



Reflections from an Independent Commission On Interface Among Trade, IP, & Antitrust

Hon. F. Scott Kieff, Commissioner, US ITC
(On Leave from Fred C. Stevenson Research Professor at
George Washington University School of Law)



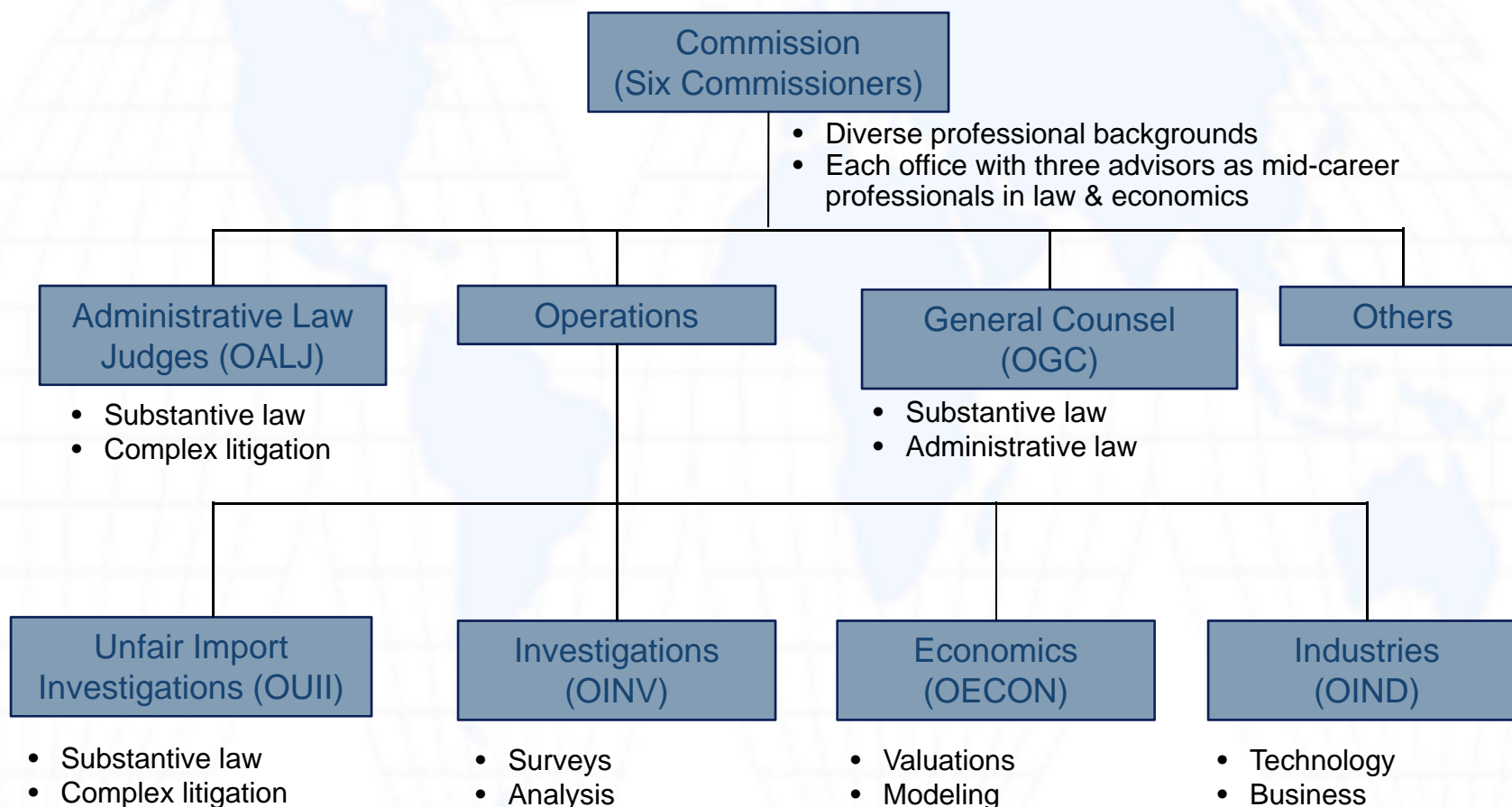
Brussels Conference on
Regulating Patent Hold-Up
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ITC Office-Level Organization Chart

(noting some often overlooked assets)





ITC Structure: Independence & Collaboration

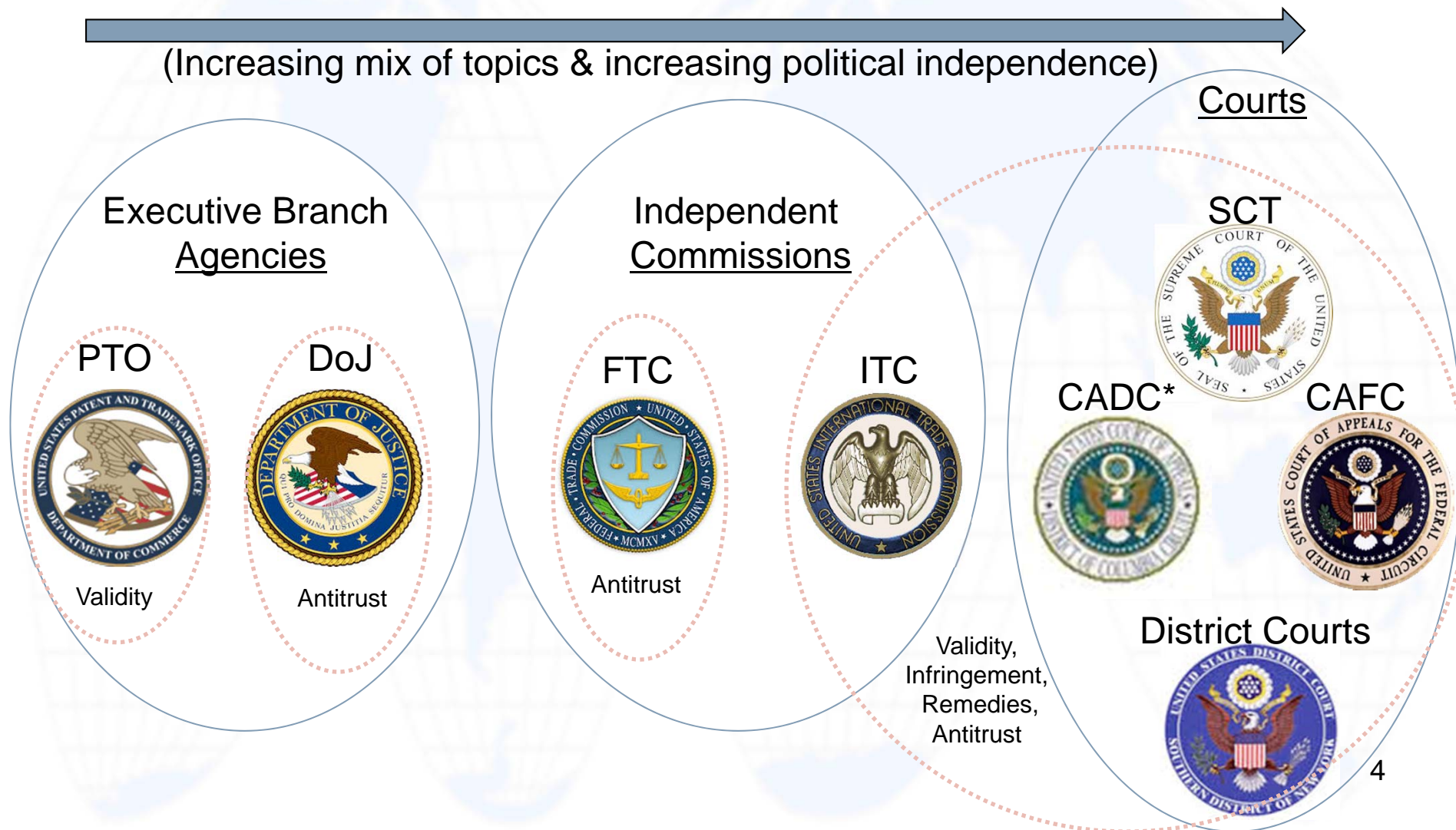
- Six Commissioners: 1 vote each on substance
- Statutorily structured in shadow of Civil War (tariffs before income tax)
 - Adjudicatory role, applies law as given by Congress and interpreted by courts (Rules-based decision-making on IP, Antitrust, and Trade)
 - No more than three members of same political party, with Presidential nomination and Senate confirmation
 - Nine-year, non-renewable, staggered terms
 - Chair changes party every two years
 - Four can overrule Chair on administration

(Daily & Kieff, Benefits of Patent Jury Trials for Commercializing Innovation, 21 Geo Mason L Rev 865 (2014))



Many Agencies of the US Patent System

(Increasing mix of topics & increasing political independence)





Perspectives on Property Rights' Web of Contracts around Patents in a Well-Operating System

Inventor (or her employer)	Returns to investment in invention
2 nd parties contract over patent <ul style="list-style-type: none">• Venture capitalists• Joint venture partners• Outsiders who license or buy	Returns to investment in commercialization
3 rd parties	Avoid infringement or contract to license or buy
Consumers	New goods, services, & business models brought to market <ul style="list-style-type: none">• Access to these new options• Increased competition brought to legacy options
Everyone	No need for government to trace contributions or allocate values because parties themselves made allocations through contracts, at least implicitly

(Kieff, *Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access*, 56 Emory L.J. 327 (2006); Kieff, *On Coordinating Transactions in Information: A Response to Smith's Delineating Entitlements in Information*, 117 Yale L.J. Pocket Part 101 (2007))



What Can Patent System Questions about Hold-Up Learn from History? Ask Nobel Laureate Oliver Williamson:

Asset specificity

- Asset cannot be redeployed from current, reasonably intended use to some alternative use without a decline in value

Williamson, *The Economic Institutions of Capitalism*, 52–56 (1985)

Plus Opportunism

- self-interest seeking with guile, including calculated efforts to mislead, deceive, obfuscate, and otherwise confuse

Williamson, *The Mechanisms of Governance*, 378 (1996)



Holdup Risks in Context of Patent Remedies

- Patent holdup (all 3 of the following)
 - At least some minimal level of advance patent clearance attempted by infringer
 - Infringer then invests sunk costs in reasonable reliance, and the sunk costs are large and asset specific
 - Opportunism by patentee
- Reverse holdup
 - Patentees and contracting parties strung along by opportunistic infringers holding out for patentee to cave
 - Delay in selecting standard or threat of picking bad one
- Government holdup
 - Patentees and contracting parties learn later that infringers get preferred treatment

(Epstein, Kieff, Spulber, *The FTC, IP, and SSOs: Government Hold-up Replacing Private Coordination*, 8 J. COMPET. L. AND ECON. (2012); Kieff & Layne-Farrar, *Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations*, 9 J. Competition L. & Econ. 1091 (2013))



SSOs, Patents, & ITC: Details of Parties' Behaviors Matter a Lot for Both Substance & Process

- Broadcom v. Qualcomm (337-TA-543, 2007) “baseband processors” public interest public hearing
 - https://www.usitc.gov/press_room/news_release/2007/er0607ee1.htm
 - <https://www.law.cornell.edu/cfr/text/19/210.43>
- Samsung v. Apple (337-TA-794, 2013) “smartphone wars”
 - <http://www.essentialpatentblog.com/2013/07/itc-releases-public-version-of-the-commission-opinion-and-dissent-in-samsung-apple-case-337-ta-794/>
 - <http://www.essentialpatentblog.com/2013/08/u-s-trade-representative-vetoes-exclusion-order-in-samsung-apple-itc-case-inv-no-337-ta-794-no-iphoneipad-ban/>
- Amkor v. Carsem (337-TA-501, 2014) “encapsulated integrated circuits” and JEDEC, with additional views of Aranoff, Broadbent, Kieff, and Pinkert
 - <http://www.essentialpatentblog.com/2014/05/itc-issues-limited-exclusion-order-upon-finding-patent-was-not-essential-to-jedec-standard-337-ta-501/>
 - <http://www.essentialpatentblog.com/wp-content/uploads/sites/234/2012/12/2016.01.28-SEP-Litigation-in-ITC-D.-Long.pdf>
- Tomorrow’s discussions under the Sunshine Act: “parties ... may submit a written request for a hearing to present oral argument.... The Commission shall grant the request when at least one of the participating Commissioners votes in favor of granting the request.”
 - <https://www.law.cornell.edu/cfr/text/19/210.45>
 - <http://www.essentialpatentblog.com/2016/02/help-us-help-you/>
- Why limit the analytical benefit of open conversations about complex topics to just SEPs and the like....?