfully consider how to achieve judges with patent specialization (e.g., judges that resemble bankruptcy judges or a Federal Circuit-like experiment at the district court level).¹²⁵ But regardless of what form the congressional reform of the patent trial system takes, it should be done in a thoughtful manner, not dependent on plaintiff's venue choices. Any congressional reform to the patent venue statute should mandate that districts have randomized case assignment procedures.

Two other alternatives exist to congressional change of patent venue. The Supreme Court is currently scheduled to hear arguments in *TC Heartland LLC*, a case about patent venue. There, the Court may decide to limit the venue options that a plaintiff has in patent infringement cases.¹²⁶ A severe restriction on venue options would reduce the appeal

124. Howard, *supra* note 1.

125. There are advantages and drawbacks to both systems of specialized judges that are beyond the scope of this article. For more, see generally J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 446–51 (2016) (highlighting the risk of increased lobbying by judges from specialized courts).

126. Of course, predicting what the Supreme Court will do in any case is risky business, and I do not presuppose what the Justices will do in that case. The question of patent venue is a complicated one. The Justices may well decide that they do not want to disrupt the apple cart. *See*

of judge shopping in the Eastern District by limiting the number of cases that the court has authority over.

Finally, the Eastern District could limit the ability of plaintiffs to shop for friendly judges. By imposing some true randomization into its judge selection procedure, the district could go a long way toward eliminating judge shopping. One might question whether eliminating judge shopping (and thus part of the appeal of the district to plaintiffs) is what the district ultimately wants. The Eastern District can halt the practice of judge shopping on its own. If it is unwilling to do so, legislative action by Congress may be required.

J. Jonas Anderson, *Applying Patent-Eligible Subject Matter Restrictions*, 17 VAND. J. ENT. & TECH. L. 267, 268–69 (2015) (illustrating the Supreme Court’s trouble with enunciating a workable standard for patent-eligible subject matter).