Wrongly Affirmed without Opinion

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INTRODUCTION

In his 1909 treatise on appellate jurisdiction, the future Justice Benjamin Cardozo explained the role of appellate courts—not simply "declaring justice between man and man, but . . . settling the law."¹ In Justice Cardozo's view, the appellate courts exist "not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue."² Justice Cardozo's vision more than a century ago still resonates, and precedential opinions form a mainstay of appellate court activity nationwide.³

However, one court of appeals is quite different from the rest. The Court of Appeals for the Federal Circuit issues a substantial number of Rule 36 affirmances without any opinion at all.⁴ In fact, most of the court's Patent Office merits decisions are released as so-called judicial orders as permitted by the court's local rule for "judgment of affirmance without opinion."⁵ Although frustrating for parties and court watchers, the approach likely provides substantial short-term efficiency gains for a court that has seen a sharp rise in the number of appeals following a set of dramatic statutory revisions and Supreme Court holdings.⁶

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¹. Philip Marcus, Affirmance Without Opinion, 6 FORDHAM L. REV. 212, 227 (1937) (quoting BENJAMIN N. CARDOZO, JURISDICTION OF THE COURT OF APPEALS § 6 (2d ed. 1909)).
². Id.
³. See id. at 226–27.
⁴. FED. CIR. R. 36.
⁶. See Marcus, supra note 1, at 212 (describing "affirmance without opinion" as "a phenomenon which at one time or another is an unwelcome visitor in almost every law office").
The Federal Circuit has repeatedly made clear that its Rule 36 judgments are not opinions, that they offer no reasons for judgment, and that they should not be read as accepting any of the reasoning or findings of the lower court. Although many have complained about the no-opinion judgments, no one has yet suggested that the practice violates federal statutory law.

In this Article, I make the novel argument that the appellate court's steady practice of no-opinion judgments runs contrary to the law. Both the Patent Act and the Lanham Act require the Federal Circuit to provide an opinion when issuing a judgment on an appeal from the Patent and Trademark Office ("PTO"). In particular, both statutes indicate that, upon determination of the case, the Federal Circuit "shall issue... its mandate and opinion." Quite simply, Rule 36 judgments are not opinions and do not satisfy the opinion requirement.

As Justice Cardozo explained, appellate tradition favors explanatory opinions. In addition, the well-known public-notice concerns associated with patent and trademark rights help justify the statutory requirement that opinions be written and included within the publicly available patent or trademark application file history. This approach is also consistent with the agency law mandate that requires full explanatory written judgments both by examiners and the administrative trial boards—the Patent Trial &

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7. See, e.g., Rates Tech., Inc. v. Mediatrix Telecom, Inc., 688 F.3d 742, 750 (Fed. Cir. 2012) ("Since there is no opinion, a Rule 36 judgment simply confirms that the trial court entered the correct judgment.").

8. See, e.g., id. ("[The judgment] does not endorse or reject any specific part of the trial court's reasoning.").

9. See, e.g., id. ("In addition, a judgment entered under Rule 36 has no precedential value and cannot establish 'applicable Federal Circuit law.'"). Federal Circuit Rule 36 identifies the process as offering a judgment without opinion. FED. CIR. R. 36.


13. See Marcus, supra note 1 (quoting BENJAMIN N. CARDOZO, JURISDICTION OF THE COURT OF APPEALS § 6 (2d ed. 1909)).

Appeal Board ("PTAB") and the Trademark Trial & Appeal Board ("TTAB").

The gap in appellate practice has become critical with the advent and popularity of post-issuance patent review proceedings (termed "AIA trials"). In addition to their large numbers and the higher probability of appeal when compared to traditional ex parte proceedings, PTO decisions regarding America Invents Act ("AIA") trials are more likely to be nuanced and directly tied to pending infringement litigation. However, in 2015 and 2016, the Federal Circuit released hundreds of no-opinion judgments in these very cases.

After an introductory historical section, this Article inches through the construction of the statutory provision—asking whether the statutes actually require the court to issue opinions and whether the Federal Circuit's Rule 36 judgment orders should be deemed opinions under the statute. In addition to the plain language analysis, I look to the legislative history, policy goals, and comparative provisions in the U.S. Code and Rules of Appellate Procedure. Finally, the Article offers a "what next" scenario for the court and parties.

I. BACKGROUND AND HISTORY OF THE APPELLATE PROCESS FOR CASES STEMMING FROM THE PATENT & TRADEMARK OFFICE

In general, decisions by the PTAB and TTAB are appealable to the Court of Appeals for the Federal Circuit. These administrative judgments stem from both ex parte and contested cases.

15. See In re Nuvasive, Inc., 842 F.3d 1376, 1382 (Fed. Cir. 2016) (highlighting that the PTAB must fully explain its judgment).
19. See Rantanen, supra note 17.
20. The Patent Trial & Appeal Board was formerly known as the Board of Patent Appeals & Interferences. Its name was changed as part of the Leahy-Smith America Invents Act of 2011, H.R. 1249, 112th Cong. (1st Sess. 2011) (AIA introduced AIA Trials and eliminated prospective interference proceedings).
The statutes provide that on appeal the Federal Circuit "shall review the decision from which the appeal is taken on the record before the United States Patent and Trademark Office."23 The statutes then require that "[u]pon its determination the court shall issue to the Director [of the Patent and Trademark Office] its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case."24 I suggest it is this statutory requirement—"shall issue . . . its . . . opinion"—that requires the court to provide an opinion explaining the bases for determination.

A. History of the Statutory Provisions Requiring a Written Opinion

The statutory provisions at issue reach back to at least the year 1893 and the creation of the Circuit Court of Appeals for the District of Columbia.25 In its enacting statute, the D.C. Circuit Court of Appeals was authorized to pass judgment on appeals from the Commissioner of Patents.26 The provision required "[t]hat the opinion of the said court of appeals in every case shall be rendered in writing, and shall be filed in such case as a part of the record thereof."27 In 1929, jurisdiction over these appeals shifted to the Court of Customs and Patent Appeals ("CCPA").28 The CCPA authorizing statute required that "[t]he opinion of the Court . . . in every case on appeal from the decision of the Patent Office shall be rendered in writing, and shall be filed in such case as part of the record thereof, and a certified copy of said opinion shall be sent to the Commissioner of Patents and shall be entered of record in the Patent Office."29 The statute was again rewritten with the Patent Act of 1952.30 At that time, Congress added the language that the CCPA's decisions "shall be confined to the points set forth in the reasons for appeal."31 The revised 1952 statute no longer expressly required a written opinion, but did require that "[u]pon its determination the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of

26. Act of Feb. 9, 1893, ch. 74, § 9, 27 Stat. 434, 436. The Patent Act of 1836 provided for a "board of examiners" appointed by the Secretary of State that has power to overturn decisions of the Patent Commissioner. Patent Act of 1836, ch. 357, § 7, 5 Stat. 117. Nothing in that statute expressly required a written opinion from the selected board, but only that each board member should receive a sum not exceeding ten dollars. Id.
27. Act of Feb. 9, 1893 § 10.
29. Id. § 3.
31. Id.
record in the Patent Office and govern the further proceedings in the case." 32 In 1962, the Lanham Act was also amended to require that the CCPA’s decisions in trademark appeals “be confined to the points set forth in the reasons of appeal” and that a certification of decision be provided to the Patent Office Commissioner that then be entered of record. 33 The Court of Appeals for the Federal Circuit was created in 1982 as the successor court of and replacement for the CCPA and authority was shifted to the new appellate court. 34 In 1984 the statutes were amended again—this time reintroducing the aforementioned opinion requirement that continues to be in effect. 35

Unfortunately, legislative history explains neither the reasons for the elimination of the opinion requirement in 1952 nor those for its subsequent reintroduction in 1984. According to the accompanying House Judiciary Committee report, the amendments were associated with a streamlining of procedures—a “cost-saving provision.” 36 However, those cost savings were expected to be generated by elimination of the statutory requirement for certified copies of papers and evidence being used in the appeal. 37 The legislative history made no mention of the new opinion requirement or why it was included in the revision.

The lack of legislative history for the 1984 opinion requirement addition is at least partially explained by context. At the time of the bill’s passage, the Federal Circuit’s standard operating procedure was to write opinions in all cases—a practice that it had adopted from its predecessor court, the CCPA, which appears to have maintained that practice for the entirety of its existence. 38 Thus, the longstanding status quo in 1984 was that all appeals from the PTO received a written opinion explaining the judgment. As such, I interpret the legislative requirement more as a codification of practice and returning to statutory roots rather than as a “fix” or change of expectations. 39

Although seemingly unique at the federal appellate level, the requirement is not unique to American law. The Federal Rules of

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32. Id.
34. Id.
37. Id.
39. See Ted Sichelman, Patent Law Revisionism at the Supreme Court?, 45 LOY. U. CHI. L.J. 307, 308 (2013) (“When Congress passes a statute codifying judicial doctrine, the judiciary is expected to read that doctrine with fidelity.”).
Civil Procedure require a federal district court to "find the facts specially and state its conclusions of law separately." 40 Similarly, district court judges must "state in open court the reasons" for imposing a particular criminal sentence. 41 A number of states have also imposed requirements upon their appellate courts to expressly justify their judgments. 42 In addition, a general principal of federal administrative law requires written explanations of adverse judgments. 43 The Federal Circuit itself has repeatedly rejected decisions from lower courts for failing to fully explain their decisions. 44

B. History of the Federal Circuit's Local Rule Allowing Judgment Without Opinion

Written opinions were uncommon in early English common law. 45 Although American appellate courts have largely kept to the tradition of writing opinions explaining their judgment, no-opinion judgments have also remained popular throughout the nation's history. 46 For instance, in his 1937 article, Affirmance Without

41. 18 U.S.C. § 3553(c) (2012).
42. See Ariz. Const. art. VI, § 2 ("The decisions of the court shall be in writing and the grounds stated."); Cal. Const. art VI, § 14 (stating Supreme Court and Appellate Court must make determinations "in writing with reasons stated"); Md. Const. art. IV, § 15 (stating Supreme Court determinations must be in "an opinion, in writing"); Mich. Const. art. VI, § 6 ("Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal."); Ohio Const. art. IV, § 2(C) ("The decisions in all cases in the Supreme Court shall be reported, together with the reasons therefor."); Wash. Const. art. IV, § 2 ("In the determination of causes all decisions of the [supreme] court shall be given in writing and the grounds of the decision shall be stated."); W. Va. Const. art. VIII, § 4 (stating the Supreme Court shall file the reasons for its decision in writing); see also Tex. R. App. P. 47.1 (requiring brief but complete decisions from the court of appeals); Rene Lettow Lerner, International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade, 2001 B.Y.U. L. Rev. 229, 287 (2001) ("Each of the arbitration regimes specified under NAFTA requires that the award be in writing and the reasons stated.").
44. Cutsforth v. MotivePower, No. 2015-1316, 2016 WL 279984, at *1 (Fed. Cir. Jan. 22, 2016) ("Because the Board did not adequately describe its reasoning for finding the claims obvious, we vacate and remand for further proceedings."); In re Sang-Su Lee, 277 F.3d 1338, 1346 (Fed. Cir. 2002) ("The agency tribunal must make findings of relevant facts, and present its reasoning in sufficient detail that the court may conduct meaningful review of the agency action."); see Dennis Crouch, Board Must Explain its Decisions, PATENTLY-O (Jan. 22, 2016), http://patentlyo.com/patent/2016/01/federal-circuit-decisions.html.
45. Marcus, supra note 1, at 213.
46. Id.
Opinion, Philip Marcus found that most of the judgments issued by the New York Court of Appeals (the highest New York state court) in 1934 and 1935 were decided without opinion. The United States Supreme Court has also relied upon the practice through summary affirmances and GVR mandates.

In 1982, in its very first issued decision, the Federal Circuit adopted as binding precedent all decisions of its predecessor courts, including the CCPA. That decision was facilitated by the fact that the CCPA only issued precedential opinions when deciding merits cases. As it began its process, the Federal Circuit also followed this tradition by writing opinions in all cases.

The Federal Circuit's predecessor court, the CCPA, perhaps came closest to reckoning with the requirement of a written opinion in its 1944 Hamer v. White decision. In Hamer, the court affirmed the patent board's decision in an interference proceeding between two sets of competing patent applicants. Rather than writing a complete opinion explaining the issues and its judgment, the court decided to accept the Board's findings. In doing so, however, the 1946 panel's output differed greatly from contemporary Rule 36 affirmances without opinion. Notably, the court wrote several pages of text that identified and challenged particular aspects of the Board's opinion as well as the parties' arguments. Hamer did include an interesting statement regarding the court's duty of a written opinion when reversing:

The decisions of the board, of course, will be available to all who may care to read it after our decision shall have been published. Any written review of the evidence made by us could be little more than a paraphrase of what the board said. Were we reversing the decision of the board it would be incumbent upon us to give a written review and point out the

47. Id. at 216; see also Lee Van der Voo, Unwritten Opinions Hard to Erase at the Oregon Court of Appeals, INVESTIGATEWEST (Sept. 16, 2015) http://invw.org/2015/09/16/unwritten-opinions-hard-to-erase-at-the-oregon-court-of-appeals/ (stating that "more than half the cases reviewed by the state's second-to-highest court end up unchanged, with no written explanation for why the court didn't tinker with them").
50. South Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982); Martha Dragich Pearson, Citation of Unpublished Opinions As Precedent, 55 HASTINGS L.J. 1235, 1244 n.71 (2004).
51. 143 F.2d 987 (C.C.P.A. 1944).
52. Id. at 990.
53. Id. at 991.
54. Id. at 990.
55. Id. at 989–91.
reasons for disagreement. Since we are affirming, no such review is necessary.\(^{56}\)

The opinion did not provide any citation for the source of this full-review requirement. The statutory law would have been an obvious source since, at the time, the statute required that “the opinion of the Court . . . in every case on appeal from decision of the Patent Office shall be rendered in writing.”\(^{57}\) That same year, the court in Kenyon v. Platt\(^{58}\) came to a parallel conclusion, writing that “it would serve no useful purpose to here restate in detail the attempts shown in appellees’ voluminous record to prove reduction to practice.”\(^{59}\) However, as in Hamer, the Kenyon court provided a substantive opinion on the merits even if it did not completely restate the evidentiary conclusions of the Board.\(^{60}\)

By 1989, however, members of the court recognized the increasing potential of a docket backlog and implemented local Rule 36 to allow for affirmances without opinion.\(^{61}\) In discussing the rule change, then-Chief Judge Markey offered this new “third form of disposition where it’s not necessary to explain, even to the loser, why he lost.”\(^{62}\) The Internal Operating Procedures (“IOPs”) of the Federal Circuit explain that “[t]he workload of the appellate courts precludes preparation of precedential opinions in all cases” and that “unnecessary . . . full opinions . . . impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.”\(^{63}\)

Thus, the new rule allowing affirmances without opinion was implemented by unilateral court action five years after Congress amended the statute to require the same court to provide an opinion in PTO cases.\(^{64}\) Although any local rule “must be consistent with . . . Acts of Congress,”\(^{65}\) the Federal Circuit appears to have—up to now—given no consideration to whether its rule violates the statute. Likewise, as noted by Federal Circuit Judge Evan Wallach

\(^{56}\) Id. at 990.
\(^{58}\) 152 F.2d 1006 (C.C.P.A. 1946).
\(^{59}\) Id. at 1008.
\(^{60}\) Id. at 1008–11.
\(^{61}\) FED. CIR. R. 36; see Transcript of The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 128 F.R.D. 409, 420 (1989) [hereinafter Transcript]. The local rules had been originally written the prior year, but the new Rule 36 was added by amendment the following year. See id. at 418.
\(^{62}\) Transcript, supra note 61, at 420.
\(^{63}\) FED. CIR. I.O.P. 10 (the IOPs’ explanation is written as a justification for non-precedential opinions; it does not directly justify the need for the release of judgments without opinions as opposed to non-precedential opinions).
\(^{64}\) See supra notes 33–39 and accompanying text.
\(^{65}\) FED. R. APP. P. 47(a)(1).
in a recent article, Rule 36 decisions have only rarely been the subject of academic literature.66

The court's rules limit Rule 36 judgments to cases where "an opinion would have no precedential value" and at least one of the following is true:

(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous; (b) the evidence supporting the jury's verdict is sufficient; (c) the record supports summary judgment, directed verdict, or judgment on the pleadings; (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or (e) a judgment or decision has been entered without an error of law.67

Of course, when issuing such a judgment, the court does not identify sources of qualification.68 A number of other circuit courts of appeals have local rules that expressly allow for judgment without opinion.69

The Federal Circuit is not solely a patent court. Rather, the court handles a wide variety of appeals in addition to those arising from the PTO.70 These include appeals arising from the Court of Federal Claims, the Court of Appeals for Veterans Claims, various boards of contract appeals, the United States Merit Systems Protection Board, the United States International Trade Commission, and the United States Court of International Trade.71 In addition, the Federal Circuit hears patent infringement cases stemming from the various U.S. district courts.72 The statutes requiring an opinion do not appear to apply to cases arising from these non-PTO fora.

C. Recent Rise in No-Opinion Judgments of Patent and Trademark Office Appeals to the Federal Circuit

Over the past few years, the number of PTO appeals to the Federal Circuit has risen dramatically and, as you might expect, so
has the percentage of Rule 36 judgments.\cite{73} For instance, Professor Jason Rantanen calculated that in 2015 and the first five months of 2016 the Federal Circuit decided most PTO appeals via Rule 36 judgments.\cite{74} The rise in the absolute number of PTO appeals heard by the Federal Circuit is largely driven by implementation of the inter partes review procedure authorized by the AIA.\cite{75} Prior to that, both PTO appeals to the Federal Circuit and the percentage of Rule 36 judgments had been relatively stable for many years.\cite{76}

One might expect that Rule 36 judgments would be used in only non-controversial, open-and-shut cases applying longstanding law.\cite{77} However, Peter Harter and Gene Quinn have identified many recent Rule 36 judgments that focus on substantial and novel patent law.\cite{78} In an admittedly one-sided article, the pair writes, "[T]he Federal Circuit is simply abnegating its duty [to provide uniform patent doctrine] by refusing to speak on critical issues of patent eligibility under when it has a duty to do so."\cite{79}

Although Harter and Quinn call for congressional action to fix the problem, the pair did not consider the opinion requirement

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\footnote{74. Rantanen, supra note 17.}


\footnote{76. See Markey, supra note 73, at 2–3; Tegfeldt, supra note 73, at 248.

\footnote{77. Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) (holding summary affirmation "is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists").


\footnote{79. Id. In this context Harter and Quinn argue that the court is violating its own rule that limits Rule 36 judgments to cases where the resulting "opinion would have no precedential value." Id.}

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already found in the statute. I argue here that Congress has already acted and already requires an opinion in these cases.

II. THE MOST DEFENSIBLE CONSTRUCTION OF THE STATUTES IS THAT THE FEDERAL CIRCUIT IS REQUIRED TO ISSUE AN OPINION WHEN DETERMINING THE OUTCOME OF APPEALS FROM THE PATENT AND TRADEMARK OFFICE

The statutes state that the Federal Circuit "shall issue . . . its mandate and opinion" when deciding appeals from the PTO. The statutes are so straightforward that it appears almost laughable to argue that no opinion is required. However, as noted above, the court’s standard operating procedures have been seemingly in violation of the statutes for more than a quarter century. That longstanding practice thus requires a more complete interpretation of the statute and consideration of whether the court is in violation. In doing this analysis, however, there is little precedential backdrop because it appears that the court has entirely ignored the statutes. Rather than addressing the potential conflict between the law and its procedures, the court has instead taken no steps to expressly consider whether its no-opinion judgments violate the law. This section briefly steps through statutory construction of the brief statute and its key words: "its . . . opinion."

Statutory construction begins with the words of the statute and their plain meaning. According to the Federal Circuit, “When a statute is at issue, we begin with the statutory language.” When clear, courts presumptively follow a statute’s semantic meaning.

80. Id.
82. See supra notes 63–71 and accompanying text.
83. David F. Johnson, “You Can’t Handle the Truth!”—Appellate Courts’ Authority to Dispose Of Cases Without Written Opinions, 22 APP. ADVOC. 419, 419 (2010) (failing to recognize the existence of the particular statute for patent and trademark cases). At least one petitioner challenged the Federal Circuit’s Rule 36 practice as “contrary to appropriate appellate judicial procedure.” See Petition for Writ of Certiorari at 7, Schoonover v. Wild Injun Prod., 56 F.3d 80 (Fed. Cir. 1995) (No. 95-371); see also Petition for Rehearing at 7–9, Biopolymer Eng’g, Inc. v. Immunocorp, 390 F. App’x 989 (Fed. Cir. 2010) (No. 2010-1096), order vacated on rehe’g, 397 F. App’x 662 (Fed. Cir. 2010) (challenging Rule 36 judgment for failing to fit with the bounds of the rule itself).
85. See generally William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621 (1990) (discussing the debate over what level preference should be given to a text’s plain meaning).
87. See Ardestani v. INS, 502 U.S. 129, 135 (1991) (indicating a “strong presumption” that the plain language of the statute expresses congressional intent); Unexcelled Chem. Corp. v. United States, 345 U.S. 59, 64 (1953) (“It is
"If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning."\(^{88}\) That plain semantic meaning is derived from text as well as the statutory structure.\(^{89}\)

In our situation, the primary statutory statement at issue is found in 35 U.S.C. § 144. That section is titled "Decision on appeal" and is housed within Chapter 13 of Title 35 of the United States Code.\(^{90}\) The entire chapter focuses on court challenges of PTO decisions.\(^{91}\) Section 144 is the only provision that discusses the decision on appeal. The provision states in full:

The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.\(^{92}\)

The trademark statute is closely parallel. The provision in question is codified at 15 U.S.C. § 1071(a)(4). Section 1071 is generally titled "Appeal to courts" and subsection (a)(4) is the only portion that directly relates to the court's decision on appeal.\(^{93}\) The subpart states in full:

The United States Court of Appeals for the Federal Circuit shall review the decision from which the appeal is taken on the record before the United States Patent and Trademark Office. Upon its determination the court shall issue its mandate and opinion to the Director, which shall be entered of record in the United States Patent and Trademark Office and shall govern the further proceedings in the case. However, no final judgment shall be entered in favor of an applicant under section 1051(b) of this title before the mark is registered, if such applicant cannot prevail without establishing constructive use pursuant to section 1057(c) of this title.\(^{94}\)
The textual focus for this Article is the requirement in both statutes that “the court shall issue . . . its . . . opinion.” I deconstruct the analysis here to primarily focus on two questions: (1) does a Rule 36 judgment without opinion qualify as an “opinion” under the statute; and (2) does the statute actually require an opinion?

A. An Opinion is an Explanation, Not Simply the Judgment “AFFIRMED”

Black’s Law Dictionary defines “opinion” as you might expect: “A court’s written statement explaining its decision in a given case, [usually] including the statement of facts, points of law, rationale, and dicta. Also termed judicial opinion.”\(^{95}\) An opinion is distinct from a judgment (or decision) in that the former requires explanation while the latter does not.\(^ {96}\) The Federal Rules of Appellate Procedure complement this distinction—noting the clerk must enter a judgment both in cases with an opinion as well as in cases where “judgment is rendered without an opinion, as the court instructs.”\(^ {97}\)

In his article titled What’s An Opinion For?, Professor James B. White explains that that the opinion provides much more than simply the case’s outcome:

> For in every case the court is saying not only, “This is the right outcome for this case,” but also, “This is the right way to think and talk about this case, and others like it.” The opinion in this way gives authority to its own modes of thought and expression, to its own intellectual and literary forms.\(^ {98}\)

Although perhaps lofty in its writing, Professor White’s point parallels that of the dictionary—that a judicial opinion must be more than simply the one word “AFFIRMED.”

Some readers convinced by my argument that the statute requires an opinion may attempt to foxtrot around any dramatic impact of that conclusion by arguing that the court’s Rule 36 judgments are actually offering an opinion. To be fair, the judgments do offer a one-word statement, “AFFIRMED.” And, although miniscule and de minimus in its explanatory value, its explanatory value is probably greater than nothing. But “more than nothing” does not equate to an opinion, and offering a one-word judgment—what the court is doing here—is separate and distinct from offering an opinion. Furthermore, this argument appears

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97. FED. R. APP. P. 36.
foreclosed by multiple prior statements in the Federal Rules of Appellate Procedure, local rules, opinions, and statements by the court that all directly and unequivocally distinguish between judgments accompanied by an opinion and those without opinion.99

In describing its own procedures, the Federal Circuit writes, "The court’s decisions on the merits of all cases submitted after oral argument or on the briefs, other than those disposed of under Rule 36, shall be explained in an accompanying precedential or nonprecedential opinion."100

In other words, the court states that opinions explain decisions, and its Rule 36 judgments are not opinions. Perhaps the clearest precedential statements come from the court’s 2012 and 2013 decisions of Rates Technology, Inc. v. Mediatrix Telecom, Inc.101 and TecSec, Inc. v. International Business Machines Corp.102 In both cases, the court held that no information can be gleaned from a Rule 36 judgment other than affirmation of the lower court’s judgment.103 In particular, the court made clear that a Rule 36 judgment should not be seen as affirming the reasoning of the lower court.104

In Rates Technology, the plaintiff’s attorney, James Hicks, appealed the trial court’s discovery sanctions.105 In the briefing, Hicks cited to a prior Rates Technology case where his conduct had been unsuccessfully challenged.106 In the prior case, the district court had sided with Hicks (refusing to award sanctions) and the decision was then affirmed by the Federal Circuit on appeal in a Rule 36 judgment without an opinion.107 Rebuking Hicks, the Federal Circuit wrote:

Rule 36 allows us to “enter a judgment of affirmance without opinion” under certain circumstances. Since there is no opinion, a Rule 36 judgment simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court’s reasoning. In addition, a judgment entered under Rule 36 has no

99. Wallach & Darrow, supra note 66, at 113 (referring to Rule 36 opinions as “affirmances without opinion”).
100. FED. CIR. I.O.P. 9.
101. 688 F.3d 742 (Fed. Cir. 2012).
102. 731 F.3d 1336 (Fed. Cir. 2013).
103. Rates Tech., 688 F.3d at 750; TecSec, 731 F.3d at 1342.
104. Id.
105. See Rates Tech., 688 F.3d at 744–45.
precedential value and cannot establish "applicable Federal Circuit law."\(^{108}\)

The next year, in *TecSec*, the court faced a situation where it had previously affirmed a district court judgment of non-infringement via a Rule 36 judgment without opinion.\(^{109}\) Later, *TecSec* appealed the same construction claim that had been previously appealed, but now involving a different party as an accused infringer.\(^{110}\) In the second appeal, the Federal Circuit found no preclusion—either from the mandate rule or from the doctrines of issue preclusion and law of the case because the lower court decision had been granted on two independent alternate bases and therefore "it [was] impossible to glean which issues this court decided when we issued the Rule 36 judgment."\(^{111}\) In other words, the *TecSec* court found that a Rule 36 judgment does not bar relitigating the identical issues appealed unless the issues were necessary for the affirmation.\(^{112}\) Since a Rule 36 judgment could be based upon a purely procedural matter raised sua sponte and sub silento by the appellate court, it is not clear the unstated reasons for such a judgment could ever truly be isolated to this degree. The Supreme Court has similarly explained that its summary dispositions "[affirm] only the judgment of the court below, and no more may be read into [its] action than was essential to sustain that judgment."\(^{113}\) The analysis of these cases may act as a detour, but I suggest that it offers substantial contour and backing to the simple claim that a Rule 36 judgment is not an opinion.

A substantial amount of academic literature focuses on the distinction between published and unpublished opinions, including some questions of whether unpublished opinions should even count as opinions.\(^{114}\) The literature does not include a discussion of no-opinion judgments, but those judgments go well beyond the prior perceived line of non-publication.\(^{115}\)

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108. *Rates Tech.*, 688 F.3d at 750; see also U.S. Surgical Corp. v. Ethicon, Inc., 103 F.3d 1554, 1556 (Fed. Cir. 1997); Chicago & N. W. Ry. v. Board of Supervisors, 165 N.W. 390, 390 (Iowa 1917) (indicating no inference of approval for purpose of stare decisis from affirmance without opinion).


111. *Id.*

112. *Id.*


115. *Id.*
Looking at its structure, the statute also calls for issuance of a mandate that appears to be separate and distinct from the opinions.\textsuperscript{116} The mandate is the actual order from the appellate court to the lower body.\textsuperscript{117} A mandate in the federal courts is a term of art defined largely by the Federal Rules of Appellate Procedure.\textsuperscript{118} These rules spell out that a “formal” mandate may be issued, but otherwise includes “a certified copy of the judgment, a copy of the court’s opinion, if any, and any direction about costs.”\textsuperscript{119} Note here that the rules again make a distinction between the judgment and the opinion and recognize that an appellate court may issue a judgment without opinion.\textsuperscript{120} That distinction matches with Rule 36, which recognizes that judgments may be “rendered without an opinion, as the court instructs.”\textsuperscript{121}

\textbf{B. The Statute Requires a Written Opinion}

I suggest that the best interpretation of the statutory phrase “the court shall issue . . . its . . . opinion” requires issuance of an opinion. However, a \textit{conceivable} interpretation of the statute would require issuance of the opinion only if such an opinion exists—rendering the requirement merely an illusory request. If the Federal Circuit’s opinion does not exist, then “its opinion” is simply a nullity. This end-run interpretation somewhat parallels the Federal Circuit’s interpretation of the “best mode” requirement of 35 U.S.C. § 112(a). Section 112(a) states that the inventor “shall set forth the best mode contemplated by the inventor.”\textsuperscript{122} When interpreting the statute, the court has repeatedly held that the best mode need only be submitted when the inventor actually “had a best mode of practicing the claimed invention.”\textsuperscript{123} As interpreted, § 112(a) does not require that the inventor actually take any steps to identify a best mode and the provision simply does not impact inventors who never identify the best mode of their invention.\textsuperscript{124}

Although linguistically appealing, the best mode analogy fails for several reasons, beginning with the comparative language of the statutes. Section 112(a) includes the express caveat of best mode “contemplated by the inventor,” and it is that caveat that forms the linguistic hook for limiting the doctrine.\textsuperscript{125} The distinction is

\begin{footnotesize}
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\item \textsuperscript{116} 35 U.S.C. § 112(a) (2012).
\item \textsuperscript{117} \textit{Mandate}, \textsc{Black’s Law Dictionary} (10th ed. 2014) (“1. An order from an appellate court directing a lower court to take a specified action.”).
\item \textsuperscript{118} \textit{Fed. R. App. P. 41}.
\item \textsuperscript{119} \textit{Id}.
\item \textsuperscript{120} \textit{See id}.
\item \textsuperscript{121} \textit{Fed. R. App. P. 36}.
\item \textsuperscript{122} 35 U.S.C. § 112(a) (2012).
\item \textsuperscript{123} \textit{Chemcast Corp. v. Arco Indus. Corp.}, 913 F.2d 923, 927–28, (Fed. Cir. 1990).
\item \textsuperscript{124} \textit{See} 35 U.S.C. § 112(a).
\item \textsuperscript{125} \textit{Id}.
\end{enumerate}
\end{footnotesize}
revealed by comparing the best mode statutory language with another requirement of § 112(a)—that "the specification shall contain a written description of the invention." The written description provision lacks the "contemplated by the inventor" caveat and consequently is interpreted as a requirement that must be met—not one excused by a plea that the inventor did not have a written description on hand. Section 112(b) of the Patent Act includes a similar requirement that the patent application include claims that cover "the subject matter which the inventor . . . regards as the invention." As with the written description requirement, this requirement will not be excused by the inventor's lack of understanding of what he or she "regards as the invention." For a patentee, providing the written description is part of the quid pro quo exchange for receiving patent rights. In the same way, forming a reasoned decision is the role of every appellate court, and the statute simply requires that those reasons be written and released.

Reaching a judgment in each merits case is both an inherent duty of the appellate court and a statutory requirement, and that judgment requires the court to at least form a reasoned opinion that justifies the outcome. In other words, the court must make its judgment based upon the law at hand applied to the facts presented. Even when issuing a judgment without releasing an opinion, the court will have formed reasons for its judgment that are at least self-satisfyingly sufficient. Anything less would be a reversible arbitrary judgment and likely a violation of the due process rights of the parties.

The statutory requirement of issuing "its . . . opinion" is not an illusory request that can be avoided by simply not writing an opinion. Rather, the statute requires a transformation of the court's internal decision justifications into a document that becomes part of the record of the case as it returns to the PTO.

Although the actual inner-workings of the appellate courts are often shrouded, the appellate panels do create and exchange

126. Id.
127. Id.
129. Id.
131. Amicus Brief, supra note 73, at 273 ("A panel that affirms a district court decision under Rule 36 certainly has some reasons for doing so. Those reasons should ordinarily be available to the parties and to the public to demonstrate that issues have been considered and that there is a sound basis for the court's decision.").
132. See Furman v. United States, 720 F.2d 263, 264 (2d Cir. 1983) (holding that a party has no constitutional right to appeal from a lower court opinion); Chase v. Coe, 122 F.2d 198, 198 (D.C. Cir. 1941) (stating that such a right likely does exist for an agency action denying or canceling patent rights).
informal opinions—either oral or written—of the cases that eventually lead to the Rule 36 judgments.\textsuperscript{133} The court’s IOPs require that the panel “hold at least one conference” to discuss and decide the outcome.\textsuperscript{134} And a panel’s “election to utilize a Rule 36 judgment shall be unanimous among the judges of a panel.”\textsuperscript{135} To wit, in a recent discussion of Rule 36 judgments, Federal Circuit Judge Reyna reportedly indicated that “when a Rule 36 affirmance is delivered the court has done 90% of the work” needed for a written opinion.\textsuperscript{136} The court wrote as much in its 1997 \textit{U.S. Surgical Corp. v. Ethicon, Inc.}\textsuperscript{137} decision: “Appeals whose judgments are entered under Rule 36 receive the full consideration of the court, and are no less carefully decided than the cases in which we issue full opinions.”\textsuperscript{138}

There may be occasions where an appellate panel can reach judgment without agreement upon the reasons for judgment. The Supreme Court has recognized in the non-patent context that “sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent.”\textsuperscript{139} Of course, this unique situation will not explain the hundreds of no-opinion judgments issued of late, nor does it face the particular statutory requirement at issue here.

Finally, it makes sense to note that the full text of the statutes requires the court to issue both “its mandate and opinion.”\textsuperscript{140} It would be absurd to interpret this provision as requiring neither a mandate nor an opinion because without either, the case is never decided.\textsuperscript{141}

\textbf{C. The Purposes of the Provision Support a Conclusion That the Provision Requires a Written Opinion}

In addition to requiring the court to issue an opinion, the statutes at issue here also provide that the opinion “shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.”\textsuperscript{142} This additional requirement reflects the longstanding recognition of the public nature of patent

\begin{itemize}
\item \textsuperscript{133} \textit{Fed. Cir. I.O.P.} 9.
\item \textsuperscript{134} \textit{Fed. Cir. I.O.P.} 8.
\item \textsuperscript{135} \textit{Fed. Cir. I.O.P.} 10.
\item \textsuperscript{136} Harter & Quinn, \textit{supra} note 78.
\item \textsuperscript{137} 103 F.3d 1554 (Fed. Cir. 1997).
\item \textsuperscript{138} \textit{Id.} at 1556.
\item \textsuperscript{142} 35 U.S.C. § 144.
\end{itemize}
rights.\textsuperscript{143} Even more than other property rights, information regarding a patent’s scope and ownership have long been available to the public.\textsuperscript{144} Patent rights are effectively use and alienation limits on items otherwise under the absolute control of members of the public.\textsuperscript{145} Although a company may own its own copper and steel, patent rights held by others will limit what machines can be built from those raw materials.\textsuperscript{146} In his 2007 public notice article, Professor Michael Risch explains:

One of the primary functions of a patent is to provide public notice about the claimed invention. This goal has been a primary rationale underlying patent jurisprudence for at least 150 years . . . . The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights.\textsuperscript{147}

In \textit{Lear v. Adkins},\textsuperscript{148} the Supreme Court explained “the strong federal policy favoring the full and free use of ideas in the public domain.”\textsuperscript{149} The scope of those rights is found in the patent documents, including patent application file histories.\textsuperscript{150} Of course, patent documents are now more complex than ever. A single invention is ordinarily reflected in a set of differentiated claims, regularly divided into multiple patent applications filed in the same or different global patent offices, forming a patent family.\textsuperscript{151} Further, multiple families of patents may be owned by the same company and, although not formally related, may substantially

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\item 145. \textit{In re Nuitjen}, 500 F.3d 1346, 1352 (Fed. Cir. 2007).
\item 146. \textit{Id.}
\item 147. Risch, \textit{supra} note 144, at 187.
\item 149. \textit{Id.} at 674.
\item 150. \textit{Id.} at 674.
\end{enumerate}
\end{footnotesize}
overlap in coverage.\textsuperscript{152} Although the Federal Circuit sets precedential authority over all federal district courts (in patent matters), the PTO does not have that authority.\textsuperscript{153} The collective result of this is that the Federal Circuit's judicial reasoning—even when affirming a PTO determination cancelling one or more patent claims—will likely be highly relevant to later cases involving the same or closely related inventions either in the United States or abroad. The statute recognizes this by requiring the opinion be issued and placed in the publicly available patent file.\textsuperscript{154}

The record appears unquestionable now that "Congress gave the Federal Circuit a clear mandate to bring uniformity" and expertise to patent law.\textsuperscript{155} The problem, of course, is that the substantial number of no-opinion judgments leaves the community and decision-makers without substantial guidance. A recent example involves the law of patent eligibility, which has been upended in recent years by a series of Supreme Court decisions.\textsuperscript{156} However, jurisprudence in this area is following an example-based approach entirely, meaning that each incremental decision offers important insight into the scope of patent rights available. The benefit of expertise and uniformity here is not simply to provide insight to other judicial bodies. Rather, the vast majority of patents are never litigated but are used as part of a rights-transfer, either in a license, outright sale, or as collateral.\textsuperscript{157} Another important example involves the AIA, which has been seen as the most substantial modification of U.S. patent law since 1952.\textsuperscript{158} Although the new law raises a large number of both substantive and procedural issues, most of the

\textsuperscript{152} See, e.g., id. at 219 (highlighting the complexity of patent litigation, including impact of PTO AIA Trials).

\textsuperscript{153} Id.


\textsuperscript{157} Ashtor, supra note 151, at 222.

\textsuperscript{158} Dreyfuss, supra note 156 at 235.
appeals to the Federal Circuit have been decided without opinion.\footnote{159} The court’s failure to provide guidance in these areas of the law creates direct uncertainty in these areas.\footnote{160}

\section*{D. \textit{Congress Has Power to Require the Writing of an Opinion}}

A hallmark of the American constitutional structure is the separation-of-powers between the three primary branches of government. This system of checks and balances is not, however, structured so that each branch operates independently without being controlled by the others.\footnote{161} Rather, the structure is that each branch has substantial control over the others.\footnote{162}

Although major separation-of-powers issues continue to be debated, those generally occur at the level of the highest court.\footnote{163} It appears certain that Congress holds the original power granted by the Constitution to set the federal rules of civil and appellate procedure for “[t]ribunals inferior to the Supreme Court.”\footnote{164} It is

\footnote{159. Id. at 241.}

\footnote{160. Amicus Brief, supra note 73, at 271 ("A Rule 36 affirmance of a decision involving a controversial legal issue provides little guidance to patent owners, or to the business community, and leaves the parties with little basis to challenge the correctness of any decision either factually or legally."); Harter & Quinn, supra note 78; see also Erin F. Delaney, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, 66 DuKE L.J. 1, 2 (2016). Some commentators have drawn a link between administrative agency action and that of the Federal Circuit jurisprudence—especially in its review of PTO action. See Gugliuzza, supra note 155, at 1823 ("The court [at times] acts not as an appellate court, reviewing the decision of an inferior tribunal, but as an agency administrator, dictating the issues the PTO must consider."); Sapna Kumar, The Accidental Agency?, 65 Fla. L. REV. 229, 269–74 (2013); Ryan Vacca, Acting Like an Administrative Agency: The Federal Circuit En Banc, 76 Mo. L. REV. 733, 744–49 (2011) (analogizing the Federal Circuit’s en banc process to administrative rule making). This analogy only works, however, to the extent that the court issues instructive opinions. “Indeed, the U.S. Supreme Court has repeatedly held that the duty to give reasons is a function of due process in the administrative context.” Mathilde Cohen, When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach, 72 Wash. & Lee L. Rev. 483, 529 (2015). Finally, a number of researchers have found that judges fail to follow the requisite guidelines for when to publish opinions. Stephen J. Choi et al., What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals, 27 J.L. & Econ. Org. 1, 7 (2011) (pointing out that despite the existence of guidelines directing judges when to publish opinions, research shows that judges fail to follow them); see also Donald R. Songer et al., Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review, 50 J. Pol. 206, 207 (1988).

\footnote{161. U.S. Const. art. I, § 1; U.S. Const. art. II § 1; U.S. Const. art. III, § 1.}

\footnote{162. See sources cited supra note 161.}

\footnote{163. See sources cited supra note 161.}

now generally agreed that the power to make rules for lower federal
courts has been delegated to the Supreme Court by Congress, and
that Congress may withdraw or modify that power.\textsuperscript{165}

Professor Robert J. Pushaw explains that an understanding of
this framework dates at least to Chief Justice Marshall’s decision in
\textit{Wayman v. Southard}:\textsuperscript{166}

Chief Justice Marshall expressed “no doubt whatever” about
Congress’s Article I power to make procedural rules that it
deemed “necessary and proper” to enable federal courts to
fulfill their Article III functions, such as rendering judgments.
Indeed, Congress had a “duty” to “expressly and directly
provide” either a complete procedural code or the “great
outlines” of one, as it had done in the Process Act by
instructing federal judges to follow state practice circa 1789.\textsuperscript{167}

The bottom line here is that Congress certainly has power to enact
rules of civil procedure, including its requirement here that an
opinion explaining judgment be written for a particular class of
appellate cases.

\textbf{III. Next Steps}

\textbf{A. Immediate Action}

The first and most obvious next step is that the Court of
Appeals for the Federal Circuit should immediately stop issuing
Rule 36 judgments without opinion in appeals stemming from PTO
actions. Although substantial harm has already occurred through
what appears to be an unrecognized error, the gap can be
immediately filled by an internal unilateral action of the court.
Barring action by the court as a whole to modify its IOPs, each
appellate judge is empowered to at least block the use of Rule 36
judgments in their cases since the court’s rules require unanimous
agreement of the panel judges.\textsuperscript{168}

\textsuperscript{165} Adam Behar, \textit{The Misuse of Inherent Powers When Imposing Sanctions
for Discovery Abuse: The Exclusivity of Rule 37}, 9 \textit{CARDozo L. REV.} 1779, 1799–
power.”).

\textsuperscript{166} 23 U.S. (10 Wheat.) 1 (1825).

\textsuperscript{167} Henry P. Chandler, \textit{Some Major Advances in the Federal Judicial
legal scholars the opinion was held that determining the rules of courts was
solely a judicial function and that the legislative branch had no right to touch
it . . . . But the entire course of legislation concerning the federal courts from
the beginning of the federal government was against the theory.”); Robert J.
Pushaw, Jr., \textit{The Inherent Powers of Federal Courts and the Structural

\textsuperscript{168} \textit{FED. CIR. I.O.P.} 9.5.
Although a full analysis of standing is outside of the scope of this Article, it appears clear that a party who has lost on Rule 36 certainly would have a right to request a panel rehearing or rehearing en banc, or to petition the Supreme Court for a writ of certiorari, so long as the timeline has not expired. In the same way that the appellate court rejects lower court decisions that fail to comply with the explanatory requirements of Rule 52(a), the Supreme Court (or en banc Federal Circuit) could rebuke a panel that failed comply with the opinion requirement of the Patent and Trademark Acts. The court, however, may well force a petitioner to also show that the no-opinion error is not simply harmless error.

Although all of the members of the court have been on Rule 36 panels, the court has never considered the extent to which the Patent and Trademark Acts contravene those judgments without opinion. Thus, an ordinary panel of three judges will be fully authorized to rule on the question without upsetting prior precedent. Of course, there are several hundred Rule 36 decisions from recent years that are now likely too ancient to revive.

Although I do not prefer this approach, we might recognize here that the opinion requirement does not call for a substantial or lengthy opinion. It would likely be sufficient for the court to include a less-than-comprehensive opinion, such as affirmed based upon “the doctrine of res ipse loquitur,” “affirmed upon authority of [prior predecential case],” or “affirmed upon opinion below.”

B. Should Congress Step In to Change the Law?

An important question in the background is whether Congress should step in to change the law, relieving the court of its burden of writing opinions in all PTO appeals. In my view, the answer to that question is clearly “no.” There is no general problem with issuing opinions on the merits. The primary concern will be docketing and potential backlog, and I am confident that the court will take measures to ensure efficient adjudication while conforming to the law. Rule 36 judgments also offer the potential of providing quick justice—“an immediate answer to the parties on appeal” in a way that may be advantageous. However, the court has historically

170. FED. R. CIV. P. 52(a).
172. Marcus, supra note 1, at 217.
173. The Federal Circuit’s docket is greatly simplified as compared to other appellate courts because of the lack of a criminal law docket. But see Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972) (expressing concern over lower court dockets).
174. Tegfeldt, supra note 73, at 248 (“Unlike published and non-precedential opinions, a Rule 36 case is not circulated to the full court before issuance. This permits parties to receive a decision, in some cases, in very short order after the oral hearing. For example, in the case of Upjohn Co. v. Medtron Laboratories,
been willing to hear emergency motions for expedited hearing when such a case arises. In this situation, Congress should not step in to rescue the court from writing opinions unless the need is actually shown. Another justification for the no-opinion approach is that it allows for slower development of the precedential edifice. Many decision-makers gather significant input from a variety of sources prior to finally deciding upon a course of action. A difficulty of the appellate court precedential system is that a decision must be made in the first case addressing an issue—perhaps before considering important ramifications. If that decision is precedential, then it builds an edifice difficult to later tear down. Although this tale has some interesting features—perhaps for a separate article—it does not fit the storyline for no-opinion judgments because those decisions are supposed to be limited to only opinions that "would have no precedential value."

CONCLUSION

In many ways, the Federal Circuit is facing a crisis of public confidence based largely upon external changes to the legal landscape but compounded by the court’s masked jurisprudence—hidden in the large number of summary affirmances. “Justice must not only be done, it must appear to be done.” Opinions provide a major source of legitimacy for the court. Hidden decisions create the risk of either sloppy or intentionally misguided actions as well as later inconsistent rulings on the same set of facts. Furthermore, in the patent context, the public demands—and is entitled to—a decision that both settles the law at hand and also declares the facts in a way that becomes part of the case file and that will guide later courts in interpreting the patent family. I have so much respect for the members of the Court of Appeals for the Federal Circuit. I hope they will use this opportunity to take the next step in the right direction.

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175. Id. at 252.
176. Id.
177. Id.