Myth v. Fact on the 2015 Hatch-Ryan Fast Track Bill

Few Changes from 2014 Fast Track, No Fixes to Fast Track's Fundamental Flaws

The Hatch-Ryan Fast Track bill would revive the Fast Track mechanism that was dead on arrival in the House in 2014 and that Congress has only authorized once in the last 21 years. A side-by-side comparison of the 2015 and 2014 bills by the Ways and Means Democratic staff shows how few *words* are different from the 2014 bill, which itself replicated the controversial 2002 Fast Track process. If this bill were enacted, whomever is president could unilaterally choose trade partners and launch negotiations for the next three to six years, and whether or not the negotiating objectives in the bill were met could sign and enter into agreements before Congress approves their contents and then be guaranteed House and Senate votes in 90 days with no amendments and limited debate.

Despite this, the 2015 bill's supporters claim it has "important modifications and improvements" that "boost oversight by Congress, enhance consultations and increase accountability by the Obama administration." A review of the bill language shows that this is not true.

- The "new" provisions on "accountability" impose unsurmountable obstacles for even the Ways & Means or Finance committees to remove an agreement from Fast Track if it fails to meet Congress' goals, while the bill word-for-word replicates the equally unusable mechanism in the 2002 Fast Track and 2014 bill for any member of Congress to do so.
- The "new" provisions on "transparency" simply restate current practice or instruct the Office of the U.S. Trade Representative to develop new procedures without requiring new access to congressional staff or the public.
- The bill even eliminates congressional oversight requirements with respect to World Trade Organization negotiations that were included in the 2014 bill.

(References below are to sections in the 2015 bill so readers can check the text for themselves.)

Minimal Changes in 2015 Fast Track Relative to 2002 Fast Track and 2014 Bill Fail to Boost Oversight by Congress, Enhance Consultations or Increase Accountability

Provisions Touted as Providing "Exit Ramps" from Fast Track are Really Dead Ends: The 2015 bill's terms for removing a pact from Fast Track are unusable in practice, and are a step backwards from a past iteration of Fast Track, which provided for either the Ways & Means or Finance committees to withdraw Fast Track before an agreement could be signed if negotiators ignored Congress' negotiating objectives.

> *GOP Ways & Means Claim: For the first time, the legislation establishes a new mechanism to remove expedited procedures for a trade agreement if, in the judgment of either the House or Senate, that agreement does not meet the requirements of TPA. If the House Committee on Ways and Means or the Senate Finance Committee determines that the President has not met the conditions prescribed by TPA, either Committee could trigger a Consultation and Compliance Resolution. This new resolution provides a mechanism for either the House or Senate to remove expedited procedures for its chamber with respect to that implementing bill.*

Reality: The bill's only "new" feature, the "consultation and compliance" procedure (Sec. 6(b)(3-4)) does not in fact provide Congress with new accountability over negotiators or a usable "exit ramp":

- Only the House Ways & Means or the Senate Finance committees can trigger this process, not all members of Congress. A majority vote of either the House Ways & Means or the Senate Finance

committee negatively reporting out the implementing legislation submitted for a pact would automatically generate a resolution removing Fast Track consideration for the implementing bill in the relevant chamber. However **the resolution would not be privileged and could only obtain floor consideration if the Speaker or Majority Leader agreed to schedule a vote.**

- **Moreover, Senate floor approval would require 60 votes, even though "no" votes by 50 Senators would effectively take an agreement off of Fast Track and send it back for changes.**
- **Further, even if the "consultation and compliance" mechanism were operational, it comes too late in the process for the Congress to affect the contents of a trade agreement.** The procedure could only be triggered *after an agreement was already signed and entered into and the executive branch had written and submitted legislation to implement a pact.* At that point changes to the underlying pact could be made only if all other negotiating parties agreed to reopen negotiations and then agreed to the changes, likely after extracting further concessions from the United States.
- **The "consultation and compliance" procedure is a step backwards from terms in the 1988 Fast Track that empowered *either* the Ways & Means *or* the Finance committee *before* a president could sign and enter into a trade agreement to vote *by simple majority* to remove a pact from Fast Track *in both chambers*, with *no additional floor votes required.*** (19 USC 2903(c)(2)(B)) This provision provided the trade committees with leverage to pressure executive branch negotiators to comply with Congress' negotiating objectives during negotiations. Even so, this mechanism proved insufficient to enforce the labor rights negotiating objective that was included in the 1988 Fast Track. Both the NAFTA and the WTO were implemented using the 1988 Fast Track grant, but neither pact included the required labor rights provisions.

Reality: The 2015 bill replicates word-for-word the "procedural disapproval" mechanism from the 2002 Fast Track and the 2014 bill, including the same insurmountable conditions that ensure it could never be deployed to remove an agreement from Fast Track. **While any member of Congress can offer a "procedural disapproval" resolution, *both* the Senate Finance *and* the House Ways & Means committees would have to approve it. Even if a resolution survived that untenable condition, it then would need to be passed by <u>both</u> chambers *within 60 days* to take effect.** However, unlike a Fast Tracked trade agreement, the procedures set forth for consideration of such a disapproval resolution do not require that voting occurs within a set number of days. (Sec. 6(b)(1-2))

<u>Touted "Transparency" Provisions Merely Codify the Unacceptable Status Quo</u>

What proponents claim are new "unprecedented transparency requirements" are largely a codification of status quo procedures used by past Democratic and GOP administrations. In fact, the provisions fail to require the same degree of transparency with respect to access to draft trade agreement text exhibited by the George W. Bush administration.

> *<u>GOP Ways & Means Claim</u>: The proposal would establish—for the first time in law—that the text of a completed trade agreement must be public for at least 60 days before the President may sign it.*

Reality: A close read of this provision (Sec. 6(a)(1)) reveals that the requirement to make the text publicly available would occur 30 days *after* the agreement was initialed and the text locked, at which point it would be too late for the public or Congress to demand changes. (The preceding provision in the bill requires the president to notify Congress *90 days* before signing an agreement, at which point the text would be closed.) This "new" provision actually codifies what has been standard practice for past Fast Tracked-agreements – the texts typically have been made public after negotiators

decided talks were completed and the text was "initialed" and closed, but before the deal was signed. However, the bill fails to codify past practices that achieved a greater degree of public transparency, such as the World Trade Organization's posting of draft trade agreement text on its website or the George W. Bush administration's 2001 release of the draft composite negotiating text of the Free Trade Area of the Americas on the U.S. Trade Representative's (USTR) website for anyone to read well before it was completed. The 2015 bill includes no such requirement for the draft texts of Fast Tracked trade agreements to be released to the public. (Sec. 4(d))

GOP Ways & Means Claim: USTR must promptly provide the classified negotiating texts of all trade negotiations to any Members of Congress, at that Members' request, who may view the texts with their staff (provided that staff have obtained the appropriate security clearance).

Reality: In fact, identically to the 2014 bill, the 2015 bill continues the U.S. Trade Representative's (USTR) discretion with respect to the specifics of how and when access will be provided to trade agreement texts for members of Congress and their staffs. The bill instructs USTR to "develop written guidelines on enhanced coordination with Congress." (Sec. 4(a)(3)(A)) The one difference between the 2014 and 2015 bill language – the putative extension of access to non-committee staff - contains a caveat that again preserves USTR's discretion to determine if and when it is appropriate for such staff with security clearances to see confidential text. The bill instructs that USTR's guidelines are to provide rules for "the sharing of detailed and timely information with Members of Congress, and their staff with proper security clearances *as appropriate*, regarding those negotiations and pertinent documents related to those negotiations (including classified information)" (emphasis added) (Sec. 4(a)(3)(B)(2))

Reality: **Even if the USTR's guidelines provided ready access to all congressional staff with security clearances, it would simply formalize USTR's past practices under the Bill Clinton and George W. Bush administrations, before the Obama administration's moves toward greater secrecy.** During the North American Free Trade Agreement (NAFTA) negotiations, members of Congress and any of their staff with security clearances had open access to the full draft composite NAFTA text, with a new version placed into a secure reading room in the Capitol after each round of talks. The 2015 Fast Track would simply restore the pre-Obama-administration status quo regarding congressional and security-cleared staff access, while continuing to deny public access.

Reality: **The bill would create a *statutory basis* for congressional staff without security clearances to be denied access to draft trade pact texts.** USTR's practice has been to require the few staff with any access to draft text to have security clearances. Repeated requests by Congress for USTR to reveal the statutory authority to do so has not been forthcoming. And, leaked chapters of the TPP text reveal that they are marked "confidential," not classified. Moreover, the cover pages of various leaked TPP chapters all include a disclaimer that makes clear that classified handling is not required: "This document must be protected from unauthorized disclosure, but may be mailed or transmitted over unclassified e-mail or fax, discussed over unsecured phone lines, and stored on unclassified computer systems. It must be stored in a locked or secured building, room, or container." Despite this, the bill would formalize USTR's practice of requiring security clearances for staff obtaining access.

GOP Ways & Means Claim: The legislation creates—in statute—a Transparency Officer at USTR that will consult with Congress and advise the USTR on transparency policies. This new position is established to ensure consistent transparency policies across the agency and to engage and assist the public in understanding the trade negotiations.

Reality: This provision – which is itself six words shorter than the above GOP staff summary of it – is extremely vague and includes no requirement that USTR acts more transparently. The bill would simply add the following two sentences: "There shall be in the Office [of USTR] one Chief Transparency

Officer. The Chief Transparency Officer shall consult with Congress on transparency policy, coordinate transparency in trade negotiations, engage and assist the public, and advise the United States Trade Representative on transparency policy." (Sec. 4(f)) Rather than requiring trade negotiations to be more transparent or trade texts to be released, this language simply creates a new, ill-defined job at USTR.

GOP Ways & Means Claim: The proposal will statutorily require the Administration to publish detailed and comprehensive summaries of the specific objectives that trade negotiators are seeking in trade negotiations, and keep such summaries updated as negotiations continue.

Reality: Despite Finance Committee Ranking Member Wyden basing his opposition to the 2014 Fast Track bill in part on its lack of transparency and its failure to guarantee information for the public about trade agreements under negotiation, the 2015 bill does not remedy this problem. A provision new to the 2015 bill requires the USTR to publish a "summary of the specific objectives with respect to the negotiations, and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States" 30 days before negotiations on a new agreement begin. (Sec. (5)(a)(1)D)) That is to say that USTR is not even required to publicly release its *proposals* for agreements' provisions, a practice that the European Union has adopted or update the public on whether negotiations are meeting even the USTR's version of what a pacts' goal are. Moreover, nothing in this provision would require the administration to actually meet Congress' negotiating objectives before signing and entering into an agreement or condition getting the Fast Track voting procedures on doing so. Without this provision, there has been no lack of prose from the administration about pacts' supposed benefits. What remains missing from this bill is any means for members of Congress to certify that negotiators are complying with Congress' trade pact negotiation objectives.

GOP Ways & Means Claim: The proposal will require the independent International Trade Commission to conduct new analysis and publish new reports on the economic impact of all trade agreements that Congress has enacted since 1984.

Reality: This provision, largely replicated from the 2014 Fast Track, is not linked in any way to the Fast Track process that this bill would revive. The president still would be able to sign and enter into new trade agreements before Congress got a vote and enjoy a guaranteed 90-day no-amendments vote even if the International Trade Commission (ITC) found – as many academic studies have– that the past trade pacts on which current pacts are based have contributed to U.S. job offshoring and downward pressure on middle class wages. The provision includes no requirement for the administration to act on the findings of the ITC reports, such as by altering the status quo trade model. Further, though the Ways & Means leadership touts this provision as one that improves transparency, the provision does not require that the ITC reports be made available to the public, or even to all members of Congress. It only requires the ITC to submit its reports to the House Ways & Means and Senate Finance committees. In contrast, public availability is an explicit requirement for most other reports stipulated in the bill. (Sec. 5(f)(2))

GOP Ways & Means Claim: The bill requires the President to submit to the committees of jurisdiction the final, legal text of a trade agreement and a draft of its Statement of Administrative Action at least 30 days before the President may submit an implementing bill to the Congress. This new requirement provides Congress time to review how the Administration plans to implement the agreement even before an implementing bill is submitted.

Reality: This requirement again merely formalizes standard past practice. For past Fast Tracked pacts, the president has provided Congress the final legal text of the agreement before submitting a bill to implement the pact. Codifying this practice does not alter the fact that, under the Fast Track process that this bill would revive, the final legal text presented to Congress would already be signed and entered into whether or not it met Congress' negotiating objectives. And the requirement to inform Congress "how the

Administration plans to implement the agreement" would do nothing to allow Congress to alter those plans. If, during the touted 30-day review period, members of Congress should find that the text of a signed agreement failed to meet their negotiating objectives, or that the plans to implement the agreement included unnecessary and harmful changes to U.S. law, they would have no power to require modifications to the agreement or the legislation. (Sec. 6(a)(1)(D))

Negotiating Objectives Are Unenforceable

The bill's supported tout inclusion of a negotiating objective claimed as "advancing human rights." But because the bill does not reform the core Fast Track process, this, and other, negotiating objectives are entirely unenforceable.

> *GOP Ways & Means Claim: The bill recognizes the importance of trade agreements in advancing [internationally recognized] human rights and supports and includes a negotiating objective aimed to ensure implementation of trade agreement commitments to strengthen good governance, transparency, the effective operation of legal regimes, and the rule of law, which promote respect for [internationally recognized] human rights and create more open democratic societies. The President would also be required to take this objective into account when initiating negotiations with potential trade agreement partners on par with any other negotiating objective.*

Reality: The bill's requirement for the president to "take this objective into account" is effectively meaningless unless Congress – not the president – can certify that an agreement meets its objectives before the president can sign and enter into the pact. The 2015 Fast Track bill, like past Fast Track delegations, provides no mechanism for Congress to certify its objectives were met and instead empowers the president to determine if Congress' objectives have been *taken into account*. Ways and Means Ranking Member Sander Levin (D-Mich.) emphasizes this point in a critical response to the 2015 bill:

> *[The 2015 Fast Track] relies on the President to certify whether his negotiators have met the negotiating objectives that Congress set. It is unacceptable to rely upon a President – who negotiated the agreement – to issue a statement "asserting that the agreement makes progress in achieving" Congressional negotiating objectives.*

Whether or not U.S. negotiators obtained the human rights objective or any other negotiating objective, the bill would empower a president to sign and enter into an agreement *before* Congress approved its contents, authorize the executive branch to write legislation to implement the pact that is not subject to committee amendment and obtain House and Senate votes within 90 days with no floor amendments allowed and a maximum of 20 hours of debate permitted. (Sec. 3(b))

Moreover, the 2015 Fast Track would allow the president to unilaterally pick countries with serious human rights abuses as trade negotiating partners, initiate negotiations with them, conclude negotiations, and sign and enter into the trade agreement with the governments committing the abuses, with no opportunity for Congress to require the president to do otherwise. Indeed, the nearly-completed TPP includes countries with serious human rights abuses, such as Vietnam – repeatedly cited by the U.S. State Department for jailing political dissidents, suppressing free speech and repressing unions – and Brunei, which enacted last year a sharia-based penal code that punishes homosexuals and single mothers.

In fact, Democratic and GOP presidents alike have historically ignored negotiating objectives included in Fast Track. The 1988 Fast Track used for NAFTA and the establishment of the World Trade Organization included a negotiating objective on labor standards, but neither pact included such terms. The 2002 Fast Track listed as a priority the establishment of mechanisms to counter currency manipulation, but none of the pacts established under that authority included such terms.