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International Trade Commissioner Dissents & Views: Trends & Impacts

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I. INTRODUCTION

Through subsequent actions following—and sparked by—one of the most influential dissents in American history, Dred Scott was freed from slavery.[1] Justice John McLean famously dissented: "a slave is not a mere chattel. He bears the impress of his Maker, and is amendable to the laws of God and man; and he is destined to an endless existence."[2] Dissenting opinions like this one have influenced the American justice system by providing an alternative viewpoint for the world to ponder and change to follow.[3]

The influence of these separate opinions is not confined to the American judicial branch. The U.S. International Trade Commission allows its Commissioners to file separate statements if their positions part from the majority or if they have additional views.[4] Commissioner statements were employed as tools of influence throughout the 1980s and 1990's in Section 337 investigations and beyond. Such statements notably disappeared throughout most of the 2000s, but have surged in recent years since Commissioner Dean Pinkert's dissent from the Commission's decision for Samsung against Apple.[5] This return to Commissioner statements has addressed, for example, the appropriateness and scope of cease-and-desist and exclusion orders, and factual issues within the investigations.[6] In effect, these statements advance theories from which future cases may draw, and allow individual Commissioners to play a larger role in what has often been an unruffled domain.[7] While dissents of the degree in Dred Scott affect core constitutional rights,[8] and the same cannot be said of dissents of ITC commissioners, these dissents may help a patent owner to enforce their constitutional rights in a patent against infringing imports.[9]

This article first addresses certain origins and influences upon ITC proceedings and Commissioner statements, particularly in comparison to Article III judge statements. Second, this article assesses the historical occurrences and recent resurgence of Commissioner dissents. Next, this article analyzes the trends of scope of recent Commissioner dissents, which lead into the

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[1] *Scott v. Sandford*, 60 U.S. 393, 601 (1857) (McLean, J. and Curtis, J., dissenting).
[2] *Id.* at 550 (McLean, J. and Curtis, J., dissenting).
[3] *See, e.g.*, Hon. Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010).
[4] Augustus Golden & Daniel Valencia, *The ITC's Evolving Approach To Cease and Desist Orders*, LAW360 (May 8, 2017, 5:10 PM), https://www.law360.com/articles/921762/the-itc-s-evolving-approach-to-cease-and-desist-orders.
[5] *See infra* text accompanying notes 29–36.
[6] *See infra* text accompanying notes 37–46.
[7] *See infra* text accompanying notes 58–75.
[8] *See* Hon. Ruth Bader Ginsburg, *supra* note 5, at 1.
[9] *See* U.S. Const. art. I, § 8; 19 U.S.C. § 1337(e)(1) (2012).

following section detailing the significance of these statements. Lastly, this article proposes predictions as to these statements for both the Commission and specific Commissioners.

II. DISCUSSION

A. The Unique Influences Upon ITC Deliberations and Commissioner Statements

Article III appeal courts generally take a straw poll after a hearing to gauge leanings and designate who will author the opinion. The author will then draft an opinion and try to build consensus around it. Appeal decisions thus result from the writing efforts of a single author, influenced by consensus-building efforts behind the closed-doors of the court.[10] The ITC, on the other hand, is subject to the Government in the Sunshine Act of 1976, requiring that the majority of a government agency, like the ITC, cannot meet in private before releasing their decisions to the public.[11] The Sunshine Act thus constrains consensus-building efforts by requiring that any meeting of half or more ITC Commissioners be on the public record.[12] Moreover at the ITC, opinions are the collective effort of the Commissioners, their staff, and the General Counsel's office, rather than the result of a primary author as in Article III appeal courts.[13]

ITC Commissioners have a toolbox of techniques at their disposal to voice opinions and influence policy. Commissioners can work to build a consensus amongst their colleagues about the various determinations and remedies that arise. They can release separate views to note their agreement with the majority's final decision, but disagreement with the logic used to reach that decision. Additional views can be released in which the Commissioner can either disagree with the majority's logic or, basically, say whatever they want. A Commissioner's final tool is the dissent. Commissioners can dissent from the majority's opinion to note their disagreement with the majority's determination and, sometimes, the logic used to reach that determination.

Commissioners are thus constrained in building consensus behind any particular opinion: with a full slate of six Commissioners, only one-on-one meetings are allowable behind closed doors; a meeting among three or more Commissioners requires public disclosure. Thus, dissents and additional views have particular importance at the ITC. Notably as well, the ITC differs from executive branch commissions, like the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), and the Securities & Exchange Commission (SEC): while

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[10] Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PENN. L. REV. 1319, 1320 (2009).

[11] 5 U.S.C. § 552b(c) (2012). It requires public disclosure of "deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." § 552b(a)(2). Thus, at the ITC, a meeting of a majority of Commissioners constitutes a decision making majority, requiring a public meeting with a public announcement. With only four current Commissioners, a meeting of three to discuss official agency business meets the requirements of the Government in Sunshine Act. § 552b(d)(4); *see also* § 552b(3)(e).

[12] 19 C.F.R. § 210.35 (2008) (allows for prehearing conferences). This requirement of public record could also explain the recent call by Commissioner Kieff and others for a return to Commission hearings to allow the full Commission to hear and debate arguments. *See* Jones Day's ITC Team, *Commissioner Kieff to Leave ITC*, JONES DAY (June 14, 2017), http://jonesdayitcblog.com/kieff-leave-itc/; *see also* Jones Day's ITC Team, *Commission Holds Section 337 Oral Argument*, JONES DAY (Nov. 22, 2016), http://jonesdayitcblog.com/section-337-oral-argument/.

[13] *See, e.g.*, 19 C.F.R. § 210.45 (2008) ("Commission" reviews Initial Determinations).

the ITC must be composed of an equal number of Democrat and Republican Commissioners, with the Chairman and Vice Chairman from differing parties, the FTC, FCC, SEC and others generally have a majority and leadership from the party of the President. The party-parity of the ITC thus further influences Commissioner statements—a dissent or additional view from an ITC Commissioner may influence the Commission toward agreement as a whole in future deliberations, whereas such a statement from a minority-party FTC, FCC, or SEC commissioner may be made simply to make a record of disagreement.[14]

In contrast to dissents from Article III courts or even of other Commissioners, ITC Commissioners dissent in a more conversational tone. This may result from the party-parity dynamic[15] or the lack of the ability to build consensus.[16] This is a unique feature of the ITC, and one that may help push Commissioners to dissent or disclose additional views, since these demonstrative statements are welcomed and found appealing.[17]

B. Ebbs and Flows in Commissioner Statements over the Years

1. The Number of Commissioner Statements Sharply Dropped In 2001

In the twenty-six years between 1975 and 2001, forty-one statements were identified in which a Commissioner either dissented, dissented-in-part, or provided separate or additional views to the Commission's majority opinion.[18] In ten of those instances, Commissioners expressed different views from the majority by joining in the opinion of an ITC Chairman or Vice Chairman.[19] Between 1978 and 1987, five ITC decisions received Presidential vetoes.[20] Statements from dissenting Commissioners seemed to sway Presidential vetoes in at least three of these cases.[21]

Starting in March 2001, there was a sharp drop in Commissioner statements. Only two Commissioner statements in one investigation were identified for nearly eleven years despite the

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[14] *See supra* note 14 and accompanying text.
[15] *Id.*
[16] *See supra* text accompanying notes 14–16.
[17] *See, e.g.*, *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers* ("*Electronic Devices*"), Inv. No. 337-TA-794, Dissent of Commissioner Pinkert at 1 (July 5, 2013) (Commissioner Pinkert only mentions the majority opinion once in offer his views.).
[18] To provide the number of Commissioner opinions, all cases were manually reviewed starting from 337-TA-1 to 337-TA-1015, which was the most current Section 337 decision at the time of this writing. For the list of cases found, see Appendix A: Commissioner Dissents and Views 1976-2017.
[19] *See, e.g.*, *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Handsets* ("*Baseband Processor Chips*"), Inv. No. 337-TA-543, Additional and Dissenting Views of Chairman Pearson and Commissioner Pinkert at 7 (June 19, 2007).
[20] Landon J. Greene, *Alternate Reality: Limiting the Scope of Presidential Authority under § 337*, 24 Fed. Cir. B.J. 111, 114-15 (Each of the five vetoes concerned ITC decisions to exclude certain infringing products from United States markets.).
[21] *See Certain Welded Stainless Steel Pipe and Tube*, Inv. No. 337-TA-29 (Feb. 22, 1978); *see also Certain Dynamic Random Access Memories, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-242 (Sept. 21, 1987); *Certain Alkaline Batteries*, Inv. No. 337-TA-165 (Nov. 1, 1984).

boom in Section 337 investigations from forty-one in 2001 to sixty-nine in 2011.[22] Likewise, no ITC decisions during this time period received Presidential vetoes. Before the rise in ITC investigations in 2011, the nearly six-year hiatus from Commissioner statements ended in June 2007 with Chairman Pearson and Commissioner Pinkert's joint dissent in *Certain Baseband Processor Chips.*[23] The majority decided to allow continued importation of devices imported into the United States as of a particular date. Commissioners Pearson and Pinkert dissented from the majority's decision finding that instituting a downstream limited exclusion order banning cell phones containing the infringing chips was against the public interest.[24] Commissioners Pinkert and Pearson noted that this "grandfathering remedy" may inhibit the development of cell phone technology over time.[25]

Two years later, in *Certain Personal Data and Mobile Communications Devices,* Commissioner Pinkert provided Additional Views emphasizing that the existence of substitutes for the infringing device should not obviate consideration of the likely impact of exclusion on the range of choices available to consumers.[26] Though he agreed with the majority's exclusion order in this case, the disagreement on the legal standard to apply signaled that a long-standing disagreement amongst ITC Commissioners over the application of cease-and-desist and exclusion orders was reigniting.[27]

The next identified statement may have helped to push for an executive veto of an ITC decision. In 2013, Commissioner Pinkert dissented in the ITC decision in the widespread Apple-Samsung battle. As detailed in the following section, this dissent took the debate surrounding exclusion orders and their application from the ITC to the hands of the Executive branch.[28]

2. Chairman Pinkert's Seminal Apple-Samsung Dissent

The weight of the public interest with regard to the exclusion of infringing technologies remains a popular subject of disagreement at the ITC. If an article is found to violate Section 337, the act requires it be excluded from entry into the United States, *unless* such exclusion is

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[22] *Section 337 Statistics*, U.S. INT'L TRADE COMM., https://www.usitc.gov/press_room/337_stats.htm.
[23] *Baseband Processor Chips*, Inv. No. 337-TA-543, Additional and Dissenting Views of Chairman Pearson and Commissioner Pinkert (June 19, 2007).
[24] *Id.*
[25] *Id.* at 30. Commissioner Lane agreed with the majority's opinion, but disagreed with their analysis of the EPROM factors, which are designed to determine the scope and remedy of an exclusion order in a Section 337 investigation. *Baseband Processor Chips*, Inv. No. 337-TA-543, Separate, Concurring Views of Commissioner Lane at 1 (June 19, 2007).
[26] *Certain Personal Data and Mobile Communications Devices and Related Software,* Inv. No. 337-TA-710, Additional Views of Commissioner Pinkert at 1 (Dec. 29, 2011).
[27] *Id.* The exclusion order prevents entry of items into the United States while the cease-and-desist order targets products that are already in domestic inventory. *A look at the ITC's exclusion and cease & desist orders in the Samsung-Apple case (337-TA-794)*, ESSENTIAL PATENT BLOG (June 6, 2013), http://www.essentialpatentblog.com/2013/06/a-look-at-the-itcs-exclusion-order-samsung-apple-337-ta-794/. The exclusion orders are a more limited remedy; thus, Commissioners disagree over the standard and how much the exclusion order would affect the public interest.
[28] *Electronic Devices,* Dissent of Commissioner Pinkert at 1.

against the public interest.[29] Since 2011, eight of the fifteen Commissioner statements identified have addressed the appropriateness of issuing remedial orders in light of the public interest.

Commissioner Pinkert's Apple-Samsung dissent was such a statement. In 2013, the ITC majority ruled against Apple to exclude various versions of the iPhone, iPad, and iPod Touch that infringed Samsung's patents.[30] Commissioner Pinkert dissented from the majority's decision. Pinkert reasoned that the majority did not apply the public interest factors correctly in determining to issue the limited exclusion and cease and desist orders, particularly in light of Samsung's commitment to license its standards-essential patents on fair, reasonable, and non-discriminatory terms.[31] Commissioner Pinkert opined that the exclusion of the infringing Apple devices would deny entry-level devices to those who rely on the mobile network, and consumers would experience high switching costs to obtain a similar alternative.[32]

It seems Commissioner Pinkert's dissent influenced U.S. Trade Representative Michael B.G. Froman to implement a veto of the ITC's remedial orders on behalf of the President.[33] Ambassador Froman, like Commissioner Pinkert, cited public interest concerns in his disapproval of the Commission's decision.[34] In particular, Ambassador Froman cited the strong effects on consumers and the market competition that limited exclusion and cease and desist orders would cause.[35] Ambassador Froman's veto of the ITC's decision was the first presidential veto of an ITC decision since the President's veto of the remedy in *Certain Dynamic Random Access Memories* in December 1987, and showcases the potential effect of dissents like Commissioner Pinkert's.[36]

C. Commissioner Statements Since 2011 Follow Topical Trends

1. Debate over Remedial Orders Has Been Reignited

Since the decision in *Certain Baseband Processor Chips* in 2011, there have been seventeen Commissioner statements and one statement in which Commissioners joined in the opinion of a Chairman or Vice Chairman. Unsurprisingly, eight out of the seventeen Commissioner statements covered issues surrounding cease and desist and limited exclusion orders. As discussed earlier, many of the Commissioner statements have concerned the legal standards involved in the application of cease and desist and limited exclusion orders.[37] Statements over the legal standards comprise two of the seventeen recent statements, and further

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[29] 19 U.S.C. § 1337(e)(1) (2012).
[30] *Electronic Devices*, Inv. No. 337-TA-794, Comm'n Op. at 119 (July 5, 2013).
[31] *Electronic Devices*, Inv. No. 337-TA-794, Dissent of Commissioner Pinkert at 1 (July 5, 2013).
[32] *Id.* at 7 (iPhone 4 and iPad 2 3G).
[33] Michael B.G. Froman, RE: Disapproval of the U.S. International Trade Commission's Determination in the Matter of *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 (Aug. 3, 2013).
[34] *Id.*
[35] *Id.*
[36] Presidential Disapproval of a Section 337 Determination, 52 Fed. Reg. 46,011 (Nov. 27, 1987).
[37] *See supra* text accompanying notes 29–30.

reignite the strong disagreement over cease and desist and limited exclusion orders at the ITC in the past.[38]

The trend in Commissioner statements continued after *Certain Electronic Devices* in 2013. Since May 2016, there have been eight statements. Seven of them have covered issues surrounding cease and desist or exclusion orders. These recent statements range from mere requests for information[39] to strong disagreements regarding an exemption in the majority's exclusion order for ATM replacement parts.[40]

2. Recent Statements Address Legal or Factual Analysis

Commissioner statements regarding proper legal analysis comprise ten of the most recent seventeen identified statements For example, in 2014's *Certain Computers and Computer Peripheral Devices*, Commissioner Aranoff disagreed with the majority view that a complainant is required to prove the existence of "articles" protected by the relevant patent under Section 1337(a)(3)(C) as to licensing.[41] She based her opinion on a differing interpretation of 19 U.S.C. §1337, in light of the Federal Circuit's holdings in *InterDigital I* and *II* and the language and legislative history of the 1988 amendments to Section 337.[42]

Disputes surrounding factual analysis comprised five out of the last seventeen identified Commissioner statements, though these disputes seem to have tailed off as of early 2016. In particular, the last eight Commissioner statements have not touched issues related to factual analysis. With subjects ranging from whether respondents have shown clear and convincing evidence that complainant's patent claims are invalid due to lack of support from the specification[43] to whether the facts supported an exclusion order as in the public interest,[44] there is no recognizable trend regarding the subject matter of these factual analyses.

Disagreements over the interpretation of statutory terms have been the center of two of the last seventeen Commissioner statements identified.[45] Most recently, in April 2017, Commissioner Kieff filed additional views as to his understanding of the Commission's opinion, namely that the term "sales" does not include "rentals" that are temporary in nature.[46] Prominent

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[38] *See infra* text accompanying notes 41–42.
[39] *Certain Electric Skincare Devices, Brushes and Chargers Therefor, and Kits Containing the Same,* Inv. No. 337-TA-959, Separate Views of Commissioner Kieff, at 1 (Feb. 13, 2017) (information from entities concerning whether there is a practice of not issuing CDOs in the absence of commercially significant inventory and whether the law provides a presumption against a CDO unless the patentee proves the existence of such inventory).
[40] *Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same,* Inv. No. 337-TA-972, Dissent of Commissioner Kieff, at 1 (June 12, 2017).
[41] *Certain Computers and Computer Peripheral Devices, and Components Thereof, and Products Containing the Same,* Inv. No. 337-TA-841, Dissent of Commissioner Aranoff, at 1 (Jan. 9, 2014).
[42] *Id.*
[43] *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same,* Inv. No. 337-TA-929, Separate Opinion Dissenting-In-Part of Commissioner Kieff at 1 (Mar. 17, 2016).
[44] *Baseband Processor Chips*, Inv. No. 337-TA-543, Additional and Dissenting Views of Chairman Pearson and Commissioner Pinkert at 1 (June 19, 2007); *Electronic Devices*, Inv. No. 337-TA-794, Dissent of Commissioner Pinkert at 1 (July 5, 2013).
[45] *See, e.g., Certain Semiconductor Devices, Semiconductor Device Packages, and Products Containing Same* ("*Semiconductor Devices*"), Inv. No. 337-TA-1010 (June 20, 2016).
[46] *Semiconductor Devices*, Inv. No. 337-TA-1010, Additional Views of Commissioner Kieff at 2 (Apr. 18, 2017).

issues of interpretation seem to be holding steady. From 1993-2001, one out of seven Commissioner statements covered issues of interpretation. These more recent statements have served to contribute ideas for future direction to ITC jurisprudence.

3. Commissioners Reveal Trends in the Frequency of Their Statements

There are also recognizable trends regarding particular Commissioners. These trends can involve both the frequency and subject matter of their statements. The statements of current Commissioners Johanson, Schmidtlein, Broadbent, and Williamson are here analyzed along with the statements released by previous Commissioners Kieff and Pinkert.

Among the current Commissioners, only Commissioners Broadbent and Williamson have not provided individual statements.[47] Commissioner Schmidtlein has proffered two separate views and one dissent as a Commissioner along with one separate view during her time as Chairman. Commissioner Schmidtlein's separate views both concerned the appropriateness of issuing cease and desist orders. As a Commissioner, her most recent separate views came as a footnote in August 2016. She agreed with the Commission's opinion that domestic inventory provides a basis for cease and desist orders, but disagreed that it is an absolute statutory requirement.[48] Her other separate views expressed her opinion that sales of domestic industry products at the time of the complaint are qualifying activities for domestic industry import.[49]

Only one individual statement from Commissioner Johanson was identified, but it was a very important one. Commissioner Johanson dissented in *Certain Digital Models, Digital Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances*.[50] This dissent was referenced by the Court of Appeals for the Federal Circuit in their decision to overturn the ITC majority's decision in *ClearCorrect*.[51]

Commissioner Kieff made up a strong proportion of the Commissioner statements during his tenure on the Commission from August 2013 to June 2017. Commissioner Kieff made seven out of the thirteen statements that were provided by Commissioners during that time. The subject matter of Commissioner Kieff's statements included noting his concern with an increasing

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[47] However, Commissioner Broadbent did release additional views as Chairman, along with Vice Chairman Pinkert and Commissioners Williamson and Johanson, clarifying when the ITC can request a briefing. *Certain Dental Implants*, Inv. No. 337-TA-934, Additional Views of Chairman Broadbent, Vice Chairman Pinkert and Commissioners Williamson and Johanson (May 11, 2016).

[48] *Certain Three-Dimensional Cinema Systems and Components Thereof*, Inv. No. 337-TA-939, Separate Views of Commissioner Schmidtlein (Aug. 23, 2016).

[49] *Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, Separate Views of Commissioner Schmidtlein (Oct. 30, 2015).

[50] *Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Appliances, The Appliances Made Therefrom, and Methods of Making the Same*, Inv. No. 337-TA-833, Dissent of Commissioner Johanson at 1 (Apr. 10, 2014).

[51] *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1297 (Fed. Cir. 2015) ("We agree with Commissioner David S. Johanson who argued in his dissent that "[i]ndeed, [the cease and desist] provision demonstrates that the definition of articles for Section 337(f) must be the same as the rest of the statute; otherwise the provision for replacement [of cease and desist orders with exclusion orders] would be rendered a nullity and read out of the statute.").

diversity of opinions within the Commission over the authority to issue cease and desist orders[52] and whether commercially significant inventory is the only way to show that a cease and desist order is appropriate.[53] Indeed, five out of Commissioner Kieff's seven statements concerned the appropriateness of cease and desist or limited exclusion orders.

Commissioner Pinkert was sworn in on February 26, 2007.[54] His service ended on February 28, 2017. Three statements that he released as Commissioner were identified, and one statement that he joined as Vice Chairman. He made the three statements, which concerned cease and desist orders, between 2011 to 2013. His dissent in *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers* was particularly persuasive. It may have led to Ambassador Froman's veto of the majority decision.[55] Pinkert also released a statement noting that the existence of substitutes for the infringing devices does not obviate consideration of the likely impact of exclusion on the range of choices available to consumers.[56]

D. The Resurgence of Commissioner Statements Is Influencing Presidential- and Appeal-Review, and Subsequent ITC Decisions

After the Executive branch receives an ITC decision, under delegated authority from the President the Office of the United States Trade Representative has sixty days to "disapprove" of the decision and cancel it, but he may only disapprove for policy reasons.[57] Presidents have only vetoed ITC decisions regarding Section 337 matters five times.[58]

If a Section 337 decision is appealed, it goes directly to the United States Court of Appeals for the Federal Circuit,[59] where the judges can read both the majority Commission opinion and individual Commissioner statements. In previous cases, these Federal Circuit judges have cited and agreed with a dissenting Commissioner's opinion. In 2014, the ITC decided *Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances*, in which Commissioner Johanson dissented from the

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[52] *Certain Electric Skincare Devices, Brushes and Chargers Therefor, and Kits Containing the Same,* Inv. No. 337-TA-959, Separate Views of Commissioner Kieff at 1 (Feb. 13, 2017).
[53] *Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof,* Inv. No. 337-TA-965, Separate Views of Commissioner Kieff at 1 (Feb. 1, 2017).
[54] Pinkert Named Vice Chairman of U.S. International Trade Commission, U.S. INT'L TRADE COMM. (June 17, 2014) https://www.usitc.gov/press_room/news_release/2014/er0617mm2.htm.
[55] Michael B.G. Froman, RE: Disapproval of the U.S. International Trade Commission's Determination in the Matter of *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 (Aug. 3, 2013).
[56] *Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, Additional Views of Commissioner Pinkert at 1 (Dec. 29, 2011).
[57] 19 U.S.C. § 1337(j)(2) (2012). In 2005, President George W. Bush delegated the Review Power under Section Section 337(j) of the Tariff Act of 1930 to the Office of the United States Trade Representative. Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43,251 (July 26, 2005).
[58] Landon J. Greene, *Alternate Reality: Limiting the Scope of Presidential Authority under § 337*, 24 Fed. Cir. B.J. 111, 114.
[59] § 1337(c).

majority's interpretation of "articles" in Section 337.[60] In his opinion, "article" did not cover the purely digital transmissions that were at issue in the case.[61]

ClearCorrect appealed the ITC's ruling and the Court of Appeals for the Federal Circuit cited Commissioner Johanson's dissent in agreement.[62] The Court agreed "a definition of 'articles' that includes intangibles would read out the very purpose behind the inclusion of cease and desist orders yield[ing] further evidence that the term article is meant to be limited to tangibles."[63] Before *ClearCorrect* the most recent instance identified in which the Federal Circuit relied on a dissenting Commissioner occurred in 1991. The Federal Circuit agreed with Commissioner Rohr's dissent in *Certain Internal Mixing Devices*, where he rejected the Commission majority's decision to terminate a Section 337 investigation because it coincided with arbitration.[64]

ITC Commissioners may also cite to other Commissioner statements in majority opinions or their own individual statements. In *Certain Semiconductor Devices, Semiconductor Device Packages, and Products Containing Same*, Commissioner Kieff's additional views statement cites to his and Commissioner Schmidtlein's separate views statements in *Certain Electric Skin Care Devices* to show examples of the consistent disagreement amongst ITC Commissioners regarding cease and desist orders.[65] Commissioner Kieff also cites to a previous additional views statement of his in *Certain Electric Skin Care Devices* to indicate the importance of evaluating the total risk of a cease and desist order.[66]

E. Future Impacts and Trends of Commissioner Statements

1. Statements Regarding Cease and Desist and Limited Exclusion Orders Will Likely Continued

It seems likely that a steady stream of differing opinions on the appropriateness and scope of cease and desist and limited exclusion orders will continue, based on recent trends. It is difficult to predict a trend for other issues as there is not a consistent disagreement surrounding particular issues outside of the aforementioned issue. Legal issues are likely to remain more prevalent than factual issues and interpretive issues due to the seemingly strong disagreement over the tests involved to determine domestic industry and the tests surrounding the issuance of cease and desist orders. Factual issues should remain noticeable, particularly with the application of the public interest factors and *EPROMS* analysis for cease and desist and limited exclusion orders. From the statements identified, the dissents and views show a disagreement about the extent to which exclusion of certain infringing products weighs against the public interest in any

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[60] *Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making the Same* ("*Digital Models*"), Inv. No. 337-TA-833 (Apr. 10, 2014).
[61] *Digital Models*, Inv. No. 337-TA-833, Dissent of Commissioner Johanson at 1 (June 11, 2014).
[62] *ClearCorrect Operating, LLC vITC*, 810 F.3d 1283, 1297 (Fed. Cir. 2015).
[63] *Id.* (alteration in quotation).
[64] *Farrel Corp. v. ITC*, 949 F.2d 1147, 1156 (Fed. Cir. 1991).
[65] *Semiconductor Devices*, Inv. No. 337-TA-1010, Additional Views of Commissioner Kieff at 2 n.1 (June 20, 2016).
[66] *Certain Electric Skin Care Devices, Brushes, and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Separate Views of Commissioner Kieff at 4 n.8 (Feb. 13, 2017).

one case. Public interest factors affect the determination of the remedy and are a striking difference between ITC and Article III court remedies.[67] Commissioners will need to continue to weigh the patentee's interests of stopping infringement against the respondent's interests of allowing devices that, though infringing, provide substantial, unique benefits to the public.[68]

2. The Departure of Commissioners Kieff and Pinkert Indicates a Possible Decrease in Commissioner Statements

As an academic with a technical background and long-standing connections to the law and economics of both trade and intellectual property, Commissioner Kieff's debut as an ITC Commissioner brought excitement to the agency. His significant number of statements could be seen as an open exchange of ideas and an increase in transparency at the ITC. His willingness to release additional statements may have encouraged his fellow Commissioners to release their own statements, further contributing to transparency and openness.

With the departure of Commissioner Kieff, there may well be a downturn in the frequency of Commissioner statements. Commissioner Kieff made seven Commissioner statements while at the ITC, while the current ITC Commissioners have made a total of five.[69] While the subject of cease and desist and limited exclusion orders was particularly popular among former Commissioners, the statements from the four current Commissioners seem to cover a wider range of topics. Thus, it seems likely that Commissioner statements will dip in the near future, but will cover a larger realm of subject matter than in previous few years. Similarly, Commissioner Pinkert, who led the resurgence of Commissioner statements, has also moved on from the Commission.

3. Commissioner Statements Will Continue to Play a Role in the Future

The President has praised Ronald Reagan on his policies surrounding trade.[70] As Reagan had the most Presidential vetoes of ITC exclusion orders,[71] one must wonder how the power of the Presidential veto will be used under the current administration. Will we see a Reaganesque presidency in which the President vetoes more than one ITC exclusion order, or will we see a presidency in which the Presidential veto power goes unused? It seems that the President will want to exclude infringing products.

As the Federal Circuit continues to review appeals from ITC decisions,[72] this outlet will provide an opportunity for Commissioners who do not fully agree with a Commission's majority

[67] *Contra eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 400 (2006).
[68] 19 U.S.C. §1337(d)(1) (2012).
[69] Of the current Commissioners, Commissioner Schmidtlein has released three statements while Commissioners Williamson and Broadbent have not released any. *See* Appendix A: Commissioner Dissents & Views 1976-2017.
[70] Patrick Gillespie, *Trump praises Reagan on trade -- but saw it differently in 1989*, CNN MONEY (Oct. 19, 2016, 10:19 AM), http://money.cnn.com/2016/10/19/news/economy/trump-reagan-japan-trade-1989/index.html.
[71] Reagan vetoed three ITC decisions, out of the total five in history. *See* Angelo Young, *Barack Obama Overrides US Global Trade Watchdog's Ruling On Apple Products; The Last President To Veto ITC Ruling Was Ronald Reagan In 1987*, INTERNATIONAL BUSINESS TIMES (Aug. 4, 2013, 3:12 PM), http://www.ibtimes.com/barack-obama-overrides-us-global-trade-watchdogs-ruling-apple-products-last-president-1371073.
[72] § 1337(c).

opinion to make their voices heard through separate statements. In the past, one identified dissent may have influenced a Presidential veto,[73] and two dissents were cited in Courts of Appeals decisions that agreed with the dissenting Commissioner.[74] Though the majority of these Commissioner statements do not seem to lead to significant policy changes, of the statements that do, their ripples can be felt throughout the various legal and political systems.

III. CONCLUSION

Commissioners can work to build a consensus amongst their colleagues about the various determinations and remedies at the ITC. Commissioners can release views to note their agreement with the majority's final decision, but identify points of disagreement with the logic in the decision or any other views. More importantly, Commissioners can dissent from the majority's opinion to note their disagreement with the majority's determination and, sometimes, the logic used to reach that determination. The marked rise in dissents since 2011 evidences a change in the landscape of the ITC and the role that Commissioners play. These Commissioner statements may have led to one executive veto and have been cited in two Federal Circuit decisions, just since 2013. Thus, as these statements continue, their effects and impacts will likely increase as well.

[73] Michael B.G. Froman, RE: Disapproval of the U.S. International Trade Commission's Determination in the Matter of *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 (Aug. 3, 2013).

[74] *See Farrel Corp.*, 949 F.2d at 1156; *see also ClearCorrect Operating*, 810 F.3d at 1297.

Appendix A: Commissioner Dissents & Views 1976-2017

Case	Caption	Commissioner	Opinion	Date
337-TA-972	Certain Automated Teller Machines, ATM Modules	Kieff	Dissent	06/12/17
337-TA-1010	Certain Semiconductor Devices, Semiconductor Device Packages	Kieff	Separate Views	04/18/17
337-TA-959	Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits	Kieff	Separate Views	02/13/17
337-TA-965	Certain Table Saws Incorporating Active Injury Mitigation Technology	Kieff	Separate Views	01/27/17
337-TA-939	Certain Three-Dimensional Cinema Systems	Kieff	Separate Views	08/23/16
337-TA-934	Certain Dental Implants	Chairman Broadbent; Vice Chairman Pinkert; Williamson; Johanson	Additional Views	05/11/16
337-TA-934	Certain Dental Implants	Kieff	Additional Views	05/11/16
337-TA-929	Certain Beverage Brewing Capsules	Kieff	Dissent-In-Part	04/05/16
337-TA-883	Certain Opaque Polymers	Schmidtlein	Dissent	04/30/15
337-TA-833	Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances	Johanson	Dissent	04/09/14
337-TA-841	Certain Computers and Computer Peripheral Devices	Aranoff	Dissent	01/09/14
337-TA-794	Certain Electronic Devices, Including Wireless Communication Devices, Portable Music And Data Processing Devices, And Tablet Computers	Pinkert	Dissent	07/05/13
337-TA-710	Certain Personal Data And Mobile Communications Devices	Pinkert	Additional Views	12/29/11
337-TA-543	Certain Color Television Receivers and Color Display Monitors	Chairman Pearson; Pinkert	Dissent-In-Part	06/07/07
337-TA-543	Certain Color Television Receivers and Color Display Monitors	Lane	Separate Views	06/07/07
No Commissioner Statements (from 02/13/01 to 10/01/11)				
337-TA-429	Certain Bar Clamps, Bar Clamp Pads, and Related Packaging Display	Askey	Dissent-In-Part	02/13/01
337-TA-372	Certain Neodymium-Iron-Boron Magnets, Magnet Alloys	Crawford	Dissent	11/01/97
337-TA-380	Certain Agricultural Tractors Under 50 Power Take-Off Horsepower	Crawford	Dissent	02/25/97
337-TA-148	Certain Processes for the Manufacture of Skinless Sausage Casings	Rohr; Newquist	Separate Views	09/01/94

337-TA-350	Certain Sputtered Carbon Coated Computer Disks, Including Disk Drives	Chairman Newquist; Nuzum	Additional Views	11/01/93
337-TA-293	Certain Crystalline Cefadroxil Monohydrate	Chairman Brunsdale; Vice Chairman Cass	Dissent	06/01/91
337-TA-317	Certain Internal Mixing Devices	Rohr	Dissent	11/02/90
337-TA-289	Certain Concealed Cabinet Hinges and Mounting Plates	Vice Chairman Cass	Dissent-In-Part	01/08/90
337-TA-276	Certain Erasable Programmable Read-Only Memories	Eckes; Rohr	Dissent	05/01/89
337-TA-276	Certain Erasable Programmable Read-Only Memories	Lodwick	Additional Views	05/01/89
337-TA-266	Certain Reclosable Plastic Bags and Tubing	Eckes; Rohr	Dissent	01/01/88
337-TA-242	Certain Dynamic Random Access Memories	Eckes; Rohr	Dissent	10/01/87
337-TA-243	Certain Luggage Products	Vice Chairman Brunsdale; Rohr	Additional Views	03/27/87
337-TA-237	Certain Miniature Hacksaws	Chairman Liebeler; Vice Chairman Brunsdale	Additional Views	01/15/87
337-TA-231	Certain Soft Sculpture Dolls	Chairman Liebeler; Vice Chairman Brunsdale	Additional Views	11/07/86
337-TA-170	Certain Bag Closure Clips	Vice Chairman Liebeler	Dissent	03/01/85
337-TA-213	Certain Fluidized Bed Combustion Systems	Rohr	Dissent	01/01/85
337-TA-165	Certain Alkaline Batteries	Vice Chairman Liebeler	Additional Views	11/01/84
337-TA-182	Certain Fluidized Supporting Apparatus	Vice Chairman Liebeler	Dissent-In-Part	10/01/84
337-TA-112	Certain Cube Puzzles	Stern	Dissent	12/15/82
337-TA-122	Certain Miniature Battery-Operated, All Terrain, Wheeled Vehicles	Stern	Additional Views	10/01/82
337-TA-122	Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles	Haggart	Additional Views	10/01/82
337-TA-105	Certain Coin-Operated Audiovisual Games	Frank	Dissent	01/04/82
337-TA-90	Certain Airless Paint Spray Pumps	Vice Chairman Calhoun; Frank	Additional Views	11/24/81
337-TA-88	Certain Spring Assemblies and Methods for Their Manufacture	Stern	Additional Views	07/14/81
337-TA-82	Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper	Stern	Dissent	04/01/81
337-TA-85	Certain Slide Fastener Stringers	Moore	Dissent	01/12/81
337-TA-37	Certain Skateboards and Platforms Therefor	Stern	Dissent	10/01/80

337-TA-37	Certain Skateboards and Platforms Therefor	Chairman Parker; Vice Chairman Alberger	Additional Views	10/01/80
337-TA-68	Certain Surveying Devices	Chairman Alberger; Stern	Dissent	07/01/80
337-TA-62	Certain Rotary Scraping Tools	Vice Chairman Alberger; Stern	Additional Views	01/01/80
337-TA-60	Certain Automatic Crankpin Grinders	Parker	Separate Views	12/01/79
337-TA-64		Alberger; Stern	Separate Views	11/16/79
337-TA-56	Certain Thermometer Sheath Packages	Parker	Dissent	07/25/79
337-TA-55	Certain Novelty Glasses	Parker	Dissent	07/01/79
337-TA-3	Doxycycline	Moore; Stern	Concur-In-Part, Dissent-In-Part	04/12/79
337-TA-22	Certain Reclosable Plastic Bags	Ablondi	Separate Views	01/17/77
337-TA-5	Chain Door Locks	Parker	Separate Views	04/03/76
337-TA-2	Convertible Game Tables	Parker	Dissent-In-Part	04/02/76
		Chairman Schmidtlein	Separate Views	
		Chairman Alberger	Additional Views	
		Schmidtlein	Separate Views	
		Rohr	Additional Views	
		Vice Chairman Watson; Brunsdale; Crawford	Additional Views	