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by
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I
INTRODUCTION

The current controversy over the state of American foreign trade policy has evoked calls for reorganization of U.S. trade institutions to resolve our problems. Critics argue that reorganization is at best an illusion, at worst a diversion of time and resources. Reorganizing governmental institutions, however, can be of great importance. Due to the complexity and size of our government and society, inattention to organization leads to uninformed policy and poorly directed or chaotic action.

Many of the organizational problems encountered by the federal government were foreseen and encouraged by the framers of the Constitution. The sharing of power among the three "co-equal" branches was designed specifically to perpetuate inefficiency and conflict within the federal government. In late eighteenth century America, this arrangement was viewed as the surest guarantor of individual liberty and State autonomy. Not all intra-governmental frictions, however, were consciously nurtured by the founding fathers, nor do all such inefficiencies contribute to the public welfare. This Article is concerned with the organizational weaknesses within the executive branch, most specifically those plaguing the trade-policy process.

First, we will outline the fundamental problems facing the executive branch in formulating and administering policy. We will then propose guidelines for executive organization to resolve these problems. Next, we will briefly summarize the historical development of U.S. trade organization and analyze the inadequacies of our current trade structure. Finally, we will describe the merits of trade reorganization, reviewing two trade bills currently before the Congress. We conclude by supporting the bill proposed by Representative Don Bonker (D–WA) as the best political and substantive alternative for trade reorganization.[1]

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1. H.R. 4432, 98th Cong., 1st Sess., 129 CONG. REC. H1055 (daily ed. Nov. 16, 1983). The CONGRESSIONAL RECORD does not set forth the text of the bill, which is available from the U.S. Congress.

II
THE PRESIDENT AND THE BUREAUCRACY

A prime organizational problem facing the executive branch stems from the President's personal responsibility for the direction of the government. Article II of the Constitution vests the President alone with executive power. The President, unlike his parliamentary counterpart, the Prime Minister, is held personally accountable for the actions of his administration.[2] The President's constitutional and political obligation to shape policy has been reinforced by the growing compartmentalization of bureaucratic responsibilities, which has placed a high premium on presidential leadership. This is particularly true today, when the inter-relationship of disparate government policies is becoming increasingly apparent.

The area of trade policy clearly illustrates this. Historically, this country has perceived trade issues as encompassing the manipulation of tariffs, quotas, and exchange rates, but little else. In today's more open economy, however, where a large percentage of all American-produced goods competes with foreign-made products, this limited definition of trade policy is no longer accurate. Policy and regulatory decisions by almost every department and agency in the government can affect the relative competitiveness of American-made products and significantly alter the pattern of international trade. Similarly, trade-policy decisions have significant effects on such diverse areas as foreign relations, national security, the environment, inflation, and employment.

Given the intertwining of policies and the limited mandates and specific interests of the various departments and agencies, it is unlikely that the Cabinet Secretaries, acting independently, can produce coherent or consistent national policy. Moreover, in light of the relative equality of power among the department heads, a coherent interdepartmental policy is virtually impossible without some direction from outside the Cabinet. That direction must come from the President, as he is the only individual in the administration with a bureaucratically unfettered view of national interest, a non-biased position regarding inter-departmental disputes, and a clear preponderance of power.

Zbigniew Brzezinski confirms that coordination and integration of policy "cannot be achieved from a departmental vantage point."[3] Using the example of national security policy, Brzezinski observes that:

2. Other systems of government take different approaches to executive organization and accountability. Parliamentary systems, for instance, place the mantle of political legitimacy upon the shoulders of a party, not a person. It is true, of course, that a Prime Minister is normally the undisputed head of government. This individual, however, derives authority from their party, and only indirectly from the people. A President has no such barrier between himself and the public. This is especially true in contemporary politics where party nominations themselves are largely won through direct appeals to the voters, not the party apparatus.

3. Brzezinski, *Deciding Who Makes Foreign Policy*, N.Y. Times, Sept. 18, 1983, § 6 (Magazine), at 62, col. 3.

> [N]o self-respecting Secretary of Defense will willingly agree to have his contribution, along with those of other agencies, integrated for Presidential decision by another departmental secretary—notably, the Secretary of State. And no self-respecting Secretary of State will accept integration by a Defense Secretary.[4]

Under such circumstances, only the President can resolve inter-departmental conflict.

A second problem relates to the role of the bureaucracy in implementing policy. In the context of today's enormous and fragmented bureaucracy, with expansive obligations and tremendous powers, a President is unable personally to control the levers of government. In addition to the help of an extensive and activist White House staff, the President must win the support and active cooperation of his Cabinet Secretaries and their respective bureaucracies to carry out executive policies.

Not surprisingly, department chiefs and bureaucracies do not always obey their President's wishes. This is especially true when presidential decisions are taken unilaterally or solely on the advice of White House staff, without the participation or concurrence of the interested Cabinet officers. Cabinet Secretaries and bureaucrats are jealous of their policy responsibilities, partly out of the common human desire for power and influence. More importantly they defend their prerogatives because, over time, "they grow to equate the importance of their function and the strength of their organization with the broader national interest and welfare."[5]

A tension is thus created between the need for presidential leadership and a bureaucracy's tendency to maintain control over its areas of responsibility. The more a President seeks to fulfill his obligation to shape policy, the more he risks conflict with his Cabinet Secretaries and their bureaucracies. Such conflict can jeopardize the loyalty of those individuals upon whom the President depends and can turn his decisive leadership into unfulfilled promises.

Henry Kissinger, who had the unusual opportunity to serve as both a senior White House aide and a Cabinet Secretary, describes how a bureaucracy can become an intractable opponent:

> Any President soon discovers that his problem is not only to give an order but to get it implemented, and this requires willing cooperation. Bureaucratically unpopular orders can be evaded in a variety of ways. They can be interpreted by skilled exegesis to yield a result as close as possible to what the department most concerned wanted in the first place; there can be endless procrastination in implementation; leaks can sabotage a policy by sparking controversy.[6]

The presidential reach is simply not long enough to insure that once decisions are made, they will be carried out with dispatch and good faith.

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4. *Id.*

5. I.M. DESTLER, PRESIDENTS, BUREAUCRATS, AND FOREIGN POLICY: THE POLITICS OF ORGANIZATIONAL REFORM 68 (1974).

6. H. KISSINGER, WHITE HOUSE YEARS 40 (1979).

Only the bureaucracy, under the leadership of the Cabinet Secretaries, can accomplish that. Thus, while there is a built-in tendency toward conflict between a President and his Cabinet, there remains an ineluctable, mutual dependency.

Resolving the tension between presidential decision-making and bureaucratic administration is primarily an organizational task. Personalities and personal relationships within an administration are important, and to a limited degree these factors can transcend organization charts. A Cabinet Secretary who has the confidence of his President and frequent access to the Oval Office may well be able to overcome the institutional barriers that divide Presidents from their department chiefs. Unfortunately, such a relationship is exceptional. Moreover, the nature of the executive institutions themselves, and their relationships to one another, do much to determine the course of relations between a Cabinet Secretary and his President, regardless of personal ties. In sum, the need to appoint competent individuals to fill posts within an administration does not diminish the importance of a sound organizational structure to facilitate the formulation and execution of policy.

A third organizational problem confronting the executive branch is ensuring that the President promptly receives the relevant data, opinions, and, most importantly, options which he requires to make an informed decision. For in addition to relying on the executive departments and agencies for the implementation of presidential decisions, the Chief Executive also depends on these offices for the information and recommendations which provide the basis for his policy judgments.

Managing the information flow into the Oval Office is a complex function with many potential pitfalls, the most serious of which in recent years has been the excessive limitation of advice and information which are allowed to reach the President. This problem has two sources. The first is an overactive White House staff, which focuses its efforts on "lightening the President's load."[7] Such a function is admirable and essential, but is often overdone. Clearly, the President need not know every statistic, rumor, or disagreement within the Cabinet. At the same time, however, minimizing the President's personal involvement in resolving interagency disputes or judging the quality and relevance of information can weaken his ability to make enlightened choices. One White House aide from the Eisenhower Administration has described the pernicious effects of an overly protective or "helpful" staff: "[T]he less he [Eisenhower] was bothered, the less he knew, and the less he knew, the less confidence he felt in his own judgment. He let himself grow stale . . . ."[8]

The White House staff is not the only culprit in this matter. The Cabinet Secretaries, individually or collectively, can be equally guilty of reduc-

7. R. NEUSTADT, PRESIDENTIAL POWER 117 (1980).
8. *Id.*

ing the President's knowledge of events and range of choice. A Cabinet Secretary's goal is not normally to ease the President's already heavy burden, but rather to ensure that his interests and preferences are reflected in, or at least not subverted by, presidential decisions. In fulfilling this goal, Cabinet officers often seek to provide the President only with information and options which will produce a desired result. Kissinger depicts this pattern of behavior in the following way:

> [T]he strong inclination of all departments is to narrow the scope for Presidential decision, not to expand it. They are organized to develop a preferred policy, not a range of choices . . . . Every department, finally, dreads being overruled by the President; all have, therefore, a high incentive to obscure their differences. Options tend to disappear in an empty consensus that at the end of the day permits each agency or department maximum latitude to pursue its original preference.[9]

A fourth problem of executive organization is the unnatural and inefficient division between making and implementing policy. This division largely results from the barriers between the President and his Cabinet Secretaries, but is also a function of fissures within the bureaucracy itself. The administration of trade policy is a classic illustration of the problem. The United States Trade Representative (USTR) has primary responsibility for developing trade policy, while the implementation of trade policy is largely within the purview of the International Trade Administration (ITA) in the Department of Commerce.[10]

Division of labor based on functional, rather than policy, considerations generates several serious problems. First, separating policy development from implementation is more easily said than done, since it is not clear where policy development ends and implementation begins. For example, is an ITA determination in a countervailing duty case an implementation of policy, or a policy decision in and of itself? Second, dividing policy formulation from implementation creates an undesirable barrier between the policy-maker and the real world, as the individuals who establish policy are several layers removed from the people affected by those policies. This results in policy goals that often do not fulfill real needs or solve real problems. Third, the separation of function places a heavy premium on communication and cooperation between the policy-makers and implementors. In practice, this means implementation will often fail to address policy goals. Finally, the detachment of policy-makers from implementors allows both to avoid responsibility for their own actions. When a policy fails, the policy-maker simply blames the executor and vice-versa.

A complete resolution of these organizational dilemmas is probably not possible, given our political and social history, as well as the general

9. H. KISSINGER, *supra* note 6, at 43.

10. *See* Reorganization Plan No. 3 of 1979, 3 C.F.R. 513 (1980), *reprinted in* 19 U.S.C. § 2171, at 963–67 (1982). *See also* Executive Order No. 12,188, 3 C.F.R. 131 (1980), 45 Fed. Reg. 989 (1979), *reprinted in* 19 U.S.C. § 2171, at 968 (1982).

nature of human endeavor. Minimizing these structural problems, however, is within our grasp and would significantly improve our ability to formulate consistently coherent policy and carry out such policy effectively.

III
GUIDELINES FOR EXECUTIVE ORGANIZATION

In light of the preceding description of the systemic problems facing any administration, efforts to improve the organization of the executive branch should have the following goals:

1. *Clear White House responsibility for policy coordination*, to ensure coherent and consistent policy. It is important to emphasize that coordination must not be so broadly defined as to encompass formulation and implementation. A White House staff that vigorously seeks to direct the course of policy, rather than to organize options and facilitate inter-departmental consistency, can do great damage to an administration by engendering the disaffection and antagonism of the bureaucracy. The President is necessarily the focal point of policy. The President's staff, however, must clearly understand the limits of its mandate;
2. *Full participation of the Cabinet in presidential decisions*, to promote cooperation, rather than conflict, between the Chief Executive and his department heads. This goal does not imply that the President's decision-making powers should be curtailed. It only suggests that, to the degree practicable, the structure of an administration should facilitate close presidential consultation with the relevant Cabinet Secretaries;
3. *Broader presidential access to information, opinions, and options*, to give the President the ability to exercise fully his decision-making duties;
4. *Unification of policy formulation and administration authority*, to improve the efficiency and responsiveness of government.

IV
THE CASE OF TRADE

A. The History of Trade Organization

The present trade-policy structure in the executive branch supplies ample evidence of how a divided and diffuse organizational design can subvert the development and implementation of coherent policy. Before analyzing the problems of trade administration, let us briefly review the history of the executive branch's organizational approach to trade policy.

Article I, section 8, of the Constitution cedes to the Congress the responsibilities for regulating "commerce with foreign nations." Presidents seeking authority to adjust tariffs, impose quotas, or to negotiate international trade agreements must come to Congress first. They have dutifully met that requirement over the course of the past century. Prior to that time, however, Presidents were largely content to let Congress take care of trade policy.

Congressional leadership on trade during America's first century was not only a consequence of the foreign commerce clause of article I. In

many respects the more fundamental source of congressional responsibility for trade during this period was article I's revenue clause, which gives Congress the power to "lay and collect" taxes and duties.[11] Up until this century, the federal government levied no income tax.[12] Before the passage of the Sixteenth Amendment, Washington largely relied on tariff collections to fund the government. In the period preceding the Civil War, about ninety percent of all federal revenues were derived from tariffs.[13] In sum, a significant portion of what we now consider trade policy was treated as a sub-set of government finance. As a consequence, most trade issues of concern to the executive branch were handled by the Treasury Department.[14]

In 1897, Congress agreed for the first time to relinquish some of its obligations regarding trade by enacting the Dingley Tariff.[15] Under this statute, Congress gave the President authority to negotiate bilateral, reciprocal trade agreements.[16] Although this delegation of authority was repealed in 1909, it re-emerged twenty-five years later in the form of the Reciprocal Trade Agreements Act of 1934.[17] The devolution on the executive of new responsibilities for trade had significant bureaucratic implications. Specifically, the introduction of presidential authority to negotiate tariff adjustments with foreign governments placed the Secretary of State, rather than the Secretary of the Treasury, at the center of the executive trade-policy organization.[18]

As the importance of international trade to the American economy grew during the early post-World War II era, Congressional opinion of the State Department's leadership in trade negotiations deteriorated. On Capitol Hill, it became an article of faith that the State Department had "bargained away" important commercial interests for "uncertain diplomatic gains", and that the "striped-pants boys [were] unsympathetic and unresponsive to domestic interests . . . ."[19] So when President Kennedy asked Congress in 1962 for additional tariff negotiating authority (preparatory to the Kennedy Round of the General Agreement on Tariffs and Trade), Wilbur Mills, then Chairman of the Ways and Means Committee, made his

11. U.S. CONST. art. I, § 8, cl. 1.

12. The U.S. Supreme Court held a tax on income derived from state and local bonds to be unconstitutional in Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895), determining that the payment of tax on income was an unapportioned, direct tax in violation of article I, section 9, clause 4 of the Constitution. Congress passed the 16th Amendment in 1913, providing Congress with Constitutional authority for a tax on income.

13. R. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929–1976 at 73 (1980).

14. *Id.*

15. 30 Stat. 1 (1897–98).

16. 30 Stat. 203 (1897–98).

17. 19 U.S.C. § 1351 (1934).

18. The interdepartmental Trade Agreements Committee was chaired by the Secretary of State. A Trade Agreements Division was established within the State Department to conduct trade negotiations.

19. I.M. DESTLER, THE POLITICS OF TRADE 20 (1978).

support for the new authority contingent on the demotion of the Secretary of State from the post of chief trade negotiator. Mills suggested that trade negotiations be conducted by an individual within the Executive Office of the President, to be called the Special Trade Representative (STR).[20] Kennedy accepted this bargain, and with the enactment of the Trade Expansion Act of 1962, STR was born.[21]

In 1963, STR had a professional staff of only twenty-five, and although it was the brightest light in the administration's trade-policy scheme, it was not the lead agency on all, or even most, trade issues. STR's early responsibilities centered almost entirely on the conduct of the Kennedy Round multilateral trade negotiations. Outside the GATT context, executive trade policy was dominated by State, Treasury, and an increasingly influential Commerce Department. Most sectoral and bilateral negotiations, as well as the development of overall trade policy, were beyond the purview of the new trade office. It was only after the conclusion of the Kennedy Round that the Office of the STR sought to broaden its jurisdiction.

The Trade Act of 1974[22] ratified and broadened STR's growing mandate over trade policy, by establishing STR as the chief U.S. representative to all trade negotiations, not just those associated with the GATT.[23] Second, the legislation also expanded STR's administrative duties by making it responsible for the implementation of the trade agreements program.[24]

The Trade Act of 1974 also greatly enhanced STR's stature in the eyes of the Congress. STR had always been closely associated with the legislature. After all, the 1962 Act creating the office sprang from the Longworth Building, not the White House. But in its first decade, STR rarely took the time to develop a close relationship with Congress. The administration's lobbying efforts surrounding the Trade Act changed this. STR's active involvement in the development and consideration of the Trade Act afforded the agency its first opportunity to gain "an understanding of what Congressmen and Senators did and did not need."[25] The result was a much stronger bond between STR and Capitol Hill.

Since 1974, STR's mandate has expanded even further. Under President Carter's Reorganization Plan No. 3,[26] the Special Trade Representa-

20. R. PASTOR, *supra* note 13, at 112.

21. The Office of the Special Representative for Trade Negotiations was established within the Executive Office of the President by Executive Order No. 11,075 on January 15, 1963. *See* 3 C.F.R. 692 (1964).

22. Pub. L. No. 93-618, § 141, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-2487 (1982)).

23. 19 U.S.C. § 2171(c)(1)(A) (1982).

24. 19 U.S.C. § 2171(c)(1)(B) (1982).

25. I.M. DESTLER, *supra* note 19, at 53.

26. *See* Executive Order 12,188, 3 C.F.R. 513 (1980). The Executive Order implemented Reorganization Plan No. 3, which had been transmitted to Congress in the fall of 1979. REORG. PLAN. NO. 3, 44 Fed. Reg. 69,273 (1979). *See generally*, Graham, *The Reorganization of Trade Policymaking: Prospects and Problems*, 13 CORNELL INT'L L.J. 221, 229-37 (1980).

tive became the United States Trade Representative (USTR), and was designated the President's principal trade advisor and spokesman. In addition, the 1980 Executive Order made USTR responsible for the development and coordination of "trade strategies and policies."[27]

While President Carter was greatly elevating the role of the USTR, he was also expanding the trade responsibilities of the Department of Commerce. Prior to 1979, Commerce had been active in export promotion and East-West trade, including the administration of export controls. Reorganization Plan No. 3 significantly expanded Commerce's trade responsibilities by establishing the International Trade Administration, which consolidated the Department's existing trade responsibilities while absorbing several important new functions. In particular, the State Department's Foreign Commercial Service was transferred to ITA and the new administration became responsible for implementing the countervailing duty and anti-dumping laws, previously under Treasury's jurisdiction. Additionally, ITA was directed to conduct research and analysis in support of trade-policy formulations.[28]

One executive agency that has not yet been mentioned, but which has exercised significant responsibility for U.S. trade policy, is the Department of Agriculture (USDA). For many years, USDA has consistently been an influential voice in the executive branch on international trade. Through its accumulated expertise regarding farm exports, its administration of the price support programs (which include the regulation of imports), and its close relations with Congress and the farming community, USDA has been able to play an important, and occasionally dominant, role in the development of trade policy and the conduct of trade negotiations. This has been the case despite the fact that USDA's statutory responsibilities for international trade are fairly limited.[29]

B. Failures of the Current Trade Structure

On paper, Reorganization Plan No. 3 clearly gives USTR full authority for trade negotiations and the formulation and coordination of trade policy. ITA and USDA have secondary responsibility, with duties limited primarily to executing policy and promoting exports. The relationships among USTR, ITA, and USDA, however, are far more complicated than they might appear in the reorganization plan. Specifically, the delegation of trade-policy responsibilities in the executive branch is ambiguous at best and overall trade-policy leadership is diffuse or non-existent.

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27. 3 C.F.R. 513 (1980).
28. *Id.*
29. Under such statutes as the Agricultural Adjustment Act and the Agricultural Trade Act of 1978, USDA's mandate with regard to trade is largely limited to export promotion and administration of commodity quotas that support domestic farm programs. *See* 7 U.S.C. §§ 612–613, 624, 1707, 1761–1768 (1982).

There are two leading explanations for the breakdown of Reorganization Plan No. 3. The first is that the Reagan Administration, which had no part in developing Carter's organizational design, came into office without any commitment to implementing it. As a consequence, the reorganization scheme was largely ignored and a different approach to trade-policy organization, one with President Reagan's own imprimatur, was adopted. The problem with this explanation, however, is the underlying presumption that if the Reagan Administration had only implemented Reorganization Plan No. 3 in good faith, the plan's goals would have been realized. The weakness of this presumption suggests a second explanation: that the Carter scheme was unworkable in the first place and its abandonment by the Reagan Administration was more the result than the cause of the plan's shortcomings.

The central premise of Reorganization Plan No. 3 is that it is possible and desirable to centralize the important trade policy and negotiating functions of the executive branch within the White House. The earlier analysis of executive organization explains why this premise is fundamentally flawed. By stripping the line departments of any significant responsibility for formulating policy, the reorganization plan invites perpetual conflict between the White House and the bureaucracy. Its attempt to clearly separate policy formulation from execution is both unrealistic and inefficient. Furthermore, by greatly expanding USTR's administrative mandate, the reorganization plan risks making USTR appear more like an executive department than a White House office, thereby damaging the Trade Representative's credibility as a member of the President's personal staff and leaving the White House without a senior trade adviser. Given these deficiencies, a partial abandonment or erosion of Reorganization Plan No. 3 was inevitable, regardless of who was in the White House.

In practice, much of Carter's reorganization plan has survived, although significant elements have been informally undercut or ignored. No part of the scheme has been officially repudiated or amended. The USTR chairs the cabinent-level, interagency Trade Policy Committee (TPC), and heads all trade negotiating teams. USTR is active in formulating administration trade policy and is a principal spokesman for and advisor to the President on international trade.

Contrary to President Carter's Executive Order, however, USTR is not the undisputed leader of U.S. trade policy. Under the leadership of Malcolm Baldrige, the Commerce Department has emerged as a strong challenger to USTR's preeminence. The Commerce Secretary is a regular visitor to the Oval Office and is generally regarded as having the confidence of the President. More significantly, Secretary Baldrige has heavily concentrated his own efforts, and those of the Commerce bureaucracy, on international trade rather than the issues of domestic commerce which have traditionally been the Department's focus. Characteristic of the Secretary's

overriding concern with international trade is his active promotion of a trade reorganization plan that proposes the transformation of the Department of Commerce into a Department of International Trade and Industry (DITI).[30] His success in securing the President's endorsement of the trade reorganization proposal, particularly in light of USTR's objections, provides further evidence of the Secretary's, and by association, the Department's, formidable influence.

During the past three years, the Commerce Department has even gathered substantial new responsibilities for the conduct of trade negotiations. For instance, Secretary Baldrige co-chairs, along with Ambassador Brock, the U.S.-Mexico Joint Commission on Commerce and Trade and representatives of USTR and the Commerce Department co-chair the U.S.-Japan Working Group on High Technology Industries. Perhaps more significantly, the Commerce Department was the lead agency in the 1982 negotiations with the European Economic Community to limit steel imports.

Secretary Baldrige's efforts to expand the Commerce Department's role in trade policy have been abetted by President Reagan's Cabinet Council system. Cabinet Councils are inter-agency groups, composed of Department Secretaries, which are responsible for coordinating policy and developing recommendations and options for the President. The Cabinet Council on Commerce and Trade, which has jurisdiction over most international trade matters, is chaired by the Secretary of Commerce, not the USTR. In his role as chairman, Baldrige can exercise broad oversight and coordination powers far beyond those available to previous Commerce Secretaries. It is important to note that the Cabinet Council on Commerce and Trade largely encompasses policy responsibilities that are also assigned to the Trade Policy Committee, which is chaired by Trade Representative William Brock.

In sum, the status quo reflects a hybrid of Carter's reorganization plan and Reagan's Cabinet Council system. This synthesis has resulted in a balance of power between USTR and the Commerce Department. No single individual or institution stands out as the recognized leader within the administration on international trade policy. Moreover, since there has been no formal alteration of Reorganization Plan No. 3, there is no clearly understood or mutually accepted guidepost for determining how responsibilities over trade policy should be divided. The result is a confusing, ad hoc system that lacks clear direction, needlessly dissipates time and energy, and duplicates effort.

Additionally, the present organizational matrix leaves the President without a senior trade adviser inside the White House. To be sure, the Trade Representative has technically been a part of the White House since 1963, and under Reorganization Plan No. 3, he is formally charged with

30. For a critique of the Secretary's efforts, see Pine, *A Department for Restricting Trade?*, Wall St. J., July 7, 1983, at 20, col. 3.

serving the President as his chief trade counselor. The reality, however, is quite different.

The problem could be seen as a matter of personalities, not institutions. But as has been suggested earlier, an advisor's relationship to his President is more often a function of where he sits than who he is. The USTR heads a professional staff of about 150, with a statutory mandate to direct trade policy and negotiate trade agreements. Moreover, the Trade Representative is directly answerable to Congress, as well as the President, and is required by law to work closely with congressional trade committees and representatives of the private sector.[31] These factors are not insignificant, because from the vantage point of the Oval Office, they make the Trade Representative look suspiciously like a Cabinet Secretary and Cabinet Secretaries are more often than not treated with some degree of circumspection by their Presidents.

The widely publicized Houdaille machine tool case provides a good example of the lack of trade-policy coordination within the White House. In May of 1982, Houdaille Industries, Inc., of Fort Lauderdale, Florida, filed a petition with the administration, seeking the denial of investment tax credits for purchases of Japanese-made machine tools. For eleven months, the administration wrestled with this complex request. The Cabinet Council on Commerce and Trade and the Trade Policy Committee both sponsored extensive discussions on the issue. Several meetings with White House staff and high-level department representatives were convened to review the petition in detail. Finally, agreement was reached among the top trade and economic officials to present the President with a set of options regarding the Houdaille case, together with a recommendation that remedial action be taken against the Japanese. But before the President met with his trade advisors, he received a telephone call from Japanese Prime Minister Nakasone, urging him to reject Houdaille's petition. On the basis of this phone call, and without hearing the comments of either Brock or Baldrige, Reagan decided to comply with Nakasone's request.[32] Thus, one of this administration's most important international trade decisions was taken by the President without the benefit of any advice from his top trade advisors. This breakdown in the trade policy process points to one of the most glaring deficiencies in the present trade structure: the absence of a senior trade specialist close to the President and inside the White House.

When held up against the guidelines for executive organization presented earlier, the current structure of the administration's trade functions is woefully inadequate. The distribution of policy functions within the bureaucracy is both inefficient and ambiguous. As there is no individual recognized as the President's chief trade advisor, there is no clear White

31. *See* Trade Act of 1974, §§ 135, 161, 19 U.S.C. § 2171(c)(1) (1982).

32. *See* Auerbach, *Trade Battle With Japan Shows Policy Confusion*, Wash. Post, Aug. 15, 1983, at A1, col. 6.

House leadership over policy. Indeed, given the relative equality of influence and responsibility between USTR and the Commerce Department, there is no clear leadership from any source within the administration. Lacking a trade advisor on his personal staff, the President often does not have timely access to the information and options he needs to make informed judgments.

C. Why Reorganization is Necessary

Faced with these serious and debilitating weaknesses in the executive branch's trade structure, a broad consensus on the need for reorganization should exist. Many leaders on Capitol Hill and in the private sector, however, remain unconvinced and contend that the present system should not be tampered with. They have advanced two separate arguments. First, opponents of reorganization insist that "shuffling boxes on an organization chart" will only divert attention from more important tasks—like developing a more coherent trade policy.[33] But this assertion ignores the fact that an inefficient and ineffective organization can dissipate just as much time and energy as a reorganization effort. More importantly, by improving government institutions, we improve the government's capacity for producing sound and coherent policy in the future. Retaining a disjointed and confused organization prevents the achievement of this goal.

Second, critics of reorganization contend that the extant structure should not be altered because to do so might threaten USTR, which is widely viewed as one of the most proficient agencies in the federal government.[34] USTR is staffed by extremely capable and hard-working professionals, whose successes are many and reputations well-deserved. But the quality of USTR must not become confused with the quality of the executive branch's trade-policy organization as a whole. After all, USTR is only a part of a much larger trade-policy structure. It is the effectiveness of this larger structure that counts.

A corollary to the preceding defense of USTR is the claim that reorganization would also set back the cause of a liberal trade policy. Since most reorganization schemes would devolve more trade responsibilities upon the line departments at the expense of USTR, the hand of protectionism would be strengthened, so the argument goes, because the departments (and especially the Commerce Department) are notorious bastions of special interests. If this assertion were true, there might indeed be reason to question the efficacy of reorganization. But the claim is not true.

Early in its history, the Trade Representative's office may have been more liberal in its approach to trade than line departments such as Com-

33. *See* Eizenstat, *Unsettling a Delicate Balance*, N.Y. Times, June 19, 1983, at 2F, col. 1.

34. *See* Letter from the National Grange and Seven Other Farm Organizations to Senator Roth, May 20, 1983 (on file with International Tax & Business Lawyer). *See also* Pine, *supra* note 30.

merce. But as USTR has become more active in bilateral and sectoral issues and more involved with the private sector and Capitol Hill, this free trade bent has faded. In 1976, for instance, STR strongly favored import relief for the shoe industry, while the supposedly protectionist Commerce Department opposed such relief.[35] The stringent 1977 orderly marketing agreement with the Japanese, restricting imports of color televisions, was developed, negotiated, and advocated by STR, not the Commerce Department.[36] More recently, USTR and Commerce have generally been on the same side of most import remedy cases, including the Houdaille petition. At present then, USTR is no more internationalist in its view of trade than the line departments.

V
LEGISLATIVE INITIATIVES: THE ROTH AND BONKER BILLS

Thoughtful and practical reorganization of the executive branch's trade functions need not obstruct the development of coherent policy, destroy the professionalism of the government's trade specialists, or lead the United States inexorably down the road to protectionism. On the contrary, reorganization can be an important step toward making the federal government a stronger and more effective force for expanded world trade.

Two prominent trade reorganization proposals presently before Congress attempt to take this step. The bill that has attracted the most attention to date is S. 121, sponsored by Senator William Roth (R-DE).[37] Introduced in January 1983, S. 121 has undergone two transformations. In August, the bill was modified to make it compatible with the administration's trade reorganization proposal, which had been unveiled in June. Following these changes, the administration embraced the Roth bill as its own.[38] In October, after several days of mark-up, S. 121 was reported out of the Governmental Affairs Committee with further alterations, including the addition of an industrial policy provision.[39] The bill is currently waiting to be placed on the Senate calendar for floor action.

The central feature of S. 121 is the proposed merger of USTR and the Department of Commerce to create a new Department of International Trade and Industry (DITI). DITI would have lead responsibility within the executive branch for conducting trade negotiations and developing, implementing, and coordinating trade policy. Under S. 121, the Secretary of DITI would hold the title of United States Trade Representative. The office of the USTR itself would technically remain intact, but would be

35. *See* I.M. DESTLER, *supra* note 19, at 59.
36. *Id.*
37. 98th Cong., 1st Sess., 129 CONG. REC. S591 (daily ed. Jan. 26, 1983).
38. *See* Pine, *supra* note 30.
39. 129 CONG. REC. D1287 (daily ed. Oct. 4, 1983). *See also* Auerbach, *Senators Add Policy Issue to Trade Bill*, Wash. Post, Oct. 5, 1983, at A10, col. 1.

moved inside the office of the Secretary for International Trade and Industry. Although the President would become chairman of the inter-agency Trade Policy Committee, the DITI Secretary would serve as chairman pro tempore, thereby assuring him primary authority for policy coordination.[40]

The section concerning industrial policy, drafted by Senators Thomas Eagleton (D-MO) and Carl Levin (D-MI), would oblige the Secretary of DITI to form temporary sectoral councils to examine and comment on the problems and opportunities confronting critical American industries. The councils would be composed of representatives from business, government, and organized labor, and their analyses and recommendations would be advisory only. Although this language passed the Governmental Affairs Committee by a comfortable margin, many members who voted for it expressed serious reservations and have not committed themselves to supporting the provision on the Senate floor.[41]

Other features of the bill include creating an Under Secretary for Agriculture within the new trade department, elevating the Secretary of Agriculture to the position of Vice Chairman of the Trade Policy Committee, and spinning-off several offices currently within the Commerce Department whose functions are not central to DITI's trade mandate.[42]

Proponents of the Roth bill promise that, if enacted, S. 121 would produce significant efficiency gains through the unification of the important trade-policy functions in a single agency whose primary focus is trade.[43] But the Senate bill tries to consolidate too much, and by so doing it makes the fulfillment of that promise highly unlikely. In the name of efficiency, S. 121 proposes to delegate responsibility for policy coordination to the new trade department. This suggestion is at once undesirable and impractical. Because a line department has a narrow focus and specific interests, it cannot effectively coordinate policy that, by its nature, touches on areas under the purview of so many other agencies. Inter-departmental rivalry, if nothing else, forbids it. Moreover, the legitimate concerns and interests of other departments (most notably USDA) would be intolerably submerged by such a concentration of authority in a single agency, and would improperly slant policy toward that agency's particular interests, rather than the national interest.

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40. This responsibility is muddled by a committee-approved amendment proposing the establishment of a presidential adviser on international economic policy, who would chair an interagency committee responsible for coordinating all international economic policy, including trade policy. *See* Pine, *supra* note 30.

41. Transcript, Mark-up session of Senate Governmental Affairs Committee (Oct. 4, 1983).

42. S. 121 proposes the following spin-offs: Economic Development Administration to USDA; Minority Business Development Agency to Small Business Administration; National Oceanic and Atmospheric Administration given independent status; Census Bureau given independent status. *See* Sec. 13 of the proposed text, 129 CONG. REC. S596 (daily ed. Jan. 26, 1983).

43. Statement of Senator Roth, 129 CONG. REC. S591 (daily ed. Jan. 26, 1983).

In addition, by designating the Secretary of DITI as the President's principal trade counselor, S. 121 ignores the Chief Executive's need for unbiased (or at least balanced) information and a range of realistic options. A Department Secretary's function is to represent and lead his own bureaucracy in the competitive milieu of executive branch politics. In such a context, a Secretary cannot be expected to provide a President with information or options that fairly reflect anything but his own department's preferences. Only the White House staff, free of bureaucratic constraints and biases, can fulfill this function.

The future of the Roth bill in the Senate is clouded. Strong opposition to the legislation, led by Senator John Danforth (R-MO), has surfaced in the Senate Finance Committee.[44] Although the Committee does not have any formal jurisdiction over the bill, it generally has substantial jurisdiction over international trade issues. Unless Senator Roth can reach some accomodation with the Finance Committee, floor consideration of S. 121 may be indefinitely delayed. Perhaps more significantly, the administration's support for the Roth bill has become decidedly lukewarm. In particular, the administration has expressed serious concerns regarding the industrial policy section of the bill, which is wholly antithetical to the Reagan economic philosophy.[45] Without strong administration backing, it is doubtful that S. 121 will be able to reach the floor.

Before pronouncing the bill dead, however, one must remember that the "experts" never believed that the administration would endorse trade reorganization or that the legislation would be reported out of committee. The persistence and persuasiveness of Senator Roth and Secretary Baldrige should not be underestimated. In the end, their personal commitment to reorganization may be enough to bring the bill before the full Senate and even, perhaps, enough to get the bill passed.

In the House, however, the prospects for S. 121 are even bleaker. First, the bill is viewed by many Democrats as a Reagan initiative, designed to draw attention away from what they claim to be the administration's "failed policies" on international trade.[46] According to these Democratic critics, supporting the administration's proposal in an election year would be an ill-advised political gift to the Republicans. Second, the farm community, which has a strong voice in Congress, fears that a trade structure dominated by DITI, whose central focus would be the promotion of American industry, would deal a harsh setback to agricultural interests.[47] Finally, the Roth bill has been expressly and forcefully rebuked by several prominent Democrats and Republicans on the Ways and Means Committee. In a

44. Auerbach, *supra* note 39.

45. *Id.*

46. *See* NATIONAL HOUSE DEMOCRATIC CAUCUS, RENEWING AMERICA'S PROMISE 37 (January 1984).

47. Letter from National Grange, *supra* note 34.

letter to Jack Brooks, Chairman of the House Committee on Government Operations, the Ways and Means leadership voiced strong opposition to S. 121, primarily on the ground that it would leave the executive branch without an "honest broker" to sort through the competing trade interests that exist in an administration.[48] An underlying concern of the Committee is that S. 121 might jeopardize the Committee's jurisdiction over trade matters. In particular, Ways and Means members are concerned that folding USTR into what is essentially a reconstituted Commerce Department might give rise to claims by the Energy and Commerce Committee to extend its authority to the negotiation of trade agreements, presently under the authority of the Ways and Means Committee.

Responding to these concerns, Representative Don Bonker introduced H.R. 4432 near the close of the 98th Congress's first session.[49] The Bonker bill is a significant initiative, which promises not only to remedy the deficiencies of the Roth bill, but also to establish a workable and effective trade-policy structure in the executive branch.

H.R. 4432 proposes reorganizing the trade functions of the executive branch in several ways. First, it would dissolve the Department of Commerce in favor of a new Department of Commerce and Trade. The Secretary of the new department would be responsible for conducting commercial (i.e., non-agricultural) trade negotiations. Such negotiations would be conducted on a day-to-day basis by two Deputy Secretaries for International Trade Negotiations and a Chief Textile Negotiator. All three would have the rank of Ambassador. One of the Deputy Secretaries would be permanently assigned to the GATT in Geneva, with the status of Chief of Mission. The new department would have primary responsibility for developing and implementing commercial trade policy. In addition, the new department would have responsibility for analyzing the competitiveness of important sectors of the American economy, studying methods of improving productivity and expanding the application of modern technology to all economic sectors, and developing government strategies to enhance industrial growth and competitiveness. As with the Roth bill, H.R. 4432 would spin off many offices presently in the Commerce Department which do not readily fit the new department's trade focus.[50]

Second, H.R. 4432 would give primary responsibility for negotiating agricultural trade agreements to the Department of Agriculture. USDA

48. Letter to Chairman Brooks dated June 6, 1983, and signed by Dan Rostenkowski (D-IL), Sam Gibbons (D-FL), Bill Frenzel (R-MN), Barber Conable (R-NY), Ed Jenkins (D-GA), and Kent Hance (D-TX) (on file with the International Tax & Business Lawyer).

49. *See supra* note 1.

50. H.R. 4432 tit. IV proposes the following spin-offs: Economic Development Administration to Housing and Urban Development; Minority Business Development Agency to Small Business Administration; National Bureau of Standards to National Science Foundation; National Oceanic and Atmospheric Administration given independent status; Census Bureau given independent status.

would also have lead responsibility for developing and implementing agricultural trade policy. To carry out these negotiating duties, a Deputy Secretary for International Trade Negotiations would be created within USDA with the rank of Ambassador, who would conduct day-to-day negotiations on behalf of the Secretary. In addition, USDA would be given the opportunity to assign a permanent representative to the GATT, also with the rank of Ambassador and status of Deputy Chief of Mission.

Third, H.R. 4432 would create the post of Assistant to the President for International Trade. This individual would replace the U.S. Trade Representative as the President's principal advisor on trade issues and chief coordinator of trade policies. The international trade advisor would be the chairman pro tempore of a Trade Policy Committee, which the President would chair. Under the leadership and direction of the trade advisor, the Trade Policy Committee would be responsible for advising the President, coordinating policy among the various agencies, and supervising international negotiations.

The Trade Policy Committee, through a Subcommittee on Trade Negotiations, would advise the President on the appointment of delegations to trade negotiations and would recommend instructions for those delegations. In appointing negotiating teams, the President and the inter-agency groups would be directed to take into account whether a particular negotiation involved issues that are primarily agricultural or commercial in character. In commercial cases, the new trade department would head the delegation; in agricultural cases, USDA would be in charge. In either instance, both USDA and the Department of Commerce and Trade would have the opportunity to be represented.

Finally, the Bonker reorganization plan would create a permanent Council on Industrial Competitiveness. This Council would be chaired by the Secretary of Commerce and Trade and be composed of representatives from business, labor, government, and the general public. The Council would examine various sectors of the American economy, issue reports on the competitive position of these sectors, and make recommendations for improving competitiveness and facilitating economic adjustment. The reports and recommendations of the Council would be purely advisory, having no force of law.[51]

H.R. 4432 proposes an organizational design that is both effective and practical. The establishment of the position of Assistant to the President for International Trade would secure White House leadership over the coordination of policy. The presence of this presidential adviser inside the White House, stripped of any substantial bureaucratic or administrative obliga-

51. The section regarding the establishment of the Industrial Competitiveness Council presents only a skeletal framework for the structure, duties, and powers of the Council. It does not reflect a new industrial policy initiative and is not intended to affect the course of the industrial policy debate in the House.

tions, would greatly improve the President's access to competent, balanced, and timely counsel on important trade issues. The expanded policy mandates of the Department of Commerce and Trade and USDA would strengthen the role of the line departments in the decision-making process and generally enhance efficiency and responsiveness in the conduct of trade policy.

One may criticize H.R. 4432 for dividing negotiating and policy-making responsibilities between Commerce and Trade and USDA. These critics claim that this separation ignores the inherent inter-relationship between agricultural and commercial trade issues, particularly in the context of international negotiations where bargaining can cut across sectoral lines.

There are two responses to this criticism. First, to an increasing degree, international trade negotiations are conducted bilaterally with a focus on discrete sectoral issues. Wide-ranging, multilateral discussions are no longer the focal point of trade negotiations. Sectoral trade talks tend to have lives of their own, irrespective of separate negotiations regarding other economic sectors. In this environment, cross-sectoral trade-offs are increasingly rare, and a negotiator's horse-trading sense is less valuable than his technical expertise.

Second, through the inter-agency apparatus led by the White House, trade policy and negotiating positions would reflect administration-wide consensus, not the preferences of an individual department. Furthermore, USDA and Commerce and Trade would both have the opportunity to be represented at any trade negotiating session, regardless of its primary topic. Neither department, then, would be cut out of any negotiation, and both would be on the scene to insure that their respective interests are not improperly ignored.

Finally, the devolution of negotiating authority on the line departments is less a new initiative than a recognition of reality. Today, even though USTR heads almost every negotiating team, the Commerce Department and USDA generally provide the bulk of the staff support—often at a very senior level. For example, the delegation that negotiated the most recent Soviet grain deal was headed by Deputy USTR Robert E. Lighthizer. Supporting Lighthizer was Under Secretary of Agriculture for International Affairs and Commodity Programs Daniel Amstutz. Clearly, in this negotiation, the interests and expertise of USDA were recognized as preeminent, and the Department was given a major, if not controlling voice in the consummation of the agreement. Significantly, the pact was signed in Moscow by Secretary of Agriculture Block, rather than by the U.S. Trade Representative.

In addition to being a sound and workable approach to executive organization, H.R. 4432 presents the best hope for breaking-up the political logjam blocking consideration of trade reorganization in the House. First, H.R. 4432 offers Democrats an opportunity to support trade reorganization

without giving a gratuitous boost to Ronald Reagan's reelection hopes. H.R. 4432, after all, is the progeny of a Democrat and is substantially different from the administration-endorsed bill. As a result, Democrats should be able to embrace the Bonker approach without appearing to support a Reagan initiative.

H.R. 4432 goes far to assure the agricultural community that its interests need not be sacrificed by reorganization. Indeed, by ceding certain negotiating authorities to USDA and giving the Department an explicit mandate to develop and implement agricultural trade policy, the Bonker bill may well enhance the voice of farmers in U.S. trade policy.

In addition, H.R. 4432 squarely addresses the concerns of the Ways and Means Committee. Although the bill would dismantle USTR, it would retain within the White House what are arguably the Trade Representative's two most important functions: coordinating policy and advising the President. This arrangement maintains the "honest broker" principle that Ways and Means so strongly supports. Furthermore, the bill reaffirms the Committee's jurisdiction over trade by framing much of the legislation as amendments to the Trade Act of 1974, a statute clearly within the purview of Ways and Means.

The political logjam, however, is not the only barrier confronting proponents of trade reorganization in the House. Substantial parliamentary obstacles have arisen as well. Most notable is the joint referral of H.R. 4432 to eight separate committees, which in effect gives any one of the eight committees virtual veto power over the legislation.

Although serious, these procedural hurdles will not by themselves determine the success or failure of H.R. 4432. Ultimately, the bill's fate depends upon the creation of both a consensus supporting reorganization and a commitment to action from the House leadership. Given such support, the procedural problems will not prove insurmountable.[52] Guiding H.R. 4432 through the maze of Committees will be an arduous task. Nonetheless, the attractiveness of the bill as a realistic alternative to S. 121, both politically and substantively, makes H.R. 4432 the best, if not the only, vehicle for trade reorganization in Congress.

52. House consideration of President Carter's proposal to create the Department of Energy demonstrates the weakness of parliamentary obstacles when the Congress is determined to act. On May 2, 1977, Carter's proposal was introduced and referred to five committees. Invoking clause 5 of House Rule X, Speaker of the House O'Neill appointed an ad hoc committee to expedite consideration of the bill. On August 5, 1977, the bill was passed by the House. Energy Conservation Act, 42 U.S.C. §§ 6201–6422 (1976) (amended in 1981). House Rule X has often been invoked during the past twenty-five years. *See* GUIDELINES FOR THE ESTABLISHMENT OF SELECT COMMITTEES, REPORT OF THE HOUSE RULES SUBCOMM. ON LEGISLATIVE PROCESS (February 1983).

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CONCLUSION

Reorganizing the trade functions of the executive branch is not a pointless exercise, designed merely to improve the appearance of the government's organizational chart. Nor is trade reorganization simply a smokescreen to obscure an empty and ineffective policy. Rational reorganization of the executive branch can strengthen the formulation and implementation of U.S. trade policies, improve coordination among the several departments and agencies, and increase the weight given to trade considerations in the broader context of U.S. domestic and foreign policy-making.