

## TRADE ADMINISTRATION

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*At the core of public debates about trade policy making in the United States and the so-called “trade war” is a controversy over who should be responsible for making U.S. trade law: Congress or the President. What these important conversations miss is that underlying much of our trade policy in recent decades is a widespread executive-branch-lawmaking apparatus with monitoring, rulemaking, adjudicative, and enforcement features that operates in considerable shadow. Executive branch agencies are now the primary actors in trade lawmaking. This Article excavates that critical underbelly: what I call our “trade administrative state.” It maps the trade administrative state’s statutory and institutional ascent, which I maintain was the product of considerable experimentation in governance schemes developed in response to diverging market trends and normative priorities, the absence of judicial mechanisms to monitor its borders, and a deficiency of administrative law disciplines to respond to its fortification.*

*This unearthing reveals that the trade administrative state does not operate like the rest of the regulatory state either in form or in process,*

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*despite that its actors engage in several conventional regulatory functions. Rather, trade lawmaking is predominantly managed by a single agency, the Office of the United States Trade Representative, and, procedurally, it lacks the hallmarks traditionally associated with administrative law. The Article then evaluates this model in light of administrative law’s aspirations. It demonstrates how our present model of trade administration and its self-policing control mechanisms clash with commonly held scholarly and doctrinal understandings of executive governance.*

*This assessment of modern trade governance also prescribes certain lessons for how administrative law operates when it comes to certain specialized areas of administration. Surprisingly, despite the fact that trade administration challenges established positivist and process-oriented values, it does so in such a way that may enhance compliance with international law. At a moment when critics raise concern about the President’s disfavor of international trade law and institutions, this study reveals that certain norms may be entrenched in our trade administrative state to counteract those concerns.*

*Taken together, the Article makes three contributions: First, it identifies and illustrates the experimental history of trade administration. Second, I unpack the distinct features of trade lawmaking as managed by executive branch agencies and draw conclusions about its functions for the way we conceive of trade actors and trade action in our constitutional framework. Finally, the Article analyzes the implications of this revealed structure for administrative law both in process and in content and shows how trade law serves as an unexpected administrative constraint.*

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#### INTRODUCTION

Legal debates over allocations of power in trade lawmaking have focused on the shift in power from Congress to the President.<sup>1</sup> But beneath the surface of our separation of trade law powers is a vast trade-lawmaking administrative apparatus with understudied implications. It is the executive branch beyond the President that wields considerable control over trade law outcomes and policy actions. The true driving forces of U.S. trade lawmaking are sited inside the executive and are often out of sight. This Article seeks to precipitate a turn away from thinking about the imposition of *congressional* controls in trade lawmaking in favor of greater consideration for *administrative* controls. I argue that the modern trade-lawmaking process is not one shaped by the separation of powers as much as it is by agency administration.

This study considers the work of what I call the “trade administrative state”<sup>2</sup>—and with some urgency. As recent events have brought the

<sup>1</sup> See, e.g., Timothy Meyer & Ganesh Sitaraman, Trade and the Separation of Powers, 107 Calif. L. Rev. 583, 586–97 (2019); Kathleen Claussen, Separation of Trade Law Powers, 43 Yale J. Int’l L. 315, 316–20 (2018) [hereinafter Claussen, Separation of Trade Law Powers]; John Linarelli, International Trade Relations and the Separation of Powers under the United States Constitution, 13 Dick. J. Int’l L. 203, 204–05 (1995); Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking After *I.N.S. v. Chadha*, 18 N.Y.U. J. Int’l L. & Pol. 1191, 1191–92 (1986).

<sup>2</sup> As I explain further below, the “trade administrative state” refers to a vast landscape of executive branch agencies that write trade rules, monitor the implementation of those rules, adjudicate disputes over their content, and subsequently enforce them in three dimensions—horizontal, vertical, and diagonal. See Subsection II.A.1.

features of our trade administration once again to the fore,<sup>3</sup> commentators have argued for better balance between the President and Congress as a means of correction.<sup>4</sup> While those assessments underscore important conversations about the democratic separation of powers generally, they tend to discount the normative and practical entrenchment of trade lawmaking among executive branch agencies.<sup>5</sup> The delegations from Congress to the President are just the tip of the iceberg with respect to our trade topography. U.S. trade lawmaking is embedded in a much larger administrative structure—parts of which are hidden from Congress, despite its constitutional primacy, and from even the White House. But the story is not just one of structure. Administration is also largely about process. Executive agencies play the most important role in trade lawmaking, and they do so according to *sui generis* processes subject to little supervision.

This Article provides a thorough descriptive review of modern U.S. trade administration and then evaluates whether our form of trade administration is appropriate or preferred. In so doing, one key feature

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<sup>3</sup> See, e.g., Josh Zumbrun, Feliz Solomon & Jeffrey Lewis, U.S.-China Trade War Reshaped Global Commerce, *Wall St. J.* (Feb. 9, 2020), <https://www.wsj.com/articles/u-s-china-trade-war-reshaped-global-commerce-11581244201> [<https://perma.cc/CGZ2-3CGX>]; Ana Swanson & Jeanna Smialek, U.S. Manufacturing Slumps as Trade War Damage Lingers, *N.Y. Times* (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/business/manufacturing-trump-trade-war.html> [<https://perma.cc/3ZC2-2BT9>]; Shawn Donnan, Trade Won't Fade as a Big Disrupter in 2020, *Bloomberg* (Jan. 2, 2020), <https://www.bloomberg.com/news/articles/2020-01-02/trade-war-latest-trump-2020-china-tariffs-election-polls> [<https://perma.cc/7ZQW-FXCZ>].

<sup>4</sup> See, e.g., Philip Wallach, James Wallner & Clark Packard, Is Congress Willing To Assert Responsibility for Trade?, *Bulwark* (Feb. 3, 2020), <https://thebulwark.com/is-congress-willing-to-assert-responsibility-for-trade/> [<https://perma.cc/254H-AL5M>]; Daniel Griswold, Only Congress Can End the China Trade War Quagmire, *Hill* (Sept. 11, 2019), <https://thehill.com/opinion/international/460920-only-congress-can-end-the-china-trade-war-quagmire> [<https://perma.cc/D2WK-QQJM>]; Jennifer A. Hillman, How To Stop Trump's Trade War Madness, *N.Y. Times* (Aug. 11, 2019), <https://www.nytimes.com/2019/08/11/opinion/trump-china-trade.html> [<https://perma.cc/N4XX-583F>]; Clark Packard, Congress Should Take Back Its Authority Over Tariffs, *Foreign Pol'y* (May 4, 2019) [hereinafter Packard, Congress Should Take Back Its Authority Over Tariffs], <https://foreignpolicy.com/2019/05/04/congress-should-take-back-its-authority-over-tariffs-trump/> [<https://perma.cc/BME2-XV9C>].

<sup>5</sup> To be sure, a considerable literature on the political economy of trade policy has identified this important shift. See, e.g., Douglas A. Irwin, U.S. Trade Policy in Historical Perspective, 6–7 (*Nat'l Bureau of Econ. Rsch.*, Working Paper No. 26,256, 2019) (referring to additional work in the field). Legal scholarship relating to domestic trade institutions, on the other hand, has been more limited, especially in recent years. This Article builds off the foundation of the former to build a conversation in the latter.

surfaces: the managerial role played by a single agency created in 1962 called the Office of the United States Trade Representative (“USTR”).<sup>6</sup> Today, USTR supervises most of our modern trade-lawmaking enterprise, acting as a super-agency similar to the Office of Management and Budget (“OMB”).<sup>7</sup> USTR oversees other agency rulemaking and, strikingly, can compel action from other parts of the government.

It was not always this way. The present arrangement is only the latest iteration in a history of experimental trade governance. At the nation’s founding, the regulation of foreign commerce consisted primarily of the issuance of tariff schedules and the negotiation of commercial treaties.<sup>8</sup> Congress relied on the President to adjust tariffs in respect of carefully circumscribed situations and counted on the Bureau of Customs to apply the tariff rates on goods at the border.<sup>9</sup> These activities involved little discretion by the executive branch. A progressively aggressive delegation of authorities to the President and a movement toward reciprocal arrangements with trading partner countries empowered the executive branch to take on greater authority from the 1890s through the 1930s.<sup>10</sup> By the middle of the twentieth century, trade lawmaking had become an exercise of an extensive legal machinery—not just in content but also in institutional form. While Congress continued to guide its substance, the diminished congressional role eventually heralded a new mode of governance with distinct features that have since characterized the way U.S. trade law is made.

This Article presents the details of this structural change. It demonstrates how the trade administrative state today is deeply entrenched and remarkably complex. To practice in this area is to develop a niche specialization in a distinctive administrative universe. Thus, one purpose of this Article is to review the undervalued legal system of foreign trade regulation: to chronicle the statutory and institutional rise of

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<sup>6</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, § 101 et seq., 76 Stat. 872 (codified as amended at 19 U.S.C. § 1801 et seq.).

<sup>7</sup> See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *Yale L.J.* 2182, 2194–99 (2016) (describing the role of OMB); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *Mich. L. Rev.* 1239, 1243 (2017) (discussing the OMB’s super-styled role without using the term); see also David C. Vladeck, *O.M.B.: A Dangerous Superagency*, *N.Y. Times* (Sept. 6, 1989), <https://www.nytimes.com/1989/09/06/opinion/omb-a-dangerous-superagency.html> [<https://perma.cc/9PVV-XYFM>] (warning that OMB “exercises cradle-to-grave control over all regulatory initiatives”).

<sup>8</sup> See *infra* Section I.A.

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Section I.C.

this multifarious system and to situate it empirically at the core of modern trade law.

This functional appraisal illuminates another layer of trade administration: its characteristic administrative law traits—or rather, the lack of administrative disciplines that apply. At first glance, one might think the positive story of trade lawmaking just mirrors that of either regular administrative lawmaking or of foreign affairs lawmaking. Some observers may see this as a sort of extension of the work of the OMB.<sup>11</sup> But in ways unlike other areas of executive branch lawmaking, trade-lawmaking agencies are sites of administrative innovation. They make law not through the standard administrative law playbook but regularly rework it from the ground up. Only some features of trade lawmaking are subject to the Administrative Procedure Act (APA).<sup>12</sup> A great deal of trade agency action is not subject to either conventional notice-and-comment procedures or judicial review.<sup>13</sup> In many trade-related congressional delegations to agencies, the form and content of administrative process, if any is specified, is left to the agency's discretion. These notable omissions raise questions both for administrative law's reach as well as for trade law's accountability, transparency, and legitimacy. The result is a form of administrative governance that is characterized more by experimentation and haphazardness than by accountability and rule-of-law values.

Most surprising about this account is that USTR intervenes in the domestic rulemaking process where it finds that rules proposed by other agencies are not compliant with international trade law. Thus, one overlooked feature of the trade administrative state is that it has elements that both reject administrative law features and inject international law primacy into the administrative process. At a moment when critics raise concern about the future of international trade law and institutions, this study reveals that certain norms are entrenched in our trade administrative state to counteract those concerns.

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<sup>11</sup> OIRA Pages, The White House, <https://www.whitehouse.gov/omb/information-regulatory-affairs/> [<https://perma.cc/5G4J-SYYV>] (last visited Jan. 29, 2021); see also Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 *Geo. L.J.* 259, 268–70 (2015) (examining Office of Information and Regulatory Affairs (“OIRA”) practice as a form of executive lawmaking).

<sup>12</sup> See 5 U.S.C. §§ 500–04, 551–59, 561–84, 591–96, 701–06. I return to the question of whether trade falls within the APA's foreign-affairs exception *infra* at note 219 and accompanying text.

<sup>13</sup> See *infra* Section III.A.

The stakes of trade administration have only continued to grow. Congress has delegated vast authorities of different types to these agencies such that the choice between a “free trade” policy or a more “protectionist” policy is left almost entirely to the executive.<sup>14</sup> Take, for example, the Trump administration’s so-called “trade war.” Under the current model, the process for imposing tariffs on products is an administrative process. Agencies carry out investigations, make determinations, and either act on the President’s direction or provide their findings to the President for his ultimate decision. Those agencies also implement the tariffs and adjudicate which products and industries will be exempted from those tariffs. Critically, and unexpectedly, the trade war has illustrated that when these agencies engage in trade lawmaking, they are subject to a different set of rules and regulations and processes than many agencies that act exclusively domestically.<sup>15</sup> Our recent extensive tariff exercise has helped bring to light this discrepancy in practice and may provide a guide to how stakeholders can advocate for change or an end to the warring tariffs. Thus, shifting the lens of our focus to trade *administration* helps us to deconstruct the trade war and contextualize it within broader notions of regulatory authority.

The study’s descriptive content motivates its positive and normative conclusions. From a policy perspective, modern trade administration has both benefits and drawbacks. The costs of trade administration—such as its lack of transparency and democratic inputs—may be outweighed by its international-law-enhancing functions. But the costs and benefits are not mutually exclusive. The absence of traditional administrative law mandates may provide necessary expertise, flexibility, and compliance with international law, but they can also be abused in the way that administrative law’s proponents have feared. This dilemma raises the question whether it is possible to create a principled approach to trade lawmaking that fosters compliance and coherence, but that also addresses

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<sup>14</sup> For an overview of the delegations made by Congress to the executive with respect to both free trade and protectionism, see generally Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 *Stan. L. Rev.* 1097, 1109–26 (2020) [hereinafter Claussen, *Trade’s Security Exceptionalism*].

<sup>15</sup> This is not to suggest that all domestic agencies subscribe to a singular process, but rather to capture how the typical agency controls are not as salient as they would be in the traditional domestic administrative law textbook depiction.

the fundamental participatory and democratic principles that administrative law endorses.<sup>16</sup>

I argue that a different way forward is possible, even if handicapped by a certain degree of path dependence and entrenchment, and that more ought to be done to consider administrative principles in trade law. We can strengthen administrative law values in trade law without losing the important coordinating and rule-enforcing features of the present system. When done well, an administrative law approach to trade could lessen the pressure on congressional-executive politics and take advantage of agency expertise while also creating an opportunity for administrative review. Judicial review is an important check on agency rulemaking that could be enhanced without considerable overhaul of the present system. Administrative law structures can hold agencies accountable for providing appropriate justifications and abiding by statutory requirements.

Finally, a critical examination of trade administration is of pressing importance as Congress, courts, and legal scholars debate new forms of trade governance and institutional frameworks for trade law and lawmaking.<sup>17</sup> This evaluation allows policy makers to assess the practical

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<sup>16</sup> Again, this question is one with which the political economy literature has wrestled, but which legal scholarship has not confronted in detail in some time. The picture of trade administration has evolved since those prior accounts as discussed further below. See *infra* Section II.A.

<sup>17</sup> See, e.g., *Am. Inst. for Int'l Steel v. United States*, 806 Fed. App'x 982, 990–91 (Fed. Cir. 2020); *Invenenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1281–83 (Ct. Int'l Trade 2019); *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1272–76 (Ct. Int'l Trade 2019); Rep. DelBene Introduces Bill To Prohibit the Use of IEEPA To Impose Tariffs, Inside U.S. Trade (June 28, 2019), <https://insidetrade.com/trade/rep-delbene-introduces-bill-prohibit-use-ieepa-impose-tariffs> [<https://perma.cc/TU7F-8CPT>]; Rep. Murphy Introduces Bill To Give Congress a Say in National Security Tariffs, Inside U.S. Trade (June 25, 2019), <https://insidetrade.com/trade/rep-murphy-introduces-bill-give-congress-say-national-security-tariffs> [<https://perma.cc/UB69-KWG7>]; GOP Bill Would Require Congressional Approval of IEEPA Declarations, Inside U.S. Trade (June 20, 2019), <https://insidetrade.com/trade/gop-bill-would-require-congressional-approval-ieepa-declarations> [<https://perma.cc/7YFK-663U>]; Isabelle Hoagland, Sens. Lankford, Coons Divided on USMCA Timing, United on Need for Tariff Legislation, Inside U.S. Trade (June 13, 2019), <https://insidetrade.com/daily-news/sens-lankford-coons-divided-usmca-timing-united-need-tariff-legislation> [<https://perma.cc/BC79-KDJH>]; New Kaine-Carper Bill Would Give Congress Broader Trade Authorities, Influence, Inside U.S. Trade (Mar. 27, 2019), <https://insidetrade.com/trade/new-kaine-carper-bill-would-give-congress-broader-trade-authorities-influence> [<https://perma.cc/XFV2-AAD2>]; Lawmakers Introduce Bill To Delay Potential Auto Tariffs, Inside U.S. Trade (Mar. 14, 2019), <https://insidetrade.com/daily-news/lawmakers-introduce-bill-delay-potential-auto-tariffs> [<https://perma.cc/XF6P-QG2Z>].



operation and costs and benefits of changing or abandoning the existing model, which may be especially important in periods of political transition.

The Article proceeds in four parts. Part I describes the anterior three eras of trade-lawmaking governance in historical perspective and theorizes the foundations of the trade administrative state. It analyzes the evolution both structurally and functionally by identifying key statutes and institutional moves made by all three branches. As this Part demonstrates, a confluence of factors led to the increased responsibility for a variety of agencies in trade lawmaking.

Part II introduces the idea of modern trade administration and maps out major institutional design choices. The bulk of this Part presents newly gathered legislative and executive materials to establish the breadth of agency and sub-agency involvement in trade lawmaking and its hierarchical, expansive, and multifaceted structure of today's foreign commercial regulatory framework. I document the ways in which the executive branch trade apparatus has flourished to the point of making USTR a manager, rather than an agent as is traditionally believed, when it comes to U.S. trade law. This Part captures the hallmarks of managerial trade administration that set USTR apart from other agencies. Taken individually, each of USTR's many roles is not especially noteworthy, but taken together, they make USTR distinctive in under-explored ways.

Part III turns to normative issues, analyzing doctrinal, practical, and policy benefits and drawbacks. I argue that this managerial model exacerbates concerns about interest group capture in some ways by removing such engagements from judicial review and the public eye. But it also has the unexpected benefit of enhancing U.S. commitments to international trade law. Thus, on the one hand, such an approach to trade governance improves U.S. adherence to international law and streamlines a considerable array of cross-border economic policy, but, on the other, it does so at the expense of traditional positivist and process-oriented values.

Finally, Part IV considers lessons for why the trade administrative state and its legal limits matter for ongoing structural and doctrinal debates. I refer to this as trade law's "unfinished business."

Two caveats are in order. First, this Article tries to capture the most important pieces of trade lawmaking. There are some areas where the managerial model has less salience, but the Article seeks to confront why and how that fragmentation in trade governance surfaced. Second, given

its breadth and opacity, no single essay could fully canvass trade administration. I intend to set out a preliminary review and to note areas that cannot be addressed in this space.

### I. ANTERIOR TRADE FIDUCIARIES

This is not the first article to identify executive branch prominence in trade lawmaking.<sup>18</sup> Scholars tell the story with varying degrees of concern,<sup>19</sup> questioning the legitimacy of the President’s decision making on trade policy and attributing it to different internal and external factors. Few, however, have scrutinized the nature and content of this multilayered work of the executive or the consequences for and influences on multiple areas of law that it implicates. In fact, U.S. trade law is the product of a complicated contest among governing bodies and constituencies: the U.S. Congress and the executive branch, international institutions and domestic agencies, and interest groups and technocracies, to name a few. The Constitution does not dictate a specific association between the branches or these other actors on trade.<sup>20</sup> Because of the complexities of the issues and the dynamism of different narratives and evolving politics, no single entity has gained plenary control. The result has been an evolving relationship among these many actors—one that can be traced across different eras of governance characterized by their noteworthy and distinct features.

This Part presents a structural periodization of trade administration. It lays out as an historical taxonomy the eras that have informed the governance configuration of trade lawmaking today. Four distinct modes have shaped trade lawmaking from the earliest days to the present.<sup>21</sup> Each is defined not just by the relationship between the branches during those

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<sup>18</sup> See, e.g., Meyer & Sitaraman, *supra* note 1, at 597–612 (discussing how delegations shifted authority from Congress to the President); Jide O. Nzelibe, *The Illusion of the Free-Trade Constitution*, 19 *N.Y.U. J. Legis. & Pub. Pol’y* 1, 2–3 (2016); Koh, *supra* note 1, at 1192–93 (“[T]he President has historically asserted dominance over international trade . . .”).

<sup>19</sup> Compare Nzelibe, *supra* note 18, at 8 (“legislative altruism”), with Meyer & Sitaraman, *supra* note 1, at 609 (“abdication”).

<sup>20</sup> To be sure, some would say it does. See, e.g., I.M. Destler, *American Trade Politics* 33 (4th ed. 2005). They point to the fact that Congress is the only constitutionally empowered branch. U.S. Const. art. I, § 8, cl. 3. But those same scholars do not deny that Congress has the opportunity to delegate its authority as necessary. Destler, *supra* note 20, at 32.

<sup>21</sup> Cf. Meyer & Sitaraman, *supra* note 1, at 586–612 (describing only two paradigms). My analysis does not take issue with the two paradigms that Meyer and Sitaraman set out; rather, it intends to complement that important project and take up the explicit and implicit structural modes within those governing paradigms.

years as identified in legislative delegations or judicial pronouncements, but also by the extensions and applications of the executive that changed the texture of trade law over time. The transition to each new period turns on rules and patterns of practice developed in response to specific contingent events. What emerges from this view is that the developments of the nineteenth and early twentieth centuries laid the foundation for a robust trade administrative state. Further, while the periodization is based on identifying changing centers of power in trade lawmaking, it also identifies how pressures in the regulatory state to develop processes that provide checks and balances on the actors governing the regulatory space did not obtain as a priority in trade. The result is a system with few top-down controls from Congress and few bottom-up checks through administrative processes by private actors.

Last, while this story is largely situated in an executive-legislative give-and-take responding to international politics and markets, this is not meant to suggest that there is no role for the judiciary. The impact of the courts ebbs and flows at different points in the story. For reasons I will explain, courts have been noticeably absent in serving as a control for the growth of the trade administrative state due to statutory constraints on their intervention. I highlight some relevant judicial interventions in this Part, but I leave a comprehensive review of the scope of trade law's domestic adjudication for another day. Such a contemporary study is badly needed but goes beyond the focus of this project. For now, this Part provides a typology of the features, both statutory and institutional, in each governance model, why they emerged, and the trade-offs of applying any one of them.

### *A. Partnership*

Although the Constitution assigns tariffs and the regulation of foreign commerce to Congress,<sup>22</sup> in the earliest days the actual application and development of foreign commercial relationships was very much a partnership between the two branches with both executive agencies and the President engaged in supportive roles.<sup>23</sup> Congress immediately

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<sup>22</sup> U.S. Const. art. I, § 8, cl. 1, 3.

<sup>23</sup> See Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 *Tex. L. Rev.* 1495, 1516 (2016) (referring to authorizations made to Washington, Adams, and Jefferson to embargo ships). At that time and for many years trade was related to war. The United States fought wars over trade and fought wars through trade. Trade was inextricably linked to the existence of the nation. *Id.* at 1517.

following its creation established a list of tariffs and instituted an executive infrastructure to apply them.<sup>24</sup> The fifth Act of Congress created the federal Customs Service and tasked it with collecting tariffs at ports of entry, but legislators quickly added other responsibilities as well.<sup>25</sup> Within a matter of weeks, Congress also assigned to the Customs Service the design, construction, staffing, and management of lighthouses in each customs district.<sup>26</sup> Shortly thereafter, customs collectors took on a range of administrative tasks, serving as the front-line actors on the border. Among their responsibilities were the use and implementation of ten ships (“cutters”) to police U.S. waters in relation to customs revenue,<sup>27</sup> as well as the enforcement of quarantine and state health laws,<sup>28</sup> and collecting hospital duties from marine hospitals.<sup>29</sup> By September 1789, Congress created the Department of the Treasury responsible for all matters pertaining to the collection and protection of revenue.<sup>30</sup> Administration of customs laws was placed under the Treasury Secretary at the Department’s creation.

From the beginning of the Republic, the executive branch also negotiated Friendship, Commerce, and Navigation (“FCN”) treaties with other countries regularly.<sup>31</sup> Those treaties, negotiated by the State Department, gave special tariff privileges to the treaty partner. They guaranteed most-favored-nation treatment to certain goods entering the United States from that country.<sup>32</sup> Through these treaties, the executive together with the Senate enacted rules about foreign commerce that would be executed by the Customs Bureau. Likewise, Congress would issue

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<sup>24</sup> In July 1789, the second Act of Congress established a system of tariffs on imported “goods and merchandises” while the third Act established tariffs on the tonnage of ships. Already in Congress’ earliest days, there was a debate about the proper objectives of a tariff, but most salient was the need for revenue. Act of July 4, 1789, ch. 2, 1 Stat. 24; Act of July 20, 1789, ch. 3, 1 Stat. 27.

<sup>25</sup> Act of July 31, 1789, ch. 5, 1 Stat. 29.

<sup>26</sup> Act of Aug. 7, 1789, ch. 9, 1 Stat. 53.

<sup>27</sup> Act of Aug. 4, 1790, ch. 35, §§ 62–64, 1 Stat. 145.

<sup>28</sup> Act of May 27, 1796, ch. 31, 1 Stat. 474.

<sup>29</sup> Act of July 16, 1798, ch. 77, 1 Stat. 605.

<sup>30</sup> Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

<sup>31</sup> John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 *Colum. J. Transnat’l L.* 302, 307 (2013). Although these FCN treaties were popular into the twentieth century, their impact on foreign commerce diminished. In fact, most FCN treaty provisions were incorporated into other areas of U.S. law. *Id.* at 341–43 (describing the ways the treaty provisions “fade[d] into near-irrelevance”).

<sup>32</sup> See, e.g., *Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, Prussia-U.S.*, art. 4, Sept. 10, 1785, 8 Stat. 84.

ordinary tariff schedules and the Customs Bureau would execute by collecting the applicable tariffs on products at the border. Neither branch of government had a clear monopoly as both worked to create alliances and revenue for the newly independent United States. As with other aspects of the constitutional transition, many of the foreign economic policies had to adjust from individual U.S. states' administrative machineries to a national, federal system.

The nation's early decades were not without controversy as to executive authority in foreign affairs generally.<sup>33</sup> These arguments tended to favor increased presidential power, but, in trade, given that tariffs were at the heart of the policy, there was bi-branch engagement in policy making and partnership in execution.

### *B. Trusteeship*

By the early nineteenth century, change was already underway in the mode of trade administration. In addition to the continued implementation of tariff rates and other customs regulations as well as the negotiation of FCN treaties, Congress began to delegate certain authorities to the President in which it entrusted him with a fiduciary role over trade lawmaking. For these particular authorities, the President was the principal executive branch actor, rather than the State Department, Treasury, or Customs Bureau. His discretion was limited, however, such that he could act only when national interest required his intercession. The President effectively served as the nation's trustee with respect to trade law and trade lawmaking.

Relying on the President to make these determinations was not the only way Congress enhanced its tariff-setting authority during this period. It also institutionalized an independent support system. This Section begins with the delegations that evolved during what I call the trusteeship era before turning to these structural innovations.

#### *1. One-Way Delegations*

As early as the 1790s and going forward, foreign commercial problems arose in practice, if not in law. Those problems, which included attacks on U.S. commercial vessels and complications with European and

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<sup>33</sup> See Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 Va. L. Rev. 987, 1013–14 (2013).

Caribbean trading partners,<sup>34</sup> demanded more flexible solutions in the regulation of our foreign commercial policy than Congress could provide. Although the branches still worked together in various capacities on trade matters, the legislation of the period reflects a congressional view that real-time decisions were needed and Congress was not well-positioned to make such decisions, particularly in light of the nuances of our foreign policy in which they were really very entwined.

On at least four separate occasions before 1810, Congress granted the President the authority to adjust under specific circumstances trade policies that Congress enacted.<sup>35</sup> Those circumstances almost always involved the invocation of public or national need or interest. That is, Congress relied on the President to determine where national needs demanded adjustments. Congress repeatedly granted the President the power to amend, specially apply, or even reverse some commercial rule where the President found it to be in the “interest of the United States”<sup>36</sup> or “if in his judgment the public interest [or safety] should require it”<sup>37</sup> in 1794, 1799, 1806, and 1808.<sup>38</sup> The concept was pervasive in these delegations throughout the period: Congress treated the President as a guardian of the public interest in trade matters.

Under his trustee-styled delegations, the President had the discretion to start and stop certain trade practices, to provide access, to instruct executive branch officials to act on these authorities, and eventually to raise and lower tariffs on certain products and on products from certain

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<sup>34</sup> See, e.g., Message Transmitting a Report of the Secretary of State on the Spoliations Committed on the Commerce of the United States (Mar. 5, 1794), in 1 *American State Papers: Foreign Relations* 423, 423–24 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) (describing with concern the attacks on U.S. merchants and the need for greater authority to combat such attacks).

<sup>35</sup> Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 *Harv. L. Rev.* 799, 820–29 (1995) (“Early statutes imposed this duty on the President, typically requiring him to issue a proclamation giving each complying country a clean bill of health. We call these ‘proclamation statutes,’ and they have been very common.”).

<sup>36</sup> Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613.

<sup>37</sup> Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411.

<sup>38</sup> Act of June 4, 1794, ch. 41, 1 Stat. 372 (authorizing the President to lay an embargo on ships as necessary “whenever . . . the public safety shall so require”); Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613 (making it lawful for the President to draw back restrictions on trade that Congress enacted “if he shall deem it expedient and consistent with the interest of the United States” or “whenever, in his opinion, the interest of the United States shall require”); Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411; Act of April 22, 1808, ch. 52, 2 Stat. 490 (authorizing the President to suspend a trade embargo for certain vessels “on such bond and security being given as the public interest . . . require”).

countries. Where tweaks were needed, the Legislature entrusted the President with the ability to undertake those small changes. This practice would continue for more than one hundred years, even as the language would change in small ways. Take, for example, an Act of March 3, 1815, which dealt with the repeal of duties on goods, wares, and merchandise imported into the United States to be applied “whenever the President . . . *shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.*”<sup>39</sup> Congress used the President as a fact finder in these small ways, relying on the President’s judgment as to when or upon whom these changes in policy should apply.<sup>40</sup> In none of these did Congress install a backstop that would allow it to assess readily the President’s exercise of his discretion, but the contours of his decision making were substantially circumscribed.

Nearly identical delegations are found in Acts from 1817, 1824, 1828, 1830, and 1884.<sup>41</sup> Some acts from this period also delegated similar authority to high-ranking executive officials.<sup>42</sup> One legacy of the trusteeship era is the maintenance of these trustee-style constructions in our modern trade law, allowing the President to act, often in the form of tariff modifications, under confined circumstances where he makes a delineated factual finding.<sup>43</sup>

In 1889, conversations began in earnest about giving the President enhanced authority beyond the principled discretion he had in the trustee-

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<sup>39</sup> Act of Mar. 3, 1815, ch. 77, 3 Stat. 224 (emphasis added).

<sup>40</sup> For a more robust discussion of the President’s tariff-related fact-finding in the context of fact-finding more generally, see Shalev Roisman, *Presidential Factfinding*, 72 *Vand. L. Rev.* 825, 849 (2019).

<sup>41</sup> Act of Mar. 3, 1817, ch. 39, 3 Stat. 361–62; Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 2; Act of May 24, 1828, ch. 111, § 1, 4 Stat. 308; Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425; Act of June 26, 1884, ch. 121, § 14, 23 Stat. 53.

<sup>42</sup> See, e.g., Act of Mar. 6, 1866, ch. 12, 14 Stat. 3 (allowing suspension of the prohibition “whenever the Secretary of the Treasury shall officially determine” that importation of certain cattle would not spread infectious disease).

<sup>43</sup> See S. Rep. No. 73-871, at 1–2 (1934) (“The committee has inserted the words ‘as a fact’ following the words in subsection (a) ‘the President, whenever he finds.’ This is to make clear that Congress under the proposed bill is establishing a policy and directing the Executive to act in accordance with the congressional policy only when he finds as a fact that existing duties or other import restrictions are unduly burdening and restricting the foreign trade of the United States. In the same provision, to the words ‘existing duties or other import restrictions’ the words ‘of the United States or any foreign country’ have been added to clarify the meaning.”).

styled delegations.<sup>44</sup> Attention turned away from tariff adjustments to the prospect of negotiating reciprocal tariff reductions with trading partners.<sup>45</sup> To allow the President to negotiate tariff reductions in wide swaths would be a change that would eventually mean the President had an enhanced role more as an agent of Congress on trade lawmaking rather than a trustee. But the road away from trusteeship toward agency was not so direct or smooth.

The McKinley Tariff Act of 1890 maintained a trustee-styled delegation just with wider boundaries.<sup>46</sup> It allowed the President not just to start or stop some trade action, but also to remove individually listed products from various tariff classifications and apply different duties. The statute empowered the President to act where he believed that a country exporting certain goods was imposing duties that appeared reciprocally unequal.<sup>47</sup> Members of Congress and business actors questioned the breadth of this executive action, although the U.S. courts in a landmark case upheld these shifts and their exercise. In *Field v. Clark*, the Supreme Court concluded that permitting the President to engage in negotiations with trading partners for reciprocal tariff adjustments through a congressional delegation was appropriate because Congress may “delegate a power to determine some fact or state of things upon which the law makes, or intends to make, [Congress’s] action depend. To deny this would be to stop the wheels of government.”<sup>48</sup> Notwithstanding the

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<sup>44</sup> See Alfred E. Eckes, *Opening America’s Market: U.S. Foreign Trade Policy Since 1776*, at 70–74 (1995).

<sup>45</sup> *Id.* (noting that Secretary of State Blaine revives the idea and urges President Harrison to request authority).

<sup>46</sup> Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

<sup>47</sup> Section 3 of the Act provided that certain commodities would be admitted free of duties, but that the President could impose specified rates against nations charging “unequal and unreasonable” duties on U.S. commodities. *Id.* § 3; see also *Field v. Clark*, 143 U.S. 649, 680–91 (1892) (holding that Section 3 was not an unconstitutional delegation of legislative and treaty-making authority to the President); Douglas A. Irwin, *Clashing Over Commerce: A History of U.S. Trade Policy* 304 (2017) [hereinafter Irwin, *Clashing Over Commerce*]; H.R. Rep. No. 73-1000, at 9 (1934) (recognizing the President’s power under Section 3 and noting the *Field* decision); Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 Colum. L. Rev. 751, 761–62 (1939) (discussing presidential action in protectionist trade policy generally); Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140, 173–74 (2009) (noting this started a transformation in U.S. international lawmaking).

<sup>48</sup> 143 U.S. at 694; see also *id.* at 699–700 (Lamar, J., dissenting) (commenting that this Act ought to be distinguished as it is clearly lawmaking). Interestingly, and somewhat ironically, the Court has developed major principles of administrative law through trade-related cases



Court's stamp of approval, Congress terminated this executive trade authority in 1894 as the politics on tariffs changed.<sup>49</sup>

Three years later, Congress again reversed course and over the next 25 years would progressively grant the President greater authority,<sup>50</sup> especially at the requests of Presidents Taft and Harding.<sup>51</sup> For example, the Paine-Aldrich Tariff Act of 1909 “authorized the President to ascertain those countries [that] did not ‘unduly discriminate’ against American commerce and [that] accorded to the United States ‘reciprocal and equivalent’ treatment and to declare by proclamation that the minimum rates should be applicable to all articles imported into the United States from such countries.”<sup>52</sup> Under this authority, presidents issued 134 proclamations “including practically the entire commercial world.”<sup>53</sup> The 1909 Act also empowered the President to appoint trade advisors as he deemed necessary.<sup>54</sup>

Despite these calls and changes empowering the President in various ways, the common position continued to be that Congress was responsible for trade through the early decades of the twentieth century.<sup>55</sup> Up until

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such as *Field* and others taken up below. In the twenty-first century, trade-related administrative law has been significantly curtailed.

<sup>49</sup> Wilson-Gorman Tariff Act of 1894, ch. 349, § 71, 28 Stat. 509, 569; see also Harold U. Faulkner, *The Decline of Laissez Faire, 1897–1917*, 59–60 (1977) (discussing the politics of tariffs in the years after the Wilson-Gorman Act); Eckes, *supra* note 44, at 70 & 70 n.39 (discussing congressional opposition to executive reciprocity agreements in 1884).

<sup>50</sup> The Dingley Tariff Act of 1897 authorized the President again to negotiate reciprocal tariff agreements with an eye to lowering tariffs with trading partners. Dingley Tariff Act of 1897, ch. 11, § 3, 30 Stat. 151, 203. The 1922 Fordney McCumber Tariff Act again empowered the President to adjust tariff rates under the condition that the Tariff Commission so advised. Fordney-McCumber Act of 1922, ch. 356, § 315, 42 Stat. 858, 941–46.

<sup>51</sup> In President Taft's inauguration in 1909, he called for Congress to give him still greater authority, but also noted that any such action was a congressional prerogative. William Howard Taft, Inaugural Address (Mar. 4, 1909), *in* 1 *Presidential Addresses and State Papers of William Howard Taft: From March 4, 1909 to March 4, 1910*, at 53, 55 (1910) (“It is imperatively necessary, therefore, that a tariff bill be drawn . . . and as promptly passed as due consideration will permit. . . . I venture this as a suggestion only, for the course to be taken by Congress, upon the call of the Executive, is wholly within its discretion.”). Warren G. Harding, Inaugural Address (Mar. 4, 1921), *in* *Inaugural Addresses of the Presidents of the United States: From George Washington 1789 to George Bush 1989* 237, 243–44 (1989).

<sup>52</sup> H.R. Rep. No. 73-1000, at 10 (1934).

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

<sup>54</sup> Payne-Aldrich Tariff Act of 1909, ch. 6, § 2, 36 Stat. 11, 82–83.

<sup>55</sup> See U.S. Int'l Trade Comm'n, *The Economic Effects of Significant U.S. Import Restraints* 65 (6th ed. 2009) (“Prior to the 1930 act, tariff changes were viewed as entirely the domain of Congress.”); see also Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known As Fast Track: Building Common Ground on Trade Demands More Than a Name*

that point, these limited delegations were exactly that: limited, and often within the confines of controlled principles such as “in the national interest” or to avoid “undue discrimination.” And they were seen as necessary for the practical undertakings of execution of the congressional legislative authority.<sup>56</sup> Soon, however, the delegations would hand over so much authority to the President that he began to be seen as Congress’ agent on trade, rather than a trustee.

## 2. Institutional Foundations

A second noteworthy feature of the trusteeship era was that it laid the groundwork for the present day through its preliminary steps toward institutionalization and the creation of modern trade administrative state. Most important was its 1916 establishment of a permanent and independent Tariff Commission—today the International Trade Commission (“ITC” or “the Commission”).<sup>57</sup> Prior to the creation of the Commission, in most instances, Congress relied on facts supplied to its committees by interested parties.<sup>58</sup> But with the establishment of a

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Change, 35 *Geo. Wash. Int’l L. Rev.* 1, 6 (2003) (“Prior to the twentieth century U.S. regulation of foreign commerce was almost exclusively a congressional prerogative . . .”); Ian F. Fergusson, *Cong. Rsch. Serv.*, RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy* 2–3 (2015). (“For roughly the first 150 years of the United States, Congress exercised its authority over foreign trade by setting tariff rates on all imported products.”).

<sup>56</sup> As the Supreme Court confirmed in *Field v. Clark*: “There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.” 143 U.S. 649, 694 (1892).

<sup>57</sup> Revenue Act of 1916, Pub. L. No. 64-271, ch. 463, § 700, 39 Stat. 756, 795.

<sup>58</sup> On several different occasions since 1865, tariff boards were set up by Congress or in some instances by executive order for specific studies, but none would be permanent. For example, a tariff commission was established in 1882 with nine members. It was appointed to report to Congress on recommended tariff rate changes. Report of the Tariff Commission, H.R. Misc. Doc. No. 47-6, pt. 1., at 1, 5, 7 (1882). Upon doing so, it ceased to function. The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy, 80 *Yale L.J.* 1418, 1424 n.31 (1971); Act of May 15, 1882, Pub. L. No. 47-145, ch. 145, 22 Stat. 64; see also U.S. Tariff Comm’n, *The Tariff and Its History* 97–100 (1934) (describing nine non-permanent bodies created between 1865 and 1922 to study tariff-related issues). Likewise, in 1911, a three-member Tariff Board was established pursuant to congressional funding thereof to look into the tariff schedule for wool and woolens. Act of Mar. 4, 1911, Pub. L. No. 61-525, ch. 285, 36 Stat. 1363. Other non-permanent agencies were created in 1865, 1866, 1888, 1909, and 1912. See generally J. Bernhardt, *The Tariff Commission: Its History, Activities and Organization* 3–14 (1922) (providing an overview of the activities of seven government bodies tasked with studying tariff-related issues between 1865 and 1912).

permanent Commission, Congress had steady support on increasingly complex and technical matters related to tariffs.

The Tariff Commission also had a role in emphasizing and supporting the President as trade trustee. In its early years, Congress tasked the Tariff Commission with collecting information and reporting to Congress to inform its tariff decisions. By the early twentieth century, Congress' inability to adjust tariff rates in a timely way generated growing concern. William Smith Culbertson, President of the Tariff Commission, argued that this problem could be addressed if Congress allowed the President with the guidance of experts at the Tariff Commission to adjust import duties as economic conditions demanded.<sup>59</sup> Likewise, among the Tariff Commission's early recommendations was an endorsement of giving the President greater authority to negotiate and secure the reciprocal lowering of tariff barriers in the public interest.<sup>60</sup>

Apart from the trusteeship role of the President, Congress also delegated a handful of similarly structured investigative tasks to other executive branch actors. For example, the Anti-Dumping Act of 1921 allowed the Treasury Secretary to administer and impose duties in accordance with the results of his investigation.<sup>61</sup> The Treasury Secretary rarely used this authority, unlike in the case of the authorities delegated to the President.<sup>62</sup> Another institutional development was the creation of consular offices on behalf of the U.S. Department of Agriculture ("USDA").<sup>63</sup> These offices in foreign countries were intended to obtain seeds and plants for analysis by USDA to advise Customs on various imported items.<sup>64</sup> This was the first specialization in an otherwise domestic department to contribute to trade-lawmaking activities.

Taken together, these institutional moves primarily provided a support system for the work of Congress, while, as trustee, the President had independent authority to make decisions according to his best judgment,

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<sup>59</sup> Irwin, *Clashing Over Commerce*, supra note 47, at 356–57.

<sup>60</sup> *Id.* at 356–57, 362–64.

<sup>61</sup> Anti-Dumping Act of 1921, Pub. L. No. 67-10, ch. 14, § 201-202, 42 Stat. 9, 11–12.

<sup>62</sup> James Pomeroy Hendrick, *The United States Antidumping Act*, 58 *Am. J. Int'l L.* 914, 932 (1964) (noting just 73 findings of dumping between 1921 and 1964). From 1934 to 1954 there were only seven findings of dumping. Douglas A. Irwin, *The Rise of US Anti-dumping Activity in Historical Perspective*, 28 *World Econ.* 651, 659 (2005). In 1954, this responsibility was transferred to the ITC. Irwin, supra, at 659.

<sup>63</sup> CBP Timeline, U.S. Customs & Border Prot., <https://www.cbp.gov/about/history/timeline-static-view> [<https://perma.cc/W7BP-7LEF>] (last visited Mar. 8, 2021).

<sup>64</sup> See Act of May 15, 1862, Pub. L. No. 37-72, 12 Stat. 387, 387 (establishing USDA to "procure . . . and distribute . . . valuable seeds and plants").

acting on behalf of a beneficiary: the nation. By the early part of the twentieth century, however, a new governance era was on the horizon.

### *C. Agency*

Following the experimental authorities of the late nineteenth and early twentieth centuries, Congress began to delegate expanded control to the President: to choose among trade-policy options and among trade partners, and, in effect, to write trade law instruments. Intending to facilitate increased foreign engagement on commercial matters, and particularly to advance a new free-trade policy, a significant change toward executive action *on behalf of* Congress marked the start of a new era in trade governance, one that ought to be noted for its diversification in form and in actors.

While the nineteenth-century view was that tariffs were critical for revenue or to protect industry and the President played a limited role in particular foreign-political circumstances or as fact finder, the twentieth-century view, especially after the Depression, was that negotiating lower tariffs was critical to economic success and the President was an indispensable player in that exercise.<sup>65</sup> Downplaying the significance of this shift in authority at the time, the Supreme Court characterized the President as “the mere agent” of Congress in the trade-lawmaking process.<sup>66</sup>

I again begin with the legislative moments of significance before turning to the vast sea of executive branch activity that emerges from trade’s agency and agencies.

#### *1. Codified Cooperation*

As agent, the President engaged with trading partners to secure the best access for U.S. products and reduce tariff barriers for U.S. business.<sup>67</sup> In

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<sup>65</sup> See Eckes, *supra* note 44, at 99.

<sup>66</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 410–11 (1928). In that case, an importer contested the imposition of a duty of six cents per pound on barium dioxide, two cents more than in the 1922 statute, after a 1924 proclamation by President Calvin Coolidge. The Supreme Court ruled that the delegation of authority was constitutional because the President was carrying out the will of Congress in changing the duty. *Id.* at 400, 411.

<sup>67</sup> The use of a principal-agent framework as an analytical tool for understanding congressional-executive relations in foreign affairs is not entirely novel in practice or scholarship. Ed Swaine has described that there was a time when:

[D]iplomats were regarded as personal agents of a head of state, and could be viewed in terms of a conventional principal-agent relationship, but identifying the principal

contrast to the prior era, the President was no longer acting in the limited circumstance of essentially flipping a switch in case of extraordinary public interest as was the case when he acted as trustee. In the principal-agent era, Congress and the institutional structure it created relied on the President to take initiative and to guide the nation by composing new tools where Congress could not. Implicit in this structure was an expectation that the President would be faithful to the interests of Congress in accordance with his delegation, but he maintained far greater discretion within that domain.

Despite the enablement of the President on both tariffs and on agreements,<sup>68</sup> and his further subdelegations to the State Department to negotiate such agreements,<sup>69</sup> the general understanding at the time among commentators was that Congress still retained not just ultimate authority but rather complete authority on trade matters. Trade *power* started and stopped with Congress. The Tariff Commission reported that “the rule or principle or policy upon which tariff rates are to be determined is distinctively a legislative problem,” while the “finding of facts” to support that undertaking was “essentially an administrative problem.”<sup>70</sup> The President executed on behalf of the principal.<sup>71</sup>

In a press conference in June 1933, President Roosevelt remarked that “Congress would never give me complete authority to write tariff

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(conceivably, the head of state, a legislature, or the state itself), the agent . . . , and the nature and consequences of delegated authority became less straightforward.

Edward T. Swaine, *Unsigning*, 55 *Stan. L. Rev.* 2061, 2068 (2003). Daniel Abebe has proposed viewing Congress as principal and the President as its agent in foreign affairs generally. In contrast to my study, Abebe seeks to determine “the appropriate level of deference to the President” based on a balancing of internal and external constraints to “ensure that the President is a faithful agent” while also ensuring the President has enough “latitude to achieve congressional goals.” Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 *Stan. J. Int’l L.* 1, 53 (2013).

<sup>68</sup> See, e.g., Claussen, *Trade’s Security Exceptionalism*, *supra* note 14, at 1109. For example, Section 3(e) of the National Industrial Recovery Act gave the President the power to use import quotas or fees to regulate any imports found to “render ineffective or seriously to endanger the maintenance of any code or agreement.” Pub. L. No. 73-67, § 3, 48 Stat. 195, 197 (1933) (codified at 15 U.S.C. § 703, terminated by Exec. Order 7252).

<sup>69</sup> As early as 1923, Secretary of State Charles Evans Hughes sent a confidential circular to American diplomatic officers notifying them that the President had authorized the Secretary of State to negotiate commercial treaties with other countries by which to accord each other unconditional most-favored-nation treatment. 1 *Papers Relating to the Foreign Relations of the United States, 1923*, H.R. Doc. No. 68-397, at 131 (1938).

<sup>70</sup> U.S. Tariff Comm’n, *Sixth Annual Report* 2 (1922).

<sup>71</sup> *Id.*

schedules.”<sup>72</sup> The Roosevelt administration subsequently asked for the authority to undertake additional trade negotiations “within carefully guarded limits, to modify existing duties and import restrictions in such a way as will benefit American agriculture and industry.”<sup>73</sup> This ask from the Roosevelt administration led to the most important delegation to the President to date: the Reciprocal Trade Agreements Act in 1934 (“RTAA”).<sup>74</sup> The RTAA gave the President the authority to make trade agreements by lowering tariffs that would take effect by presidential proclamation alone.<sup>75</sup> It is regularly heralded as a major milestone in U.S. trade history, but rarely with an eye to its institutional impact.

Although the RTAA seemed like an open-ended delegation, that was not entirely the case. Congress as principal could still re-write its agent’s delegation contract. The legislation granted the President such authority on a deadline and would periodically have to renew the power. For several decades, in fact, a time-limited delegation provided Congress with significant political leverage that it threatened to use to rein in the President if he went astray in negotiations or in the course of other exercises of his delegated authority.

## 2. *Organizational Expansion*

Just like in the trusteeship era, any retelling of trade lawmaking would be incomplete if it focused only on these congressional-presidential interactions. Since the establishment of the Tariff Commission and the original soft delegations to executive officials, a trade law apparatus began to take shape in the executive branch with accelerated pace. In the agency period, new officials across diverse agencies developed competencies on trade issues, and practices began that would empower still others. Together, these developments would provide a bureaucratic infrastructure to support the President’s expanded facility. For example,

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<sup>72</sup> Presidential Press Conference (June 9, 1933), *in* 1 Complete Presidential Press Conferences of Franklin D. Roosevelt, 1933, 364, 368–70 (1972).

<sup>73</sup> Irwin, *Clashing Over Commerce*, *supra* note 47, at 425.

<sup>74</sup> Nzelibe, *supra* note 18, at 7 (“For many scholars, congressional delegation was the crucial constitutional innovation that ultimately overcame interest group capture.”) (noting also that political economy scholars are skeptical). As David Lake has commented, the important difference of the RTAA as compared to prior delegations was that it delegated multiple authorities simultaneously. David A. Lake, *Power, Protection, and Free Trade: International Sources of U.S. Commercial Strategy, 1887–1939*, at 205 (1988).

<sup>75</sup> Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943 (codified as amended in scattered sections of 19 U.S.C.).

in its original incarnation, the 1934 Act required the President to seek information and advice from other agencies “and from such other sources as he may deem appropriate.”<sup>76</sup> The idea behind listing certain agencies was to ensure a “balanced approach to tariff adjustments” and to avoid domination by one agency in the Act’s administration, but the success of any such provision would depend on how the executive would apply it.<sup>77</sup> In practice, the President created an interagency organization. At its center was a Committee on Trade Agreements which he intended to be a successor to the short-lived Interdepartmental Advisory Board on Reciprocity Treaties in place prior to the 1934 Act.<sup>78</sup>

The Secretary of State or other temporary advisors appointed by the President took on leadership positions in this modest trade administrative apparatus.<sup>79</sup> Adjustments to trade policy were often the product of State Department initiatives with the support of a small handful of interagency committees.<sup>80</sup>

Administration of the tariff was still entrusted to the Bureau of Customs, responsible for determining the proper tariff classification of an import, appraising it for purposes of customs valuation, and collecting the resulting tariff.<sup>81</sup> These administrative functions called for the exercise of relatively little discretion,<sup>82</sup> but the Bureau’s contribution to trade lawmaking would move from executory in nature to quasi-judicial.

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<sup>76</sup> *Id.* at 945.

<sup>77</sup> Harry C. Hawkins & Janet L. Norwood, *The Legislative Basis of United States Commercial Policy*, in *Studies in United States Commercial Policy* 69, 100 (William B. Kelly, Jr. ed., 1963).

<sup>78</sup> *Id.* at 101. See also Harry C. Hawkins, *Administration of the Trade Agreements Act, 1944* *Wis. L. Rev.* 3, 8–9 (1944); Henry J. Tasca, *The Reciprocal Trade Policy of the United States: A Study in Trade Philosophy* 49–50 (1938).

<sup>79</sup> Some temporary advisory positions came and went. See, e.g., Exec. Order No. 6,651, 3 *The Public Papers and Addresses of Franklin D. Roosevelt* 158, 158–60 (Mar. 23, 1934) (creating a special trade advisor).

<sup>80</sup> See, e.g., Exec. Order No. 9,832, 3 *C.F.R. Supp.* 126, 127 (1947) (creating the Committee); Exec. Order No. 6,651, 3 *The Public Papers and Addresses of Franklin D. Roosevelt* 158, 158–60 (Mar. 23, 1934) (creating the Office of the Special Adviser to the President on Foreign Trade).

<sup>81</sup> For greater detail, see Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 *UCLA L. Rev.* 285, 286 (1986).

<sup>82</sup> Historically, “neither the Bureau of Customs nor any other agency was empowered to set or change tariff rates as such.” *Id.*

Unlike other areas of lawmaking, legislators did not see outsourcing as possible or favorable in tariff-making.<sup>83</sup> For this reason, Congress elected to give the Tariff Commission more authority,<sup>84</sup> intending to make the tariff more “scientific” and less “political,”<sup>85</sup> but not to give the Commission the ability to adjust rates in significant ways. Under this plan, Congress made the Tariff Commission “an integral part” of trade lawmaking<sup>86</sup> by receiving and investigating petitions from various stakeholders in the private sector. Commentators noted, however, that the administration of this new system was not practical. The Commission was woefully underprepared and understaffed for such a national undertaking.<sup>87</sup> Moreover, this move was not successful in taking the “tariff out of politics,”<sup>88</sup> but rather just moved politics to the Commission. These were the growing pains of the new trade bureaucracy.

From the 1930s forward, Congress sought to push several trade law and policy decisions out of the legislative process to the executive.<sup>89</sup> These institutions became the central focus of trade lawmaking for the first time. Executive agencies acted under the President’s leadership whether they served in fact-finding roles, investigatory capacities, quasi-judicial functions, or made other contributions. Still, taken together, executive trade-lawmaking arrangements during this period were simple. The State Department was the lead agency acting under the President’s direction for international delegations pursuant to the congressional delegation.<sup>90</sup> Decision making occurred through a hierarchical, vertical construct

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<sup>83</sup> Stephen D. Cohen, *The Making of United States International Economic Policy: Principles, Problems, and Proposals for Reform* 17 (5th ed. 2000). One can speculate if this was due to capture or for some other reason. Compare to the experience in interstate commerce or public utilities.

<sup>84</sup> Fordney-McCumber Act of 1922, Pub. L. No. 67-318, ch. 356, § 315, 42 Stat. 858, 941–43.

<sup>85</sup> Tarullo, *supra* note 81, at 319 (noting that it was structured to be scientific).

<sup>86</sup> *Id.* at 313.

<sup>87</sup> From 1922 to 1929, more than 600 petitions covering 375 commodities were filed with the Commission and only 47 investigations covering 55 commodities were completed. U.S. Tariff Comm’n, *Thirteenth Annual Report* 10 (1929).

<sup>88</sup> Lake, *supra* note 74, at 196.

<sup>89</sup> Tarullo, *supra* note 81, at 350–51.

<sup>90</sup> *Id.*; see also *Extension of the Reciprocal Trade Agreements Act: Hearings on H.J. Res. 407 Before the H. Comm. on Ways & Means, 76th Cong. 491–500 (1940)* (statement of A. Manuel Fox, Member, U.S. Tariff Comm’n) (describing the State Department’s role in overseeing the Tariff Commission and its procedures for cooperation with other agencies); Grace Beckett, *The Reciprocal Trade Agreements Program* 18 (1941) (describing the State Department’s role in initiating new trade agreements with countries).



through which the President would engage with the State Department and the State Department would coordinate a small number of interagency committees in furtherance of our trade policy.<sup>91</sup> The President's authorizations were specific and concrete such that, as agent, he "could exercise no discretion by which he might vary the will of the legislative body."<sup>92</sup> Meanwhile, the Tariff Commission provided information to Congress for tariff adjustments, and the Bureau of Customs executed those tariff rates at the ports.

This push toward the executive unsurprisingly enhanced the trade authorities and the legitimacy of their exercise across the branch. The expansive institutionalization contributed to a further transformation in governance. By the second half of the twentieth century, the principal-agent period had given way to a new period: a managerial one.

## II. OUR MANAGERIAL TRADE ADMINISTRATION

This Part does the institutional mapping of the present configuration of trade administration, what I call "managerialism" in today's robust trade administrative state. It does so in some detail for the primary reason that this work has not been done before. Legal scholars have neglected these activities even as vigorous legal bars have grown to address them. A second reason for undertaking this original study is that, while a lot of what happens in the rest of the regulatory state is written down and therefore easily studied, in trade, little is written, and therefore a detailed qualitative and empirical approach is necessary.

I begin by providing a positive theory for our managerial moment, arguing that managerial trade administration has emerged as a result of both market and legislative forces. Working through these causes helps lay the groundwork for the present institutional features. First, I analyze the growth of the trade law manager: a central agency with "superpowers," the Office of the United States Trade Representative ("USTR"). Next, I maintain that USTR, distinct from Congress or the President, manages and operates trade lawmaking in its broadest form through a handful of unseen but pervasive operational controls.<sup>93</sup>

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<sup>91</sup> The State Department ran the Committee for Reciprocity Information, for one. U.S. Dep't of State, 41 Dep't of State Bull. No. 1,054, at 354–55 (Sept. 7, 1959).

<sup>92</sup> *William A. Foster & Co. v. United States*, 20 C.C.P.A. 15, 22 (1932).

<sup>93</sup> The idea of identifying managers in the law is not new either in the domestic or international context. I adopt the term here as a further extension and new application of the concept—one that I believe more aptly captures what is happening in trade. I do not

Consequently, the management function of USTR serves as a type of administrative constraint—and one that goes above and beyond traditional *political* concerns that may be raised in the interagency review process to incorporate also *legal* considerations.

Managerial trade administration is characterized by distinct features as compared to prior periods—and it is about far more than just the presence of USTR as practical and normative manager. The label captures a set of relationships within the executive branch in which multiple agencies are engaged in trade lawmaking through rulemaking, monitoring, adjudication, and enforcement. Managerial administration moves beyond the simplistic bimodal or trimodal models of agency and trusteeship in recognition of expanding regime complexity with the emergence of polycentric and sometimes rivalrous nodes of authority and Congress largely fading from the picture. Much, but not all, of that is centrally coordinated and most of that likewise involves agencies working directly with foreign counterparts. As will become clear, this activity is carried out largely without traditional administrative review mechanisms. It is an administrative system of governance unlike anything that came before it and distinct from what occurs in other areas of law.

### *A. Positive Theories*

#### *1. Tradification*

By the middle of the twentieth century, the agency model, with its narrow and limited delegated activities, no longer sufficed for the development of a coherent and consistent trade policy. Trade claimed relevance in regulation by way of a growing free trade norm and served as a vehicle for achieving multinational regulatory goals. These symbiotic trends, what I call “tradification,” forced a transformation away from

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subsequently adopt all the same consequences that prior commentators have identified in their spaces, but I draw on them for inspiration. For other iterations, see, e.g., Bijal Shah, *Congress’s Agency Coordination*, 103 *Minn. L. Rev.* 1961, 2058 (2019) (referring to the President as a manager of the executive branch); Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 3 (1995) (examining international law compliance through a managerial model); Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374, 378 (1982) (referring to judges as managers of their cases).

agency to a new governance model.<sup>94</sup> Developments in the global economy, advances in technology, as well as government attempts to bolster free trade were the primary push factors toward this new model, but they would later be supplemented by an internally expansive regulatory system within the United States.

First, international trade negotiations in the 1960s and 1970s shifted attention from the reduction of traditional tariff barriers to the elimination of “non-tariff barriers” to trade such as licensing requirements, health and safety regulations, and other administrative measures that could be considered discriminatory to foreign business. Consequently, the move toward free trade at the international level required that the major economies in the multilateral conversation would take steps to harmonize such rules or otherwise commit to avoiding unfair treatment in those additional areas—many of which had a direct impact on domestic rulemaking. Take, for example, food safety and labeling. Once an issue of solely domestic concern, today food safety and food labeling matters are regulated through the rules agreed within the World Trade Organization (“WTO”) and other international organizations.<sup>95</sup> Comprehensive international rules govern what the U.S. Food and Drug Administration can do in this respect should it wish to be consistent with those rules.<sup>96</sup> Falling outside them could mean the measure would be subject to a challenge under the WTO dispute settlement system.<sup>97</sup> This codification change enhanced trade’s trans-substantivity and demanded engagement across the administrative state.

Expanding markets and the proliferation of cross-border supply chains through globalizing trends forced a dramatic change to the idea and practice of trade law during this same time frame. Taken together, it became clear to some lawmakers that the State Department was no longer equipped for the regulatory monitoring and implementation that would be required in this new era. Domestic rules were needed to police these new global trade flows just as those rules were also the subject of foreign

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<sup>94</sup> Jeff Dunoff identified some of the same trends as they began. Jeffrey L. Dunoff, “Trade and”: Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications, 17 *Nw. J. Int’l L. & Bus.* 759, 760 (1997).

<sup>95</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 14, 1994, 1867 U.N.T.S. 154, [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) [<https://perma.cc/MG9R-CTQK>].

<sup>96</sup> *Id.*

<sup>97</sup> Dispute Settlement, WTO, [https://www.wto.org/English/tratop\\_e-/dispu\\_e/dispu\\_e.htm](https://www.wto.org/English/tratop_e-/dispu_e/dispu_e.htm) [<https://perma.cc/7U6A-4T76>].

negotiations. The market and the multilateral negotiations on non-tariff barriers pushed trade into the far reaches of our administrative state.

With such spacious contours, it is difficult today to determine what is counted in or counted out of “trade law.”<sup>98</sup> Trade law suffers from a boundary problem: not knowing where it starts and finishes, and unable to contain all that may fall within its scope.<sup>99</sup> It encompasses tools that include traditional border measures, like tariffs, but it also involves regulatory measures that in prior decades would not be considered to fall under the trade umbrella at all. It covers private rights of action as much as it governs state action.

A corollary of this expansion and the capaciousness of “trade” is that areas of policy that were once siloed (or that did not exist) became part of trade policy making because they have a transnational and economic aspect to them. For instance, in 2001, USTR created an office for labor issues.<sup>100</sup> Rather than rely on the Department of Labor to advise it on trade-related labor matters, it incorporated that expertise into its office around the same time that labor provisions became a permanent fixture in trade agreements.<sup>101</sup> In this way, tradification has had a mutually reinforcing effect: as states have expanded the list of topics falling under trade’s harmonization and rulemaking across borders, they have made more of their own rulemaking subject to international rules. Tradification ushered in a new form of governance as the law became both a policy task and a policy limit across many agencies.

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<sup>98</sup> See, e.g., Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 *UCLA J. Int’l L. & Foreign Affs.* 209, 211–12, 221–38 (2011) (providing an overview of the expansion of trade agreements).

<sup>99</sup> This “problem” could be considered a feature more than a bug by those that use trade law to regulate and enforce international commitments in newfound areas. I have explored this double-edged sword in other work. See Kathleen Claussen, *Our Trade Law System*, 73 *Vand. L. Rev. En Banc* 195, 198–201 (2020).

<sup>100</sup> 146 *Cong. Rec.* 6,805–06 (2000).

<sup>101</sup> *Id.* at 6,806. Most of USTR’s offices were established this way. Only three are mentioned in statute: two in “sense of Congress” statements and one referring to the responsibilities of the Assistant United States Trade Representative for Industry and Telecommunications (a role that no longer exists as such). 19 U.S.C. §§ 3724, 4208, 3812. For example, the Trade and Development Act of 2000 included a “sense of Congress” statement, making note of the importance of having an Assistant United States Trade Representative for African Affairs. Pub. L. No. 106-200, § 117, 114 Stat. 251, 267 (2000) (codified at 19 U.S.C. § 3724). More recently, Congress has created specific positions at the ambassador rank such as the Chief Agricultural Negotiator, Chief Innovation and Intellectual Property Negotiator, and Chief Transparency Officer. *Id.* at 293.

Market transformations have likewise favored a larger trade administrative state with increased complexity to the global marketplace. One can see this change in Trade Promotion Authority (“TPA”) legislation where Congress lays out the subject areas that any free trade agreement should cover. The 2015 TPA legislation, for example, covers 21 issue areas in the negotiating objectives ranging from “trade in goods” to “anti-corruption.”<sup>102</sup> By one count, there are today 500 customs-related laws that are administered by 47 agencies.<sup>103</sup>

As the concept of what constituted trade law expanded, so did the trade law bureaucracy. As a statutory matter, both Commerce and Treasury are tasked with major international economic policy making and execution.<sup>104</sup> Customs and Border Protection (“CBP”) continues its historical role of implementing policies put in place by Congress and the other agencies of the executive branch and likewise counseling to advise them in their work. In the 2015 Trade Facilitation Act alone, Congress issued CBP 100 different mandates.<sup>105</sup>

In addition to these “traditional” trade players, other major departments play important roles in trade law and policy development and execution. For example, most agricultural trade policy originates with the USDA.<sup>106</sup>

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<sup>102</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 102, 129 Stat. 320 (codified at 19 U.S.C. § 4201). USTR likewise indicates that it is monitoring agreements for compliance in topics as diverse as financial services and tomato paste. See, e.g., Off. of the U.S. Trade Representative, 2020 Trade Policy Agenda and 2019 Annual Report 8, 165 (2020) [hereinafter 2019 Annual Report], [https://ustr.gov/sites/default/files/2020\\_Trade\\_Policy\\_Agenda\\_and\\_2019\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Trade_Policy_Agenda_and_2019_Annual_Report.pdf) [<https://perma.cc/GKT7-4M3E>].

<sup>103</sup> Authorizing Customs and Border Protection and Immigration and Customs Enforcement: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec., 113th Cong. 18 (2014) (statement of Kevin K. McAleenan, Acting Deputy Comm’r, U.S. Customs & Border Prot.). At least seventeen agencies, engaged in some exercise of trade policy making, regularly conduct U.S. trade and international economic functions under various statutory and administrative authorities. U.S. Gen. Acct. Off., GAO-00-76, Strategy Needed to Better Monitor and Enforce Trade Agreements 4 (2000) [hereinafter GAO-00-76].

<sup>104</sup> For example, the Commerce Department facilitates the trade remedies program as set out in 19 U.S.C. chapter 4. See 19 U.S.C. § 1339. The Treasury also engages in major economic regulation through engagement in international affairs. See David Zaring, Administration by Treasury, 95 Minn. L. Rev. 187, 212–13 (2010).

<sup>105</sup> See generally Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016) (scattered sections).

<sup>106</sup> See generally U.S. Dep’t of Agric., Trade Policies and Procedures, <https://www.usda.gov/topics/trade/trade-policies-and-procedures> (providing an overview of the various trade programs that the USDA has in place for “commodities and agricultural products”) [<https://perma.cc/P9JQ-HKHX>] (last visited Jan. 30, 2021).

Health and Human Services and the Department of Labor each maintain a trade role: the former primarily through the Food and Drug Administration and the latter by monitoring compliance with the labor chapters of U.S. trade agreements, tracking eligibility for certain trade preferences, and administering the Trade Adjustment Assistance program for workers.<sup>107</sup> Looking even deeper, we can identify foreign commerce regulation in the Department of the Interior, Department of Defense, Department of Energy, and still other agencies.<sup>108</sup> And, the State Department still oversees U.S. trade and economic relationships through its bureaus and embassies, and through the negotiation of bilateral investment treaties.<sup>109</sup>

The ITC's tasks have continued to expand likewise in several areas of our trade law. Today, the ITC investigates injuries caused by dumping, subsidies, import surges, as well as alleged infringement of U.S. intellectual property rights. Its work is partly judicial, partly prescriptive, and partly administrative.<sup>110</sup>

The modern trade administrative state also incorporates some statutory inter-agency mechanisms, including for engagement with the private sector. On the private side, the high-level President's Advisory Committee for Trade Policy and Negotiations examines U.S. trade policy and agreements for the overall national interest.<sup>111</sup> Members represent key sectors. Additional policy advisory committees comprising roughly 700 members and covering areas such as agriculture, labor, and environment

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<sup>107</sup> See Shayerah I. Akhtar, Cong. Rsch. Serv., IF11016, U.S. Trade Policy Functions: Who Does What? (2020). We could add more to this executive trade landscape such as the Export-Import Bank, which “finances and insures U.S. exports of goods and services”; the Small Business Administration, which administers grants in support of trade; or the agencies that support trade capacity building or that promote economic growth in developing countries, such as United States Agency for International Development, United States International Development Finance Corporation, and the Trade and Development Agency. See *id.*

<sup>108</sup> See Thomas R. Graham, *The Reorganization of Trade Policymaking: Prospects and Problems*, 13 *Cornell Int'l L.J.* 221, 228 & n.38 (1980). Even the Federal Emergency Management Agency took on new trade tasks during the COVID-19 pandemic. See *Export Allocation Rule on Medical Supplies and Equipment for COVID-19*, FEMA, <https://www.fema.gov/fact-sheet/fema-implementation-allocation-order-exports-scarce-ppe-and-notice-exemptions> [<https://perma.cc/R5ER-YZ8S>] (last visited Jan. 30, 2021).

<sup>109</sup> Cohen, *supra* note 83, at 46 (discussing the “crowding out” of the State Department).

<sup>110</sup> See *About the USITC*, U.S. Int'l Trade Comm'n, [https://www.usitc.gov/press\\_room/about\\_usitc.htm](https://www.usitc.gov/press_room/about_usitc.htm) [<https://perma.cc/8EPB-7FY7>] (last visited Jan. 30, 2021).

<sup>111</sup> *Off. of the U.S. Trade Representative, Charter of the Advisory Committee for Trade Policy and Negotiations* (2018), <https://ustr.gov/sites/default/files/files/about/ACTPN%20Charter%202018-2022%20USTR.pdf> [<https://perma.cc/YR5J-X5FK>].

examine issues from their respective specific policy lenses.<sup>112</sup> These coordinated mechanisms are among the many ways that the several agencies involved in trade lawmaking receive input from the private sector.

This statutory and institutional portrait of the trade administrative state, as scattered and obscured as it is, is still incomplete. For one, codified organizational provisions only give us the top layer. They fail to portray the important work that occurs among civil servants in their quotidian encounters.<sup>113</sup> Among each other, they are advocates for their subject area, interlocutors on matters of law and policy, agenda setters, and gatekeepers for issues and enforcement.<sup>114</sup> Neither does the overview capture precisely the work in which these agencies engage and particularly their trade-lawmaking activities.<sup>115</sup> Multiple agencies reinforce and make trade law in their outreach to foreign governments and their transnational regulatory counterparts. They work in three dimensions—horizontal, vertical, and diagonal. Horizontally, agencies collaborate with others in the executive branch to develop trade law rules. Vertically, executive agencies engage with the White House and with Congress in the development of policy objectives or manipulate those same hierarchies to shield their regulatory activities from these elected officials. Diagonally, the actors in the trade administrative state work directly with foreign governments and private actors in these same rule-writing, -monitoring, and -enforcing operations.

For another, the structural topography does not reflect how the system that has developed is kept in check. Rather than be subject to traditional administrative law disciplines, the trade-lawmaking activities of these agencies are subject to little to no review in terms of public input. The precise situation varies depending on the agency or the activity, but often there is limited notice and comment, limited judicial review, and limited

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<sup>112</sup> Off. of the U.S. Trade Representative, Advisory Committees, <https://ustr.gov/about-us/advisory-committees> [<https://perma.cc/24US-G53A>] (last visited Jan. 30, 2021).

<sup>113</sup> Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 Harv. L. Rev. 546, 595–96 (1987) (noting that lower-level committees composed chiefly of civil servants develop information).

<sup>114</sup> *Id.*

<sup>115</sup> See Kathleen Claussen, *Trade Executive Agreements 10–14* (unpublished manuscript) (on file with the author) [hereinafter Claussen, *Trade Executive Agreements*] (describing a category of trade lawmaking—trade executive agreements—that is a mix of free trade agreements, solo executive agreements, and rules issued by agencies, has largely grown out of recent practice, and is thus understudied).

checks for arbitrary or capricious decision making. As will be shown below, trade lawmaking is administered through a separate and distinct control system.

It is impossible to fully and appropriately capture all that the present tradified landscape entails. At a minimum, this brief overview reveals a dispersed authority across many agencies. All of this must be funneled into a coherent policy. Thus, most important to this story is that at least one agency, USTR, coordinates this work.

## 2. *The Rise of a Trade Super-Agency*

Congress directed the President to appoint a Special Representative for Trade Negotiations in 1962<sup>116</sup> to balance the competing interests between U.S. domestic and foreign policy among the range of trade-related agencies and the many domestic stakeholders as tradification proliferated.<sup>117</sup> Legislators at the time called the role, which would later become the USTR, a necessary “focal point” for coordinating trade policy.<sup>118</sup> The following year, President Kennedy created in the Executive Office of the President what was intended to be the “interagency organization” set out in the statute.<sup>119</sup> At its head, the position of USTR would be appointed “by and with the advice and consent of the Senate” with the “rank of ambassador extraordinary and plenipotentiary.”<sup>120</sup>

USTR’s original role was modest. First and foremost, it was the “chief representative” of the United States in trade negotiations.<sup>121</sup> Further, the 1962 Act required the USTR to “seek information and advice with respect to each negotiation from representatives of industry, agriculture, and labor, and from such agencies as he deems appropriate.”<sup>122</sup> To support the new position, President Kennedy created an office for the USTR in the

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<sup>116</sup> Trade Expansion Act of 1962, Pub. L. No. 87-794, § 241, 76 Stat. 872, 878 (codified as amended at 19 U.S.C. § 1801).

<sup>117</sup> Graham, *supra* note 108, at 224–25 (describing the role of the trade representative in the early years of the position); H.R. Rep. No. 93-571, at 40 (1973) (“[T]he position was created to provide both better focus and centralized direction for treating trade negotiations and trade problems from an overall commercial point of view—and to downplay the strictly foreign policy orientation . . . of the Department of State.”).

<sup>118</sup> H.R. Rep. No. 93-571, at 40 (1973) (declaring that the USTR was created “with the implicit intention of providing the Congress with a focal point in the executive branch”).

<sup>119</sup> Exec. Order No. 11,075, 3 C.F.R. 692–96 (1963); Trade Expansion Act § 242.

<sup>120</sup> Trade Expansion Act § 241(a).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* § 241(b), 76 Stat. at 878.



Executive Office of the President—the administrative body that houses the White House Office, the National Security Council, the OMB, among other small agencies.<sup>123</sup>

In the first decade, the Special Trade Representative and his two deputies principally represented the United States in the multilateral trade negotiations taking place at that time.<sup>124</sup> The Office had 28 employees from 1964 to 1969<sup>125</sup> and worked closely with other agencies in the government to acquire the requisite expertise for this purpose. That would change over time as USTR grew and expanded its expertise in both regional issues, specific subject issues, and legal affairs. By 1980, the Office employed 113 staff.<sup>126</sup> By 1997, there were 164 USTR staff members.<sup>127</sup> Today, there are roughly 250.<sup>128</sup>

The Trade Act of 1974 changed the trade-lawmaking landscape in two significant respects. First, it created a process for Congress to approve trade agreements known as “fast-track” or, today, as Trade Promotion Authority (“TPA”).<sup>129</sup> At the center of this process is the USTR acting on the President’s behalf to negotiate trade agreements with U.S. partners. Second, and relatedly, the 1974 Act expanded the USTR’s role substantially. The Act set out that the USTR shall:

(A) be the chief representative of the United States for each trade negotiation under this title or section 301; (B) . . . be responsible to the President and the Congress for the administration of trade agreements programs under [various Acts]; (C) advise the President and Congress with respect to nontariff barriers to international trade, international commodity agreements, and other matters which are related to the trade agreements programs; (D) be responsible for making reports to Congress with respect to [the above]; (E) be chairman of the

<sup>123</sup> History of the United States Trade Representative, Off. of the U.S. Trade Representative, <https://ustr.gov/about-us/history> [<https://perma.cc/3YYL-DX6B>] (last visited Apr. 19, 2021).

<sup>124</sup> *Id.*

<sup>125</sup> Fred O. Boadu & Jie Shen, An Empirical Analysis of the Growth and Autonomy of the Office of the United States Trade Representative, 6 *Currents: Int’l Trade L.J.* 3, 9 (1997).

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

<sup>127</sup> *Id.*

<sup>128</sup> See Exec. Off. of the President, Office of the United States Trade Representative: Fiscal Year Budget 2021, at 6 (2020), <https://ustr.gov/sites/default/files/foia-/USTR%20FY%202021%20Congressional%20Budget%20Submission.pdf> [<https://perma.cc/KGP6-LT4T>].

<sup>129</sup> In a recent symposium, I summarized the historical and legal foundations for fast-track. Kathleen Claussen, Trading Spaces: The Changing Role of the Executive in U.S. Trade Lawmaking, 24 *Ind. J. Glob. Legal Stud.* 345, 351–52, 351 n.18 (2017).

interagency trade organization . . . ; and (F) be responsible for such other functions as the President may direct.<sup>130</sup>

Nevertheless, these extensive responsibilities did not do enough in the eyes of Congress or the private sector to effectively coordinate the executive-trade machinery. By early 1978, conversation began in Congress about creating a new trade department or again altering the division of responsibility among existing departments.<sup>131</sup> Ultimately, lawmakers settled on a minimalist approach in the subsequent Reorganization Plan of 1979, proposed by the Carter Administration.<sup>132</sup> In that Reorganization Plan, the President concentrated nearly all the trade responsibilities within USTR and Commerce. Commerce largely had the role of administering and operating existing trade remedies programs such as those available through anti-dumping and countervailing duty laws. The Reorganization tasked the USTR with primary responsibility for “developing, and for coordinating the implementation of, United States international trade policy, including commodity matters and, to the extent they are related to international trade policy, direct investment

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<sup>130</sup> Trade Act of 1974, Pub. L. No. 93-618, § 141, 88 Stat. 1978, 1999 (codified as amended at 19 U.S.C. § 2171). These moves reflected a congressional interest in enhancing executive authority while also maintaining control on the executive’s work in the trade space: “We have also endeavored to articulate an appropriate cooperative role for the Congress and the executive branch in an effort to come to grips with these very complex problems and issues in which delegation of congressional authority is needed.” H.R. Rep. No. 93-571, at 15 (1973); see also Claussen, *Trading Spaces*, *supra* note 129, at 350–54 (providing an overview of the balancing of the trade-policy roles and responsibilities that Congress and the executive branch hold); 15 C.F.R. § 2001.3 (2020) (establishing that the U.S. Trade Representative reports to and is responsible to both the executive branch and Congress).

<sup>131</sup> See, e.g., *To Create a Department of International Trade and Investment: Hearing on S. 1990 Before the S. Comm. on Governmental Affs.*, 95th Cong. 1 (1978) (statement of Sen. William V. Roth, Member, Comm. on Governmental Affs.); *Reorganizing the Government’s International Trade and Investment Functions: Hearing on S. 377, S. 891, S. 937, S. 1471, and S. 1493 Before the S. Comm. on Governmental Affs.*, 96th Cong. 2, 44, 47 (1979) (statements of Sen. Robert C. Byrd and Adlai E. Stevenson); *Proposed Foreign Trade Reorganization: Hearings Before a Subcomm. of the H. Comm. on Gov’t Operations*, 96th Cong. 2–4 (1979) (statement of Rep. Frank Horton); *Federal Government International Trade Function Reorganization: Hearings Before the Subcomm. on Trade of H. Comm. on Ways & Means*, 96th Cong. 114–16 (1979) (statement of William N. Walker, Vice Chairman, Com. Pol’y Comm., U.S. Council of the Int’l Chamber of Com.); *International Trade and Investment Reorganization Act*, H.R. 3859, 96th Cong. § 2(b) (1979).

<sup>132</sup> Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (proposed Sept. 25, 1979); see Graham, *supra* note 108, at 222 & n.5 (1980) (discussing inter-branch communications on reorganization).

matters.”<sup>133</sup> Under this arrangement, USTR had the lead in overseeing policy supervision and coordination. The Reorganization also replaced the interagency trade group known as the Trade Agreements Committee with the Trade Policy Committee: a cabinet-level interagency committee that would advise USTR.<sup>134</sup> The 1979 Trade Act likewise granted the USTR increased responsibility, made the USTR an indispensable actor on more trade activities by requiring other secretaries work with the USTR, and created additional various duties to report and consult to Congress.<sup>135</sup>

The Omnibus Trade and Competitiveness Act of 1988 further elevated USTR’s role to coordinate trade policy, to serve as the President’s principal trade advisor and trade “spokesman,” and to lead U.S. international trade negotiations.<sup>136</sup> Whereas the 1974 Act mentions the USTR 49 times in a collection of provisions that include some mandates, some inputs, and some discretionary engagement, by 1988, USTR is mentioned 265 times, including in a “sense of Congress” statement that made clear its importance.<sup>137</sup> The 1988 Act also continued a pattern of moving presidential delegations to the USTR, among other tasks.<sup>138</sup>

As these statutes and the preceding tradification story begin to reveal, USTR has grown into a managerial role—supervising and coordinating trade lawmaking—as the result of a confluence of mutually reinforcing factors. In addition to the congressional delegations and organic need for greater coordination and trade expanded, the President regularly has subdelegated and continues to subdelegate his delegated authorities to the USTR. These subdelegations make up much of USTR’s authority.<sup>139</sup> The

<sup>133</sup> Reorganization Plan No. 3 of 1979, § 1(b), 44 Fed. Reg. 69,273 (proposed Sept. 25, 1979).

<sup>134</sup> Shayerah Ilias, Cong. Rsch. Serv., R42555, *Trade Reorganization: Overview and Issues for Congress 11* (2012).

<sup>135</sup> Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 411, 413, 93 Stat. 144, 243–44 (codified as amended at 19 U.S.C. §§ 2541, 2543).

<sup>136</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1601(a)(1), 102 Stat. 1107, 1260 (codified as amended at 19 U.S.C. § 2171(c)).

<sup>137</sup> See *id.* § 1601(a)(2), 102 Stat. at 1261.

<sup>138</sup> See, e.g., *id.* § 1301(a), 102 Stat. at 1164 (granting the USTR authority to respond to the denial or violation of U.S. trade rights under any trade agreement, subject only to any “specific direction” from the President).

<sup>139</sup> See, e.g., Memorandum, 70 Fed. Reg. 43,251 (July 21, 2005) (delegating authority under Section 337 of the Tariff Act of 1930); Proclamation 6,942, 61 Fed. Reg. 54,719 (Oct. 17, 1996) (delegating authority related to the Generalized System of Preferences); Exec. Order No. 12,964, 60 Fed. Reg. 33,095 (June 21, 1995) (stating that the USTR shall perform the functions of the President under the Federal Advisory Committee Act); Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988) (delegating the authority of the President to the

President has also used his delegated authority to create new trade-related bodies.<sup>140</sup> Both Congress and the President could justify giving more power to USTR because each saw USTR as its own.<sup>141</sup>

Further, in response to audits of USTR's work, USTR itself has taken efforts to grow and specialize in various respects. It developed functional and regional offices such that it no longer needed to rely on other agencies for subject-matter expertise. Instead, it brought that expertise in-house.<sup>142</sup> Today, USTR resembles a mini-government in its internal structure with both country-specific offices and policy offices that specialize in all the substantive areas relevant to trade. That organizational structure was not mandated by statute.<sup>143</sup>

Over its 50 years, USTR changed from acting as a coordinator and lead agency in the area of trade agreements to serving as a manager of foreign commerce law and policy for the United States. Although the language in the legislation and in congressional records suggests that Congress is managing U.S. trade lawmaking, in practice that is not the case.<sup>144</sup> The next Section illustrates the breadth and importance of USTR's present operational controls that make it a powerful manager. Many of the managerial functions have developed apart from any written statute or regulation. They are informal but have legal force.

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USTR under the 1988 Act). This is especially true up until the early 2000s when USTR grew in influence and size. Many statutory delegations to USTR come from statutes enacted in the last 30 years. See, e.g., Uruguay Round Agreements Act, Pub. L. No. 103-465, § 122(b), 108 Stat. 4809, 4829 (Dec. 8, 1994) (codified at 19 U.S.C. § 3532) (specifying that the USTR has lead responsibility on matters related to the World Trade Organization).

<sup>140</sup> See, e.g., Exec. Order No. 12,964, 60 Fed. Reg. at 33,095 (creating a Commission on United States-Pacific Trade and Investment Policy); Exec. Order No. 12,870, 58 Fed. Reg. 51,753 (Sept. 30, 1993) (creating the Trade Promotion Coordinating Committee); Exec. Order No. 12,905, 59 Fed. Reg. 14,733 (Mar. 25, 1994) (creating the Trade and Environment Policy Advisory Committee within the Office of the United States Trade Representative).

<sup>141</sup> This arrangement was part of the point of creating the USTR in the first place: to take this power away from Congress where interest groups dominated.

<sup>142</sup> See, e.g., USTR Announces New Office to Monitor China Deal's Implementation, Handle Disputes, Inside U.S. Trade (Feb. 14, 2020), <https://insidetrade.com/trade/ustr-announces-new-office-monitor-china-deals-implementation-handle-disputes> [<https://perma.cc/AU6J-955Q>].

<sup>143</sup> Cf. 15 C.F.R. § 2001.2 (1975) (establishing the Office as consisting of the United States Trade Representative and two Deputy Trade Representatives).

<sup>144</sup> H.R. Rep. No. 93-571, at 40-41 (1973) (noting that there has not been enough coordination with Congress from 1962 to 1973 and expecting that the USTR would be "speaking for the United States and the Congress in the forthcoming multilateral trade negotiations").

*B. Managerial Controls*

As compared to prior eras of trade administration in which the State Department acted pursuant to a presidential direction, or the President himself made a determination within the confines of a congressional delegation, our present managerial era involves a qualitative distinction in form. USTR has come to manage nearly all aspects of trade lawmaking, just as the definition of “trade” itself has grown. Unlike other agencies, however, USTR’s mandates are scattered across many different areas of law.<sup>145</sup> And also unlike other agencies, USTR is not clearly subject to the same administrative review despite engaging in admin-style lawmaking.

The early idea that USTR simply would represent the United States abroad, coordinate the interagency organization, and advise and report to both branches on trade matters was quickly displaced in practice.<sup>146</sup> In the managerial model, USTR controls the process and has a strong hand in the outcome. It operationalizes this control through at least three mechanisms: rulemaking and overseeing rulemaking, adjudicating and enforcing, and monitoring both domestic agencies and foreign partners.

First, USTR controls trade lawmaking by writing rules, but its rulemaking exercises differ from those of other agencies. To illustrate just how different USTR is from other agencies, I conducted a search in the Federal Register of its notices and proposed and issued rules from 1995 to 2019. During that period, USTR issued only 17 rules, 8 proposed rules (since 1998 they are all related to the Freedom of Information Act), and 1,603 notices.<sup>147</sup> To put these in perspective, just taking notices alone in this same time period, the EPA has issued roughly 51,000 notices, the USDA roughly 32,000, and the FDA roughly 19,000. Nevertheless, USTR regularly engages in at least two types of what I call “rulemaking”: first, pursuant to authorities delegated by Congress, USTR determines tariff rates and other import or export rules, and second, USTR negotiates binding rules in agreements with foreign counterparts.

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<sup>145</sup> For a sampling of relevant statutes, see Staff of H.R. Comm. on Ways & Means, 113th Cong., *Compilation of U.S. Trade Statutes*, at v–xi (Comm. Print 2013).

<sup>146</sup> Trade Act of 1974, Pub. L. No. 93-618, § 141(c), 88 Stat. 1978, 1999.

<sup>147</sup> Nor is USTR subject to the levels of litigation that other agencies are subject to as discussed in Parts III and IV, but it does hold hearings on some of its investigations. By comparison, CBP has issued 289 rules, 91 proposed rules, and 2,673 notices since it was created in 2003; the ITC issued 44 rules, 30 proposed rules, and 8,194 notices in the same period (1995–2019); the ITA issued 72 rules, 57 proposed rules, and 18,937 notices in the same period.

With respect to its first type of “rulemaking,” USTR has the power to carry out an investigation and then implement restrictions or tariffs. It may conduct a public hearing and issue notice, but it does not follow typical administrative processes in doing so. Take Section 301 of the Trade Act of 1974, for example.<sup>148</sup> Under this statute, the USTR is tasked with determining whether an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts U.S. commerce.<sup>149</sup> When USTR makes such a determination, USTR may impose restrictions on trade in goods from that country or enter into an agreement that would put an end to the act, policy, or practice.<sup>150</sup> It may take steps to impose a rule on private entities about market access or import taxes. Moreover, the agency can decide the content of those rules—the level, scope, and breadth of the regulation.<sup>151</sup> The statute does not refer to the APA, and USTR typically has not used ordinary notice and comment rulemaking for this purpose.<sup>152</sup> Nevertheless, the outcome is the same: USTR can restrict activities by private parties with the force of law.<sup>153</sup>

USTR also determines and applies provisions to exempt certain private actors from those restrictions.<sup>154</sup> Recently, as it has employed increasingly

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<sup>148</sup> Trade Act 130§ 301 (codified as amended at 19 U.S.C. § 2411).

<sup>149</sup> 19 U.S.C. § 2411. See also Erwin P. Eichmann & Gary N. Horlick, *Political Questions in International Trade: Judicial Review of Section 301?*, 10 *Mich. J. Int'l L.* 735, 742 (1989) (explaining both the mandatory and discretionary actions that the USTR must take for violations of trade agreements or harm to U.S. commerce).

<sup>150</sup> Trade Act § 301(b) (codified as amended at 19 U.S.C. § 2411(b)). This authority was shifted to USTR and away from the President in the 1988 Act. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164 (codified as amended at 19 U.S.C. § 2411).

<sup>151</sup> Section 301 addresses the activities of U.S. firms abroad and interference by foreign governments to the detriment of U.S. firms. See Judith Hippler Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series #10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 *Int'l Law.* 211, 213–15 (1987).

<sup>152</sup> Whether USTR's imposition of tariffs under Section 301 is subject to the APA despite the statute's lack of a clear statement is under consideration at the CIT at the time of writing. *HMTX Indus. LLC v. United States*, No. 20-00177 (Ct. Int'l Trade filed Sept. 10, 2020). Section 301 sets out a process for USTR to reach its determination but whether that supersedes USTR's obligations under the APA and whether the application of Section 301 falls within the APA's foreign-affairs exception are live questions.

<sup>153</sup> To be sure, the statute does provide for a public hearing in certain circumstances. See, e.g., 19 U.S.C. §§ 2412(a)(4), 2414(b)(1)(A). But that is not always the case in USTR's actions nor does the statute set out procedures for how the public hearing is conducted. The statute provides a type of functional notice and comment.

<sup>154</sup> This has occurred most recently in USTR's exclusion process related to the Section 301 tariffs on products from China. See Gary Clyde Hufbauer & Zhiyao Lu, *The USTR Tariff*

more tariff authorities, the agency's quasi-adjudicatory, quasi-rulemaking authority on exemptions (known as "exclusions") has grown in parallel. In 2019 and 2020, it processed thousands of requests and engaged a collection of contractors to be able to do so.<sup>155</sup> Applying exclusions from these tariffs is yet another manifestation of this type of special rulemaking, even if not called such.

With respect to its second form of "rulemaking," USTR writes internationally and domestically enforceable laws in its negotiations with trading partners in the context of the WTO or in negotiating free trade agreements ("FTAs"). Operating under expansive strokes of authority delegated from Congress,<sup>156</sup> USTR approves the form and content of the obligations to which the U.S. government commits itself. But USTR also writes smaller "trade executive agreements" with trading partners and determines which countries and companies get access to special treatment.<sup>157</sup> FTAs are subject to ex post congressional review, but trade executive agreements are not.<sup>158</sup>

Importantly, these issues have taken on increased relevance since 2018 as the Trump administration has relied more heavily on both types of rulemaking.<sup>159</sup> These broad applications of statutory authorities—far exceeding their prior use—have called attention to those authorities' procedural omissions and limitations. Whether in the making of the rules or thereafter, traditional administrative law disciplines often do not

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Exclusion Process: Five Things to Know About These Opaque Handouts, Peterson Inst. for Int'l Econ. (Dec. 19, 2019), <https://www.piie.com/blogs/trade-and-investment-policy-watch/ustr-tariff-exclusion-process-five-things-know-about-these> [https://perma.cc/33N8-QJUZ].

<sup>155</sup> See, e.g., Isabelle Ico, White House Requests \$6 Million Boost for USTR in FY2021 Budget Proposal, *Inside U.S. Trade* (Feb. 11, 2020, 2:47 PM), <https://insidetrade.com/daily-news/white-house-requests-6-million-boost-ustr-fy2021-budget-proposal> [https://perma.cc/5B3R-MFFT].

<sup>156</sup> See, e.g., Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 103, 129 Stat. 320, 333 (codified as amended 19 USC § 4202).

<sup>157</sup> See, e.g., U.S.-Japan Trade Agreement Text, Off. of the U.S. Trade Representative, <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text> [https://perma.cc/2Q2E-ST6X] (last visited Apr. 19, 2021) ("eliminat[ing] or reduc[ing] tariffs on certain agricultural and industrial products"). The term "trade executive agreement" is mine and the subject of a separate project, a manuscript of which is on file with the author. See Claussen, *Trade Executive Agreements*, *supra* note 115, at 3.

<sup>158</sup> This is a matter of debate. See Claussen, *Trade Executive Agreements*, *supra* note 115, at 10–12.

<sup>159</sup> See Claussen, *Trade's Security Exceptionalism*, *supra* note 14, at 1149–51.

expressly apply to USTR or to other agencies with which USTR works on trade-related matters.<sup>160</sup> This lack of administrative oversight alters the incentives that trade-engaged agencies would otherwise face. In the absence of conventional checks, they do not face pressure to provide information *ex ante* in their rulemaking.<sup>161</sup> USTR's rule-writing control mechanism is strengthened by unparalleled latitude and secrecy through which USTR is able to work.<sup>162</sup>

Second, USTR controls trade lawmaking by monitoring. Its monitoring also takes two forms: external and internal. USTR monitors other countries' compliance with international trade rules and it monitors other U.S. agencies' activities to ensure compliance with U.S. international trade agreement obligations. The external monitoring role is straightforward. USTR investigates whether trading partners are engaged in behavior or governmental measures that are contrary to international rules.<sup>163</sup> In 2015, Congress codified the establishment of a monitoring and enforcement center within USTR to ensure effective support for this activity.<sup>164</sup>

More important is that USTR reviews U.S. agency draft rules that may have a connection with cross-border commerce before it is promulgated.<sup>165</sup> It advises agencies inwardly on their compliance with or

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<sup>160</sup> For some past relevant commentary insofar as international economic negotiations are concerned, see David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 *Wash. U. L. Rev.* 59, 84 (2013) (discussing how there is no role for the process requirements of the APA where agencies negotiate rules with foreign counterparts).

<sup>161</sup> *Id.* at 83 (commenting that the threat of judicial review may have led to an expansion in detail in administrative agencies' work).

<sup>162</sup> While administrative constraints need not be the only types of constraints on an agency, USTR also is subject to limited congressional or presidential oversight as I and others have noted in previous work. See, e.g., Koh, *supra* note 1, at 1204–06, 1213–14.

<sup>163</sup> Monitoring and Enforcement Actions, Off. of the U.S. Trade Representative, <https://ustr.gov/issue-areas/enforcement/monitoring-and-enforcement-actions> [<https://perma.cc/6ASE-SD2H>] (last visited Jan. 30, 2021).

<sup>164</sup> Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 604, 130 Stat. 122, 185–87 (codified at 19 U.S.C. § 2171(h)) (establishing the Interagency Center on Trade Implementation, Monitoring, and Enforcement).

<sup>165</sup> It does most of this work through the Trade Policy Staff Committee. See *Interagency Role*, Off. of the U.S. Trade Representative, <https://ustr.gov/about-us/interagency-role> [<https://perma.cc/27SR-KXSC>] (last visited Jan. 30, 2021) (noting that 20 agencies and offices participate under USTR's oversight, reviewing hundreds of lawmaking documents each year); see also Akhtar, *supra* note 107 (“Cabinet-level review on trade issues is through the Trade Policy Committee (TPC).”).



otherwise behavior consistent with trade norms.<sup>166</sup> In other words, USTR reviews internationally facing regulations, speeches, and draft legislation as part of its review process for not just trade-policy equities, but also trade law violations or ambiguities.<sup>167</sup>

As shown above, multiple agencies across the trade administrative state are involved in trade rulemaking, monitoring of foreign partners, and enforcement, although they may take different forms in each agency. In reviewing their work, USTR may effectively influence an agency to change a rule in a way that may seem inconsistent with substantive domestic law or administrative law procedures.<sup>168</sup> For example, when FDA makes a rule with foreign effect, like a foreign importer rule,<sup>169</sup> or when USDA makes organic regulations, typically USTR will note legal concerns through the Office of Information and Regulatory Affairs (“OIRA”) review process or directly and those concerns could prompt change or further intra-agency dialogue.<sup>170</sup>

Third, USTR makes trade law through its enforcement of commitments at the international level. USTR decides when to bring a case against another country and under what conditions. These cases or dispute settlement actions have occurred primarily at the WTO or under FTAs, but the Trump administration relied upon domestic authorities also to increase tariffs as a means of enforcing trade rules.<sup>171</sup> USTR may choose

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<sup>166</sup> As noted by a U.S. General Accounting Office (today called the Government Accountability Office, GAO) study, USTR is mandated to “identify[] compliance problems, set[] priorities, gather[] and analyze[] information, develop[] and implement[] responses, and tak[e] actions.” GAO-00-76, *supra* note 103, at 15–16.

<sup>167</sup> You can see this increase in the number of attorneys rather than economists. *Id.* at 18.

<sup>168</sup> Much of this work is done behind the scenes but occasionally USTR’s work with other agencies in their rulemaking may come out in litigation as the other agencies note their international trade law constraints. See, e.g., *Nat. Res. Def. Council, Inc. v. Dep’t of Agric.*, 613 F.3d 76, 85–86 (2d Cir. 2010) (in which the Animal and Plant Health Inspection Service of USDA contextualizes its rulemaking within international trade law); *Miss. Poultry Ass’n v. Madigan*, 992 F.2d 1365, 1362 (5th Cir. 1993), amended by, 9 F.3d 1113 (5th Cir. 1993), on reh’g, 31 F.3d 293 (5th Cir. 1994) (in which the Secretary of Agriculture’s interpretation of a standard was informed not just by the U.S. commitments under the World Trade Organization but also under free trade agreement rules); *Nat’l Coal Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 877 (D.C. Cir. 1987) (describing changes in the Environmental Protection Agency’s rulemaking in light of international trade concerns).

<sup>169</sup> See, e.g., *Foreign Supplier Verification Programs for Importers of Food for Humans and Animals*, 79 Fed. Reg. 58,574 (Sept. 29, 2014) (to be codified at 21 C.F.R. pt. 1).

<sup>170</sup> See Interview with USTR official (Nov. 10, 2020). This is one of several interviews and conversations carried out with USTR officials during research for this Article.

<sup>171</sup> See Claussen, *Trade’s Security Exceptionalism*, *supra* note 14, at 1107.

what cases to bring with political pressure and capacity limitations acting as weak constraints.

USTR is not the only agency that has a role in applying and enforcing U.S. trade law.<sup>172</sup> But USTR's piece is institutionally significant because it has a trickle-down effect on so many other agencies and serves as the last stop. Whatever USTR enforces with respect to trading partners abroad has implications for domestic enforcers. USTR can even direct appropriated funds,<sup>173</sup> and "draw upon the resources of" other agencies, with their approval, to do so.<sup>174</sup> The result is that other agencies, under USTR's oversight, both determine the content of our trade policy and implement it.<sup>175</sup>

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USTR's managerial functions have changed the shape of trade governance from prior eras. Whereas in the trusteeship and agency eras, trade governance was structured vertically both within and without the executive branch,<sup>176</sup> the present trade administrative state is flatter, with diagonal and round-about interactions.<sup>177</sup> The organizational chart for trade policy making shifted from vertical authority, streamlined within the State Department, to scattered lines of authority in horizontal or diagonal form.

Complicating matters further, all these actors engage both with foreign countries and private interest groups. Individual agencies work directly with their foreign counterparts, concluding legally binding agreements

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<sup>172</sup> Other enforcers of different aspects of trade law include CBP, Commerce, the ITC, and the Court of International Trade ("CIT").

<sup>173</sup> 19 U.S.C. § 2171(e).

<sup>174</sup> 19 U.S.C. § 2171(f).

<sup>175</sup> A 1934 congressional report described its intended delegation to the Executive as "Congress Determines the Policy—The President Executes." H.R. Rep. No. 73-1000, at 14 (1934). Little today in trade policy follows that heading, which epitomizes how trade governance worked in prior eras.

<sup>176</sup> See, e.g., Irwin, *Clashing Over Commerce*, *supra* note 47, at 435 fig.9.1.

<sup>177</sup> Not even the GAO has a clear organizational chart to capture this engagement. It has tried. Compare GAO-00-76, *supra* note 103, at 48–50 tbl.3 (table indexing lead responsible agencies with reporting mechanisms) with U.S. Gov't Accountability Off., GAO-06-167, *USTR Would Benefit from Greater Use of Strategic Human Capital Management Principles* 6 fig.1 (2000) (using a hierarchical chart to illustrate USTR organizational structure).

and setting up institutions to manage cross-border commerce.<sup>178</sup> In a self-perpetuating cycle, Congress now regularly mandates interagency committees given the increase in the number of agency stakeholders.<sup>179</sup> The institutional contours have become exceedingly complex.<sup>180</sup>

Taken together, this model of trade administration creates a special blend not accounted for in our executive governance models.<sup>181</sup> USTR handles, directs, governs, and controls trade policy in action or use. It combines a collection of authorities in both structure and substance: delegated statutory authority like agency heads, delegated authority directly from the President, and a coordinating function. That combination is distinct in the federal government.<sup>182</sup> Whereas, for example, CBP executes customs law mandates with virtually no policy-oriented discretion, USTR has both considerable discretion and leadership responsibilities—both *de facto* and *de jure*—consistent with common understanding of “management.” Through these tools, USTR can precipitate both major changes in economic priorities for the nation and seemingly small regulatory actions that have major impacts for particular industries. As the gatekeeper for trade law and policy, given the effects of tradification, this role extends far beyond major policies made by the White House—it extends to everyday rulemaking by dozens of agencies.

Seen in this light, and as a whole, USTR’s functions are special and underappreciated. The managerial trade administration model shifts the central locus of authority one level down from seeing the President as the

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<sup>178</sup> See, e.g., Bureau of Int’l Labor Affs., U.S. Dep’t of Labor, 15-2378-NAT, US and Honduras Sign Landmark Labor Rights Agreement (Dec. 9, 2015), <https://www.dol.gov/newsroom/releases/ilab/ilab20151209> [<https://perma.cc/GKE7-RGLQ>].

<sup>179</sup> See, e.g., United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113, §§ 202A(b), 711, 134 Stat. 11, 34, 81 (2020) (to be codified at 19 U.S.C. § 4532).

<sup>180</sup> Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil, in Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System* 113, 122 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (asserting that one needs a diagram to trace all the authorities of Section 301 that makes up an “intricate maze” with “extremely wide loopholes”). Again, some commentators may find this to be precisely what was intended as Congress built this system. The political economy literature has covered that territory well.

<sup>181</sup> It is perhaps closest to a blend between the White House Office of Legal Counsel and the Office of Management and Budget—just trade-specific.

<sup>182</sup> Cf. Pasachoff, *supra* note 7, at 2207–08 (describing how OMB controls policy making through its budget process in ways somewhat similar to USTR’s controls over trade-related policy making).

coordinator,<sup>183</sup> where the agency has different operational controls. Whereas the President can appoint and remove officials, and direct the actions of administrators through his advisors,<sup>184</sup> USTR has developed a different set of controls that directly and immediately has impacts on private actors and foreign governments. In so doing, it exhibits both executive and legislative functions. On the legislative side, USTR develops U.S. trade policy and can choose the entirety of its direction based on authorities delegated to it.<sup>185</sup> On the executive side, USTR conducts negotiations with other countries on topics related to international economic matters.<sup>186</sup> In neither structure nor content does trade lawmaking fit with other models of domestic or international lawmaking.

This is not to say that USTR controls every piece of U.S. trade policy; there is a small handful of areas where USTR has very limited influence.<sup>187</sup> Further, leadership in trade lawmaking has sometimes depended on personality.<sup>188</sup> The relative strength of USTR versus Commerce, Treasury, or individual members of the National Economic Council or National Security Council has reflected the strength of individual relationships with Congress or the White House. Given the wide scope of trade lawmaking across the regulatory state, this should come as no surprise. USTR's managerialism is necessarily incomplete as I discuss in the next Section.

### *C. Incomplete Modelling*

That USTR would become the trade law manager was not always foreseen. Congress rejected other options for managing the trade

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<sup>183</sup> See, e.g., Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 *Geo. Wash. L. Rev.* 533, 546–52 (1989); Charles F. Bingman, *The President as Manager of the Federal Government*, 35 *Proc. Acad. Pol. Sci.* 146, 147–49 (1985).

<sup>184</sup> Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 *U. Chi. L. Rev.* 1675, 1692 (2017).

<sup>185</sup> That is, USTR can choose to impose tariffs or it can negotiate free trade agreements. See Claussen, *Trade's Security Exceptionalism*, *supra* note 14, at 1163.

<sup>186</sup> See, e.g., Press Release, Off. of the U.S. Trade Representative, *United States and China Reach Phase One Trade Agreement* (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach> [<https://perma.cc/UAE2-DSTR>].

<sup>187</sup> See *infra* Section II.C.

<sup>188</sup> See, e.g., Sylvan Lane, *Five Key Players in Trump's Trade Battles*, *Hill* (Aug. 20, 2019, 6:00 AM), <https://thehill.com/policy/finance/trade/458016-five-key-players-in-trumps-trade-battles> [<https://perma.cc/Z379-HTY9>] (last visited Jan. 30, 2021).

administrative state over the years.<sup>189</sup> Nor is our trade-governance experiment over. Periodic proposals on trade reorganization, as well as newer debates over the balance of power on trade, have rekindled congressional interest in examining U.S. trade functions.<sup>190</sup> In fact, in nearly every administration, one finds proposals from both branches for reconsidering how we do trade policy.<sup>191</sup> Some of these past proposals may underestimate the myriad relationships now entrenched in the trade administrative state.<sup>192</sup>

Further, there are two areas of trade lawmaking that involve more typical administrative law activities and appear to operate beyond the reach of managerial administration.<sup>193</sup> That is, rather than be subject to USTR's oversight, monitoring, and enforcement, these areas of trade lawmaking are subject exceptionally to judicial review and traditional administrative processes in many respects. The first is in customs and import processing; and, the second is trade remedies law involving the ITC and Commerce, and ITC's work more generally. What sets each of these apart from the rest of the trade administrative state is primarily a robust review mechanism over each.

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<sup>189</sup> Discussing one of these options, see Graham, *supra* note 108, at 230 n.41; see also I.M. Destler, *Making Foreign Economic Policy* 213–14 (1980) (explaining why that option was not viable).

<sup>190</sup> See, e.g., Stuart E. Eizenstat, *Unsettling a Delicate Balance*, N.Y. Times, (June 19, 1983), <https://www.nytimes.com/1983/06/19/business/business-forum-unsettling-a-delicate-balance.html> [<https://perma.cc/AK7Y-MDT2>].

<sup>191</sup> See, e.g., *id.* (discussing attempts to change during the Kennedy, Carter, and Reagan administrations); Press Release, The White House, *President Obama Announces Proposal to Reform, Reorganize and Consolidate Government* (Jan. 13, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov> [<https://perma.cc/WZR6-WWD8>]; see also Timothy Meyer & Ganesh Sitaraman, *It's Economic Strategy, Stupid*, *Am. Affs. J.* (Feb. 20, 2019), <https://americanaffairsjournal.org/2019/02/its-economic-strategy-stupid/> [<https://perma.cc/HX6Z-ZRCP>] (noting that the Obama administration proposed merging the Department of Commerce, Small Business Administration, USTR, Export-Import Bank, Overseas Private Investment Corporation, and U.S. Trade and Development Agency).

<sup>192</sup> Executive reorganizations are no longer legally facilitated, which has shifted pressure within the White House to find other ways to make structural changes and to deal with personalities. See Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *Colum. L. Rev.* 1789, 1818–22 (2015).

<sup>193</sup> There are also some smaller processes that do not envision a strong role for USTR like Section 232 of the Trade Expansion Act of 1962, especially if they were created simultaneously with or before USTR's creation. Pub. L. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

In the case of customs, USTR has very little control or oversight. At the same time, CBP's role is largely executory and application-oriented. As noted above, Congress often delegates implementation authority directly to CBP. Perhaps most importantly, many of CBP's trade-related operations are subject to review in the Court of International Trade ("CIT").<sup>194</sup>

Second, the trade remedies system is a complex administrative process that likewise benefits from extensive judicial review. It allows private parties to petition for duties that would counteract either import dumping (selling at less than fair value) or foreign government subsidies. Petitioners may seek this relief through a multi-step quasi-judicial process carried out by the Commerce Department and ITC. Upon exhaustion of administrative remedies, parties may also seek review by the CIT. More generally, Congress sometimes makes executive action contingent on a finding by the ITC. ITC, as an independent agency, is not subject to USTR's direction, although USTR can request findings from the ITC.<sup>195</sup> Since 1974, the ITC budget-approval process is handled between the agency and Congress and not OMB, enhancing its independence. The 1974 Trade Act also required the ITC to act in accordance with the APA<sup>196</sup> and that the ITC could order goods excluded rather than rely on another agency to institute the order. This was the first time the ITC was empowered to act directly with effect on private actors rather than just recommend action.<sup>197</sup> In these ways, the ITC has gradually increased its authority and operates apart from USTR in most respects. Its early factfinding work gave way to investigations with increased breadth as early as the trade acts of 1922 and 1930. By 1958, it was hearing private applications and granted wide subpoena powers.<sup>198</sup> It is further exceptional in that it is among the few agencies that now carry out work once carried out by Congress. Today, the ITC is far more than just the "[n]ation's major source of information about international trade."<sup>199</sup>

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<sup>194</sup> See 28 U.S.C. § 1581.

<sup>195</sup> See, e.g., 19 C.F.R. § 201.7 (2020).

<sup>196</sup> Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053-54.

<sup>197</sup> This empowerment was much slower than other empowerments of other commissions which is why it is unusual—most could regulate, but not so with ITC until 1974. Tarullo, *supra* note 113, at 581 & n.109.

<sup>198</sup> John M. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission* 119 (1976).

<sup>199</sup> *Id.* at 132.

In sum, and largely as a result of their distinct histories, these aspects of trade lawmaking do not exhibit the same qualities of managerial governance. They are subject to their own independent reviews in their trade administration activities which makes them useful touchpoints for evaluating the distinctions underlying the rest of the system. Across the remainder of the trade administrative state, USTR is the super-agency with considerable oversight and control.

### III. ASSESSING TRADE'S AGENCY & ITS AGENCIES

The above functional accounting of the modern trade administrative state highlights an important change to a wide range of agencies as trade-lawmaking actors with USTR as a key, often primary, manager. In addition, in their trade lawmaking, those agencies often do not use nor are they subjected to traditional administrative or judicial disciplines. This turn to agencies with distinct internal and external processes has altered the access points to trade policy making for external actors. Likewise, new spaces for contestation have made agencies still more powerful players in the trade-lawmaking story.

This Part turns to a normative assessment of our present managerial trade administration. It addresses which institutions *should* have trade administrative primacy, how much bureaucratization may be helpful or harmful, and, most important, what types of process may be appropriate within and outside of trade lawmaking in light of these features. The executive and legislative branches have subscribed to the idea that the USTR centralization mechanism is desirable, but we lack a theorization of that choice. Here, I make the tentative case that there are some constructive aspects of this mode of governance, including its centralization and efficiency; nonetheless, I argue that three aspects of managerial trade administration raise concerns: its lack of transparency, lack of accountability, and its debatable legality. I begin with the costs of our present mode of trade administration and then turn to the benefits.

#### *A. The Costs of Modern Trade Administration*

Compared to other potential modes of administration, managerial agency administration exacerbates three routine administrative concerns. First is the lack of transparency in the way USTR and other agencies conduct their trade-lawmaking work. Second, there is a general lack of accountability in this governance model considering the way USTR

operationalizes its control mechanisms. Third, much of what occurs in the modern trade administrative state is of questionable legality.<sup>200</sup> Thus on both process and positivist dimensions, our present trade administration underperforms.

Concerns about transparency in our trade lawmaking are not recently discovered nor are they unique to trade. Rather, for many years, civil society advocates have expressed doubt about the secrecy through which USTR and other agencies engage in rulemaking with other countries.<sup>201</sup> While trade policy details are known in broad brush strokes, there are nevertheless many parts that remain hidden. The public is not privy to the drafts, internal communications, or external negotiating positions during the preparation of trade agreements or in other trade rulemaking. To alleviate some of these concerns in 2015, Congress instituted a Chief Transparency Officer position at USTR, although little more has been made public.<sup>202</sup>

Transparency issues likewise arise not just in rulemaking but also on the monitoring and enforcement sides of trade lawmaking. Opaque processes may prevent weak constituencies from ensuring that rules relevant to them are enforced.<sup>203</sup> This is not a hypothetical. A 2019 Commerce Inspector General report raised concern about arbitrary decision making by the Commerce Department in its handling of tariff exclusion requests.<sup>204</sup> Further, in some instances, we do not know the results of investigations that form the basis for subsequent trade restrictions despite reporting requirements in certain agency statutes.<sup>205</sup>

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<sup>200</sup> These concerns bear some resemblance to the problems we see in other EOP super-agencies. See, e.g., Pasachoff, *supra* note 7, at 2250–71.

<sup>201</sup> See, e.g., Patrice McDermott & Emily Manna, *Secrecy, Democracy and the TPP: Trade Transparency Is What the Public Wants—and Needs*, Hill (Sept. 12, 2016, 7:30 AM), <https://thehill.com/blogs/congress-blog/economy-budget/295365-secrecy-democracy-and-the-tpp-trade-transparency-is-what> [<https://perma.cc/2PA3-N7DG>].

<sup>202</sup> Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 104(f), 129 Stat. 320, 342 (codified as amended at 19 U.S.C. § 4203). Some members of Congress expressed concern that the role has been vacant during the Trump administration. See, e.g., Press Release, Rep. Debbie Dingell, Dingell, Pascrell Demand Increased Transparency at USTR (Mar. 29, 2018), <https://debbiedingell.house.gov/news/documentsingle.aspx?DocumentID=1359> [<https://perma.cc/RT2Y-YU5P>].

<sup>203</sup> Meyer & Sitaraman, *supra* note 1, at 635.

<sup>204</sup> Off. of the Inspector Gen., Dep't of Com., OIG-20-003-M, Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process (2019).

<sup>205</sup> See, e.g., David Shepardson, *Trump Administration Won't Turn Over Auto Import Probe Report, Defying Congress*, Reuters (Jan. 21, 2020, 12:56 PM),



Whereas the notice-and-comment process ought to give a public window into rulemaking, there is not the same visibility in USTR's monitoring role. For example, the scope and content of conversations within interagency committees or in bilateral exchanges between agencies are not publicly available. That USTR's monitoring role is heavily focused on a legal analysis rather than policy equities may diminish transparency concerns to the extent observers see legal analysis as more objective, but we lack empirical evidence to fully evaluate such claims. Across USTR's activities, it has a flexibility advantage but a transparency problem.<sup>206</sup>

A second concern is that few of the processes or the substance of the trade administrative state are subject to review or oversight that would provide meaningful accountability.<sup>207</sup> There is little in place for any other government actor or private actor to "demand an explanation . . . and to reward or punish" USTR or other agencies based on their performance or explanation.<sup>208</sup> These concerns align with other studies of the executive branch,<sup>209</sup> but are exacerbated in trade administration by the lack of congressional, judicial, or administrative backstops, which I will take up in turn.

Whereas in the trusteeship or in the principal-agent model, Congress could amend the already limited delegation or legislate over it to correct missteps by the executive,<sup>210</sup> that remedy proves less curative in the present model. Under present circumstances, given the entrenched nature of the trade administrative state together with the breadth and scope of congressional trade delegations to the executive, Congress no longer

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<https://www.reuters.com/article/us-usa-trade/trump-administration-wont-turn-over-auto-import-probe-report-defying-congress-idUSKBN1ZK2A1> [<https://perma.cc/W86W-HYLV>].

<sup>206</sup> See David Zaring, Rulemaking and Adjudication in International Law, 46 Colum. J. Transnat'l L. 563, 565 (2008).

<sup>207</sup> I draw here from Jerry Mashaw's foundational work on the subject. See Jerry L. Mashaw, Accountability and Institutional Design: Some Thoughts on the Grammar of Governance, *in* Public Accountability: Designs, Dilemmas and Experiences 115, 121 (Michael W. Dowdle ed., 2006).

<sup>208</sup> Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2135 (2005).

<sup>209</sup> See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, Inside the Administrative State: A Critical Look at the Practice of Presidential Control, 105 Mich. L. Rev. 47, 52 (2006). This study provides additional support for the phenomena that Bressman and Vandenbergh describe in their important work. For one, there is much more happening in OIRA review than meets the eye.

<sup>210</sup> And it did. For some examples, see Claussen, Trade Executive Agreements, *supra* note 115.

retains control over small and large policy decisions. Managerial trade administration distances policy-making choices and their resultant outcomes from congressional review both as a result of statute and practice. Further, while in prior governance models, the executive was bound by various duties, those principles do not apply or exist in the present construction. By comparison, other than the threat of limiting appropriations, the most common oversight mechanism used by Congress toward agency trade lawmaking is requiring agencies to consult with Congress in a number of different ways.<sup>211</sup> USTR's control mechanisms become a substitute for supervision through legislative controls for other agencies.

Most importantly, trade lawmaking suffers from limited judicial review.<sup>212</sup> There are two principal difficulties that preclude robust judicial review over major trade actions.<sup>213</sup> The first is that some delegations are still made to the President and subject to his discretion.<sup>214</sup> Even though he often subdelegates with respect to process, he has the final word, which many have argued pulls these many trade decisions out of reach of administrative disciplines. Under the APA, the President is not considered an agency, and his decision cannot be challenged for arbitrary and capricious decision making.<sup>215</sup>

The second difficulty is, as noted above, that USTR in many aspects of its rulemaking, monitoring, and enforcement is itself likewise not subject to the same accountability mechanisms as other agencies such as the APA disciplines. Although USTR is engaged in making findings and taking actions with an immediate impact on private persons, it is rarely

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<sup>211</sup> Missing from the literature is a comprehensive study of the congressional consultation power—its scope, meaning, and implication. Other scholars have likewise noted its prevalence. See, e.g., Lucas Issacharoff & Samuel Issacharoff, *Constitutional Implications of the Cost of War*, 83 *U. Chi. L. Rev.* 169, 185 & n.81 (2016) (discussing and citing sources on congressional oversight in war powers as requiring consultation). In the case of USTR, this responsibility primarily involves reporting to congressional committees. Different statutes also provide for members of Congress to be designated congressional advisors, accredited to advise USTR particularly with respect to negotiations. See, e.g., Trade Act of 1974, Pub. L. No. 93-618, § 161, 88 Stat. 1978, 2008.

<sup>212</sup> See Frederick Davis, *The Regulation and Control of Foreign Trade*, 66 *Colum. L. Rev.* 1428, 1459–60 (1966).

<sup>213</sup> A third difficulty that I will take up further below in the context of reform is the challenge of establishing standing.

<sup>214</sup> As Davis puts it, it is “[p]residential button-pushing.” Davis, *supra* note 212, at 1458.

<sup>215</sup> Administrative Procedure Act § 2, 5 U.S.C. § 551; see also *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that the President was not an “agency” within the meaning of the APA).

challenged and indeed whether USTR's actions are subject to judicial review is a matter of debate.<sup>216</sup> That debate has not come to prominence, until recently. Part of the question is rooted in the fact that the statutes empowering USTR do not indicate that administrative law processes or review should apply, nor do they normally create institutional support for such mechanisms.<sup>217</sup> USTR is subject to some general statutes of administrative law<sup>218</sup> but its place under the APA is less clear and may be action-specific. Although the APA includes a foreign-affairs exception, courts have not determined conclusively whether USTR's activities qualify for that exception.<sup>219</sup> What is perhaps more important than whether USTR's work actually is a matter of foreign affairs or a domestic matter is that, when challenged, even if rarely, it can *claim* the APA exception as a further means of shoring up its exemption from traditional administrative law process.

In some instances, USTR has created new rulemaking processes on its own or at the direction of the President—who himself has sometimes used

<sup>216</sup> For a recent application, see *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1281–83 (Ct. Int'l Trade 2019).

<sup>217</sup> Interestingly, it is more often the statutes that pre-date the APA that were amended to refer to the APA than those that came after. But bear in mind again that only a fraction of USTR's authority comes from statute. Where powers are subdelegated, presidents rarely specify process. Courts may find determinative a difference between authorities for direct action delegated to USTR by Congress, authorities subdelegated by the President, or authorities for making recommendations to the President delegated by Congress. For example, compare Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2141–42 (subdelegated by President), and id. § 201, 88 Stat. at 2011–12 (delegated by Congress), with Tariff Act of 1930, Pub. L. No. 361, § 337, 46 Stat. 590, 703–04 (delegated by Congress).

<sup>218</sup> Under such generally applicable statutes as the Federal Records Act and the Freedom of Information Act, USTR is considered an “agency.” Off. of the U.S. Trade Representative, USTR Instruction 511.2, USTR Records Mgt. Program (2010) <https://ustr.gov/sites/default/files/uploads/gsp/speeches/reports/IP/ACTA/about%20us/reading%20room/USTR%20Instruction%20511-2%20Records%20Management%20Program.pdf> [<https://perma.cc/NBY5-VRGZ>] (internal guidance recognizing USTR as an “agency” subject to the Federal Records Act); Off. of the U.S. Trade Representative, FOIA Reference Guide, <https://ustr.gov/about-us/reading-room/freedom-information-act-foia/foia-reference-guide> [<https://perma.cc/CEC8-CT29>] (last visited Mar. 8, 2020) (indicating that USTR is an “agency” subject to FOIA requests).

<sup>219</sup> *Invenergy* is one of the very few cases that has confronted the question at all. In a preliminary injunction order and opinion in that case, Judge Katzmann concludes that administrative law in its traditional tenets applies broadly to trade law, although it remains to be seen how far this conclusion may stretch and what sorts of USTR rulemaking it sweeps in. 422 F. Supp. 3d 1255, 1288 (Ct. Int'l Trade 2019). As Ganesh Sitaraman has noted, the foreign-affairs exception is itself limited and agencies engaged in foreign-affairs work are still subject to the APA's protections. Ganesh Sitaraman, *Foreign Hard Look Review*, 66 *Admin. L. Rev.* 489, 492–93 (2014).

the language of “notice and comment” without saying more—and without any statutory or regulatory guidelines.<sup>220</sup> On those recent occasions, USTR has employed ad hoc arrangements that it developed; some of those arrangements take the form of applications, for example, that are reviewed by USTR staff.<sup>221</sup> In 2019–2020, USTR engaged in that *sui generis* work at a large-scale level and now is facing related challenges under the APA at the Court of International Trade.<sup>222</sup>

A related issue has to do with the fact that USTR’s activities do not fit the traditional mold of those covered by the APA, nor has it grown into using APA-like language as might have been anticipated as it bureaucratized. Apart from one case discussing USTR’s provenance, there are only about two dozen cases in which USTR was a party in a non-Freedom of Information Act (“FOIA”) proceeding and none of these takes up institutional questions such as those at play in this project.<sup>223</sup> USTR is,

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<sup>220</sup> See Exec. Off. of the President, Memorandum of March 22, 2018: Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 13,099, 13,100 (Mar. 27, 2018).

<sup>221</sup> See Off. of the U.S. Trade Representative, Procedures to Consider Requests for Exclusion of Particular Products From the Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 32,181, 32,182 (July 11, 2018) (outlining the process for requesting a product be excluded from proposed tariffs).

<sup>222</sup> Off. of the U.S. Trade Representative, China Section 301—Tariff Actions and Exclusion Process, <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> [<https://perma.cc/SZ3V-BEAA>] (last visited Apr. 19, 2021) (listing numerous exclusions granted and extended). The Court of International Trade in a recent case decided that USTR’s withdrawal of an exclusion from tariffs imposed by the President under Section 201 of the Trade Act of 1974 was insufficient for administrative law norms. See *Invenergy*, 422 F. Supp. 3d at 1286–88. It left open the question of what process USTR ought to have used to implement the exclusions in the first place.

<sup>223</sup> Advanced search conducted in Westlaw using party name: “trade /5 representative,” removing FOIA cases, and limiting results to reported cases using a Westlaw filter. Sample cases found with this search include: *Forest Stewardship v. USTR*, 405 F. App’x 144, 146 (9th Cir. 2010) (“Essentially, the best the Appellants hope for is that a judgment will somehow encourage USTR to renegotiate the SLA with Canada, even though the court lacks the power to direct the executive branch’s conduct of foreign negotiations directly.”); *U.S. Ass’n of Importers of Textiles & Apparel v. United States*, 350 F. Supp. 2d 1342, 1344, 1350–51 (Ct. Int’l Trade 2004) (granting a preliminary injunction against an interagency committee with USTR only as one of several named defendants while noting only the “seriousness” of the question whether the APA’s rulemaking procedures applied to the committee), rev’d sub nom. *U.S. Ass’n of Importers of Textiles & Apparel v. U.S. Dep’t of Com.*, 413 F.3d 1344, 1345–46, 1350 (Fed. Cir. 2005) (reversing on ripeness grounds and a failure to show likelihood of success on the merits); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1342 (Fed. Cir. 2018) (involving USTR, but only in relation to a presidential proclamation).

therefore, uniquely positioned. Because it is less visible and its work perceived to be mostly unreviewable, the current framework gives USTR more authority and at the same time provides constituents with fewer procedural safeguards to protect them from abuse of that authority.

The absence of clear APA protections means that exercises of trade-lawmaking authority may not be subject to the same externally legitimizing procedures as other areas of domestic regulation. In this way, the managerial trade administration story qualifies longstanding scholarly claims that Congress controls policy outputs through agency design.<sup>224</sup> This mode of executive governance also obscures which actor is responsible for trade policy outcomes. Even at the level of trade law and policy decisions, it can mask the true decider. By developing their own norms for trade lawmaking, the executive actors in trade administration reconfigure their own content, organizational, and procedural boundaries.

Finally, a third and most problematic concern has to do with the legality of the entrenched norms at work in the trade administrative state. Consistent with what public choice theorists would predict,<sup>225</sup> we are starting to see further expansion of trade lawmaking beyond statutory mandates through unreviewable agency claims on inherent or unidentified delegations. The lack of accountability and transparency contributes to this concern. It is difficult to trace all that the agencies in the trade administrative state are doing. Because trade lawmaking is not labeled as rulemaking, not being published as such, otherwise being exceptionalized, or not made public at all, the questionable legality of its work cannot be challenged.<sup>226</sup>

In the prior models, little commentary questioned whether the executive was acting pursuant to congressional delegation; presidents over the years made that clear.<sup>227</sup> Today, however, USTR and other agencies regularly act under these unidentified authorities. For example,

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<sup>224</sup> See Daphna Renan, *Pooling Powers*, 115 *Colum. L. Rev.* 211, 259–61, 272–73 (2015) (describing legal and political theories that support this claim).

<sup>225</sup> See, e.g., Eamonn Butler, *Public Choice—A Primer* 88 (2012) (noting public choice theorists who formulated the theory that government bureaucrats have a strong interest in expanding the size and scope of the government sector).

<sup>226</sup> Even if USTR's actions were to be considered reviewable, many consider it futile to challenge its decisions. Interviews with Trade Pracs. (Jan. 2020) (some even appear to fear retaliation from the government). Beyond the scope of this Article is a further discussion to be had about how trade lawmaking could influence what commentators mean by "rules." This Article appropriates the term for its explanatory force, but its invocation may also have legal force and therefore may be used selectively by advocates in this context.

<sup>227</sup> See *supra* Part I.

in 2020, USTR announced that it had negotiated an agreement with Mexico according to which the United States will permit entry of grain-oriented electrical steel from Mexico under certain conditions and Mexico will establish a monitoring regime for its exports of the same.<sup>228</sup> But in the course of making this announcement, USTR did not cite any authority and the text of the agreement itself is not available for review. While agreement through exchange of letters such as these is typical in the practice of USTR,<sup>229</sup> such letters are often expressly linked to the entry into force of a trade agreement or come after the agreement is already in force. Yet that was not the case with the announced agreement with Mexico. These letters stand alone without any statute clearly providing authority for the conclusion of the agreement between the two nations. Accordingly, in making these trade executive agreements, USTR is acting with at best thin legal basis.<sup>230</sup> This example is one of many in which USTR's actions manifest only a weak, if any, statutory hook. As seen in these types of actions, in this model, Congress does not share responsibility in trade lawmaking, rather it is a mere "bystander."<sup>231</sup>

Given the breadth of their administration and the delegations to them, executive branch agencies in the trade administrative state decide with considerable discretion what U.S. trade policy will be: discretion among ends rather than merely means or conditions. Further, USTR has the authority to set the agenda for trade lawmaking ultimately with legal effect but in a manner that is often insulated from review.

Because modern trade administration involves considerable activity beyond statutory delegations, it also distances the executive branch farther from Congress such that it, ironically, aggravates the accountability problem. In an administrative model that prioritizes one or more agencies, Congress can evade, divest, and disassociate itself from trade-lawmaking responsibility or claim to do so when politically

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<sup>228</sup> Press Release, Off. of the U.S. Trade Representative, USTR Statement on Successful Conclusion of Steel Negotiations with Mexico (Nov. 5, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/november/ustr-statement-successful-conclusion-steel-negotiations-mexico> [<https://perma.cc/VC9W-Q4VK>].

<sup>229</sup> See Claussen, Trade Executive Agreements, *supra* note 115, at 33–34.

<sup>230</sup> In other forthcoming work, I present original empirical research on more than 1,220 agreements of similar nature. Hundreds of trade executive agreements suffer from the same questionable legality—but the present state of the law permits no challenge to their conclusion and implementation. See Claussen, Trade Executive Agreements, *supra* note 115, at 7.

<sup>231</sup> Hawkins & Norwood, *supra* note 77, at 86.

convenient.<sup>232</sup> It can treat our international commitments as obligations of the executive rather than of the United States. In this sense, a managerial governance model may be ideal for Congress because this way Congress can claim credit for successes and denounce failures.<sup>233</sup> Indeed, what I have described as a drawback here may be an advantage in the eyes of certain members of Congress or certain private actors who see this model as more easily accessible or subject to manipulation and exploitation.<sup>234</sup>

Having agencies as custodians of process also provides some distancing from the White House, but only so much as the heads of these agencies are political appointees shaping policy for the President.<sup>235</sup> Nearly all the major trade acts in the second half of the twentieth century established these processes either directly within agencies<sup>236</sup> or were so moved by the President.<sup>237</sup> This arrangement may risk conflict within the bureaucracy and may create increased uncertainty, even if delegating directly to agencies may have the benefit of making more easily applicable the APA.<sup>238</sup> Likewise, informal and unsanctioned processes modify the relative positions of the agencies vis-à-vis the President and

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<sup>232</sup> *Id.*

<sup>233</sup> As it did with the United States-Mexico-Canada Agreement. See Kimberly Ann Elliott, *Trump and Pelosi Both Claim Victory on the USMCA. Who Really Won?*, *World Pol. Rev.* (Jan. 7, 2020), <https://www.worldpoliticsreview.com/articles/28451/trump-and-pelosi-both-claim-victory-on-the-new-nafta-who-really-won> [<https://perma.cc/EH8P-3NRD>].

<sup>234</sup> For an example of easy manipulation, see the situation with the Section 232 tariff exclusion process noted above. Lydia DePillis, *How Trump's Trade War Is Making Lobbyists Rich and Slamming Small Businesses*, *ProPublica* (Jan. 6, 2020, 5:00 AM), <https://www.propublica.org/article/how-trump-trade-war-is-making-lobbyists-rich-and-slamming-small-businesses> [<https://perma.cc/T786-DY5S>]. I have not taken up here questions of accessibility which are among the non-transparent aspects of USTR's work, but which may benefit certain actors.

<sup>235</sup> Some have said that the statutory language today still permits action against "virtually any trade practice the USTR wishes to attack." Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 *Law & Pol'y Int'l Bus.* 263, 306 (1992).

<sup>236</sup> Notably, while Congress could legislate to restrict this type of movement or to re-assign these authorities, it rarely does so.

<sup>237</sup> See, e.g., Exec. Order No. 13,141, 64 *Fed. Reg.* 63,169 (Nov. 18, 1999) (setting policy to do environmental reviews); Exec. Order No. 13,786, 82 *Fed. Reg.* 16,721 (Apr. 5, 2017) (calling for a report on deficits); Exec. Order No. 13,601, 77 *Fed. Reg.* 12,981 (Mar. 5, 2012) (creating the Interagency Trade Enforcement Center); Exec. Order No. 13,785, 82 *Fed. Reg.* 16,719 (Apr. 5, 2017) (establishing enhanced collection of anti-dumping and countervailing duties); Exec. Order No. 13,796, 82 *Fed. Reg.* 20,819 (May 4, 2017) (dictating how every trade agreement should uphold certain principles).

<sup>238</sup> See Tarullo, *supra* note 81, at 317–18 n.114.

Congress. This model also chances unevenness where trade lawmaking may be managed loosely in some areas and managed stringently in others. Managerial trade administration has a concealed normativity that privileges actors and values in dominant institutions over traditional administrative assets.

### *B. Unexpected Virtues*

The greatest and perhaps most obvious and intended advantage of managerial trade administration is its coordination. USTR usefully develops a single and consistent policy across a sprawling trade administrative state.<sup>239</sup> A unilateral and single voice on trade is critical to internal and external relationships. Rather than have each agency resolve trade law consistency determinations on its own, USTR can ensure that the United States speaks with one voice on trade.<sup>240</sup> This arrangement could have a bolstering effect where agencies are able to work together toward the same goal, therefore ensuring or shoring up trade law content and its execution. At its best, this coordination provides value not just to the President in seeing that the laws are faithfully executed and to Congress in implementing legislative policies that Congress could never carry out itself, but also to the many market actors that operate in the trade space.

Tradification makes coordinated regulation more challenging. On the one hand, Congress is not positioned to micromanage trade.<sup>241</sup> Big trade agreements that take years to negotiate<sup>242</sup> are likely impractical for the

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<sup>239</sup> This “single responsible authority” concept has been hailed as an improvement. Stanley D. Metzger, *Trade Agreements and the Kennedy Round* 92 (1964). For the same point in the OIRA context, see Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 *U. Chi. L. Rev.* 609, 613 (2014); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *Harv. L. Rev.* 1838, 1841–42 (2013). These positive accounts have led some scholars to call for an expansion or extension of OIRA-type agencies. See Jennifer Nou, *Agency Coordinators Outside of the Executive Branch*, 128 *Harv. L. Rev. F.* 64, 65 (2015).

<sup>240</sup> The foreign relations literature is rife with one-voice doctrine analyses. See, e.g., Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 *Vill. L. Rev.* 975, 979 (2001) (describing “[t]he ‘one-voice’ doctrine” as “a familiar mantra of U.S. foreign relations jurisprudence”). As I point out below, having USTR at the center helps, but it is insufficient to ensure that the United States speaks with just one voice in its foreign engagements—in some ways, it has the opposite effect. A more horizontal trade landscape means more agencies are engaged in diagonal rulemaking.

<sup>241</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928).

<sup>242</sup> Caroline Freund & Christine McDaniel, *How Long Does It Take To Conclude a Trade Agreement with the US?*, Peterson Inst. for Int’l Econ. (July 21, 2016),



speed at which the global economy is moving. The diagonal relationships between agencies and their foreign counterparts are more multifaceted than previously appreciated with respect to the breadth of countries involved and the scope of topics. Multiple agencies now develop bilateral agreements—large and small—to regulate trade and few of those agreements are publicly known or reported to Congress.<sup>243</sup> In this sense, working through and with USTR has the advantage of better keeping track of those various connections.<sup>244</sup>

To be sure, USTR's coordination as trade law manager is not perfect. Agencies sometimes move forward without USTR's consent or complicate trade policies by taking action in other areas of foreign relations.<sup>245</sup> For example, CBP and Commerce sometimes apply different standards on the basis of the same statute.<sup>246</sup> Within the trade administrative state, agencies approach similar or related problems with different tools and in so doing have differing priorities. But in the absence

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<https://www.piie.com/blogs/trade-investment-policy-watch/how-long-does-it-take-conclude-trade-agreement-us> [<https://perma.cc/VAP2-GJKJ>].

<sup>243</sup> For an elaboration and list of these agreements, see Claussen, *supra* note 115. For one illustration: the USDA, together with USTR, negotiated details around trade in sheep offals with China—directly and without congressional review. See U.S. Dep't of Agric., Economic and Trade Agreement Between the United States of America and the People's Republic of China Fact Sheet: Agriculture and Seafood Related Provisions 4 (2020), [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Phase\\_One\\_Agreement-Ag\\_Summary\\_Long\\_Fact\\_Sheet.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Phase_One_Agreement-Ag_Summary_Long_Fact_Sheet.pdf) [<https://perma.cc/TCK9-G9ND>]; see also Lighthizer: China Deal Will Be an Executive Agreement, Not Submitted to Congress, *Inside U.S. Trade* (Feb. 27, 2019, 11:15 AM), <https://insidetrade.com/trade/lighthizer-china-deal-will-be-executive-agreement-not-submitted-congress> [<https://perma.cc/KSQ8-XES3>] (noting lack of congressional review).

<sup>244</sup> USTR compiles these in an annex to its annual report. See 2019 Annual Report, *supra* note 102, Annex II.

<sup>245</sup> The Section 232 investigations by the Commerce Department are one example. The statute provides no role for USTR and indeed the steel and aluminum Section 232 investigations began before Ambassador Lighthizer was confirmed by the Senate. See Jacob M. Schlesinger & Natalie Andrews, Senate Confirms Robert Lighthizer as Trump's U.S. Trade Representative, *Wall St. J.* (May 11, 2017), <https://www.wsj.com/articles/senate-confirms-robert-lighthizer-as-trumps-u-s-trade-representative-1494529048> [<https://perma.cc/TD6Q-KC6R>]; Bureau of Indus. & Sec. Off. of Tech. Evaluation, U.S. Dep't of Com., *The Effect of Imports of Steel on the National Security* 18 (2018), <https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file> [<https://perma.cc/AEC6-MA3H>] (noting the 232 investigations began in April 2017).

<sup>246</sup> Interview with Trade Prac., Washington, D.C. (Nov. 21, 2019). These differences can be seen in the jurisprudence of the Court of International Trade. *Id.*

of such a central figure, the trade administrative state might face much greater fragmentation.

Further, not everything in the trade administrative state is harmonious. Sometimes USTR will disavow the work of other agencies.<sup>247</sup> On other occasions, it may not be aware of agency activities despite close coordination. For instance, agency competition between USTR and the Commerce Department in the Trump administration created an east-west divide, pitting the east side of the White House (where USTR's office is located) against the west (where the Commerce department is located). This infighting is not new nor is the attempt at ending it. As early as 1934, conflict between the Secretary of State and the trade advisors in the White House put the finalization of a trade agreement in question.<sup>248</sup> USTR does not have the last word on all trade-related matters,<sup>249</sup> but this structure provides a streamlining effect.

A second easily discernable benefit of the managerial model is the flexibility it brings compared to prior models. It provides some degree of efficiency and dynamism. It allows the executive to change policies as necessary in response to domestic and international pressures where increased congressional oversight would prove problematic. Principal-agent relationships can limit innovation<sup>250</sup> or create excessive constraints that may push the President and his collaborators to seek to manage trade relationships in other ways. A more flexible system such as the current

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<sup>247</sup> U.S.-China Trade: Hearing Before the H. Comm. on Ways & Means, 116th Cong. (2020) (testimony of Robert Lighthizer, Ambassador, U.S. Trade Rep.) [hereinafter Lighthizer Testimony] (repeating that the Section 232 national security tariffs were not in "[his] lane").

<sup>248</sup> See Hawkins & Norwood, *supra* note 77, at 93–95 (discussing the Hull-Peek controversy in 1934 in which Peek, a special advisor on foreign trade, negotiated an agreement with Germany for cotton but Secretary Hull urged the President to disapprove); see also Ellery C. Stowell, Editorial Comment: Secretary Hull's Trade Agreements, 29 *Am. J. Int'l L.* 280, 283 (1935) (discussing allocation of power between State and Commerce).

<sup>249</sup> See, e.g., Sabrina Rodriguez, Lighthizer, Mnuchin and Liu Play Telephone, Politico (Nov. 26, 2019, 10:00 AM), <https://www.politico.com/newsletters/morning-trade/2019/11/26/lighthizer-mnuchin-and-liu-play-telephone-783072> [<https://perma.cc/TM2G-MA9T>]; Damian Paletta, Top Trump Trade Officials Still at Odds After Profane Shouting Match in Beijing, Wash. Post (May 16, 2018, 6:42 PM), <https://www.washingtonpost.com/news/business/wp/2018/05/16/top-trump-trade-officials-still-at-odds-after-profane-shouting-match-in-beijing/> [<https://perma.cc/F5ZJ-DC63>]; Logan Pauley, Consistent Inconsistency Crippling Trump's China Trade Ambitions, Hill (May 31, 2018, 8:30 PM), <https://thehill.com/opinion/finance/390085-consistent-inconsistency-crippling-trumps-china-trade-ambitions> [<https://perma.cc/7YNX-8A9S>].

<sup>250</sup> Claussen, Separation of Trade Law Powers, *supra* note 1, at 326 (describing how this occurs in trade).

one can be more responsive and assertive to correct and address trading partner or market anomalies. For these reasons, lawmakers rejected proposals to reorganize the trade administrative state by putting USTR in Commerce.<sup>251</sup> In the 1980s, when these discussions were at their height, commentators warned of making USTR too large a bureaucracy that might lead to its developing turf concerns.<sup>252</sup>

A third benefit that relates to the flexibility piece is that trade administration in its present construction relieves pressure from other trade-lawmaking access points. It alleviates concerns about congressional logrolling. Indeed, much of the evolution of at least some aspects of trade lawmaking has had to do with controlling interest group capture, establishing channels of communication and delegation between the branches, and balancing bureaucratic expertise with market-driven agenda setting.<sup>253</sup> The methods of information gathering and inputs to the trade-lawmaking process are therefore critical to outcomes. As agencies have taken on greater roles and developed their own processes for rulemaking, monitoring, adjudication, and enforcement, these access points for industry and the public have only grown in importance.

A fourth and the most surprising benefit of trade managerialism is its trade law compliance-enhancing effect.<sup>254</sup> Having a super-agency at the

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<sup>251</sup> Eizenstat, *supra* note 190 (noting that the administration's reorganization proposal "would weaken and even further fragment trade policy" putting USTR in a "bulky Commerce Department bureaucracy," and that the USTR's "most important asset" is direct access to the President).

<sup>252</sup> USTR cannot be "both a trade advocate and an interagency coordinator." *Id.*

<sup>253</sup> Additional work is needed to unpack where the expertise should be and where and how coherence may be valuable in trade institutional design. Administrative law scholars have long studied issues related to capture and expertise. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 94 (2008) (explaining that the Supreme Court has considered whether an administrative actor utilized their expertise in deciding whether to apply *Skidmore* deference); Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* 3–4 (2008) (arguing administrative procedures help to insulate agencies against capture). But see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 Duke L.J. 1321, 1325 (2010) (arguing that transparency requirements in the rulemaking process without proper filtration of information have facilitated what she calls "information capture"—where well-resourced parties inundate regulators with information as a means of influencing them). Little of this work has extended these explorations to traditional trade domains.

<sup>254</sup> This is a flip side of administrative scholars' critique of OMB and OIRA as selective. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1266–69 (2006) (criticizing OIRA for its overly narrow focus on regulatory costs); Bressman & Vandenberg, *supra* note 209, at 92–96 (critiquing OIRA's

center of our trade law apparatus with commanding effect may enhance the likelihood of compliance or at least awareness of the terms of compliance with international trade rules. Indeed, USTR's management is at its most directive when it acts as a monitor with respect to the work of other agencies. As each agency develops its cross-border regulation, USTR ensures that that regulation is consistent with U.S. international trade law commitments to avoid risk of litigation at the WTO or under free trade agreements. This role goes far beyond that of OMB or other EOP agencies.<sup>255</sup> USTR is not just a gatekeeper to policy making but also reinforces international law norms.

Although the State and Defense Departments oversee their own activities, rarely do they monitor other agencies in a police-like role as USTR does. Even in other areas of international economic law, most U.S. agencies are responsive rather than preemptory as USTR is.<sup>256</sup> This managerial system creates a different kind of international law-enhancing "transmission belt" than we have seen before in U.S. cross-border governance or in other parts of the regulatory state.<sup>257</sup> Importantly, at this moment during our trade war, when critics raise concern about the President's disfavor of international trade law and institutions, this study reveals that USTR's control over trade lawmaking is entrenched enough to counteract those concerns.

In this respect, managerial trade administration is process-trumping but international-law-enhancing. The law-enhancing effect makes trade law an administrative process control. It privileges substance over process but nevertheless serves as a control mechanism over agency rulemaking in the same way that APA disciplines do. The result of modern trade administration lacking in process but gaining in compliance makes this area of lawmaking a ripe case study for further research in administrative law more generally.

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lack of transparency, selectivity, and narrow focus on costs based on interviews with agency officials who have participated in OIRA review). USTR's review is legalized in contrast.

<sup>255</sup> As Tom Merrill has noted, "to allow the EOP to displace the myriad agencies by becoming the 'decider' would weaken legal constraints on administrative action, and deprive affected interests and individuals from having an effective voice in the implementation of regulatory policy." Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 *Colum. L. Rev.* 1979–80 (2015).

<sup>256</sup> See, e.g., Zaring, *supra* note 104, at 212–16 (describing the role of the Treasury Department in international economic lawmaking shaping policies as needed in coordination with international organization).

<sup>257</sup> On the longstanding transmission belt idea in administrative law, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1675 (1975).

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This qualified appraisal of modern trade administration yields mixed results. On the one hand, we gain advances in certain areas that may be particularly important to policy makers, but on the other, we may lose values central to administrative law theory and practice over the last fifty years. The next Part turns to the prescriptions for both trade and administrative law.

#### IV. IMPLICATIONS & FUTURE EXPERIMENTS

The development of trade law through a trade administrative state augments and in significant respects subordinates other modes of trade law governance, including modes that other participants expected and directed to play a substantial role such as the international legal framework that governs most of global trade. In this Part, I examine the implications of the new phenomenon for ongoing structural and doctrinal debates related to but beyond traditional understandings of trade law. This preliminary review is intended to lay the groundwork for further research. I turn here to the implications of this unexplored area for three issue areas or ongoing debates: first, for our understanding of foreign relations law and policy; second, for the perhaps ill-fated scholarly ambition for a constitutionally balanced regime; and third, for shaping future modes of administrative law.

When one views trade lawmaking as an administrative program instead of one driven primarily by international law or our constitutional regime, the prescriptive challenges quickly crystallize. Trade scholars have focused on the separation of powers when more work has been needed on how it is that trade law lacks the guarantees that we have come to expect of a traditional administrative law system since the middle of the twentieth century.

The next phase of our trade governance experiment depends on how actors address these deficits. The managerial model need not be the only way to administer U.S. trade law going forward. Here I consider other ways and show that this project has lessons both for trade policy makers and for administrative law scholars, as well as for auxiliary literatures from which it draws, including constitutional and foreign relations laws. I begin with the latter before turning to how the challenges of trade administration resound to administrative law.

*A. Confronting Trade's Intermesticity*

This study has implications not just for how the law treats trade but also about how we treat trade in the law. Should we think about trade as a domestic regulatory matter or as an international or foreign affairs matter? What are the implications of that choice for *internal process* rather than for organizational design? Is trade lawmaking more like treaty making where there is not a lot of oversight, or is it more like traditional regulations where process-focused norms emphasize the need for notice-and-comment opportunities? Better understanding the project of trade administration brings into stark contrast the question as to whether or how to think about trade under the heading of foreign affairs, and vice versa. Having thought about it as subject to a foreign-affairs paradigm<sup>258</sup> has likely affected the scrutiny with which we have approached trade lawmaking.

Trade lawmaking undoubtedly has some distinct features as described in Part II, but those ought not to suggest that the normal regulatory oversight mechanisms do not apply or that trade-focused agencies ought not to share the same values as those of other agencies, especially those engaged in foreign affairs. The difficulty is that while other parts of foreign relations may have been normalized in U.S. law,<sup>259</sup> that has not been the case for trade. Trade has been only selectively normalized.

One consequence of trade's role in both domestic and foreign practice together with its general neglect by domestic doctrines is that, in practice, trade can claim foreign-affairs disciplines when convenient. When other domestic authorities do not serve to support trade lawmaking, trade actors have claimed that the President is acting on his inherent authority regarding foreign affairs.<sup>260</sup> They have relied on a foreign-affairs exception to the APA where USTR's actions have come under judicial review.<sup>261</sup> They assert that secrecy and non-transparency are required in international negotiations and rulemaking when they make trade law

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<sup>258</sup> See generally Meyer & Sitaraman, *supra* note 1, at 598–601.

<sup>259</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897, 1919–24 (2015).

<sup>260</sup> See Lighthizer Testimony, *supra* note 247, at 18–19; Brief of Defendants-Appellees at 16–17, *Am. Inst. for Int'l Steel v. United States*, 806 Fed. App'x 982 (Fed. Cir. 2020) (No. 19-1727).

<sup>261</sup> *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1288–89 (Ct. Int'l Trade 2019).

rules.<sup>262</sup> They also claim foreign-affairs authority exempts them from congressional approval for certain trade agreements. A good example of the latter occurred when Ambassador Lighthizer informed Congress that he would not be sharing drafts of agreements with China or Japan with congressional committees because the Constitution permitted the President to act subject to his inherent foreign-affairs authority.<sup>263</sup>

On the other hand, trade law agencies opt out of foreign-affairs restrictions when convenient. For instance, domestic rules under what is known as the Case Act require agencies to report international agreements and to adhere to certain protocols administered by the State Department.<sup>264</sup> By claiming to be excepted from the rest of the foreign-affairs apparatus, actors in the trade administrative state are able to undertake international trade engagements without coordinating with other foreign-facing elements of the U.S. government. This differentiation works against the coordination that USTR facilitates: while the United States is able to speak with one voice on trade, those actions may not be coordinated with the rest of our foreign policy, managed primarily by the State Department. These distinctions challenge the foreign affairs “one-voice” doctrine.<sup>265</sup> Given its various mandates, USTR is able to choose between domestic or foreign affairs—including national security—doctrines as they suit what USTR perceives as the need of the moment.<sup>266</sup>

Questions about trade’s “foreign affairs-ness” and the contributions of the trade administrative state to foreign relations law are related to another ongoing debate among scholars and practitioners that asks: if we think foreign affairs is a separate track in constitutional or administrative law, then where does trade fit? This question which is indirectly before the courts in various nondelegation and other challenges now underway<sup>267</sup> may belatedly force a determination on trade’s doctrinal home. At the

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<sup>262</sup> Doug Palmer, *Secrecy Needed in Trade Talks: USTR Kirk*, Reuters (May 13, 2012, 1:56 PM), <https://www.reuters.com/article/us-usa-trade-kirk-idUSBRE84C0AQ20120513> [<https://perma.cc/TZ9G-CU4J>].

<sup>263</sup> Lighthizer Testimony, *supra* note 247, at 18–19.

<sup>264</sup> The Case-Zablocki Act (Case Act for short) requires executive branch agencies to report their international agreements to Congress through the State Department. 1 U.S.C. § 112b.

<sup>265</sup> See Cleveland, *supra* note 240, at 979.

<sup>266</sup> See, e.g., Brief of Defendants-Appellees at 20, *Am. Inst. for Int’l Steel v. United States*, 806 Fed. App’x 982 (Fed. Cir. 2020) (No. 19-1727).

<sup>267</sup> See, e.g., *Am. Inst. for Int’l Steel v. United States*, 806 F. App’x 982, 988–89 (Fed. Cir. 2020).

time of USTR's creation, these institutional changes were seen as "radically alter[ing]" the way the United States conducted its "broader foreign policy" because it would allow USTR to "control other important segments of U.S. foreign relations."<sup>268</sup>

Trade's foreign-affairs selectivity (and foreign affairs' trade selectivity) is counterintuitive when seen through the lens of foreign relations literature that considers as one of normalization's features a shift from exceptional constitutional law to ordinary administrative law and statutory interpretation arguments.<sup>269</sup> Trade is probably the most administratively heavy of all foreign affairs and yet, it is considered functionally, institutionally, and methodologically distinct. Right now, trade law evades on both grounds. When it is a matter of an APA challenge, USTR or other trade-administering agencies can claim a foreign relations exception. When the Case Act or other foreign relations disciplines are invoked, they can claim domestic or *sui generis* status. This benefit is afforded trade lawmakers in part as a result of trade's intermesticity: its part domestic, part international character, although this study shows just how much the relevance of domestic doctrines has been neglected.<sup>270</sup>

Debates in foreign relations law have adhered largely to questions of text, structure, and history to the exclusion of trade administrative activities and possibly to both bodies' detriment.<sup>271</sup> But the foreign-affairs doctrines and literature are not the only bodies that miss the mark on trade.

### *B. Regime Shifting*

A further lesson for scholarship and practice from this analysis is that the quest for balance in our separation of trade law powers may not be the most productive approach. This project seeks to shift the positioning of trade law from constitutional to administrative territory to reflect better the actual exercise of trade lawmaking. There, agencies are not competing against one another but are instead part of a complex organizational structure that administers trade policy. And the power of the agencies is tempered by the presence of an agency manager. These are institutional arrangements that our constitutional account too often misses—where

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<sup>268</sup> Graham, *supra* note 108, at 235.

<sup>269</sup> See Sitaraman & Wuerth, *supra* note 259, at 1901.

<sup>270</sup> Tim Meyer has discussed the dangers of disjunctions in our trade law. See Timothy Meyer, *Misaligned Lawmaking*, 73 *Vand. L. Rev.* 151, 154–55 (2020).

<sup>271</sup> See Sitaraman, *supra* note 219, at 492.



executive branch agencies make trade policy in the interstices of statutory delegations.

Scholarly attempts to grapple with trade governance have fallen along several general lines but nearly all focus on the constitutional separation of powers. Some commentators have considered that there ought to be a better “balance” between Congress and the executive on managing trade policy and have addressed that directly, while others focus on substantive outputs and regulatory aspects of trade law as a general or subject-specific matter.<sup>272</sup> They frequently call for Congress to “take back” its authority or “restore” its trade power.<sup>273</sup> These works undoubtedly help discern the nature of the separation of powers, but ultimately pay insufficient attention to the myriad ways the executive alone implements and administers trade law. Formalists may think that trade administration blends powers inconsistently with the Constitution. But that view equally obscures all the work that agencies are doing as a matter of practice. In short, despite the lack of literature reviewing the specifics of the executive branch’s involvement in trade lawmaking, trade and foreign relations commentators have perceived there to be a tipped balance that ought to be corrected.

I submit that commentators have been asking the wrong question. It is not about what is the appropriate balance between the branches or about bi-branch institutional design, but rather, given the entrenched practice-driven ecosystem that has emerged, more about examining appropriate procedural schemes. Constitutional balancing exercises tend to emphasize

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<sup>272</sup> See, e.g., Hathaway, *supra* note 47, 239–68 (2009) (broadly re-balancing in foreign affairs including trade). Important recent contributions in the latter category include: Timothy Meyer, *Local Liability in International Economic Law*, 95 N.C. L. Rev. 261, 269 (2017) (“[D]irect liability for subnational governments should replace strict vicarious liability and immunity in international economic law.”); Alexia Brunet Marks, *The Right to Regulate (Cooperatively)*, 38 U. Pa. J. Int’l L. 1, 8 (2016) (“[W]hen it comes to food safety, the harms caused by regulatory pluralism outweigh the benefits.”); Gregory Shaffer, *Alternatives for Regulatory Governance Under TTIP: Building from the Past*, 22 Colum. J. Eur. L. 403, 403–04 (2016) (proposing six alternative paradigms to evaluate negotiations over the Transatlantic Trade and Investment Partnership).

<sup>273</sup> See, e.g., Henry Olsen, *Opinion, The President Has Too Much Power Over on Tariffs. Congress Should Reclaim That Authority.*, Wash. Post (June 14, 2019, 3:17 PM), <https://www.washingtonpost.com/opinions/2019/06/14/president-has-too-much-power-over-tariffs-congress-should-reclaim-that-authority/> [<https://perma.cc/88DQ-BD6Y>]; Glenn Altschuler, *How Congress Can Take Back Control Over Tariffs*, Hill (June 2, 2019, 12:30 PM), <https://thehill.com/opinion/finance/446513-how-congress-can-take-back-control-over-tariffs> [<https://perma.cc/3SYX-B75Z>]; Packard, *Congress Should Take Back Its Authority Over Tariffs*, *supra* note 4.

the same limits: classifying some activities as clearly legislative or clearly executive,<sup>274</sup> while trade-lawmaking exercises are structurally or practically shared. In trade law governance, as a matter of historical practice, as opposed to doctrinal, structural, or textual foundation, the executive branch has developed a trade administration cemented in an elaborate institutional design that, despite its prior evolution, is now politically and practically hard to change.

Accordingly, this Article is not intended as a roadmap to reform or rebalancing. The answer to these well-intended concerns, I submit, does not lie in rectifying constitutional doctrine at all but rather in the acquisition of a fuller understanding of the trade administrative state and trade law managerialism that may precipitate a better theory of and process for trade lawmaking over time. Thus, this study yields lessons for policy makers interested in shifting the pendulum in other directions—such as toward the promise of administrative law disciplines in this space.

At present, administrative law disciplines face a figurative wall in their application to trade lawmaking in light of particularly three issues: constitutional ambiguity, discretionary authority, and statutory multiplicity. Each of these makes trade-relevant administrative law difficult. First, the constitutional ambiguity in trade authority allows trade actors to claim foreign affairs and inherent Article II authority,<sup>275</sup> making it appear as though any statutory claim that an agency such as USTR is acting *ultra vires* is unlikely to be successful. Courts have waffled on what is justiciable among trade law which may have created a perception that certain trade law decision making is not subject to review.<sup>276</sup> Second, the vast discretionary authority granted to the President, the USTR, and other trade actors impedes the application of administrative disciplines. Many of the statutes that result in trade action put ultimate discretion in the hands of the President and therefore out of reach of review even if the

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<sup>274</sup> See, e.g., Julian Davis Mortenson, Article II Vests Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1230 (2019) (arguing that “executive power” was originally understood as “a discrete subset of . . . substantive authorities”).

<sup>275</sup> See, e.g., Brief of Defendants-Appellees at 1, 5, Am. Inst. for Int’l Steel v. United States, 806 Fed. App’x 982 (Fed. Cir. 2020) (No. 19-1727).

<sup>276</sup> Compare *Almond Bros. Lumber Co. v. United States*, No. 10-37, 2010 WL 1409656, at \*1–\*3 (Ct. Int’l Trade Apr. 4, 2010) (concluding that the CIT lacked subject-matter jurisdiction to review the Softwood Lumber Agreement because plaintiffs did not present sufficient evidence that the agreement was negotiated under Section 301) with *Invenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1263–70 (Ct. Int’l Trade 2019) (concluding that the CIT had jurisdiction under Section 201 to review USTR’s withdrawal of its prior exclusion of a product from safeguard duties).

agencies and particularly USTR is doing the work.<sup>277</sup> Third, the multitude of relevant trade statutes has led to disorganization and exacerbates the lack of awareness by Congress of what is happening, leaving many organically developed processes in place without making them subject to challenge. Few practitioners have tested USTR authorities in the courts over the years, although the reason for their not doing so remains unclear.<sup>278</sup> Relatedly, despite that the President frequently uses executive orders to create trade subdelegations, there is no overarching guidance like in Executive Order 12866 setting up regulatory review for the OMB and OIRA<sup>279</sup> which has meant there is little guidance as to the boundaries of USTR's authority.<sup>280</sup> Much of what USTR and other trade-related agencies do has developed or evolved organically through practice making it difficult to identify what law applies.<sup>281</sup>

Trade lawmaking in the interstices of congressional statutes and delegations occurs in administrative law's blind spot. And yet, administrative law is intended to superimpose a legal framework on a political process and to mediate an uneasy relationship among the branches. Administrative law applies to the ongoing operation of government bodies and seeks to shape official decisions that impact businesses and citizens throughout society.<sup>282</sup> But in trade, as a result of both statute and doctrine, administrative law's constraints are somewhat absent.<sup>283</sup>

Given these constraints, it should come as no surprise that administrative law scholarship likewise does not engage deeply with trade administration. Administrative and constitutional law experts have long

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<sup>277</sup> See, e.g., 19 U.S.C. § 2251 (“[T]he President . . . shall take all appropriate and feasible action . . . which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”).

<sup>278</sup> Interviews with Trade Praes. (Jan. 2020) (commenting that they do not believe USTR's actions qualify for APA review). But see *infra* text accompanying note 286.

<sup>279</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

<sup>280</sup> Cf. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *Tex. L. Rev.* 441, 453–56 (2010) (reviewing presidential administration and the roles of OMB and OIRA).

<sup>281</sup> See Claussen, *supra* note 115, at 3 (describing agency practice).

<sup>282</sup> See Cary Coglianese, *Administrative Law: The United States and Beyond*, in *International Encyclopedia of Social & Behavioral Sciences* 109 (James D. Wright ed., 2d ed. 2015).

<sup>283</sup> See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1319–20 (11th Cir. 2001) (finding the question whether NAFTA was appropriately concluded as a congressional-executive agreement to be a “nonjusticiable political question”).

lamented what appears to be congressional abdication to the President with the growth of the regulatory state. A burgeoning literature on executive authority that does not need to be rehearsed here finds benefits in an unbound executive while also warning of its dangers.<sup>284</sup> Oddly, that literature has not explored in detail the problems and puzzles posed by trade administration.<sup>285</sup> It is remarkably light on trade administration today, how it has evolved, and what that might mean for the administrative law enterprise. That is not to say that trade law and administrative law have not influenced each other. Administrative law applies readily to trade law and trade lawmaking as can be seen in the jurisprudence of the CIT. The CIT ordinarily hears several hundred cases each year.<sup>286</sup> In nearly 70 percent of these cases, the CIT is called upon to adjudge whether CBP, the ITC, or the Commerce Department acted consistently with a trade statute or with the procedural requirements of the APA.<sup>287</sup> Administrative law is the backbone of the CIT when it comes to the activities of these three agencies. Still, few scholars have taken up the larger trends or issues in trade administration.<sup>288</sup> In sum, while administrative law debates have dealt with pragmatic issues on how best to develop processes that are both “effective for modern times and true to the Constitution’s commitment to checks and balances,”<sup>289</sup> little of that

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<sup>284</sup> See, e.g., Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 5 (2011) (arguing that while there is no guarantee that an unbound executive will “pursue the public interest,” there is also “no pragmatically feasible alternative” and that “politics and public opinion . . . block the most lurid forms of executive abuse”).

<sup>285</sup> Outdatedly, see William D. Araiza, Note, Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response, 99 *Yale L.J.* 669 (1989); Davis, *supra* note 212; George Bronz, *The Tariff Commission as a Regulatory Agency*, 61 *Colum. L. Rev.* 463 (1961).

<sup>286</sup> In fiscal year 2018, 242 new cases were filed with CIT. U.S. Cts., U.S. Court of International Trade—Cases Filed, Terminated, and Pending During the 12-Month Periods Ending September 30, 2017 and 2018, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_g1\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_g1_0930.2018.pdf) [<https://perma.cc/XMY9-KTGP>].

<sup>287</sup> *Id.* Exceptionally, in autumn 2020, more than 3600 complaints were filed at the CIT against USTR for its Section 301 activities. See Standard Procedure Order, *In Re Section 301 Cases*, No. 21-01 (U.S. Ct. Int’l Trade, 2021).

<sup>288</sup> Existing accounts are dated. Frederick Davis and Daniel Tarullo each penned their reviews of trade administrative concerns in 1966 and 1986 respectively. See Davis, *supra* note 212; Tarullo, *supra* note 81. That there is such a dearth is surprising given that some of the most important administrative law and nondelegation cases from the twentieth century are related to trade law (e.g., *Field v. Clark*, 143 U.S. 649 (1892); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)).

<sup>289</sup> Sitaraman, *supra* note 219, at 496–97.

process-oriented conversation has covered trade. Rather, it has missed a lot of actual administration in practice.<sup>290</sup>

Orienting our thinking toward managerial trade administration manifests lessons for administrative law that are worth surfacing for further consideration. The trade administration experience maps on to administrative theory in multiple ways. And, in certain respects, it turns some administrative law theories on their heads. For one, traditional normative debates among the administrative law literature do not overlay well where administrative law's premises cannot be assumed. What trade may show is that our concepts of administrative law are overgeneralized and more nuance may be needed.<sup>291</sup>

An additional lesson is that non-traditional administrative practices may become entrenched in the absence of administrative norms and that is difficult to undo. Trade represents an area in which substitutes have arisen and now are regularly practiced. Since there is no back-up or default administrative law for these types of systems, they have developed largely without it. Additional scholarship on how to address these overlooked elements of our regulatory systems would be helpful.

Similarly, looking at trade through an administrative law lens uncovers areas of nuance that again are lacking in the literature. The trade story suggests a spectrum of administrative law models from thin to thick. It is not a one-size-fits-all approach to regulation in the executive branch. Rather, administrative law must adapt its norms to particular areas of law that require more or less of each, but we lack a deeper understanding of the greater implications of the spectrum.

### *C. Trade Administration's Unfinished Business*

Notwithstanding this state of play, administrative law holds promise as a way to defend against problems of non-transparency and lack of accountability in trade lawmaking. Achieving and maintaining such a system is no simple task. How, under this structure, do we guarantee the disciplines that meet our normative expectations? Given that

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<sup>290</sup> David Zaring makes this point, relying on earlier work by Jerry Mashaw. See Zaring, *supra* note 104, at 194.

<sup>291</sup> For a broader critique of this point, see Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 *Wis. L. Rev.* 1351, 1352–53 (2019) (arguing that, in agency adjudications, “Congress and individual agencies have . . . create[d] unique adjudicatory proceedings designed to meet the individual needs of different administrative agencies and programs”).

administrative law is not doing the job that it should and that many assume it already does in trade, what changes could be made? How could trade administration be made better subject to disciplines that are necessary to achieve the goals embedded in normal administrative law? Or, what will post-managerial trade administration look like? This model is dynamic by nature, even if it is structurally entrenched. We have an opportunity now to rethink its procedural form and content.<sup>292</sup>

Although the potential menu of options involves all sorts of possibilities both to enhance and enable productive trade policy, some are more likely to be realized than others. Further, rather than emphasize “balance” in a traditional checks and balances refrain, accepting the present trade law governance regime as reasonably impermeable may mean we need more checking than balancing and not by Congress but rather by shifting down and out just as trade has done. As the access points and topics have grown, so ought the checks in the system in parallel.

Short of balancing, Congress could do more to address the transparency, accountability, and legality issues that arise in this trade law managerialism. For example, first, Congress could intervene in the administrative landscape to address the disparity in traditional administrative law disciplines and trade administration. Congress could make clear the APA’s application to trade lawmaking. This approach also has its limitations, however, such as in slowing down trade lawmaking in ineffective ways.

A stronger discipline here may be heavier judicial review over the procedural aspects of the trade administrative state’s work. Congress could create a larger role for courts. The courts’ authority is severely curtailed by their limited subject-matter jurisdiction, limitations on standing, and longstanding doctrines that do not permit them to scrutinize certain trade executive authorities or processes.<sup>293</sup> The availability of judicial review might lead to the development of some guidelines that

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<sup>292</sup> More work is needed to consider both how and whether it may be possible to change conventional ideas of administrative law to “accommodate” trade law and both how and whether trade law might adopt more conventional administrative law processes.

<sup>293</sup> See generally Patrick C. Reed, *Expanding the Jurisdiction of the U.S. Court of International Trade: Proposals by the Customs and International Trade Bar Association*, 26 *Brook. J. Int’l L.* 819 (2017) (discussing the limitations on the CIT’s jurisdiction); accord Devin S. Sikes, *Why Congress Should Expand the Subject Matter Jurisdiction of the United States Court of International Trade*, 6 *S.C. J. Int’l L. & Bus.* 253, 254 (2010) (“The federal statutes vesting the CIT with jurisdiction over international trade disputes do not account for the evolution of international trade into new areas.”).

would provide private actors with reasonable expectations and greater consistency. It would also clarify chains of command and could help sort the divided trade administrative state loyalties.<sup>294</sup> The multiplicity of statutes and statutory ambiguities can serve as constraints on robust judicial review of the unnamed rulemaking and the monitoring that agencies, especially USTR, do. Thus, clarifying that the APA applies where unclear or ambiguous, removing final discretion from the President to avoid exemption from review, and using the language of administrative law in the delegations could go a long way to improving access to the courts and holding agencies accountable for their trade lawmaking. But here too, there are challenges. Above all, creating justiciable standards for the courts to apply in this context is not an insignificant undertaking.

Second, Congress could consider greater transparency obligations. Transparency remains a problem for USTR's managerial administration. Despite the creation of the Transparency Officer position, information about its internal monitoring function remains inadequate. It does not present a complete picture of its review. Its influence is often not known. Transparency is particularly important to holding agencies accountable for their domestic as well as international obligations. Going forward, creating disclosure and reason-giving requirements in the trade regulatory review process would be a good place to start. Increased transparency would also help promote, not obscure, political accountability.

A third move for enhancing administrative law norms in trade law would be to put additional controls on the possibility of political agencies initiating trade-related investigations. Modifying discretion away from executive branch agencies generally could promote trade administration's legitimacy, but it also could create further roadblocks to sound economic policy choices. For example, to the extent such a move strengthened the hand of powerful interest groups, additional processes would need to be put in place for reviewing their requests for action and evaluating their merits.

Fourth, creating a greater role for the ITC, an independent agency, and particularly taking away final authority from the President and passing it to the ITC could help channel outcomes while maintaining flexibility. At different points in the ITC's varied history, it had greater and lesser control over its recommendations. With respect to trade remedies, it may

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<sup>294</sup> Galbraith, *supra* note 184, at 1693 (noting that the executive branch agencies' loyalty is "divided").

be at a high point at present, but there is certainly potential for more. Congress could require the ITC's engagement on trade lawmaking at more stages.

Finally, given the tradification that has occurred, it may be necessary to disaggregate trade better in the law and reexamine executive trade authority through trade's component parts. The Constitution distinguishes only between tariffs and the rest of foreign commerce, but a more nuanced picture comes to light when viewed as this project does through other measures or frames.

To be sure, enhancing accountability and transparency by adding procedural steps or modifying agency roles could have a negative impact on some of the unexpected virtues of managerial trade administration such as its coordinating or flexible features. Just as the work of CBP and ITC largely fall outside USTR's umbrella and make the system more susceptible to inconsistencies, some of the reforms suggested above could have similar damaging effect. Nevertheless, the many costs to the trade system that cut against its legitimacy and reliability from the current model could at least be partly alleviated with low impact on coordination and flexibility if done in the right way. Minimizing structural disruptions and focusing instead on procedural adjustments that reflect administrative law norms ought to be at least under consideration.

Unfortunately, few of the legislative proposals on the table as of December 2020 take up the implementation of traditional administrative disciplines.<sup>295</sup> Unsurprisingly, most remain focused on enhancing the congressional role in trade lawmaking. This project illustrates how even though Congress, courts, agencies, and the President all regularly engage in trade lawmaking, we lack an account of how trade's tasks ought to be allocated among these actors and we regularly overlook the foremost applications of agency delegation that dominate the trade landscape. These proposals should be revisited to reflect the way trade lawmaking occurs in actual practice. Trade's unique position at the intersection of domestic and international and at the intersection of legislative and executive authority has obscured this work. Finding the constitutionally and practically appropriate administrative law disciplines will remain a work in progress.

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<sup>295</sup> For an overview of these proposals, see Kathleen Claussen, *Trade War Battles: Congress Reconsiders Its Role*, *Lawfare* (Aug. 5, 2018, 11:00 AM), <https://www.lawfareblog.com/trade-war-battles-congress-reconsiders-its-role> [<https://perma.cc/D5R2-T8HP>].



## CONCLUSION

This Article has examined the understudied functional administrative governance structure in U.S. trade law with major implications for the U.S. and global economies as well as for administrative law disciplines and our constitutional-law-premised ideas of separation of powers. Managerial trade administration may entail certain benefits—coherence in trade policy, coordination among disparate agencies, flexibility in policy making, and above all enhancing U.S. commitments to international trade law. But, as a means to make U.S. trade law, modern trade administration has significant downsides. It is not subject to clear and robust checks and balances at either the congressional or administrative level. Trade agency action is subject only to limited judicial review just some of the time.

Ultimately, the entrenchment of the trade administrative state may mean that reorganization is no longer feasible or desirable, but some additional administrative law constraints could improve outcomes and impressions. At the very least, twenty-first-century economic pressures and a commitment to rule-of-law principles demand a renewed look at trade administration.