

USITC Commissioner Series: Meet the (Vocal) Commissioners



3 MIN READ

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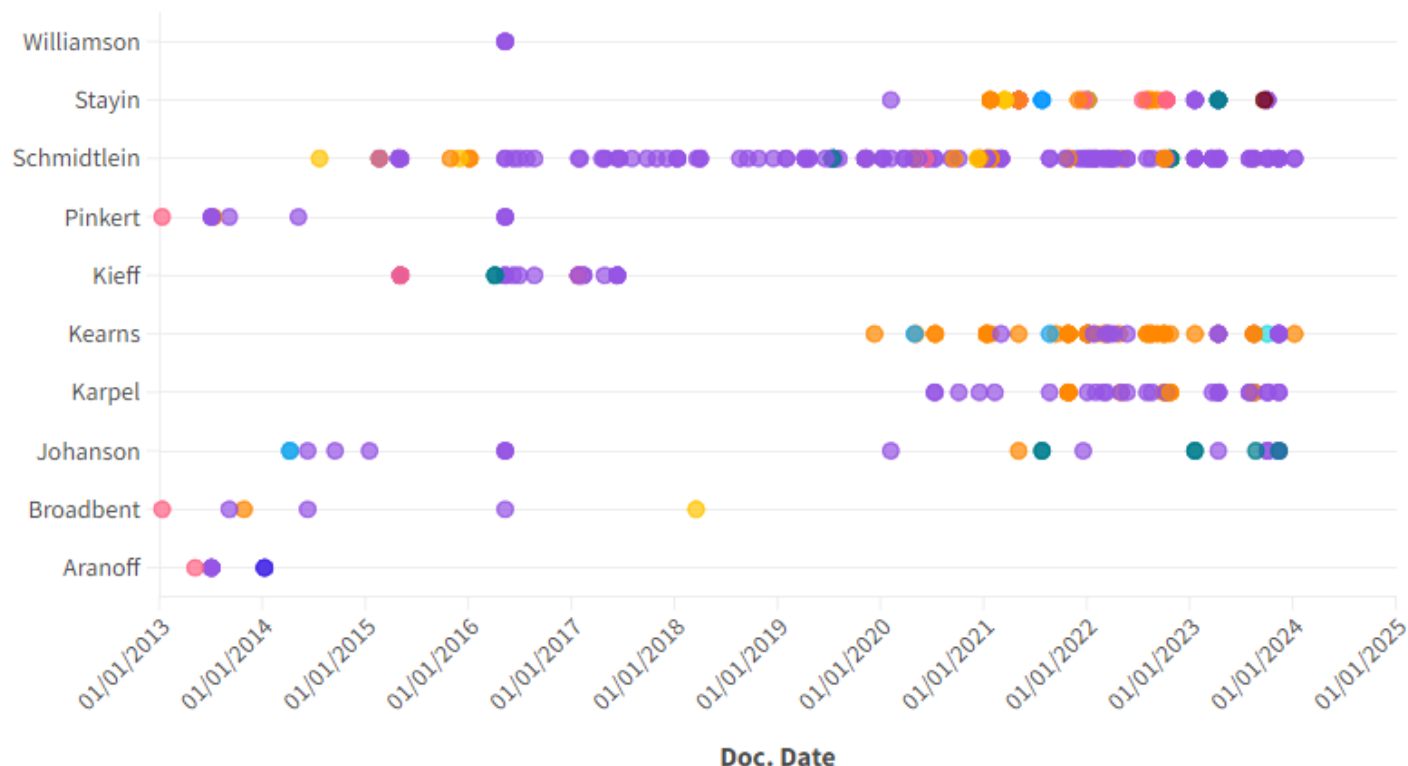
This is part two of our **USITC Commissioner Series**.

Read [part one here](#) and [part three here](#), [part four here](#), and [part five here](#).

As my colleagues Brian Johnson and Ian Swan [reported in March](#), dissenting and concurring opinions in Section 337 Investigations, either as footnotes or separate opinions, at the International Trade Commission (ITC) have become more frequent in the last 10 years. However, the data (visualized below) shows that not all Commissioners dissent or concur equally. Some, like Commissioner Rhonda K. Schmidlein (pictured above), are more vocal than others, which could create changes in ITC outcomes as the makeup of the Commission continually shifts.

Issue Category

- Domestic Industry (Technical Prong)
- Remedy
- Infringement
- Domestic Industry (Economic Prong)
- Procedure and other miscellaneous non-substantive issues
- Invalidity
- Importation
- Infringement, Invalidity, False Designation, Dilution, Domestic Industry (Economic Prong)
- 337 defenses
- Invalidity, Domestic Industry (Economic Prong)
- Trade secret
- Infringement, Invalidity
- Infringement, Domestic Industry (Technical Prong), invalidity



Commissioner Rhonda K. Schmidtlein

State: Missouri

Appointed by: President Obama

Term: Apr. 28, 2014 - Dec. 16, 2021

Number of dissents: 179

Commissioner Schmidtlein easily dissents the most frequently, with 179 dissenting or concurring opinions in footnotes or separate opinions in the last 10 years. Most of her dissents relate to the standards for issuing cease-and-desist orders (CDOs), one of the remedies available to ITC complainants. The majority position is that the issuance of a CDO requires the complainant to show that a respondent maintains a commercially significant inventory of the unfairly imported article in the U.S. As she expresses in around a third of her dissenting opinions, however, Commissioner Schmidtlein believes that the presence of *any* infringing domestic inventory, regardless of the commercial significance, provides a basis to issue a CDO.

[1]

Commissioner Jason E. Kearns

State: Colorado

Appointed by: President Trump

Term: Apr. 2, 2018 - Dec. 16, 2024

Number of dissents: 58

Commissioner Kearns is the next most frequent dissenter, often as to the economic prong of the domestic industry requirement for complainants in Section 337 cases. To assert infringement, a complainant needs to show a “significant” investment in plant and equipment, “significant” employment of labor or capital, or “substantial” investment in the protected articles’ exploitation. As there is no statutory definition of a “significant” or “substantial” investment, Commissioner Kearns often disagrees with various aspects of the majority’s analysis of those terms. He has, for instance, noted that he considers it necessary in determining “significance” to compare domestic and foreign activities or investments if domestic industry products benefit from both.^[2]

Commissioner Amy A. Karpel

State: Washington

Appointed by: President Trump

Term: Aug. 26, 2019 - June 16, 2023

Number of dissents: 40

Despite being the most recently appointed, Commissioner Karpel has already issued a fair number of dissents. She frequently joins Commissioners Schmidlein and Kearns in departing from the majority views on the standards to apply in determining what remedies are available to complainants.^[3]

^[1] See, e.g., *Certain Graphics Systems, Components Thereof, and Consumer Products Containing the Same*, Inv. No. 337-TA-1044 (Sept. 18, 2018), Comm’n Op. at 70 n.43; *Certain Plant-Derived Recombinant Serum Albumins (“rHSA”) and Products Containing Same*, 337-TA-1238 (Oct. 11, 2022), Comm’n Op. at 66 n.48 (listing further dissenting opinions by Commissioner Schmidlein on the same issue).

^[2] E.g., *Certain Electronic Candle Products and Components Thereof*, Inv. No. 337-TA-1195 (Sept. 13, 2021), Comm’n Op. at 18 n.22; *Certain Vaporizer Cartridges and Components Thereof*, Inv. No. 337-TA-1211 (Mar. 1, 2022), Comm’n Op. at 7 n.13.

^[3] See, e.g., *Certain High-Density Fiber Optic Equipment and Components Thereof*, Inv. No. 337-TA-1194 (Aug. 23, 2021), Comm’n Op. at 87 n.50 (joining Commissioner Schmidlein in dissenting regarding availability of CDOs); *Certain Automated Put Walls and Automated*

Storage and Retrieval Systems, Associated Vehicles, Associated Control Software, and Component Parts Thereof, Inv. No. 337-TA-1293 (Aug. 17, 2023), Comm’n Op. at 29 n.26 (joining Commissioner Kearns in dissenting regarding Commission’s discretion in selecting remedy and listing further dissents on the same issue).



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