

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:

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**“EVOLUTION OF SECTION 337 DECISION-MAKING
AT THE ITC: ROLES OF THE COMMISSIONERS, ALJS,
GENERAL COUNSEL, AND OUII”**

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UNITED STATES OF AMERICA
INTERNATIONAL TRADE COMMISSION

"Evolution of Section 337 Decision-Making at the ITC:
Roles of The Commissioners, ALJs,
General Counsel, and OUII"

Wednesday, May 11, 2016

Ronald Reagan Building
Rotunda Room
1300 Pennsylvania Avenue, N.W.
Washington, D.C.

1 SPEAKERS:

2

3 Sara Hamblim

4 Moderator: Barbara Murphy

5 Founding Partner, Foster, Murphy, Altman & Nickel, P.C.

6

7 Jim Adduci, Founding and Managing Partner,

8 Adduci, Mastriani & Schaumberg, LLP

9

10 Jennifer A. Hillman, Former USITC Commissioner,

11 Cassidy Levy & Kent, Washington, D.C.

12 Visiting Professor of Law, Georgetown Law Center

13

14 Jean H. Jackson, Assistant General Counsel

15 U.S. International Trade Commission

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17 LYNN I. LEVINE, Senior Of Counsel

18 Morrison & Foerster LLP

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P R O C E E D I N G S

(7:48 p.m.)

MS. Hamblim: Everyone, could I have your attention, please? Hello, I would like to welcome everyone to the ITC TLA 2016 Spring Meeting.

First I would like to recognize our honored guests from the Commission that we have with us today. I believe we have Chairman Broadbent, Vice Chairman Pinkert, Chairman Williamson, and Chairman--or, sorry, I beg your pardon, Commissioner Williamson and Commissioner Schmidtlein.

From the Office of the ALJs I believe we have Charles Bullock, Judge Ted Essex, Judge Shaw, and Judge McNamara.

From the General Counsel, I believe we have General Counsel Dominic Bianchi, as well as Jean Jackson and Wayne Harrington.

I would also like to recognize Margaret McDonald from the Office of Very Important Investigations, and Lisa Barton from the Secretary's office.

So our panel presentation tonight is entitled "The Evolution of Section 337 Decision-Making at The ITC: The Roles of the Commissioners, the ALJs, the General Counsel, and OUII."

This is the second in a series of history panels

1 that have been organized this year to celebrate the
2 Commission's Centennial. I would like to thank Jim Altman
3 for his work on behalf of the AIPLA in organizing these
4 panels which are being co-sponsored by the ITC TLA. And I
5 would also like to thank Stephanie Shamburg who as president
6 elect has the honor of organizing this meeting this year.

7 Now I would like to introduce our moderator for
8 our panel, Barbara Murphy. Ms. Murphy is a former president of
9 the ITC TLA herself. She has nearly 30 years of
10 experience in trade, including in Section 337, and she is
11 currently a partner at Foster, Murphy, Altman & Nickel.

12 And with that, Barbara, I would ask you to
13 introduce the rest of the panel.

14 MS. MURPHY: Thank you, Sara.

15 (Applause.)

16 MS. MURPHY: We are really fortunate tonight to
17 have a great panel of speakers, each of whom owe some of
18 their expertise to time spent at the Commission. For some,
19 including myself, it was a very short time. But for others
20 it was much of their careers.

21 But over the past 40 years there's only one year,
22 1980, that someone on this panel was not working at the
23 Commission, and I think that's pretty cool.

24 That timeline starts with Jim Adduci, a long-time
25 partner at Adduci, Mastriani & Schaumberg. He worked as a

1 legal adviser to Commissioner Al Ablondi from 1976 to 1979.
2 After that, I worked at what is now known as OEYI during law
3 school, and that was in 1981 and 1982. So there's the gap
4 between Jim and me.

5 Lynn Levine, now Senior Of Counsel at Morrison &
6 Foerster, arrived in 1983 as an investigative attorney at
7 OEYI, rising to director of OEYI, a position she held for 25
8 years.

9 Next we have Jean Jackson, who is the only
10 current employee of the Commission. And she has worked in
11 the General Counsel's Office since 1985, becoming Assistant
12 General Counsel for Section 337 in 2004.

13 Finally, we have Jennifer Hillman, a partner now
14 at Cassidy Levy & Kent, who served as a Commissioner from
15 1998 to 2007, which included a term as Vice Chair of the
16 Commission from June 2002 through June 2004. And during
17 Jennifer's nine-year tenure as Commissioner, all three of
18 the other women on the panel overlapped at the ITC.

19 Tonight our panel is going to talk about all the
20 different roles the various offices at the ITC play in
21 Section 337 determinations. They will focus on important
22 changes and developments within each of these areas over the
23 years, and we will also hear about some key cases and
24 watershed moments. Hopefully we will get some inside scoop
25 about things that most people are not aware of.

1 First off, though, Jean will briefly explain how
2 determinations are made in Section 337 cases, and how that
3 has changed over the years.

4 Jean?

5 MS. JACKSON: Okay. I guess this [microphone] is
6 on. Before the 1974 Act, the Commission operated a lot
7 differently than it does now. It did not actually make a
8 determination; instead, it made a recommendation to the
9 President on whether an exclusion order should issue.

10 After the complaint and responses were filed, a
11 team of a lawyer, an economist, an industry analyst,
12 independently gathered information. They did field trips,
13 and did reports, and sent questionnaires out, and made a
14 recommendation to the Commission whether there should be
15 further investigation, or whether the case should be
16 dismissed. Or, if there should be temporary relief issued
17 during the full investigation.

18 If the recommendation for a full investigation
19 was accepted, the Commission would hold a hearing. They
20 would publish a Federal Register Notice, and it would state
21 the date of the hearing, and what the hearing would be
22 about.

23 The hearing was conducted under relaxed rules of
24 evidence. The Commissioners ask questions. The General
25 Counsel and attorney ask questions. Witnesses testify. At

1 the end of that, the Commission issued its findings and
2 allowed promotions for rehearing.

3 After that time had passed, it made its
4 recommendations to the President if an exclusion order
5 should issue.

6 In 1974, a Trade Act was passed that applied the
7 Administrative Procedures Act to Commission investigations. And
8 this was a watershed moment in the Commission.
9 Previously there had not been a lot of investigations filed.
10 According to Wayne's treatise he wrote, there were about
11 seven a year up until the late 1960s and cases started to
12 increase then. The changes to 337 became effective in
13 January of 1975.

14 The main difference was that now there had to be
15 a hearing in accordance with the APA and had to be conducted
16 on the record with opportunity to cross-examine witnesses.
17 It required a formal hearing.

18 At first, individual Commissioners presided over
19 these hearings. That continued for some indefinite time
20 until the hearing examiners, which are now called ALJs,
21 began working at the Commission.

22 There was a period of time around 1980 where I
23 see the rules talk about "either/or." Either the Commission
24 will be presiding, or the presiding officer will be
25 presiding. So it looks like there was a period of time

1 where it was not definite for ALJs. It was also the
2 Commission who also heard hearings.

3 Petitions for review were not immediately made
4 available. Looking through the rules, it wasn't until 1980
5 that the rules allowed for a petition for review. And at
6 that time the judges were issuing recommended
7 determinations. So petitions for review could be filed for
8 those, but they would not be--but the judge's decision would
9 not go into effect unless the Commission looked over every
10 bit of it and said what part it was adopting, or reversing,
11 or modifying.

12 In 1981, a rule was proposed that took effect in
13 1982 that now called for initial determinations from the
14 ALJ. The notice of proposed rulemaking indicates this was
15 to streamline the process. The Commission at that time
16 thought it wouldn't have to deal with every issue; that it
17 could just accept ALJ's determinations and the whole
18 procedure would be streamlined.

19 Since that change with the initial determinations
20 and the petitions for review, the Commission decision making
21 process hasn't changed all that much. I started at the
22 Commission in 1985, and at that time the initial
23 determinations would come up. The petitions would be filed.
24 The Office of General Counsel would write a memorandum
25 giving a recommendation on what to do, and it would go to

1 the Commission.

2 It was generally accepted. It's pretty much the
3 same sort of procedure. We write recommendations. The
4 Commissioners are somewhat more engaged than they were in
5 1985, but they still have this Sunshine Act, which I think
6 former Commissioner Hillman is going to tell us about, that
7 keeps them from talking to each other or being in a group of
8 more than two, I think. So a lot of the discussion of the
9 case goes through their aides, goes through the General
10 Counsel's attorney. Things go back and forth. So it's kind
11 of a complicated process, but that's generally how it's
12 done.

13 The Commission has also recently been delegating
14 more public interest issues to the ALJ. In the past, the
15 ALJ made no findings on public interest. It would just
16 issue a recommendation on bonding and what type of remedy
17 they should be given.

18 But now many cases are being referred to the ALJ
19 to take evidence so that the Commission has a lot more to
20 deal with when it comes to determining a remedy.

21 Oh, one other thing interesting that happened for
22 institutions around 1990--going out of order--the Commission
23 switched to action jackets. That is how it--previously it
24 instituted cases at open meetings. Around 1990--maybe Lynn
25 knows exactly when--we switched to the action jacket process

1 where the Commission would just vote on the jackets. And
2 that--

3 MS. LEVINE: I remember the event, but not the
4 date.

5 (Laughter.)

6 MS. JACKSON: It was around that time. And the
7 Commission decisions now, as they have been for at least the
8 last 30 years, have been, final determinations have been by
9 action jacket. And that's how they are today.

10 So I think that's my overview.

11 MS. MURPHY: Alright. Thank you, Jean.

12 Now to get into the specifics of the different
13 roles of the Commissioners, the ALJs, OUII, and the General
14 Counsel's Office. We will start with Jennifer, please.

15 MS. HILLMAN: Thank you, very much. It is really
16 a delight and an honor for me to be here and on this panel
17 since it is also a rare opportunity for me to be the "new"
18 kid on the block. Much gratified. I want to thank the
19 members of the ITC TLA for inviting me. I would say
20 particularly since I see some former Commissioners out there
21 in the audience who no doubt could have better filled my
22 shoes tonight. I certainly want to thank very much Shara
23 Aranoff who did a lot of writing about the history of the
24 337 process in a number of speeches that I think were very
25 helpful to me in thinking about this.

1 I also want to particularly thank Barbara for her
2 excellent and diligent work in organizing us.

3 So I have been asked to address tonight the role
4 that the ITC Commissioners themselves play in the 337
5 process, and how, when, and why the engagement of
6 Commissioners has changed over time.

7 As I think you have just heard from Jean Jackson,
8 there has been a huge amount of evolution. And that
9 evolution has very much affected the role that Commissioners
10 play. Obviously prior to the Trade Act of 1974, as we have
11 heard, the Commissioners were very much involved in the
12 hearings. The big difference is the hearings that were
13 held in the pre-1974 era were almost exclusively focused on
14 the issue of injury to the domestic industry and not really
15 on sort of patent law issues. And obviously there were very
16 few cases--very, very few 337 cases at that time.

17 The vast majority of those, as I understand it,
18 were dismissed after preliminary inquiries. So very limited
19 activity to then.

20 Along comes the Trade Act of 1974 and, as we have
21 heard, the big change there in terms of what do
22 Commissioners do is the introduction of administrative law
23 judges. So now that you have administrative law judges that
24 are conducting the majority of the hearings, you really are
25 seeing the Commissioners move into much more of a reviewing

1 role, rather than a primary initial player in the
2 fact-gathering process itself. But remaining within that
3 was still, in 1974, the need for there to be an injury
4 determination in all of the 337 cases.

5 And I will say, hence for me this becomes a
6 little bit personal because this became sort of the
7 launching of my own career, because at the time I was a
8 junior associate at the law firm. Back in the days when you
9 had an IP law firm that would traditionally partner up with
10 firms that had a traditional trade remedy practice, so that
11 the one firm could focus on the IP issues and the claims and
12 proof in evidence of it, and the traditional trade law firms
13 would focus on the injury side of things. And the cases
14 were clearly run in parallel in that way.

15 At the time, I was working at a firm with a
16 traditional trade remedy practice on a case involving
17 fertilizer imports from Italy that settled on the eve of
18 trial in August of 1986, at which point I asked the managing
19 partner of my then-law firm for a leave of absence so that I
20 could go down to North Carolina and work in the senate
21 campaign of the man that had been the 16-year long president
22 of my alma mater Duke University. And luckily for me, Terry
23 Sanford won his Senate campaign.

24 He turned around and hired me as his legislative
25 director, and immediately put me to work on, among other

1 things, the Omnibus Trade and Competitiveness Act of 1988.
2 And it definitely set me off on a 25-year-long path as a
3 government servant working in the area of international
4 trade.

5 And it was that very 1988 Trade Act, the one that
6 I really cut my teeth on, that brought what I would say is
7 the second huge change to the role that Commissioners play
8 in 337 investigations because that '88 Trade Act eliminated
9 the injury test for patent, copyright, and trademark cases,
10 which pushed Commissioners I would say even further out of
11 the limelight of 337.

12 So I think my task tonight is to try to bring a
13 touch of that limelight back to the role that Commissioners
14 and their offices do play with respect to 337 cases today.

15 And when I say "Commissioners and their offices,"
16 there are obviously many differences across the many years,
17 and across each individual Commissioner, but I think there
18 is no doubt that the tremendous growth in the number of 337
19 cases has meant that every Commissioner's office has had to
20 focus more resources, more time, and more attention on 337
21 cases than ever before.

22 Obviously each Commissioner is free to structure
23 their offices however it best meets their own needs, but I
24 think fairly typically Commissioners have hired two lawyers
25 and one economist. Typically one lawyers does entirely

1 trade remedy cases, and one lawyer that does, if you will,
2 half 337 and half trade remedies. But recently I think the
3 caseload has gotten to the point where many offices have
4 found that they need almost a full-time dedicated lawyer
5 focusing on providing advice to a Commissioner in the 337
6 area. Even the economists, again typically hired to work on
7 332 cases and trade remedy cases, with the growth of
8 attention to the public interest test, you have seen a
9 number of even the economists in the Commissioners' offices
10 I think pitching in on 337 cases as well.

11 And it is really that work of advising each
12 Commissioner that falls primarily to the attorney in their
13 own personal offices, which places a really high burden on
14 Commissioners to find lawyers with the background and the
15 skill to work in this IP area--and at government salaries, I
16 might add.

17 I know I was extremely fortunate to have the very
18 talented and dedicated Stuart Weiser, who I think is here
19 tonight, while I was a Commissioner, and I know that he is
20 continuing to do an excellent job for Commissioner
21 Williamson.

22 It is really the attorneys in the Commissioners'
23 offices such as Stuart who bear the huge brunt of
24 communicating their own Commissioner's views to all of the
25 other Commissioners, and coordinating with the General

1 Counsel's office. Because here too is an area in which the
2 Commissioners' engagement has changed over time,
3 particularly with the passage in 1976 of the Government in
4 the Sunshine Act, which requires that every portion of every
5 meeting of an agency be open to public observation.

6 So you cannot have just a casual last-minute chat
7 in the hallway. You cannot schedule at the last minute any
8 conference between members. So it really means that
9 Commissioners cannot sit in the same room, or meet as a
10 group, or even in numbers greater than two, to deliberate or
11 debate any pending determinations.

12 So there simply aren't the kind of collective
13 meetings that the Commissioners used to engage in. So what
14 in practice this means is that Commissioners or their staffs
15 have to walk the hall. You go in to one Commissioner's
16 office and say I'm thinking about doing this. What do you
17 think?

18 And then you walk down the hall and you say, I'm
19 thinking about this. And this other Commissioner tells me
20 he or she is thinking about doing that. And this goes on
21 and on with that old-fashioned telephone game sort of loss
22 of sort of translation, and a real often duplicative efforts
23 it takes to reach a consensus on both decisions and opinion
24 language that everyone can live with. But, nonetheless,
25 that's the process.

1 So we fast-forward then to the 1988 Trade Act.
2 It clearly still leaves I would say four clear areas where
3 the Commissioners themselves are very much engaged in the
4 337 process.

5 You start with the institution of investigations.
6 That is clearly one of them. Secondly, there is a number of
7 sort of interlocutory types of determinations, whether that
8 is amendments to complaints, summary determinations, consent
9 agreements where you'll have clear Commissioner engagement.

10 You thirdly, and most importantly I would say,
11 have the Commissioner review of final Ids, whether that's in
12 whole, in part, based on the petitions of one or more of the
13 parties, or even sua sponte, you will have clear Commission
14 review of Ids.

15 And finally, fourth, remedy determinations.

16 So tonight I wanted to focus primarily on the
17 last of those two. But it's clear that the Commissioners
18 and their offices are involved in all four.

19 At the institution phase, for example, while the
20 decision of whether or not to institute an investigation
21 itself, is rarely controversial. In recent years,
22 Commissioners are also at the same time voting on a number
23 of ancillary questions: whether to request the ALJ to engage
24 in findings to develop a full factual record on the public
25 interest. Whether to name OUII as a party. Whether to

1 place a given investigation into the 100-day pilot program
2 if it appears there's dispositive issues that may resolve
3 the investigation early on.

4 How does this happen? It's this action jacket
5 process that Jean has mentioned, which really means that
6 it's circulated, a jacket, a folder with a very clear
7 memorandum in which Commissioners are going to literally
8 vote in writing with their initials, deciding on each one of
9 the subsections of votes that they are casting.

10 At the initiation stage this is going to be very
11 much based on a recommendation by OUII. I mean here is the
12 one place in the process where the Commissioners and OUII
13 have the most direct interaction with specific briefings, or
14 responses to inquiries from Commissioners often part of that
15 process of figuring out whether and on what terms an
16 investigation is going to be initiated.

17 Once the decision to institute is made, OUII
18 takes on a very different process vis-a-vis the Commission.
19 It is treated as a party. So once the case is initiated,
20 they're treated in essence as an ex parte contact between
21 the Commissioners and OUII. So that is the one place where
22 there is that interaction.

23 What I really want to focus on is the decision to
24 review a final ID, and the decisions on crafting remedy
25 determinations, because to me that's really where the

1 Commissioners play their largest role in the process--even
2 if the role itself is rarely seen from the outside. You
3 might ask yourself why, if this is the most important role,
4 is it so hidden?

5 Here too I think the changes in the law are
6 primarily responsible for why is this so behind-the-scenes.
7 Because once the requirement for an injury determination was
8 removed in 1988, Commission-level public hearings in 337
9 virtually disappeared.

10 Indeed, there has been only one hearing at the
11 Commission level in a 337 case since September of 1993.
12 That one hearing held in 2007 focused on the public interest
13 issues raised in the Base Band Processor Chips case, not
14 really on patent issues.

15 And so that hearing helped the Commission develop
16 the record that it needed to tailor a remedy that would
17 address the concerns of the first responders and others over
18 access to mobile phones. The fact that no hearing has been
19 held since then. I think to me underscores the reluctance on
20 the part of the Commission to make hearings a regular
21 feature of the 337 process.

22 And at least for me the reluctance stems
23 primarily from the significant time and cost that hearings
24 before the Commission add to any proceeding. If you add up
25 all of the briefing and the witness preparation time and the

1 cost, if the Commission were to hold hearings in many of the
2 337 cases I think the concern would be that it would push
3 the process way beyond the notion of getting these cases
4 done as expeditiously as possible.

5 So what does the behind-the-scenes process for a
6 final ID look like? I think three things I would note at
7 the beginning.

8 First is that the majority of final ID's and
9 recommended determinations have petitions filed by one or
10 more of the parties. So almost every ID is going to be
11 subject to a request for review.

12 Secondly, important to note to me, is it takes
13 the vote of only one Commissioner to request a review. So
14 even if five of the six Commissioners believe that the ALJ
15 got it just right, the case will be reviewed by all. And
16 this same holds true for questions or briefing requests. So
17 the questions in the notice of review are framed as though
18 they have come from the entire Commission as a whole, but it
19 may very well be that the question being asked is of
20 significant interest to only one Commissioner.

21 Third, I would say if the review involves claim
22 construction or certain other issues that are linked to
23 other determinations, including the technical prong of the
24 Domestic Industry requirement, it may appear that the
25 Commission is seeking a very broad review when its real

1 concerns may be much more narrow. But because the issues
2 are linked, the review has to at least open up all of those
3 issues.

4 From a data perspective, I tried to pull together
5 some numbers on the Commissioners' role in reviewing ID's,
6 but I wasn't able to find any data more current than those
7 in a really excellent article written in 2001 by Mike Deal,
8 a much beloved and respected former 337 attorney who worked
9 for former ITC Chairman Shara Aranoff.

10 He studied in detail sort of interesting 337
11 cases during a two-year period and found during that time
12 that 23 out of the 25 cases--so 92 percent of them--there
13 was one or more petitions to review the ID, and one case in
14 which the Commission reviewed sua sponte.

15 What he found was that the Commission declined to
16 review any issue about a quarter of the time. So about 25
17 percent of the time the Commission is getting the petition
18 for review and turning it down.

19 Then when the Commission did grant a request for
20 review, it voted to take up only 37 percent of the issues
21 that were subject to the petition. And on review it
22 affirmed the ALJ either outright or with additional
23 clarifications about 66 percent of the time.

24 So as a result, the parties in the end achieved
25 reversals of the ALJ on only 12 percent of the issues for

1 which review was requested. I don't have any hard data more
2 recently. The people I've talked to would suggest that if
3 you did this same survey today, you would not get wildly
4 different results except for the fact that the starting
5 point data would not be 92 percent of the cases are subject
6 to a request for review, it would in fact be 100 percent of
7 the cases are subject to a review.

8 Again, as a Commissioner I was really well aware
9 of why everyone requests reviews every time, and I certainly
10 understood it, and there was a lot of reasons why to do it.
11 What I did find in the end surprising, or perhaps I would
12 say frustrating, was the number of appeals that covered
13 absolutely everything, almost, or even actually, including
14 the title of the case itself. I certainly remember at one
15 point asking my attorney Stuart Weiser, is there any single
16 word in the ID that is not being subject to appeal?

17 I think all the Commissioners understand the
18 motivations for review petitions, but I know I at least
19 found it difficult to sort out what was really important,
20 what was of genuine concern, and where the most likely if
21 any errors in the ID could be found when every single
22 matter, no matter how large or small, was appealed.

23 I will close only very quickly by saying the
24 Commissioners are very, very engaged at this review ID and
25 remedy recommendation determination. The one thing I will

1 close on is there are two areas that I think is important to
2 note where the Commissioners are not engaged at all. And
3 that would be in the sort of political process that
4 sometimes surrounds 337 cases.

5 We occasionally, obviously in trade remedy cases,
6 often hear from Members of Congress. They occasionally
7 write in letters in 337 cases. I will tell you that in my
8 own view they have absolutely no impact on the decisions
9 coming out t of the agency. For those of you out there, I
10 would not encourage you to run to your Congressman or
11 Senator and tell them that they have to weigh in on a case,
12 because it will have no effect.

13 The second area in which I just want to note very
14 clearly that the Commissioners have no engagement is, once
15 an ID has a recommendation for a remedy has been issued and
16 has gone over to USTR, I think the Commissioners take no
17 role in weighing in at all with the TPSC or TPRG agencies.
18 They leave that entirely to that process in terms of whether
19 or not a disapproval decision will be made at the
20 USTR/Presidential level.

21 So I hope I have shed a little tiny bit of light
22 on the Commissioner role in the process.

23 MS. MURPHY: I know we asked you to cover a lot of
24 detail, and that is going to be the case with all of our
25 speakers. I think we could have each of them talk for a

1 good half an hour, but we don't have that much time tonight.

2 So with that, we are going to turn to Jim to talk
3 about the ALJs role in the process.

4 MR. ADDUCI: Thank you, Barbara. And I too am
5 delighted to be here this evening surrounded by so many
6 friends and colleagues over many, many years.

7 Section 337 has been very good to me, and this is
8 my time--

9 (Laughter.)

10 MR. ADDUCI: --to pay back a little bit. But I
11 do want to talk a little bit about the Office of
12 Administrative Law Judges, and then talk a little bit about
13 the OUI and its evolution from the Office of Legal Services
14 to the OUII.

15 Lynn will then provide a great deal more detail
16 about the function and structure and operation of OUII, but
17 I will say a few words.

18 Prior to the '74 Trade Act, Section 337, as Jean
19 said, were conducted primarily by the ITC's Office of
20 Investigation, the Office of Industries, and the Office of
21 the General Counsel, with minimal participation by private
22 parties. Of course much has changed since passage of the
23 '74 Act, and now the very substantial involvement in the
24 investigation by the private parties and the applicability
25 of the APA.

1 Interestingly, in the early days just after the
2 January 1, 1975, effective date of the Act, the first 10 of
3 15 numbered investigations were presided over by sitting ITC
4 Commissioners, specifically Commissioners Ablondi, Leonard,
5 and Menchu. For whatever reason, and I can think of a few,
6 the Commissioners decided that they wanted someone else to
7 do that job.

8 (Laughter.)

9 MR. ADDUCI: And thus in 1976 the Commission
10 appointed the first ALJ, Myron Rennick. Since that time,
11 there have been a total of 19 ALJs appointed to preside over
12 Section 337 investigations. And since 1976, the size of
13 that office has ranged from one ALJ to the six sitting ALJs
14 that we have today.

15 Now as a trip down memory lane for some of us, I
16 thought it would be fun to just name those judges in
17 chronological order: Myron Rennick, Donald Duval, Janet
18 Saxon, Sidney Harris, Paul Luckern, John Mathias, James
19 Timony, Deborah Morris, Delbert Terrell, Charles Bullock,
20 Robert Barton, Carl Charneski, Theodore Essex, Robert
21 Rogers, Edward Gilvay, Thomas Pender, David Shaw, Sandra
22 Lord, and Mary Joan McNamara.

23 Now ALJs are chosen from the federal ALJ pool.
24 They are appointed by the ITC Chairman in consultation with
25 the other Commissioners. Interestingly, most ALJs did not

1 come to the Commission with the technical background, but as
2 roughly 90 percent of our docket is based on allegations of
3 patent infringement ALJs quickly develop that expertise and
4 are commonly referred to, including by myself, as the most
5 patent savvy forum in the United States.

6 Of the current ALJs, Judge Bullock came from the
7 EPA. Judge Essex from the Office of Medical Hearings and
8 Appeals, and from the Military. Judges Pender, Shaw, Lord,
9 and McNamara all came from the Social Security
10 Administration, Office of Disability and Adjudication and
11 Review.

12 The average size of the administrative law
13 judge's docket has changed over the past several years and
14 has varied significantly from 36 cases last year, 34 in
15 2014, 42 in 2013, 40 in 2012, and 69, the high-water mark,
16 in 2011.

17 Donald Duval was the first Chief ALJ from 1978 to
18 1983, followed by Chief ALJs Saxon, Luckern, and the current
19 Chief Charles Bullock who was named Chief in October of
20 2011. Assignment of new cases to ALJs for many years was
21 done by rotation. As a result, as a practitioner you
22 generally knew which ALJ you were going to draw, depending
23 on when you filed your case. Thus, depending on the type of
24 case you were filing, you would often time the filing of
25 your complaint to get the ALJ you wanted, or defer the

1 filing to avoid the ALJ you didn't want.

2 (Laughter.)

3 MR. ADDUCI: Now that system changed, and
4 currently the ALJ assignments are made by the Chief ALJ who
5 informally confers with judges next in rotation, or the ALJ
6 that the Chief Judge thinks should be assigned based on
7 their docket and their familiarity with the technology at
8 issue.

9 So there have been a number of recent procedural
10 changes that have impacted the administrative law judges
11 that are worth noting.

12 In November of 2011, the Commission rules were
13 amended to require complainants to file a separate public
14 interest statement concurrently with the complaint. The
15 statement, no longer than five pages, addresses how
16 requested relief could affect the public health and welfare,
17 competitive conditions in the United States, and how such
18 relief would impact production of like and directly
19 competitive articles in the United States or on consumers.

20 Now prior to November 2011, the ALJs very
21 infrequently made findings on public interest issues, though
22 the Commission then and now continues to solicit comments on
23 the impact of the proposed relief prior to making a final
24 determination.

25 But after the rule change in November of 2011,

1 the Commission now regularly directs the ALJs to develop a
2 record on these public interest issues. In fact, since 2012
3 the Commission has instructed the ALJ to develop a public
4 interest record in approximately 25 percent of all
5 investigations instituted.

6 Another development impacting the ALJ conduct of
7 investigations was the launch and--this has already been
8 alluded to--of the 2013 Pilot Program in which certain
9 dispositive issues could be decided within the first 100
10 days of the investigation.

11 The Commission either on its own or after
12 considering a request from private parties can require that
13 the investigation be conducted under the 100-day pilot
14 programs and render an initial determination on the
15 dispositive issues so identified.

16 That issue tends to be whether there is a
17 domestic industry in the United States. The first case to
18 be so designated was Laminated Packaging where the case was
19 terminated on a finding that there was no domestic industry.

20 Finally, a trend that many practitioners have
21 perceived as a use of a far more extensive set of ground
22 rules issued by the ALJs at the outset of the investigation.
23 These ground rules are not uniform and vary in part with
24 each ALJ.

25 Practitioners are advised to adhere closely to

1 the requirements set forth in the ground rules, which ALJs
2 have reminded the parties--I remember Judge Essex telling me
3 this on more than one occasion--these are not ground
4 suggestions, they are ground rules.

5 (Laughter.)

6 MR. ADDUCI: A few words about Markman hearings.
7 Although Markman hearings were initially disfavored, they
8 have recently become far more commonplace for a variety of
9 reasons, including but not limited to reducing the
10 complexity of infringement arguments while avoiding
11 interlocutory review by the Commission, as Markman Orders
12 are not considered ID's.

13 The first Markman hearing was held on September
14 9th, 2003, by Judge Terrell in Investigation 496, Certain
15 Home Vacuum Packaging Products.

16 Since 2003, the percentage of cases involving
17 Markman hearings did not get double digits until 16 percent
18 of the cases in 2010 had these hearings. From 2003 to 2009,
19 10 Markman hearings were held. In 2010 alone, 9 Markman
20 hearings were held. Starting in 2011, at least 20 percent
21 of the cases had a Markman hearing each year. In 2015,
22 almost 30 percent of the cases held Markman hearings, the
23 highest percentage since 2003.

24 Judge Bullock and Judge Pender have held the most
25 Markman hearings, with each hearing occurring in

1 approximately 20 and 40 percent of their investigations,
2 respectively. ALJ Lord has also held a relatively high
3 number of hearings in 15 percent of her cases. Recently
4 retired Judge Gilvay conducted Markman hearings in almost 30
5 percent of his cases.

6 One impact of the Markman hearing is that they do
7 tend to extend the procedural schedule. Investigations with
8 Markman hearings held evidentiary hearings on the average 25
9 days later than investigations without Markman hearings.

10 It is clear that, despite the impact of the
11 extension of the procedural schedule in cases involving
12 Markman hearings, I believe the use of Markman hearings is
13 on the upswing, and I believe that trend will continue going
14 forward.

15 Okay, let me just talk briefly about the
16 formation of the OUII and its evolution from the Office of
17 Legal Services. In the year 1976, which is the year I
18 arrived at the Commission as an attorney advisor to one of
19 the Commissioners, the Commission decided it wanted to take
20 an across-the-board reorganization of the Commission
21 offices, including the Office of General Counsel. And as I
22 said, Lynn is going to provide a great deal more detail
23 about OUI, but I thought it would be useful to say a few
24 words about how the office came into being.

25 The reorganization plan developed during much of

1 1976 took effect in January 1977, at which time the Office
2 of Legal Services was created, reporting to the Director of
3 Operations. In 1979, the Office of Legal Services was
4 renamed the Office of Unfair Import Division, reporting to
5 the Director of Investigations, who in turn reported to the
6 Director of Operations.

7 Harold Brandt was recruited by the Commission
8 from the FTC to become the first Director of the Office of
9 Legal Services, and the first lawyer to supervise the work
10 of that office. He served from 1977 to 1978. Ed Lebos
11 succeeded Harold as Director of the Office of Import
12 Division in 1979.

13 Art Weinberg took over as Acting Chief of the
14 Unfair Import Division in 1984, and in 1985 a decision was
15 made to set a separate office of the Commission, the
16 current-day Office of Import Investigations, or OUII.

17 Art Weinberg served as the first Director of the
18 OUII from 1984 to 1987, followed by Lynn Levine from 1989 to
19 2012, and in 2013 to the present Director of OUII Margaret
20 McDonald when she was appointed.

21 Changes in the Trade Act of 1974 including, as
22 previously noted, a much larger role for the private
23 parties, was the impetus for the creation of the Office of
24 Legal Services. Under Section 554(d) of the APA, employees
25 are generally prohibited from ex parte communication with

1 private parties. In this case, the Commissioners and the
2 Office of the General Counsel, which advises the
3 Commissioners, could not engage in ex parte communications
4 with private parties and therefore this, and for other
5 reasons, the Office of Legal Services was created and
6 staffed largely by former employees of the Office of the
7 General Counsel. And I will have a few more words to say on
8 that a little bit later, the back story on how that came
9 into being.

10 Thank you.

11 MS. MURPHY: Thank you, Jim. You have given us a
12 little preview about OUII, but we're going to turn next to
13 Jean Jackson for a discussion about the General Counsel's
14 office.

15 MS. JACKSON: I realize I needed to state my
16 disclaimer, that all of these comments are mine and not
17 those of the Commission or the Office of General Counsel.

18 From my tenure at the Commission, a big change
19 was 1985. All the attorneys in the Office of General
20 Counsel did any type of investigation that they might happen
21 to be assigned to, whether it was Title 7, or 337, or 332.
22 There was no specialization at all.

23 When I got to the Commission, Wayne Harrington
24 and Marsha Sundeen were the only patent lawyers there. And
25 I think they both got that job--they were the prime mover

1 there. Whereas in my case, Commissioner Liebler had
2 indicated that she would like more patent staff.

3 So a friend of mine was working at the Commission
4 and I was a patent examiner at the time and said we need
5 patent people there. So that's how I ended up at the
6 Commission. But still I needed to do a couple Title 7 cases
7 because we were just rotating through.

8 Over time, particularly in 1987, the Commission
9 got its first like chip cases, EPROM 276, and it caused a
10 big uproar. Who was going to handle this? We didn't have
11 any electrical engineers.

12 So actually we borrowed somebody from the Office
13 of Technology Assessment--I don't think they exist anymore,
14 but they were with Congress at the time. So someone came
15 over and helped us with that electrical case. That case
16 became the famous EPROMs case with the downstream tests and
17 all that. So that became a famous case.

18 But now we have people dedicated in our office
19 that just do 337. They are all patent lawyers. If they
20 haven't got the Patent Bar, they at least have patent
21 experience and they all have technical degrees. And they do
22 exclusively 337 cases.

23 So that's been one major change. And our staff
24 has grown a lot. We started out with basically three, when
25 I got there, three of us that were trying to do 337 cases

1 exclusively, and now there are 11 staff attorneys, and there
2 are 2 supervisors. I supervise the administrative part of
3 337, and Wayne Harrington supervises all the litigation, 337
4 litigation.

5 The attorneys are assigned to cases when they
6 first are filed. It's pretty much rotation, but if I know
7 someone has done--has particular expertise in the
8 technology, or if they've done a related case, I will assign
9 the case to them.

10 So even though we don't have a lot of involvement
11 at the beginning of the case, certain things do come up.
12 Sometimes there are institution questions that are asked
13 during the course of the investigation, and there are always
14 these interlocutory ID's that we make a recommendation to
15 the Commission on. All of this is by action jacket. Some
16 of those interlocutory ID's generally are pretty much not
17 reviewed, but the final ID's, as we've heard from
18 Commissioner Hillman, there's a lot of review.

19 That same attorney will handle the whole case,
20 and anything that might come up, APO breaches, later
21 ancillary matters on enforcement, advisory modification, and
22 pretty much keep that unless someone leaves and it has to be
23 reassigned to someone else.

24 A major part of 337 work is preparing the
25 recommendations on whether to review the final ID's. As has

1 been pointed out, there is always a petition. They are
2 usually quite lengthy. Our rules don't have limitations on
3 petitions, and maybe they should, but we get a lot.
4 Sometimes everything is petitioned. The winner petitions
5 for things they lost on and calls it a contingent petition.
6 That is still treated the same. We still go through the
7 same process of writing a recommendation on every petition
8 issue, and anything else that we might think needs
9 attention--some institutional issues perhaps that were
10 overlooked by the parties because they didn't really care.

11 So after our recommendation goes out to the
12 Commission, we are available for any questions that the
13 Commissioners' aides might have. We basically deal with
14 Commissioners' aides. They are pretty much the interface
15 between GC and the Commissioners, and also between the
16 Commissioners, as Commissioner Hillman noted.

17 And so then we help--well, we draft the notices,
18 with a lot of input from the Commissioners' offices. They
19 have a lot of input into all those questions you see on the
20 notices of review. And it's very much a collaborative
21 process.

22 After the decision goes out, the Office of
23 General Counsel is also in charge of--works on the appeal.
24 We draft the briefs. We have discussions with the
25 intervener, the party who won basically. They're on our

1 side, so they will join in. And there's discussions. We
2 also do the oral argument.

3 And if there's anything else, like petitions for
4 rehearing, the staff attorney will be working on that. And
5 also the staff attorney assists the Department of Justice's
6 Solicitor's Office in responding to any petitions for cert.

7 If the Commission decides to issue relief, the
8 USTR, as delegated by the President, will consider whether
9 the relief should be disapproved for policy reasons.

10 At this point, this varies quite a bit. There
11 have been times in the Commission time I've been there when
12 the USTR would call a TPSC meeting in every single case, and
13 we would go over there. I think we were called "observers"
14 because we weren't actually on the committee, but actually
15 we functioned more as a resource person, if they had any
16 questions about the record, and we would go to these
17 meetings. And much more infrequently, the TPRG. I know
18 Shara Aranoff went to one of those meetings. But that was
19 not common at all.

20 So right now we're in a period where they are not
21 holding these meetings, or if they are they're not asking us
22 to participate.

23 (Laughter.)

24 MS. JACKSON: So it's been awhile. I think the
25 last one we participated in was 796, the one where relief

1 did issue. And of course 794, the one they disapproved, we
2 had a lot of involvement in that one. But I think that's the
3 last time we've been invited to go over to USTR. So that's
4 been about three years.

5 And we keep the Commission informed of anything
6 that happens. Like Commissioner Hillman said, the
7 Commissioners don't get involved at that state but we do
8 tell them what's going on.

9 Another major function of the General Counsel's
10 office is interfacing with Customs. Over the last few years
11 this has been a very proactive process. Once an Order goes
12 out, we try to get together with Customs and with OUII and
13 we have a meeting, and we go over every question Customs
14 might have.

15 Often by the time we have that meeting they've
16 already met with complainant or respondents, so they already
17 have specific questions they like to ask. And we go over the
18 record, and anything they need. And that continues
19 throughout any time Customs has a question about the record,
20 or anything else we can help them with they are always free
21 to give us a call.

22 And that has been a major change in the last few
23 years. There used to not be so much cooperation. And that
24 has been working out very well, and I'm sure we will be
25 continuing that.

1 So Barbara asked me to cover some key cases. So
2 the ones I thought I would focus on are the ones that
3 changed Commission practice.

4 The first one I would note here is AmTour. That
5 was a case in 1930, I think. I remember because I cited
6 that case at an oral argument and Judge Rich said, "I was a
7 law clerk on that case."

8 (Laughter.)

9 MS. JACKSON: Great.

10 (Laughter.)

11 MS. JACKSON: So the point there was the court
12 found that we had no powers outside of patent law. In other
13 words, the Unfair Act had to have been proclaimed an Unfair
14 Act by someone else other than the Commission before the
15 Commission could act.

16 And at this time, process patents were not
17 covered by the Patent law, if you were doing a process
18 overseas and there was no control over that. So the AmTour
19 decision--so the Commission also could do nothing about
20 that.

21 So that led to the enactment of Section 337(a)
22 which gave us that power to exclude goods that were made by
23 a process that would infringe if it occurred in the United
24 States. I think that's the way the language went. And for
25 55 years we were the only game in town on that until the

1 1995 Process Patent Act.

2 And now we still have that statute, and it's a
3 little bit different than patent infringement, something to
4 do with the defenses. So it's still in our statute.

5 Another important case was Gremlins. That soft
6 of led to the licensing as a Domestic Industry. That was a
7 case where Warner Brothers was denied relief because all
8 they did was license, although it was quite an industry.

9 These are not in order, by the way. AmGen won.
10 That was a case where AmTour came up. The Court found that
11 when the Commission is faced with a question of whether they
12 have jurisdiction over a case, they should decide it on the
13 merits because they're jurisdictional and merits--a
14 violation on the merits is intertwined.

15 It also said that cases should be instituted.
16 And if necessary dismissed on the merits. So that's pretty
17 much a change. Before that the Commission occasionally did
18 institute cases, but after that if a complaint was well
19 pleaded it was instituted.

20 There have been some cases that weren't
21 instituted because they didn't meet our rules on the
22 complaint. But substantively it will be instituted.

23 Aramid Fibers led to a WTO challenge, which led
24 to the 1995 Amendments. Suprema, a recent case, found the
25 Commission can issue a remedy against violations based on

1 indirect infringement. Vasfame, all defenses and
2 enforcement proceeding, and if you were in a general
3 exclusion order situation and you weren't in the case, so
4 there's no res judicata against you, you can bring up patent
5 invalidity.

6 Tesara of course, you can't remedy downstream
7 products if they are imported by nonrespondents. Spansion,
8 the Commission isn't bound by EBay. And Allied Tesara tells
9 you when you can file on appeal. You need to file the
10 appeal patent by patent, and the patent isn't finished until
11 everything having to do with that patent is concluded.

12 And, let's see, the last big one, Clear Correct.
13 Articles are not electronic transmissions.

14 MS. MURPHY: So far, right.

15 (Laughter.)

16 MS. MURPHY: Thank you, Jean. Now we are going to
17 turn to OUII. Jim, did you want to make your comments to
18 just open that up, and then we'll turn to Lynn.

19 MR. ADDUCI: Yeah, just a minute. And what I am
20 about to say is all CBI.

21 (Laughter.)

22 MR. ADDUCI: As I discussed before, in 1976 the
23 Commission determined to conduct a general reorganization of
24 all the Commission offices.

25 At that time, the Commissioners did not interact

1 with the congeniality and the non partisan approach to
2 things that seems to be the case today. It was quite the
3 opposite.

4 The Republicans and the Democrats went at it
5 fiercely. The three Republicans were older, had sat on the
6 Commission longer, and were certainly more conservative than
7 the three Democrats who were recently appointed, young turks
8 who were recent--close professionally and personally.

9 So you add to the mix the General Counsel, who
10 had been at the Commission for decades, who had become
11 somewhat of an institution, a bit of a--well, had very
12 strong views on Commission policy both legal and otherwise,
13 and was generally supported by the Republicans.

14 All of this led to a very real clash with the
15 Democrats on a number--between the General Counsel and the
16 Democrats on a number of occasions, especially with the
17 Democratic Chairman who at times, I think it's fair to say,
18 considered the General Counsel to be insubordinate and was
19 heard to say so in the halls loudly.

20 Their relationship was openly bitter and hostile,
21 and everybody was aware of that. So in the reorganization
22 committee, each Commissioner was given lead responsibility
23 for various Commission units.

24 I was fresh out of law school and an advisor to a
25 Commissioner who was given lead responsibility for the

1 reorganization of the General Counsel's Office. He
2 delegated that task to me.

3 In the course of this process, it was made clear
4 to me--and I won't say who or whom told me--that said, Jim,
5 you've got to get that guy and break up his fiefdom. Huh?
6 His fiefdom. So as a good soldier, I went out to the
7 library and I started researching how other organizations
8 organized themselves, and I found that in several
9 investigations agencies like the FTC separated the functions
10 between the attorneys who conducted the investigations and
11 advocated positions, and the attorneys who advised the
12 Commission--that is, the General Counsel and the
13 Commission's personal legal staff. There was a wall.

14 In fact, this was required by the APA. So I
15 prepared a recommendation and a plan that was both, I felt,
16 legally sound and defensible and which met the political
17 objectives that I was assigned.

18 As a result, an office separate from the General
19 Counsel was created call the Office of Legal Services. It
20 was staffed by roughly half the attorneys from the General
21 Counsel's Office. So that fiefdom was taken apart.

22 Shortly thereafter, the General Counsel resigned.
23 So now you know my dirty little secret.

24 (Laughter.)

25 MR. ADDUCI: I am the father of OUII.

1 (Laughter.)

2 MS. MURPHY: Thank you, Jim,

3 MR. ADDUCI: CBI.

4 (Laughter.)

5 MS. MURPHY: Thanks, Jim. Lynn, if you can pick
6 up before you got there I guess, and then continue on to
7 when you served for 25 years as Director.

8 MS. LEVINE: Well, before I do that, I did want to
9 thank Jim Altman for his efforts to put together this series
10 of historical panels about 337, and also AIPLA and ITC TLA
11 for supporting those efforts, and also I very much
12 appreciate that they included me in one of those panels.

13 Now back to the topic at hand. Actually I think
14 Jim had indicated that OUII began as Office of Legal
15 Services. Then it went to UIID, the Unfair Import
16 Investigations Division of Investigations. And then it was
17 broken out as a separate office of its own. And I will just
18 say, it's interesting to hear Jim talk about the genesis.

19 One of the reasons, I understood, that OUII
20 became a separate office reporting in as the other program
21 offices did to the Office of Operations was that there was a
22 gentleman who was in charge of the Office of Investigations--
23 --he was a nonlawyer. He really didn't know anything about
24 337, wasn't particularly well liked in the building, and it
25 was determined that perhaps OUII should be split off from

1 Investigations. Maybe he didn't need to--maybe his scope of
2 authority didn't need to extend that far.

3 So that's how we got to OUII. Essentially, OUII
4 is an independent office with the Commission whose role
5 changes during the course of a 337 proceeding. As I see it,
6 during my tenure with OUII, which began in 1983, and until
7 the present time, OUII has essentially three primary--has
8 had essentially three primary roles.

9 First, prefiling complaint reviews. Speaking on
10 a confidential basis with prospective complainants about the
11 sufficiency of potential complaints. Draft review of
12 complaints began before I became the Director in 1988, but I
13 think it's fair to say that they became more thorough during
14 my tenure. While those reviews were voluntary and remain
15 that way, almost all complaints that are filed at the ITC
16 the complainants choose to go through the draft review
17 process.

18 And I think the reviews, along with some rule
19 changes over the years, led to the filing of more detailed
20 complaints and discouraged the filing of weak complaints,
21 and of temporary relief requests in particular that weren't
22 well founded and weren't likely to succeed.

23 The second role for OUII comes after a complaint
24 is filed. OUII's role is to advise the Commission on the
25 sufficiency of the complaint and make recommendations

1 regarding institution.

2 During this pre-institution period, OUII can and
3 often does ask for supplementation and clarification from
4 the complainant. Then OUII puts up an institution memo
5 which is part of the action jacket process that Jean
6 mentioned. And that recommendation from OUII includes the
7 various items Jennifer outlined in her remarks regarding
8 whether public interest should go to the judge, for example,
9 and those sorts of things.

10 The institution memo is voted on by the
11 Commission as to whether to institute, and who and what to
12 include in the notice of investigation.

13 Then we get to the third role for OUII, which is
14 by far OUII's most important role, which is an independent
15 party representing the public interest while the
16 investigation is before the judges and the Commission.

17 As Director, I was often asked what does that
18 mean exactly? Representing the public interest? What's
19 that? And I used to liken it to the search for truth and
20 beauty. Basically, OUII works to understand the relevant
21 facts, develop the necessary record for the decision makers,
22 and correctly apply the law to those facts.

23 And also, to the extent possible, OUII works with
24 the other parties to facilitate the investigation. And that
25 can take the form of trying to iron out discovery disputes

1 so that unnecessary motions aren't filed. It can at times
2 take the form of educating attorneys who aren't really
3 familiar with 337 processes about the peculiarities and
4 special requirements of 337. Or it can take the role of
5 promoting settlements.

6 Once an investigation begins, OUII, like the
7 private parties, as others have said, are barred from ex
8 parte communications with the decision makers, the judges,
9 the Commission, and also the General Counsel's Office.

10 Thus, OUII participates on the record without
11 specific directions from the Commission regarding the
12 positions it should take in a given investigation. That
13 remained unchanged during my 30 years at the Commission and
14 remains unchanged today.

15 And as a party which is employed by the
16 Commission, but tasked with working on behalf of the public
17 interest, rather than on behalf of the commercial interests
18 of a litigant, OUII paid particular attention when I was
19 there, and I believe today as well, to what I would call
20 special institutional issues, issues that the parties might
21 not care all that much about in a particular investigation
22 but which OUII was concerned about because we thought an
23 issue, for example claim correspondents, had been wrongly
24 decided by the Commission and should be revisited by the
25 Commission, and it was. Or because Commission precedent was

1 unclear in an area, and we felt that clarification was
2 desirable for future cases. Or there might be an issue that
3 the parties weren't that interested in but we thought raised
4 a question of first impression which would have impacts
5 further on down the road for other cases. So we would pay
6 more attention to that perhaps in briefing and the like than
7 the other parties.

8 Also, because of our unique position, we
9 approached petitions for review differently. The question
10 in looking at an Initial Determination isn't, well, did the
11 judge agree with OUII's position? It's more in the nature
12 of did the judge commit reversible error? Or does the ID
13 present an issue affecting Commission policy such that OUII
14 should petition regardless of whether the other parties do
15 or not?

16 With respect to the nature of OUII's role over
17 time, I think the basic role of OUII has essentially been
18 constant during the decades I was at the Commission, and up
19 until the present time, but there were important personnel
20 changes over time that I think enhanced the value of OUII's
21 participation in the process.

22 When I arrived in '83, OUII focused primarily on
23 injury and domestic industry requirements, and less on the
24 IP aspects of the complaints.

25 Back then, injury, or threat of substantial

1 injury, to an economically and efficiently operated domestic
2 industry, had to be proven in all cases. Indeed, very few
3 attorneys in OUII had technical or IP law backgrounds back
4 then.

5 Art Weinberger, my predecessor's director,
6 realized that IP issues were more challenging than the
7 injury issues in the 337 cases. And that was where the
8 judges and the Commission most needed the assistance of
9 OUII.

10 As Jean noted, Commissioner Liebler and perhaps
11 other Commissioners as well had the same feeling. The
12 Commissioners spent a lot of time on Title 7 cases back
13 then. They had a feel for injury--not so much for patents
14 and trademarks. 337 cases in the early and mid-'80s often
15 involved rather inexpensive products that were widely copied
16 by imports. We had caulking guns, toy vehicles, Rubic's
17 Cube, plastic bags and food storage containers, and a
18 substantial portion of the docket back then did not involve
19 patents.

20 There were many cases where patents weren't
21 among--patent infringement wasn't among the Unfair Acts
22 alleged, or cases where patent infringement was one of
23 several Unfair Acts that would include things like passing
24 off, and false advertising, as well as trademark
25 infringement.

1 But there were some big patent cases that stand
2 out in the mid- to late-'80s. The Aramid Fiber case, which
3 was brought in 1984 by Dupont against Axa, which was its
4 European counterpart. Very big case. Actually, Judge
5 Luckern's first trial, trial by fire. And then there was
6 the huge, at the time huge, ten patent D-Ram case brought by
7 Texas Instruments in 1986. Multiple trials before Judge
8 Saxon there.

9 So it became clear to some of us in OUII, and
10 particularly Art Weinberg, that we really needed to focus on
11 the IP issues in the cases. That was perhaps where OUII
12 could add the most value.

13 So there was increasing pressure on OUII staff
14 attorneys to become more involved in IP issues. I mean, I
15 recall sitting in the old building reading Chisholm to
16 self-educate on patent law. Not what I expected when I
17 arrived at the Commission with five years of antitrust
18 litigation experience, and no knowledge of patents.

19 As the docket grew and the cases became more
20 complicated, the Commission added staff to address the
21 rising caseload. And the percentage of Commission resources
22 went up--that was attributable to 337, went up. In the
23 early '80s, mid-'80s, it was like 10 to 12 percent. Well
24 that rose to about 30 percent by the mid-2000s.

25 I think it's fair to say that certain offices at

1 the Commission, administrative as well as program offices,
2 raise concerns about the increases in resources allotted to
3 337 versus other areas.

4 And the budget concerns grew throughout. And as
5 the budget concerns grew throughout the Federal Government,
6 those concerns resonated with Commissioners.

7 So in early 2009, the Commission brought in
8 outside consultants to assess 337 resource needs. And in
9 what became known as the Op Two, or Operation Two Review.
10 Ultimately in early 2011, the Commission decided to add
11 staff to the General Counsel's Office, add staff to Office
12 of Administrative Law Judges, and to curb the growth of
13 OUII.

14 And with that decision, the Commission said,
15 well, we're not going to add more staff lawyers in OUII, and
16 therefore, given the resource constraints, OUII will no
17 longer participate in all 337 investigations.

18 While there was considerable concern in some
19 quarters, both within and outside the Commission that OUII
20 might substantially limit its involvement in critical IP
21 issues as a result of this new plan by the Commission, that
22 has not been the case.

23 After the Op Two Review was completed, it was
24 quite heartening to hear a number of the judges publicly
25 announce that they really didn't want to see OUII exit their

1 investigations; that they valued that input.

2 When I left in December of 2012, OUII was
3 continuing to participate in about two-thirds of the new
4 investigations. And I believe that that's continued to
5 date. In fact, in some years since I've been gone I think
6 OUII has been in more than two-thirds of the cases.

7 Finally, I don't think there's been a general
8 awareness of the involvement of OUII personnel in a number
9 of 337-related projects that go beyond OUII's litigation
10 responsibilities.

11 For example, Tom Jarvis was instrumental in
12 developing the original EDA system that gave the public
13 online access to the Commission's docket. And he was also
14 the driving force behind the development of the original 337
15 investigative history that provided summary information on
16 all investigations via the Internet to the public.

17 While OGC, General Counsel, was in charge of most
18 337 rulemaking projects when I was at the ITC, Karen Norton
19 spearheaded a major rules amendment project that updated and
20 improved 337 procedures and requirements.

21 And lastly, OUII was put in charge of the
22 strategic planning and reporting efforts relating to 337
23 proceedings when the Commission started producing annual
24 strategic plans.

25 The work we did in that area, Anne Golwin was

1 very prominent in that regard. And it also resulted in
2 various process improvements.

3 So even though OUII is and continues to be an
4 independent office, it has worked very effectively over a
5 period of many decades with other parts of the agency on
6 337-related initiatives and projects.

7 And with that, I will turn it back to Barbara.

8 MS. MURPHY: Thank you very much, Lynn.

9 I think we have time for a couple of questions
10 from the audience. One thing, a couple of tidbits I wanted
11 to just throw out there.

12 Lynn and Jean mentioned institution memos and GC
13 memos. Back in the early days, those were things that you
14 could actually get by filing a FOIA request. But the
15 Commission soon decided that they could protect those by
16 claiming them to be part of executive decision making. So
17 those are no longer available. But those are things that,
18 you know, back in the early '80s anyway you could get ahold
19 of and get some insight into some of the Commission's
20 thinking on some critical issues.

21 Any questions from the audience? Kent?

22 KENT: Yeah. On behalf of a couple hundred
23 people here who would all be expert on the future, where's
24 this trend line going, the evolution of the future? The
25 agency has seen, that in the past on taking up

1 antitrust cases. We've seen the phenomenon over
2 the China cases. Others from outside have
3 said you ought to be a bullet hole cases, and
4 perhaps, you know, digital cases.

5 Jim, I think you've seen people ask you about
6 what's the future in the digital world, the content people
7 reminders. The general question to the panel is: Where do
8 you see the next hot area of law for 337? And perhaps I
9 can point you guys individually to private practitioners
10 within the existing framework of law, and perhaps to
11 Jennifer or Jean, where do you see the Commission openness
12 to expanding this jurisdiction? Just in general,
13 what's the next hot area?

14 MS. MURPHY: Kent, we don't have three hours.

15 (Laughter.)

16 MS. MURPHY: But does anybody want to jump on
17 that? Where's the Commission going from here? I mean, just
18 one thing I'll point out, I mean we've obviously had a
19 complete surge in cases lately. So something is keeping the
20 Commission busy, or will be keeping the Commission busy for
21 quite awhile with all the new cases that are getting filed.

22 MR. ADDUCI: Well I'll just comment that I think
23 the future depends a great deal on what the Congress does to
24 the Commission over the next number of months.

25 I do see a trend towards more non-patent-based

1 investigations. I'm hopeful that there are more. We're
2 certainly talking up the other ways, the other types of
3 Unfair Acts that are encompassed, or could be encompassed
4 within the Commission's jurisdiction. And not so much in
5 the antitrust area, but I hope more trademark work. I think
6 after the Converse case is won you will see more--

7 (Laughter.)

8 MR. ADDUCI: --trademark cases involving apparel
9 products.

10 MS. MURPHY: Excuse me--

11 MR. ADDUCI: But the short answer is that I think
12 more non-patent cases.

13 MS. MURPHY: Anybody else want to throw in on that
14 one? Lynn?

15 MS. LEVINE: Well the only thing I think I'll note
16 is, because you asked this question about jurisdiction,
17 notwithstanding a lot of press reports and what have you in
18 the last few years, when I was at the Commission--and I
19 don't really think it's changed that much--this was not an
20 agency that was grabbing for more jurisdiction.

21 This was an agency, or is an agency that has been
22 very circumspect about the limits of its jurisdiction.
23 That's not to say, given the broad language of 337, that the
24 Commission will not or will never find additional Unfair
25 Acts beyond those they have before. But I don't see the

1 agency suddenly looking to acquire, you know, a lot of
2 additional jurisdiction. That's never been the way that
3 they've operated.

4 I agree with Jim's comments about non-patent
5 cases. I mean I still think, I don't have a reason to
6 believe that patent cases are not going to be the bread and
7 butter of the Commission. But I do think that, for example,
8 the trade secret area is an area where we have been seeing
9 some increase in recent years, and we may see more.

10 So--and I think what's really interesting to me
11 is when I started, I tried to put some facts and trends
12 together, and in the '80s it was a really diverse docket.
13 And by the way, the reports in the '80s talk about all the
14 high-tech cases then. And now we're back to having a very
15 diverse docket since the end of the Smart Phone wars.

16 If you look at the docket, it's again very
17 diversified, as it has been in the past. I mean, you know,
18 still a solid percentage of computer and telecommunications
19 cases, but a lot of diversity in the docket that continues
20 and really has been there for decades now. I don't see that
21 changing.

22 MS. MURPHY: We've gone over our time here, but,
23 Brian, one more question?

24 BRIAN: Just one quick question. Commissioner
25 Hillman mentioned that the last time we saw the Commission

1 hold a full Commission hearing on a 337 case was
2 in 2006, I believe. When are we going to see the next--

3 (Laughter.)

4 MS. MURPHY: Apparently I think the Commission
5 announced today that there will be one. Yes, the Commission
6 announced today that there will be a hearing in one 337
7 case.

8 Stephanie?

9 STEPHANIE: I know over time what the trends have
10 been, but I have a burning question. I want to know what
11 Commission history is with regard to petitions for cert to
12 the Supreme Court. And, you know, Jean touched on this
13 briefly, but what is the process for determining whether
14 you're going to petition for cert? What's the Commission's
15 historical track record on that, and generally on
16 board, and private parties on board. I know that can be a
17 long answer, but I'm hoping--

18 MS. MURPHY" I'm going to make Wayne Harrington
19 answer that. He's over there. So he just left.

20 (Laughter.)

21 MS. MURPHY: Well I don't believe we've ever filed
22 one. And we would certainly work closely with DOJ, as we
23 always do any time anything's having to do with petitions
24 for cert come up. We deal directly with the Office of the
25 Solicitor.

1 So that's about all I can tell
2 you. The answer man is gone.

3 (Laughter.)

4 MS. MURPHY: Alright, well please join me in
5 thanking this panel for a great job.

6 (Applause.;)

7 (Whereupon, at 9:06 p.m., Wednesday, May 11,
8 2016, the meeting was adjourned.)

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CERTIFICATE OF REPORTER

TITLE: In The Matter Of: “Evolution of Section 337 Decision-Making at the ITC:
Roles of The Commissioners, ALJs, General Counsel,
and OUII”

HEARING DATE: 5-11-16

LOCATION: Washington, D.C.

NATURE OF HEARING: Preliminary

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