

Chapter 1

Introduction



Photo: The Commissioners as of September 2016, from left to right: Vice Chairman David S. Johanson, Commissioner Rhonda K. Schmidtlein, Commissioner Dean A. Pinkert, Commissioner Meredith M. Broadbent, Chairman Irving A. Williamson, Commissioner F. Scott Kieff.

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On September 8, 1916, President Woodrow Wilson signed the Revenue Act of 1916, which created the United States Tariff Commission.² The agency was later renamed the United States International Trade Commission (Commission).³ This book presents a history of the Commission from its inception to 2016 in commemoration of the one hundredth anniversary of the agency's founding.

In 1916, and on that day, the United States was in a time of relative peace before U.S. involvement in World War I. Aside from the passage of the Revenue Act, Friday, September 8, seems chiefly notable for a baseball milestone: in Philadelphia's Shibe Field that afternoon, Wally Shang became the first switch hitter to hit home runs from both sides of the plate in a single game. The Athletics pummeled the New York Yankees, 8–2.⁴ Meanwhile, in New London, Connecticut, U.S. and Mexican commissioners had just begun talks on the withdrawal of John J. “Black Jack” Pershing's expeditionary force from Mexico after his failed attempt to capture Francisco “Pancho” Villa.⁵ In Europe, the Battle of the Somme continued on the Western Front and the Brusilov Offensive in the east. As part of the effort on the Somme, British generals were putting the finishing touches on a new push that would result in the Battle of Flers-Courcelette, in which tanks would be used for the first time in history.⁶ Seven months would pass before the United States was drawn into the conflict raging overseas.

Already in progress for more than two years, World War I had severely disrupted international trade. The British had imposed a blockade on the Central Powers, and German U-boats were preying on Allied merchant shipping. The United States, however, was still relatively safe in its neutrality—Germany would not institute unrestricted submarine warfare until early 1917. Bolstered by the needs of belligerents, U.S. exports to Europe rose from \$1.479 billion dollars in 1913 to \$4.062 billion in 1917.⁷

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² 39 Stat. 756 (September 8, 1916). Title VII of the act (39 Stat. 795) applies to the Commission.

³ Pub. L. No. 93–618, title I, § 171, January 3, 1975, codified at 19 U.S.C. § 2231.

⁴ The Society for American Baseball Research, sabr.org/bioproj/person/629ca705; <http://www.baseball-reference.com/boxes/PHA/PHA191609080.shtml> (accessed December 1, 2015).

⁵ John D. Eisenhower, *Intervention: the United States and the Mexican Revolution, 1913–1917* (New York: W. W. Norton & Co., 1993), 303.

⁶ Charles Messenger, *Trench Fighting, 1914–1918* (New York: Ballantine Books, 1972), 86.

⁷ U.S. Bureau of the Census (1975), series U324, cited in <http://eh.net/encyclopedia/u-s-economy-in-world-war-i/>.

By 1916, many in the United States supported, for a variety of reasons, the creation of a tariff commission. One concern, cited in the report accompanying the Revenue Act, was that the war was bringing about far-reaching economic changes in the world, and a tariff commission could ascertain how those changes would affect U.S. trade.⁸ As later chapters will detail, tariffs had long played an important role in the nation's budget and economy. In a context explained in Chapter 3, President Wilson had declared in 1911: "The tariff question is at the heart of every other economic question we have to deal with, and until we have dealt with that properly we can deal with nothing in a way that will be satisfactory and lasting."⁹ An agency that would study tariff-related issues was expected to be helpful to Congress in shaping tariff and trade laws.

The present book is not the first historical work relating to the Commission. *Two Centuries of Tariffs* (1976) traced the development of U.S. tariffs from the beginning of the republic and chronicled the operations of the Commission from 1916 to 1976.¹⁰ Frank Taussig, the first Chairman of the U.S. Tariff Commission, published several editions of *The Tariff History of the United States*.¹¹ The Commission produced a *History of the Tariff Commission Building*, in 1940 and 1968, and a similar pamphlet, *The United States International Trade Commission Building*, in 1980. The present work builds on these earlier ones to present a comprehensive history of the Commission's first 100 years.

The book is part of a centennial celebration that also included a conference on the history of the Commission held on September 8, 2016. Speakers at the event included Chairman Kevin Brady (R-TX) of the House Ways and Means Committee, U.S. Trade Representative (USTR) Michael Froman, Chief Judge Sharon Prost of the U.S. Court of Appeals for the Federal Circuit, Judge Leo Gordon of the U.S. Court of International Trade, and a distinguished group of Senate and House officials, academics, practitioners, and current and former Commissioners and Commission staff members.

⁸ H.R. Rep. 64-922, 9 (July 5, 1916).

⁹ Woodrow Wilson, "Interview," *New York Times*, December 24, 1911, in Link, ed., *PWW*, vol. 23 (1977), 611.

¹⁰ *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission*, U.S. International Trade Commission (Washington, DC: U.S. Government Printing Office (GPO), 1976). The book was written by John M. Dobson, Associate Professor of History at Iowa State University. It was published in December 1976. The earliest history of the agency is covered in Joshua Bernhardt, *The Tariff Commission: Its History, Activities, and Organization* (New York: D. Appleton and Co., 1922).

¹¹ The first edition appeared in 1892. The eighth edition was published in 1931 and reprinted in 1967 (New York: Augustus M. Kelley, 1967).

On August 31, 2016, President Barack Obama sent a letter to the Commission commemorating the agency's anniversary. He wrote that the Commission's "mission is critical now more than ever as we continue to expand our Nation's reach in an ever-changing global economy."¹²

A number of Senators and Representatives made statements about the Commission that are included in the *Congressional Record* and cited at the beginning of this book. Chairman Brady congratulated "the Commission and its exceptional staff on their distinguished service."¹³ Ranking Minority Member Sander M. Levin (D-MI) of the House Ways and Means Committee said that he looked forward to "working with the Commission, as it begins its second century of work, to ensure that the analysis of international trade addresses 21st century economic issues."¹⁴

Chairman Orrin Hatch (R-UT) and Ranking Minority Member Ron Wyden (D-OR) of the Senate Finance Committee made joint remarks. Chairman Hatch stated that September 8 was an appropriate day to "acknowledge the distinguished service that this independent and nonpartisan Federal agency has provided, and continues to provide, in the field of international trade."¹⁵

The Commission began the process of preparing this book by publishing a notice calling for submissions in the *Federal Register* and on its website.¹⁶ As a result of this and other outreach efforts, contributors from a variety of backgrounds agreed to submit draft chapters. These contributors include academics, trade practitioners, former staff of Congress and the Office of the USTR, and former Commissioners and Commission staff. The contributors brought a wealth of knowledge, experience, and expertise to the preparation of their parts of the book.

Once draft chapters had been submitted, they were subjected to three rounds of review. The first round was conducted by a group similar to the contributors, in that it included academics, practitioners, and former government employees, all of whom were knowledgeable about the Commission. The second round of review was by current Commission staff. The Commissioners conducted a third round of review and then approved the book for publication. During the review process, contributors were given opportunities to respond to the annotations made by reviewers.

The result of these efforts is a book whose chapters cover many topics, from Congress's efforts to gather tariff data in the 19th century through the development of unfair trade investigations

¹² <https://www.usitc.gov/publications/332/tradeshifts/obamaletter.pdf> (accessed October 17, 2016).

¹³ 162 Cong. Rec. E1187 (daily ed. September 6, 2016).

¹⁴ 162 Cong. Rec. E1228 (daily ed. September 8, 2016).

¹⁵ 162 Cong. Rec. S5455 (daily ed. September 8, 2016).

¹⁶ 81 Fed. Reg. 812 (January 7, 2016).

to the history of industry and economic analysis. This chapter begins by describing the Commission and its mission as they exist today. The chapter then sets out the structure of the book and summarizes the chapters to come.

The Commission's Mission

The Commission is “an independent, nonpartisan Federal agency with broad investigative responsibilities on matters of trade.”¹⁷ The Commission’s Strategic Plan for 2014–18 sets out the agency’s mission:

Consistent with its statutory mandate, the Commission makes determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provides independent tariff, trade and competitiveness-related analysis and information; and maintains the U.S. tariff schedule.¹⁸

International trade has long been important to the economy of the United States. In recent decades, it has assumed an even larger role. To cite one example, merchandise trade grew as a share of U.S. gross domestic product from just under 16 percent in 1981 to over 23 percent in 2014.¹⁹

A comparison over ten years shows substantial increases in trade. From 2005 to 2015, U.S. exports of goods rose by 65 percent from \$913.016 billion to \$1,513.453 billion, while imports of goods increased by 34 percent from \$1,695.820 billion to \$2,272.760 billion.²⁰

The nature of commerce has changed substantially over time. Successive multilateral and bilateral agreements have driven down tariff rates, while nontariff measures, such as testing, labeling, and standards requirements, as well as intellectual property rights, have become more important. Trade in services has more than doubled in the past decade: U.S. services exports rose from \$373.006 billion to \$710.165 billion in 2005–15, as the U.S. trade surplus in services grew from \$68.558 billion to \$219.552 billion.²¹ At the same time, digital trade—trade conducted via the Internet—has expanded rapidly. In a 2014 report, the Commission estimated

¹⁷ Office of Management and Budget, *The Budget of the United States Government, Fiscal Year 2016*, Appendix, 1281, <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/oia.pdf> (accessed December 1, 2015).

¹⁸ https://www.usitc.gov/press_room/documents/usitc_2014-2018_strategicplan_final.pdf.

¹⁹ World Bank, <http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS> (accessed December 30, 2015).

²⁰ U.S. Census Bureau statistics, <http://www.census.gov/foreign-trade/statistics/historical/index.html>.

²¹ *Ibid.*

that digital trade had increased U.S. real GDP by 3.4–4.8 percent, or \$517.1–\$710.7 billion, in 2011.²²

The Commission plays a crucial role in its service to the American people within the increasingly important and ever-changing trade arena. First, the Commission gives the President and Congress clear and accurate information and analysis on a wide range of trade-related issues. These include examining how changes in trade and competitiveness affect the health of the U.S. economy. At the request of the Administration or Congress, the Commission recently produced reports on such topics as the likely impact of the Trans-Pacific Partnership Agreement on the U.S. economy and specific industry sectors, trade and investment policies in India, and trade barriers that U.S. small and medium-sized enterprises see as affecting exports to the European Union.²³

The Commission also investigates certain unfair trade practices. Enforcing laws in these areas helps ensure that U.S. firms can compete on a level playing field in the global marketplace. Under one of its authorities, the Commission investigates allegations of intellectual property rights infringement and other unfair acts and methods of competition with respect to imported articles. For example, the Commission recently conducted proceedings involving wireless headsets, network devices, and ink cartridges.²⁴

In addition, the Commission determines whether allegedly dumped or subsidized imports have caused material injury to a domestic industry. Recent proceedings have covered imports ranging from steel pipe to chlorinated isocyanurates and wooden bedroom furniture.²⁵ And although its authority has not been used in some years, the Commission can conduct global and bilateral “safeguard” investigations into whether increased imports cause serious injury to domestic industries.²⁶

When it was formed, the Commission’s first responsibility related to tariffs, and it remains active in this area. Most importantly, the Commission maintains the Harmonized Tariff Schedule of the United States. This is the official legal document that specifies the appropriate tariff, if any, applied to an imported good. In a related activity, the Commission takes part in the work of the World Customs Organization.

²² *Digital Trade in the U.S. and Global Economies, Part 2*, USITC Publication 4485 (Washington, DC: USITC, 2014), 13.

²³ 19 U.S.C. §§ 1332 *et al.*; Investigation Nos. TPA-105-001 332-550, and 332-541.

²⁴ 19 U.S.C. § 1337; Investigation Nos. 337-TA-943, 945, and 946.

²⁵ 19 U.S.C. §§ 1671 *et seq.*; Investigation Nos. 701-TA-469 and 731-TA-1168, 731-TA-1082-1083, and 731-TA-1058.

²⁶ 19 U.S.C. § 2252 *et al.*

It is important to note that the Commission does not formulate trade policy.²⁷ That function is reserved to the President and Congress.

The Commission's Structure

Commissioners and Staff

The Commission's organic statute provides for six Commissioners to head the agency and a Secretary to assist them. Each Commissioner is nominated by the President and confirmed by the Senate. No more than three can be of the same political party. As of this writing, two Democratic Commissioners are serving, including Irving A. Williamson and Rhonda K. Schmidlein; and two Republicans: David S. Johanson and Meredith M. Broadbent. A Commissioner normally serves a nine-year term, but can hold over until his or her successor is appointed and qualified.²⁸

The President designates one of the Commissioners to be the Chairman of the agency for a term of two years. Another Commissioner is designated as Vice Chairman. The Chairman and Vice Chairman cannot be of the same political party, and the Chairman cannot be of the same party as the preceding Chairman.²⁹ The current Chairman is Rhonda Schmidlein, and the current Vice Chairman is David Johanson.

Although the statute specifically provides only for Commissioners and a Secretary, these seven are not expected to work alone. Currently, the Commission employs a staff of nearly 400 people. These include economists, attorneys, commodity analysts, and others, assigned to 28 Commissioner and staff offices.³⁰ All agency personnel are located in the Commission's headquarters building at 500 E Street, SW, in Washington, DC.

Each Commissioner's office employs a small staff of aides. Other personnel work in the staff offices that support the work of the Commission:

- The Office of the Administrative Law Judges holds hearings and makes determinations in investigations involving alleged infringement of intellectual property rights and other unfair acts and methods of competition.
- The Office of the General Counsel serves as the Commission's chief legal advisor.

²⁷ Dobson, *Two Centuries of Tariffs*, 116.

²⁸ The term is nine years unless a Commissioner is appointed to fill an unexpired term. The terms are set by statute and are staggered with the intent that a different term expires every 18 months. A Commissioner who has served for more than five years is ineligible for reappointment. 19 U.S.C. § 1330.

²⁹ *Ibid.*

³⁰ Organization charts for the Commission are contained in an appendix to the book.

- The Office of Operations supervises the following offices:
 - The Office of Economics provides economic analysis for import injury investigations, industry and economic analysis reports, and other products.
 - The Office of Industries maintains technical expertise related to the performance and global competitiveness of U.S. industries and the impact of international trade on those industries, for studies and import injury investigations.
 - The Office of Investigations conducts import injury investigations.
 - The Office of Tariff Affairs and Trade Agreements implements the Commission’s responsibilities with respect to the Harmonized Tariff Schedule and the International Harmonized System.
 - The Office of Unfair Import Investigations participates in adjudicatory investigations.
 - The Office of Analysis and Research Services provides research and investigative support.
- The Office of External Relations, which also includes the Office of Trade Remedy Assistance, serves as a liaison to executive branch agencies, Congress, foreign governments, international organizations, the public, and the media.
- The Office of the Chief Information Officer provides information technology support to the agency.
- The Office of the Chief Financial Officer and its subordinate Offices of Budget, Finance, and Procurement carry out functions in those areas.
- The Office of Administrative Services and its subordinate Offices of Human Resources, Security and Support Services, and the Secretary, provide a wide range of administrative support services.
- The Office of the Inspector General provides audit, evaluation, inspection, and investigative support services covering all Commission programs and strategic operations.

A Day in the Life of the Agency

A description of a typical day in 2016 at the Commission can help illustrate how the agency functions and its scope of responsibility has grown. The following summarizes a particularly busy day; normally, not all possible events happen on the same day.

The Commission opens for business at 8:45 a.m. Many employees have been at work for hours already, but this is the official start time set by regulation.³¹ Members of the trade bar and the public begin filing documents, such as notices of appearance and briefs, with the Office of the

³¹ 19 C.F.R. § 201.3.

Secretary. Much filing is done electronically, through the agency's Electronic Document Information System, but many documents still are filed in paper form.³²

On the first floor of the Commission building, in one of the agency's three courtrooms, an Administrative Law Judge, aided by a law clerk, opens the trial in an intellectual property-related import investigation conducted under section 337 of the Tariff Act of 1930.³³ As required under the Administrative Procedure Act (APA), the proceeding is similar to a trial in a court. Counsel for the holder of a U.S. patent and counsel for importers present arguments, and witnesses provide testimony. An attorney and supervisor from the Office of Unfair Import Investigations also appear as a party. An elaborate computer setup allows a court reporter to provide real-time transcription to the participants in the trial.

At 9:30 a.m., the Chairman convenes a meeting of the Commission in the Main Hearing Room, across the hall from the courtroom being used for the trial. The Commissioners are arrayed on the large dais at the far end of the room. The principal item on the agenda is a vote on an antidumping and countervailing duty review. In addition to Commissioner aides, members of the investigative team who took part in the review are present to assist the Commissioners as needed. The team includes a supervisory investigator and an investigator from the Office of Investigations, an economist from the Office of Economics, a commodity analyst from the Office of Industries, and an attorney from the Office of the General Counsel. The Secretary calls the roll and the Commissioners vote on whether to approve a report on the investigation prepared by agency staff, and then whether to make an affirmative or negative determination.

Immediately following the meeting described above, the Commission begins a hearing. Its purpose is to hear statements and testimony in a study requested by the U.S. Trade Representative; other studies may be requested by the House Ways and Means Committee, the Senate Finance Committee, or both. Senators, members of Congress, and governors testify while news cameras roll. Industry representatives, attorneys, and others follow with their own statements. Commissioners take turns asking questions. Also present are Commissioner aides and staff from the Offices of Economics, Industries, and the Secretary. Although some hearings, such as one in early 2016 concerning the Trans-Pacific Partnership, can run as many as three days; today's event is more normal in that it will take only one day.

Meanwhile, up on the seventh floor, aides in each Commissioner's office are reading action jackets, briefs, hearing transcripts, and exhibits in the administrative record. Each jacket is a red plastic file folder containing a request for a Commission decision and background materials on that decision.

³² [Http://edis.usitc.gov](http://edis.usitc.gov).

³³ 19 U.S.C. § 1337.

During the day, each staff office is carrying out various functions of the agency. In many cases, two or more offices act together. As noted, an antidumping investigation is conducted by an investigative team drawn from several staff offices. The use of teams allows for a matrix approach that brings an effective mix of abilities and experience (e.g., economic analysis, legal knowledge, commodity expertise) to bear in an investigation; a team member may answer to one supervisor administratively and another substantively. Teams around the agency are preparing investigative reports, as well as related documents such as legal issues memoranda that are issued by the General Counsel.

In other cases, an office acts alone. For example, an attorney from the Office of Tariff Affairs and Trade Agreements is in Brussels, Belgium, participating in the activities of the World Customs Organization. An editor in the Office of Analysis and Research Services is reviewing a draft report on possible modifications to the Harmonized Tariff Schedule to be issued under section 1205 of the Omnibus Trade and Competitiveness Act of 1988.

A significant element of how the staff functions is the considerable amount of discretion it exercises in carrying out its duties. This is particularly true of the Administrative Law Judge in a section 337 investigation because of the requirements of the APA. However, it is also true of staff in other contexts. Although the Commissioners make the final determination in an investigation, they delegate authority to the staff to carry out most of the proceeding without close supervision by the Commission.

For instance, the Office of Industries obtains approval from the Commission by action jacket to conduct an investigation under section 332 of the Tariff Act of 1930. The jacket describes the general approach the staff will take, defining the terms of reference, listing the resources assigned, and scheduling milestones. Essential planning has been done without prejudicing the outcome of the study. Staff from Industries and other offices will now proceed with the investigation without significant intervention by Commissioners until the end of the study.

Moreover, the Office of Procurement is working with the Office of Economics to acquire economic modeling services. The Office of Budget is preparing the annual budget estimate that must be sent to the President for inclusion in the Budget of the United States Government. The Office of Human Resources is making an offer to a candidate for a commodity analyst position in the Office of Industries. One staff member in the Office of Security and Support Services is arranging for a background check on an existing employee who needs an upgraded clearance, while others are meeting with officials of the General Services Administration to discuss the agency's office space lease. Employees in the Office of the Chief Information Officer are testing the security of the agency's information systems. The Senior Analyst at the Office of Inspector General is putting the finishing touches on a report on the agency's telework program.

The Administrative Law Judge’s trial and the Commission’s hearing will last into the evening, and other personnel are also staying late, but the Office of the Secretary shuts its doors to paper document filers at the official closing time of 5:15 p.m.³⁴

The Independence of the Commission

A number of characteristics define the Commission. That it is designed to be nonpartisan is clear, given the statutory requirement that no more than three Commissioners be of the same political party. Another characteristic—one that is less obvious—is its independence. The Commission is often described, including by the executive and legislative branch authorities, as an independent agency.³⁵ Notably, the United States Government Manual, which is published pursuant to a delegation of authority from the President and is the official handbook of the federal government, lists the Commission as one of the “Independent Establishments and Government Corporations” in the executive branch and is included among agencies categorized as “Executive Agencies.”³⁶ This points up the fact that some agencies can be described in statute as both “independent” and within the executive branch.³⁷

However, the agency’s organic statute does not use the word “independent.” This is in contrast to certain other agencies, such as the Nuclear Regulatory Commission and the Consumer Product Safety Commission, each described in statute as an “independent regulatory agency.”³⁸

An initial question concerning the word “independent” is: independent from whom? The Commission clearly is not independent of Congressional control. Armed with the power of the purse, Congress could shut down the Commission quickly by denying it appropriated funds.³⁹ And the judicial branch, particularly in the form of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade, has statutory jurisdiction to review certain Commission decisions and issue orders binding on the agency.

³⁴ 19 C.F.R. § 201.3.

³⁵ Office of Management and Budget, *The Budget of the United States Government, Fiscal Year 2017*, Appendix, at 1300 (“The U.S. International Trade Commission (Commission) is an independent, nonpartisan Federal agency.”); S. Rep. No. 114-239, Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017 (April 21, 2016), Title IV, at 123 (“The International Trade Commission [ITC] is an independent, quasi-judicial agency.”).

³⁶ See 1 C.F.R. §§ 9.1 and 9.2(a) and the authorities listed in the authority citation for 1 C.F.R. Part 9, as well as the Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual 2015*, <http://www.usgovernmentmanual.gov>.

³⁷ See, e.g., 5 U.S.C. § 104 (defining “independent establishment” for purposes of title 5, U.S. Code, as within the executive branch); 12 U.S.C. § 1752a (the National Credit Union Administration was established “in the executive branch of the Government [as] an independent agency”).

³⁸ 42 U.S.C. § 5841(a)(1); 15 U.S.C. § 2053(a).

³⁹ This happened to another agency, the Administrative Conference of the United States, in 1995. Alternatively, Congress could remove the statutory basis for the Commission’s existence, as happened when it allowed the authorization for the Export-Import Bank of the United States to expire.

As is made clear in the legislative history described below, the Commission's independence is from control by the executive branch.

The Commission interacts with the President and other executive branch officials in diverse ways as it carries out its mission. The President reviews the Commission's determinations in investigations conducted under section 337 of the Tariff Act of 1930.⁴⁰ The President also makes determinations based on Commission recommendations in safeguard cases, such as those conducted under section 202 of the Trade Act of 1974.⁴¹ The Commission often conducts studies requested, in theory, by the President under section 332 of the Tariff Act of 1930, though the President has delegated this authority to the U.S. Trade Representative.⁴² In antidumping and countervailing duty investigations, the Commission takes into account the calculations of the Commerce Department.

Although in some of these relationships, executive branch officials provide input on Commission actions—e.g., in section 332 studies, the USTR determines what topics the Commission examines—these officials do not have the authority to dictate how the Commission makes its determinations.

Congress made this clear at the time of the Kennedy Round of multinational trade negotiations (1964–67), when the executive branch negotiated an International Antidumping Code with foreign nations. A Senate Finance Committee report objected to the President's attempt to use an executive agreement negotiated without Congressional approval in an attempt to bind the Commission's predecessor, the Tariff Commission. The report noted:

While it is true that the President has authority to instruct the Treasury Department, an agency of the executive branch, with respect to the duties and functions entrusted to it under the Antidumping Act of 1921, he has no similar authority with respect to the duties and functions entrusted to the Tariff Commission under that act. The more important functions dealt with by the International Antidumping Code that are in question—the scope of an industry and the degree of injury required to invoke a dumping duty—are functions entrusted to the Tariff Commission and the Tariff Commission's determinations as to these matters are final without regard to the attitude of the executive branch. In the opinion of the committee because of the unique position of the Tariff Commission as an arm of the Congress, the ordinary rules which

⁴⁰ 19 U.S.C. § 1337. The President has delegated this responsibility to the USTR.

⁴¹ 19 U.S.C. § 2252.

⁴² 19 U.S.C. § 1332.

bind the executive departments to positions taken by the President in international agreements do not apply.⁴³

Indeed, the Senate committee relied on a report issued by a majority of the Tariff Commission outlining the many inconsistencies between the International Antidumping Code and domestic statutes. The committee also noted that the Tariff Commission majority's preparation of the report attested to the Tariff Commission's "independence from the executive branch."⁴⁴

Previously, in 1948, Congress had acted to reinforce the Commission's independence in another way. Starting in 1934, Commission personnel had taken part as full members of U.S. delegations in trade negotiations. Congress now prohibited this participation. The law was revoked, enacted again, and again revoked. The result has been that while the Commission assists negotiators, agency employees are not full members of negotiating teams. Similarly, Commission personnel attend some meetings of the executive branch Trade Policy Staff Committee, but only to provide technical assistance and not as full voting members of the Committee.⁴⁵

The statutes that set out the Commission's mission define, in effect, the independent role the Commission plays in its work, although they do not make explicit statements about that independence. A number of statutes and other authorities more explicitly establish the Commission's independence in certain areas.

Limitations on Authority to Remove a Commissioner from Office

Certain senior officials, such as the Secretary of Commerce, serve at the pleasure of the President. As a result, the President has plenary power to remove such an official without stating a cause, as and when he chooses.⁴⁶ The ability to remove a government official from office is one of the most powerful means the President has to ensure the official complies with the Administration's policies.

The President's removal authority with respect to a Commissioner is significantly different. As explained below, a Commissioner can be removed during his or her statutory term of office only for cause; after the end of the term, the Commissioner can be replaced. The President's inability to easily fire a Commissioner during his or her term bolsters the Commission's independence from executive branch control.

⁴³ S. Rep. No. 90-1385, Part II, 90th Cong., 2d sess. (July 11, 1968).

⁴⁴ *Ibid.*

⁴⁵ Donald R. Whitnah, ed., *Government Agencies* (Westport: Greenwood Press, 1983), 563; 15 C.F.R. § 2002.2.

⁴⁶ See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602, 627–29 (1935) (referring to the removal of an "executive officer restricted to the performance of executive functions.").

The Commission's organic statute provides that a Commissioner is appointed by the President, with the advice and consent of the Senate, to a term of nine years.⁴⁷ However, the statute is silent on the issue of whether the President can remove a Commissioner from office. In contrast, the organic statutes of certain other federal agencies expressly address the issue of Presidential removal power, indicating that a member of such an agency can only be removed for cause. For example, the organic statutes of the Commission on Civil Rights and the Consumer Product Safety Commission (CPSC) allow for the removal of a Commission member "for neglect of duty or malfeasance in office."⁴⁸ Similarly, the organic statutes of the Federal Maritime Commission and the Federal Trade Commission provide for Presidential removal of a Commissioner for "inefficiency, neglect of duty, or malfeasance in office."⁴⁹

Although the Commission's statute lacks such language, legislative history and judicial decisions establish that Commissioners enjoy a significant degree of protection from Presidential removal.

A House report concerning the Commission's 1978 authorization stated: "The Commission is an independent agency with quasi-legislative and quasi-judicial responsibilities and removal of the Commissioners is subject to the standards set down by the Supreme Court (e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958))."⁵⁰

In *Humphrey's Executor v. United States* (*Humphrey's*), the Supreme Court considered the question of whether the President had the authority to remove a member of the Federal Trade Commission from office. As noted above, the FTC statute provided for removal based on "inefficiency, neglect of duty, or malfeasance in office." The Court held that the President could not remove the commissioner in the absence of one of the listed circumstances, i.e., without cause. The Court cited a number of indications that Congress intended the FTC to be independent. Commissioners were appointed to a fixed term; the agency was to be nonpartisan; the FTC's "duties are neither political nor executive, but predominantly quasi-

⁴⁷ 19 U.S.C. § 1330(a).

⁴⁸ 42 U.S.C. § 1975(e); 15 U.S.C. § 2053(a). The President may have a different level of authority with respect to the removal of a chairman from that position than he does as to removal from office as a commissioner. See Office of Legal Counsel, *President's Authority to Remove the Chairman of the Consumer Product Safety Commission*, July 31, 2001, <http://biotech.law.lsu.edu/blaw/olc/cpscchairmanremoval.htm>, stating that the CPSC chairman serves as chairman at the pleasure of President, although the President cannot remove the chairman from his or her post as commissioner without cause).

⁴⁹ *E.g.*, 15 U.S.C. § 41.

⁵⁰ H.R. Rep. No. 518, 95th Cong., 1st sess. (1977) (concerning H.R. 6370, International Trade Commission Authorization, 1978) at 6.

judicial and quasi-legislative.” The Court found that “Congress was of the opinion that length and certainty of tenure would vitally contribute” to the agency’s independence.⁵¹

The Commission shares with the FTC the indications of independence cited by the Court. Commissioners serve for fixed terms, and are appointed in a nonpartisan procedure. Most importantly, the House report cited above specifies that the Commission’s duties are primarily quasi-judicial and quasi-legislative.

Again, the Commission’s statute does not contain language similar to the FTC’s concerning removal for malfeasance *et al.* But 23 years after *Humphrey’s*, the Supreme Court decision in *Weiner v. U.S.* showed that this difference is immaterial to the issue of Presidential removal power. In *Weiner*, the Court considered whether the President could remove a member of the War Claims Commission (WCC), whose organic statute made no provision for removing a commissioner. Citing the “intrinsic judicial character” of the WCC’s mission, the Court held that the reasoning of *Humphrey’s* applied even in the absence of specific language in the statute. Thus, the Court held that the President could not remove a member of the WCC without cause.⁵²

The *Humphrey’s* and *Weiner* decisions, and the Commission’s legislative history that cites them, make clear that the President cannot remove any Commissioner without cause. As in the case of the FTC and other similar agencies, this limitation on the President’s authority stems from Congressional intent to accord the Commission independence from executive branch control.

The expiration of a Commissioner’s term gives the President the opportunity to name a replacement, who then normally must be confirmed by the Senate. Meanwhile, as noted above, “any [USITC] commissioner may continue to serve as a commissioner after an expiration

⁵¹ 295 U.S. at 624, 629 (“[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will”). The Court found that the FTC was designed to be “independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.” *Ibid.* at 625–26 (emphasis added). The emphasized phrase recognizes that the President has the power to appoint commissioners, but the decision shows that such power does not equate to the power to remove an appointee.

⁵² *Weiner v. United States*, 357 U.S. 349, 355–56 (1958) (“Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.”). See also *S.E.C. v. Blinder*, 855 F.2d 677, 681 (10th Cir. 1988).

of his [statutory] term of office until his successor is appointed and qualified.”⁵³ During the holdover period after the end of the Commissioner’s term, the President may be able to replace the Commissioner without Senate action by making a recess appointment.

The President’s authority in this area was confirmed in 2002 by a decision of the Court of International Trade (CIT). The case involved President Clinton’s 2001 replacement of USITC Commissioner Thelma Askey by Commissioner Dennis Devaney as a recess appointment. Commissioner Devaney then participated in the determination in an antidumping review concerning steel imports from Italy and Japan.⁵⁴ Plaintiffs brought suit in the CIT challenging the determination as not in accordance with law because Commissioner Devaney had not validly been appointed a Commissioner. The court upheld the validity of Commissioner Devaney’s recess appointment, recognizing that the President had the authority to replace Commissioner Askey during her holdover period.⁵⁵

Budgetary Independence

Under 31 U.S.C. § 1104, “The President shall prepare budgets of the United States Government.” This authority gives the President control over the budgets of executive branch agencies, and consequently extensive control over their operations. However, another statute, 19 U.S.C. § 2232, invests the Commission with independent budget authority:

Effective with respect to the fiscal year beginning October 1, 1976, for purposes of chapter 11 of title 31, estimated expenditures and proposed appropriations for the United States International Trade Commission shall be transmitted to the President on or before October 15 of the year preceding the beginning of each fiscal year and shall be included by him in the Budget without revision, and the Commission shall not be considered to be a department or establishment for purposes of such chapter.

⁵³ 19 U.S.C. § 1330(b)(2). Many holdover statutes of regulatory agencies employ nearly identical language to that of the USITC’s holdover provision. See *Wilkinson*, 865 F. Supp. at 898 (listing various holdover statutes of regulatory agencies: 5 U.S.C. §1202(b) (a Merit Systems Protection Board member “may continue to serve until a successor has been appointed and has qualified”); 16 U.S.C. § 792 (a member of the Federal Power Commission “shall be appointed . . . until his successor is appointed and has qualified”); 49 U.S.C. § 10301 (an Interstate Commerce Commission member “may continue to serve until a successor is appointed and qualified”); 15 U.S.C. § 41 (a Federal Trade Commission member “upon the expiration of his term of office . . . shall continue to serve until his successor shall have been appointed and shall have qualified”); 15 U.S.C. § 78d(a) (a member of the Securities and Exchange Commission “shall hold office . . . until his successor is appointed and has qualified”).

⁵⁴ 731-TA-355 (Review), USITC Publication 3396 (February 2001).

⁵⁵ *Nippon Steel v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367 (August 30, 2002). See also *Swan v. Clinton*, 932 F. Supp. 8, 13 (D.D.C. 1996).

This language prevents the President from modifying the Commission’s budget request before it is submitted to Congress. It also exempts the Commission from being considered a “department or establishment” for the purposes of chapter 11 of title 31, U.S. Code.⁵⁶

Congressional pronouncements made clear that the purpose of the provision on the budget was to guarantee the Commission’s independence. Congress’ intent is strongly evident in the legislative history of the Trade Act of 1974. The report of the Senate Finance Committee states:

The Committee strongly believes in the need to prevent the Commission from being transformed into a partisan body or an agency dominated by the Executive Branch. . . . The committee strongly believes that the only way to preserve the strict independence of the Commission from unwarranted interference by the Executive Branch is to place its budget directly under the control of the Congress. Consequently, section 175 of the bill would more specifically identify the Commission as an agency independent from the Executive departments, would provide that the budget of the Commission shall not be subject to revision by the President under the Budget and Accounting Act, 1921, but rather shall be included by the President in the Budget without revision. Further, any necessary apportionment or reapportionment of appropriations required by [31 U.S.C. 1512] would not be subject to the control of the Director of the Bureau of the Budget, but rather by the Commission officer having administrative control of such appropriation.⁵⁷

The Committee’s report also characterized the Commission as “a permanent, independent, nonpartisan agency.”⁵⁸

In 1979, Congress reaffirmed its intent to guarantee the Commission’s budgetary independence. During 1978, the Office of Management and Budget (OMB) told the Commission it intended to impose a hiring freeze on the agency’s budget following Presidential instructions to limit the number of full-time positions in each Federal agency. OMB revised the Commission’s budget for fiscal year (FY) 1980 before submitting it to Congress. The Commission’s oversight committees rejected this interference in the Commission’s budget formulation. The House Ways and Means Committee stated:

⁵⁶ 19 U.S.C. § 2232. Two other statutory provisions are related to section 2232. These provisions, in chapter 15 of title 31, U.S. Code, give the Commission special status in certain financial matters. 31 U.S.C. §§ 1513 and 1514.

⁵⁷ S. Rep. No. 1298, 93d Cong., 2d sess. at 115–118 (1974).

⁵⁸ S. Rep. No. 1298, 93d Cong., 2d sess. at 115–118 (1974), 115. This characterization was echoed by Congressman Charles Vanik (D.-OH) in remarks on the floor concerning the Commission’s 1977 authorization act: “[T]he Congress has always intended the Commission to be a nonpartisan, semijudicial, semilegislativ body capable of providing impartial and objective advice to the President and the Congress.” Cong. Rec. H8673, August 4, 1977.

Because of the unique role of the Commission as a quasijudicial and independent agency designed to provide trade expertise to both legislative and executive branches of Government, the Congress provided that the budget of the [Commission] would not be subject to control by [OMB], but would instead be submitted directly to the Congress. The Committee believes that this budgetary independence has been useful in insuring the independence and objectivity of the Commission, and the actions of Congress in recent years in reducing the Commission's budget request have insured a careful use of the taxpayers' moneys. The Committee makes these observations in light of material included in the fiscal year 1980 budget Appendix in which the administration suggests a budget figure for the Commission in light of temporary Civil Service employment limitations. This Budget Appendix addition is gratuitous and has no binding effect on the Commission or Congress. Your Committee trusts this Appendix reference does not indicate any attempt to infringe on the Commission's budget independence.⁵⁹

It should be noted that the Commission also has a budgetary advantage over other agencies in that it has "no-year" funding. Since 1993, the Commission's appropriation has contained the phrase "to remain available until expended." This language permits the Commission to carry forward any unexpended monies from that year's appropriation from one fiscal year to later years.⁶⁰ However, although the no-year funding provision gives the Commission flexibility in spending its appropriations, it does not enhance the Commission's independence from executive control.

More recent legislation has eroded the significance of the budgetary independence provision, specifically the statement that the Commission is not a department or establishment for the purposes of chapter 11 of title 31. Chapter 11 now generally imposes requirements on "agencies," not on departments and establishments.⁶¹ For example, 31 U.S.C. § 1115, enacted as part of the Government Performance and Results Act, provides that "the Director of the Office of Management and Budget shall require each agency to prepare an annual performance

⁵⁹ See H.R. Rep. No. 62, 96th Cong., 1st sess. at 4 (1979). See also S. Rep. No. 96-143, 96th Cong., 1st sess. at 3 (1979) (wherein the Senate Finance Committee stated that OMB's revision of the Commission's budget was a "clear violation of the spirit if not the letter of section 175").

⁶⁰ Government Accountability Office, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, GAO-05-734SP, September 1, 2005 ("budget authority" at "no-year authority" on page 22); and 31 U.S.C. § 1301(c)(2). The legislative history of the no-year funding provision indicates that Congress was concerned about the Commission having unused funds at year-end. See Conference Report on H.R. 5678, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (House of Representatives, September 28, 1992) ("The conferees note that the Commission has lapsed significant portions of its appropriations in recent years. Therefore, the conferees have included language which permits the appropriation to remain available until expended to make available any unused balances to fund a portion of the Commission's budget request in fiscal year 1994.").

⁶¹ Even without section 2232, it would have been difficult to argue that the Commission is a "department," given the normal definition of that term as meaning one of the cabinet departments. See, e.g., 5 U.S.C. § 101.

plan.” The Commission’s budgetary independence provision does not explicitly exempt the agency from this performance plan requirement, because the Commission’s provision speaks of departments and establishments, whereas section 1115 refers to agencies.

The Accountability of Tax Dollars Act (ATDA), codified at 31 U.S.C. § 3515, requires certain agencies to prepare audited financial statements. Although the statute does not explicitly refer to the Commission, the legislative history indicates that the Commission is covered by the statute’s requirements.⁶²

Note that the placing of the Commission among the agencies covered by the ATDA reflects a shift in the attitude of Congress toward the agency. In the period 1975–85, Congress took pains to guarantee the Commission’s independence from the President’s oversight, at least in budgetary matters. More recently, Congress has not shown the same degree of concern about the agency’s independence. Statutes such as the ATDA apply to the Commission even though such application may subject the Commission to Presidential oversight.

The Paperwork Reduction Act

The Commission’s organic statute establishes its independence in another way as well. At 19 U.S.C. § 1330(f), the statute states: “The Commission shall be considered to be an independent regulatory agency for purposes of chapter 35 of title 44.” This provision makes it clear that the Commission is subject to the Paperwork Reduction Act, or PRA (44 U.S.C. chapter 35), which among many other things requires approval from OMB for certain Commission information collection efforts, such as a questionnaire in an antidumping investigation.⁶³ But the provision also gives the agency the authority to override an OMB disapproval of such an effort. The Commission has rarely if ever exercised its authority under this provision, but the authority exists, and would allow the Commission to proceed with necessary fact-finding in an investigation over OMB’s objection.

In some cases, OMB has delayed taking action on a questionnaire. Because Commission investigations are subject to tight statutory and administrative deadlines, a delay in clearing a questionnaire could hamper the Commission’s fact-finding. The PRA permits an agency requesting OMB clearance to proceed with its information collection if OMB has failed to take action within a specified period.⁶⁴ This provision does not apply to emergency requests, which

⁶² S. Rep. No. 107-331, 107th Cong., 2nd sess., 2002 (November 4, 2002), 2002 WL 31474288 (Leg. Hist.), at 3-4; S. Rep. No. 108-144, 108th Cong., 1st sess., 2003 (September 5, 2003), 2003 WL 22067742 (Leg. Hist.) at 70.

⁶³ 44 U.S.C. §§ 3502(1), 3507(f).

⁶⁴ 44 U.S.C. § 3507(c)(3).

the Commission often has made in section 332 studies, but OMB is required to respond to an emergency request by a deadline set by the requesting agency.⁶⁵

Ironically, the provision specifying that the Commission is an independent regulatory agency—intended to enhance the Commission’s independence—has had the effect of ensuring that the agency is subject to executive branch control in a number of areas. For example, the PRA assigns oversight authority over the government’s use of information resources to OMB’s Office of Information and Regulatory Affairs.⁶⁶ Thus, the PRA imposes a degree of executive oversight on the Commission.

One provision of the PRA, concerning chief information officers (CIOs), illustrates the sometimes complicated analysis necessary to determine the Commission’s status within statutory schemes. Under section 3506(a)(2)(A) of the PRA, “the head of each agency shall designate a Chief Information Officer.” The PRA assigns certain duties to all CIOs.⁶⁷ Another statute, the Chief Financial Officers Act, assigns additional duties to the CIOs of certain specified departments and agencies, but the Commission is not one of the specified agencies.⁶⁸ Thus, although the Commission, in common with other agencies, must appoint a CIO, the Commission’s independence limits the extent to which it must delegate responsibilities to that officer.

Litigating Authority

The organic statute, at 19 U.S.C. § 1333, also gives the Commission independent litigating authority: “The Commission shall be represented in all judicial proceedings by attorneys who are employees of the Commission or, at the request of the Commission, by the Attorney General of the United States.” Thus, unlike most Federal agencies, the Commission need not rely on the Justice Department to represent it in litigation. Consequently, the Justice Department (and by extension the President) cannot dictate the positions the Commission takes in court. A similar provision (19 U.S.C. § 1516a(g)(9)) governs representation before panels under the North American Free Trade Agreement (NAFTA): “In the case of binational panel proceedings convened under chapter 19 of the NAFTA or of the Agreement, the administering authority and the Commission shall be represented by attorneys who are employees of the administering authority or the Commission, respectively.”

⁶⁵ 44 U.S.C. § 3507(j).

⁶⁶ 44 U.S.C. § 3504.

⁶⁷ 44 U.S.C. § 3506(a)(3).

⁶⁸ 40 U.S.C. § 1425(c), 31 U.S.C. § 901. Nevertheless, legislative history indicates an intent that CIOs in agencies other than the specified ones are to “perform essentially the same duties” as CIOs in specified agencies. H.R. Conf. Rep. 150, 104th Cong., 2d sess. 977 (January 22, 1996).

In contrast, the Commission has no authority to represent the U.S. government in dispute resolution proceedings before the World Trade Organization (WTO). Commission staff prepare the briefs and make oral presentations to WTO panels, but it is the Office of the U.S. Trade Representative that represents the United States in panel proceedings and determines the litigation posture that the Commission must adopt. In proceedings before the Supreme Court of the United States, the Commission has been represented by attorneys of the Office of the Solicitor General.

The Framework of This Book

The book is divided into parts and chapters that set out the history of the Commission through a mixture of straight narration and thematic discussion.

Part I includes two chapters that address how the Commission came to be created.

Chapter 2, prepared by Professor Andrew Reamer, describes what could be called the “pre-history” of the Commission. It covers the attempts by Congress during the 19th century to obtain adequate information for making decisions on tariffs. Congress’ inability to find an agency capable of providing that kind of information paved the way for the creation of the Commission.

Chapter 3, by Professor W. Elliot Brownlee, addresses the creation of the Tariff Commission. Topics include why the President, Congress, and others perceived a need for such an agency; the President’s initiative; communications between the Administration, Congress, and others on the subject of creating the agency; the evolution of the organic legislation; and the enactment of the Revenue Act of 1916.

Part II covers various aspects of the evolution of the agency over the past century.

Chapter 4, by former Chairman Bill Leonard and trade practitioner F. David Foster, gives a narrative history of the Commission from both a functional and an institutional point of view. The chapter also serves as an overview of the material that follows.

Chapter 5, offers the insights of three former Chairmen of the Commission—Shara Aranoff, Deanna Okun, and Daniel Pearson—into the nature of the Chairmanship.

Chapter 6, by the author of the current chapter, describes the headquarters and field offices that the Commission has occupied during its existence.

Part III is the first of several that address in detail various parts of the agency's mission.

Chapter 7, covers tariff-related activities. It was prepared by Gene Rosengarden, former Director of the Office of Tariff Affairs and Trade Agreements, and by Janis Summers and Arun Butcher, currently of that office. This topic includes Commission work on the Tariff Schedule of the United States and the Harmonized Tariff Schedule of the United States. The chapter addresses the role of the Office of Tariff Affairs and Trade Agreements and other offices, and describes the Commission's participation in international tariff activities, including work with the World Customs Organization.

Chapter 8, by former Chairman and Professor Alfred Eckes, provides a detailed look at the Commission in its first several decades, from 1917 to 1974, focusing particularly on tariff-related functions.

Part IV addresses the investigative functions of the Commission.

Chapter 9, was written by Lynn Featherstone, former Director of Investigations, and James Lyons, former General Counsel. It focuses on antidumping and countervailing duty (AD/CVD) investigations and related proceedings under Title VII of the Tariff Act of 1930. The chapter discusses both original investigations and five-year reviews. The chapter closes with a description of the agency's experience in AD/CVD litigation.

Chapter 10, by Professor Kara Reynolds, covers safeguard investigations conducted under several statutes. The chapter discusses different types of safeguards, including global safeguards and those based on bilateral agreements, such as ones with China. Major cases are summarized.

Chapter 11, by former Chairman Eckes and practitioner Terence Stewart, is a compilation of interviews with senior trade practitioners over many years. These provide perspectives on the experiences of the trade bar as it has practiced before the agency.

Chapter 12, was provided by former Chairman Deanna Okun and practitioners James Adduci, Sarah Hamblin, Louis Mastriani, and Tom Schaumberg. It addresses intellectual property-related import investigations pursuant to section 337 of the Tariff Act of 1930.

Part V covers industry and economic analysis.

Chapter 13, by Dr. Robert Koopman, former Director of Operations, and Dr. Michael Ferrantino, formerly of the Office of Economics, provides an overview of this area of the Commission's mission, which encompasses individual studies and recurring reports undertaken under several statutory authorities. The chapter

examines how Commission offices such as Economics and Industries have contributed to these analyses, and the growing role that economic modeling has played in the Commission's activities.

Chapter 14, prepared by Professor Michael Moore, examines economic analysis in more detail.

Chapter 15, by former Commissioner Thelma Askey, describes the assistance that the Commission provides to Congress. The principal statutory customers are the Ways and Means Committee of the House of Representatives and the Finance Committee of the Senate.

Chapter 16, by Catherine Field, formerly of the Office of the U.S. Trade Representative, addresses industry and economic analysis that the Commission has provided to the Executive Branch. The chapter examines section 332 studies that the executive branch requested, as well as those that Congress required the Commission to provide to the executive.

A brief conclusion recaps the themes of the book.

Part I Creation

