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# Expert Court, Expert Agency

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*Under Chevron v. Natural Resources Defense Council, federal courts are required to defer to an agency’s reasonable interpretation of its ambiguous organic statute if Congress intended to delegate lawmaking authority to the agency. But the semi-specialized U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has not applied deference to patent decisions from the United States International Trade Commission (“ITC”). Given that both the Federal Circuit and the ITC are experts in patent law, this raises the question of whether the Federal Circuit should be required to defer to the agency on patent issues.*

*This Article argues that ITC patent validity and enforceability decisions are decided under the Tariff Act and that such decisions are entitled to Chevron deference. It demonstrates that this outcome is desirable from an institutional design perspective because the ITC possesses unique expertise, superior factfinding capability, and is politically accountable, in contrast to the Federal Circuit. This Article also argues that interest group theory does not support disregarding Chevron.*

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## INTRODUCTION

In *Chevron v. Natural Resources Defense Council*,<sup>1</sup> the Supreme Court clarified the standard for how federal courts review agency interpretations of ambiguous statutory language. *Chevron* is based, in part, on the idea that agencies have superior expertise and institutional advantages over courts.<sup>2</sup> In general, agencies have detailed knowledge of their organic statutes and possess broad factfinding resources. This places agencies in a better position than courts with regard to interpreting ambiguous statutory language. Consequently, under *Chevron*, courts are required to defer to reasonable agency interpretations of ambiguous statutory language. But what happens when both the court and the agency are experts in the same area of law?

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) is a semi-specialized Article III court whose jurisdiction includes appeals of cases that arise under the Patent Act.<sup>3</sup> The Federal Circuit also hears appeals of patent decisions from the U.S. Patent and Trademark Office (“PTO”) and the U.S. International Trade Commission (“ITC”). Because about one-third of the Federal Circuit’s docket is comprised of patent-related cases,<sup>4</sup> the judges of the court have developed broad expertise in patent law. The court also hears appeals from various non-patent agencies.<sup>5</sup>

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<sup>1</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>2</sup> *See id.* at 865.

<sup>3</sup> 28 U.S.C. § 1295(a) (2006). Section 1295(a)(1) grants the Federal Circuit jurisdiction over an appeal from a final decision of a district court, where the district court’s jurisdiction was based on 28 U.S.C. § 1338. *Clearplay, Inc. v. Abecassis*, 602 F.3d 1364, 1366 (Fed. Cir. 2010). Section 1338 jurisdiction is based on “any civil action arising under any Act of Congress relating to patents.” 28 U.S.C. § 1338(a) (2006). However, if a patent issue arises solely in a counterclaim, it will not serve as a basis for Federal Circuit jurisdiction. *Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831-32 (2002).

<sup>4</sup> *See* Tony Dutra, ‘Introspective Look’ at Federal Circuit Highlights Breadth of Court’s Docket, 77 PAT. TRADEMARK & COPYRIGHT J. 560, 560 (2009) (noting that thirty-one percent of Federal Circuit’s docket is intellectual property cases, with nearly all such cases involving patents); John M. Golden, *The Supreme Court As “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 666 (2004) (“Patent appeals typically form only about a third of the court’s docket”).

<sup>5</sup> These agencies include the Merit Systems Protection Board, Court of Federal Claims, Board of Contract Appeals, Court of Veterans Appeals, and the International Trade Administration. *See* Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415, 1432-33 (1995).

The Federal Circuit treats appeals from patent agencies differently than those from non-patent agencies. The Federal Circuit has granted *Chevron* or the lesser *Skidmore* deference<sup>6</sup> to decisions from all of its non-patent agencies.<sup>7</sup> In contrast, the Federal Circuit has historically chosen not to defer to agencies on issues of patent law. For example, the Federal Circuit held that the Administrative Procedure Act (“APA”) did not apply to appeals from the Board of Patent Appeals and Interferences (“BPAI”).<sup>8</sup> The Federal Circuit did not reverse course until the Supreme Court intervened.<sup>9</sup>

The Federal Circuit is especially reluctant to grant deference to patent decisions from the ITC — an agency that is playing an increasingly important role in patent litigation.<sup>10</sup> Under section 337 of

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<sup>6</sup> See *infra* Part II.A.1.

<sup>7</sup> See *infra* Part II.A.1; see also *Keener v. United States*, 551 F.3d 1358, 1363 (Fed. Cir. 2009) (granting *Chevron* deference to Court of Federal Claims’ interpretation of 26 U.S.C. §7422); *Patterson v. Dep’t of the Interior*, 424 F.3d 1151, 1159 (Fed. Cir. 2005) (granting *Chevron* deference to Office of Personnel Management); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1336-37 (Fed. Cir. 2005) (granting *Chevron* deference to Merit Systems Protection Board’s interpretation of 5 U.S.C. § 7521); *Brownlee v. Dyncorp*, 349 F.3d 1343, 1354-55 (Fed. Cir. 2003) (granting *Chevron* deference to Secretary of Defense’s interpretation of Federal Acquisition Regulation); *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (“Even where [the Department of] Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw *Chevron* deference.” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001))); *Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prods. Co.*, 994 F.2d 1569, 1571-72 (Fed. Cir. 1993) (granting *Chevron* deference to Trademark Trial and Appeals Board’s interpretation of Lanham Act). Note that in light of *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001), the Department of Veteran Appeals is no longer eligible for *Chevron* deference. See *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1378-79 (Fed. Cir. 2001) (holding that although Department of Veteran Appeals’ interpretive rulemaking is not eligible for *Chevron* deference, it is potentially eligible for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

<sup>8</sup> *In re Zurko*, 142 F.3d 1447, 1449-59 (Fed. Cir. 1998) (holding that standards of review in Administrative Procedure Act do not apply to patent decisions from PTO), *rev’d*, *Dickinson v. Zurko*, 527 U.S. 150 (1999).

<sup>9</sup> See *Zurko*, 527 U.S. at 152 (holding that § 706 of Administrative Procedure Act applies to PTO); Stuart M. Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 285 (2007) (“Until the Supreme Court’s intervention in 1999, however, the Federal Circuit explicitly rejected the application of section 706 to PTO factfinding”). *But see* *Kinik Co. v. U.S. Int’l Trade Comm’n*, 362 F.3d 1359, 1361-63 (Fed. Cir. 2004) (noting, in dicta, that ITC is entitled to *Chevron* deference for its decision that certain patent defenses under Patent Act are not applicable in section 337 proceedings).

<sup>10</sup> See Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 532 (2009).

the Tariff Act, the ITC can grant broad exclusion orders to companies whose patents have been infringed by imported goods.<sup>11</sup> Such orders prevent infringing goods, such as cell phones or cameras, from entering the United States. One factor that distinguishes the ITC from agencies such as the PTO is that Congress has expressly granted the ITC the authority to engage in formal adjudication<sup>12</sup> under § 556 and § 557 of the APA.<sup>13</sup> This grant makes the ITC's decisions under section 337 potentially eligible for *Chevron* deference.<sup>14</sup>

The issue of Federal Circuit deference to ITC patent decisions is ripe for discussion. The number of patent cases filed in the ITC has increased dramatically over the past decade,<sup>15</sup> and there are conflicting cases regarding the applicability of the *Chevron* doctrine to patent-related ITC decisions.<sup>16</sup> Moreover, an open question remains regarding

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<sup>11</sup> Section 337 is codified at 19 U.S.C. § 1337 (2006).

<sup>12</sup> 19 C.F.R. § 210.36(d), which applies to section 337 investigations, states:

*Rights of the parties.* Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §§ 554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

19 C.F.R. § 210.36(d) (2010).

<sup>13</sup> 5 U.S.C. §§ 556, 557 (1990). See *infra* Part II.B.2.

<sup>14</sup> Under *Mead Corp.*, 533 U.S. at 229-30, only formal adjudication, formal rulemaking, and notice-and-comment rulemaking are presumed to signal Congress's intent to allow the agency to speak with the force of law. Informal adjudication and interpretive rulemaking are still potentially eligible for *Chevron* deference, but such deference is not presumed. See *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (granting *Chevron* deference to agency's statutory interpretation reached through means less formal than notice-and-comment rulemaking because "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

<sup>15</sup> In the 2000 Fiscal Year, twelve section 337 proceedings were instituted; in the 2009 Fiscal Year, thirty-six section 337 proceedings were instituted. See U.S. INT'L TRADE COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2009, at 37 (2009), available at [www.usitc.gov/press\\_room/documents/FinalPAR2009.pdf](http://www.usitc.gov/press_room/documents/FinalPAR2009.pdf); U.S. INT'L TRADE COMM'N, YEAR IN REVIEW: FISCAL YEAR 2000, at 16 (2000), available at [http://www.usitc.gov/press\\_room/annual\\_report.htm](http://www.usitc.gov/press_room/annual_report.htm).

<sup>16</sup> Compare *Kinik Co. v. U.S. Int'l Trade Comm'n*, 362 F.3d 1359, 1361-63 (Fed. Cir. 2004) (noting that ITC is entitled to *Chevron* deference when it interprets ambiguous language under section 337 and stating that court "affirm[s] the [ITC]'s ruling that the defenses established in § 271(g) are not available in § 1337(a)(1)(B)(ii) actions"), with *Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 565 F.3d 846, 849 (Fed. Cir. 2009) (failing to acknowledge *Chevron* and stating that ITC's "statutory

whether deference to the ITC is desirable, given the Federal Circuit's specialized knowledge of patent law. Although this Article focuses on patent validity and enforceability, it builds a foundation for providing *Chevron* deference to other types of ITC patent determinations, such as claim construction.

The case for applying *Chevron* deference to ITC patent decisions is not an obvious one, given that the Federal Circuit is valued for having brought uniformity to a fractured area of law.<sup>17</sup> But granting *Chevron* deference to some ITC decisions would not compromise patent uniformity.<sup>18</sup> Rather, it would promote uniformity in administrative law, and would address the imbalance of power in patent law between the judicial and executive branch.

Part I provides a brief background of the ITC and provides a historical framework for section 337 of the Tariff Act. It discusses how the ITC was created initially to protect domestic industry from the harsh effects of free trade, as opposed to protecting intellectual property rights in general. Part II gives an overview of the *Chevron* doctrine and discusses the Federal Circuit's application of *Chevron* to patent validity decisions from the ITC. Part II then analyzes ITC adjudication of patent validity cases under the *Chevron* doctrine. It concludes that, from a doctrinal standpoint, the Federal Circuit should defer to reasonable ITC validity determinations.

Part III makes a normative justification for *Chevron* deference. It maintains that the ITC has a comparative institutional advantage over the Federal Circuit. Although the Federal Circuit is well-versed in patent law, the ITC has expertise in trade law aspects of section 337 patent cases, as well as substantive knowledge of the technology that is

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interpretations and rulings of law receive plenary review, applying the standards of the Administrative Procedure Act”).

<sup>17</sup> See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 74 (1989) (“On [t]he whole, the CAFC experiment has worked well for patent law, which is now more uniform, easier to apply, and more responsive to national interests.”); Cynthia M. Ho, *Biopiracy and Beyond: A Consideration of Socio-Cultural Conflicts with Global Patent Policies*, 39 U. MICH. J.L. REFORM 433, 521-22 (2006) (noting that creation of Federal Circuit has led to more uniformity in validity of patents, but noting concern that courts overly protect patent rights); Howard T. Markey, *The Federal Circuit and Congressional Intent*, 41 AM. U. L. REV. 577, 577 (1992) (maintaining that “the Federal Circuit met the desire of its congressional creators for increased uniformity and elimination of forum shopping in its assigned areas of national law”).

<sup>18</sup> Under *Texas Instruments v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996), Federal Circuit decisions that review section 337 ITC determinations are not binding on federal district courts or on subsequent Federal Circuit panels that review the same patent under the Patent Act. See *infra* Part II.B.2.b.

commonly the subject of section 337 proceedings. Moreover, the ITC is politically accountable to both Congress and the President and has superior tools for engaging in factfinding.

Part III further argues that the interest group branch of public choice theory shows that the Federal Circuit, as a semi-specialized court, is more vulnerable to interest group involvement than are typical courts of appeal. When comparing the Federal Circuit to the ITC with regard to the comparative risk of interest group influence, the Federal Circuit does not emerge as the clear winner. The court was created because of the influence of a strong patent interest group over Congress, and it is unclear whether patent groups continue to influence the court through lobbying the judicial appointments process or exerting other pressures on the court. Consequently, interest group theory does not support the Federal Circuit's role as the primary decisionmaker for section 337 patent cases.

#### I. PATENT DECISIONS IN THE INTERNATIONAL TRADE COMMISSION<sup>19</sup>

##### A. Overview

The ITC is an independent, quasi-judicial federal agency that has broad powers to investigate trade-related issues.<sup>20</sup> The agency, which is headed by six Commissioners,<sup>21</sup> has a broad range of responsibilities. Notably, it administers U.S. trade remedy laws,<sup>22</sup> provides trade policy support to the executive branch and Congress,<sup>23</sup> and maintains the Harmonized Tariff Schedule.<sup>24</sup> In conjunction with

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<sup>19</sup> For a detailed overview of the ITC, see Kumar, *supra* note 10, at 534-44.

<sup>20</sup> *About the USITC*, U.S. INT'L TRADE COMM'N, [http://www.usitc.gov/press\\_room/about\\_usitc.htm](http://www.usitc.gov/press_room/about_usitc.htm) (last visited June 6, 2011) [hereinafter *About the USITC*]; 19 U.S.C. § 1330 (2006) ("The Commission shall be considered to be an independent regulatory agency . . .").

<sup>21</sup> 19 U.S.C. § 1330 ("The United States International Trade Commission (referred to in this title as the "Commission") shall be composed of six commissioners who shall be appointed by the President, by and with the advice and consent of the Senate.").

<sup>22</sup> *See id.* §§ 1330-1338.

<sup>23</sup> *See About the USITC*, *supra* note 20 ("The mission of the Commission is to (1) administer U.S. trade remedy laws within its mandate in a fair and objective manner; (2) provide the President, USTR, and Congress with independent analysis, information, and support on matters of tariffs, international trade, and U.S. competitiveness; and (3) maintain the Harmonized Tariff Schedule of the United States (HTS).")

<sup>24</sup> *See 2011 Official Harmonized Tariff Schedule*, U.S. INT'L TRADE COMM'N, <http://www.usitc.gov/tata/hts/> (last visited June 6, 2011).

the Department of Commerce, the ITC conducts antidumping and countervailing duty investigations and reviews of antidumping and countervailing duty orders.<sup>25</sup>

Under section 337 of the Tariff Act, the ITC has the power to investigate foreign acts of unfair competition, in order to protect domestic industry.<sup>26</sup> Although section 337 actions were once used for a variety of non-patent claims, statutory changes have led to a sharp rise in use by patent holders to enjoin parties that import infringing goods or sell imported infringing goods.<sup>27</sup> Litigants are drawn to the

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<sup>25</sup> See 19 U.S.C. §§ 1671-1675 (2006). Dumping occurs when goods are sold by a foreign company in the U.S. for less than the cost charged for comparable goods sold in the foreign company's home country or a third market. Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT'L L. & POL'Y 993, 996-98 (1995). Subsidization occurs when products sold in the U.S. "benefit from countervailable subsidies provided through foreign government programs." *Antidumping and Countervailing Duty Investigations*, U.S. INT'L TRADE COMM'N, [http://www.usitc.gov/trade\\_remedy/index.htm](http://www.usitc.gov/trade_remedy/index.htm) (last visited June 6, 2011). The U.S. Department of Commerce determines whether dumping or subsidization is occurring, and if so, determines the margin of dumping or amount of subsidy. *Id.* The ITC determines whether a U.S. industry was materially injured or threatened with material injury because of the dumping or subsidization. *Id.*

<sup>26</sup> 19 U.S.C. § 1337(a) states:

Unfair methods of competition declared unlawful.

(1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:

(B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

(i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or

(ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.

19 U.S.C. § 1337(a) (2006).

<sup>27</sup> In the 2009 fiscal year, for example, seventy-nine of the eighty-five active section 337 investigations included a patent infringement claim. The remaining investigations contained allegations of trademark infringement, copyright infringement, false advertising, and trade secret misappropriation. U.S. INT'L TRADE COMM'N, YEAR IN REVIEW FOR FISCAL YEAR 2009, at 14 (2009), available at [http://www.usitc.gov/publications/year\\_in\\_review/pub4167.pdf](http://www.usitc.gov/publications/year_in_review/pub4167.pdf) [hereinafter ITC YEAR IN REVIEW FOR FISCAL YEAR 2009]. For a detailed discussion on how the 1988 amendment to the Tariff Act facilitated ITC patent litigation, see Kumar, *supra* note 10, at 546-51.

ITC due to the availability of exclusion orders and the speed of ITC proceedings.

### 1. ITC Procedure

If a patent holder files a complaint in the ITC that merits action,<sup>28</sup> the ITC opens an investigation.<sup>29</sup> The case is then referred to one of six Administrative Law Judges (“ALJs”) for a hearing.<sup>30</sup> The ITC also assigns an investigative attorney, who represents the public interest throughout the investigation and serves as a third party in the investigation.<sup>31</sup>

After discovery closes, the ALJ holds a formal evidentiary hearing on the record in accordance with § 556 and § 557 of the APA.<sup>32</sup> The ALJ then issues an Initial Determination (“ID”) on whether section 337 has been violated and recommends a remedy.<sup>33</sup> It is not unusual for such IDs to be over 200 pages in length, given that they contain detailed discussions about patent validity, enforceability, and infringement.<sup>34</sup> Thus, although the ALJs come from a variety of backgrounds, they acquire extensive experience in patent law and are widely regarded as experts.<sup>35</sup>

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<sup>28</sup> The process for filing an ITC complaint is discussed in 19 C.F.R. § 210.12 (2010).

<sup>29</sup> 19 C.F.R. § 210.10.

<sup>30</sup> See U.S. INT’L TRADE COMM’N, SECTION 337 INVESTIGATIONS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (2009), available at [www.usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf) [hereinafter ITC FAQ]. An administrative law judge “presides over the taking of evidence in an investigation” under section 337. 19 C.F.R. § 210.3.

<sup>31</sup> ITC FAQ, *supra* note 30, at 2. The investigative attorney is sometimes referred to as a “staff attorney.”

<sup>32</sup> 19 C.F.R. § 210.36(a)(2)(d).

<sup>33</sup> *Id.*; 19 C.F.R. § 210.42.

<sup>34</sup> See, e.g., Certain Printing & Imaging Devices & Components Thereof, Inv. No. 337-TA-690, 2010 ITC LEXIS 2190 (Sept. 23, 2010); Certain Video Displays, Components Thereof, & Products Containing the Same, Inv. No. 337-TA-687, 2010 ITC LEXIS 1973 (Sept. 17, 2010).

<sup>35</sup> See Patricia Larios, *The U.S. International Trade Commission’s Growing Role in the Global Economy*, 8 J. MARSHALL REV. INTELL. PROP. L. 290, 296 (2009) (noting that ITC judges have heavy patent caseload, and therefore “quickly develop familiarity and experience with patent disputes”); Kali N. Murray, *The Cooperation of Many Minds: Domestic Patent Reform in a Heterogeneous Regime*, 48 IDEA 289, 333 (2008) (noting that although ITC is not charged with interpreting Patent Act, it nevertheless has expertise in patent law supporting *Chevron* deference); David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1702 n.14 (2009) (listing several additional sources that note expertise

Once the ALJ's ID issues, a party may request review by the ITC's six-member Commission,<sup>36</sup> the Commission can also choose to review the decision on its own initiative.<sup>37</sup> The Commission may then "affirm, reverse, modify, set aside or remand [the ID] for further proceedings."<sup>38</sup> The Commission's order becomes final within 60 days, unless the President sets the order aside on public policy grounds.<sup>39</sup>

## 2. Availability of Exclusion Orders

Although the ITC cannot grant cash damages to remedy a section 337 violation, it can grant a unique and powerful form of injunctive relief known as an exclusion order.<sup>40</sup> In a typical case where the ITC finds that the respondent's product has infringed the complainant's patent, the ITC will issue a limited exclusion order.<sup>41</sup> This order has the effect of blocking importation of the infringing product at the U.S. border. Depending on the circumstances, the agency might include downstream products<sup>42</sup> in the exclusion order, or may issue a general exclusion order targeting all manufacturers of the infringing good.<sup>43</sup> The ITC can also issue cease-and-desist orders to prevent U.S.

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of ITC ALJs).

<sup>36</sup> 19 C.F.R. § 210.43.

<sup>37</sup> 19 C.F.R. § 210.44 ("A self-initiated Commission review of an initial determination will be ordered if it appears that an error or abuse of the kind described in § 210.43(b)(1) is present or the initial determination raises a policy matter which the Commission thinks is necessary or appropriate to address.")

<sup>38</sup> 19 C.F.R. § 210.45(c).

<sup>39</sup> 19 U.S.C. § 1337 (2006); *see also infra* Part III.A.2.

<sup>40</sup> *See* ITC FAQ, *supra* note 30, at 24.

<sup>41</sup> *See id.*; Kumar, *supra* note 10, at 568-69.

<sup>42</sup> A "downstream product" is a product that includes the infringing good. *See* Steven J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. 177, 184 n.28 (1990). For example, a cell phone that included an infringing microprocessor would be a downstream product and could be included under an exclusion order at the ITC's discretion. *See* Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prod. Containing Same, Including Cellular Tel. Handsets, Inv. No. 337-TA-543, 2007 ITC LEXIS 621, at \*5 (June 19, 2007), *rev'd in part sub nom.*, *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n*, 545 F.3d 1340, 1345 (Fed. Cir. 2008). Note that the Federal Circuit held in *Kyocera Wireless Corp.* that only downstream products of named respondents can be included in a limited exclusion order. 545 F.3d at 1357-59.

<sup>43</sup> For example, the ITC issued a general exclusion order against disposable camera manufacturers who were importing cameras that infringed patents held by Fuji. *Fuji Photo Film Co. v. U.S. Int'l Trade Comm'n*, 386 F.3d 1095, 1097 (Fed. Cir. 2004).

companies from selling domestic stockpiles of infringing goods, and it may issue preliminary exclusion orders.<sup>44</sup>

Once the ITC determines that a complainant's patent has been infringed, it very rarely denies an exclusion order.<sup>45</sup> In federal court proceedings, judges are bound by the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, which requires judges to apply the traditional four-part equitable test prior to granting a permanent injunction.<sup>46</sup> However, the Federal Circuit has recently held that "*eBay* does not apply to Commission remedy determinations under Section 337."<sup>47</sup> The rationale for the court's decision is that the ITC's issuance of an exclusion order is based on the criteria set forth in section 337, as opposed to traditional equitable considerations.<sup>48</sup>

Patent holders need not choose between cash damages and exclusion orders because they can litigate both in the ITC and in federal court.<sup>49</sup> Because ITC decisions do not have preclusive effect in federal court,<sup>50</sup> a patent holder can first file a complaint in the ITC, and then later opt to file a lawsuit in federal district court. Alternatively, the patent holder can litigate in both forums simultaneously, although the defendant may stay the district court litigation until the ITC litigation is completed.<sup>51</sup>

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<sup>44</sup> See ITC FAQ, *supra* note 30, at 21, 24-25.

<sup>45</sup> There have only been three cases since 1974 where the ITC has found an imported good to infringe a valid patent, but declined to issue an exclusion order: *Fluidized Supporting Apparatus*, Inv. No. 337-TA-182/188 (Oct. 1984), available at <http://www.usitc.gov/publications/337/pub1119.pdf>; *Inclined-Field Acceleration Tubes*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 1980), available at <http://www.usitc.gov/publications/337/pub1667.pdf>; and *Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022, (Dec. 1979), available at <http://www.usitc.gov/publications/337/pub1022.pdf>.

<sup>46</sup> *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). The Court in *eBay* noted that "[a]ccording to well-established principles of equity," any plaintiff seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391.

<sup>47</sup> *Spansion, Inc. v. U.S. Int'l Trade Comm'n*, 629 F. 2d 1331, 1359 (Fed. Cir. 2010).

<sup>48</sup> *Id.*

<sup>49</sup> See Kumar, *supra* note 10, at 538-40.

<sup>50</sup> See *id.* at 558-63.

<sup>51</sup> Note that district court patent infringement decisions preclude ITC decisions. The Federal Circuit has interpreted section 337(c)'s language that "[a]ll legal and equitable defenses may be presented in all cases" to mean that parties can raise res judicata and collateral estoppel defenses when a federal district court has already

### 3. Speed of Section 337 Proceedings

Another major advantage of ITC patent litigation is speed. Although the average time it takes to litigate an ITC claim continues to grow, it currently takes less than eighteen months from start to finish.<sup>52</sup> This time frame is faster than typical district court litigation and is on par with several “rocket dockets” — district courts that have specialized procedural rules to expedite the handling of patent litigation.<sup>53</sup> ITC litigation will become more attractive if appellate courts continue to grant transfer of venue motions out of rocket docket courts, such as the Eastern District of Texas.<sup>54</sup>

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resolved a patent infringement claim. *See In re Princo Corp.*, 478 F.3d 1345, 1353, 1356 (Fed. Cir. 2007) (“The district court’s proceedings also potentially have a direct effect on the Commission’s investigation because the district court’s decision on infringement might be entitled to collateral estoppel effect in the Commission proceedings.”)

Although the Federal Circuit does not appear to have considered the preclusive effect of a district court validity decision, such a decision could follow from the court’s expansive reading of section 337(c). Moreover, on at least one occasion, the ITC has treated a district court’s determination that a patent is invalid as binding under the doctrine of collateral estoppel. *See Certain EPROM, EEPROM, Flash Memory & Flash Microcontroller Semiconductor Devices, Inv. No. 337-TA-395*, 1998 ITC LEXIS 371, at \*2-3 (July 9, 1998) (noting that California district court determined that ‘811 patent is invalid due to defect in specification, and therefore finding that ‘811 patent and another patent with same specification were “invalid on the basis of collateral estoppel in light of the California decision”). It remains unclear whether section 337(c) prevents the ITC from finding a patent to be invalid on grounds outside section 282 of the Patent Act, where a federal court has already held the patent to be valid.

<sup>52</sup> *See* U.S. INT’L TRADE COMM’N, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2009, *supra* note 15, at 40.

<sup>53</sup> *See* G. Brian Busey et al., *Selecting a Litigation Forum From Among the District Courts and the International Trade Commission*, 1020 PLI/Pat 309, 336 (2010) (comparing speed of ITC patent proceedings with eight rocket docket district courts); Peter S. Menell, *The International Trade Commission’s Section 337 Authority*, 2010 PATENTLY-O PAT. L.J. 79, 85 (noting that typical district court litigation is generally three or more years).

<sup>54</sup> For example, the Eastern District of Texas is a well-known rocket docket. But the Fifth Circuit and the Federal Circuit have recently granted mandamus petitions that overturned denials of transfer from the Eastern District of Texas. *See, e.g., In re Zimmer Holdings, Inc.*, No. 2010-M938, 2010 U.S. App. LEXIS 12939, at \*1 (Fed. Cir. June 24, 2010); *In re Genentech*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008); *see also* Mark Scarsi & Caitlin Hawks, *Rocket Docket No More?*, 213 PAT. WORLD 21, 21-23 (2009) (discussing cases where Eastern District of Texas has granted motions for transfer).

*B. A Brief History of Section 337*

The ITC was created as a replacement for the relatively powerless U.S. Tariff Commission.<sup>55</sup> Under the Tariff Act of 1930, more commonly known as the Smoot-Hawley Tariff Act, the Tariff Commission investigated acts of unfair competition. The Commission's primary responsibilities were to provide information to Congress and the President to facilitate setting tariff rates and to make recommendations to Congress upon request.<sup>56</sup>

In the early 1970s, the Nixon administration addressed the weak economy by proposing reduced trade barriers and additional power for the President to set U.S. trade policy.<sup>57</sup> To obtain protectionist legislative support, Nixon suggested "subjecting cases involving imports to judicial proceedings similar to those which involve domestic infringement."<sup>58</sup>

Congress consequently passed the Trade Act of 1974,<sup>59</sup> which replaced the Tariff Commission with the ITC. The ITC was granted broad powers to remedy acts of unfair competition. While the Tariff Commission could only advise the President of the occurrence of unfair competition,<sup>60</sup> the ITC could directly issue exclusion orders

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<sup>55</sup> See Kumar, *supra* note 10, at 540-45.

<sup>56</sup> See ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 61 (1971).

<sup>57</sup> See H.R. 6767, 93d Cong. (1st Sess. 1973); EDWARD S. KAPLAN, AMERICAN TRADE POLICY, 1923-1995, at 89 (1996).

<sup>58</sup> President's Special Message to Congress Proposing Trade Reform Legislation, 5 PUB. PAPERS 258, 261, 265 (Apr. 10, 1973).

<sup>59</sup> At this time, section 337 stated:

UNFAIR METHODS OF COMPETITION DECLARED UNLAWFUL. Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended in 19 U.S.C. § 1337).

<sup>60</sup> See Tariff Act, ch. 497, § 337, 46 Stat. 696, 703 (1930) (codified as amended at 19 U.S.C. § 1330) ("To assist the President in making any decisions under this section the commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative."); S. COMM. ON FIN., 93D CONG., COMPARATIVE ANALYSIS OF EXISTING TRADE LAWS WITH H.R. 10710 — THE TRADE REFORM ACT OF 1973, at 116 (Comm. Print 1974).

which the President could reverse only for “policy reasons.”<sup>61</sup> This change made patent litigation in the ITC attractive to patent holders.

The next major amendment to the Tariff Act passed fourteen years later, under the Omnibus Trade and Competitiveness Act of 1988 (“Trade Act of 1988”). In revising the Tariff Act, one of Congress’s main goals was to enhance protection for intellectual property by improving access to the ITC by intellectual property holders.<sup>62</sup> For example, the Findings section stated that “the existing protection under [section 337] against unfair trade practices is cumbersome and costly” and claimed that Congress had failed to provide intellectual property rights-holders with sufficient protection against foreign infringers.<sup>63</sup> The purpose of the revised section 337 was “to make it a more effective remedy for the protection of United States intellectual property rights.”<sup>64</sup>

To achieve this pro-intellectual property agenda, Congress made it easier for inventors to utilize the ITC. It dropped the requirement that the imported good must destroy or substantially injure an efficiently and economically operated industry and no longer required a patent holder to show that infringement would lead to substantial economic injury.<sup>65</sup> It also relaxed the standard for what constituted a domestic industry.<sup>66</sup>

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<sup>61</sup> Trade Act of 1974, Pub. L. No. 93-618, § 337(c)-(d), 88 Stat. 2053, 2054 (1975) (codified as amended at 19 U.S.C. § 1337(c)-(d) (2006)). Since 1975, only the Reagan administration has reversed an ITC exclusion order for policy reasons.

<sup>62</sup> See generally Kumar, *supra* note 10, at 545-51 (discussing legislative history of section 337).

<sup>63</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1341(a)(2), 102 Stat. 1211, 1212 (1988).

<sup>64</sup> *Id.*

<sup>65</sup> Kumar, *supra* note 10, at 549; see 19 U.S.C. § 1337(a)(1)(B) (1988) (codified as amended at 19 U.S.C. § 1337(a)(1)(B) (2006)).

<sup>66</sup> The Tariff Act of 1974 required that the patent at issue be “exploited by production in the United States.” *Schaper Mfg. Co. v. U.S. Int’l Trade Comm’n*, 717 F.2d 1368, 1371 (Fed. Cir. 1983) (quoting H.R. REP. NO. 93-571 (1973)). As revised, 19 U.S.C. § 1337(a)(2) states that prohibitions on importation of articles that infringe intellectual property apply only if “an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(3) states that such an industry exists if there is in the United States:

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

Furthermore, Congress added a provision explicitly addressing patent infringement. Section 337(a)(1)(B) now prohibited the importation, sale for importation, and certain post-importation sales of articles that infringe a valid and enforceable United States patent or that “are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.”<sup>67</sup> Intellectual property protection for U.S. companies was now at the forefront of section 337.

Although Congress was concerned about intellectual property protection, the legislative history is silent with regard to what constitutes a valid patent, and fails to discuss the role of the Patent Act or of Federal Circuit precedent. The Senate Committee Report only notes that the ITC should apply the standards of the Federal Circuit for preliminary injunctions.<sup>68</sup> The House Committee Report provides no useful guidance.<sup>69</sup> The House and Senate hearings contain no references to the Patent Act, nor does the testimony discuss the role of precedent from the Federal Circuit.<sup>70</sup>

Between the 1974 and 1988 amendments to the Tariff Act, Congress created the Federal Circuit to handle all patent-related appeals.<sup>71</sup> Nevertheless, in 1988, Congress did not express intent to reduce the scope of the ITC’s power under section 337. If anything, by expanding patent-holder access to the agency, Congress signaled an intent for the ITC to become even more powerful.

In 1988, a panel from the General Agreement on Tariffs and Trade (“GATT”) reported that portions of section 337 violated the national treatment provision in Article III of the GATT.<sup>72</sup> The 1994 Uruguay Round Agreements Act amended section 337 to limit general exclusion orders and remove the limitation on the amount of time the

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<sup>67</sup> 19 U.S.C. § 1337(a)(1)(B).

<sup>68</sup> S. COMM. ON FIN., 100TH CONG., REP. ON OMNIBUS TRADE ACT OF 1987, at 131 (Comm. Print 1987).

<sup>69</sup> See generally H.R. COMM. ON WAYS AND MEANS, 100TH CONG., REP. ON OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 (Comm. Print 1988).

<sup>70</sup> See generally *Comprehensive Trade Legislation: Hearing on H.R. 3 Before the H. Comm. on Ways & Means*, 100th Cong. (1987); *Comparing Major Trade Bills: Hearing on S. 490 Before the S. Comm. on Fin.*, 100th Cong. (1987); *Improving Enforcement of Trade Agreements: Hearing on S. 490 Before the S. Comm. on Fin.*, 100th Cong. (1987). This conclusion is based on an electronic search of these hearings — using the LEXIS Congressional Digital Collection — for any of the following terms: “Federal Circuit,” “Title 35,” “35 U.S.C.,” “35 USC,” and “patent.”

<sup>71</sup> See *infra* Part III.B.

<sup>72</sup> Report of the Panel, *United States — Section 337 of the Tariff Act of 1930*, (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345-54 (1990).

ITC had to issue a final order.<sup>73</sup> It also permitted the respondent to raise counterclaims in the ITC that could be immediately removed to district court, as well as providing the power to stay a parallel district court proceeding until the ITC proceeding concludes.<sup>74</sup>

## II. THE DOCTRINAL CASE FOR DEFERENCE

To determine whether an infringing article violates section 337, the ITC must assess whether the patent at issue is “valid and enforceable.”<sup>75</sup> This raises the question of whether the ITC makes patent-related determinations under the Patent Act or the Tariff Act. Scholars have argued generally that such assessments are made under the Patent Act.<sup>76</sup> Because the ITC does not administer the Patent Act, any interpretation that it makes under the Patent Act is not entitled to *Chevron* deference.<sup>77</sup>

Patent issues in the ITC, however, do not stand alone. As the Federal Circuit stated in *Solomon Technologies v. ITC*, “invalidity is not a separate claim,” but rather, “simply one ground for determining that the importation and sale of allegedly infringing articles do not ‘infringe a valid and enforceable United States patent.’”<sup>78</sup> In *Solomon*, the court was discussing why it was not required to address “every possible ground on which the [ITC’s] order might be sustained.”<sup>79</sup> But the court’s statement raises a broader point: in reviewing section 337 determinations, the relevant question is whether a particular article should be excluded, as opposed to determining merely whether a valid and enforceable patent has been infringed.

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<sup>73</sup> Uruguay Round Agreements Act § 321, Pub. L. No. 103-465, 108 Stat. 4809, 4943-4944 (1994); see Joel W. Rogers & Joseph P. Whitlock, *Is Section 337 Consistent With the GATT and the TRIPS Agreement?*, 17 AM. U. INT’L L. REV. 459, 523-24 (2002).

<sup>74</sup> Uruguay Round Agreements Act § 321.

<sup>75</sup> 19 U.S.C. § 1337(a)(1)(B)(i) (2006).

<sup>76</sup> See, e.g., *Process Patents: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 86-87 (2007) [hereinafter *2007 Senate Hearings*] (statement of John R. Thomas, Professor of Law, Georgetown University) (testifying that ITC interprets Patent Act whenever it makes patent-related determinations); Rogers & Whitlock, *supra* note 73, at 471 (maintaining that in section 337 cases, ITC applies “the same substantive patent law as a federal district court would”).

<sup>77</sup> See *Rapaport v. Dep’t of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995) (holding that deference is not owed to agency’s interpretation of statute, where agency shares responsibility for administration with other agencies).

<sup>78</sup> *Solomon Techs., Inc. v. U.S. Int’l Trade Comm’n*, 524 F.3d 1310, 1320 (Fed. Cir. 2008) (quoting 19 U.S.C. § 1337(a)(1)(B)).

<sup>79</sup> *Id.*

Such a determination cannot be made by a rote application of the Patent Act. The language from section 337 concerning articles that “infringe a valid and enforceable United States patent,” encompasses, at minimum, issues involving patents, international trade, and antitrust law. It was for this reason that Congress explicitly granted the ITC the power to determine “for its own purposes” whether a patent is invalid.<sup>80</sup> Legislative history of the Tariff Act coupled with the ITC’s power to engage in formal adjudication<sup>81</sup> supports a strong argument that the ITC is entitled to *Chevron* deference for its patent validity and enforceability determinations under section 337.<sup>82</sup>

Subpart A provides an overview of the *Chevron* doctrine and Subpart B argues that the two-part *Chevron* framework is appropriate for ITC determinations regarding patent validity and enforceability. It looks at the legislative history of the 1974 Tariff Act to show that the ITC interprets the Tariff Act for such determinations. Subpart C then performs a *Chevron* step one analysis, showing that “valid and enforceable” is ambiguous when one considers the text and history of section 337. Subpart C also considers the Federal Courts Improvement Act of 1982 and argues that Congress did not intend to unify patent law for agencies by creating the Federal Circuit. Subpart D discusses step two of *Chevron*. Part II concludes that ITC validity and enforceability determinations meet *Chevron* step one and should be affirmed if the agency acted reasonably in accordance with *Chevron* step two.

#### A. *The Federal Circuit’s Application of Chevron in Patent Cases*

##### 1. Overview of the *Chevron* Doctrine

Prior to 1984, the Supreme Court’s decision in *Skidmore v. Swift* controlled how a court reviewed an agency’s interpretation of its organic statute.<sup>83</sup> The Supreme Court held that an agency or administrator’s “rulings, interpretations and opinions” under its governing statute have the “power to persuade,” given its unique

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<sup>80</sup> See *infra* Part II.B.2.

<sup>81</sup> See *infra* Part II.B.1.

<sup>82</sup> This Article only focuses on validity and enforceability decisions from the ITC. However, a compelling argument can be made that ITC claim constructions should be granted *Chevron* deference as well.

<sup>83</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

expertise.<sup>84</sup> However, the federal judiciary is ultimately the decisionmaker in how the ambiguous term was to be construed.

In *Chevron*, the Court considered the Environmental Protection Agency's interpretation of an ambiguous portion of the Clean Air Act. The Court articulated a two-step framework for reviewing an agency's construction of a statute that it administers. First, the reviewing court must consider "whether Congress has directly spoken to the precise question at issue."<sup>85</sup> If the reviewing court concludes that "the intent of Congress is clear, that is the end of the matter; the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>86</sup> But if Congress did not directly address the precise question at issue, and "the statute is silent or ambiguous with respect to the specific issue," the reviewing court moves on to step two, asking "whether the agency's answer is based on a permissible construction of the statute."<sup>87</sup>

The Court did not regard this two-step framework as a major departure from its prior precedent. But the requirement that courts provide strong deference to agencies where Congress merely implicitly delegates interpretive authority is "[t]he more revolutionary but less often recognized aspect of *Chevron*."<sup>88</sup> This idea expanded the range of agency decisions eligible for deference and shifted power from the courts to the executive branch. The *Chevron* decision can thus be viewed as having had a profound effect on separation of powers.<sup>89</sup>

Moreover, the *Chevron* decision promoted uniformity in how courts review federal law by providing a clear framework to reviewing courts.<sup>90</sup> As legal scholar Peter Strauss notes, an agency will reach one

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<sup>84</sup> *Id.* at 139-40.

<sup>85</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

<sup>86</sup> *Id.* at 842-43.

<sup>87</sup> *Id.* at 843.

<sup>88</sup> Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1548 (2006) (citing *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")).

<sup>89</sup> See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) ("In an extraordinarily wide range of areas — including the environment, welfare benefits, labor relations, civil rights, energy, food and drugs, banking, and many others — *Chevron* has altered the distribution of national powers among courts, Congress, and administrative agencies.")

<sup>90</sup> See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1989) ("The suggestion here is that it is helpful to view *Chevron*

interpretation of a provision of its organic statute, but a panel of judges “could vary in its judgment.”<sup>91</sup> By shifting the responsibility for precise statutory interpretation to the agency, *Chevron* “enhances the probability of uniform national administration of the laws.”<sup>92</sup>

The Supreme Court later narrowed the reach of *Chevron* in *United States v. Mead Corp.*<sup>93</sup> The U.S. Customs Service had issued a “ruling letter” regarding the tariff rate for Mead’s imported planners. The Court of International Trade granted *Chevron* deference to the agency’s interpretation of the Harmonized Tariff Schedule, but the Federal Circuit reversed it.

On appeal, the Supreme Court affirmed the Federal Circuit and declined to grant *Chevron* deference to the ruling letter. It held that the *Chevron* framework is applicable only when Congress intended to delegate interpretive authority to the agency. The Court observed that “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”<sup>94</sup> Finding no congressional intent to delegate interpretive authority to the Customs Service, the Court concluded that *Chevron* deference was not appropriate.<sup>95</sup> The Court did hold, however, that *Skidmore* deference still applied, and remanded the case for a *Skidmore* analysis.<sup>96</sup>

*Mead* has been interpreted to stand for the proposition that when Congress grants an agency authority to engage in formal adjudication, formal rulemaking, or notice-and-comment rulemaking, this constitutes sufficient evidence of Congress’s intent to delegate, making the *Chevron* framework relevant.<sup>97</sup> Although it is possible for less

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through the lens of the Supreme Court’s severely restricted capacity directly to enforce uniformity upon the courts of appeals in those courts’ review of agency decisionmaking. When national uniformity in the administration of national statutes is called for, the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework.”)

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>94</sup> *Id.* at 230.

<sup>95</sup> *Id.* at 233-34.

<sup>96</sup> *Id.* at 234-35, 238-39. The Federal Circuit does not appear to have applied *Skidmore* deference to any PTO or ITC patent decision.

<sup>97</sup> See Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003) (“*Mead*, however, does not adopt this relatively simple approach. The opinion is quite clear that although the agency’s authority to use, and actual use of, the relevant procedural formats (i.e., formal rulemaking or adjudication and informal rulemaking) should be taken as sufficient (or all but sufficient) evidence of a

formal proceedings to be eligible for *Chevron* deference, such deference in those cases is rare.<sup>98</sup>

## 2. The Federal Circuit's Application of *Chevron*

The Federal Circuit maintains an uneasy relationship with the APA and the *Chevron* doctrine. As noted earlier, the court properly applies the APA and *Chevron* deference to agencies that do not handle patent matters, as well as to the PTO and the ITC when patents are not at issue.<sup>99</sup> However, it has resisted granting deference to agency patent decisions, choosing, instead, to maintain patent exceptionalism in administrative law.<sup>100</sup>

Consider the court's review of patent validity decisions appealed from the BPAI. In the case *In re Zurko*, the Federal Circuit considered whether § 706 of the APA applies to the court's review of the BPAI's findings of fact.<sup>101</sup> In other words, should the Federal Circuit defer to BPAI factfinding pursuant to § 706, or should it apply the less deferential standard of review used for district court proceedings?

In an en banc decision, the Federal Circuit unanimously held that the BPAI is exempt from the APA's review procedures. The court supported its decision based on the precedent of its predecessor court, the Court of Claims and Patent Appeals ("CCPA"), as well as a strained reading of the APA's legislative history.<sup>102</sup> The Supreme Court reversed, holding that § 706 is presumed to apply whenever a court reviews an agency's decision, absent clear statutory language to the contrary.<sup>103</sup>

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congressional intent to delegate, it is not necessary to use these formats.").

<sup>98</sup> See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 217-22 (2002) (holding that Social Security Administration's interpretation of ambiguous statutory language in course of informal adjudication was entitled to *Chevron* deference due to "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

<sup>99</sup> See *supra* notes 7-9 and accompanying text.

<sup>100</sup> See Kali Murray, *First Things, First: A Principled Approach to Patent Administrative Law*, 42 J. MARSHALL L. REV. 29, 48-54 (2008) (discussing patent exceptionalism in administrative law).

<sup>101</sup> *In re Zurko*, 142 F.3d 1447, 1450-52 (Fed. Cir. 1998), *rev'd sub nom.*, *Dickinson v. Zurko*, 527 U.S. 150 (1999).

<sup>102</sup> *Id.* at 1454-56.

<sup>103</sup> *Dickinson*, 527 U.S. at 156-60.

The Federal Circuit also takes an exceptionalist approach in applying *Chevron* to ITC patent decisions.<sup>104</sup> The only decision in which the court was willing to consider *Chevron* deference is in the 2004 case, *Kinik v. ITC*.<sup>105</sup> In *Kinik*, the court considered the agency's decision that infringement defenses under § 271(g) of the Patent Act<sup>106</sup> do not apply in section 337 proceedings.<sup>107</sup> The court stated that the ITC's decision was entitled to *Chevron* deference, concluding that the ITC had interpreted section 337 and not the Patent Act.<sup>108</sup> Although the section of the opinion granting *Chevron* deference was dictum, the suggestion that *Chevron* deference could apply to ITC patent decisions was met with criticism, leading to a Senate hearing regarding the case.<sup>109</sup> Scholars and practitioners argued that the ITC interprets the Patent Act whenever it decides patent-related cases.<sup>110</sup>

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<sup>104</sup> Note that with regard to ITC questions of fact, the Federal Circuit has properly applied the substantial evidence standard. For example, the court has interpreted validity determinations regarding prior art and the written description requirement as questions of fact, and reviewed them for substantial evidence. See *Linear Tech. Corp. v. U.S. Int'l Trade Comm'n*, 566 F.3d 1049, 1066 (Fed. Cir. 2009) (quotations omitted) ("Whether a prior art reference anticipates a patent claim is a question of fact, which we review for substantial evidence."); *Energizer Holdings, Inc. v. U.S. Int'l Trade Comm'n*, 275 Fed. App'x 969, 976-77 (Fed. Cir. 2008) (unpublished) (noting that "[a] validly issued patent must comply with the written description requirement" and that "whether a patent meets the written description requirement is a question of fact" that is reviewed for substantial evidence). Likewise, materiality and intent, which are elements of inequitable conduct, are reviewed for substantial evidence. See *Winbond Elecs. Corp. v. U.S. Int'l Trade Comm'n*, 01-1031, 2001 U.S. App. LEXIS 25113, at \*12 (Fed. Cir. Aug. 22, 2001) (unpublished) (citing *Tandon Corp. v. U.S. Int'l Trade Comm'n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987)). However, claims that the ITC invalidates for indefiniteness are treated as questions of law and reviewed de novo. See *Honeywell Int'l, Inc. v. U.S. Int'l Trade Comm'n*, 341 F.3d 1332, 1338 (2003) (noting that claims that are not "amenable to construction" are invalid as indefinite under 35 U.S.C. § 112, and that such determinations are reviewed de novo). Improper inventorship is likewise treated as a question of law and reviewed de novo. See *Univ. of Pittsburgh v. Hedrick*, 573 F.3d 1290, 1297 (Fed. Cir. 2009).

<sup>105</sup> *Kinik v. U.S. Int'l Trade Comm'n*, 362 F.3d 1359, 1361 (Fed. Cir. 2004).

<sup>106</sup> The relevant portion of 35 U.S.C. § 271(g) states:

A product which is made by a patented process will, for purposes of this title, not be considered to be so made after —

- (1) it is materially changed by subsequent processes; or
- (2) it becomes a trivial and nonessential component of another product.

35 U.S.C. § 271(g) (2006).

<sup>107</sup> *Kinik*, 362 F.3d at 1361.

<sup>108</sup> *Id.* at 1363.

<sup>109</sup> 2007 Senate Hearings, *supra* note 76 (statement of Sen. Patrick Leahy) (testifying regarding controversy surrounding ITC's decision that § 271(g) Patent Act

The *Kinik* decision, however, was an anomaly. In a later decision, the court affirmed that § 271(e) of the Patent Act does not apply in ITC proceedings.<sup>111</sup> Although the case was similar to *Kinik*, the court did not mention the *Chevron* doctrine. Nor has the court ever granted *Chevron* or *Skidmore* deference to an ITC patent validity or enforceability decision.<sup>112</sup> It appears, instead, that the Federal Circuit views itself as the patent expert.

### B. Step Zero: Applicability of Chevron Framework

As the Supreme Court observed in *Mead*, the two-step *Chevron* framework does not apply to every case in which there is judicial review of an agency's statutory interpretation. To be eligible for *Chevron* deference, Congress must intend to delegate interpretive authority to the agency. Courts generally find such intent if Congress authorized the agency to engage in formal adjudication, formal rulemaking, or notice-and-comment rulemaking. Moreover, the agency must be charged with administering the statute that is at issue. Scholars refer to the inquiry regarding whether the *Chevron* framework is applicable as "step zero."<sup>113</sup>

#### 1. Congressional Intent to Delegate Interpretive Authority

The primary step zero concern is whether ITC patent decisions constitute the type of delegated authority meriting *Chevron* deference.

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defenses are not available in section 337 proceedings).

<sup>110</sup> See *supra* note 76 and accompanying text. But see 2007 Senate Hearings, *supra* note 76, at 44 (written statement of Christopher A. Cotropia, Associate Professor of Law, University of Richmond School of Law) (citing 19 U.S.C. § 1337(a)(2), (3) (1988)); *Tandon Corp. v. U.S. Int'l Trade Comm'n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987) (testifying that while district courts are charged to enforce patents via Patent Act, ITC polices trade-related activities and protects domestic industries under Tariff Act).

<sup>111</sup> *Amgen v. U.S. Int'l Trade Comm'n*, 565 F.3d 846 (Fed. Cir. 2009).

<sup>112</sup> The Federal Circuit also has not granted *Chevron* or *Skidmore* deference to an ITC claim construction. Nor is the court implicitly giving such deference, as a recent empirical study has confirmed that ITC claim constructions are reversed as frequently as district court claim constructions. See David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1719-20 (2009) ("The reversal rates for the ITC appear roughly in line with the reversal rates for patent-busy district courts.").

<sup>113</sup> See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) ("But in the last period, the most important and confusing questions have involved neither step. Instead they involve *Chevron Step Zero* — the initial inquiry into whether the *Chevron* framework applies at all.").

Under *Mead*, if an agency engages in formal adjudication, the *Chevron* framework is applicable.<sup>114</sup>

The ITC engages in formal adjudication under section 337. Section 337(c) states that all determinations of exclusion “shall be made *on the record after notice and opportunity for a hearing* in conformity with the [APA].”<sup>115</sup> The use of the so-called “magic words” triggers the requirement that the agency proceed by formal adjudication under § 556 and § 557 of the APA.<sup>116</sup> The ITC promulgated a rule stating that all hearings under section 337 shall be made in accordance with § 556,<sup>117</sup> which also cross-references § 557.<sup>118</sup> Consequently, ITC statutory interpretation under section 337 is potentially eligible for *Chevron* deference under *Mead*.

## 2. Administration of the Tariff Act and Patent Act

Another initial hurdle is determining which statute the ITC interprets when it makes patent decisions and whether the ITC administers that statute. Courts will only defer to an interpretation of a statute that the agency at issue is charged with administering.<sup>119</sup> Moreover, if two agencies administer the same statute, neither is eligible for *Chevron* deference.<sup>120</sup>

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<sup>114</sup> United States v. *Mead*, 533 U.S. 218, 229 (2001).

<sup>115</sup> 19 U.S.C. § 1337(c) (2006) (emphasis added).

<sup>116</sup> See *Brand v. Miller*, 487 F.3d 862, 867 (Fed. Cir. 2007) (“Under § 554 of the [APA], if an agency adjudication is ‘required by statute to be determined on the record after opportunity for an agency hearing,’ the adjudication becomes a formal proceeding, subject to the requirements of §§ 556 and 557 of the APA.”).

<sup>117</sup> 19 C.F.R. § 210.36(a)(2)(d) states:

Rights of the parties. Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §§ 554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

19 C.F.R. § 210.36(a)(2)(d) (2010).

<sup>118</sup> 5 U.S.C. § 557(a) (2006) states: “This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.”

<sup>119</sup> See, e.g., *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (refusing to grant deference to Office of Workers’ Compensation Programs’ director’s interpretation of APA because director was not charged with administering statute); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (refusing to grant deference to Department of Labor’s interpretation of statute because Department was not charged with its administration).

<sup>120</sup> See *Collins v. Nat’l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C. Cir. 2003)

The ITC has “exclusive jurisdiction to administer section 337,”<sup>121</sup> but the PTO alone administers the Patent Act.<sup>122</sup> Thus, if the ITC interpreted section 337 in determining whether a patent is valid and enforceable, the *Chevron* framework would be appropriate. If the ITC interpreted the Patent Act in such circumstances, it would not receive any deference on appeal.

The Tariff Act is silent with regard to whether the Patent Act applies when the ITC makes patent decisions.<sup>123</sup> Thus, to determine whether the ITC interprets the Tariff Act in making section 337 patent determinations, it is necessary to look at the legislative history of section 337. The only legislative history discussing ITC validity and enforceability determinations in any detail are the 1974 Senate Finance Committee Report (“Senate Report”) and the 1973 Report of the Committee on Ways and Means (“House Report”).<sup>124</sup>

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(“These cases establish that because the FDIA is administered by four separate agencies . . . the interpretation of any one of them is not entitled to *Chevron* deference.”); *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (“When a statute is administered by more than one agency, a particular agency’s interpretation is not entitled to *Chevron* deference.”); *Rapaport v. Dep’t of Treasury*, 59 F.3d 212, 216 (D.C. Cir. 1995) (holding that deference is not owed to agency’s interpretation of statute, where agency shares responsibility for administration with other agencies).

<sup>121</sup> *Farrel Corp. v. U.S. Int’l Trade Comm’n*, 949 F.2d 1147, 1155 (Fed. Cir. 1991).

<sup>122</sup> See *Corning Glass Works v. U.S. Int’l Trade Comm’n*, 799 F.2d 1559, 1565 n.5 (Fed. Cir. 1986) (“[T]he Commission is not charged with administration of the patent statute, 35 U.S.C. § 1 et seq. Thus we do not defer to its interpretation of patent law.”). Although the Federal Circuit has held that the PTO administers only portions of the Patent Act, *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1337 (Fed. Cir. 2008), Section 2(a)(1) of the Patent Act states that the PTO “shall be responsible for the granting and issuing of patents . . .” 35 U.S.C. 2(a)(1) (2006). This implies that the PTO administers the entire Patent Act. See Rochelle Cooper Dreyfuss, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 VA. L. REV. 677, 748 (1986) (“Because the PTO is an expert agency charged with the principal responsibility for administering the highly technical Patent Act, it is somewhat surprising that its decisions are not accorded this same respect, especially in light of the presumption of validity created by the Patent Act.”); Nard, *supra* note 5, at 1455 n.150 (“Implicit in [*Corning Glass Works* note 5] is that the Federal Circuit would defer to the PTO’s interpretation of the patent statute. If the PTO does not administer the patent statute, then who does?”). But see Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 167 n.169 (2000) (arguing that nobody administers Patent Act).

<sup>123</sup> Arguments that Congress invoked the Patent Act through using certain language in Section 337 and that the *in pari materia* canon is applicable will be considered in Part I.C.

<sup>124</sup> S. COMM. ON FIN., 93D CONG., TRADE ACT OF 1974, S. REP. NO. 93-1298, at 196 (1974), as reprinted in 1974 U.S.C.C.A.N. 7186, 7329; H. COMM. ON WAYS & MEANS, 93D CONG., TRADE REFORM ACT OF 1973, H.R. REP. NO. 93-571, at 78 (1974).

a. “Existing Law” Under the 1974 House and Senate Reports

The House Report initially noted that in “making its determinations in cases involving the claims of a U.S. patent,” the ITC would consider precedent from the CCPA. It observed that such precedent established that the importation or domestic sale of infringing imported goods constitutes an unfair method of competition.<sup>125</sup> This portion of the House Report does not appear to have required the ITC to consider all precedent from the CCPA, let alone all patent precedent from the courts of appeal. Rather, it appears to direct the agency to consider only section 337 CCPA precedent.

The House Report next stated that the ITC “would also consider the evolution of patent law doctrines, including defenses based upon antitrust and equitable principles, and the public policy of promoting ‘free competition.’”<sup>126</sup> Similar language appeared in the Senate Report.<sup>127</sup> Both Reports observed that the Tariff Commission historically heard complaints of importation regarding goods that violated a U.S. patent. However, under the Tariff Act of 1922 and the Tariff Act of 1930, the Tariff Commission was required to presume that all patents were valid unless a court held otherwise.<sup>128</sup> The Reports then discussed *Lear, Inc. v. Atkins*, in which the Supreme Court held that a contract forbidding a licensee from challenging the validity of a patent was “inconsistent” with the federal patent policy of “favoring the full and free use of ideas in the public domain.”<sup>129</sup>

The House Report further stated that *Lear* and “the ultimate issue of the fairness of competition” under section 337

necessitate that the Commission review the enforceability of patents for the purposes of section 337, in accordance with contemporary legal standards when such issues are raised and are adequately supported. The President is not *empowered under existing law* — *nor would the Commission be under the amendment* — to set aside a patent as being invalid or to render it unenforceable. The extent of the Commission’s authority is to take into consideration such legal defenses and

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<sup>125</sup> H.R. REP. NO. 93-571, at 78.

<sup>126</sup> *Id.*

<sup>127</sup> S. REP. NO. 93-1298, at 196, as reprinted in 1974 U.S.C.C.A.N. 7186, 7329.

<sup>128</sup> H.R. REP. NO. 93-571, at 78; S. REP. NO. 93-1298, at 196, as reprinted in 1974 U.S.C.C.A.N. 7186, 7329.

<sup>129</sup> *Lear, Inc. v. Atkins*, 395 U.S. 653, 673-74 (1967).

to make findings thereon for the purposes of determining whether section 337 is being violated.<sup>130</sup>

In this context, it appears that “existing law” refers to the Tariff Act. The House Report observed that neither the pre-1974 version of section 337 nor the amended version would permit the ITC or the President to affect the validity or enforceability of a patent. Rather, the ITC could consider an invalidity defense for the purpose of determining whether section 337 has been violated.

The language of the Senate Report is similar:

The Committee believes the Commission may (and should when presented) *under existing law* review the validity and enforceability of patents, but Commission precedent and certain court decisions have led to the need for the language of amended section 337(c). The Commission is not, of course, *empowered under existing law* to set aside a patent as being invalid or to render it unenforceable, and the extent of the Commission’s authority *under this bill* is to take into consideration such defenses and to make findings thereon for the purposes of determining whether section 337 is being violated.<sup>131</sup>

The Senate Committee thus states that the ITC can review validity and enforceability under the Tariff Act, but that it was amending section 337 to clarify this point. Such an interpretation makes sense given that the full paragraph discusses the Tariff Act, but makes no mention of the Patent Act.

The Senate Report further noted:

The relief provided for violations of section 337 is “in addition to” that granted in “any other provisions of law.” The criteria of section 337 differ in a number of respects from other

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<sup>130</sup> H.R. REP. NO. 93-571, at 78 (emphasis added). Both the House and Senate Report note that validity and enforceability should be interpreted “in accordance with contemporary legal standards.” *Id.*; S. REP. NO. 93-1298, at 196, as reprinted in 1974 U.S.C.C.A.N. 7186, 7329. One could argue that this phrase means that the Patent Act applies when the ITC reviews the enforceability of patents. However, the Reports go to great lengths to emphasize that ITC decisions cannot be binding on Federal Court decisions, implying that the ITC applies a separate standard. If the ITC was required to follow the Patent Act and the judicial precedent of the courts of appeal, it is unclear why Congress would feel a need to deny the agency’s interpretations of validity and enforceability preclusive effect on courts.

<sup>131</sup> S. REP. NO. 93-1298, at 196, as reprinted in 1974 U.S.C.C.A.N. 7186, 7329 (emphasis added).

statutory provisions for relief against unfair trade practices. For example, in patent-based cases, the Commission considers, for its own purposes under the section 337, the status of imports with respect to the claims of U.S. patents. *The Commission's findings neither purport to be, nor can they be, regarded as binding interpretations of the U.S. patent laws in particular factual contexts.* Therefore, it seems clear that any disposition of a Commission action by a Federal Court should not have a res judicata or collateral estoppel effect in cases before such courts.<sup>132</sup>

This is the closest that either of the Reports came to referencing the Patent Act. Taken by itself, one might interpret the italicized language to mean that the ITC does interpret the Patent Act when determining whether an import violates the claims of a patent, but that it does so only for its own purposes. However, given that both reports emphasize that the ITC is authorized to review validity and enforceability of patents under the Tariff Act, it seems more likely that the Senate Report emphasizes the ITC's power to interpret patents under the Tariff Act.

*b. Preclusion and the Federal Circuit*

The sections of the Reports discussed above stress that the ITC makes patent determinations for its own purposes, and that these decisions do not bind federal courts. But why would Congress single out section 337 patent determinations? Non-patent section 337 ITC determinations, such as trademark decisions, have preclusive effect on courts.<sup>133</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> See *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 14 (1st Cir. 1992) (holding that section 337 proceeding for antitrust claim is entitled to res judicata effect); *Balt. Luggage Co. v. Samsonite Corp.*, No. 91-2171, No. 91-2190, 1992 U.S. App. LEXIS 27493, at \*9 (4th Cir. Oct. 16, 1992) (unpublished) (holding that “the ITC has full authority to decide trademark claims and its adjudications of unfair trade practice and trademark infringement causes of action are entitled to res judicata [claim preclusion] effect” and rejecting arguments regarding Seventh Amendment violations); *Union Mfg. Co. v. Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985) (noting that there are no cases “not involving patent validity” where res judicata effect has been denied and holding that ITC trademark decisions are entitled to res judicata effect); *Order No. 3, Apparatus for Disintegration of Urinary Calculi*, Inv. No. 337-TA-221, 1985 WL 303900 (June 6, 1985) (discussing res judicata in section 337 patent and trademark proceedings). Note that the absence of recent nonpatent appellate res judicata cases could be a reflection of the fact that nonpatent section 337 proceedings are uncommon.

One possibility is that Congress included this language because, in 1974, the ITC was not an expert in patent law. However, this explanation is unlikely. At the time, patent infringement cases were heard by district court judges and then appealed to general courts of appeals. Moreover, the ITC eventually gained expertise in patent law; yet Congress did not include any language in subsequent amendments to the Tariff Act to grant preclusive effect to ITC decisions.

A second possibility is that Congress wanted to increase uniformity. But in 1987, the Federal Circuit announced in *Tandon Corp. v. ITC* that “our appellate treatment of decisions of the Commission does not estop fresh consideration by other tribunals.”<sup>134</sup> The Court based this decision on the language from the Senate Report.<sup>135</sup> Although the Tariff Act was revised substantially in 1988, Congress did not address uniformity at that time.

Indeed, some speculation arose after the Trade Act of 1988 passed regarding whether *Tandon* remained good law. In 1996, the Federal Circuit revisited the issue in *Texas Instruments, Inc. v. Cypress Semiconductor Corp.*<sup>136</sup> The plaintiff in this case filed parallel patent proceedings in the district court and the ITC. The plaintiff won in the ITC and on appeal before the Federal Circuit in 1993. The 1993 Federal Circuit panel affirmed that two claims of the patent at issue were infringed. But in 1995, the defendant prevailed in the district court proceeding, which set aside the jury verdict and held that those same two claims were *not* infringed.<sup>137</sup>

The plaintiff appealed the district court’s decision to the Federal Circuit, arguing that the district court was bound by the Federal Circuit’s 1993 decision and that the doctrine of issue preclusion applied.<sup>138</sup> The Federal Circuit disagreed, holding that patent rulings under section 337 cannot bind subsequent district court proceedings due to the legislative history of the 1974 Act. It affirmed the district court, thereby creating a split with its 1993 decision.<sup>139</sup> The court noted that *Tandon* remained good law, and that the Federal Courts Improvement Act, the Trade Act of 1988, and the Uruguay Round

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<sup>134</sup> *Tandon Corp. v. U.S. Int’l Trade Comm’n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987).

<sup>135</sup> *Id.*

<sup>136</sup> *Tex. Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558 (Fed. Cir. 1996).

<sup>137</sup> *Id.* at 1563.

<sup>138</sup> *Id.* at 1568.

<sup>139</sup> *Id.* at 1564-65, 1569.

Agreements did not alter Congress's clear intent as expressed in the Senate Report.<sup>140</sup>

The end result was two Federal Circuit opinions interpreting the same patent claims in different ways. Consequently, the plaintiff was able to obtain an exclusion order in the ITC, but could not get cash damages in federal court. District courts took heed of *Texas Instruments* and stopped treating Federal Circuit appeals of ITC decisions as binding,<sup>141</sup> although some district courts have treated such decisions as being persuasive.<sup>142</sup>

The fact that Federal Circuit patent decisions involving section 337 have no preclusive effect on subsequent federal court Patent Act decisions is illogical, unless district court and ITC proceedings are fundamentally different. As *Texas Instruments* illustrates, the language from the Reports prevents uniformity by leading to conflicting federal court opinions.<sup>143</sup> The most plausible explanation for Congress treating section 337 patent decisions as distinct from Patent Act decisions was that it wanted the ITC to have the flexibility to adapt patent doctrines under the Tariff Act.

### C. Step One

Under step one of *Chevron*, the reviewing court considers “whether Congress has directly spoken to the precise question at issue” or whether the statute at issue is silent or ambiguous.<sup>144</sup> To answer this question, the court looks to the “text, structure, purpose, and history”

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<sup>140</sup> *Id.* at 1569.

<sup>141</sup> *See, e.g.,* 3M v. Beutone Specialties Co., 117 F. Supp. 2d 72, 83 (D. Mass. 1999) (holding that Federal Circuit's affirmance of ITC's claim construction had no preclusive effect on district court's consideration of the same patent).

<sup>142</sup> *Flexsys Am. LP v. Kumho Tire U.S.A., Inc.*, 695 F. Supp. 2d 609, 617 (D. Ohio 2010) (“[T]his Court shall afford the Federal Circuit's claim interpretation a strong presumption of correctness, which may only be overcome by compelling reasons such as ‘evidence or arguments not presented to the Circuit panel or, in the rarest of cases, plain error on the face of the Federal Circuit opinion.’”) (quoting *Alloc v. Lifton Co.*, 03 Civ. 4419, 2007 U.S. Dist. LEXIS 52293, at \*29 (S.D.N.Y. July 18, 2007)).

<sup>143</sup> *Texas Instruments* illustrates the fact that inconsistency between patent cases under the Tariff Act versus the Patent Act already exists. Federal Circuit appeals of ITC decisions do not bind other courts. *Tandon Corp. v. U.S. Int'l Trade Comm'n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987) (“[O]ur appellate treatment of decisions of the Commission does not estop fresh consideration by other tribunals.”). Consequently, if the Federal Circuit were required to grant *Chevron* deference to ITC validity and enforceability decisions, this would not lead to any additional inconsistencies between the two Acts. As *Tandon* shows, such Federal Circuit decisions are nonbinding to future courts regardless of whether the Federal Circuit granted deference.

<sup>144</sup> *Chevron, U.S.A., Inc., v. Nat'l Res. Def. Council*, 467 U.S. 837, 842 (1984).

of the relevant statute, in addition to its relationship with other statutes.<sup>145</sup>

### 1. Text, Structure, and Purpose of Section 337

In drafting section 337, Congress did not define several important terms, leaving the ITC to fill the gaps.<sup>146</sup> In particular, Congress left the language pertaining to patents ambiguous. Section 337(a)(1)(B) declares as unlawful:

(B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that —

(i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or

(ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.<sup>147</sup>

The Tariff Act does not explain how to determine when articles “infringe a valid and enforceable United States patent,” nor does it cross-reference the Patent Act.

One could argue that Congress signaled that § 282 of the Patent Act applies to section 337 decisions by using the term of art “valid.” Section 282 of the Patent Act states that “[a] patent shall be presumed valid.”<sup>148</sup> It then states four defenses to “any action involving the validity or infringement of a patent.”<sup>149</sup>

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<sup>145</sup> Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004).

<sup>146</sup> For example, in *Enercon v. ITC*, the ITC interpreted “sale” using section 2-204(1) of the Uniform Commercial Code. *Enercon v. U.S. Int’l Trade Comm’n*, 151 F.3d 1376, 1383 (Fed. Cir. 1998). In that case, the Federal Circuit applied *Chevron* and concluded that the ITC’s interpretation was reasonable in light of the “language, policies and legislative history of the statute.” *Id.* at 1381.

<sup>147</sup> 19 U.S.C. § 1337(B) (2006).

<sup>148</sup> 35 U.S.C. § 282 (2006).

<sup>149</sup> Those four defenses are:

- (1) Noninfringement, absence of liability for infringement or unenforceability,
- (2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability,
- (3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title,
- (4) Any other fact or act made a defense by this title.

The problem with this theory is that the term “valid” is used in multiple contexts in section 337(a)(1). Section 337(a)(1)(B)(i) uses the term with regard to both patents and copyrights, and section 337(a)(1)(C) prohibits the importation of articles that infringe a valid registered trademark. Looking at section 337(a)(1) in its entirety, “valid” appears to refer to intellectual property rights in general, thus spanning multiple statutes. This reading is consistent with Congress’s explicit intent to bolster protection for all forms of intellectual property.<sup>150</sup> It is, therefore, unclear why use of the word “valid” would, in and of itself, signal that the Patent Act applies.

Furthermore, there is no definition of “enforceable” in the Patent Act; 35 U.S.C. § 282(1) merely specifies that “[n]oninfringement, absence of liability for infringement or unenforceability” are defenses to validity or infringement actions. Although the Federal Circuit has found a patent to be unenforceable in certain circumstances, such as in cases of inequitable conduct,<sup>151</sup> there is no common definition for the term.

Another argument in favor of applying the Patent Act is that when Congress used the term “United States patent,” it intended to cross-reference the Patent Act. However, when the same provision refers to copyrights, section 337 explicitly references the U.S. Copyright Act codified in Title 17. Likewise, when section 337(a)(1)(C) discusses trademarks, it references the Trademark Act of 1946. In contrast, there is no reference to the Patent Act anywhere in section 337 or in its legislative history. Although a counterargument can be made that Congress needed to refer explicitly to Title 17 and the Trademark Act to show that section 337 only applies to registered copyrights and trademarks, it is nevertheless unclear why Congress would fail to refer to the Patent Act.<sup>152</sup>

Moreover, the Federal Circuit and the ITC have not treated the Patent Act as applying to the ITC in its entirety. In *Kinik*, the court granted *Chevron* deference in dictum to the agency’s statutory interpretation, stating that defenses under § 271(g) of the Patent Act

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35 U.S.C. § 282.

<sup>150</sup> See Kumar, *supra* note 10, at 547.

<sup>151</sup> See, e.g., *Digital Control, Inc. v. Charles Mach. Works*, 437 F.3d 1309, 1313 (Fed. Cir. 2006) (“A patent may be rendered unenforceable for inequitable conduct if an applicant, with intent to mislead or deceive the examiner, fails to disclose material information or submits materially false information to the PTO during prosecution.”).

<sup>152</sup> Even if the Patent Act were cross-referenced for the term “United States patent,” this would still leave the ITC with leeway to determine what constitutes an “enforceable patent,” given that that term is undefined in the Patent Act.

do not apply under section 337.<sup>153</sup> The Commissioners of the ITC have stated elsewhere: “We understand the Federal Circuit’s statement that § 271(g) defenses do not apply to section 337(a)(1)(B)(ii) to mean that 35 U.S.C. § 271(g) does not inform the analysis of 19 U.S.C. § 1337(a)(1)(B)(ii), and therefore that 19 U.S.C. § 1337(a)(1)(B)(ii) must be analyzed independently.”<sup>154</sup> And at least one ALJ has noted that “no showing has been made that Section 271(f) would restrict this Commission’s jurisdiction under Section 337.”<sup>155</sup>

## 2. Legislative History

Under *Chevron*, the court looks to the legislative history of a statute to determine whether the statutory language is ambiguous. As discussed above, the legislative history for the 1974 Act discusses, but does not define, validity and enforceability. It is important to note that at the time, section 337 merely declared unlawful “unfair methods of competition and unfair acts” related to importation<sup>156</sup> and did not have patent-specific language.

Congress added language concerning articles that “infringe a valid and enforceable United States patent” in the Trade Act of 1988. The 1988 reports and hearings in the legislative history repeatedly mention the importance of protecting intellectual property and the need to make it easier for patent holders to exclude infringing goods.<sup>157</sup> The legislative history notes that the original provision in the Tariff Act did not address intellectual property rights in section 337. But by the mid-to late 1980’s, litigants were using section 337 primarily to enforce such rights.<sup>158</sup> However, none of the legislation from the revised Trade

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<sup>153</sup> *Kinik v. U.S. Int’l Trade Comm’n*, 362 F.3d 1359, 1363 (Fed. Cir. 2004).

<sup>154</sup> *Certain Sucralose, Sweeteners Containing Sucralose & Related Intermediate Compounds*, Inv. No. 337-TA-604, 2010 ITC LEXIS 631, at \*44 (Apr. 28, 2009).

<sup>155</sup> *Certain Sucralose, Sweeteners Containing Sucralose & Related Intermediate Compounds*, Inv. No. 337-TA-604, 2010 ITC LEXIS 633, at \*73 (Mar. 9, 2009), *aff’d*, 2010 ITC LEXIS 631, at \*49 (Apr. 28, 2009).

<sup>156</sup> Trade Act of 1974, Pub. L. 93-618, 88 Stat. 2053 (1975).

<sup>157</sup> See, e.g., REPORT ON THE COMMITTEE ON FINANCE, S. REP. NO. 100-71, at 128 (1987) (“The fundamental purpose of the amendments made by section 401 is to strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights.”); H. COMM. ON WAYS & MEANS, COMPREHENSIVE TRADE POLICY REFORM ACT OF 1986, H.R. REP. NO. 99-581, at 155 (1986) (“The fundamental purpose for the amendments made by section 172 is t[o] strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights.”).

<sup>158</sup> S. REP. NO. 100-71, at 128; H.R. REP. NO. 99-581, at 155.

Act sheds light on what “valid and enforceable” means, whether the Patent Act is applicable in such proceedings, or what the role of Federal Circuit precedent should be.<sup>159</sup>

### 3. Canon of *In Pari Materia*<sup>160</sup>

In determining the existence of ambiguity in the relevant statutory language, courts use traditional tools of statutory construction.<sup>161</sup> If regular interpretive methods leave no statutory ambiguity, then step one is not met, and the agency receives no deference for its interpretation.<sup>162</sup> Among the traditional tools that the Supreme Court uses are various canons of construction.<sup>163</sup> The Court describes such canons as “rules of thumb which will sometimes help courts determine the meaning of legislation.”<sup>164</sup>

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<sup>159</sup> Note that the Senate Committee on Finance Report does explicitly note that the ITC should apply “the standards used by the Federal courts in reviewing requests for preliminary injunctions in intellectual property cases.” S. REP. NO. 100-71, at 131. The House Ways and Means Report notes that for cases involving “parallel importation or gray market goods,” the rights of intellectual property owners remain unchanged “since the underlying statutes governing patents, copyrights, trademarks or mask works have not been changed.” H.R. REP. NO. 99-581, at 158. The report then notes that the law to be applied in section 337 proceedings involving parallel importation or gray market goods “is the law as interpreted by United States courts.”

<sup>160</sup> There are many canons of construction that can be used in a *Chevron* analysis. Because the canon of *in pari materia* poses the most problems to granting *Chevron* deference, I have chosen to focus on it.

<sup>161</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”). Traditional tools of statutory interpretation include the statutory text, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history. Elizabeth Garret, *Step One of Chevron v. Natural Resources Defense Council*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 55, 57 (John F. Duffy & Michael Herz eds., 2005).

<sup>162</sup> See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that agency is not entitled to deference because “regular interpretive method leaves no serious question, not even about purely textual ambiguity” for statute at issue).

<sup>163</sup> See, e.g., *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (applying canon that statutes will not be understood to apply retroactively); *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 501-02 (1998) (applying “the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning” in step one analysis); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (applying *noscitur a sociis* canon, which “dictates that words grouped in a list should be given related meaning” (internal quotations omitted)).

<sup>164</sup> *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (internal quotation marks and citation omitted).

Controversy exists regarding the extent to which such rules of thumb can be relied upon in applying the *Chevron* two-step test. The Supreme Court has not clarified how reviewing courts should treat conflicting canons or how they should proceed when canons conflict with other tools of statutory interpretation. Professor Adrian Vermeule maintains that “courts should defer to agencies whenever the statutory text at issue, viewed on its face and without recourse to the traditional tools, contains a surface-level gap or ambiguity.”<sup>165</sup> Other scholars argue in favor of courts using text-oriented or descriptive canons to fill gaps.<sup>166</sup>

The strongest argument against granting *Chevron* deference to the ITC comes from the canon of *in pari materia*.<sup>167</sup> Under this canon, different statutes addressing the same subject matter “generally should be read as if they were one law.”<sup>168</sup> The rationale for the canon is that when Congress passes a statute, “it acts aware of all previous statutes on the same subject.”<sup>169</sup> Consequently, the canon’s application makes the most sense “when the statutes were enacted by the same legislative body at the same time.”<sup>170</sup>

Although this canon is applicable only to statutes that address the same subject matter, in practice, courts use it liberally. For example, the Supreme Court held that the Patent Act and Sherman Act should be read together<sup>171</sup> — despite the fact that the Patent Act creates monopolies, while the Sherman Act regulates them. Thus, under similar reasoning, one might argue that the Tariff Act and Patent Act

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<sup>165</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 211 (2006) (quoting Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 675 (2000)).

<sup>166</sup> Caleb Nelson, *Statutory Interpretation and Decision Theory: Judging under Uncertainty: An Institutional Theory of Legal Interpretation*, 74 U. CHI. L. REV. 329, 349 (2007) (reviewing VERMEULE, *supra* note 165).

<sup>167</sup> For a discussion on the origins of the canon, see Eben Moglen & Richard J. Pierce, *Sunstein’s New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1211-12 (1990) (“It is sometimes suggested that such construction is possible because Parliament is eternal and speaks with one voice. It is also suggested, more naturalistically, that the members of the legislature are presumed to act in full knowledge of the existing state of the law.”).

<sup>168</sup> *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006) (quotations omitted) (citing *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)); see also *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845).

<sup>169</sup> *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972).

<sup>170</sup> *Id.*

<sup>171</sup> See *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) (“The patent laws which give a 17-year monopoly on ‘making, using, or selling the invention’ are in *pari materia* with the antitrust laws and modify them *pro tanto*.”)

should be read together so that the term “valid and enforceable” is unambiguous.

However, the Federal Circuit rejected this approach. In *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, the Federal Circuit considered whether the district court had original jurisdiction over a Japanese patent infringement claim under 28 U.S.C. § 1338(b).<sup>172</sup> Section 1338(b) gives the district court jurisdiction to hear certain unfair competition claims, and Mars maintained that that “unfair competition” should be construed broadly to include the infringement of a foreign patent.

The Federal Circuit stated that, in general, the infringement of patent rights is not recognized “as coming within the rubric of ‘unfair competition.’”<sup>173</sup> It then maintained that section 337 “is no exception,” because section 337 makes *importation* the “unlawful activity” and not patent infringement per se.<sup>174</sup> The court noted that “[u]nfair competition law and patent law have long existed as distinct and independent bodies of law, each with different origins and each protecting different rights.”<sup>175</sup> The court further observed that “the law of unfair competition generally protects consumers and competitors from deceptive or unethical conduct in commerce,” whereas patent law “protects a patent owner from the unauthorized use by others of the patented invention, irrespective of whether deception or unfairness exists.”<sup>176</sup> The court, therefore, concluded that “[t]he provisions of Title 35 governing patents are not *in pari materia* with the state and federal provisions governing unfair competition.”<sup>177</sup>

The reasoning in *Mars* suggests that courts should not read section 337 *in pari materia* with the Patent Act. The purpose of the Patent Act is to “promote the Progress of . . . the useful Arts”<sup>178</sup> and promote technological innovation through protecting patent owners. Patent rights are enforced regardless of their ill-effects on the public welfare or on competition. Section 337, in contrast, was created to protect domestic industry from acts of unfair competition that arise from liberalized trade. Exclusion orders cannot be issued under

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<sup>172</sup> *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1370 (Fed Cir. 1994). Note that this case was decided before Section 271 of the Patent Act was amended to protect against infringing imports.

<sup>173</sup> *Id.* at 1373.

<sup>174</sup> *Id.* at 1373 n.3.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> U.S. CONST. art. I, § 8, cl. 8.

section 337 if they unduly harm the public health and welfare.<sup>179</sup> Although exclusion orders are seldom denied on such grounds, they are often narrowed due to public interest considerations.<sup>180</sup> Thus, the strict enforcement of patent rights under the Patent Act is in direct conflict with the protectionist mission of section 337 and the Tariff Act in general.

Even if the canon applied, the ambiguity in the term “enforceable” remains unresolved. The Federal Circuit has interpreted patents to be unenforceable where the patent holder engaged in inequitable conduct or, more generally, where the defendant raises an equitable defense, such as unclean hands or prosecution laches.<sup>181</sup> But nowhere does the Patent Act define what “enforceable” means or when a patent may be found unenforceable.

Consequently, the ITC would still be entitled to *Chevron* deference on its interpretation of what constitutes an enforceable patent. The ITC could interpret patents to be unenforceable where enforcement would contravene the legislative intent of section 337, perhaps by hurting domestic industry or the public welfare. Alternatively, the ITC could interpret enforceability in a manner similar to that of the Federal Circuit, but would receive strong deference for its decisions.

#### 4. The Creation of the Federal Circuit

The Federal Courts Improvement Act of 1982 (FCIA) created the United States Court of Appeals for the Federal Circuit.<sup>182</sup> Under the FCIA, the newly created court was given jurisdiction over virtually all

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<sup>179</sup> 19 U.S.C. § 1337(d)(1) (2006).

<sup>180</sup> See, e.g., *Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prod. Containing Same, Including Cellular Tele. Handsets*, Inv. No. 337-TA-543, 2007 ITC LEXIS 621, at \*49 (June 19, 2007) (issuing exclusion order that grandfathers in current cell phones on market because “such a remedy provides effective protection to the intellectual property owner, promotes innovation without being unduly disruptive to legitimate commerce, and appropriately balances the competing public interests at stake.”), *rev’d in part sub nom.*, *Kyocera Wireless Corp. v. U.S. Int’l Trade Comm’n*, 545 F.3d 1340 (Fed. Cir. 2008).

<sup>181</sup> See, e.g., *Princo Corp. v. U.S. Int’l Trade Comm’n*, 616 F.3d 1318, 1327 (Fed. Cir. 2010) (noting that patent misuse can render patent unenforceable); *Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 829-30 (Fed. Cir. 2010) (“If the court finds on the balance that the applicants committed inequitable conduct, the patent is unenforceable.”); *Symbol Techs. Inc. v. Lemelson Med.*, 277 F.3d 1361, 1364 (Fed. Cir. 2002) (noting that prosecution laches is equitable defense to patent infringement that may “render a patent unenforceable” where there has been unexplained delay in prosecution).

<sup>182</sup> Federal Court Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982).

patent appeals,<sup>183</sup> creating a centralized court for reviewing patent cases. In the legislative history for the FCIA, Congress emphasized the problems with “undue forum-shopping and unsettling inconsistency in adjudications” that resulted from having patent cases appeal to the regional courts of appeal.<sup>184</sup>

One could argue that this Act signaled congressional intent for patent uniformity that overcomes any ambiguity in section 337. The Supreme Court has stated that “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”<sup>185</sup> Thus, if Congress spoke specifically to patent uniformity in the FCIA, it could affect the interpretation of the Tariff Act.

However, when Congress passed the FCIA, it was not concerned about the treatment of patent agency decisions. The FCIA granted the Federal Circuit jurisdiction over appeals from several agencies. But the legislative history does not discuss how appeals of patent-related agency decisions should be treated. Congress instead focused on creating a single court to hear appeals of district court patent cases.<sup>186</sup>

The view that the Federal Circuit was not created for the purpose of imposing uniformity over administrative patent decisions is consistent with how Congress structured the new court. The House Report stated that it did not intend for the Federal Circuit to be a specialized court.<sup>187</sup> The House Judiciary Committee emphasized that the court

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<sup>183</sup> A few exceptions remain. For example, in *Holmes Group, Inc. v. Vornado Air Circulation Systems*, 535 U.S. 826, 831-32 (2002), the Supreme Court held that a patent-law counterclaim does not serve as the basis for Federal Circuit jurisdiction because the well-pleaded-complaint rule governs.

<sup>184</sup> H.R. REP. NO. 97-312, at 20 (1981).

<sup>185</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)); see *United States v. Fausto*, 484 U.S. 439, 453 (1988).

<sup>186</sup> H.R. REP. NO. 97-312, at 20 (noting that “establishment of a single court to hear patent appeals was repeatedly singled out by the witnesses” as the best way to strengthen patent system by providing “nationwide uniformity in patent law” for federal court adjudication and by eliminating forum shopping).

<sup>187</sup> *Id.* at 19. Despite Congress’s intent, the Federal Circuit has become a specialized court. See *Vornado*, 535 U.S. at 838-39 (Stevens, J., concurring) (“There is, of course, a countervailing interest in directing appeals in patent cases to the specialized court that was created, in part, to promote uniformity in the development of this area of the law. But we have already decided that the Federal Circuit does not have exclusive jurisdiction over all cases raising patent issues. . . . Moreover, occasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias.” (citation omitted)); Dreyfuss, *supra* note 17, at 74-75 (arguing that specialized nature of Federal Circuit has been, overall, successful).

would have “a varied docket spanning a broad range of legal issues and types of cases.”<sup>188</sup> It further noted that appellate courts would establish rules regarding how to handle ancillary and pendent patent claims.<sup>189</sup> Justice Stevens highlighted this point in his concurrence in *Holmes v. Vornado*, where he observed that “the Federal Circuit does not have exclusive jurisdiction over all cases raising patent issues.”<sup>190</sup>

Moreover, in *Texas Instruments*, the Federal Circuit observed that the passage of the FCIA did not alter the fact that section 337 Federal Circuit decisions have no preclusive effect on district courts.<sup>191</sup> In other words, Congress’s decision to grant the Federal Circuit jurisdiction over appeals of all district court patent cases did not signal an intent to unify patent law under section 337 and the Patent Act.

In enacting the FCIA, Congress could not have expressed intent regarding strong judicial deference to agencies because *Chevron* was not decided until two years later. When the FCIA passed, the weak *Skidmore* standard governed a court’s review of agency statutory interpretation.<sup>192</sup> It is, therefore, unlikely that Congress “unambiguously expressed intent” in the FCIA to prevent deference to patent agencies because agency statutory interpretations were accorded limited deference at that time. Given that Congress failed to address the *Chevron* decision when it passed the Trade Act of 1988, Congress could not have intended to except the ITC from the *Chevron* doctrine.

The *Chevron* framework is, therefore, applicable to certain ITC patent determinations because the ITC is interpreting the Tariff Act when it determines what constitutes a “valid and enforceable U.S. patent.” The term “valid and enforceable” is ambiguous because it is not defined in the Tariff Act, nor is the Patent Act referenced in

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<sup>188</sup> H.R. REP. NO. 97-312, at 19.

<sup>189</sup> *Id.* at 41.

<sup>190</sup> *Vornado*, 535 U.S. at 838 (Stevens, J., concurring) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 811-12 (1988)).

<sup>191</sup> *Tex. Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996) (noting that although FCIA, 1988 Tariff Act, and Uruguay Round Agreements “have modified some ITC procedures and provided the ITC with the same appellate court of review as that of district courts deciding patent issues, none of these statutory amendments or their legislative histories dealt with the possible preclusive effect of ITC determinations or indicated an intent contrary to Congress’s stated intention in 1974”).

<sup>192</sup> *See, e.g., UPG, Inc. v. Edwards*, 647 F.2d 147, 156 n.23 (Temp. Emer. Ct. App. 1981) (noting that under *Skidmore*, “[t]he weight to be given an interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and other persuasive factors” (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

section 337. The legislative history for section 337 does not define the term, and the canon of *in pari materia* does not resolve the statutory ambiguity. Finally, the creation of the Federal Circuit did not impose absolute uniformity in patent law. Consequently, *Chevron* step one has been met.

#### D. Step Two

In step two, the Federal Circuit should consider whether an ITC determination of what constitutes a “valid and enforceable U.S. patent” is “based on a permissible construction” of section 337.<sup>193</sup> “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”<sup>194</sup> Thus, although the ITC’s interpretation must be a reasonable one, it need not be the same interpretation that the Federal Circuit would have chosen. Step two is generally regarded as being highly deferential to the agency. Only two Supreme Court decisions have found a step two failure, thus denying the agency deference for its statutory interpretation.<sup>195</sup>

It is impossible to know whether the Federal Circuit would, in general, construe ITC validity and enforceability determinations as permissible interpretations of section 337. Whether an agency’s decision is reasonable depends on the decisionmaking process for the particular case at issue and on how aggressive of a test the Federal Circuit develops for step two.<sup>196</sup>

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<sup>193</sup> See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>194</sup> *Id.* at 843 n.11; see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

<sup>195</sup> See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 481 (2001); *AT&T Corp v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999). Although there have been several step two failures in the D.C. Circuit under the hard look approach, such failures are still considerably less common than step one failures.

<sup>196</sup> In most courts, step two is highly deferential to agencies. But the D.C. Circuit applies an aggressive “hard look review” during step two of *Chevron*. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1263-66 (1997) (discussing cases where D.C. Circuit applied hard look arbitrary and capricious review test during step two of *Chevron*).

## III. THE NORMATIVE CASE FOR DEFERENCE

Part II presented the argument that the Federal Circuit owes *Chevron* deference to reasonable ITC validity and enforceability determinations. This raises the question of whether such deference is desirable. Given that the *Chevron* doctrine has been traditionally applied by generalist courts, one can argue that the *Chevron* doctrine, and even the APA, should not apply when there is an expert court, expert agency dichotomy. To the extent that a loophole in administrative law is warranted, it may be appropriate to apply it to the semi-specialized Federal Circuit.

But the ITC's institutional strengths give it an advantage over the Federal Circuit with regard to patent-related decisionmaking under section 337. Although both entities possess a high level of expertise in patent law, the ITC has deep knowledge of the narrow range of technologies that are repeatedly the subject of section 337 investigations. Furthermore, the ITC possesses superior factfinding capability and is politically accountable for its decisions.

Moreover, the Federal Circuit's unusual status as a semi-specialized court may render it vulnerable to interest group interference. Under interest group theory, agencies are regarded as the creation of interest groups for the purpose of exacting benefits from the government. Courts typically have greater insulation from such groups; yet, interest groups drove the creation of the Federal Circuit.<sup>197</sup> Further study is merited on whether interest groups continue to influence the court through the judicial appointments process or other means.

## A. Comparative Institutional Competence

Scholars typically refer to the Federal Circuit as a semi-specialized court, due to the fact that it has extensive patent experience, yet also hears appeals from non-patent agencies.<sup>198</sup> However, the relevant

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<sup>197</sup> See *infra* Part III.B.

<sup>198</sup> See, e.g., John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554-57 (2010) (maintaining that Federal Circuit and U.S. Court of Appeals for District of Columbia are both "semi-specialized" appellate courts); William M. Landes & Richard A. Posner, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 111 (2004) (maintaining that "the Federal Circuit is only semispecialized, since it has a substantial non-patent jurisdiction"); see also Banks P. Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC'Y REV. 839, 842 n.3 (2009) (noting that Federal Circuit "is a multispecialty court hearing not only patent cases, but also international trade cases, the appeals of veterans, personnel decisions within the U.S. government, and

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inquiry is not whether the Federal Circuit is an expert in patent law, but rather, whether it is in a better position to make patent determinations under section 337 compared to the ITC. The fact that the Federal Circuit has a specialized patent docket and is comprised of judges with patent expertise does not answer this question.

The theoretical basis for *Chevron* deference is murky.<sup>199</sup> However, a prevalent theory for deferring to an agency's reasonable statutory interpretation is based on comparative institutional competence.<sup>200</sup> The Supreme Court observed:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.<sup>201</sup>

Several important issues are embedded in the Court's statement above. By engaging in rulemaking and adjudication, agencies obtain expert knowledge in a narrow area of law. This expertise is important because the statutes that agencies administer are complex.<sup>202</sup>

Furthermore, agencies are politically accountable for their decisions. If the public dislikes an agency's approach, it can always elect a new President, who can then shape the agency through new appointments.<sup>203</sup> As the *Chevron* Court recognized, this places agencies in a superior position to make decisions regarding policy:

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non-tort claims against the U.S. government" and referring to court as specialized because court's jurisdiction is "limited by subject matter and not by geographic area").

<sup>199</sup> See, e.g., Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 688 (2007) (stating that "Chevron's theoretical rationale is unclear").

<sup>200</sup> See Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("Chevron's importance is its recognition that, expertise aside, the agencies, nevertheless, maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

<sup>201</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984).

<sup>202</sup> See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 861 (2001) (maintaining "that federal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them").

<sup>203</sup> See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1288 (2008) ("Unlike the federal judiciary, administrative agencies make policy under the

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>204</sup>

In contrast, Article III judges “are not experts in the field, and are not part of either political branch of the Government.”<sup>205</sup>

Finally, the *Chevron* Court implicitly recognized that agencies are better situated to engage in factfinding.<sup>206</sup> Appellate courts are viewed as weak factfinders and policymakers, making agency deference an attractive option.<sup>207</sup> Moreover, as Judge Frank Easterbrook has noted, agencies have unique tools available to them.<sup>208</sup> Agencies have the

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President’s electoral mandate. The President oversees the implementation of agency policy and is politically accountable for the success or failure of agency administration.”).

<sup>204</sup> *Chevron*, 467 U.S. at 866-67 (citations omitted); see also Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 363 (2009) (“[T]he Court understands that interpretation under *Chevron* is not simply a quest for the best understanding of the words used by Congress, but instead requires choosing among plausible interpretations based at least in part on considerations of policy . . . .”); Silberman, *supra* note 200, at 822 (“*Chevron*’s rule — that the federal judiciary must defer to an agency’s reasonable construction of a statute it is charged with enforcing, if Congress has not directly addressed the question at issue — is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.”).

<sup>205</sup> *Chevron*, 467 U.S. at 865.

<sup>206</sup> See Sunstein, *supra* note 89, at 2084 (1990) (“In addition, a principle of deference was appropriate in *Chevron*. The agency’s fact-finding and policy-making competence, and its electoral accountability, were highly relevant to the issue of how ‘source’ should be defined.”).

<sup>207</sup> See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 96 (2008) (“Indeed, the shortcomings of judicial capacity, which canons are, at least in part, intended to overcome — inferior capacity for fact-finding and policymaking on one hand, and a hesitance to strike down, on direct constitutional grounds, legislation enacted through democratic processes, on the other — are the very same competencies at which agencies may excel.”).

<sup>208</sup> As Judge Easterbrook noted:

The principal subject is what methods of interpretation will be applied. Judges in their own work forswear the methods that agencies employ — and that by invoking *Chevron* judges allow agencies to employ. A judge who announces deference is approving a shift in interpretive method, not just a shift in the identity of the decider, as if a suit were being transferred to a court in a different venue. What is more, the methods that agencies employ are entirely sensible ones.

freedom to consider information that most judges would view as off-limits, such as cost-benefit studies or recommendations of the current administration.<sup>209</sup> These strengths are particularly important when agencies consider mixed questions of law and fact “that call for the distinctive factfinding and policymaking competence of the agency.”<sup>210</sup>

### 1. Expertise

The Federal Circuit occupies a unique position compared to general courts of appeal because patent cases comprise roughly one-third of its docket,<sup>211</sup> and its judges have considerable expertise in patent law.<sup>212</sup> Several of the Federal Circuit judges had patent-related careers prior to their appointment to the bench, and many of them have taught courses in patent law or have published casebooks in intellectual property.<sup>213</sup> In contrast, no ITC Commissioner and only one ALJ had experience in patent law prior to joining the ITC.<sup>214</sup>

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Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3 (2004).

<sup>209</sup> See *id.*

<sup>210</sup> Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 523 n.4. As Sunstein points out, we can see these ideas underlying the Supreme Court’s decision in *Immigration & Naturalization Services v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In that case, the Court distinguished the “pure question of statutory construction” of whether two immigration standards were the same from “the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts.” *Cardoza-Fonseca*, 480 U.S. at 446, 448. It stated that “[t]here is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication.” *Id.* The Court appears to recognize the agency is in the best position to make such an evaluation.

<sup>211</sup> See Golden, *supra* note 4, at 666 (“Patent appeals typically form only about a third of the court’s docket”); see also Dutra, *supra* note 4, at 665 (noting that thirty-one percent of Federal Circuit’s docket is intellectual property cases, with nearly all such cases involving patents).

<sup>212</sup> This high level of specialization makes the Federal Circuit an anomaly among Article III appellate courts. Other specialized appellate courts, such as the United States Court of Appeals for the Armed Forces, are Article I tribunals.

<sup>213</sup> Judge Moore was a patent law professor prior to her appointment to the bench; she has co-authored a casebook entitled *Patent Litigation and Strategy*. Judge Linn has an extensive background in patent law, having worked as a patent agent, patent examiner, and having been the head of the intellectual property department at Marks and Murase, L.L.P. Judge Lourie, among other things, was the former Vice President, Corporate Patents and Trademarks, and Associate General Counsel of SmithKline Beecham Corporation and former President of the Philadelphia Patent Law Association. Judge Newman served as director of the Patent, Trademark and Licensing Department at FMC Corp. and is the co-author of a patent law casebook. Judge Rader has taught patent law at several schools and has co-authored a patent law casebook.

Although the ITC Commissioners and ALJs generally lack a patent background at the start of their ITC careers, they see a high volume of patent-related cases relative to the Federal Circuit. In the 2009 Fiscal Year, the ITC conducted eighty-five section 337 intellectual property investigations, seventy-nine of which involved patent issues.<sup>215</sup> By comparison, the agency had only twenty-one Title VII petitions regarding dumping and fifteen petitions involving allegations of subsidies.<sup>216</sup> The patent expertise of the ITC has been recognized by scholars,<sup>217</sup> practitioners,<sup>218</sup> and Judge Michel of the Federal Circuit.<sup>219</sup>

ITC cases typically involve a narrow range of technologies compared to those litigated in federal court. Sixty percent of section 337 investigations involve integrated circuit, computer, telecommunications, and other electronic technologies, and a significant portion of the remaining investigations involve consumer

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*Judicial Biographies*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.ca9.uscourts.gov/judges> (last visited June 6, 2011). Note, however, that the composition of the Federal Circuit is beginning to shift. The three current judicial nominees for the Federal Circuit have non-patent backgrounds. This may be a sign that the Federal Circuit is beginning to mature as an institution and move past its specialist roots.

<sup>214</sup> See *Commissioner Bios*, U.S. INT'L TRADE COMM'N, [http://www.usitc.gov/press\\_room/bios.htm](http://www.usitc.gov/press_room/bios.htm) (last visited June 6, 2011). Chief ALJ Paul Luckern was an intellectual property trial attorney for the U.S. Department of Justice. *Chief ALJ Paul J. Luckern*, ITC 337 LAW BLOG, <http://www.itcblog.com/chief-alj-paul-j-luckern/> (last visited June 6, 2011).

<sup>215</sup> ITC YEAR IN REVIEW FOR FISCAL YEAR 2009, *supra* note 27, at 14.

<sup>216</sup> *Id.* at 12.

<sup>217</sup> See, e.g., Kali N. Murray, *The Cooperation of Many Minds: Domestic Patent Reform in a Heterogeneous Regime*, 48 IDEA 289, 333 (2008) (maintaining that ITC's expertise in intellectual property support *Chevron* deference for its patent-related statutory interpretation); Schwartz, *supra* note 112, at 1702 ("Given the ALJs' extensive experience with patent infringement litigation, they are widely reputed as experts in patent law.").

<sup>218</sup> See, e.g., Maria Raia Hamilton, *Process Patents and the Limits of the International Trade Commission's Jurisdiction: Finding the Line in the Sand*, 50 IDEA 161, 183 (2010) ("Administrative law judges sitting at the International Trade Commission are considered to have greater technical expertise in patent matters because such disputes are the bulk of their caseload."); Michael Meehan, *Increasing Certainty and Harnessing Private Information in the U.S. Patent System: A Proposal for Reform*, 2010 STAN. TECH. L. REV. 1, ¶ 106 (recognizing ITC's expertise in intellectual property); Herbert C. Shelley et al., *The Standard of Review of Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749, 1801 (1996) (noting that granting *Chevron* deference to ITC is a "sensible result," given agency's expertise in intellectual property).

<sup>219</sup> See, e.g., Interview by Douglas Lichtman with Chief Judge Paul R. Michel (Jan. 2009), available at <http://www.ipcolloquium.com/Programs/Players/4.html> (describing ITC ALJs as "expert patent judges").

products.<sup>220</sup> Thus, ALJs and Commissioners have the opportunity to develop deep expertise in the range of technologies that repeatedly arise in section 337 investigations.

Section 337 analyses also involve expertise beyond patent law. Congress did not grant the ITC the power “to set aside a patent as being invalid or to render it unenforceable.”<sup>221</sup> Rather, in the 1974 House and Senate Reports, Congress gave the ITC authority to “review the enforceability of patents, for purposes of section 337, in accordance with contemporary legal standards when such issues are raised and are adequately supported.”<sup>222</sup> Congress instructed the ITC to consider not only CCPA precedent, but also the public policy of promoting “free competition.” This language suggests that Congress wanted the ITC to use a nuanced approach in determining patent validity and enforceability, with a focus on protecting U.S. businesses from the negative side-effects of free trade.

Such trade expertise is unique to the ITC. The agency is charged with administering the Tariff Act and possesses broad knowledge of trade practices that harm domestic companies, such as dumping and the improper use of countervailing duties.<sup>223</sup> Prior to issuing an exclusion order, the ITC is required to consider whether an order would have a detrimental effect on “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.”<sup>224</sup> Consequently, the ITC has knowledge of trade-related factors that could influence whether it finds a patent to be valid and enforceable for exclusion purposes.

Courts, by contrast, are ill-equipped to evaluate issues that bear on foreign relations and trade policy.<sup>225</sup> As the Supreme Court has noted, decisions regarding foreign affairs are “of a kind for which the

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<sup>220</sup> ITC YEAR IN REVIEW FOR FISCAL YEAR 2009, *supra* note 27, at 14.

<sup>221</sup> H.R. REP. NO. 93-571, *supra* note 124, at 78.

<sup>222</sup> *Id.*

<sup>223</sup> The ITC conducts antidumping and countervailing duty investigations under Title VII of the Tariff Act of 1930. *See* 19 U.S.C. §§ 1671-1677n (2006); *Antidumping and Countervailing Duty Investigations*, U.S. INT’L TRADE COMM’N, [http://www.usitc.gov/trade\\_remedy/index.htm](http://www.usitc.gov/trade_remedy/index.htm) (last visited Apr. 18, 2011).

<sup>224</sup> 19 U.S.C. § 1337(d) (2006).

<sup>225</sup> *See, e.g., People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, ‘decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.’” (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”<sup>226</sup> Because of this judicial disadvantage in issues of foreign affairs, the ITC emerges as having greater expertise.

In summary, although the Federal Circuit has a broad foundation in patent law, the ITC has an advantage when one considers its depth of knowledge in the specific technology that frequently arises in section 337 proceedings. The ITC is also in a superior position with regard to considering the interplay between patent law and trade policy.

## 2. Political Accountability

Another argument supporting *Chevron* deference for the ITC is the fact that it is politically accountable. Political accountability in a patent context is relevant, given the existence of divisive policy issues such as the scope of patentable subject matter.<sup>227</sup> Ideally, the public should play some role in how these issues are decided, either through electing congressional representatives who can pass patent legislation or through electing the President, who can control the PTO. However, such accountability is presently lacking in the patent arena; Congress has been paralyzed for more than a decade in passing meaningful patent reform,<sup>228</sup> and the PTO lacks the substantive rulemaking authority that is necessary to shape patent policy.<sup>229</sup>

The ITC, however, has substantive rulemaking authority and is politically accountable. The power of the President to replace ITC Commissioners is admittedly weak. Commissioners serve overlapping

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<sup>226</sup> *Chi. & S. Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

<sup>227</sup> Although patent law may be thought of as an apolitical area of law, this is not the case. Consider the Supreme Court’s recent decision in *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). Although the Court unanimously decided that the patent at issue was invalid, it split along political lines regarding the patentability of business method patents. *Compare id.* at 3228-29 (conservative majority holding that business methods are patentable subject matter), *with id.* at 3231-58 (Stevens, J., concurring) (liberal justices concurring that business methods are not patentable).

<sup>228</sup> Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J.L. SCI. & TECH. 1, 3 (2007) (“Calls for reform from the technology sector have begun to resonate in the media and in the Supreme Court; yet efforts in Congress to implement patent reform legislation have repeatedly failed.”).

<sup>229</sup> The PTO only has the power to pass rules regarding proceedings in the PTO; it cannot pass substantive rules regarding how the Patent Act should be interpreted. *See Merck & Co. v. Kessler*, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (“[T]he broadest of the PTO’s rulemaking powers — 35 U.S.C. § 6(a) — authorizes the Commissioner to promulgate regulations directed only to ‘the conduct of proceedings in the [PTO]’; it does not grant the Commissioner the authority to issue substantive rules.”).

terms of nine years, and no more than three of the Commissioners can be drawn from any single political party.<sup>230</sup> It is not uncommon for a President to be forced to fill a vacancy with a member of another political party.<sup>231</sup> This limits the degree to which the President can shape the composition of the ITC, consequently limiting the role the public can play in shaping ITC policy by voting for a new President.

The President can, however, choose to exercise considerable control over the issuance of exclusion orders under section 337(j). This provision grants the President a sixty day review of final section 337 decisions.<sup>232</sup> During this time, the President may “disapprove” the issuance of an exclusion order, which renders the exclusion order unenforceable.<sup>233</sup> Historically, such disapproval has been rare.<sup>234</sup> Nevertheless, this is a powerful mechanism that the President can use to exercise control over the ITC.

The President may also use this power to obtain a narrower exclusion order from the ITC. For example, President Reagan disapproved an exclusion order of computer memory because he was concerned that the order would affect third parties and would disrupt computer industry trade.<sup>235</sup> The ITC consequently narrowed the scope of the order, and President Reagan let the modified order stand.<sup>236</sup> Thus, the President, and ultimately voters, can reign in the ITC if the agency makes poor policy decisions.

There are also congressional limitations on ITC power, as there are for all federal agencies. Congress has the power of the purse; it can alter the ITC’s funding, thereby affecting the number of investigations the ITC can initiate and the amount of time it takes for the agency to reach a final determination. Congress can furthermore limit or expand the power of the ITC by amending the Tariff Act. As a result, the ITC is accountable to both the executive and legislative branch.

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<sup>230</sup> ITC YEAR IN REVIEW FOR FISCAL YEAR 2009, *supra* note 27, at 3.

<sup>231</sup> For example, Chairman Deanna Okun is a Republican who was appointed by President Bill Clinton, and all three Democratic Commissioners were appointed by President George W. Bush. *Id.* at 5-7.

<sup>232</sup> 19 U.S.C. § 1337(j) (2006).

<sup>233</sup> *Id.* Note that this does not work the other way — the President cannot reverse the ITC’s decision *not* to issue an exclusion order.

<sup>234</sup> President Reagan overturned four ITC determinations and President Carter overturned one determination. See Bas de Blank & Bing Cheng, *Where Is the ITC Going After Kyocera?*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 701, 719 (2009).

<sup>235</sup> See Presidential Disapproval of a Section 337 Determination, 52 Fed. Reg. 46,011-02 (Dec. 3, 1987).

<sup>236</sup> See Brian Farney, *An Overview of Section 337 Actions in the ITC*, FINDLAW, Aug. 17, 1999, <http://library.findlaw.com/1999/Aug/17/128707.html>.

By contrast, as an Article III court, the Federal Circuit is not accountable to the executive branch. Moreover, it can be held accountable to the legislative branch only if Congress chooses to alter the scope of its jurisdiction.<sup>237</sup> Thus, the Federal Circuit is not well-positioned to make subjective policy decisions from an accountability perspective.

### 3. Factfinding

When Congress created the Federal Circuit in 1982, it concentrated expertise in patents at the appellate level.<sup>238</sup> The primary reason for doing so was to alleviate the uncertainty in patent law caused by frequent circuit splits.<sup>239</sup> This institutional change created a skilled appellate court to remedy inadequacies in factfinding by generalist trial judges and juries.<sup>240</sup> Such structural change was important, given the critical role that factfinding plays in making determinations regarding patent scope and validity.<sup>241</sup>

The idea of creating an appellate court to serve as an expert factfinder worked only if there was no strong patent agency.<sup>242</sup> In making a decision of how best to allocate factfinding between district courts and appellate courts, Congress ignored the role of agencies. Such an oversight was understandable at the time, given that the weak PTO was the only agency that played a significant role in the patent arena.

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<sup>237</sup> For example, Congress could allow another court of appeal to hear district court appeals of patent cases and BPAI appeals, thereby weakening the Federal Circuit. See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. REV. 1619, 1625 (2007) (proposing that Congress grant additional appellate courts jurisdiction over district court patent litigation and PTO appeals). However, such congressional action is unlikely, given Congress's failure to pass any meaningful patent reform in recent years. See *supra* note 223 and accompanying text.

<sup>238</sup> See Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1040 (2003).

<sup>239</sup> See *infra* Part III.B.2.

<sup>240</sup> See Rai, *supra* note 238, at 1040 (noting that “despite the court’s appellate status, it still has factfinding capabilities superior to those of the other decisionmakers in the patent system”). Note, however, that many patent cases are litigated in “rocket dockets” where district court judges have developed patent expertise due to hearing a high volume of patent cases. See *supra* notes 53-54 and accompanying text; see also Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons For Patent Law Reform*, 83 TUL. L. REV. 111, 120-22 (2008) (discussing evolution of Eastern District of Texas into rocket docket).

<sup>241</sup> See Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 882-83 (2002) (discussing role of facts in patent law).

<sup>242</sup> See *supra* note 229 and accompanying text.

However, the ITC has since evolved into a strong factfinder. Although the ITC lacks substantive rulemaking authority for patent issues, it does engage in formal adjudication under section 337. The agency is structured as a factfinding agency with “broad powers to study and investigate all factors relating to U.S. foreign trade, its effect on domestic production, employment and consumption, [and] the competitiveness of U.S. products and foreign and domestic customs laws.”<sup>243</sup> And unlike district courts, the ITC has relevant expertise in patent law.

The ITC, moreover, has several means of gathering facts. First, the ALJ in charge of the investigation can call for evidentiary public hearings.<sup>244</sup> For example, in *Certain Baseband Processor Chips*,<sup>245</sup> Broadcom accused Qualcomm of importing chipsets for cell phones that infringed several Broadcom patents. The ITC allowed existing phones containing the infringing chipsets to continue to be sold in the U.S., in light of public hearings and other evidence that showed a total ban would harm the public.<sup>246</sup> This access to additional information allowed the ITC to issue a more flexible exclusion order tailored to the needs of technology users.

Second, every section 337 investigation is assigned an investigative attorney from the Office of Unfair Import Investigations, sometimes referred to as a “staff attorney.”<sup>247</sup> The investigative attorney will review the complaint for sufficiency and recommend whether an investigation should be launched.<sup>248</sup> Throughout the litigation, this attorney serves as an independent litigant who represents the public interest in the investigation.<sup>249</sup> Because investigative attorneys are neutral and involved in the entire investigation, ALJs tend to respect their position.<sup>250</sup>

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<sup>243</sup> CONGRESSIONAL QUARTERLY, FEDERAL REGULATORY DIRECTORY 604 (5th ed. 1986).

<sup>244</sup> See ITC FAQ, *supra* note 30, at 19-20.

<sup>245</sup> *Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prods. Containing Same, Including Cellular Tel. Handsets*, Inv. No. 337-TA-543, 2007 ITC LEXIS 621, \*1 (June 19, 2007), *rev'd in part sub nom.*, *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008).

<sup>246</sup> See *id.* at \*49.

<sup>247</sup> See ITC FAQ, *supra* note 30, at 2.

<sup>248</sup> See *id.* at 15; Robert G. Krupka et al., *Section 337 and the GATT: The Problem or the Solution?*, 42 AM. U. L. REV. 779, 796 (1993).

<sup>249</sup> See ITC FAQ, *supra* note 30, at 2.

<sup>250</sup> See *id.*; Louis M. Heidelberg & Jonathan M. Darcy, *Better Patent Enforcement Through the ITC*, LEGAL INTELLIGENCER, Apr. 15, 2008, <http://www.gibbonslaw.com/files/1212672819.pdf> (“While the ITC is not bound by any position taken by an investigative staff attorney, the fact a staff attorney will be substantially involved in the

The ITC's factfinding expertise is important because determining whether a patent is valid and enforceable involves an application of law to fact. Thus, the ITC can draw upon knowledge from the public and from the investigative attorney in determining whether a patent should be invalidated or found to be unenforceable. The ITC is therefore capable of making nuanced patent decisions by using knowledge that the Federal Circuit lacks.

#### 4. Policymaking

The Federal Circuit has been criticized for its use of rigid rules rather than policy-based analysis when applying the Patent Act to individual cases.<sup>251</sup> Indeed, some members of the court believe that policy considerations should not play a role in deciding cases.<sup>252</sup> The court's formalist approach can be distinguished from a textualist approach because the Federal Circuit develops common law rules when the Patent Act does not provide clear guidance. This approach of creating "rigid and mandatory formulas" has been called into question by the Supreme Court.<sup>253</sup> The alternative, however, is for courts to

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case from beginning-to-end, and will make her own recommendations and arguments, should be recognized.").

<sup>251</sup> See, e.g., Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn From the Supreme Court — And Vice-Versa*, 59 AM. U. L. REV. 787, 804-05 (2010) (noting that "although the Federal Circuit routinely recites policy justifications for the statutory requirements of patent law, it rarely provides insight into the policy rationale for its own decisions"); Rai, *supra* note 238, at 1040 ("[T]he Federal Circuit has substituted formalist decisionmaking for the fact-specific, policy-oriented analysis that is required by the open-ended language of the patent statute: Once again, although the court's approach might be justified by reference to the problems of the inferior decisionmakers, it is far from optimal."); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 810 (2003) (noting that "central concern of a sound innovation policy and due regard for administrative ramifications, along with a healthy skepticism over whether certainty can be practically achieved, suggests the desirability of more nuanced alternatives" to formalism).

<sup>252</sup> See, e.g., *Intervet Am., Inc. v. Kee-Vet Labs., Inc.*, 887 F.2d 1050, 1053 (Fed. Cir. 1989) (quoting *E. I. Du Pont De Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1433 (Fed. Cir. 1988)) ("No matter how great the temptations of fairness or policy making, courts do not rework claims. They only interpret them."); Alan D. Lourie, Keynote Address at the 20th Annual Intellectual Property Fall CLE Weekend Seminar: A View from the Court (Sept. 27, 2008), available at [http://www.cafc.uscourts.gov/images/stories/announcements/2008/AL\\_Williamsburg\\_Speech.pdf](http://www.cafc.uscourts.gov/images/stories/announcements/2008/AL_Williamsburg_Speech.pdf) ("Not once have we had a discussion as to what direction the law should take . . . . We have just applied the law and precedent as best we could determine it to the cases that have come before us.").

<sup>253</sup> See *Bilski v. Kappos*, 130 S. Ct. 3218, 3226, 3229 (2010) (holding that "machine-or-transformation test" is not sole test for determining patentability under section 101 and observing that "categorical rules" may "have wide-ranging and

take a policy-oriented approach, which would require district courts to engage in complex factfinding and to make decisions that ought to be delegated to a politically accountable body.<sup>254</sup>

The ITC is capable of taking a policy-oriented approach to patent decisions. Section 337(d)(1) states that the ITC may choose not to issue an exclusion order if it will have a detrimental effect “upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.”<sup>255</sup> Consequently, in every case where the ITC wishes to issue an exclusion order, the agency must engage in a detailed policy analysis. This creates the opportunity for the ITC to apply its policy findings to its validity and enforceability decisions.

One problem is that the ITC does not currently take advantage of its policy expertise in deciding whether to issue an exclusion order. If the ITC concludes that an imported good infringes a patent, the ITC automatically issues some form of an exclusion order,<sup>256</sup> notwithstanding section 337(d)(1). However, this problem could be solved if the President issued an executive order directing the ITC to refrain from issuing exclusion orders where the order (1) would substantially harm technological innovation, public health and welfare, or competition or (2) where the economic benefit of the order is substantially outweighed by the joint harm caused to the respondent and the public interest. Such an order would be consistent with section 337(d)(1) and could be enforced by the President’s power to disapprove exclusion orders under section 337(j)(2).<sup>257</sup>

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unforeseen impacts”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 415, 419-21 (2007) (rejecting Federal Circuit’s “rigid approach” in applying teaching-suggestion-motivation test for obviousness and observing that rigid rules “are neither necessary under our case law nor consistent with it”); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 132, 137 (2007) (rejecting Federal Circuit’s rule that company that licenses patent from another cannot establish “actual controversy” unless it breaches license agreement); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006) (rejecting Federal Circuit’s “categorical rule” of granting injunctive relief upon finding of infringement).

<sup>254</sup> See Rai, *supra* note 238, at 1108 (noting that policy-oriented approach to business method patents might not be feasible for district courts).

<sup>255</sup> 19 U.S.C. § 1337(d) (2006).

<sup>256</sup> See Kumar, *supra* note 10, at 557-58.

<sup>257</sup> *Certain Baseband Processors* is an example of a case where it is not clear that any exclusion order should have issued had public policy issues been fully considered. See generally *Certain Baseband Processor Chips & Chipsets, Transmitter & Receiver (Radio) Chips, Power Control Chips, & Prods. Containing Same, Including Cellular Tel. Handsets*, Inv. No. 337-TA-543, 2007 ITC LEXIS 621 (June 19, 2007), *rev’d in part*

In summary, political accountability and factfinding both strongly support the Federal Circuit granting *Chevron* deference to the ITC. Expertise also favors the ITC, given that it has in-depth knowledge of trade policy and focuses on a narrow range of patent cases. At this time, neither institution has shown strength in policymaking.

### B. Interest Group Theory

#### 1. Overview

Notwithstanding the fact that the ITC has greater institutional competence compared to the Federal Circuit, a concern remains that agencies may be more vulnerable to interest group forces than courts. In the aftermath of the New Deal, agencies were viewed as a means of promoting public welfare while judges were viewed as destructive forces that interfered with good governance.<sup>258</sup> During this period, presidential or congressional control over agencies was viewed with great suspicion. But over time, this optimistic view of agencies gave way to one of cynicism. The capture theory era began in the late 1960s, as people grew concerned that agencies were vulnerable to capture by the groups that they were charged with regulating.<sup>259</sup>

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*sub nom.*, *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n*, 545 F.3d 1358 (Fed. Cir. 2008). Cell phones that utilized the Qualcomm infringing chips were able to pinpoint 911 caller locations with greater accuracy than old chipset phones and avoided a problem known as "voice blanking," where users experienced a five to ten second delay before hearing the emergency operator. See Lynette Luna, *Ban Creates Headache For 911 Sector*, URGENTCOMM, July 1, 2007, [http://urgentcomm.com/mag/radio\\_ban\\_creates\\_headache/](http://urgentcomm.com/mag/radio_ban_creates_headache/) (discussing how Qualcomm chipset addresses voice blanking and accurate pinpointing of 911 callers). The final ITC order was ultimately narrowed by the Federal Circuit due to Broadcom's failure to name downstream manufacturers as respondents. *Kyocera*, 545 F.3d at 1358 (holding section 337 "prevents the Commission from issuing a limited exclusion order that excludes products of those who are not 'persons determined . . . to be violating [Section 337].'"). Nevertheless, the ITC failed properly to take into account section 337(j)'s directive when protecting Broadcom's patent rights at the expense of the public's safety.

<sup>258</sup> James Landis was a strong advocate of this view. He argued that courts are "experts in the synthesis of design" and not experts in specific areas of law. Landis stated: "The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts." JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75-76 (1938). He noted "[t]hat hope is still dominant, but its possession bears no threat to our ideal of the 'supremacy of law.'" *Id.*; see also GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 30-35 (5th ed. 2009) (discussing evolution in theories of agency behavior); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 *CHI.-KENT L. REV.* 1039, 1048 (1997) (discussing pro-agency view during post-New Deal era).

<sup>259</sup> Marver Bernstein and Roger Noll were both advocates of this view. Bernstein

Some legal and political scholars believe that in the early 1980s, a public choice era began, in which government as a whole was viewed with suspicion and public choice theory became “ascendant.”<sup>260</sup> As Professor Thomas Merrell notes, in its modern form, “public choice theory regards all organized groups demanding services from political institutions — including not just business and producer groups, but also environmental groups, labor unions, civil rights groups, and rent control activists — as being subject to a unitary logic of collective action.”<sup>261</sup>

In looking at institutional design, the interest group branch of public choice theory stresses that agencies and other governmental entities can be influenced to act in favor of the entities that they regulate and not in favor of the public interest.<sup>262</sup> Professor Edward Rubin has noted:

Because public choice theory is based on the premise that people are motivated by the desire to maximize their self-interest, it asserts that this same motivation determines their relationship to the state. Thus, all people view the modern state as an impediment to their ability to engage in self-interest maximizing behavior. In addition, many people view the state as a source of benefits by which they can increase their material self-interest.<sup>263</sup>

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observed that agencies started out public-minded, but grew to be more concerned with protecting the industries that they regulate. MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 80, 87 (1955). Noll maintained that “[a]n agency that tries to minimize the chance of being overruled by subsequent legal or legislative decisions must, when the interests of a regulated firm and its customers or the public generally are at odds, be overly responsive to the interests of the regulated.” NOLL, *supra* note 56, at 41; *see also* Merrill, *supra* note 258, at 1050.

<sup>260</sup> Merrill, *supra* note 258, at 1053, 1068. Note that thirteen years have passed since Merrill wrote *Capture Theory and the Courts*. Nevertheless, with the results of the 2010 mid-term elections, one can argue that distrust of government is as strong as ever.

<sup>261</sup> *Id.* at 1069.

<sup>262</sup> *See* DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 311 (1989) (noting that “much of the activity” of interest group organized along business, trade, or professional lines are “devoted to creating or preserving monopoly positions”); Rai, *supra* note 238, at 1066-67 (“A huge volume of literature, predating, but also influenced heavily by, the interest group prong of public choice theory, emphasizes the systematic likelihood that agencies will be influenced to take actions that are favorable to the agenda of the particular entities they regulate but unfavorable to the public interest.”).

<sup>263</sup> Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 *CORNELL L. REV.* 309, 342 (2002). Note that Rubin is critical of the public choice account of administrative law.

While the mainstream strand of interest group theory indirectly criticizes agency autonomy,<sup>264</sup> the more extreme version of the theory treats agencies as little more than a creation by interest groups seeking benefits from the state.<sup>265</sup> Under the stronger view, “[o]rganized labor obtains protective legislation and a Department of Labor is created; farmers obtain agricultural price supports and the Department of Agriculture increases in size; veterans band together to obtain pensions and subsidized medical care, thereby generating the Veterans Administration.”<sup>266</sup> In other words, vocal groups with narrow agendas will emerge as winners in the administrative state.<sup>267</sup>

Scholars have subjected courts to public choice analysis<sup>268</sup> and have observed that courts are also susceptible to influence by outside groups.<sup>269</sup> Nevertheless, courts are regarded as being less susceptible to interest group influence than agencies, which cuts against granting strong deference to agency proceedings. Article III judges have tenure

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*Id.* at 344 (“This public choice theory of the modern state’s creation and growth is an unconvincing description of people’s attitudes, and an equally unconvincing solution to the macro-micro problem.”).

<sup>264</sup> See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 104-05 (2000).

<sup>265</sup> See Rubin, *supra* note 263, at 343; *id.* at 232 (“The so-called ‘economic theories of regulation’ come closest to a self-conscious normative critique in their explanations of how rent-seeking interest groups secure agency-enabling legislation that provides those groups with private benefits while allocating costs (costs that often exceed the benefits) to the general public.”). *But see* MUELLER, *supra* note 262, at 337-38 (“Government programs do not come into existence merely because some interest group wants them and the legislature authorizes them. They must be ‘manufactured.’”).

<sup>266</sup> See Rubin, *supra* note 263, at 343.

<sup>267</sup> See Rai, *supra* note 238, at 1067 (“In the context of regulatory action, the most vocal interest groups will be those narrow constituencies directly and immediately affected by the regulatory action.”).

<sup>268</sup> See generally Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983) (hypothesizing that self-interested judges seek prestige); Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing as Everybody Else)*, 3 SUPERIOR CT ECON. REV. 1 (1993) (applying public choice theory to behavior of judges).

<sup>269</sup> See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1323 (1999) (suggesting that appellate judges “are vulnerable to factional interest” and maintaining that agencies are less likely to be controlled by factions because they are guided by President and because agencies’ internal structure encourages deliberative decisionmaking that is aimed at furthering public values); Merrill, *supra* note 258, at 1069 (“And modern public choice theory regards not just administrative agencies but also legislatures, the President, and to an increasing degree even the courts, as institutions that should be modeled on the assumption that they seek to maximize their own self-interested ends in the way they respond to these multifarious groups.”).

for life and a salary that cannot decrease, in contrast to agency officials whose jobs are not secure and who often return to their respective industries.<sup>270</sup>

Interest group theory serves as a valuable tool for examining the dilemma of how to allocate power between the Federal Circuit and the ITC.<sup>271</sup> One might expect the Federal Circuit to emerge a clear winner, given that courts are isolated from the outside pressures that agencies experience. Indeed, at least one scholar has argued that specialized courts are not more vulnerable than general courts to interest group dominance.<sup>272</sup> But a close inspection of the creation of the Federal Circuit reveals interest group involvement from the beginning, raising the question of whether the ITC is the superior decisionmaker under interest group theory. Interest group theory also calls into question assertions that non-patent interest groups balance out the effect of the patent lobby<sup>273</sup> and the theory that the patent lobby is so diverse that it is not possible for the group, as a whole, to dominate.

## 2. The Creation of the Federal Circuit

The idea of Congress creating a specialized patent appeals court began as early as the 1880s.<sup>274</sup> But the idea resurfaced in the early 1970s as a means for reducing the increasing work load for the Supreme Court

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<sup>270</sup> See Benjamin & Rai, *supra* note 9, at 311-12 (noting that unlike judges, “agency officials often come from, and plan to return to, the industry that they regulate” and observing that interest groups can offer agency members desired benefits); Cooter, *supra* note 268, at 128-29 (observing that judges are isolated from influences that affect others because they have life tenure and guaranteed salary). *But see* Cross, *supra* note 269, at 1323 (listing reasons why special interests “have only a limited ability to influence the bureaucracy”).

<sup>271</sup> The idea of applying public choice theory to the Federal Circuit is not new. *See, e.g.,* Benjamin & Rai, *supra* note 9, at 310-13 (applying public choice theory to Federal Circuit and PTO); Andrew P. Morris, *Comment: A Public Choice Perspective on the Federal Circuit*, 54 CASE W. RES. L. REV. 811, 814 (2004). My goal is not to prove that interest group theory is the most accurate model for explaining agency behavior. Rather, I view it as one of many tools for determining the best allocation of power between the Federal Circuit and ITC.

<sup>272</sup> See Jeffrey W. Stempel, *Two Cheers For Specialization*, 61 BROOK. L. REV. 67, 97 (1995).

<sup>273</sup> *See, e.g.,* Dreyfuss, *supra* note 251, at 790-91 (maintaining that there has been no capture of appointments process of federal circuit judges and that non-patent industries and bar groups are involved in lobbying for appointments).

<sup>274</sup> See Jack Q. Lever, *The New Court of Appeals for the Federal Circuit*, 64 J. PAT. OFF. SOC'Y 178, 186 (1982) (citing SUBCOMM. PATENTS, TRADEMARKS AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 20 (Comm. Print 1959); MARGARET M. CONWAY, SINGLE COURT OF PATENT APPEALS — A LEGISLATIVE HISTORY (U.S. Gov't Printing Office 1959)).

and the courts of appeal.<sup>275</sup> In 1972, Congress created the Commission on the Federal Court Appellate System, which was chaired by Senator Roman Hruska.<sup>276</sup> Known as the “Hruska Commission,” this group studied the federal appellate court system and highlighted the growing problem of forum shopping in patent law.<sup>277</sup> In its second report, released in 1975, the Hruska Commission considered improvements to the structure and operation of the federal appellate court system.<sup>278</sup> It observed that there were problems with the patent appeals system. Patentees would attempt to litigate in the Fifth, Sixth, and Seventh Circuits because those courts were not “inhospitable to patents.”<sup>279</sup> In contrast, patentees would try to avoid litigating in the Eighth Circuit, which invalidated patents at a high rate.<sup>280</sup>

The Hruska Commission considered the creation of a national patent court, but concluded that “specialized courts would not be a desirable solution either to the problems of the national law or, as noted elsewhere, to the problems of regional court caseloads.”<sup>281</sup> It was concerned that the quality of such a court’s decisions would suffer and that specialized judges would “become subject to ‘tunnel vision’ seeing the cases in a narrow perspective without the insights stemming from broad exposure to legal problems in a variety of fields.”<sup>282</sup> The Hruska Commission consequently recommended that a National Court of Appeals be formed, which would screen all petitions for review filed with the Supreme Court.<sup>283</sup>

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<sup>275</sup> See *id.* at 187-88.

<sup>276</sup> See Daniel J. Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617, 627.

<sup>277</sup> Commission on Revision of the Federal Court Appellate System, Structure, and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 220 (1975) [hereinafter Hruska Commission Report].

<sup>278</sup> See Meador, *supra* note 276, at 627.

<sup>279</sup> Hruska Commission Report, *supra* note 277, at 370; see also United States Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference, 217 F.R.D. 548, 560 (2002) (statement made by Donald Dunner) (“Before 1982, there were tremendous attitudinal differences and other differences between the circuits. If you wanted to declare a patent invalid, you would go to the Eighth Circuit, which never saw a patent that it wanted to find valid. If you wanted a court that was more hospitable to patents, you would go to the Seventh Circuit, you would go to the Fifth Circuit, maybe the Sixth Circuit.”).

<sup>280</sup> See Laurence Baum, *The Federal Courts and Patent Validity: An Analysis of the Record*, 56 J. PAT. OFF. SOC’Y 758, 762 (1974). In contrast, the Tenth Circuit invalidated only thirty percent of all patents. *Id.*

<sup>281</sup> Hruska Commission Report, *supra* note 277, at 234.

<sup>282</sup> *Id.* at 234-35.

<sup>283</sup> *Id.* at 349. This proposal was originally made by the Freund Committee. See Federal Judicial Center Report of the Study Group on the Case Load of the Supreme

In 1977, the Office for Improvements in the Administration of Justice (“OIAJ”) was created by Attorney General Griffin Bell as an entity within the Department of Justice.<sup>284</sup> A year later, led by Assistant Attorney General Dean Daniel Meador, the OIAJ proposed a merger of the CCPA and the United States Court of Claims to form a court of appeals to handle patent and tax issues.<sup>285</sup> Congress began considering this idea in 1979,<sup>286</sup> following a proposal by the Carter administration.<sup>287</sup>

Early in the debate, support emerged for having a single court of appeals to handle all patent litigation.<sup>288</sup> The American Patent Law Association (“APLA”), which is the predecessor of the American Intellectual Property Law Association, was the primary patent interest group lobbying for the new court.<sup>289</sup> The president elect of the APLA described a “crisis” precipitated by a “decline of technological superiority,” and tied this to an ineffective system for litigating patents.<sup>290</sup> He cited problems of uncertainty, forum shopping, and the high cost of patent litigation under the existing system.<sup>291</sup> Yet, the APLA agreed that the bigger problem was “‘attitudinal differences’ between the judges of various circuits” such that, even if the same law

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Court, 57 F.R.D. 573, 589-95 (1972).

<sup>284</sup> Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 559 (2003) (discussing Justice Department’s role in FCIA).

<sup>285</sup> U.S. DEP’T OF JUSTICE, THE NEEDS OF THE FEDERAL COURTS: REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM I (1977), reprinted in *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 521-43 (1977); Seamon, *supra* note 284, at 559.

<sup>286</sup> S. 677, 96th Cong. (1979); S. 678, 96th Cong. (1979); see Seamon, *supra* at 284, at 564.

<sup>287</sup> President’s Message to Congress Transmitting Proposals for the Reform of the Federal Civil Justice System, 15 WKLY. COMP. PRES. DOC. 342, 344-45 (Feb. 27, 1979).

<sup>288</sup> See Lever, *supra* note 274, at 194. Prominent supporters included Assistant Attorney General Daniel Meador and Chief Judge Markey. See *Addendum to Hearings before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary on S. Hearings on S. 677 and 678*, 96th Cong. 44-46 (1979) (statement of Daniel J. Meador); *Hearings on H.R. 2405, “Court of Appeals for the Federal Circuit Act of 1981,” before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, H. Comm. on the Judiciary*, 97th Cong. 11-14 (1981) [hereinafter *1981 House Hearings*] (statement of Chief Judge Howard T. Markey.)

<sup>289</sup> See generally *1981 House Hearings*, *supra* note 288, at 48-69 (statement of J. Jancin Jr., President Elect Am. Patent Law Ass’n).

<sup>290</sup> *Id.* at 63.

<sup>291</sup> *Id.* at 51.

is being applied in different courtrooms, “the application of law to the facts of an individual case” would produce disparate results.<sup>292</sup>

However, people inside and outside the patent community feared that a specialized court would lead to “isolation, bias, and susceptibility to special interest pressure.”<sup>293</sup> Other critics questioned whether problems existed in the current patent litigation system.<sup>294</sup> For example, the Bar Association of the Seventh Circuit accused the new court’s supporters of “creating a strawman” around the idea of a lack of uniformity and uncertainty in patent law.<sup>295</sup> Judge Cummings noted that the Seventh Circuit’s docket was not crowded with patent cases and argued that the court was doing a satisfactory job of handling patent appeals.<sup>296</sup>

Embedded in the Seventh Circuit Bar Association’s criticism was the accusation that the patent lobby was seeking a pro-patent court.<sup>297</sup> The driving force behind the new court in the 1970s and early 1980s was the fact that the Eighth Circuit was substantially less likely to find a patent to be valid compared to more pro-patent courts;<sup>298</sup> between

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<sup>292</sup> *Id.* at 53.

<sup>293</sup> *Federal Courts Improvement Act of 1979: Hearings on S. 677 and S. 678 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 96th Cong. 6, 271 (1979) [hereinafter *Senate Hearings on S.677 and 678*] (statement of Comm. on Fed. Courts of the Ass’n of the Bar of the City of New York); *see also Federal Courts Improvement Act of 1981—S. 21 and State Justice Institute Act of 1981—S. 537: Hearing Before the Subcomm. on Courts, S. Judiciary Comm.*, 97th Cong. 2, 184 (1981) (testimony of Sidney Neuman, Vice-Chairman, Comm. to Preserve the Patent Jurisdiction of the U.S. Courts of Appeals) (noting that specialized patent court would have “the potential for being captured by special interests”); *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 96th Cong. 765, 927 (1980) (reproducing Letter from Joseph M. Fitzpatrick, Chairman, Ass’n of Bar of City of New York, to Rep. Kastenmeier (Apr. 29, 1980)) (“A single specialized patent appellate court is a step that will ultimately take the patent system out of the mainstream of jurisprudence.”).

<sup>294</sup> *See Lever*, *supra* note 274, at 200-02; *Seamon*, *supra* note 284, at 573-74.

<sup>295</sup> *Senate Hearings on S.677 and 678*, *supra* note 293, at 660, 691 (prepared statement of Bar Association of Seventh Federal Circuit). Of course, because the Seventh Circuit had the highest percentage of patent cases of all the regional circuits, the attorneys in its Bar Association had the most to lose in the creation of the Federal Circuit.

<sup>296</sup> *1981 House Hearings*, *supra* note 288, at 253 (reproducing Letter from Hon. Walter J. Cummings, J., U.S. Court of Appeals for the Seventh Circuit, to Rep. Kastenmeier (Mar. 9, 1981)).

<sup>297</sup> *See id.* (noting that “[s]ome patent lawyers would like a special court in hopes that more patents would be judicially approved”).

<sup>298</sup> *See, e.g., Gregory Gelfand, Expanding the Role of the Patent Office in Determining Patent Validity: A Proposal*, 65 CORNELL L. REV. 75, 85 (1979) (observing low rate of

1961 and 1973, it invalidated eighty-nine percent of all patents, in contrast to the pro-patent Tenth Circuit, which invalidated only thirty percent of all patents.<sup>299</sup>

A court of appeals was ultimately proposed that would handle all patent litigation and also appeals from a variety of agencies. The Federal Circuit would be created by merging the CCPA and Court of Claims. As the 1981 House Report noted, the Federal Circuit would have a “varied docket spanning a broad range of legal issues” and would be “markedly less specialized” than its predecessors.<sup>300</sup> Moreover, by staffing the Federal Circuit with judges from the predecessor courts, the new court’s judges would have patent expertise and would be sympathetic to patent holders. In 1982, the FCIA was passed, creating the Federal Circuit.<sup>301</sup>

### 3. Analysis

One important question is whether patent attorneys were a sufficiently cohesive enough group to constitute an interest group for public choice purposes. Some scholars have pointed out that a public choice account of the Federal Circuit’s creation is flawed because patent attorneys were divided over the creation of the new court. For example, Professor Mark Janis stated:

A superficially plausible public choice account would presumably have predicted that wealthy patent owners (and patent lawyers) would have coalesced to pressure Congress to create a specialized patents court and to populate it with “pro-patent” judges. But even a superficial perusal of the legislative

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patent validity in Eighth Circuit and D.C. Circuit and observing that “[i]f the patent system is to encourage inventors to disclose their inventions” that “the system must offer some promise of reward.”); Rene D. Tegtmeyer, *For Greater Patent Validity*, 19 AM. U. L. REV. 1, 7 (1970) (noting that Eighth Circuit “is notorious for the percentage of patents it finds invalid”); see also David A. Anderson & Raymond P. Niro, *Intellectual Property — Rights Under Siege*, 23 DEPAUL L. REV. 361 (1973) (noting that it is difficult to imagine real property rights being treated as weakly as patent rights were in the Eighth Circuit); Edmund J. Sease, *Inventor’s Dilemma: Whose Fault*, 58 A.B.A. J. 267, 268 (1972) (observing that Eighth and Ninth Circuits have failed to protect patent rights and blaming erosion of patent rights on lack of judicial sophistication, Supreme Court’s view that monopolies are “odious,” and “lack of a unified public relations effort by the organized patent Bar”). Although supporters of the Eighth Circuit’s treatment of patents no doubt existed, I was unable to find any articles articulating such support.

<sup>299</sup> Baum, *supra* note 280, at 762.

<sup>300</sup> H.R. REP. NO. 97-312, at 19 (1981).

<sup>301</sup> Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982).

history reveals flaws in such an account. Patent lawyers, for example, were deeply split over proposals for the creation of the Federal Circuit.<sup>302</sup>

This argument, however, neglects the scope of APLA's involvement during the formation of the Federal Circuit, and the fact that APLA threw its support in favor of the specialized court. It also disregards the apparent consensus among patent attorneys that the Eighth Circuit's anti-patent approach was harmful and needed to be addressed. Thus, even if patent attorneys disagreed with the mechanism by which reform should take place, they agreed that courts needed to be friendlier toward patent holders.

The interest group theory concerns become sharper when contrasting the creation of the Federal Circuit with the creation of the ITC in 1974. Patent attorneys took little notice of the amendment to the Tariff Act of 1930 that created the ITC.<sup>303</sup> The ITC was established to appease protectionist groups that feared U.S. jobs would be lost with trade liberalization;<sup>304</sup> it was not created with patent litigation in mind. Indeed, in the thousands of pages of House and Senate testimony, there was only one statement made by a registered patent attorney.<sup>305</sup> President Nixon secured votes for trade liberalization from protectionist legislators in exchange for creating an agency to protect U.S. businesses from unfair competition.<sup>306</sup>

The groups that lobbied for the creation of the ITC — unions and other pro-protectionist entities — were different from the groups that were regulated by the agency. Although the patent lobby would later leave its mark when section 337 was amended in 1988,<sup>307</sup> it was not the driving force for the agency's existence. In contrast, the patent lobby played a major role in the creation of the Federal Circuit, with the goal of creating an appellate court that favored patent rights.

The origin of the Federal Circuit does not tell us whether the court today is susceptible to interest group pressure. It is possible that over the past twenty-five years, patent lobbies have either lost their grip

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<sup>302</sup> See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 399.

<sup>303</sup> See Kumar, *supra* note 10, at 543-44. Indeed, in the thousands of pages of testimony regarding the 1974 Tariff Act, only one patent attorney spoke. *Id.* at 544 n.95.

<sup>304</sup> *Id.* at 542.

<sup>305</sup> See *The Trade Reform Act of 1973: Hearing on H.R. 6767 Before the H. Comm. on Ways & Means*, 93d Cong. 1588-90 (1973) (joint statement of Harvey Kaye & Paul Plaia, Jr., Att'ys) (suggesting amendments to bill to facilitate ITC patent litigation).

<sup>306</sup> See Kumar, *supra* note 10, at 543-44.

<sup>307</sup> See *id.* at 545-51.

over the court or have fractured. For example, Professor Rochelle Dreyfuss maintains that the risk of patent interest groups co-opting the appointments process in the Federal Circuit is low because the court is merely semi-specialized, giving industries and bar groups outside of patent law an incentive to lobby in the appointments process.<sup>308</sup>

However, there appears to be no studies of the role that different interest groups play in the nomination and confirmation process for Federal Circuit judges. It is unclear who these non-patent bar groups are, how important their interests are, and how they influence the confirmation process. It is also not clear how fractured the patent lobby is in the confirmation process and what factors have led to the “pro-patent” position of the court that empiricists have observed.<sup>309</sup>

Furthermore, interest group pressure can manifest itself in other ways in the Federal Circuit. Consider the case of *Enzo Biochem v. Gen-Probe*.<sup>310</sup> The Federal Circuit originally held that a patent cannot meet the written description requirement if the inventor deposited a sample

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<sup>308</sup> Dreyfuss, *supra* note 251, at 790; *see also* Janis, *supra* note 302, at 400 (“Conceivably, patent enforcement litigation is inherently balanced, and this inherent balance discourages capture. This is consistent with the observations of some commentators that public choice predictions may overlook the likelihood that as an interest group forms and applies pressure, competing interest groups may spring up to blunt the impact of the first.”). *But see* Landes & Posner, *supra* note 198, at 111-12 (“It was predictable that a specialized patent court would be more inclined than a court of generalists to take sides on the fundamental question whether to favor or disfavor patents, especially since interest groups that had a stake in patent policy would be bound to play a larger role in the appointment of the judges of such a court than they would in the case of the generalist federal courts.”).

<sup>309</sup> *See* Golden, *supra* note 4, at 678 n.114 (listing several works that suggest Federal Circuit has “pro-patent” bias). Note, however, that empirical studies suggest that although the Federal Circuit supports validity of patents, it also shows that the court narrowly construes the scope of such patents. *See* Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 S. CT. ECON. REV. 1, 17 (2004) (“By eviscerating the nonobviousness requirement, the Federal Circuit has substantially reduced the level of creativity required to establish a valid patent. At the same time, while the Federal Circuit has routinely upheld patents even for minor advances, the Federal Circuit has also limited patents to a correspondingly narrow scope. Again, at a purely subjective level, the single resolution most representative of the Federal Circuit era was a ruling, as a matter of law, that the patent was valid, but not infringed.”); *see also* Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 803 (2008) (noting that “the Federal Circuit has narrowed patent scope in three different ways, through its interpretation of the doctrine of equivalents, enablement, and written description — all without any real discussion of what these restrictions have done to patent value”).

<sup>310</sup> *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 285 F.3d 1013 (Fed. Cir. 2002), *vacated*, 323 F.3d 956, 970 (Fed. Cir. 2002).

of genetic material, but failed to provide the nucleotide sequence.<sup>311</sup> Three months later, the court reissued the *Enzo* opinion to hold that a deposit satisfies the written description requirement.<sup>312</sup> Some scholars maintain that the reason for the change was that the court was reacting to the public backlash from the original decision.<sup>313</sup>

Interest group theory, therefore, does not support disregarding the *Chevron* doctrine for Federal Circuit review of ITC validity and enforceability decisions. The ITC clearly possesses flaws from a public choice perspective. But the Federal Circuit has the disadvantage of having been structured from the beginning to meet the needs of patent interest groups. It remains unclear whether the initial bias from interest group involvement in the court's creation has dissipated. However, even if we assume that interest groups no longer influence the Federal Circuit, the court possesses no institutional advantages to justify deviating from the *Chevron* doctrine.

One critical problem remains: even if the Federal Circuit *should* grant *Chevron* deference to certain section 337 patent decisions, it is unlikely that it *will* grant deference, given the court's history of not deferring to the PTO and ITC on substantive matters of patent law. It will take either a significant shift in the composition of the Federal Circuit or Supreme Court intervention to bring about such a change. Alternatively, Congress could grant jurisdiction over ITC appeals to another federal appellate court. A court lacking patent expertise would not have to disregard its own specialized knowledge to provide a proper review of ITC decisions. Such a change would be wholly consistent with Congress's intent under the FCIA. The U.S. Court of Appeals for the District of Columbia would be an ideal candidate, given that it handles a wide range of agency appeals.

#### CONCLUSION

The relationship between the Federal Circuit and the ITC reveals an instability in the expert court, expert agency dichotomy. Doctrinally,

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<sup>311</sup> *Id.* at 1022 (“We therefore conclude that a deposit is not a substitute for a written description of the claimed invention.”).

<sup>312</sup> *Enzo Biochem, Inc.*, 323 F.3d at 970 (holding that “reference in a patent specification to a deposit of genetic material may suffice to describe that material”).

<sup>313</sup> See, e.g., Robin C. Feldman, *The Inventor's Contribution*, 2005 UCLA J.L. & TECH. 6, 33 (“The decision produced such a firestorm of criticism that the Federal Circuit vacated and reissued the opinion three months later.”); Allen K. Yu, *Why it Might Be Time to Eliminate Genomic Patents, Together with Natural Extracts Doctrine Supporting Such Patents*, 47 IDEA 659, 689 (2007) (describing reissued *Enzo* decision as response to criticisms).

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the Federal Circuit should grant *Chevron* deference to ITC validity and enforceability determinations. The ITC clearly engages in formal adjudication, and it interprets ambiguous language in section 337 when it decides whether a valid and enforceable patent has been infringed. Yet, a presupposition of the *Chevron* decision was that a general court would be reviewing the decision of a specialized agency. Given that the Federal Circuit is an expert in patent law, one can argue that it should not be forced to defer to the ITC.

The existence of an expert reviewing court, however, does not justify a departure from *Chevron* deference for ITC decisions. The ITC possesses expert knowledge specific to section 337, particularly regarding foreign trade. It is politically accountable and has more factfinding tools than the Federal Circuit. Consequently, granting deference to ITC validity and enforceability decisions is wholly consistent with the Supreme Court's *Chevron* decision.

The Federal Circuit's failure to defer to the ITC illustrates why patent exceptionalism in administrative law should be viewed with suspicion.<sup>314</sup> It is easy to look at issues of agency deference superficially and to decide that the Federal Circuit should never defer based on its position as a patent expert. But the decision to grant *Chevron* deference is not based on which institution has the greatest expertise; rather, it is grounded in fundamental ideas such as institutional competence, uniformity in federal law, and separation of powers.<sup>315</sup> Allowing the Federal Circuit to take a heavy-handed approach to reviewing ITC decisions ignores the strengths that are implicit in all agencies and has the effect of expanding the power of the judiciary at the expense of the executive branch.

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<sup>314</sup> See *supra* note 100 and accompanying text.

<sup>315</sup> See *supra* notes 86-91 and accompanying text.