

Remarks of Chief Judge Paul R. Michel

25th Annual Dinner
Federal Circuit Bar Association Charitable and Educational Fund
The Mayflower
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Thank you, thank you. Thank you very much. What a fortunate Court we are to have such a bar association. It has helped us in so many ways in so many years. There is no other circuit court in the country that enjoys the kind of support that we get from all of you, so we really are indebted to you and on behalf of the entire Court, I want to convey the thanks, the appreciation, the respect, and the affection of every member of our Court, all 16 judges, for all of you, for each of you, and for what you do to help the Court be what it can be.

I'm going to tell you a little secret. I inherited such a strong healthy court from its former chief (the 4th chief of the Court), my colleague, Bob Mayer. But unbeknownst to most of you, the secret weapons I inherited are called Mike Shaengold and Scott McCaleb. They co-chair most ably the Court's 16 member Advisory Council, so what they don't know is that this is a life sentence. We're so glad to have their help. The association has done so much for the Court. Many, many past challenges. And tonight, just very briefly, I want to focus on the challenges that still lie ahead for our Court and hence for your association.

I want to focus on two particular challenges, because on them, once again, we need to draw on your help, your support, your assistance, your encouragement, and your muscle. First, we need you to help protect the Court. In 1996, a proposal was made, it had no acknowledged fatherhood, but a proposal was made to dump 14,000 immigration cases on top of our 1,400 annual filings. It would have ruined the Court. And fortunately, many people stood up against it and the Congress was dissuaded from pursuing it. We face a similar threat, perhaps not quite so dramatic, but still quite dangerous. In the current so-called patent reform bill pending before the Senate, S515 which has many fine features, there's one provision which is a kind of a torpedo, at least potentially. It would provide for an interlocutory appeal from any claim construction ruling in any case at any stage in the District Court. And if it is enacted, there is a risk that the Court would be inundated with an untold number of appeals, perhaps doubling or tripling our current filings. The proposal was based on the idea that where claim constructions are dispositive, it's important to have an early appeal, rather than go through the expense and trouble of trial, which of course is right. But what may not have been so clear to the Senate because, of course, like the Court, they're the victim of what they're told by other people and sometimes it's hard to sort things out. But the majority of the appeals that we receive every year are already interlocutory appeals, because they come from grants of summary judgment based on claim construction. So we already have an automatic interlocutory appeal provision. So what the Senate bill, as I estimate, would do is to give us appeals in cases in which the claim construction is not dispositive of infringement. Because if it were, summary judgment likely would be granted. And regardless of the exact details, if the Court gets a double or triple load, we can't handle it. The median time now to adjudicate a patent case is just under one year, from filing, to the opinion going up on the Internet. That's probably already too slow. But if we had a double filing rate, we might end up with a double delay time — two years waiting for a result.

Intolerable in today's global competitive economy to have to wait for two years for an appellate decision. So I consider this a fairly serious threat. And you know the premise of it is a little bit questionable. The idea was, well, we need all these immediate appeals on top of the ones you already have at the Federal Circuit because we can't afford the time and expense of a second trial. But the reality is most patent cases never have a first trial. About 3,000 are filed a year, about 2,700 settled spontaneously. Of the remaining 300, about 200 are resolved on summary judgment, almost always based on claim construction. And therefore an immediate appeal, interlocutory appeal to us. The remaining 100 go to trial. So the idea that we need such a provision to prevent second trials is hollow, because there almost are never second trials. There usually aren't even first trials. So, it seems to me that the Senate and the Congress have been given a very exaggerated, perhaps inaccurate premise for this provision. Now, of course some of you might not agree, or some might agree or some might not care. But I hope everyone here will at least be concerned about the Court, the potential for the Court to be swamped because we have to be careful, we have to be correct, and we have to be prompt. That's what we owe to the lawyers, and their clients. And it's, I think, somewhat threatened. The provision in the Senate bill could be adjusted, I'm not saying it has to be taken out. It could be adjusted. But on this, we need your help. We are not allowed to lobby. So we don't. But you are. And you have clients, and you have this association and many other bar associations. So, enough. A word to the wise.

Secondly, let me turn to another subject, which is the generational change — your Court, our Court, the country's Court faces. On October 6, our colleague Tony Schall chose to take senior status to which he was entitled. So one of our 12 active judges has now become a senior judge. So we have 11 active judges and five senior judges. And we applaud him for his long service to the Court, and I would ask you to join me in thanking Tony Schall for his active service. Now the other little secret here is there are five other judges of our active 11 who could retire tomorrow, or take senior status. And in either event, that creates a vacancy. So not only the vacancy for Judge Schall's seat but potentially five other seats at any time could become vacant. By the next Federal Circuit Bar Association dinner, a year hence in this room, two more will be eligible for that conversion of status. So there could be seven more vacancies within a year of tonight. Of course, we don't know who will or who won't, so not every one of these potentials will become an actual vacancy. But likely several will. No one knows the exact number. So what does this have to do with you? Well, you have the power to influence the selection of future Federal Circuit judges, and probably no one has more knowledge or more interest in those selections than the men and women here in this room. I would suggest to you that, as you might contemplate what the Court needs, you might consider some of these basic facts. We have a highly diverse court, a very strong court, the judges are enormously industrious, great intellect, great interest in their work, challenge one another or are challenged by the lawyers, to do the best job that's humanly possible in the eight hours per case, on average, available to do all the work in an appeal. Read the briefs, read the record, write an opinion, critique an opinion, deal with the en banc, rehearing petitions, and all the rest. Eight hours, on average. So it is a tough workload.

Despite the tremendous quality of the judges on the Court now, there are some identifiable gaps that a president and those advising him might consider. For example, among our 16 judges, we have two former trial judges by the name of Mayer and Rader. But both served in a non-jury forum. And, therefore, we have no judge who has presided over jury trials on an extensive basis, no former district judge on our Court. So maybe somebody from that

background would be a good choice. My colleague judge Richard Linn tried a lot of patent cases and other colleagues tried cases in both specialized and general settings, particularly Judge Linn and jury trials and Judge Gajarsa and Judge Lourie in the CCPA, another forum. But I think it's fair to say that we do not have on our Court anyone who has made his life work of trying commercial cases in front of juries, particularly patent cases. So, maybe the Court would benefit from a patent litigator who spent his life doing that. Nor do we have any judge, to my knowledge, who has a lifetime of experience or any appreciable expertise in contract law, international trade law, or veterans benefits laws — huge chunks of our jurisdiction. If you look at it a different way, we don't have and have never had an African-American judge on our Court. Nor do we have an Asian-American heritage judge on our Court. We do have three women out of 16, but three women out of 16 is less than a quarter — it's half the population. So, perhaps more women would add, in many way, not just in a representational sense but in a diverse viewpoint for our Court. Those are just a few random ideas. But the important message that I have to try to convey to you is that the Court needs your help. More important, the country needs your help to assure that the appointees to the Court are selected based on merit, on experience, on quality, on intellect, on intelligence, on energy, and not because they're, you know, somebody's cousin or whatever the other considerations might be. So I hope that all of you, directly, individually through this bar association, through other bar associations, through your law firms via your clients, and in every way you can think of, will do everything within your power to make sure that those added to the Court, as the vacancies occur, will be people of which you in the country can be proud.

Third, I want to turn to a somewhat more personal item moving from my pleas for your help for the Court to a little bit of a sense of the future. Earlier today, I sent a letter to the President informing him of my intention to retire from active judicial service, effective May 31, 2010. This 6 month notice complies with the policy of the Judicial Conference of the United States of which I am one of 27 members. Hopefully the six months will give the President and the Congress ample time to nominate and confirm a new judge so that there will be no gap and we'll have full complement of 12 active judges, because we surely need them in order to move these cases with quality and dispatch. Any advanced notice is perhaps all the more important, since I will not be taking senior status, and therefore won't be around to help, even fractionally, to carry the load of the Court. I would like to, very briefly, indicate why I chose to retire rather than continue as an active or as a senior judge. I have loved every day of being a judge, and I had always imagined I would stay a senior judge until I was carried out of the courthouse in a pine box. But I've come to a different conclusion, because I see a huge need for someone to be able to speak out on behalf of the court system generally — of the judges, the lawyers, and the litigants. To be able to speak on public matters, even controversial matters, even political matters that affect the administration of justice in this country. And we who serve in the active judiciary are not permitted to do that because of restrictions in the code of conduct. There are many challenges. In my view, the judicial branch is being severely neglected by other authorities in this country. A few quick examples: we have about 900 Article 3 federal judges in America today. But 100 of them are missing because there are 100 unfilled vacancies and most of them have existed for years. For a decade and a half, the judiciary has asked the Congress to increase the number of judges by another hundred because of the huge growth in the case load. And these pleas have gone, up to now, entirely unheeded. In addition, our 450 courthouses, about half of them are severely unsafe because of the physical conditions where you have violent criminals walking down the same hallways with jurors and witnesses and, yes, also with judges.

The workloads are going up. No one has had a pay raise in 20 years. Can you imagine a private sector job in which a pay raise over 20 years was out of the question? It's not a healthy condition. So I'm hoping to speak out on these issues. I don't know if will do any good but I'm going to try the best I can.

In short, I will be looking for new ways to serve the country that I have been very privileged to serve for 44 consecutive years since graduating from law school. A few details just for fun. You might ask, well, why May 2010? Why not tomorrow or why not a year from now or some other time? First, the projects and initiatives that have been my lot to try to promote within the Court will all be completed by May. Second, my obligations to the executive committee of the Judicial Conference, and to its long-range planning committee will also be completed by then. And on a broader basis, Chief Judges serve for a maximum of seven years, or until age 70. I think it's actually quite a healthy idea because there should be some regular turnover in leadership in any institution, including a court of appeals, or, for that matter, a district court. So my tenure would necessarily end at the very start of 2011, in any event. In fact, the average years of service of chief judges, trial or appellate, is between four and five years. And by May of 2010, I'll be at the 5½ year mark. Beside all that my successor under the statutory formula, Judge Randall Rader, has already been on the Court 19 years. If he isn't ready now, when? As I said, I'm particularly eager to be free of the restraints that govern all of my Article III colleagues, so that I can speak as strongly as I am able to try to get the judiciary what it needs to serve this country effectively. So, being a senior judge turns out not to be the right course for me. Now I want to assure you that I'm not planning to retire in order to move to Florida and play golf. As a matter of fact, I don't even know how to play golf and I have very little intention of learning, at least not any time soon. I actually don't know exactly what I'm going to do. That remains to be determined. And, it really will have to wait until I'm close to or at the May 31st mark, because I have to avoid, as all of us do, any appearance of conflict. So, we'll have to wait and see what happens. But I'm very hopeful to find ways to serve the country and the legal profession and, hopefully, be able to use my 44 years of experience, in which I've had the privilege of serving in all three branches of the Government. For sure, I plan to speak out, to write articles, perhaps to testify in Congress, maybe start a think tank, probably teach a little bit on the side. If there's a commission created to try to figure out how to improve the patent law, perhaps I could serve on that. Who knows? I may even try my hand at mediation or arbitration. Ultimately, I may try to write a book. One of the things that's fascinated me for decades is what are the lessons of recent history? I had the good fortune by just luck of circumstance to have served as the Watergate prosecutor and on the Church committee and in an investigation of allegations of bribery involving 110 Congressmen named on the front page of the Washington Post as allegedly taking bribes from a foreign government. So maybe I can write a book about what the lessons of those investigations are for the challenges today in the world we live in now. I'm sure I'm going to be as busy as ever. I'm just not quite sure what I'll be doing. I want to emphasize that I love being an appellate judge, I love being the Chief Judge, I inherited a very strong Court from Judge Mayer. He was a great Chief Judge, and I applaud him for his excellent service in his time of command. Thank you, Bob.

I hope and expect that when the time comes in the close of May that I will hand over to Judge Rader a Court that's equally strong to what I have inherited from Bob Mayer. And I should also say that I have loved serving on the Judicial Conference of the United States, 26 judges, 13 circuit, 13 representative district judges presided over by the Chief Justice of the

United States. It meets twice a year, it's supported by 27 substantive committees, it has a seven member executive committee on which I've had the great, very great privilege of serving, because that group makes all the decisions in between the twice a year meeting and I will miss all of that. I'm not bored, I'm not worn out, I'm not tired, I haven't lost my enthusiasm. I come to work every morning eager and happy, and I go home eager and happy. But it just feels right to consider that now is a time for change, for a new challenge. I have no regrets about 44 years of public service, even though I haven't had a raise in 20 years. As I move toward departure from the judicial corps, I want to urge all of you here to continue, indeed, to redouble your efforts to assist the Court, to encourage the Court, to protect the Court from threats, whatever their source, whether it's being swamped by excess filings of immigration appeals, interlocutory claim construction appeals, whatever it might be. And, even more importantly, to help try to assure that vacancies are filled with merit appointments of people who are well qualified to do the very difficult work that the country has entrusted to us. You know, our Court, like any other institution, lives in an environment, sort of an ecosystem. You are our environment. You are our support network. You are what helps keep us going. We are so fortunate to have so strong and so helpful a bar association, now for a quarter of a century. Doug Henderson is the father of this organization, and it started out in a modest way and it has just grown and grown and grown. It's grown in every imaginable way — size, membership, financing, staff, programs, influence, you name it. It's grown to something really, really great. Doug Henderson now is a great-grandfather, I learned during dinner. And so it's especially exciting that a whole new generation of leaders has come to the fore recently and currently leads this association. And so, in addition to the fatherhood of Henderson and also, of course, Hutchinson, we now have Jim Brookshire who is doing a terrific job, and a succession of fabulous head people, exemplified by Ed Reines, Joe Re, and now Scott McCaleb, a most excellent president. You have made a great thing, it's very important. Keep it going. Thank you and good night.