The Rise and Fall of
Fast Track Trade Authority

Todd Tucker and Lori Wallach

The Congress shall have power ... to regulate commerce with foreign nations.

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INTRODUCTION

The U.S. Constitution creates "checks and balances" designed to ensure no one branch of government has undue power over the others. For instance, under the Constitution, the president may negotiate international trade agreements at will, but the United States can only be bound to a trade agreement through a vote of Congress. The legislative branch — Congress — has exclusive authority "to regulate commerce with foreign nations" and to "lay and collect taxes [and] duties."[1] The executive branch — the president and his administration — has the authority to negotiate international agreements with foreign sovereigns. Throughout the years, Congress has created various means to coordinate the roles of the legislative and executive branches regarding U.S. trade agreements.

Congress maintained tight control over trade agreements' contents during most of the nation's history. However, during the last century, Congress has utilized a variety of mechanisms to delegate to the president ever-expanding aspects of the legislature's constitutional trade authority, primarily through authorizing the president to *proclaim* tariff modifications within certain limits. In some cases — most recently from 1967-75 and 1995-2002 — Congress made no delegation of its authority whatsoever. Yet trade has expanded and trade agreements have proliferated under each regime.

The trade delegation mechanism best known internationally and the focus of much of this paper is Fast Track, which was initially established in the 1973-75 period. The essential difference between this and previous delegation regimes is that *Fast Track*

1. U.S. Constitution, Article I-8.

authorized executive-branch officials to set U.S. policy on non-tariff, and indeed non-trade, issues in the context of "trade" negotiations. Under the extraordinary Fast Track process, Congress authorized the president to choose partners for international agreements that go beyond trade, determine the contents of such agreements, and sign the United States up to the terms of the deal… all *before* Congress had a vote. The mechanism also preset special rules for congressional consideration of such pacts, allowing the executive to write implementing legislation, while circumventing normal congressional-committee processes. Specifically, the president could submit the executive-branch written bill for a mandatory vote within a set number of days, with all amendments forbidden, normal Senate rules waived, and limited debate in both chamber of Congress.

Since Congress first passed it in 1974 (it was signed into law the following year), Fast Track delegation legislation has been passed on five additional occasions. It has been employed 13 times among the hundreds of U.S. commercial agreements completed since the mid 1970s. Fast Track enabled passage of the most controversial commercial pacts, such as the Uruguay Round General Agreement on Tariffs and Trade (GATT) negotiations that established the World Trade Organization (WTO), and also the North American Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (CAFTA).[2]

Many analysts have presented views about the economic impacts of trade pacts enabled by Fast Track, which have become a subject of heated debate in the past two election cycles.[3] However, less discussed, but extremely important, is the domestic non-trade regulatory implications of Fast Track providing expansive new authority for the executive branch.

When the Nixon administration first lobbied Congress for Fast Track authority, it maintained that the executive branch would only negotiate non-tariff issues closely related to trade. Instead, over the last 35 years, the scope and content of "trade" agreements have been quietly but dramatically transformed into wide-ranging international commercial pacts that contain hundreds of pages of provisions that set non-trade policy in many areas traditionally reserved for Congress and state legislatures. Indeed, in practical terms, Fast Track has become a means for the president to "diplomatically legislate" on an array of non-trade matters. The mechanism has allowed successive presidents since Nixon to establish rules related to domestic environmental, health, safety and essential-service regulations; establishment of immigration policies; limits on local development and land-use policy; extension of domestic patent terms; establishment of new rights and greater protections for foreign investors operating within the United States that extend beyond U.S. law; and even limits on how domestic procurement dollars may be expended. Indeed, today's "trade" agreements have systematically shifted decision-making on numerous non-trade policies away from the control of local, state and national legislatures to global venues impervious to meaningful participation by those who will live with the results.

Fast Track might be considered a very elegant modern Trojan-horse device. With the outward welcome appearance of delivering trade expansion, Fast Track has been used to insert a legion of policies previously repelled by Congress. And, because of the prominent U.S. role internationally, a shift in the *domestic*

2. Other usages included for the GATT Tokyo Round, and FTAs with Israel, Canada, Chile, Singapore, Australia, Morocco, Bahrain, Oman and Peru.
3. Bivens, 2008; Weisbrot, Baker and Rosnick, 2006; Tucker, 2006b; IFTC, 2007; PC 2008.

balance of power has had *global* implications in fostering the establishment of a global governance system — which the WTO's first director-general described as "the constitution of a single global economy"[4] — put in place under the guise of trade negotiations. Yet, when Congress debated the WTO, only one senator was willing to state that he had read the WTO text and to answer simple questions about it.[5] Those seeking to warn Congress about the WTO's non-trade policy incursions were rebuffed — with either claims that they were misinformed, or that they were, in fact, protectionists against trade expansion. The Trojan-horse analogy only goes so far in this instance, however, because Congress was complicit in *constructing* the very vehicle.

We tell the story of how trade-agreement negotiation and approval process in five acts — each representing a distinct regime of how Congress and the executive coordinated their trade-policy roles. Each "act" had its milestone achievements, followed by moments of crisis that resulted in establishment of a new system of coordination. The first regime, dating from 1789 to 1890, was the longest lasting, and consisted of exclusive congressional control over trade policy. This was the time when America went from being an agricultural outpost to a developed nation on par with Europe. There were practically no trade agreements during this period, but rather tariff legislation establishing trade terms with various countries. The second regime, dating from 1890 to 1934, was a period of congressional experimentation with forms of delegated trade negotiating authority, primarily to allow the executive to penalize imperial European nations who sought to keep U.S. exports

4. "We are no longer writing the rules of interaction among separate national economies. We are writing the constitution of a single global economy." Statement of WTO Director-General Renato Ruggiero at an August 1996 UNCTAD conference. UNCTAD, 1996.
5. RMSN, 1994.

out of developing nation markets. This period ended in the Great Depression, at a time when heads of state globally were centralizing power. The third regime, dating from 1934 to 1967, was a period of nearly exclusive executive control over trade agreements under delegated tariff-proclamation authority. During this period, trade agreements were limited almost exclusively to tariff rates. The period ended as the post-war economic order was disentangling and nations were challenging U.S. economic dominance. This led to the fourth regime from 1967 to the mid 1970s, when there was no delegated authority.

The fifth regime, dating from the mid 1970s to 2008, is the Fast Track period. What on paper entailed greater congressional involvement relative to the 1934-67 system of unilateral executive-branch tariff-proclamation authority, *in practice* provided the executive greater control over U.S. trade and non-trade policies than the country had ever seen. Fast Track, originally justified as a way to enhance U.S. competitiveness in the face of a rising Europe, instead coincided with a period of record-breaking U.S. trade deficits and U.S. deindustrialization. As noted, the mechanism also facilitated passage of pacts that delved deeply into domestic non-trade congressional and subfederal jurisdiction. In the late 1980s, progressive reformers sought to substantially amend the Fast Track mechanism, but were subsequently disappointed when congressional negotiating objectives — which were non-binding, a key feature and problem with Fast Track — produced the controversial NAFTA and WTO. By the mid 1990s, wide bipartisan support for Fast Track had evaporated. The delegation authority was rejected on the House floor in 1998, only passed by a one-vote margin in the middle of the night in 2002 for the Bush II administration, and was finally allowed to die in 2007. President George W. Bush's attempts to obtain additional Fast Track authority in 2008 were rebuffed by Congress.

The United States has refined its approach to global integration many times over. Similarly, as circumstances have changed, Congress has modified the processes for coordinating with the executive branch regarding trade-agreement negotiations many times over. Therefore, in our epilogue, we discuss some current proposals to reform our trade policymaking regime, while ensuring democracy and widely shared prosperity. Increasing congressional debate about a future presidential trade authority centers around what new mechanism could replace Fast Track. We believe it is possible to formulate a new mechanism that could harvest the benefits of trade expansion without undermining the key precepts of U.S. democracy (such as checks and balances and federalism) and the policy space that Congress and state legislatures need to meet climate, health and other crises now facing the nation.

Finally, a methodological note. Since we set out in late 2005 to undertake in-depth research on the history of Congress' delegation of its trade authority and the origins of Fast Track, we have been surprised at the dearth of scholarly material on the topic. Political historians and presidential biographers tended to overlook the battles over Fast Track and other previous trade-authority delegation procedures. Trade lawyers often ignored the politics and economics of trade-agreement policy. Economists altogether omitted anything outside of their discipline, and often there even gave a very partial picture. To the extent that the preexisting scholarly work touched on the trade authority issue, it relied almost entirely on secondary sources. When we began checking original sources to gain more depth, we found important aspects of the existing scholarly work to be incomplete, inaccurate or inadequately referenced. In order to compensate for this gaping hole, we spent months in the stacks of the Library of Congress piecing together the facts from the pre-electronic record era. We reviewed hundreds of volumes of 18th, 19th and early 20th Century U.S. statutes and the *Congressional Record*, dozens of committee reports, and decades of newspaper prints. The result is hopefully a more complete and accurate account of a timeless constitutional issue.

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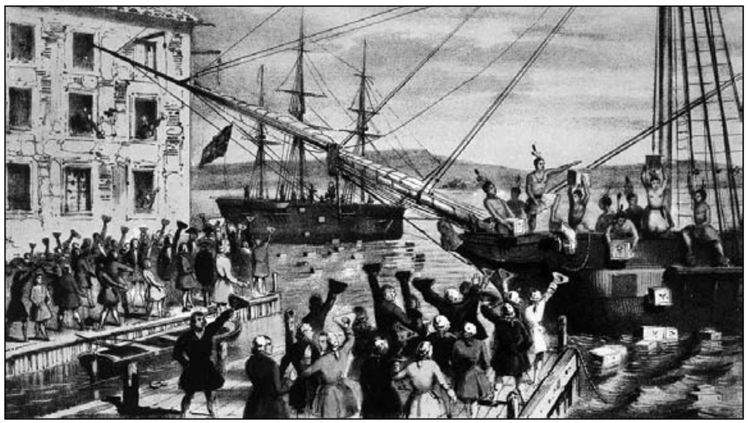
This paper has two companion pieces, one that reviews the major economic *outcomes* of the international commercial agreements established under Fast Track; another compares the treatment of subfederal governments and their policy space under the U.S. trade agreement policymaking process to that of other federal systems internationally, including in Canada, and elsewhere.[6] Public Citizen recognizes the generous support of the Alfred P. Sloan Foundation in making the researching and publishing of all of this material possible.

6. All papers are available at www.TradeWatch.org.

REGIME I. U.S. Trade Agreement Policymaking for the First 100 years

America's founding fathers were acutely aware of the perils of concentrated power in trade policymaking. "No taxation without representation" was the rallying cry of the Boston colonists, including some of the founders themselves. Their Boston Tea Party was a turning point in the movement for independence. The tax in question, however, was a tariff on tea, imported for sale in the colonies and initially imposed by King George to pay off his French war debts. In December 1773, Sam Adams, later a signatory of the new Constitution, led his fellow Sons of Liberty onto ships that had broken a colonial tea boycott organized in response to the tariff, and threw the ships' cargo into Boston Harbor.[7]



An important factor leading to the American Revolution was colonists' fury about the trade policies imposed on them by England's King George. The Boston Tea Party, protesting English tea monopoly and tariff policy, is depicted above.

7. Labaree, 1979.

In designing the Constitution, America's founding fathers created a clear separation of powers regarding trade policymaking. They sought to avoid twin dangers they had experienced: a British crown too susceptible to bartering away the national interest over foreign intrigues, and a states-dominated Articles of Confederation providing each state the ability to slap tariffs on each other's products. Chief Justice John Marshall later remarked that nothing "contributed more to that general revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress."[8] As outlined in Article I, Section 8 of the U.S. Constitution, the body closest to the people was given the exclusive authority to "to regulate commerce with foreign nations" and "lay and collect taxes [and] duties." Giving Congress this specific authority also ensured a federally uniform trade policy. Meanwhile, the executive branch was given the authority to negotiate treaties on behalf of the United States in Article II, Section 2. As Alexander Hamilton wrote in *The Federalist No. 75* with regard to the power over treaties (which was at the time the sole form of trade pacts) and the balance between the executive and legislative:

> "The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department,

8. *Brown v. Maryland*, 25 U.S. 12 Wheat. 419 (1827).

> and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them… The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."

In the words of one trade historian, "this complex system of checks and balances guarded the nation against human error and foreign corruption."[9] The divided power system had the added benefit of giving soapboxes to a variety of competing views about the best mode of development for the new American nation. While heads of state like Thomas Jefferson embraced the idea of an economy that would export agriculture to Europe and import manufactured goods, congressional leaders like Henry Clay of Kentucky could advocate from their congressional perch for an "American system" of infant industry protection and government investments to diversify the American economy. Because the Constitution gave Clay and his congressional colleagues the ultimate authority to approve trade policies, but required the president to conduct negotiations, neither branch could control the process.

9. Eckes, 1995, at 10.

Tariff acts were the primary means of implementing policy regarding the terms of trade between the United States and other nations. From 1789 until 1890, Congress enacted 16 major tariff acts, most of which increased rates, but nearly a third of which decreased rates.[10] Each of these bills consisted of a long list of duties for customs officials to charge on imports, irrespective of originating country. The "single column" tariff schedule greatly frustrated the executive branch, which sought the use of country-differentiated tariff tools in its diplomatic toolbox. In 1790-93, then-Secretary of State Jefferson advocated for the executive branch to dangle both carrots (reciprocal tariff reductions) and sticks (retaliatory sanctions) in front of Europe to gain better treatment for American traders. However, providing the executive branch with such a broad delegation of Congress' constitutional tariff-setting authority — and such a high degree of discretion about tariff rates and treatment of specific countries — did not gain traction in Congress for another 100 years.

That does not mean that the executive did not *try* to sign trade treaties. However, in doing so, presidents were required to surmount two constitutional hurdles. First, they were to use the constitutional treaty process (Senate advice and consent by two-thirds vote) to approve the agreements in question. Second, once an agreement was so approved, both chambers had to pass legislation making the treaty-required changes to U.S. tariff rates.[11] A comprehensive review of U.S. statute books did not yield a single bilateral tariff treaty that lowered duties below those set by the major Tariff Acts passed by Congress that was adopted through this two-step process up until 1854.

10. The years of passage were 1789, 1790, 1792, 1804, 1816, 1824, 1828, 1832, 1833, 1842, 1846, 1857, 1861, 1872, 1875, and 1883. Italicized years indicate tariff acts that reduced duties.

11. Shapiro, 2006, at 89-92.

Congress generally viewed such executive trade treaties as infringing on Congress' constitutional authority to set tariff rates. In 1844, 1855, and 1859, the executive branch negotiated reciprocal trade deals with Prussia, Hawaii and Mexico that would have applied tariffs to these countries' U.S. exports lower than the single-rate duty established by Congress. In the first two instances, the executive branch wrote specific tariff changes into the treaties, while the Mexico treaty would have allowed Congress to select specific items for tariff reductions from a list pre-selected by the U.S. and Mexican executives. In these instances, Congress voted down the treaties. On the Prussia treaty, historian Alfred Eckes writes:

> "On June 14, 1844, the Senate Foreign Relations Committee released a critical report advising against ratification. It held that 'the control of trade and the function of taxing belong, without abridgement or participation, to Congress.' Representatives of the people 'may better discern what true policy prescribes and rejects, than is within the competence of the Executive department.' The appropriate function of the executive, the committee said, was 'to follow, not to lead; to fulfil, not to ordain, the law…, not to go forward with [a] too ambitious enterprise." [The Senate report] counsel[ed] rejection on constitutional grounds."[12]

Congress shelved various other executive attempts at trade treaties in this period, such as a later 1867 Hawaii pact that Congress never considered in a legislative agenda dominated by Southern Reconstruction efforts. In the face of congressional opposition, the executive abandoned still other tariff-cutting trade pacts,

12. Eckes, 1995, at 65.

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including a tariff reciprocity pact with Canada that the James Polk administration had attempted to pass via normal (non-treaty) legislative procedures in the 1840s.[13]

There were only a few exceptions to Congress' antipathy to trade pacts during the first regime. One occurred when the executive negotiated a reciprocity treaty in 1854 with Canada — signed on June 5 — that eliminated duties on 28 items (mostly food and raw materials). The Senate gave its advice and consent to the treaty, whose text specified that: "The present treaty shall take effect as soon as the law required to carry it into operation shall have been passed… by the Congress of the United States." Thus, in order to make the duty eliminations operational, Congress had to pass separate implementing legislation, which it did on August 5. Once the separate branches completed all these steps, President Franklin Pierce ratified the treaty in September.[14] Congress later abrogated the treaty in 1866, since Canada had angered Congress by *increasing* duties on other U.S. products during the period. At the time, Senator Justin Morrill (R-Vt.), chair of the Senate Finance Committee, declared that tariff reciprocity treaties are "a plain and palpable violation of the Constitution, which gives to the House of Representatives the sole power to originate revenue bills."[15] Since America's early years, the Senate Finance and House Ways & Means committees played a leading role in trade policy, given tariff policy was considered a form of tax policy, and these committees had jurisdiction over such revenue measures. Because of this jurisdictional distinction, the committees are often called "gatekeepers" over trade policy.

13. USITC, 1919.
14. Reciprocity Treaty with Great Britain, Proclamation by President Franklin Pierce, June 5, 1854, Articles 3 and 5; Public Law 33-144.
15. Eckes, 1995, at 68.

In another exceptional move, the Senate gave its advice and consent and Congress passed implementing legislation for an 1875 Hawaii tariff reciprocity treaty negotiated by the Ulysses Grant administration. This surprised some, since the Senate had failed to give its advice and consent to yet another Canadian tariff reciprocity treaty the year before. However, the pro-tariff Republican *Chicago Daily Tribune* (now known simply as the *Chicago Tribune*) editorialized that one could be *for* the Hawaii pact and still *against* reciprocity more generally, since "It affects injuriously very few, if any, vested interests in this country," and, "It is better to have reciprocal free trade with the Sandwich Islands [Hawaii] than to annex them." Policymakers considered annexation the only alternative policy, given U.S. military interests in securing the Pacific.[16] The United States annexed the islands in 1900, supplanting the reciprocity treaty.

From a purely economic point of view, the almost total lack of U.S. trade pacts during America's first 100 years did not prove detrimental; real per capita income grew 389 percent, or an annual average of 4 percent.[17] During the nation's first century in existence, presidents and legislators of all political parties tended to agree on the constitutional basis for congressional control over trade policy, even when they disagreed on trade policies and economics. (Democrats tended to favor tariffs for revenue only, while Republicans tended to favor tariffs in order to develop infant industries.) Nevertheless, the congressionally controlled system began to unravel as U.S. global ambitions expanded, and the executive branch increasingly demanded it be granted trade tools to reward allies and punish enemies in the context of broader foreign-policy goals.

16. CDT, 1875.
17. Johnston and Williamson, 2008.

REGIME II. Baby Steps Towards Delegated Tariff Authority, 1890-1934

A. Initial Delegation of Tariff Authority Raises Supreme Court Challenge, 1890-1897

The traditionally pro-tariff Republican Party began the shift away from congressional control over trade policy. In 1890, Republican President Benjamin Harrison and his secretary of state James Blaine tried to persuade Congress to grant the executive branch expanded discretion of tariff policy. Again, Finance Committee Chair Morrill blocked the executive-branch intrusions on Congress' constitutional authority, causing Blaine so much consternation that he smashed his silk hat in one Finance Committee hearing.[18]

Blaine was able to get around Morrill by developing a partnership with the traditionally pro-tariff Ways & Means Chair William McKinley. The outcome of their joint effort was the 1890 McKinley Tariff Act. The bill cleverly introduced the notion of delegated authority. It employed Congress' trade authority to eliminate via statute duties on sugar, molasses, tea, coffee and hides. Meanwhile, it authorized the executive to *re-impose* such tariffs on countries that exported these products and treated U.S. exports in a "reciprocally unequal and unreasonable" fashion, "*with a view to secure reciprocal trade*" with said countries [italics added].[19] The delegation of tariff authority did not have a phase-out date. In effect, it allowed the Harrison administration to threaten to proclaim duty increases as a way of bringing foreign

18. Eckes, 1995, at 75.
19. McKinley Tariff Act of 1890. 26 Stat.567; 51 Cong. ch. 1244, § 3; H.R. 9416. House: 150-80; Senate: 33-27. Implemented October 6, 1890.

nations to the bargaining table. Congress did not have to vote on any trade pacts that resulted from these negotiations, since the intention was only to get other countries to lower *their* tariffs on U.S. exports.

Democrats assailed the measure, which they saw as a behind-the-scenes, inter-branch deal within the Republican Party. Rep. John F. Andrew (D-Mass.) told the House: “It is free to say that such extraordinary powers as this amendment contemplates has never, in recent times, been given by a free people to the executive.” Rep. Benton McMillin (D-Tenn.) declared, “the reciprocity provision of the bill was a cowardly surrender of the highest prerogative of the House. The bill gave the president power not exercised by the Czar of Russia.”[20]

The Harrison administration never proclaimed any duty increases, but used the threat of doing so to negotiate 10 treaties that compelled other counties to lower their tariffs on select U.S. exports, in return for enjoying the statutorily established free rate on sugar and the other items.[21] These pacts also established a precedent of the executive branch framing requests for expanded authority around promises to penalize countries that kept out U.S. exports.

In 1892, the Supreme Court was asked to rule on the constitutionality of the delegated tariff authority. This case involved a suit brought by an importer to obtain a refund of duties. The plaintiff, Marshall Field & Co., claimed that the

20. BDG, 1890.
21. The pacts were signed with Austria-Hungary (May 20, 1892), Brazil (April 1, 1891), the Dominican Republic (Sept. 1, 1891), El Salvador (Feb. 1, 1892), Germany (Feb. 1, 1892), Guatemala (May 30, 1892), Honduras (May 25, 1892), Nicaragua (March 12, 1892), Spain (for Cuba and Puerto Rico, Sept. 1, 1891), and the United Kingdom (for the British West Indies and British Guiana, Feb. 1, 1892). See NYT, 1901.

duties it had been charged on its imported merchandise had been illegally exacted. Field filed against John Clark, the Chicago port’s duty collector, to recover duties paid on woolen dress goods, woolen wearing apparel, and silk embroideries. The company, which was not an importer of sugar or other items contemplated for special treatment under the McKinley Act, nonetheless maintained that the statutory rates on the items he *did* import (which had been set by the act) were not legal. Field argued that the McKinley Act (and its tariffs on wool and other items) did not have the force of law because (among other technical reasons) it unconstitutionally delegated congressional authority in the section on sugar powers. The majority opinion of the Supreme Court noted: “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” However, the Court majority decided that the Act’s delegated authority “was not the making of law,” but only allowing the executive branch to serve as “the mere agent of the law-making department.” Two judges, while agreeing with the majority ruling, dissented on the constitutionality of the delegation of tariff-proclamation authority. Chief Justice Melville Fuller and Associate Justice Joseph Lamar wrote that:

> “This [provision] certainly extends to the executive the exercise of those discretionary powers which the constitution has vested in the law-making … department. It unquestionably vests in the president the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides, or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable in its

operation upon the products of this country. These features of this section are, in our opinion, in palpable violation of the constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government."[22]

When Ohio voters elected McKinley governor, and Democrat Grover Cleveland rode to the presidency on a low-tariff platform, Congress repealed the McKinley Act through the 1894 Wilson-Gorman Tariff Act. The law removed the executive's negotiating authority and abrogated the 10 Harrison treaties. It also modestly lowered duties overall, but was nonetheless full of duty increases designed to benefit certain industries (such as sugar). (Cleveland was so embarrassed that he refused to sign the bill into law. Nevertheless, because he also did not veto it, it became law after a lapse of time anyway.)[24] The now Democratic-controlled Ways & Means Committee, in its report on the bill, assailed the previous Congress and administration: "We do not believe that Congress can rightly vest in the President of the United States any authority or power to impose or release taxes on our people by proclamation or otherwise, or to suspend or dispense with the operation of a law of Congress."[25]

22. Field v. Clark, 143 U.S. 649, 692 (1892).
23. Wilson-Gorman Tariff Act of 1894, 53 Cong. ch. 349.
24. IND, 1894.
25. Eckes, 1995, at 74.

B. Second Delegation of Tariff-Cutting Authority, 1897-1909

The Democratic Party's control was short-lived. It lost both congressional chambers in the 1894 elections, followed by the presidency in the 1896 elections. Republicans again reinstated executive tariff-proclamation authority through the 1897 Dingley Tariff Act, which authorized now-President McKinley to proclaim unilaterally tariff reductions on wines and a few other specialty items. The authority again did not have a phase-out date. As with the 1890 McKinley Act, Congress limited both the items for which tariffs could be modified (for instance, sugar in 1890 and argols[26] in 1897) *and* the countries with which the executive could enter into trade negotiations (only countries that exported these items).[27] Eight European countries consented to such so-called argol agreements.[28] Further, the Dingley Act contained provisions similar to the McKinley Act that authorized the executive branch to impose tariffs on various tropical items, but these provisions were never invoked or used to demand reciprocity treaties. Neither type of agreement required a further congressional vote.

The Dingley Act also authorized the president to negotiate with any country to secure reciprocal trade treaties that would cut tariffs up to 20 percent (and remove tariffs on certain natural resource products). The act specified that these treaties *would* need the advice and consent of the Senate, and separate implementing legislation approved by congressional vote.[29] The

26. Argols are a by-product of winemaking.
27. Dingley Tariff Act of 1897, 55 Cong. Ch. 11; 30 Stat. 151, ch. 11, § 3; H.R. 379. House: 187-116. Senate: 40-30. Implemented July 24, 1897.
28. These included Spain, Bulgaria, France, Portugal, Germany, and Italy; along with more limited treaties for Great Britain and the Netherlands. See USITC, 1919.
29. Section 4 of Dingley Tariff Act.

McKinley administration finalized 11 such treaties, but leading senators opposed them, keeping them bottled up in the Senate Foreign Affairs Committee. Collectively, these were known as the Kasson Treaties, after John Kasson, the McKinley-appointed special commissioner for reciprocity negotiations.[30]

While none of the original 11 Kasson treaties gained congressional approval, President Theodore Roosevelt signed a reciprocity treaty with Cuba on Dec. 11, 1902 that lowered rates on Cuban imports by 20 percent. The Senate gave its advice and consent on March 19, 1903, but amended the treaty text to make clear that "This Convention shall not take effect until the same shall have been approved by the Congress." *Post facto*, Roosevelt decided to use the Kasson authority to get himself out of the mess. After a long fight — with opposition from Democrats like Sen. Joseph Weldon Bailey (D-Texas), who called the act unconstitutional since the House had only been involved as an afterthought — Roosevelt was able to get implementing legislation through Congress based on foreign-policy arguments on December 17, 1903.[31] Some form of Cuba tariff-reciprocity pact survived until the communist takeover in 1959.

Some Washington officials were disheartened by the Kasson treaties experience, and by the fact that the United States only successfully signed three reciprocity treaties during more than half of its history (Canada 1854-1866, Hawaii 1875-1900, Cuba 1903). According to historian Alfred Eckes, these unnamed

30. Argentina (July 10, 1899); France (July 24, 1899); Nicaragua (Oct. 20, 1899); Dominican Republic (June 25, 1900); and Ecuador (July 10, 1900). Denmark also negotiated one for St. Croix (July 5, 1900). Finally, Great Britain negotiated five pacts (one each) for Barbados (June 16, 1899), British Guiana (July 18, 1899), Turks / Caicos (July 21, 1899), Jamaica (July 22, 1899), and Bermuda (July 24, 1899). See Holt, 1933, at 196.
31. NYT, 1903; WP, 1903; P.L. 58-1; Commercial Convention – Cuba Proclamation, Dec. 17, 1903.

purveyors of conventional wisdom concluded that Congress needed to delegate tariff-cutting negotiating authority to the executive, but not be allowed a vote on the negotiations' final outcome.[32]

C. Congress Provides Executive More Flexibility in Tariff Authority, 1909-1934

Until 1909, the U.S. tariff schedule was still officially single column (one rate applied to all countries for each good) — even though certain countries had enjoyed preferential rates under the various pacts described above. The 1909 Payne-Aldrich Act — passed by a Republican Congress — changed that, authorizing the president to proclaim unilaterally that countries that discriminated against U.S. exports be charged a "maximum tariff." The authority did not have a phase-out date, and proclamations did not require further congressional votes. This maximum tariff rate, which constituted the United States' first foray into a two-column tariff schedule, was equal to the normal (or "minimum") statutory rate plus 25 percent *ad valorem.*[33] The William Taft administration never used this authority.

Moreover, the Payne Act cancelled the eight argol treaties. The only other major trade policy attempt of the Taft administration was to conduct secret trade negotiations with Canada. The executives from both countries planned to seek congressional and parliamentary approval through normal legislative (i.e. non-treaty) procedures. Democrats in the U.S. Congress had teamed up with the Republican executive and passed the bill,

32. Eckes, 1995, at 77.
33. Payne-Aldrich Act of 1909. Public Law 61-5; 36 Stat. 11, ch. 6, sec. 1-2. H.R. 1438. House: 217-161. Senate: 45-34. Implemented August 6, 1909.

making boisterous but highly misleading floor statements to the effect that the act would allow U.S. annexation of the northern country. As a result, Canadian nationalists in the parliament rejected the pact's implementing legislation.[34]

The Woodrow Wilson administration came to office on a pledge to reduce tariffs and kickstart commerce with a war-torn Europe, and was able to convince a Democratic-controlled Congress to do so through the 1913 Underwood-Simmons Act. The bill did away with the president's authority to penalize foreign countries through application of the maximum tariff, but it also authorized him to conduct reciprocal trade deals — "provided, however, that said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection."[35] The authority did not have a phase-out date. However, because the Underwood Act unilaterally reduced U.S. tariffs, foreign governments had little incentive to negotiate trade pacts with the United States, having received "something for nothing." No bilateral pacts were signed under the Underwood authority.

The general drift towards Congress delegating the executive tariff authority continued in the next decade, as the GOP returned to power. Although it contained no specific tariff reciprocity authority, the 1922 Fordney-McCumber Tariff Act delegated to President Warren Harding and his successors a new authority. Under the Act, the executive branch could raise or lower tariffs by proclamation to equalize the costs of production of articles produced in the United States and competing countries. The

34. Eckes, 1995, at 83-84.
35. United States Revenue Act of October 3, 1913, Public Law 63-16; 38 Stat. 116, ch. 16, sec. 4(a); H.R. 3321. House: 255-104. Senate: 44-37. Implemented October 4, 1913,

authority did not have a phase-out date. It limited the rate alteration, however, to no more than 50 percent of the underlying statutory duty.[36] Congress did not have to vote on these reductions. The Republican-controlled Congress supported their party's president in this proposal, but some Democrats bitterly attacked the proposal. *The New York Times* reported that Sen. Thomas Walsh (D-Mont.) "told the Senate the Constitution specifically reserved to Congress the power to lay and collect taxes and import duties, and Congress could not delegate this authority. He also attacked the flexible plan on the ground that no provision was made for judicial review of the president's action."[37]

Harding and his successors did not craft reciprocity treaties that required Senate approval and congressional implementing legislation. Instead the administrations negotiated a series of over 40 executive agreements that established most-favored nation treatment for additional countries. By guaranteeing to additional countries the tariff treatment already codified by statute in the U.S. tariff schedule, the executive avoided having to ask Congress to change any underlying laws.[38]

The beginning of the Great Depression in the United States is associated with the stock market crash on October 29, 1929, known as Black Tuesday. One of Congress' responses was to pass the Smoot Hawley Tariff Act, which went into effect on June 17, 1930. The act returned the United States to 19th Century tariff levels.[39] The Smoot Hawley Tariff Act did not change the

36. Fordney-McCumber Tariff of 1922. Public Law 67-318; 36 Stat 11, ch. 356, sec. 315; H.R. 7456. Implemented September 22, 1922.
37. NYT, 1922.
38. WM, 1934, at 10. This was similar to practice in the pre-1890 period, when numerous presidents negotiated executive agreements and treaties to not discriminate against certain countries imports *beyond* the duties mandated by statute.
39. Eckes, 1995, at 100-139.

fundamental executive-legislative balance in any way from the 1922 act. This is worth noting because editorial boards and politicians invoke Smoot-Hawley with contempt, if inaccuracy, anytime the suggestion is made to increase congressional involvement in trade policymaking.

In 1932, Sen. Cordell Hull (D-Tenn.) led an effort to give President Herbert Hoover the discretion to negotiate bilateral tariff-reduction pacts, subject to separate congressional approval. While both chambers passed the legislation, Hoover vetoed the bill, and it never became law.[40]

The Roaring Twenties produced new constitutional challenges to delegated presidential tariff authority. As it had in 1892, the Supreme Court again upheld the constitutionality of congressional delegation mechanisms. In *J. W. Hampton, Jr. & Co. v. United States*, the plaintiff imported barium dioxide into New York ports that the customs collector assessed at the dutiable rate of six cents per pound, which was two cents per pound more than that fixed by statute. The higher rate had been established by virtue of the presidential proclamation authority to equalize the costs of domestic and imported goods provided in the Fordney-McCumber Act. The company argued that Congress' delegation of constitutional tariff authority was unconstitutional, and thus did not have the force of law. In 1928, the Supreme Court, affirming a lower court decision, held that congressional delegation of tariff authority was constitutional. The court interpreted the Fordney-McCumber Act to empower and direct the president to increase or decrease duties imposed by Congress. The Court reasoned that one of the core functions that the

40. H.R. 6662. The House passed 214-182, and the Senate passed 42-30.

Constitution confers on Congress is the regulation of interstate commerce, yet noted that Congress does not attempt to directly manage interstate freight rates, a highly complex and rapidly changing task. Therefore, the Court concluded that delegation of setting specific tariffs rates to the executive under policies established by Congress should also be constitutional.[41]

Despite the expanded presidential trade authority during the 1890-1934 regime, the second major period of U.S. trade policymaking ended with high tariffs and relatively few trade agreements. The regime also saw an unusual shift in the politics of trade. Republican Congresses and executives under the Harrison, McKinley, Taft and Harding administrations — while favoring higher tariffs — took groundbreaking steps to expand executive discretion. Democrats — who favored lower tariffs — often argued in favor of the principle of congressional control, regularly raising concern about the constitutional issues involved. The latter party passed legislation scraping back what they deemed overreach into congressional constitutional authority in 1894 and 1913.

Notably, the period also saw the emergence of radical views on altering the constitutional trade checks and balances, such as that of Rep. Martin Ansorge (R-N.Y.), who proposed a constitutional amendment to outsource trade policy permanently from Congress to a non-partisan board.[42] Perhaps not surprisingly, he was only a one-term member of Congress. Nevertheless, the notion gained serious traction in the subsequent trade-policy regime from 1934-1967.

41. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).
42. NYT, 1922.

REGIME III. Executive Dictation of Tariffs, 1934-1967

A. Reciprocal Trade Agreements Act Dramatically Increases Executive Trade Authority, 1934-1945

A new and sweeping form of delegated executive-branch authority was established in the Trade Agreement Expansion Act of 1934, more commonly known as the Reciprocal Trade Agreements Act (RTAA). The legislation authorized the executive branch to enter into trade agreements that modified tariffs or any other import restrictions (such as quotas), and unilaterally proclaim tariff increases or decreases within a 50-percent band for pact partners' U.S. exports. While duty negotiations would proceed on an item-by-item basis, unlike many past congressional delegations, the legislation set no limit on the types of goods for which duties could be revised. The proposed authority also left to executive branch discretion whether or not to extend benefits negotiated bilaterally to *all* other countries on a most-favored nation basis, or only to *specific* countries that engaged in U.S. negotiations.[43]

The act — an amendment to the Smoot-Hawley Act that the Franklin Roosevelt administration justified as "emergency" legislation — provided for no subsequent congressional votes on the resulting agreements, or congressional right of appeal on executive-branch decisions. The act specified no negotiating objectives or countries with which to negotiate. The only minimal requirement was for "reasonable public notice of the intention to negotiate an agreement," and for presidential

43. WM, 1934, at 10.

consultation with relevant governmental agencies. The duration of the act was three years. Interestingly, in one aspect, it reflected the administration's claim that it was a short-term emergency measure: agreements established under the law were subject to termination when the 1934 Act itself expired.[44] However, in practice, this did not occur. Rather, this "emergency" Act's significant shift in executive-branch power in trade-agreement policymaking became the basis for future delegations.

In his recent book on Fast Track, Hal Shapiro, a former associate general counsel in the Office of the U.S. Trade Representative, notes how the RTAA "was a major departure in that it effectively 'pre-approved' presidential authority to negotiate international trade agreements."[45] While Congress had previously delegated to the executive both tariff-proclamation authority (for certain goods within certain bands) and limited authority to negotiate trade agreements that did not require congressional approval, the RTAA — which included authority for the president to also change non-tariff items like quotas without a congressional vote — significantly expanded presidential power.

What was the purpose of this new delegation? The RTAA divided opinion even within the Roosevelt administration. One faction held that the authority should be used primarily to ink bilateral agreements to stimulate exports and thus national income. Others maintained that the purpose was to unilaterally lower tariffs so as to increase imports, because the United States had *too high* of a trade surplus at the time.[46]

44. Trade Agreement Expansion Act of 1934. Public Law 73-316; 48 Stat. 943; H.R. 8687. On March 29, the House approved H.R. 8687 by 271-110 (D: 269-11; R: 2-99). On June 4, the Senate approved the measure 56-33 (D: 51-5; R: 5-28).
45. Shapiro, 2006, at 10.
46. Schlesinger, 1958, at 254-260.

Such debates were beside the point to Roosevelt's secretary of state, former senator Cordell Hull. His outlook was as simplistic and unsubstantiated as it was infectious: low tariffs equal peace, and high tariffs equal war. Hull, infamous for his role in the refusal of U.S. entry to the passengers on the S.S. St. Louis (a Jewish refugee ship dubbed the "ship of the damned") during the Nazi Holocaust,[47] had spent years in Congress advocating for trade liberalization and greater executive authority. When Hull testified before the Ways & Means Committee, he employed all imaginable rationales for the new authority: it was an essential part of the president's domestic recovery plan; it was to help poor people abroad; and it was to put the U.S. executive on equal footing with heads of state in parliamentary systems (who had total tariff authority). He also admitted that the authority went beyond just tariffs, to encompass quotas and even possibly product safety standards. He refused to speak in detail about how he planned to use the authority, citing a desire to avoid broadcasting U.S. negotiating positions to foreign governments. In an exchange with Rep. Allen Treadway (R-Mass.), Hull made clear that he thought the constitutionality of the measure was beside the point:

> *Treadway:* "Under the Constitution, article 1, section 7, all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills. Are we in any way violating that provision of the Constitution in setting up a law such as we have before us?
>
> *Hull:* "This bill is originating in the House, is it not? So far as I

47. The U.S. Coast Guard maintains an informational site on the incident, accessible at: www.uscg.mil/history/faqs/St_Louis.asp.

> am individually concerned, I think I have in mind all of these phases, but at the same time I am literally moved, driven and kicked into another line of thinking, which relates to 30 million unemployed people in the world who cannot furnish food or clothing to their people because international trade has been choked down…
>
> *Treadway:* "If those 30 million people scattered throughout the world and their families are a first consideration, should not that clause of the Constitution be amended in order to take care of the 30 million people and not to violate the Constitution directly by legislative action?"
>
> *Hull:* "That is what they said to Abraham Lincoln when he had to suspend one or two phases for the time being… Very few democratic forms of government are left — mighty few. My observation after rather careful investigation has been that the mainspring or the moving influence of those revolutions has been people out of work… We are not going to fall into that soon, but you could easily become victims of those things in other parts of the world, and for that reason I would invoke your attention long enough to deal with this emergency situation"…
>
> *Treadway:* "Assuming that to be true, and of course it is all open to debate… is the measure you are presenting to us today constitutional?"
>
> *Hull:* "My opinion is that it is up to the Congress to cooperate with another coordinate branch of the Government to determine, first, whether this real exigency, present and prospective, does exist, and whether it is of such magnitude in its effect upon our country as would justify either branch of Congress or both in giving authority to the executive department

> in advance to perform certain functions which would ordinarily be reviewed by one branch of the legislative department."[48]

Hull and administration allies like Rep. Samuel Hill (D-Wash.) also argued that the Supreme Court was likely to uphold the constitutionality of the delegation, since the previous trade regime's flexible tariff provisions had been upheld as constitutional. In a later hearing, Hill argued that the record of congressional approval of only three reciprocity treaties

> "show[s] the inefficiency of that kind of treaty making… whereas Executive agreements have produced a substantial number of reciprocal trade agreements. It seems to me in the fact of the history of this country upon that subject that to advocate a resort to the ordinary treaty-making power of the President for the purpose of effecting trade agreements or trade relationships, we must concede it simply an argument that that does not get us anywhere so far as effective progress is concerned toward improving our trade relationships with foreign countries."[49]

Once in the State Department, Hull established an inter-agency Committee on Trade Agreements housed in the State Department whose primary role he envisioned as promoting U.S. *foreign-policy* interests by reducing U.S. tariffs. The arrangement was so far removed from the days of congressional control of trade policy that Roosevelt and successor administrations would not even reveal the identity of the Committee's members to the

48. WM, 1934, at 15-18.
49. WM, 1934, at 407-408.

public. Rep. Daniel Reed (R-N.Y.)'s statement during RTAA's floor debate that "such power, if granted, will place the life and death of every industry at the mercy of the 'brain trust'"[50] was prescient. These government officials on the Committee saw their role as picking economic winners and losers, and even coded industries based on their perceived export competitiveness.[51] Congress renewed the RTAA in 1937, 1940, 1943 and 1945, each for a three-year term.[52] Roosevelt and later Truman proclaimed 40 bilateral deals with 24 countries between 1935 and 1946, dealing mostly with tariffs, but also occasionally with quotas and customs regulations.[53]

B. Rise of the GATT, 1945-1951

A major challenge to the RTAA's expanded executive trade authority came when the Truman administration interpreted it as allowing the multilateral trade negotiations that established the General Agreement on Tariffs and Trade (GATT). The 1944 Bretton Woods Conference has originally envisioned the creation of three new institutions to regulate postwar global

50. Rep. Daniel Reed (R-N.Y.), Congressional Record, 78, March 27, 1934, at 5533.
51. Eckes, 1995, at 94-177.
52. The 1937 Act passed the House 281-92 (D: 278-11; R: 3-81) and the Senate 56-23 (D: 56-9; R: 0-14). The 1940 Act passed the House 217-166 (D: 212-20; R: 5-146) and the Senate 41-35 (D: 41-15; R: 0-20). The 1943 Act passed the House 340-63 (D: 212-20; R: 145-52) and the Senate 59-22 (D: 41-8; R: 8-14). The 1945 Act passed the House 238-152 (D: 205-12; R: 33-140) and the Senate 53-21 (D: 38-5; R: 15-16).
53. Trade agreements concluded under RTAA include: Argentina (Oct. 14, 1941), Belgium-Luxemburg (Feb. 27, 1935), Brazil (Feb. 2, 1935, June 30, 1948), Canada (Nov. 15, 1935, Nov. 30, 1939, Dec. 30, 1939, Nov. 30, 1940, Dec. 13, 1940, Dec. 22, 1941), Colombia (Sept. 13, 1935), Costa Rica (Nov. 28, 1936), Cuba (Aug. 24, 1935, Dec. 18, 1939, Dec. 23, 1941), Ecuador (March 2, 1942), El Salvador (Feb. 19, 1937), Finland (May 18, 1936), Guatemala (April 24, 1936), Haiti (March 28, 1935, Feb. 16-19, 1942, April 25, 1942), Honduras (Dec. 18, 1935), Iran (April 8, 1943), Netherlands (Dec. 20, 1935), Nicaragua (March 11, 1936, Feb. 8, 1938), Paraguay (Sept. 12, 1946), Peru (May 7, 1942), Sweden (May 25, 1935), Switzerland (Jan. 7, 1936, Nov. 28, 1940), Turkey (April 1, 1939, April 14-22, 1944), United Kingdom (Nov. 17, 1938), Uruguay (July 21, 1942), and Venezuela (Nov. 6, 1939, Dec. 12, 1939, Dec. 28, 1940, Dec. 26, 1941).

economic relations: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank), and an International Trade Organization (ITO). However, many in Congress were opposed to the ITO, on the grounds that establishing a global commerce agency would undermine U.S. sovereignty. Moreover, others in Congress raised concerns that, while the administration agreed to submit U.S. membership in the ITO to a treaty vote, Congress would have no vote on the nearly two-dozen reciprocal trade agreements that prospective ITO member countries had negotiated. The RTAA *did* allow the executive branch to enter unilaterally into such tariff-cutting agreements. But the extent of its delegation of power was revealed by the prospect of the ITO establishing — in one fell swoop — a comparable number of new trade agreements as had been established under the new delegation system over 12 years. On April 7, 1947, several House members engaged in an impassioned colloquy on the topic:

> **Rep. Noah Mason** (R-Ill.): "This International Trade Organization, in effect, would be an international super state. It would take away from the American people control of American production… [it] would mean to transfer our governmental powers to a world economic authority…. We must halt this vicious plan for an International Trade Organization before it goes too far or it will be the undoing of everything that we have built up and developed under our Constitution."…
>
> **Rep. Cliff Clevenger** (R-Ohio): "As we sit in this committee, our Democratic friends are in a quandary. They have got their feet all tangled up and their eyes dim with the mist of the halo that has been around the head of Cordell Hull for so many years. They do not know where they are going… It is time that somebody rub a little Americanism on this party that rules the other end of [Pennsylvania] Avenue in order to get them to think America and work for America and protect America."…
>
> **Rep. Thomas Owens** (R-Ill.): "Aside from the fact that the executive department has emergency powers during wartime, is there any question in the gentleman's mind but that this Congress has the right to make laws and have the executive department enforce them, and that it is about time that we begin to do that in order to save our national policy?"
>
> **Mason**: "Of course, for 150 years, that was true, but that has not been true during the last 16 years, because not only has the judiciary department interpreted the laws and said what the Congress should have put in, whether they put it in or not, but our executive departments have been themselves interpreting the laws to suit themselves, and the business of the Congress today is quite largely the vetoing of department rulings which misinterpret the laws, and even vetoing some of the rulings of the Supreme Court on the laws that we have passed."…
>
> **Rep. John Rankin** (D-Mo.): "I understood that… whatever agreements were made [in Geneva] should come back to the Congress for ratification; at least, to the Senate."…
>
> **Mason**: "[The administration] said he would submit that to the Senate for approval before it would go into effect. He said, however, that as to the 18 reciprocal trade agreements which they expect to put into effect before this International Trade Organization is set up, they, of course, would not go to the Senate."[54]

54. *Congressional Record,* 93, April 7, 1947, at 3182-3184.

Indeed, by late 1947, the 23 countries that had originally engaged in GATT negotiations had already agreed to many tariff concessions. These were each made on an item-by-item, bilateral request-offer basis, and then generalized on a most-favored nation basis to the entire group. Truman, anxious to lock in these agreements, invoked the RTAA to proclaim the "provisional application" of the GATT to the United States in October 1947.[55] On March 24, 1948, Truman's Assistant Secretary of State William Clayton signed the ITO's draft charter, which would go into effect subject to congressional approval. On April 28, 1949, the Truman administration notified Congress it would submit the ITO for a Senate treaty vote, but then formally abandoned the effort in 1951 in the face of unbending congressional opposition.[56]

Members of Congress were irate at the executive branch's GATT maneuvering, as evidenced by comments at a Senate Finance Committee hearing from 1949:

> **Sen. Eugene Millikin** (R-Colo.): Would the provisions of this article or any other part of GATT impose upon the Federal Government any duties to do anything as to local State laws or movements, which are intended to promote State products, such as "Buy Georgia Peaches," "Buy Colorado Cantaloupes," state advertising campaigns out of public funds to promote those local buying campaigns?"
>
> **Winthrop Brown** (State Department Official): "No, sir."
>
> **Millikin:** "Is there anything in this agreement any place that

55. T.I.A.S. 1700, Vol. 1, Oct. 30, 1947; Jackson, 1967.
56. SF, 1951, at 1137, and 1143-44.

> imposes any obligation on the Federal Government to stop anything of that sort?"
>
> **Brown:** "I don't think so sir."
>
> **Millikin:** "Is there any question about it?"
>
> **Brown:** "No, I don't know of anything."[57]

Millikin and Brown had another face-off in March 1951:

> **Millikin:** "You are unwilling then to present the whole of GATT to Congress so that it might not only compare GATT against existing laws, but also against the Constitution? … What about the future laws of Congress?"
>
> **Brown:** "The answer to that question is that if the Congress should pass legislation in the future that was inconsistent with the GATT, they would put the United States in the position of violating the GATT."
>
> **Millikin:** "And you feel that the President is warranted in making future executive agreements which in themselves might conflict with future laws of Congress?"
>
> **Brown:** "That has been the situation with respect to all of our trade agreements since the beginning, Senator."[58]

In 1947, Sen. Hugh Butler (R-Neb.) summed up the views of many when he said: "I think it is fair to say that it was not

57. Quoted in Jackson, 1967, at 304.
58. SFA, 1951, at 1170.

contemplated when this act was passed that it would be used as the vehicle for a general revision of our entire tariff system… the State Department has tried to commit us permanently to a reversal of our long-standing policies by putting this agreement through during a temporary period of world shortages. We may not realize fully what has happened to us for some little time… Present authority to negotiate these treaties under the Trade Agreements Act will expire next year. I believe the Congress will scrutinize very, very carefully any request for an extension."[59]

C. Congress Begins to Reassert Its Constitutional Trade Authority, 1948-1962

Butler's prediction came true. Republicans took over both chambers in the 1947 election on a pledge to reign in Truman. The following year, Congress enacted its first major RTAA revision, extending the authority for only a single year, rather than the customary three years. The 1948 RTAA introduced the rather modest notion that Congress and the trade gatekeeper committees (Senate Finance and House Ways & Means) would have to receive copies of any trade agreement that threatened "serious injury" to domestic industries within 30 days of entering into the pact. This was known as the "peril point" provision.[60] In the House, 98 percent of Republicans supported the bill, and 90 percent of Democrats opposed — a total inversion of the pattern from previous RTAA extensions.

Republican resurgence was short-lived: Democrats retook both chambers that year. In 1949, Congress reestablished the RTAA

59. Sen. Hugh Butler (R-Neb.), *Congressional Record*, 93, Nov. 20, 1947, at 10675.
60. Public Law 80-972. The 1948 Act passed the House 234-147 (D: 16-142; R: 218-5) and the Senate 70-18 (D: 23-17; R: 47-1).

authority for its standard three-year duration, and removed the peril point language. While Democrats continued to hold the majority in the next Congress, the Republican minority was able to reinsert and expand the peril point language, and limit the 1951 extension of the authority to two years. The new language allowed either congressional chamber or gatekeeper committee to request that the Commerce Department's U.S. Tariff Commission (now called the U.S. International Trade Commission)[62] investigate and report on any "serious injury" caused to U.S. industries under a trade agreement. If the commission made a recommendation to alter tariff rates to compensate for the injury, the executive was authorized to proclaim further duty changes. If he chose to ignore the commission's advice, he would have to file a report with the gatekeeper committees explaining his decision.

Additionally, the 1951 legislation specified, "the enactment of this Act shall not be construed to indicate approval or disapproval by the Congress of the Executive Agreement know as the General Agreement on Tariffs and Trade."[63] Similar clauses appeared in the 1953, 1955 and 1958 acts, and were one means Congress had of showing that, while it accepted the tariff reductions

61. Public Law 81-307; 63 Stat. 697; H.R. 1211. Approved on September 26, 1949. It passed 318-69 in the House (D: 234-6; R: 84-63) and 62-19 in the Senate (D: 47-1; R: 15-18).
62. The U.S. Tariff Commission was established by Congress in 1916. The 1974 Fast Track bill changed its name to the U.S. International Trade Commission. The USITC describes itself as: "An independent federal agency determining import injury to U.S. industries in antidumping, countervailing duty, and global and China safeguard investigations; directing actions against unfair trade practices involving patent, trademark, and copyright infringement; supporting policymakers through economic analysis and research on the global competitiveness of U.S. industries; and maintaining the U.S. Harmonized Tariff Schedule." See http://www.usitc.gov/.
63. Section 10 of Public Law 82-50; 65 Stat. 72; H.R. 1612. Approved on June 16, 1951. It passed 225-168 (D: 42-163; R: 183-4) in the House. In the Senate, it passed 72-2 (D: 38-0; R: 34-2).

proclaimed by the executive, it did not accept or recognize the underlying GATT agreement.[64] In an early foreshadowing of how enhanced executive authority implicated non-tariff policy, the Truman administration admitted that a dozen domestic laws would have to be changed if the United States were to move from provisional to non-provisional acceptance of the GATT.[65]

While Roosevelt, Truman and congressional Democrats had hitherto treated any congressional alterations to the RTAA presidential trade authority as partisan affronts, the 1952 elections provided something of a wakeup call. Republican Dwight Eisenhower defeated Democrat Adlai Stevenson for the presidency, and the Grand Old Party took both chambers of Congress. Democrats were henceforth be less resistant to modifying the underlying formula, and bipartisan majorities voted over the decade to substantially increase congressional involvement in trade policy. The 1953 RTAA created a commission appointed by the executive and Congress that would study foreign economic policy, including its constitutional implications. In the 1955 RTAA, Congress increased the executive's congressional reporting requirements.[67]

The 1958 RTAA renewal was Congress' most significant reassertion of congressional prerogative over trade during the period. This Act allowed Congress to force the president to proclaim tariff modifications recommended by the Tariff Commission if he had initially rejected their advice. The exact

64. Jackson, Louis and Matsushita, 1982, at 344-345.
65. SF, 1951, at 1195-1199.
66. Public Law 83-215; 67 Stat. 472. H.R. 5495 was approved on August 7, 1953. It passed 363-34 (D: 183-9; R-179-25) in the House and on July 2, 1953, it passed by voice vote in the Senate.
67. Public Law 84-86; 69 Stat. 162. H.R. 1 was approved on June 21, 1955. It passed 347-54 (D: 297-18; R: 150-36) in the House and 75-13 (D: 37-6; 38-7) in the Senate.

The Rise and Fall of Fast Track Trade Authority

process was the following: within 60 days of receiving the commission report initially mandated by the 1951 Act, if both the House and Senate adopted a concurrent resolution by a two-thirds vote in each chamber requiring the commission's advice to be taken, Congress could override the president. The bill also specified the rules that Congress would follow in considering such resolutions, while noting that these could be changed as per the legislature's constitutional rights. Under the rules, any member of Congress could propose such a "disapproval resolution," which would be automatically reported to the gatekeeper committees, who would have 10 days to report it out. If they did not take action by then, any member of Congress could make a highly privileged motion (no amendments, one hour of debate, and other expediting procedures) for the resolution to be immediately discharged. Thereafter, the resolution would continue to receive expedited consideration.[68]

Despite growing bipartisan concerns about executive-branch unilateralism in the international arena, Truman and Eisenhower continued to rely on GATT's "provisional application," even as GATT contracting parties completed five rounds of GATT negotiations and U.S. administrations proclaimed the resulting tariff changes into U.S. law.

68. Public Law 85-686; 72 Stat. 673. H.R. 12591 was approved on August 20, 1958. It passed 317-98 (D: 184-39; R 133-59) in the House and 72-18 (D: 40-6; R: 32-12) in the Senate.

The Bricker Amendment: Criticism of Executive Unilateralism Grows

During this period, congressional concern about executive-branch unilateralism was significant, and not limited to trade-agreement matters. A constitutional amendment, known as the Bricker Amendment, which would have significantly limited executive authority, came within one vote of Senate approval.

Since the 1890s, Congress had allowed the executive to sign certain executive agreements that impacted trade without subsequent congressional approval, such as the argol agreements. Executive agreements around non-trade issues dated back even further. But their usage was getting increasingly controversial, as international agreements like the United Nations and GATT seemed to be creating supranational forms of government.

In 1951-52, Sen. John Bricker (R-Ohio) — with support from the American Bar Association —proposed a constitutional amendment that no treaty or executive agreement could be made: 1) with respect to, abridging, or prohibiting the free exercise of Americans' constitutional rights; 2) that vests in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution In the Congress, the President, and in the courts of the United States; or 3) that alters or abridges the Constitution or U.S. federal or state laws unless, and then only to the extent that, Congress shall so provide by joint resolution.

The Bricker Amendment would have also forbade executive agreements made in lieu of treaties, and would require that any executive agreements terminate within a year after the president

who made them had left office, unless the following president asked Congress for an extension. Although not specifically directed against Truman's GATT maneuvers, Bricker's floor statements from January 1952 made his thinking clear: "The General Agreement on Tariffs and Trade is an illegal executive agreement launched with the idea of greasing the way for the International Trade Organization. The ITO, in both treaty and joint resolution form, met a stone wall in Congress. GATT, its illegitimate forerunner, lingers on."[69]

In 1953-54, after the Republicans took back Congress, Bricker introduced revised versions of his Constitutional amendment, which attracted broad bipartisan support. But, Senate Minority Leader Lyndon Johnson — perhaps thinking about the executive-power question in the context of his own presidential aspirations — teamed up with Eisenhower to kill the amendment. On February 26, 1954, a watered down version of the Bricker Amendment authored by Sen. Walter George (D-Ga.) fell one vote short of the needed two-thirds supermajority, and thus died.[70]

69. Sen. John Bricker (R-Ohio), Congressional Record, 98, Jan. 23, 1952.
70. The debate is chronicled in Caro, 2002, at 527-541.

D. Yet another Congressional-Executive Trade Authority Showdown, 1962-67

John F. Kennedy came to office promising an overhaul of U.S. trade policy, stating that the 1934 RTAA model "must not simply be renewed, it must be replaced." He argued this was necessary to meet the challenges of new developments on the trade horizon, such as the "need for us to maintain a balance of trade in our favor" by reducing European tariffs.[71] In practice, the 1962 Trade Expansion Act (TEA) did not represent a huge change in the RTAA's executive-legislative relationship. It added provisions that required the president to accredit a member of each party from each chamber to go on negotiating teams, and to send copies of completed agreements to Congress. Presidential tariff-proclamation authority was limited to increases or decreases within a 50 percent band. Certain duties could be totally eliminated, such as those already under 5 percent *ad valorem*, on tropical products, or on products where the U.S. dominated global markets. Moreover, the TEA extended tariff-proclamation authority from three to five years, through 1967, and created the Office of the Special Trade Representative (later U.S. Trade Representative) to lead negotiating teams and serve as a broker between executive agencies.[72] Kennedy later placed the STR in the Executive Office of the President.

The 1962 act also pioneered the idea of buying congressional support for trade deals by attaching delegation authority to authorizations for a new program of trade adjustment assistance (TAA), which aided workers displaced by imports. The TAA legislative "sweetener" has since become standard political cover

71. TIME, 1961.
72. Public Law 87-794 § 226 and 243.

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for members of Congress making difficult trade votes.[73] The administration tucked the new TAA program into the larger delegation proposal as a means to win labor support, as AFL-CIO President George Meany indicated when he told the Senate Finance Committee in 1962:

> "As you know, we in the AFL-CIO have consistently supported the various extensions of the Reciprocal Trade Act over the last 28 years. However, we agree with the administration that the time has now come for a fundamental revision, an updating and overhauling of this basic approach… Yet I gather from newspaper reports and other sources that trade adjustment assistance still remains one of the more controversial features of the program you are considering. This causes us the gravest concern. In our opinion, there is no question whatever that adjustment assistance is essential to the success of trade expansion. And as we have said before, it is indispensable to our support for the trade program as a whole."[74]

On June 28, the House approved the TEA by a margin of 299 to 125, and the Senate promptly followed.[75] After the Kennedy assassination the following year, countries participating in the sixth GATT negotiating round renamed it in Kennedy's honor. President Lyndon Johnson saw through these negotiations, which included tariff reductions he was able to proclaim into existence.

But Johnson made a number of legislative missteps that aroused congressional anger. First, he negotiated and signed an

73. Tucker, Wu and Prorok, 2005.
74. Testimony of George Meany. See SF, 1962, at 240-241.
75. Public Law 87-794 § 226 and 243. 76 Stat. 872. H.R. 11970 was approved on October 11, 1962. The House adopted it 256-91 (D: 178-34; R: 78-57) and, in the Senate, it passed 78-8 (D: 56-1; R: 22-7).

Automotive Products Agreement with Canada on January 15, 1965 without prior congressional authorization, congressional participation in the negotiations, or the required public hearings. The pact *eliminated* certain duties on cars and car parts, even though the TEA authority only allowed for reductions on these duties within the 50 percent band.

Sen. William Fulbright (D-Ark.) questioned why the executive was not asking for the Senate's advice and consent. In a letter to Secretary of State Dean Rusk, Fulbright noted: "An increasing number of members are under the impression that executive branch decisions whether to submit international agreements to the Senate for approval by two-thirds of its Members or to the Congress for a majority decision are based on expediency rather than the Constitution."

In response, the State Department wrote: "The United States-Canadian automotive agreement is bilateral and deals with the elimination of duties. It has been the regular practice for over 30 years to use the executive agreement-legislative authority procedure for agreements of this type. In the usual case, the legislative authority has been provided first and the executive agreement made later — as under the reciprocal trade legislation of 1934 and the Trade Expansion Act of 1962. However, it is equally within the constitutional powers of the President to make an executive agreement first, subject to the enactment of legislation and have the legislation follow."[76]

76. Both letters were entered into committee records. WM, 1965, at 225-227.

Despite constitutional concerns, Congress passed the legislation, retroactively authorizing the negotiations and duty reductions, on October 21, 1965. Johnson proclaimed the duty reductions into effect the same day.[77]

Johnson made a second error in calculating Congress' tolerance for executive trade actions taken outside of delegated authority. In the Kennedy Round, he engaged in negotiations with GATT partners about changing U.S. antidumping law, and eliminating what was known as the American Selling Price (ASP), a method for valuating certain foreign imports (of chemicals, for instance) by what they would have cost to produce in America. These were quintessential non-tariff (though trade-related) issues, and in June 1966, the Senate unanimously passed S. Con. Res. 100, which stated that the president should not engage in negotiations on matters for which he had no prior congressional authorization. Sen. Vance Hartke (D-Ind.) noted that "such substantive changes in our law amount to unauthorized legislation by an international agreement whose execution exceeds the mandate for these negotiations and usurps the legislative responsibilities of Congress."[78]

While Republicans had led the mid-century charge against executive concentration of trade power, Democrats — increasingly concerned with American workers wellbeing under a global trading system — also joined the ranks of the RTAA's GOP critics.

77. Public Law 89-283; 79 Stat. 1016; H.R. 9042, passed Oct. 21, 1965.
78. Quoted in Eckes, 1995, at 199.

Johnson proclaimed the GATT Kennedy Round tariff reductions on December 16, 1967 (having concluded the negotiations by the July 1 expiration of TEA's authority to "enter into trade agreements."[79]) However, by that time, he had reluctantly realized that he would need legislative authorization to change the ASP and anti-dumping code. On May 8, 1968, he submitted to Congress a new Trade Expansion Act, which would implement changes to the ASP and anti-dumping laws and extend the 1962 authority through 1970. The Ways & Means Chair at the time, Wilbur Mills (D-Ark.), promptly convened a month of hearings, where witness after witness assailed the substance and constitutionality of the ASP measure. In contrast to the unauthorized Canadian auto-tariff eliminations, Congress was unwilling to accept Johnson's unauthorized trade commitments this time. Congress never had a vote on the bill, and the non-tariff aspects of the Kennedy Round never went into effect in the United States.

79. Public Law 87-794 § 201(a)(1).

REGIME IV. Lapse in Authority, 1967-1975

A combination of factors resulted in there being no delegation of trade authority between 1967 and 1975. In November 1967, Sen. Eugene McCarthy (D-Minn.) declared his primary challenge against Johnson, mostly on anti-Vietnam war grounds. What began as a quixotic campaign rapidly gained adherents, and by March 1968, McCarthy had come within 7 points of beating Johnson in the New Hampshire Democratic primaries. A humiliated Johnson — who had won over 60 percent of the vote only four years earlier — then announced that he would not seek the presidential nomination, which effectively ended any major policy initiatives for the rest of his term.[80]

Rapid cultural and political changes were tearing the country apart. Government's effective management of the largest peacetime economic expansion in U.S. history had ironically provoked left and right resentment of civil servants. Liberals had led the United States into a foreign war they seemed unable to win. Landmark civil rights achievements were followed by urban riots after the assassinations of Martin Luther King, Jr. in April. Then Bobby Kennedy was assassinated in June, further shaking the nation and leading to the political fragmentation of the August Chicago Democratic Convention, which nominated Vice President Hubert Humphrey, despite his not having participated in any primaries.[81]

80. Sandbrook, 2005.
81. Solberg, 1985.

In the November elections, Eisenhower's vice president Richard Nixon beat Humphrey by less than one percent of the popular vote — 43.4 to 42.7 percent. While Nixon had assiduously courted Southern Democrats in an attempt to build a new "Republican Majority," Alabama Governor George Wallace's populist third-party candidacy captured many of those voters, yielding the latter man 13.5 percent of the popular vote. Wallace's message of Beltway cultural and economic sellout of working-class voters also attracted significant support from union members. (The AFL-CIO estimated that a third of its members supported the Alabaman.[82]) Due to electoral-college rules, however, Nixon was able to claim 301 electoral votes to Humphrey's 199 and Wallace's 46. If Wallace had gotten a few thousand more votes in North Carolina and Tennessee, and if Humphrey had done slightly better in New Jersey and Ohio, then the election would have been thrown to the Democratic-controlled House of Representatives to decide.[83] Moreover, as political scientist Thomas Schaller documented, "Nixon became the first elected president in American history to enter the White House without his party capturing either chamber of Congress."[84]

For Nixon's first term, he was painfully aware of his narrow election victory and need to consolidate what he called the "Silent Majority." This involved courting Southerners and union members. He was not interested in economic matters, and saw his legacy as a partial cooptation of liberal domestic policy (through aides like Democrat Daniel Patrick Moynihan, who facilitated working relationships with the Democratic-controlled Congress), combined with executive-branch unilateralism in

82. Carter, 1995, at 352.
83. Perlstein, 2008, at 354.
84. Schaller, 2006, at 40.

foreign affairs (through other aides, like Johnson administration consultant Henry Kissinger, who were wary of Congress).[85]

Despite paying lip service to "free trade" orthodoxy, Nixon was supremely more interested in politics. "What really matters in campaigns, wars, or in government is to concentrate on the big battles and win them," he told aides. "I do not want to be bothered with international monetary matters… and I will not need to see the reports on international monetary matters in the future."[86] Throughout his 1968 run and first term, he pushed textile quotas in return for the electoral support of Sen. Strom Thurmond (R-S.C.), who Nixon put in charge of his anti-Wallace strategy.

On his maiden European trip as president in February 1969, he told European heads of state that trade expansion was not on the agenda. "I pointed out the great pressures we are under here for quotas on imports," he told advisors. "And I told them this is no the time for new breakthroughs in trade procedures. There will not be a new Kennedy Round — that's not in the cards — it's time to digest what we already have on the plate."[87]

Like it or not, international trade matters began to demand Nixon's attention, as the post-war economic order rapidly unraveled. At the 1944 Bretton Woods Conference, nations agreed to convert each other's currencies at fixed exchange rates, thereby facilitating trade and international payments. But reserve shortages in Europe after the war led countries to use the U.S.

85. Perlstein, 2008, at 360, 370, and 395.
86. Matusow, 1998, at 126.
87. Matusow, 1998, at 119.

dollar instead, which the U.S. government agreed to exchange for gold at a rate of $35 an ounce. A consequence of the *de facto* dollar-gold standard was an over-accumulation of dollar reserves abroad, which now exceeded the value of gold held by the United States at Fort Knox. By 1971, European speculators were beginning to demand more gold for dollars than the U.S. Treasury possessed. Simultaneously, the United States ran its first trade deficit since 1893.[88]

In the context of looming financial instability, Nixon's economic approach became even less orthodox. He appointed former Texas governor and Democrat John Connally as Treasury secretary in February 1971. Connally said: "My basic approach is that the foreigners are out to screw us. Our job is to screw them first."[89] Nixon also appointed Pete Peterson as Assistant to the President for International Economic Affairs, but told aides beforehand that: "Trade is a two-way street… [if he's] a total free trader… he can't have the job."[90] Neither Connally nor Peterson disappointed. Peterson maintained that: "our [trade] partners no longer need special crutches. In fact, as is sometimes the case, patients may be inclined to throw them at the doctor."[91] Connally advocated for U.S. adoption of Japanese-style industrial policy. Within months, Nixon was channeling their message, telling Peterson in June 1971 that while previous administrations had used trade for foreign policy purposes, we "must use it as [an] instrument of our domestic policy, e.g. jobs."[92]

88. Matusow, 1998, at 123-126 and 144-148.
89. Matusow, 1998, at 117.
90. Matusow, 1998, at 132.
91. Matusow, 1998, at 134.
92. Matusow, 1998, at 137.

Nixon instructed his team to, in historian Rick Perlstein's words, "win the election by doing whatever he had to do to make the economy *appear* to boom in the run-up to the 1972 elections, no matter the longer-term consequences of the techniques it took to do it."[93] In August 1971, Nixon showed a willingness to upend completely the post-war economic order if it helped him win an election. After a presidential retreat at Camp David, Nixon proclaimed through executive order that he was abandoning the dollar-gold standard, and imposing an across-the-board import surcharge of 10 percent, along with other wage and price controls.[94]

The surcharge was designed to reduce imports by making them more expensive, and thus lead to trade balance. In December 1971, Nixon phased out the relatively small surcharge, which had only a modest impact on improving trade balance. However, the underlying political goal had been accomplished: Nixon had established his populist credentials. Polls showed that 75 percent of the public approved of his August 1971 "New Economic Policy."[95] In the 1972 election, he won by almost exactly Johnson's 1964 margin — 60.7 percent of the popular vote. This translated to a whopping 520 out of 537 electoral votes. Despite Nixon's strong showing at the presidential level, however, Democrats still maintained their majorities in both chambers. This fact was extremely frustrating to his administration, which had to turn its attentions on how to work with — or at least divide and confuse — the Democratic-labor coalition.

93. Perlstein, 2008, at 599.
94. Dale, 1971; Silk, 1971. Only certain commodities like oil were exempted.
95. Perlstein, 2008, at 603.

REGIME V. Executive Hegemony over Non-Tariff Rules: Fast Track's Rise and Fall Through 2008

A. On the Fast Track in Nixonland, 1973-1975

While Nixon's first term included "more new regulation… than in any other presidency since the New Deal," in historian Allen Matusow's words, he "entered the second term determined to reverse this trend."[96] George Shultz had replaced Connally as Treasury secretary in June 1972, and convinced Nixon that trade was going to be the predominant way of exercising U.S. influence in the world, and that other country's non-tariff barriers were a primary constraint on U.S. exports, and thus obstacle to sustained U.S. trade balance.[97]

Original Fast Track architect Richard Nixon, with Gerald Ford, who would sign the final Fast Track into law.

96. Matusow, 1998, at 241.
97. Beckman, 1972; Gannon, 1973.

Labor politics were also in flux. While the AFL-CIO supported the Kennedy Round and TEA, trade-related job loss among its members was leading the federation to formulate specific proposals aimed at ensuring that trade expansion continued to benefit American workers. In 1971, the AFL-CIO drafted legislation co-sponsored by Rep. James Burke (D-Mass.) and Sen. Vance Hartke (D-Ind.). The bill would have frozen imports at 1960s levels using quotas, limited the export of U.S.-developed technology, and increased the taxes that U.S. multinationals paid on their overseas operations.[98]

As one author put it, the Burke-Hartke bill "opened debate over an entirely new area of public and democratic control of corporate behavior. It was based on the premise that the public had a right to regulate what an American corporation did internationally when American jobs were at stake… more than any single debate, it expressed the basic conflict that the post-Bretton Woods world economy was creating between business on the one hand and labor and movements" on the other. And big business fought ferociously to make sure it never became law.[99]

Nixon, who benefited from the AFL-CIO's unusual failure to endorse the Democratic candidate in the recent presidential campaign, began his second term still courting labor. In February 1973, he attended the annual AFL-CIO convention in Key Biscayne, Florida. Nixon expressed his sympathy for workers displaced by imports, but did not endorse Burke-Hartke, letting slip that he had another proposal in mind that would allow more flexibility but achieve many of the same results. Labor staffers suggested that they had won the president over

98. H.R. 10914 in the 92nd Congress, and H.R. 62 in the 93rd Congress. Also called the Foreign Trade and Investment Act.
99. Judis, 2001, at 114-115.

to their approach.[100] Echoing Shultz, the AFL-CIO's Nathaniel Goldfinger wrote in the *New York Times* that non-tariff barriers abroad were creating barriers to U.S. trade balance. Among the causes of American decline were:

> "The spread of managed national economies. Governments now have direct and indirect barriers to imports, as well as various types of subsidies for exports. The result is that imports surge into the huge American market, the most open market to imports of all major industrial countries, while the expansion of United States exports is retarded or blocked by the practices of foreign governments."[101]

In April 1973, Nixon unveiled his legislative proposal, which he pitched as a comprehensive package to restore America's trade balance.[102] *The Washington Post* editorial board summarized the situation the president found himself in: "Mr. Nixon has usually been able to arrange his affairs in a fashion that leaves Congress pretty well out of our international relations. Now, before he can negotiate with the rest of the world on the crucial issues of trade, he must have a kind of authority that only Congress can give him."[103]

The Trade Reform Act of 1973, H.R. 6767, introduced by Wilbur Mills on April 10, 1973, would create a new delegation of tariff proclamation authority. Section 401 of the act featured authority for the president to apply new import surcharges, and set their rate. The surcharges could be applied on a country-by-country or across-the-board basis. It allowed for certain

100. Shabecoff, 1973.
101. Goldfinger, 1973.
102. Beckman, 1972; Shabecoff, 1973.
103. WP, 1973.

exclusions, such as for oil. In the committee's report on the bill, it advocated that import surcharges should be the *preferred* means for countries to deal with balance-of-payments problems.[104]

Yet the most dramatic feature of the legislation was its new expansion of executive authority over *non-tariff* issues. Nixon's team saw foreign governments' procurement practices as a growing obstacle to U.S. exports and thus an impediment to closing the trade deficit. Thus, they wanted authority to enter into trade agreements that would include disciplines on government procurement and other related matters. They strongly implied that the trade deficit could be resolved by reducing foreign "non-tariff barriers." Said one administration official:

> "With the success of the Kennedy Round in 1967 in reducing tariffs among the world's major trading nations, non-tariff practices have become the major impediment to fair competition and the free flow of goods in international trade. Major attention will be given in the Multilateral Trade Negotiations to eliminating and reducing these trade-distorting measures. The job will not be easy as many of these practices are imbedded in national laws and policies."[105]

In making his case for non-tariff powers, Nixon invoked Congress' rejection of Kennedy Round non-tariff implementing legislation. He argued that the branch had embarrassed the nation, and that countries would not be willing to negotiate with the United States in the future. In reality, the next round of GATT negotiations, the Tokyo Round, was launched in

104. WM, 1973b, at 27-33.
105. SF, 1974, at 173.

September 1973, a year before Congress had agreed to new presidential trade authority. Shultz claimed: "the fact that our trade bill is still under Congressional review does not impede our ability to participate actively and fully [in GATT talks] at this stage."[106]

The provisions in the 1973 Act regarding congressional involvement in approval of the expanded non-tariff agreements represented a wholesale re-envisioning of Congress' fundamental constitutional responsibilities. While the tariff-proclamation authority was a continuation of past practice, Fast Track delegated to the president for the first time the authority to enter into an agreement that included non-tariff matters. Nixon's original Fast Track proposal would have allowed the president to negotiate and sign trade agreements covering tariff and non-tariff matters, and to unilaterally proclaim tariff levels and changes to U.S. non-tariff laws for a period of five years.

Congress would be given 90-days notice before the president entered into any trade agreement that made changes to non-tariff legislation. However, the president would not have to explain in any detail what U.S. laws he contemplated changing. After proclaiming any tariff or law changes, the president was to transmit copies of any such proclamations to Congress. No congressional vote was required, and the proclamations automatically took effect if neither chamber "vetoed" the proposal via a disapproval resolution within 90 days. In a letter to Mills on June 13, 1973, Nixon's Justice Department argued that the authorities to enter into non-tariff trade agreements and to

106. Halloran, 1973.

impose import surcharges were constitutional, and cited Supreme Court rulings from Hampton to Field.[107]

Shotgunning the Balance of Powers

John Connally summed up the Nixon administration's approach to executive-legislative relations thusly: "If the legislature wants to give you a new power — you take it. Put it in the corner like an old shotgun. You never know when you might need it."[108] One congressperson returned to this frame decades later, noting that "Fast Track operates like a gun to our head — no amendments, no reservations."[109]

In addition to the tariff and non-tariff provisions, the package included more trade adjustment assistance. And to counter concerns that limiting Congress' role would hinder private-sector input into U.S. trade agreement formulation, the proposal established a system of formal trade-advisory committees that would be comprised of private-sector representatives.

107. WM, 1973a, at 326-330. In a 1967 article, legal scholar John Jackson maintained that these rulings, coupled with the fact that RTAA hearings had discussed GATT issues, indicate: "The practice of all three branches of our government recognizes the legal existence of GATT." In the same article, he quotes 1955 testimony by John Foster Dulles (Eisenhower's secretary of state) that, "I don't believe that this law which has remained on the books 21 years unchallenged is constitutional." Nonetheless, Jackson's article quoted the aforementioned angry questioning of the Truman administration official by Sen. Eugene Millikin in 1949, showing that the matter was far from settled, as Jackson himself discovered in 1973, when he faced tough congressional questions on the scope of GATT non-tariff issues. Legal scholar Lawrence Tribe has a critical perspective of the Jackson-Dulles analysis. In Field v. Clark, Tribe writes, "the Supreme Court upheld a proclamation statute – an act of Congress authorizing the president to take particular action upon finding certain conditions to be met – by relying in part on the value as precedent of legislative practice… The Court's decision nearly a century later in Chadha, however, makes plain than an historical pedigree extending back only a matter of decades is insufficient to sustain the constitutionality of even a frequent congressional practice that conflicts with constitutional text and structure." See Tribe, 1995, at 1281.

108. Perlstein, 2008, at 600.

109. Sen. Ernest Hollings (D-S.C.), quoted in Cloud, 1991.

Nixon had kicked off 1973 trying to get labor backing for his proposal. After the initial collaborative noises, however, both he and Mills sidelined labor. As early as April, labor leaders recognized the Nixon-Mills bill did not meet their minimum standards, and President Meany promised to push mandatory Burke-Hartke style quotas as an amendment. But Ways & Means voted down the Meany amendment in July.[110] *The Washington Post* again summed up the situation when its reporter wrote in September that, "the landmark legislative proposal gives organized labor none of its maximum demands."[111] Meany declared that the Nixon-Mills bill was "worse than no legislation at all."[112]

The bid for greater presidential authority and an expanded scope for "trade" agreements did not go unnoticed in Congress. In the month-long Ways & Means hearings, the very first comment fired at administration officials came from Rep. Al Ullman (D-Ore.), who said: "My problem with your proposal, and I think this perhaps will be your major obstacle in getting this legislation through, is the degree to which we are delegating broad new powers to the executive."[113]

Even Mills showed great foresight when he raised the specter of non-trade laws being challenged as barriers to trade in new trade agreements — the exact kinds of questions Eugene Millikin raised decades before in regards to the original GATT talks. Nixon administration official John Jackson batted this criticism away: "There are some other possibilities in the area of how a government will allow another government or another society's

110. McKinsey, 1973; and Dale, 1973b.
111. Berger, 1973.
112. LAT, 1973.
113. WM, 1973a, at 183.

firms to set up offices in the country, in our country, for instance, or to provide certain kinds of facilities. Now, sometimes these are termed, I grant you they are out on the fringe, but sometimes they are termed nontariff barriers." Mills retorted: "Do any of our health laws enter into this, sanitation laws?" Jackson replied: "Yes. I am sure that there are such, there are aspects of those laws that could be termed nontariff barriers."[114]

The administration's strategy was to downplay at every opportunity the implications for undermining Congress' authority over U.S. domestic non-trade policy. Nevertheless, while Nixon sought to brush off these congressional worries, a review of the extensive hearings reveals testimony from a Japanese business advocate that listed "Buy Local" and "Buy America" provisions in almost every state as something to be eliminated in the GATT negotiations.[115]

Mills was prescient. Fast Track proved to be a powerful mechanism for skirting Congress' control of domestic non-trade policy, and forcing changes to the very policy areas he had identified. (For instance, implementation of the Fast Tracked GATT Uruguay Round in 1995 included changes to U.S. meat and poultry safety and inspection regulations. This weakened the previously standing policy that allowed only imports of meat and poultry meeting U.S. standards.[116]) At the time, however, Mills and others were reassured that their

114. WM, 1973a, at 447-448.
115. WM, 1973a, at 1060.
116. See e.g. 60 Fed. Reg. 38667, July 28, 1995 which explains why the WTO's Sanitary and Phytosanitary Agreement and the Uruguay Round Implementing Act require a change to USDA rules. The regulation removes the requirement that meat and poultry may only be imported from countries with safety standards equal to U.S. law to the WTO-required standard of accepting imports that meet 'equivalent' foreign standards, noting that doing otherwise could be deemed an illegal non-tariff barrier.

concerns would never come to pass. Ways & Means documents reveal that the committee assumed that the kinds of non-tariff negotiations being contemplated would lend themselves to simple conversion to tariff equivalents. This would involve, to take a purely hypothetical instance, converting a 500-shipment-a-year cheese quota to a 25 percent cheese tariff. But what is the tariff equivalent of a public health-care system, or a recycled-content requirement (both targeted for curtailment in subsequent Fast Tracked trade negotiations)?

The Ways & Means report on the bill revealed further insights into the committee's expectations on process. "The committee has been assured, however, that due to the complexities involved and, in particular, to the unique legislative character [of non-tariff barriers],… that the adoption of [changes to non-tariff laws] will be the subject of a request for affirmative congressional approval through the normal legislative process."[117] In other words, Mills trusted the president responsible for the Watergate break-in to refrain voluntarily from using the vast new authorities that the committee had just greenlighted.

It is intriguing to consider the role of the Ways & Means Committee in agreeing to such a major delegation of congressional authority. The committee originally had jurisdiction over trade because tariffs had been a primary source of government revenue in the republic's early years, and the committee had jurisdiction over tax and revenue measures. But by 1973, tariffs constituted only 1 percent of government revenue.[118] And in any case, since 1890, Congress had regularly

117. WM, 1973b, at 25.

118. Total 1974 government receipts taken from U.S. Census Bureau, *Statistical Abstract of the United States*, 1974, at 221. Total 1974 duties collected taken from U.S. Census Bureau, *Statistical Abstract of the United States*, 1984, at 841.

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delegated authority over tariffs to the executive branch, which had built up agencies like the Tariff Commission to make recommendations on the issue. However, the scope of non-tariff pacts contemplated under the Fast Track proposal would deeply delve into numerous other congressional committees' jurisdiction, including many delicate domestic policy issues not appropriate for executive-branch control. The historical record hints at some congressional awareness of the implications of this expansion of jurisdiction, although to this day, many in Congress are surprised to learn that WTO or NAFTA include binding rules regarding non-trade issues covered by committees outside Ways & Means and Finance. Interestingly, most of the House committee chairs voted against Fast Track.[119]

Regardless, decades of jurisdictional inertia meant that the committee — which was without jurisdiction over many of the non-tariff issues contemplated in the already-launched GATT negotiations — was empowered to facilitate Nixon's establishment of a stunning grab of legislative-branch trade and non-trade authority.

119. The jurisdiction of at least nine House committees other than Ways & Means could be reasonably construed to be impacted by the international commercial agreements, such as WTO and NAFTA, enabled by Fast Track. These committees are contemplated for consultations under provisions of the Trade Reform, Accountability, Development and Employment (TRADE) Act introduced on June 4, 2008 regarding review and renegotiation of existing agreements. A majority of the then-chairs of the affected committees voted against Fast Track in 1973. The six opposed include: William Poage (D-Texas) of Agriculture; Carl Perkins (D-Ky.) of Education & Labor; Harley Staggers (D-W.V.) of Energy & Commerce; Wright Patman (D-Texas) of Banking & Currency (now Financial Services); Thomas Morgan (D-Pa.) of Foreign Affairs; and Peter Rodino (D-N.J.) of Judiciary. Only James Haley (D-Fla.) of Natural Resources and John Blatnik (D-Minn.) of Transportation supported the legislation. Mills was absent, but acting Ways & Means chair Al Ullman also voted aye. Small Business, the final committee contemplated for consultations under the 2008 TRADE Act, did not yet exist in 1973.

The Ways & Means leaders from both parties — Acting Chair Ullman[120] and Ranking Member Herman Schneebeli (R-Pa.) — rounded up support for Fast Track, and controlled a combined six hours of debate when it came to the House floor on December 10, 1973. Even though a majority of Democrats opposed the measure, the bill's opponents only got one hour of floor-time to present their views. James Burke (of the Burke-Hartke bill) made the most of the scarce time, giving a blistering speech:

> "There is no question that this bill would make the President of the United States the foreign trade czar of this Nation. While it is conceivable that there would be times when I might agree with his actions, it is also certain that there would be many times when I would disagree. But, agree or disagree, there would be little Congress could do, having voted in this bill to give the President a free hand to conduct this nation's foreign trade as he determines best over the next 5 years… taken all together, this massive delegation of authority to the President constitutes a virtual abdication of congressional authority and interest in the foreign trade area.
>
> "In my opinion, the Founding Fathers clearly and carefully assessed the importance of the power to levy duties and in other ways to regulate foreign commerce… If regulation of foreign trade was of crucial importance to our Founding Fathers… of how much more greater concern should the conduct of foreign trade be to a Congress today? Not only is foreign trade inextricably wound up with the conduct of this nation's foreign policy but it is crucial to the Nation's whole domestic economic policy, both monetary and fiscal, as well as its full employment policy…

120. Mills was sick during the floor proceedings.

"To mention the Gulf of Tonkin is to mention the most flagrant example of congressional abdication of authority, in this instance, Congress' exclusive power to declare war. Anyone who has been in this body the last 10 years knows firsthand the tremendous effort it took to gradually regain some semblance of congressional authority in this area, culminating as it did only with the decision to end the bombing of Cambodia on August 15 of this year.

"How this same Congress a few weeks later can even contemplate abdicating authority in the foreign trade area is beyond my comprehension. To allow the President — and in effect faceless bureaucrats downtown, answerable to no one — authority to make the vital decisions over the next 5 years in foreign trade is for Congress to bow out of one of the most important areas of decision-making in the government today. History — and not ancient, but very recent history — if it has taught this Congress anything, it is that power lost today in the name of greater ease of decision-making and flexibility for negotiators, is power hard to regain tomorrow in the name of constitutional prerogatives…

"Now we all know that life today is more complicated than it was in the days of our Founding Fathers. Certainly relations with foreign governments are no exception. Doubtlessly matters requiring, as trade policies do today, detailed negotiations with foreign governments necessitate the day-to-day participation of executive department personnel. Furthermore, it has never been anything but difficult since the beginning of time for governments to resolve conflicting demands between the dual needs of determining national foreign policy objectives and providing negotiators with sufficient flexibility to negotiate the best possible arrangements

> with foreign governments. Granted these conflicting demands make it extremely difficult to legislate in the foreign trade area. However, I do not think we acquit ourselves with any great distinction when we avoid drafting necessarily difficult and complicated legislation and simply give the executive department authority to make the tough decisions in this area. In my opinion, these decisions are important enough to be either made directly or clearly charted by the legislative branch of the government. But instead of wrestling with the problem of providing sufficiently clear guidelines for our negotiators in the very important international conferences scheduled for the near future, we have left it for the President to do… Instead of being called the Trade Reform Act of 1973, it should be labeled the Trade Power Transfer Act."[121]

The bill passed the House on a 272-140 vote on December 11, 1973, offering Nixon — in the middle of the Watergate scandal — unprecedented powers.[122]

Surely the Senate then, that traditional bastion of legislative-branch prerogative, would block the overreaching Fast Track authority. In fact, it did, amending the legislation to require Congress to actually have a vote to approve or disprove trade deals negotiated by the executive branch under the delegated authority. In negotiations in the summer of 1974, Sen. Herman Talmadge (D-Ga.) got the executive branch to admit that there were only a few non-negotiable aspects of the bill. Namely, that congressional consideration of trade agreements should

121. Rep. James Burke (D-Mass.), Congressional Record, Dec. 10, 1973, at H40533-H40534.
122. Trade Reform Act of 1973, H.R. 10710, was approved on a 272-140 vote on Dec. 11, 1973. 121 Democrats opposed, and only 112 supported. Republicans voted 160-19 in favor of the bill.

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be time limited, and that these should be given an up or down vote once they were negotiated (so as to avoid the Kennedy Round situation where Congress refused to vote on non-tariff implementing legislation at all). The administration claimed that a guaranteed vote would reassure negotiating partners that once negotiations were complete, Congress would be forced to accept or reject the outcome.[123]

The final bill ordered the president to quickly take action to have the GATT adopt "international fair labor standards" including public petition and dispute settlement.[124] And, when one final concession was made — this time related to a provision for the trade treatment of Soviet bloc countries that limited Jewish emigration[125] — an amended Fast Track was approved by the Senate on a 72-4 vote on Dec. 20, 1974, months after Nixon had resigned.[126] The bill was signed into law by President Gerald Ford in January of the following year.

123. Marks and Malmgren, 1975, at 339.
124. Public Law 93-618 § 121(a)(4). Such standards were not included in the GATT deal negotiated under this Fast Track.
125. 19 U.S.C. § 2432.
126. Senate Democrats voted for the bill (H.R. 10710) on a 41-3 margin, and Republicans by a 31-1 count. The pre-conference version vote on Dec. 13, 1974 was identical except for the support of one additional GOP member.

Core Aspects of Fast-Track Trade-Authority Delegation

>> Allowed the executive branch to select countries for, set the substance of, negotiate and then sign trade agreements — all before Congress had a vote on the matter.

>> The executive branch was required to notify Congress 90 calendar days before signing and thus entering into an agreement.[127]

>> The executive branch was empowered to write lengthy implementing legislation for each pact on its own, without committee mark ups. That is to say, the process circumvented normal congressional committee processes. These executive-authored bills altered wide swaths of U.S. law to conform domestic policy to each agreement's requirements, as well as formally adopting the agreement texts as U.S. law. As a concession to congressional decorum, the executive branch has participated in "non" or "mock" hearings and markups of the legislation by the trade committees. However, this is a practice, not a requirement. In 2008, President George W. Bush chose to waive this practice and exercise the president's Fast Track right to force a vote on an agreement by submitting it without informal agreement on timing or mock mark ups, despite congressional leaders' objections to the pact's submission at that time.[128]

127. Public Law 93-618 § 102(e)(1).

128. The House responded to Bush's exercise of this aspect of Fast Track by reasserting Congress' constitutional prerogatives and removing the 60-day mandatory vote requirement from the agreement. This was possible because, as a technical matter, the pre-set floor vote procedures aspect of Fast Track is a "rule" of the House and Senate, which the chambers can change by majority vote. (This was a necessary compromise for the Fast Track floor-consideration rules to be constitutional.) However, such a rule change has only occurred in this one instance in the history of Fast Track.. The various trade-authority delegations have also contained procedures for Congress to take an agreement off the Fast Track through the passage of disapproval resolutions. For various reasons described in part below, these procedures have been largely ineffectual. For more information on disapproval resolutions, see Forbes, 2008.

>> Once the executive branch transferred such a bill, the agreement itself, and various supporting materials to Congress, the House and Senate was required to vote on the implementing legislation and the attached agreement within 90 legislative days.

>> Such bills were automatically referred to the House Ways & Means and Senate Finance Committees. (In the 2002 Fast Track bill, the House and Senate Agriculture committees also got a somewhat enhanced role). However, if a committee failed to report out the bill within 45 legislative days from when the president submitted the legislation to Congress, the bill was automatically discharged to the floor for a vote.

>> A House floor vote was required no later than 15 legislative days after the bill was reported or discharged from committee. Thus, within 60 legislative days, the House was required to vote on whatever agreement the president has signed, and whatever legislation changing U.S. laws he had written to implement the package.

>> The Senate Finance Committee was allowed an additional 15 days after the House vote, at which time the bill was automatically discharged to the Senate floor for a vote that was required within 15 legislative days.

>> The floor votes in both the House and Senate were highly privileged. Normal congressional floor procedures were waived, including Senate unanimous consensus, debate and cloture rules, and no amendments were allowed. Debate was limited to 20 hours — even in the Senate.

>> Once the president provided Congress with notice of his intent to sign an agreement, he was authorized to sign after 90 calendar days. However, there was no mandatory timeline for him to submit formal implementing legislation and start the 90-legislative day vote clock. Thus, an agreement whose legal text has been finalized just minutes before the delegation

authority expired could be sent to Congress even years later.

- >> Once a president submitted an agreement under Fast Track, that agreement's Fast Track treatment was "used up." If Congress adjourns before the mandatory vote clock ran out or Congress voted against the agreement, Fast Track for that agreement expired. If it were to be submitted again for a later vote, normal congressional floor procedures would apply.[129]
- >> A trade advisory committee system was established to obtain private sector input on trade agreement negotiations by presidentially-appointed advisors. This system is organized by sector and industry and now includes 700 advisors comprised mainly of industry representatives. Throughout trade talks, these individuals obtained special access to confidential negotiating documents to which most members of Congress and the public have no access. Additionally, they have regular access to executive-branch negotiators and must file reports on proposed trade agreements. Fast Track legislation listed committees for numerous sectors, but not consumer, health, environmental or other public interests.[131]
- >> The 2002 Fast Track created an additional requirement for 90-day notice to the gatekeeper committees *before* negotiations could begin, but neither the gatekeepers nor the executive was required to take any further action during this period once notice was given.[132]

129. For details on House Parliamentarian's ruling on the matter, see IUT, 2006b.
130. Public Law 93-618 § 135.
131. PC, 1991. Labor was mentioned in the statute and a labor advisory committee was established. In the 1984 Fast Track (Public Law 98-573 § 306(c)(2)(A)), a new advisory committee was added for representatives of state and local governments and their associations. Lawsuits in the 1990s resulted in establishment of a Trade and Environment advisory committee, but it was comprised of equal numbers of industry and environmental group representatives, deadlocking its reports and eventually causing some of the environmental representatives to resign. See MH, 2003.
132. Public Law 107-210 § 2104(a).

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- >> The 1974 Fast Track also elevated STR to the cabinet level, and required the Executive Office to house the agency. While other cabinet level positions tend to be responsive to a pre-defined constituency (Agriculture and farmers, for instance), the STR was unique in that its only real constituency was the president, the gatekeeper committees of Congress, and the hundreds of trade advisory committees. And its main goal was proliferation of trade negotiations. The 1979 Fast Track changed the name of the STR to the U.S. Trade Representative (USTR).

Transporting oneself back to the 93rd Congress (1973-74), it is possible to see how such a revolutionary delegation of congressional authority might have passed. The United States was running its first trade deficit in a century, and the executive branch was promising rapid deployment of trade measures like import surcharges to restore balance. Some trade advocates bemoaned that, "the Administration trade bill, which would have been regarded as drastically protectionist a decade ago, now represents the liberal wing of the congressional debate."[133] Also, Nixon officials premised their campaign on a view of the global economy that seems quaint in retrospect, telling Ways & Means that: "China is largely an agricultural country… we don't know for sure how much trade they are prepared to have."[134]

Perhaps most critically, U.S. trade agreements to date had concerned only traditional trade matters — cutting tariffs and lifting quotas. Thus, the Senate amendment that provided a congressional vote on the final deal may have seemed like a tolerable protection of congressional authority, given Congress'

133. Quote of C. Fred Bergsten, in Jones, 1973.
134. WM, 1973a, at 212 and 263.

notion of what would be included in trade agreements. Congress had delegated tariff-proclamation authority before. Because no such thing had ever before existed, legislators could not foresee expansive pacts like the WTO and NAFTA, which would rewrite swaths of non-trade policy. Additionally, Congress was reassured that the scope of future non-tariff provisions would still be limited mostly to issues like quotas or customs valuation methods.

The debate on the initial establishment of Fast Track also revealed the split between the so-called "gatekeeper" committees — Ways & Means and Finance — and the rest of Congress. The dealmaking-Mills encapsulated the approach that both Democratic and Republican gatekeeper chairs would take over the years. He said of Nixon: "He is asking for more of a grant of authority than we have given any other President. This is a touchy subject in Congress right now. But… I'm for it."[135]

Reformers led by Rep. Richard Bolling (D-Mo.) tried to address the concentration of power by attempting to remove trade from Ways & Means' jurisdiction in 1973-74. The effort, led from Bolling's Select Committee on Committees, would have given trade jurisdiction to the Foreign Affairs Committee. Mills organized vigorously against the effort, making common cause with labor groups that opposed Bolling's accompanying proposal to separate out education from the House Education & Labor Committee's jurisdiction. In September 1974, the House Rules Committee reported out Bolling's plan, with a Democratic Caucus-backed substitute that did not include the jurisdictional

135. Dale, 1973b. For scandals affecting various Ways & Means chairs, see Remini, 2006, at 442-443, 455, and 480-481.

changes. The House passed that watered-down reform bill by a wide margin.[136]

In sum, Fast Track was passed because of a unique set of historical circumstances. The Nixon White House's disregard for separation of powers likely played a major role. Only in the midst of a global economic breakdown that was poorly understood by experts would Fast Track's highly unorthodox provisions on non-tariff issues been considered a possible economic remedy. Opposition from the Republican Party — for 30 years the voice of constitutional criticism of the Reciprocal Trade Agreements Act — was absent: *their president* was in charge this time.

Democratic criticism was split between a labor camp (that bet everything on a strategy on mandatory quotas, thought it had an ally in Nixon, and lost big) and a foreign policy camp (led by Sen. Henry "Scoop" Jackson (D-Wash.) and Rep. Charles Vanik (D-Ohio), who didn't debate the bill's constitutional or trade implications but focused on the bill as vehicle to pressure for Jewish emigration from the Soviet Union). Other Democratic leaders just wanted to make a deal, and had perhaps not thought critically about the proposal. Mills' once sharp mind in particular had been weakened by addiction to alcohol since 1969 and painkillers since 1972, according to biographer Julian Zelizer.[137] So when legal scholars like Hal Shapiro say that Fast Track "is not necessary,"[138] it must be added that it was also not inevitable. Yet for a generation, it was the presumptive trade policy negotiation and agreement mechanism.

136. Zelizer, 2004, at 143-151.
137. Zelizer, 1998, at 334-336, and 350-353.
138. Shapiro, 2006, at 161.

Wilbur Mills (D-Ark.) Chair of the House Ways & Means Committee at the time Fast Track was first established (pictured left), with then-Rep. George H.W. Bush (R-Texas) (pictured center), at a 1966 reception for freshman members of Congress. In 1973-74, Mills played an instrumental role in getting the original Fast Track through Congress. From 1989-1993, Bush used Fast Track as president to negotiate NAFTA and the WTO. Also pictured is Rep. John Byrnes (R-Wis.).

B. Fast Track's First Uses Expand GATT from Tariffs to Other Issues, 1975-1980

The Tokyo Round of GATT negotiations started in 1973, and in 1979, the Jimmy Carter administration brought the completed deal back to Congress for an expedited up-or-down Fast Tracked vote. The first use of Fast Track revealed a problem that time only exacerbated. Fast Track did not provide Congress any mechanism to review agreement texts to ensure they met Congress' negotiating objectives (which, in the 1974 act were listed in the form of "steps to be taken toward GATT revision" in Section 121). There was also no process by which the executive branch — if it ignored congressional negotiating objectives and instructions — would lose Fast Track's rights to sign an agreement before a congressional vote. Thus, Fast Track gave the executive branch extraordinary power to determine unilaterally the contents of trade agreements.

Despite Congress' negotiating objectives to the contrary, the final Tokyo Round agreement did not contain meaningful labor standards. Indeed, labor standards still remain outside the WTO system, despite repeated negotiating instructions in Fast Track delegations.[139] Included instead were a series of unprecedented agreements on various non-tariff barriers that extended far beyond the quotas and customs valuation issues discussed with the committees during the 1973-74 Fast Track debate — let alone the original midcentury hearings on the GATT. The notion of expanding into non-tariff issues was so controversial with the other 102 countries involved in GATT that the only way to even broach these subjects was for the resulting outcomes not to become full GATT agreements. Rather, the new expanded non-tariff rules were only signed by some participants. These plurilateral agreements became known as the Tokyo Round "codes," and were signed by only a relatively small number of (mainly industrialized) GATT members, including the United States.[140]

The texts of these non-tariff agreements delved deeply into matters previously in the exclusive jurisdiction of domestic legislatures, including the most domestic of all matters: how domestic tax dollars should be spent in procuring goods and services. The Tokyo Round procurement agreement not only

139. Pier, 2006, at 81.

140. The new non-tariff issues were dealt with in "plurilateral" agreements, meaning they were not binding except on countries that specifically opted into them. (This was called the "GATT a la carte" approach, as opposed to the Uruguay Round's "single package" approach.) The Tokyo Round codes included the Agreement on Government Procurement; the Agreement on Import Licensing Procedures; and the Agreement on Technical Barriers to Trade (sometimes called the Standards Code). There were also codes interpreting exiting GATT rules, such as on subsidies and countervailing measures (interpreting Articles 6, 16 and 23 of the GATT); customs valuation (interpreting Article 7); anti-dumping (interpreting Article 6, replacing the Kennedy Round code). Lastly, there were three sector-specific codes (the Bovine Meat Arrangement, International Dairy Arrangement and Trade in Civil Aircraft). See Public Law 96-39 § 2(c); Jackson, 1997, at 166.

required that foreign and domestic goods and producers be treated equally — a direct conflict with expansive Buy America laws then in effect — but set forth limits on what technical specifications and supplier qualifications Congress could establish.

The incursion into Congress' turf was significant, but the GATT's dispute resolution and enforcement systems did not make these new rules truly binding on signatory countries. At that time, the GATT utilized a dispute settlement procedure — fleshed out over a few decades of practice — mediated inter-member conflicts. Panels convened under this dispute practice were comprised of trade experts, who analyzed challenged laws. The "Technical Barriers to Trade" and "Procurement" Codes both included similar panel systems. The standard diplomatic safeguard of requiring all members' consensus before altering the balance of commitments or taking other actions gave national governments more power than they have under the WTO today. In particular, if a member country strongly objected to a panel's conclusion that its laws violated GATT rules or orders that it change a domestic law, that country could block adoption of such a ruling, and thus avoid any sanction for maintaining GATT-inconsistent policies.[141]

While the Fast Track aspect of the 1974 trade package was used to enormously extend the scope of "trade" agreement jurisdiction and ignore Congress' instructions regarding what should and should not be in the next GATT round, the other aspects of the 1974 trade package came largely to naught. For instance, the Ford and Carter administrations did not utilize the broad import-surcharge authority provided in the package, and instead focused on a "jawboning" strategy of talking down the dollar and talking

141. Jackson, 1997, at 163-168.

up foreign demand for U.S. exports. This approach failed to close the trade deficit, which instead grew systematically.[142]

In the "non-hearings" in Congress on the Tokyo Round, labor union representatives urged that procurement and other non-tariff issues be taken out of the legislation.[143] Human rights and religious groups urged the Carter administration to make good on its commitment to include labor rights in the GATT and focus on poor-country development.[144] Yet the silence from the gatekeeper committees and Congress was deafening. It is an open question whether most in Congress had any idea that they were approving new constraints on their own procurement-policy authority and other areas clearly within Congress' remit. For those who may have been aware, Fast Track prevented them from offering amendments or engaging in normal debate, for instance in the Senate, where such a power grab might have been filibustered to death.

The Trade Agreement Act of 1979 implemented the Tokyo Round and extended Fast Track authority until 1988.[145] Interestingly, the 1979 Act was not a vote on congressional approval of the underlying GATT agreement, which was still only under provisional acceptance by the United States.[146] Carter's Fast Track also specified that any U.S. law would prevail in the event of a conflict with trade-agreement requirements. Further, the bill explicitly required that, if the president determined that GATT or other trade pacts required further changes in U.S. statutes, he would have to request Congress to consider such

142. Biven, 2002, at 120 and 178.
143. WM, 1979, at 441.
144. WM, 1979, at 626 and 633.
145. Public Law 96-39 § 1101.
146. Jackson, Louis and Matsushita, 1982, at 345.

changes through normal congressional procedures, and give the gatekeeper committees 30-days advance notice before sending up the suggested statutory changes to Congress.[147] The 1979 Fast Track passed virtually unanimously in both houses.[148]

C. Fast Tracking the "Reagan-Thatcher" Agenda, 1980-1988

President Ronald Reagan came to office inheriting the eight-year Fast Track delegation passed in the 1979 Act. The trade deficit was increasing and Congress was responding with various proposals to limit imports, especially from developing countries. Legislation authorizing the Generalized System of Preferences (GSP), a system providing special low tariffs to imports from developing countries, was expiring and pressure was building to exempt richer-country beneficiaries (such as Hong Kong, Taiwan and South Korea) from continuing in the program.[149] As an array of trade bills consumed much of Congress' attention, the Reagan administration focused on GATT.

Reagan faced considerable congressional opposition to many of his legislative initiatives, which focused on implementing the *laissez-faire* goals to restrict government's role in the marketplace. Ideological allies such as the UK's Margaret Thatcher faced backlash among their populations for similar initiatives.[150] Nevertheless, Reagan's advisors also convinced him to take trade actions that intervened in the "free market," such as currency market interventions and the negotiation of voluntary export

147. Public Law 96-39 § 3(c).
148. Passed House on July 11, 1979 by a 395-7 margin (D: 247-5; R: 148-2). Passed Senate on July 23, 1979 by a 90-4 margin (D: 52-3; R: 38-1).
149. Destler, 2005, at 83-88, and 115-129.
150. Faux, 2006, at 76-91; Chang, 2008, at 74.

restraints. Such actions, similar to those taken by Nixon, undermined his credibility as a *de*-regulator, which would have to be pursued by other means.

An agenda thwarted in the context of full debate found a perfect home in the context of obscure international negotiations. The Uruguay Round of GATT talks (launched in 1986 in Punta del Este, Uruguay) provided a suitable delivery mechanism for much of the Reagan-Thatcher agenda: service-sector privatization, limits on government regulation, enhanced private-property rights, and more.[151] Reagan administration officials — led by USTR official Geza Feketekuty — played a leading role in rallying corporate and think-tank support to attach their deregulatory agenda onto the GATT talks.[152] One Feketekuty ally told the *Chicago Tribune* in 1980, just days after Reagan's election victory: "A lot of services that have traditionally been done by the government, such as education, and social services, may become something that we'll have to deal with in international commerce."[153]

There was ample domestic and international opposition to the notion that service-sector or investment regulations should be set internationally, much less by trade negotiators whose experience was largely limited to tariffs, quotas and the procurement issues that had been advanced under Fast Track in the 1970s' Tokyo Round. It was thus of extreme importance to Reagan that he find a legislative vehicle that would attract minimal critical attention and maximum legislative support. As it turned out, a bill that had been kicking around Congress since 1983 authorizing negotiation of a "Free Trade Agreement" (FTA) with Israel — which had

151. Wallach and Woodall, 2004, at 3.
152. Drake and Nicolaidis, 1992, at 52.
153. Tefft, 1980.

163 House cosponsors and was supported primarily on foreign-policy grounds — proved to be the perfect option. Several of the trade bills then under consideration in Congress, including some restraining trade and the GSP reauthorization, were combined into a package that became the Trade and Tariff Act of 1984.[154] In order to overcome House opposition to the GSP and non-trade measures, the Senate Finance Committee reported out a bill (H.R. 3398) that combined these elements with authorization for Israel FTA negotiations. On September 20, 1984, the bill passed the Senate by a 96-0 vote. Because the House had not passed any of the component legislation, the Ways & Means committee reported out four separate bills, and passed each of them on October 3. This was orchestrated by Chairman Dan Rostenkowski (D-Ill.), who had taken Wilbur Mills' place as chief trade dealmaker. The House Fast Track bill (H.R. 5377) passed on a 416-6 vote. After a conference to resolve the differences, the final measure (H.R. 3398) passed the House on a 386-1 vote on Oct. 9, and the Senate on a voice vote the same day.

Largely below the radar screen, the 1984 Act dramatically expanded the subject matter and the types of agreements that the president was authorized to negotiate. Title III of the Act authorized the president to collect information on (and enter into agreements related to elimination of) "barriers to international trade in services" and "the trade distortive effects of certain investment-related measures." Service and investment barriers were defined as denial of "national treatment and restrictions on the establishment" of service operations and investments, "foreign industrial policies," "export performance requirements," and "direct or indirect restrictions on the transfer of information into, or out of" a given country. The Commerce Department was also

154. Destler, 2005, at 84.

authorized to collect information on other countries' governments' failures to enforce copyrights and patents were identified as barriers to trade (even though protection of monopoly patents is one of the most trade-distorting measures).[155]

The 1984 Act's Fast Track provisions also included a new congressional delegation of authority for the president to negotiate and enter into bilateral FTAs across a wide range of tariff and non-tariff subjects. While negotiations with Israel were greenlighted by the statute, the gatekeeper committees were to be given an additional 60-day notice in addition to the required 90-day notice before trade agreements with *other* countries were signed. If the executive failed to provide such notice, the proposed pact would not receive Fast Track treatment. Moreover, under the 1984 act, the gatekeeper committees could take an agreement off the Fast Track for any reason at all during that 60-day period.[156] During the debate over an FTA with Canada, Sen. Max Baucus (D-Mont.) catapulted to prominence on the trade issue by becoming the ringleader of an effort to force administration action on Asian trade issues. His tactic? Threatening to use the 1984 act's disapproval resolution to withhold use of Fast Track for the Canada pact. In the end, the administration cut side deals with a variety of senators and the Fast Track was applied to the Canadian FTA.[157]

As one legal scholar noted in 1986, the 1984 disapproval provision "dramatically expands the influence of the House Ways & Means Committee and the Senate Finance Committee vis-à-vis the rest of Congress."[158] (This broad gatekeeper committee

155. Public Law 98-573 §§ 301-308.
156. Public Law 98-578 § 401(a)(4)(B).
157. Koh, 1986, at 1214-1221.
158. Koh, 1986, at 1213.

Fast Track disapproval procedure was subsequently removed during the 1988 Fast Track. A narrow disapproval resolution limited to situations in which the executive failed to give notice or properly consult with Congress was instead included.[159]) While the addition of *any* Fast Track disapproval resolution may sound like an improvement in Congress' relative power compared to the original Fast Track process (and the broad mechanism in the 1984 act *did* provide leverage in its one [threatened] use), the post-1988 procedural disapproval resolution provisions meant little in practical terms, given the tendency of the gatekeepers' policy attitudes to align with the executive branch.

The Israel FTA, passed in 1985, was modest in reach by today's FTA standards. The Canada FTA, however, included chapters and provisions related to investment, finance, and intellectual property — a greatly expanded scope from the reciprocal tariff agreements of the past.[160] The Reagan administration rushed negotiations on the Canada pact to completion in late 1987, so that Congress could be notified 90 days before a planned signing on January 2, 1988 — the very last day of the 1979 Fast Track. According to trade analyst I.M. Destler: "To legislators' annoyance, and contrary to the law's intent, major substantive provisions of the agreement were defined in the period *between* the October notification and the January signing."[161]

Even though its scope expanded beyond any past trade agreement, the 1988 Canada FTA did not draw much attention in the United States beyond agricultural state representatives. Few in Congress were even aware of its many first-time expansive non-

159. See Forbes, 2008, for more detail on disapproval resolutions.
160. The Canada-U.S. FTA required that Canada export a fixed percentage of oil to the United States, even if Canada experiences an energy shortage. See Laxer and Dillon, 2008, at 12.
161. Destler, 2005, at 96.

tariff provisions. In Canada, the pact, which threatened to drag down to U.S. levels better Canadian environmental and safety laws, generated passionate grassroots opposition and became a major national political issue.[162]

D. Failure of Attempts to Reform Fast Track, 1988-1994[163]

By the end of the Reagan years, there was a widespread sense in Congress that the United States needed to pull back from the *laissez-faire* policies Reagan was pushing in every forum. The trade deficit continued to grow, and Congress was demanding a return to import surcharges. Reagan partially stifled these demands by negotiating the 1985 Plaza Accords, an international agreement to allow the dollar to depreciate against other currencies,[164] and by extending voluntary restraint agreements on steel.

But deindustrialization continued, and the Democratic Congress saw a new opening to force action through the expiration of Fast Track in 1988. In particular, some in Congress sought to condition a new delegation of trade authority on the insertion of labor rights into trade pacts, and on an enhanced Section 301 process that could pressure trade partners such as Japan

162. Barlow, 1998, at 99.
163. For the following sections, we occasionally draw on our own firsthand experiences in addition to the cited primary and secondary sources. One of us played a leading role in trade legislative debates since 1990; the other since 2004.
164. Bradsher, 2004; Farnsworth, 1985a; Farnsworth, 1985b.

for more market access.[165] The result: the Omnibus Trade and Competitiveness Act of 1988.

The 1988 Act was unique in the history of Fast Track in that the president did not initiate a request for new authority. In fact, Reagan eventually demonstrated his displeasure by vetoing the bill passed by Congress. The version of the bill that Reagan vetoed passed twice in each chamber. While the House voted to override the president's veto, the Senate was unable to do so. Ultimately, Rostenkowski brokered a compromise bill that removed provisions opposed by Reagan that would give workers advance notice if their plant were closing. (Cleverly, Congress passed the so-called "WARN Act" as stand-alone legislation that the president did not veto, but also did not sign into law.)[166] The final vote on the watered-down bill flipped the tables on the traditional trade divisions in Congress, with those who had been critical of current trade policies, such as Reps. Byron Dorgan (D-N.D.) and Marcy Kaptur (D-Ohio) supporting the bill, and those who supported the existing policies, like Sen. John McCain

165. Section 301 refers to provisions of the Trade Act under which "the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny U.S. rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict U.S. commerce." The provision allowed the USTR to initiate an investigation of the trade practices of another country, either on its own initiative, or upon the request of a U.S. citizen. The WTO undermined the use of such unilateral trade enforcement mechanisms, which is ironic, since the WTO was negotiated and approved under the very same 1988 Fast Track bill that initiated the Section 301 process. For discussion of trade offs on market access mechanisms in 1988 bill versus 2001 bill, see "Zoellick Signals Fast-Track Link To U.S.-Jordan Trade Deal," Inside U.S. Trade, March 2, 2001.

166. Destler, 2005, at 91-96.

(R-Ariz.) and Rep. Tom DeLay (R-Texas) and Phil Crane (R-Ill.), voting against it.[167]

Despite the supposedly tougher language on labor rights being included in future trade pacts, this grant of Fast Track is what produced NAFTA and facilitated much of the Uruguay Round negotiations — neither of which contained labor standards,

Polish American Congress

Like the Nixon-Mills pair before them and the Bush-Thomas pair after them, President Ronald Reagan (center) and Chair Dan Rostenkowski (left) formed a partnership to get Fast Track through Congress and signed into law. Rostenkowski also partnered on Fast Track with presidents George H.W. Bush and Bill Clinton. In 2000, Clinton pardoned Rostenkowski, who was convicted in 1996 of mail fraud, as one of his last acts in office.[168]

167. The stronger version – H.R. 3 – passed the House three times: on a 290-137 vote on April 30, 1987; on a conference vote of 312-107 on April 21, 1988; and on a veto override of 308-113 on May 24. The bill passed in the Senate twice, by a 71-27 margin on July 21, 1987, by a 63-36 margin in the conference vote on April 27, 1988. On June 8, the Senate failed to override Reagan on a 61-37 vote, thus failing to get a two-thirds majority. The House passed a watered down version (H.R. 4848) by a 376-45 margin on July 13, (D: 243-4; R: 133-41), and the Senate approved the bill by an 85-11 margin on Aug. 3, 1988 (D: 50-1; R: 35-10). The bill, titled the Omnibus Trade and Competitiveness Act, became Public Law 100-418, 102 Stat. 1107.

168. CT, 2000.

and both of which exploded past boundaries to include a wide array of non-trade policy constraints and obligations. Anger and resentment grew as members of Congress and advocates saw how their "model" delegation authority had been twisted to produce "trade" agreements in which trade policy occupied a minority position among hundreds of pages of non-trade provisions. Those observers paying closer attention would have realized that in fact Rostenkowski's 1988 Fast Track had only expanded on Reagan's 1984 Fast Track in regards to authorizing the executive branch to set investment, services, intellectual property, and other regulatory policies through trade negotiations.[169]

When President George H.W. Bush gave notice to Congress in February 1991 of his intent to use Fast Track to negotiate a North American Free Trade Agreement (NAFTA) that expanded on the Canadian pact's scope and added Mexico, many in Congress took notice. Mexico's per-capita income at the time was 10 to 15 percent of U.S. levels, and environmental and health conditions in Mexico — some caused by U.S. companies operating border *maquiladora* plants — were often terrible.[170]

Meanwhile, the first draft text of the Uruguay Round GATT talks leaked. The new text showed the stunning scope of the talks, which focused mainly on non-tariff issues and the setting of globally binding constraints on an array of policies that previously had been under the sole jurisdiction of domestic legislatures. This included regulation of service-sector firms operating within a country, patent and copyright law, immigration policy, and more. The text also included a proposal to establish a new global commerce agency then called

169. Public Law 100-418 § 1101.
170. MacArthur, 2000, at 103-125; Faux, 2006, at 36; and Salas, 2006.

the "Multilateral Trade Organization," under which GATT and a dozen new agreements would be subsumed. Fighting against an overwhelming sense of congressional disbelief that a "trade" agreement could in fact implicate such issues or create a new international organization to which the United States would be a member without a treaty vote, environmental and consumer advocates joined labor in trying to draw congressional attention to the proposal. And then a GATT tribunal issued a ruling against the U.S. Marine Mammal Protection Act, the law that forbid U.S. sale of tuna fish caught by encircling dolphins with purse seine nets, which had led to high rates of dolphin death. The case, dubbed GATTzilla v. Flipper by Fast Track opponents, became Exhibit #1 in the threats posed by over-reaching international commercial rules and tribunals undermining non-trade — in this case environmental — policy.[171]

The disenchantment was voluble. Congress was increasingly angry about having no means to control with which countries the executive chose to initiate trade agreement negotiations. It was becoming increasingly clear that executive-branch negotiators were ignoring those congressional negotiating objectives that did not comport with executive-branch ideology, while adding aspects to pacts — such as MTO, later renamed the WTO — never contemplated by Congress. As NAFTA and GATT Uruguay Round talks continued, many in Congress saw themselves being placed in the position of having to agree to numerous objectionable non-trade provisions in the pacts (plus various totally unrelated provisions tucked into the implementing

171. Dunne, 1992; Wallach and Woodall, 2004, at 4; Jackson, 1992, at 1250-1253.

legislation)[172], or oppose entire agreements. This led to the end of wide bipartisan support for Fast Track.

One concrete expression of this ire was the introduction of the first resolution of disapproval for a Fast Track extension. The 1988 Fast Track was written such that it would run until 1991 and then continue on until 1993, unless Congress passed a resolution of disapproval to stop the extension past 1991. Such an extension disapproval resolution could be introduced by any member of Congress, and would enjoy a privileged guaranteed vote.[173] In March 1991, Rep. Byron Dorgan (D-N.D.) and Sen. Ernest Hollings (D-S.C.) introduced such resolutions and led a majority of Democrats in voting to discontinue the grant of Fast Track.[174] In I.M. Destler's words:

> "At this time the issue could have been killed in committee — the law provided that a fast-track disapproval resolution could reach the House or Senate floor only if the requisite committee(s) approved. But committee and chamber leaders quickly decided that burial in committee, while perfectly legal, would be viewed as politically egregious and thus discredit

172. For instance, the Uruguay Round Agreements Act (URAA) sections 771-778 included changes to the Pension Benefit Guarantee Corporation statute that changed the way defined benefit plans must calculate the lump-sum value of a participant's vested accrued benefit. Sections 761-764 changed other aspects of the Employee Retirement Income Security Act (ERISA). Section 801 of the URAA also amended the Communications Act regarding what were called pioneer spectrum preferences. The URAA also directed the FCC to award licenses within fifteen days to certain applicants, including one related to a newspaper editorializing heavily for congressional passage of the bill.
173. Omnibus Trade and Competitiveness At of 1988, P.L. 100-418, § 1103 (b)(5). For more information on disapproval resolutions, see Forbes, 2008.
174. H. Res. 101, the Dorgan disapproval in the House, received 192 votes for (170 Democrats, 21 Republicans and one independent), and 231 votes against (91 Democrats, and 140 Republicans). The Hollings Senate resolution attracted 36 votes (31 Democrats and 5 Republicans), with 59 nay votes (23 Democrats and 36 Republicans).

> both the procedures and any agreements reached thereunder. Disapproval resolutions would have to go to both floors, and be voted up or down there."[175]

Ways & Means and Finance thus reported out the resolutions, although with the recommendation that they be rejected by the Congress as a whole. The House committee's negative recommendation passed 27-9, and the Senate committee's was 15-3. Nonetheless, the actual House floor vote on the extension disapproval resolution was close — 192-231. The resolution had failed to obtain a majority thanks in part to a partnership between Republican President Bush and the Democratic chairs of the gatekeeper committees. Rostenkowski and his Senate counterpart Lloyd Bentsen got Bush to promise a non-binding "action plan" on NAFTA labor and environmental issues in return for committee opposition to the Dorgan-Hollings resolutions.[176]) As a face-saving measure, members were allowed to let off steam by voting the same day for a non-binding "sense of the Congress" resolution (H. Res. 146) on what should be and should not be in NAFTA and the WTO.[177] (In 2005, Dorgan — since elected to the Senate — introduced an extension disapproval resolution under the 2002 Fast Track. This time, the Republican-controlled Finance Committee simply bottled it up and refused to let the measure go to the floor.)[178]

The Clinton administration arrived in 1993 with the NAFTA negotiated by the Bush administration signed and ready to go to Congress under Fast Track. In Geneva, the GATT talks were bogged down over agricultural issues and opposition by

175. Destler, 2005, at 98.
176. Carrier, 1996, at 712.
177. Destler, 2005, at 99-101.
178. S. Res. 100, introduced April 6, 2005.

many countries to the expansive service-sector, investment, procurement and intellectual-property aspects of the deal. The negotiations were heading towards establishing a new global commerce agency, the WTO, which would provide much stronger enforcement of GATT's rules, and transform the pact's contracting parties into members of a new international organization with on-going negotiating remit. This also drew considerable concern from many countries.[180]

Rather than altering these pacts, the Clinton administration made passing NAFTA a top priority[181], and launched an intense campaign against the majority of the Democratic base groups that had just worked to elect the new Democratic president. The NAFTA campaign squandered the new president's political capital for passing the health-care reform proposals that had been a highlight of his campaign.[182] The Clinton administration then pushed for passage of a short Fast Track extension specifically to allow completion of the Uruguay Round.[183]

179. Raghavan, 1990a.
180. According to Raghavan: "If the Industrialized Countries have their way, the Brussels Ministerial meeting of the Uruguay Round Trade Negotiations Committee (TNC) is to take steps to establish a Multilateral Trade Organization (MTO) that would effectively take over the work of the rest of the UN system in areas covered by the Uruguay Round negotiations… The idea of converting GATT into the ITO was flagged by the EC early this year…The Group of 77 at UNCTAD and elsewhere came out against converting GATT into the ITO, whereupon the EC put forward the idea of an MTO which in name would be different from the ITO but in practice would amount to the same thing." See Raghavan, 1990b.
181. IUT, 1993.
182. Wilentz, 2008, at 335.
183. The bill (H.R. 1876) passed the House by a 295-126 margin June 22, 1993 (Democrats: 145-102; Republicans 150-23), and the Senate by a 76-16 margin on June 30, 1993. It became Public Law 103-49.

The Rise and Fall of Fast Track Trade Authority

The sudden encroachment of "trade" agreements into an array of non-trade domestic regulatory issues attracted new constituencies in the environmental and consumer worlds to the issue. The 1993-1994 votes on NAFTA, Fast Track and the WTO respectively attracted a very determined broad-based opposition. This included hundreds of interests that had never before been involved in a trade fight.

However, many in Congress dismissed these groups' concerns after a joint corporate/Clinton administration campaign to characterize the messengers and the message as uninformed, loopy and protectionist.[184] Given no past trade agreement had, for instance, increased monopoly protections for pharmaceutical companies, allowed foreign corporations to skirt U.S. courts to sue the U.S. for cash compensation, or required Congress to conform wide swaths of law unrelated to trade to their terms, many in Congress simply did not believe the critics who raised these issues. With the Fast Track process limiting normal committee procedures, relatively few hearings were held on the proposal and few members outside the gatekeeper committees considered what they thought was a trade agreement to be a subject for their special concern or attention. Indeed, during the WTO debate, it came out that hardly any members of Congress had read the Uruguay Round agreements.[185]

Other members of Congress claimed that it would be inappropriate — despite their concerns with the legislation — to reject an agreement that had taken the president years to negotiate. Still other fence sitters in the NAFTA battle were

184. MacArthur, 2000, at 233.
185. Skidmore, 1994. John Jackson pointed out that the WTO's "26,000 pages of text, schedule commitments, and other matters… is a record for its length." See Jackson, 1997, at 166.

amenable to what the Center for Public Integrity called an "orgy of dealmaking" on unrelated issues that characterized the Clinton administration's legislative approach.[186]

Even ardent defenders of Fast Track recognized that NAFTA and WTO had revealed Fast Track's enormous discretion for "diplomatic legislating" by the executive branch. One such analyst conceded that: "Fast Track gives the President greater freedom to shape trade agreements to his programmatic agenda than would otherwise be possible under ordinary legislative process."[187] In November 1993, Congress passed NAFTA by a vote of 234-200. This closest trade agreement vote in modern history included 102 Democrats voting for NAFTA, in part to support their new president.[188] A year later, Democrats lost control of Congress, after core supporters frustrated with their trade policy defected to the GOP, or just stayed home.[189] The Democratic Party's final act in leadership for 12 years was passage of the Uruguay Round Agreements Implementation Act in a lame-duck session, establishing at a moment of minimum political accountability the international commerce agency Truman had failed to get through Congress over 40 years before.[190] Ironically, in doing so, the Democratic Congress put in place an array of limits that would be brought up endlessly to attack Democratic food-safety, auto-safety, climate, energy, health-care, access-to-affordable-medicines, and other priority domestic policies.

186. Lewis, 1993; Tucker, Wu and Prorok, 2005.
187. Koh, 1992, at 171.
188. The NAFTA implementing bill, H.R. 3450, passed the House November 13, 1993 by 234-200 (D: 102-156; R: 132-43) and the Senate on November 20, 1993 by 61-38. It became Public Law 103-182.
189. Teixeira and Rogers, 2000.
190. The WTO implementing bill (H.R. 5110) passed the House on November 29, 1994 by 288-146 (D: 167-89; R: 121-56) and the Senate on December 1, 1994 by 76-24. It became Public Law 103-465.

NAFTA and WTO Not About Tariffs

Agreements like NAFTA and WTO contain hundreds of pages of non-tariff rules to which all signatory countries must confirm their laws at all levels.[191] For instance, the WTO enforces 17 major agreements, only two of which are about trade in the traditional sense. NAFTA-style pacts contain various special investor privileges that reduce many of the risks and costs previously associated with relocating production from developed countries to low-wage developing countries.[192] Among these are a minimum guaranteed standard of treatment for foreign investors, bans on performance requirements, and powerful intra-pact enforcement systems that allow investors to avoid domestic courts. This investor-state enforcement system allows a foreign investor to directly sue governments before a World Bank or United Nations tribunal over domestic policies or government actions that it believes undermines its future expected profits or its expansive trade-pact rights, and to demand cash compensation for such losses.[193]

Also, special protections for pharmaceutical companies included in the WTO require signatory governments to provide them longer monopoly patent protections for medicines. The University of Minnesota found that extending U.S. monopoly patent terms by three years (as required by the WTO) increased the prices paid by Americans for medicine by over $8.3 billion in today's dollars. That figure only covers medicines that were under patent in 1994 (when Congress approved WTO membership),

191. For a comparative analysis of federal-subfederal consultation mechanisms on trade commitments under areas of shared jurisdiction, see Bottari and Wallach, 2008.
192. The WTO also contains investor protections that ban certain performance requirements and require national treatment once an investor is established.
193. Bottari and Wallach, 2005.

so the total cost today is much higher.[194] NAFTA and the FTAs extend these price-increasing protections even further.

In addition, the Clinton administration committed certain U.S. immigration policies — including a guarantee of minimally 65,000 H1-B visas per year for foreign workers to enter the United States[195] — and over 100 service sectors to comply with the WTO's service-sector agreement. This means that an array of U.S. health-care, land-use, and climate policies must comply with WTO constraints, and could be challenged if these exceed pact-established limits.[196] The WTO, NAFTA and the related FTAs also set limits on safety standards and inspection rates for imported food and products, even as these pacts include rules that increase the volume of imports.[197]

That the constraints on domestic policy established in "trade" agreements can undermine non-trade policies and policy space is not a theoretical threat. The ban on Internet gambling within U.S. territory was recently ruled to be a WTO violation by the organization's enforcement tribunals. U.S. Clean Air Act and Endangered Species Act regulations have been successfully attacked at WTO and subsequently weakened. A NAFTA tribunal ordered the U.S. to allow Mexico-domiciled trucks to have access to all U.S. roads despite weaker safety and environmental standards. Canadian extra-long and extra-heavy

194. Schondelmeyer, 1995, at 6-7.
195. Wallach and Tucker, 2006.
196. Tucker and Bottari, 2008.
197. Bottari, 2007; Tucker, Bottari and Pullen, 2007.

trucks also have similar rights thanks to NAFTA.[198] Beyond just the WTO rulings themselves — in which tribunals ruled against challenged domestic laws 90 percent of the time[199] — mere threats of trade challenges often suffice to chill a domestic proposal. The WTO has undermined scores of other signatory countries' non-trade policies as well.[200]

In the end, the Bush I and Clinton administrations utilized Fast Track in the way that Nixon might have intended but was unable to accomplish in his own time. An executive branch bundled together its controversial trade and domestic priorities into trade deals that were too long for members of Congress to read, and too complicated for all but the most determined to even opine upon.

E. Fast Track is Dead, Part I, 1995-2001

Increasingly, many in and outside Congress were becoming angry that Fast Tracked "trade" deals were being used to push a domestic anti-public interest agenda. Further, two key concerns were raised about how the Fast Track *process* was weakening the leverage of Congress and private-sector groups not privileged to be appointed by the president to the formal advisory committees. First, the structure of Fast Track had dramatically shifted the center of gravity on a wide array of trade and non-trade policies to the executive branch. Instead of numerous members of Congress being subject to some level of accountability by constituents (particularly in the House with its two-year election cycle), policy

198. Claybrook, 2007.
199. See http://www.citizen.org/documents/WTODisputesSummaryOnePagerwtables.pdf for win-loss ratios at the WTO.
200. See Wallach and Woodall, 2004 and Bottari and Wallach, 2005 for instances of the chilling effect.

was being made by *appointed* executive-branch staff who were regularly revolving between industry and the administration. The president (who did face re-election pressures) could theoretically be held accountable. However, in practice, the concentration of trade policymaking power in one elected president — whom voters would judge on a vast array of policy decisions over four years — meant that accountability on specific trade decisions was extremely attenuated. Moreover, the Fast Tracked trade agreements were establishing and empowering supranational institutions — from the WTO itself to an array of WTO and NAFTA-recognized private-sector standardization bodies — which were shielded from democratic accountability altogether.[201]

As one WTO staff admitted in a moment of candor, the WTO "is the place where governments collude in private against their domestic pressure groups."[202]

In order to try to steer trade-agreement policymaking back towards trade and away from backdoor domestic deregulation, advocates created and strengthened cross-sectoral coalitions — that involved labor groups that had long been active on trade, and added consumer, farm, faith and environmental groups — such as the Citizens Trade Campaign. These Fast Track critics utilized a comprehensive "inside-outside" strategy that combined lobbying with grassroots pressure. They also clarified that their goal was changing the "rules" or "model" of globalization, so that trade expansion could occur without sacrificing the principles and practice of democracy, and the domestic public-interest protections it had created.[203]

201. Engler, 2008, at 154.
202. Jonquieres, 1998.
203. Shoch, 2000.

The executive NAFTA-WTO overreach created a lasting political backlash against Fast Track. The growing effectiveness of the new public-interest coalitions, growing Democratic congressional concern about the Clinton trade agenda (as the economic damage and political backlash from NAFTA and WTO grew), and the Republican-controlled Congress' partisan power-plays meant that the Clinton administration was unable to get Fast Track for the entire remainder of its term.

Fast Track Not Necessary For Trade Expansion

The Clinton administration is known for its major trade-expansion agenda, but it did not have Fast Track but for the first two years of its eight-year reign. This reveals that Fast Track had relatively little to do with trade expansion *per se*. As already shown, the GATT — the single most important multilateral trade regime — was negotiated without Fast Track. Without Fast Track, trade expanded over 30 percent from 1995 to 2000. By its own reckoning, the Clinton administration negotiated and passed 130 trade and investment agreements without Fast Track,[204] including the U.S.-Jordan Free Trade Agreement, which contained enhanced labor standards and was passed by almost universal acclaim under normal congressional floor procedures.[205] In former Clinton administration USTR Charlene Barshefsky's words in 2000, "if you look at our record on trade since 1995, I don't think the lack of Fast Track impeded our ability to achieve our major trade goals."[206]

204. This number comes from the Annual Trade Report of the USTR, which lists all trade and investment agreements in operation.
205. The Clinton administration negotiated the Jordan FTA, which Congress passed after he left office.
206. Quoted in Shapiro, 2006, at 79.

Yet lack of trying does not explain why the Clinton administration was without presidential trade authority for six of its eight years.[207] After a failed effort to obtain Fast Track in 1995, Clinton worked in 1997 with GOP congressional leaders to develop a new Fast Track authorization bill. In contrast to the broad margins of passage for the 1979, 1984 and 1988 Fast Tracks, this bill faced fierce opposition. The administration, GOP congressional leaders and a broad corporate coalition lobbied fiercely for the bill. Although they were uncertain that they had a majority locked down, a vote was scheduled in the House. The thinking of Speaker Newt Gingrich (R-Ga.) and the Clinton White House was that actually starting the vote would create the maximum leverage for their efforts to obtain the last needed bloc of votes. After initially being on the schedule for the previous week, the vote process began on November 9, with the debate on the rules for consideration of the underlying bill. The rules vote had to occur before turning to the actual legislation itself. The climate on the House floor was volatile. In the course of over twelve hours, congressional debate on the 1997 Fast Track bill started and stopped and the time for the planned vote on the bill was pushed back repeatedly as the White House and GOP leaders worked every angle to build a majority for the bill. Ultimately, the Clinton administration finally asked the Republican leadership to pull down the Fast Track bill in the wee hours of November 10 after over 80 percent of Democrats and many Republicans indicated they would oppose it.[208]

The 1997 Fast Track fight was a historic moment. Had the vote proceeded, Fast Track would have been defeated. Some GOP leaders were eager to deliver such a stinging defeat to the Clinton

207. IUT, 1995a.
208. Gugliotta 1997; Conley, 1999, at 786.

administration. Perhaps worried that the precedent of Congress voting down Fast Track was too costly, GOP leaders complied with the Clinton request to pull the bill.[209]

However, in 1998, the congressional Republicans revived the Fast Track bill, and it was defeated on the House floor — a historic first — with 171 of 200 Democrats and 71 of 222 GOP opposed.[210] The political problems caused for members of Congress by Fast Track were fundamental: increasingly furious constituents were holding individual members of Congress accountable for the problems being caused by trade agreements over which they had no control. As Rep. Peter DeFazio (D-Ore.) noted:

> "This is about a process that includes plausible deniability. That means there are a lot of people here who do not want to take responsibility for what is happening in America. They can say, you know, I had concerns about NAFTA. I knew there were problems with some parts of NAFTA. I knew there were problems with labor agreements, they were kind of weak, and we lost a lot of jobs there, and wages have gone down on both sides of the border. Yes, I had some real concerns about those environmental provisions. I really did not think they would clean up the border, which is one of the largest and fastest growing hazardous waste sites in the world. But I had to vote up or down, and I could not sacrifice 2 years of secret negotiations, and we will fix those things later. That is what we hear every time an agreement comes forward under fast track. Are Members going to blow up three years of careful secret negotiations, just because

209. Schmickle, 1997.
210. The Reciprocal Trade Agreement Authorities Act (H.R. 2621) failed by a 180-243 vote on Sept. 25, 1998 (Democrats: 29-171; Republicans 151-71, with one independent opposed).

> they have a minor concern about their farmers or about the environment or about American workers? No. The herd here most times said, gee, I would have liked to do something, but I could not. Why could they not? Because they gave away that authority at the beginning. Do not give away that authority ever again."[211]

The vote, which was accompanied by extensive debate about Fast Track's unacceptable concentration of power in the executive branch, also revealed the growing awareness in Congress of Fast Track's policy problems. Marcy Kaptur, who had been instrumental in attempting to beef up the 1988 Fast Track, summed up these concerns by noting on the House floor: "Fast Track is not required for good trade agreements. It is required to get bad trade deals through Congress."[212]

F. George W. Bush Administration Kills Fast Track's Remaining Legitimacy, 2001-2008

When George W. Bush entered office in 2001, he set obtaining Fast Track authority as one of his legislative priorities for his first year. With Republicans controlling both chambers of Congress and the White House, Bush was eager to obtain a new delegation of authority to extend NAFTA-style trade agreements to additional countries. While the Republican congressional leadership shared his zeal for this agenda, public antipathy to NAFTA was high and the prospect of NAFTA expansion was unpopular in Congress, including with some members of his own party.[213]

211. Rep. Peter DeFazio (D-Ore.), *Congressional Record*, Sept. 25, 1998, at H8789.
212. Rep. Marcy Kaptur (D-Ohio), *Congressional Record*, Sept. 25, 1998, at H8765.
213. Destler, 2005, at 288-293.

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Passing this final delegation of Fast Track required almost two years of intense legislative battle. Controversial procedural tactics included holding open the House roll call, to twist arms, to flip votes, to ultimately pass a Fast Track grant by two votes in the middle of the night, just as Congress was going on recess in 2002. This was a pyrrhic victory, as Bush's use of Fast Track was the undoing of the delegation mechanism. Indeed, Fast Track's structure provided Bush with a perfect tool to abuse what was an already shaky inter-branch relationship regarding trade agreement negotiations and approval.

Ironically, the straw that broke Fast Track's back came when Bush simply used the full powers of the extraordinary mechanism, which to date, presidents had only threatened to use to obtain congressional action. For members of Congress, the Bush administration's use of Fast Track to steamroll congressional suggestions about trade agreements' contents, implementing legislation, and vote timing revealed exactly how the process operated, and to what degree it cut Congress out of a meaningful role in the trade-agreement process. As we show in this section, not only was Congress unwilling to provide Bush with additional authority past 2007, but by 2008 even former proponents of the Fast Track process had begun discussing the need for a greatly altered presidential trade-authority system that enhanced Congress' control over the trade-agreement negotiation and approval process.

Almost immediately after entering office in 2001, the Bush administration started demolishing what little remained of the past bipartisan (mainly Republicans with a smaller bloc of Democrats) "trade consensus" that had allowed passage of NAFTA and WTO. The Jordan FTA, which Clinton had negotiated and signed in 2000, contained somewhat improved labor provisions and importantly contained labor provisions in *its core text.* The agreement passed by a wide margin without Fast Track under normal congressional voting procedures in the first year of the Bush administration. When Democrats who had traditionally opposed FTAs supported the Jordan pact — even though it contained other provisions they opposed limiting access to generic medicines — they stated that the improved labor standards were but the *first step* toward a more comprehensive overhaul of FTAs. But the Bush administration's response was to invalidate the FTA's labor provisions, by writing the King of Jordan and declaring it would not enforce them.[214]

In the summer of 2001, the Bush administration launched a campaign for what it called a "clean fast track," i.e. one that did not address the reservoir of concerns about past Fast Track delegations, the agreements it had produced, or their lack of enforceable labor, environmental and other public interest standards.[215] In this effort, Ways & Means Chair Bill Thomas (R-Calif.) played a key role. Thomas' abrasive personal style and open contempt for committee Democrats resulted in a Fast Track bill that infuriated many Democrats who in the past had supported Fast Track delegations.[216] Thomas' bill contained substantially weaker language on labor standards than those in the 1988 Fast Track authority.[217] His proposed legislation included language designed to deny Fast Track treatment to trade bills containing the kind of labor provisions contained in the Jordan FTA. This language stated that Fast Track procedures would only apply to labor and environmental provisions that are "directly related to trade," "consistent with the sovereignty of the U.S.," "trade expanding and not protectionist," and do "not affect a country's ability to make changes to its laws that are consistent with sound macroeconomic development."[218]

As early as June 2001, House Democrats — from Minority Leader Richard Gephardt (D-Mo.) (who has supported the 1993 Fast Track extension) to the pro-"free trade" New Democrats — were united against the Thomas bill and the Bush administration approach. While some Democrats focused on the need to change the structure of Fast Track to enhance Congress' role, a considerable amount of debate concerned the labor rights language that should be included in the bill. (Nevermind that the structure of Fast Track makes Congress' negotiating objectives unenforceable.) For some Democrats, the labor rights issue became a proxy for a wider critique. Meanwhile, many Democrats who had supported NAFTA and other past trade pacts called for improved labor standards, assuming the Bush administration would agree. (Past administrations have regularly ignored labor provisions in actual negotiations, yet inclusion of the language provided political cover for their support for Fast Track.) Given the mood in Congress on trade, even one of the most pro-Fast Track, pro-NAFTA Democrats in Congress, Rep. Jim Moran (D-Va.), announced, "a clean bill is a dead bill."[219]

The Bush administration proceeded with its push for trade authority, invoking arguments about the alleged economic success of past Fast Tracked trade deals like NAFTA. Thanks to record NAFTA trade deficits, however, this line of argumentation did not gain traction in Congress.

214. Bolle, 2003.
215. IUT, 2001a; IUT, 2001b.
216. Destler, 2005, at 290-291.
217. Pier, 2006, at 85.

218. Section 3(b)(3).
219. IUT, 2001b; IUT, 2001c; IUT, 2001d.

After the 9-11 attacks, the administration shifted its messaging to a national-security frame, which it has ever since used to promote its trade agenda.[220] In this instance, a central argument aimed at corralling GOP support for Fast Track was that Republican members of Congress had to demonstrate to the world their support of the president. GOP congressional leaders began to move the bill.[221]

By October 2001, Ways & Means ranking member Charles Rangel (D-N.Y.) and committee trade leaders Sander Levin (D-Mich.) and Robert Matsui (D-Calif.) developed an alternative Fast Track legislation that would have improved labor, environmental and other negotiating objectives. The proposal addressed some criticisms of NAFTA-style investment rules, by specifying that mere diminution in value of an investment would not constitute a compensable expropriation. It established a "non-political screening process for investor-state claims,"[222] and allowed for more opportunities for members of Congress to initiate Fast Track disapproval resolutions. Their bill also sought to impose more accountability over executive-branch negotiators in regards to the meeting of Congress' negotiating objectives, although it did do in a manner that (bizarrely) increased the influence of corporations during the negotiation phase. Ninety days before signing a trade agreement, the president would be required to certify to Congress that the principal negotiating objectives in the relevant Fast Track delegation had been met. At that point, the private-sector advisory groups would have 30

220. Gates and Santos, 2008.
221. Blustein, 2001.
222. IUT, 2001e. For greater detail on the investor-state mechanism, see Bottari and Wallach, 2005.

days to vote on whether the negotiating objectives had indeed been met. If a majority of the advisory committees disagreed, Fast Track procedures would not apply to the agreement.[223]

Rangel and his colleagues offered this proposal as a "motion to recommit" during the debate on the bill on December 6, 2001. This legislative procedure allows members critical of a bill to call for a vote on whether to send it back to committee with specific amendment instructions. Less than an hour after the motion to recommit had failed, the Thomas bill passed the House by the narrowest of margins (215 to 214), after Speaker Dennis Hastert stretched House rules to keep voting open for twenty minutes after the official clock had tolled, when votes on the board showed a majority against Fast Track. Frustrated Democrats were yelling from the Floor that time had expired — and Fast Track had been defeated.[224] On the sidelines, in order to win the support of several Republicans from textile districts, the House Republican leadership promised to pass legislation amending several U.S. trade preference programs. Three Republican Fast Track critics then changed their stance thanks to this last minute maneuver, including Rep. Robin Hayes (R-N.C.), who cast the deciding vote.[225] Hastert slammed down the gavel the second the "yes" vote number bested the "no" vote tally.

As well as rolling back labor standards language (even the stronger version of which had proved ineffective in the past), Thomas' 2001 Fast Track contained language on other issues, including

223. Text of the proposal is available at *Congressional Record*, 147, Dec. 6, 2001, at H9030. Section 7(b) describes the new trade advisory proposal.
224. Nelson, 2001.
225. Specifically, this deal would require that imports of knit and woven fabrics from various preference-program countries be dyed, finished and printed in the United States to receive duty-free treatment. As a result, Rep. Jim DeMint (R-S.C.) switched his vote from "nay" to "aye," and Reps. Cass Ballenger (R-N.C.) and Robin Hayes (R-N.C.) lodged their "aye" votes after he did. See IUT, 2001g.

foreign-investor rights, which provided enormous discretion for negotiators to continue with extremely problematic FTA provisions. The investor-rights issue became a prominent focus of the Senate debate on the Finance Committee's Fast Track bill. That legislation had a twisted path that resulted in a more moderate bill than that written by Thomas in the House. Republicans and Democrats had twice exchanged the Finance Committee's chairmanship during 2001-02 (from William Roth (R-Del.) to Max Baucus (D-Mont.) to Charles Grassley (R-Iowa).) Unlike the House side, however, where the Democratic gatekeeper committee leaders put forward ideas (squashed by Thomas) to modestly reform Fast Track's structure, Baucus supported a bill largely drafted by his Republican counterparts in exchange for White House commitments on trade adjustment assistance (TAA).

The 2002 Senate Fast Track debate featured an unprecedented month-long floor fight, from April 25 to May 23. While final passage in the Senate, which traditionally has passed trade bills by wide margins, was expected, the array of amendments to the Finance Committee proposal was unique. Sen. John Kerry (D-Mass.) offered an amendment on investment rules that was a stronger version of the Rangel proposal. Additionally, the Kerry amendment included general instructions for negotiators to insert in future agreements a carve-out for non-discriminatory public interest and environmental policies. The White House campaigned fiercely against the amendment, and it was defeated, with help from Baucus. The White House similarly attacked and defeated a modest amendment by Sen. Joseph Lieberman that would have rolled back some of the new anti-labor and anti-environmental standards language contained in the Senate bill relative to the past Fast Track delegations.[226]

226. IUT, 2002b.

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Meanwhile, a bipartisan team of senators, Mark Dayton (D-Minn.) and Larry Craig (R-Idaho), offered an amendment forbidding U.S. negotiators from rolling back U.S. anti-dumping laws in future trade agreements. Unlike the Kerry amendment, this amendment was structured so that it would actually create a binding congressional mandate upon which Fast Track would be conditioned for the first time. The amendment called for the waiver of Fast Track rules on congressional consideration and restoration of regular process if a trade agreement undermined existing U.S. dumping laws. The Dayton-Craig amendment was supported in the Senate on May 14, 2002 by a strong bipartisan vote of 61-38.[227] The Senate voted on the overall Fast Track package — as an amendment to a bill on Andean trade preferences — on May 23 on a 66-30 vote.

The House and Senate had passed different Fast Track bills, with some Senate provisions (such as on TAA) having never received a House vote. The two chambers needed to convene a conference to bring the bills into a form for final passage. The procedural stunts, however, were far from over. On June 26, Thomas and allies on the House Rules Committee proposed a so-called "self-executing rule" that, in addition to the standard procedure of requesting a conference, took the unprecedented step of simultaneously approving vast portions of the Senate bill that the House had never voted on. The measure also stripped the Dayton-Craig amendment. Democrats questioned its constitutionality. In the words of Rep. Alcee Hastings (D-Fla.): "Last week, [Thomas] accused the other body of all sorts of underhanded legislative witchcraft. And how do we answer that in the House? With our own Harry Potter-like sorcery."[228] Rep.

227. IUT, 2002a.
228. Rep. Alcee Hastings (D-Fla.), *Congressional Record*, 148, June 26, 2002, at H3953.

Nancy Pelosi (D-Calif.) added, "This is a very dark day for the House of Representatives."[229] The "rule" passed by a 216-215 vote, with over 94 percent of Democrats opposed.[230]

After a month in conference, the bill that came to the House floor for final passage in the middle of the night on July 27 had added to it a remarkable provision, dubbed the Gramm amendment. This was a massive loophole to the bill's (already weak) labor and environmental standards clauses, that stated that the requirement for a country not to repeatedly fail to "strive" to enforce its own labor and environmental law would not be deemed a violation of the agreement if a country decided to spend its resources on other priorities![231] In the words of Rep. David Wu (D-Ore.): "To deem this a loophole is to call the hole in the side of the Titanic a small leak."[232] The conferenced bill also gutted the Senate-passed Dayton-Craig amendment, including instead hortatory and unenforceable language on dumping. Additionally, the final version gutted much of the TAA proposal attached in the Senate.[233]

Despite only 25 out of 210 House Democrats supporting the bill and 27 House Republicans opposing, the Orwellian-named Bipartisan Trade Promotion Authority Act of 2002 passed the House 215-212 at 3 in the morning the day after Congress'

229. Rep. Nancy Pelosi (D-Calif.), *Congressional Record*, 148, June 26, 2002, at H3961.
230. H. Res. 450, "Relating to consideration of the Senate amendment to the bill (H.R. 3009) to extend the Andean Trade Preference Act, to grant additional trade benefits under that Act, and for other purposes," approved June 26, 2002.
231. Public Law 107-210, § 2102 (11).
232. Rep. David Wu (D-Ore.), *Congressional Record*, 148, July 27, 2002, at H5974.
233. IUT, 2002c.

summer recess was to have started.[234] The approval again came again after the vote clock was stopped. Levin summed up the view of many when he said, the mechanism "maintains a minimal, meaningless, and last-minute role for Congress, at a time when trade policy is increasingly intertwined with all areas of domestic policy."[235] Perhaps the most poignant statement of the debate came from Robert Matsui, one of the House's leading Democratic advocates of NAFTA and WTO. He urged his colleagues to vote down Fast Track, saying:

> "I stand here before you today as a free trader… But this vote is about much more than that. It's about the fact that the very nature of international trade has changed radically. Trade is no longer primarily about tariffs and quotas. It's about changing domestic laws. The constitutional authority to make law is at the heart of our role as a Congress and of our sovereignty as a nation. When international trade negotiators sit down to hammer out agreements, they are talking about harmonizing 'non-tariff barriers to trade' that may include everything from antitrust laws to food safety.
>
> "Now, I believe the President and the USTR should be able to negotiate trade deals as efficiently as possible. There's no questions about that. But that does not mean that Congress must concede to the Executive Branch its constitutional authority over foreign commerce and domestic law

234. The House passed an initial version of Fast Track (H.R. 3005) by a 215-214 vote on Dec. 6, 2001 (D: 21-189; R: 194-23, with 2 independents opposed). The Senate passed an amended version attached to trade preferences legislation (H.R. 3009) on May 23, 2002 by a 66-30 vote (D: 25-25; R: 40-5, with one independent in favor). The conference version passed the House on July 27 by a 215-212 vote (D: 25-183; R: 190-27, with 2 independents opposed), and the Senate on August 1 on a 64-32 vote (D: 20-29; R: 43-5, with one independent in favor).
235. Stokes, 2002.

> without adequate assurances that Congress will be an active participant in the process. Congress should be a partner, not a mere spectator or occasional consultant to the process. The Thomas bill does not ensure that. Think about what may be bargained away at the negotiating table: our own domestic environmental protections ... food safety laws ... competition policies. That's the air we breathe, the food our children eat, and the way Americans do business.
>
> "The nature of trade has changed, and fast track authority must change with it. I ardently believe in the principles of free trade. But I will not put my constitutional authority over domestic law and my responsibility to my own constituents on a fast track to the executive branch. I urge my colleagues to vote no on this legislation."[236]

Overall, the Bush administration used Fast Track much more aggressively than previous presidents, passing eight NAFTA-style trade deals, including the Central America Free Trade Agreement, which passed the House by a two-vote margin in 2005 in the middle of the night largely along party lines. In that instance, the bill passed once again after the vote clock was stopped and Hayes had reversed his "no" vote.[237]

The Bush administration's strong-arming of the legislative branch via Fast Track was educational for many members of Congress who had not previously focused on the details and implications of the delegation authority. First, Bush dispensed with some of the friendly if largely meaningless courtesies past presidents provided

236. Rep. Robert Matsui (D-Calif.), Congressional Record, 147, Dec. 6, 2001, at H9025.
237. See Tucker, 2006a, at 23.

to the trade gatekeeper committees, which had provided a patina of legislative-executive branch cooperation. In 2006, after a front page *New York Times* exposé detailed the prevalence of horrific sweatshop conditions in Jordanian factories producing for the U.S. market under the Jordan FTA, Sen. Kent Conrad (D-N.D.) offered an amendment to the Oman FTA in the Senate Finance Committee's "mock markup" session. Conrad's amendment would have prohibited goods made with slave labor from entering the United States. He noted that he offered the amendment, which was approved by the committee on a bipartisan unanimous 18-0 vote, because FTA partner countries had promised Congress in the past to make certain changes to their laws but then failed to do so after the vote.[238] Not only did the Bush administration refuse to add this amendment to the Oman FTA's implementing legislation, but argued moreover that it was prohibited by Fast Track from amending the FTA. Conrad subsequently told the press that he had "really lost confidence in this process… I won't subject American workers to that kind of competition."[239]

The arbitrary authority provided the executive branch under Fast Track was then further highlighted — in this case to the upset of some Republican congresspeople — when the Bush administration proceeded to do the very thing it claimed it could not: it changed the text of several FTAs signed under Fast Track procedures. Bush in May 2007 renegotiated FTAs with four countries to include certain labor, environmental and drug-patent provisions after Rangel and Levin — now in the majority — asked him to in exchange for rounding up Democratic support. Two Republican Finance Committee members, Sens. Orrin

238. He referred to Bahrain's promise in advance of an FTA vote with that country to dismantle its boycott of Israel, which it did not. See IUT, 2006a.
239. Blinkhorn, 2006.

Hatch (R-Utah) and Jon Kyl (R-Ariz.), voted against the Peru FTA during a September 21 mock-mark up of the bill, citing the *post facto* changes to the FTA's terms.[240]

President George W. Bush shakes hands with Ways & Means Chair Bill Thomas. The two partnered to use Fast Track more aggressively than in the past, leading to its demise.

The May 2007 deal that had resulted in Bush making these changes had been negotiated without input of most Democratic House members, much less their consent. Considerable ire ensued within the Democratic House Caucus.[241] Compounding the concerns of many House Democrats had been surprising statements by Rangel and Baucus, when elevated to chairs of their committees in 2007, suggesting he was inclined to provide President Bush with new Fast Track authority.[242] Much of the new House majority Democratic leadership and caucus members

240. Vaughan, 2007.
241. Abrams, 2007.
242. McGrane, 2007.

were focused on investigating and countering what they deemed abuse by President Bush of his *existing* authorities and disdain for Congress' constitutional role. Thus the notion of granting him additional discretion or authority was not popular. The Peru FTA passed, but with a majority of Democrats — including 12 of 19 House committee chairs — voting against.[243]

Another outcome of the contentious debate: the Democratic House leadership issued a written statement in June 2007 that it would not support further Fast Track for President Bush.[244] The document, signed by Speaker Pelosi, Majority Leader Steny Hoyer (D-Md.), Rangel and Levin, demonstrated unity against further Fast Track for Bush. It also signaled that Rangel and Baucus' early 2007 statements did not represent the position of the united House leadership.[245]

Yet the Fast Track structure might have survived President Bush, to be modified but not replaced by a future president, were it not for his last Fast Track move. Most stunningly of all of Bush's maneuvers, the president broke traditional Fast Track etiquette by submitting the Colombia FTA for a vote, over the explicit *opposition* of the House leadership and without the courtesy of going through the mock mark-up process. The trade deal was highly controversial to begin with, since many in and out of Congress consider Colombia to have such severe labor and human rights problems (and its president so entangled with rightwing paramilitaries) that the country should never be considered for an FTA absent fundamental changes in the country.[246]

243. Strawbridge, 2007.
244. Pelosi, 2007.
245. Hennig, 2007; Swanson, 2007.
246. Sweeney, 2008; Nichols, 2008.

The president's right to force a vote in this manner is of course a key aspect of Fast Track. But past presidents has avoided formally exercising it, perhaps to avoid highlighting to all in Congress that, under Fast Track, the president could seize control of the legislative branch's floor schedule. Corporate supporters of the Colombia FTA had urged the White House to not use what they dubbed the "nuclear option," for fear of what it would do to the future of the Fast Track process.[247] Regardless, the administration dispensed altogether with the "mock mark ups," and submitted legislation it had written without congressional review, and thus started the Fast Track House 60-day forced-vote clock.

Bush's last move was the death knell for the Fast Track process. Pelosi and the House Rules Committee responded to Bush's unprecedented move by reasserting Congress' constitutional prerogatives. The Rules Committee formulated a new rule for the Colombia FTA, which removed the mandatory 60-day vote timeline, and the House passed this new rule on April 10, 2008.[248] In Pelosi's words, "We are the people's House. Their timetable should be our timetable."[249]

The comments of previously uncritical supporters of Fast Track signaled the damage that Bush's move had wrought. Rep. Ike Skelton (D-Mo.), who has systematically supported past Fast Tracks and trade agreements, noted: "Article 1, section 8 of the U.S. Constitution grants Congress the power to regulate commerce with foreign nations … On April 8, 2008, the Administration took the unprecedented step of delivering the

247. IUT, 2008; Homan, 2008.
248. H. Res. 1092, passed April 10, 2008, by a 224-195 margin (Democrats: 218-10; Republicans: 6-185). For a behind the scenes look at the rules change, see O'Connor and Kady, 2008.
249. Speaker Nancy Pelosi (D-Calif.), *Congressional Record*, 154, April 10, 2008, at H2182.

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Colombia Trade Promotion Agreement to Congress without having fully consulted with the House and the Senate. In my view, the Administration's maneuver seriously jeopardizes prospects for the trade agreement's passage in the House."[250] Sen. Richard Lugar (R-Ind.) issued a statement "in response to President Bush sending the U.S.-Colombia Trade Promotion Agreement to Congress to ensure a vote this year": "I support the U.S.-Colombia Trade Promotion Agreement… However, I am concerned by the politically inhospitable circumstances in which the agreement is being sent to the U.S. Congress. The Colombian free-trade agreement faces stiff opposition because many in Congress believe the Colombian government has not taken sufficient measures to ensure the safety and security of its workers. This opposition could derail its passage this year…"[251] Rep. Greg Meeks (D-N.Y.), one of the few Democratic supporters of CAFTA and a fierce supporter of the Colombia FTA, commented: "I'm disappointed… You don't take these kinds of agreements up unless you have an agreement. I think this hurts it."[252]

One long-time Beltway trade pundit denounced the Colombia FTA Fast Track meltdown as "the gravest threat to the global trading system in decades."[253] But less shrill establishment commentators noted that "Even before this week, fast track has had a rocky history and has sometimes been suspended, for

250. Rep. Ike Skelton (D-Mo.), *Congressional Record*, 154, April 10, 2008, at H2187.
251. Lugar, 2008.
252. O'Connor and McGrane, 2008.
253. Bergsten, 2008.

example during the latter years of the Clinton administration following the passage of the North American Free Trade Agreement."[254]

America's final historic trade regime, Fast Track, had also signaled a return to low Robber Baron rates of U.S. per capita income growth. From 1973 to 2008, average real per capita growth rates were only 2 percent — below that of America's first 100 years, and of its post-war Golden Age.

254. Politi, 2008.

CONCLUSION: Toward A New Consensus, 2008-?

Our historical study shows how the U.S. trade-agreement negotiation and approval process has developed over time and been altered by Congress to accommodate changing circumstances. Such changes are both natural and inevitable.

Because the Constitution gives Congress exclusive authority to set tariff rates and decide the terms of commerce with foreign nations, while the executive branch has authority to conduct international negotiations, some form of coordination has been required. Over the course of the United States' existence, this constitutional separation of powers has resulted in the legislative and executive branch playing widely varying roles in the formation of both trade agreements and trade policy more generally. Consistent throughout the varying coordination models has been attempts by the executive branch to acquire increased control over the content of trade-agreement policy and varying levels of congressional concern about the executive's accumulation of such power.

In the Republic's first 100 years, trade agreements were generally adopted by the Senate as treaties, with bicameral implementing legislation used to implement the changes to U.S. tariff rates. From 1890 to 1934, over the course of several tariff acts, Congress experimented with delegating to the executive branch defined authority to negotiate tariff terms. The first several delegation acts allowed the executive to negotiate tariff agreements without subsequent congressional approval, but these were limited to specific countries and specific goods. The 1922 act introduced the notion of allowing the executive to proclaim tariff adjustments to equalize the costs of production across countries. Several acts during the period authorized the president to negotiate trade agreements that would have to be brought back to Congress for approval.

With the 1934 Reciprocal Trade Agreements Act (RTAA), Congress permitted the executive to negotiate trade agreements that modified tariffs within certain bands covering all goods without requiring a congressional implementing vote. The Act was controversial in Congress, and was initially established only as an emergency measure for three years, with the caveat that any agreements negotiated without Congress' approval would sunset with the new authority.

However, once initially established, the RTAA's tariff proclamation authority was repeatedly extended by Congress for one- to three-year periods. Scores of trade agreements were completed under this form of tariff-proclamation authority, including the original 1947 GATT and four rounds of further GATT negotiations. The GATT set certain principles regarding trade in goods and established tariffs rates. Congress did not vote on these GATT rounds; a proposal to establish an International Trade Organization (which would house the GATT) failed to obtain Senate treaty approval. As the importance of trade to the U.S. economy increased, by 1958, Congress began reasserting its role by establishing a form of legislative veto if the president failed to take the advice of (what was then called) the Tariff Commission regarding certain tariff policies.

When the Johnson administration overstepped its delegated tariff authority in the 1967 Kennedy Round of GATT, Congress' willingness to allow adoption of trade agreements without an affirmative congressional vote came to a halt. The Kennedy

Round GATT agreement included non-tariff measures related to anti-dumping policy. Congress had warned that such matters related to domestic law, not tariffs, were outside of the executive's trade authority. Johnson signed the agreement anyway. Congress demonstrated its constitutional prerogatives by refusing the implement that aspect of the GATT deal, while Johnson used existing tariff-proclamation authority to implement the Kennedy Round tariff cuts. Congress did not provide any new delegation of presidential trade authority from 1967 to 1975.

Fast Track was the next U.S. trade agreement negotiation and approval mechanism. During President Nixon's narrowly won first term, he worked to consolidate his political base including by courting various constituencies with voluntary restraint agreements limiting imports, an across the board import surcharge and other measures. After winning his second term, Nixon changed his economic team, but continued prioritizing political power over the substance of policy. His initial proposal for new presidential trade authority would have allowed him to negotiate trade agreements on tariff and certain non-tariff issues such as procurement and dumping and proclaim not only the new tariff rates, *but the changes to federal law needed to implement the pacts.*

The Nixon administration initially argued that this was necessary for other countries to be willing to negotiate with the United States after the Kennedy Round meltdown. However, when countries agreed to launch the next GATT Tokyo Round prior to any delegation of congressional trade authority, the administration admitted that the real issue was ensuring Congress would provide a final vote on trade agreements the president negotiated. The Senate put a stop to Nixon's outlandish presidential-law-change-proclamation proposal that would have grabbed Congress' basic legislative authority. However, the Senate did agree to a Fast Track system that would allow a president to negotiate on tariff and certain non-tariff issues and sign and enter into agreements before a congressional vote, with a later vote guaranteed on the already signed pacts within a set amount of time under controlled floor voting rules.

The GATT Tokyo Round was completed under this form of Fast Track. For the first time, it included "codes" on issues traditionally under sole congressional purview, such as procurement, non-tariff barriers (regulatory standards) and dumping. The Fast Track authority was extended for an additional eight years in 1979.

The Reagan administration transformed Nixon's consolidation of presidential *trade*-agreement power into a new instrument expanding presidential power over an array of new issues that were central to Reagan's *laissez-faire* ideology. The 1984 and 1988 Fast Tracks authorized the president to negotiate and enter into agreements that set rules for service-sector, intellectual property, financial and investment policy. This remarkable new expansion of presidential authority to diplomatically legislate on a wide swath of domestic non-trade issues was used to launch the Uruguay Round GATT talks in 1986.

The first President Bush's notice to Congress of his intent to launch NAFTA negotiations triggered a congressional backlash against Fast Track. In 1991, Fast Track opponents invoked a midterm Fast Track extension disapproval procedure to allow a vote to terminate the authority. Unlike the near-unanimous passage of the 1979, 1984 and 1988 Fast Tracks, 192 House members voted against Fast Track under the disapproval resolution. But without a majority to stop its extension, the

procedure remained in effect for use to finalize NAFTA. A WTO-specific Fast Track extension was obtained by the Clinton administration in 1993 to finish those negotiations.

The NAFTA and WTO exploded the boundaries of "trade" agreements. These pacts established numerous constraints and obligations on a wide range of policies — from food safety and immigration, to drug patents and truck safety — unrelated to trade. Unlike the widely supported GATT Tokyo Round, the WTO and NAFTA engendered fierce congressional opposition, and required the Clinton administration to spend a great deal of political capital. Even NAFTA and WTO critics were not to understand the full effect of the agreements' expansive non-tariff terms until the pacts began to be implemented and an array of domestic non-trade laws were undermined. And despite promises by the pacts' supporters that the pacts would reverse the growing U.S. trade deficit, U.S. trade with Mexico shifted from balance to a growing deficit, and the global trade deficit continued to grow. Congress' support for Fast Track and the expansive international commercial agreements it had wrought steadily diminished.

The Omnibus Trade and Competitiveness Act of 1988 — used for NAFTA and WTO — replicated similar requirements in past Fast Tracks that labor standards be included in trade agreements. However, because Fast Track's structure allows executive-branch negotiators enormous discretion regarding whether to following Congress' negotiating objectives, such provisions were not forthcoming in NAFTA or WTO.

The Clinton administration, known for its major trade-expansion agenda, did not have Fast Track authority for six of its eight years. Indeed, a Clinton administration Fast Track bill was voted down on the House floor in 1998 — a historic first. From 1995 through 2002, there was no congressional delegation of trade authority.

President George W. Bush came to office with establishment of Fast Track and expansion of NAFTA as top priorities. After a lengthy battle, he obtained a Fast Track delegation in 2002. Many Democrats who had ardently supported past Fast Tracks led the fight against it, focusing on the broad implications of providing the executive branch with enormous authority to implement non-trade policies through Fast Tracked "trade" agreements. Bush used Fast Track to extend the NAFTA model through eight pacts, including the Central America Free Trade Agreement, which passed by a two-vote margin in 2005.

Ironically, it was Bush's use of Fast Track's full powers that destroyed what was left of congressional support for the extraordinary procedure. The Bush administration dispensed with many of the traditional, albeit not required, executive-legislative coordination practices employed by past presidents. The full use of Fast Track awakened many in Congress to the full implications — and perils — of providing such a broad delegation of authority. Instead of negotiating with the trade gatekeeper committees on a bipartisan basis regarding the terms of trade-agreement implementing legislation, the Bush administration even ignored a unanimously supported Finance Committee amendment passed in the mock mark up of the Oman FTA in 2006. The Bush administration altered various FTAs it had signed under Fast Track in 2007 without providing Congress with the required notice, leading some Republican Finance Committee members fuming and voting no in the mock mark up of the Peru FTA. The final straw came when Bush, against the warning of many corporate Fast Track supporters, used the process to try to force a vote on the Colombia FTA in April

2008, after congressional leaders had explicitly asked for further discussion of the proposal. Congress reasserted its constitutional prerogatives and passed a new rule for consideration of the FTA that removed the pact from the Fast Track required 60-day House vote obligation.

A new president will arrive in 2009 facing the challenge of negotiating with Congress to establish a new mechanism for presidential trade authority to replace Fast Track. As this review shows, the Fast Track mechanism was but one of various procedures employed by Congress to coordinate trade-agreement negotiations and approval. As President Kennedy noted in 1961, an old trade authority delegation method that did not meet the needs of the era "must not simply be renewed, it must be replaced."

This review has also shown that the Fast Track mechanism was not necessary to ensure U.S. trade agreements or trade expansion. Under other delegations — or in the absence of delegations — trade has expanded and agreements have been signed, negotiated and put into effect. For instance, while the Clinton administration was without Fast Track, trade expanded over 30 percent from 1995 to 2000. And by its own reckoning, the Clinton administration negotiated and passed 130 trade and investment agreements without Fast Track, including the U.S.-Jordan Free Trade Agreement, which passed unanimously under normal congressional floor procedures.

We have also described the mismatch between the Fast Track mechanism and the challenges of today's complex international commercial agreements. The broad delegation of congressional authority and related executive discretion regarding agreement terms inherent in Fast Track was premised on 1970s realities, when trade agreements were still largely about traditional trade matters such as tariffs, quotas and anti-dumping policy. Unless Congress is to reestablish strict limits on the scope of "trade" negotiations, it will need a greatly enhanced role in determining what must and must not be in international commercial pacts that affect wide swaths of non-trade policy space.

Even defenders of current trade policies agree that Fast Track's time has passed, and a new delegation mechanism is needed. Hal Shapiro, the author of a recent book on the topic, wrote that Fast Track "is surely not what the drafters of the Constitution intended. Indeed, in key respects, Fast Track appears to contravene what they intended. Moreover, it is not necessary, and it does not promote the right debate… Fast track has become a distraction for fashioning policy to a national globalization strategy."[255]

Some will always think that *any* congressional or public input on trade is too much. For instance, one Clinton administration official, Harold Hongju Koh, called Fast Track "the most congressionally influenced trade regime since Smoot-Hawley." Indeed, he wrote that even the 1962 Act offered Congress "too much input."[256] Invariably, when any new congressional trade delegation mechanism is brought up, interests who see it providing a role for new interested parties who might not support the goals of those already involved will raise the specter of protectionism to attack it. However, history has shown trade expansion to flourish under a variety of institutional arrangements. At issue is not a battle between protectionism and free trade. Rather, at issue is Congress' appropriate role in devising international commercial agreements that directly affect

255. Shapiro, 2006, at 161-162.
256. Koh, 1986, at 1202, 1208 and 1211.

wide swaths of non-trade policy in the era of globalization.

A growing majority in Washington and in U.S. state capitals believe that the Fast Track delegation mechanism has outlived its usefulness and is ill suited to developing consensus around America's globalization strategy. Substantive concerns are accompanied by a high level of political traction, with criticism of status quo trade policy proving to be an electorally potent issue — playing a key role in the 2006 Democratic take-back of Congress.[257] It has also figured prominently in the 2008 presidential primaries, with all eight Democratic candidates and even some Republicans pledging changes to trade policy. Sen. Barack Obama (D-Ill.), for one, promised to "replace Fast Track with a process that includes criteria determining appropriate negotiating partners that includes an analysis of labor and environmental standards as well as the state of civil society in those countries. Finally, I will ensure that Congress plays a strong and informed role in our international economic policy and in any future agreements we pursue and in our efforts to amend existing agreements."[258]

The quest for the next system of presidential trade-authority started in 2007, when the last delegation of Fast Track sunset. Prominent civil society organizations passed formal policy resolutions and issued papers laying out their views of the core aspects required in any new trade authority. Many of these efforts built on concepts proposed in the past by members of Congress, such as a 1995 Fast Track replacement proposal promoted by then-Rep. Bill Richardson (D-N.M.) and Minority

257. Tucker, 2006b; Slevin and Tucker, 2007.
258. IFTC, 2007.

Leader Richard Gephardt,[259] and the 2001-02 Rangel-Levin Fast Track reform proposal. The AFL-CIO and Change to Win labor federations and the National Farmers Union passed formal policy resolutions calling on Congress to replace Fast Track with a mechanism that enhanced Congress' role. This would include setting readiness criteria to identify suitable prospective negotiating partners, setting binding negotiation objectives, and having a vote on trade-agreement texts *before* they are signed and entered into. The Citizens Trade Campaign, Public Citizen and other organizations have called for a new trade negotiation system based on similar elements.[260]

Perhaps the clearest evidence that the Fast Track delegation system has altogether lost its legitimacy has been the "reform" proposals of business interests who have long defended the status quo. A recent example was a draft bill put out by the National Foreign Trade Council (NFTC), which represents the interests of large corporations who had a privileged role in shaping U.S. trade agreements under Fast Track. The NFTC's July 2008 proposal, while not surprisingly largely continuing the current Fast Track system, includes enhancements in Congress' role, such as establishment of a congressional super-committee that would be required to approve executive-branch proposals to launch FTA talks with specific countries. This Joint Committee on Trade would be comprised of chairs and ranking members of an array of committees whose jurisdiction is affected by today's wide-ranging "trade" agreements.[261]

259. IUT, 1995b.
260. Copies of these resolutions are available at: http://www.citizen.org/trade/fasttrack//.
261. NFTC, 2008.

Interestingly, establishment of such a trade super-committee is one element of a comprehensive U.S. trade reform proposal introduced into Congress in June 2008. Sen. Sherrod Brown (D-Ohio) and Rep. Mike Michaud (D-Maine) unveiled new legislation in June 2008 called the Trade Reform, Accountability, Development and Employment (TRADE) Act, which sets forth the principles for a Fast Track replacement and also details mandatory economic and regulatory objectives with which new and existing U.S. trade must comply.[262] As of July 25, 2008, the bill has 67 cosponsors, including seven House Committee Chairs, and members representing a diverse geographic and political distribution.[263] A labor official's statement at a news conference on the TRADE Act seemed to represent Congress' intent with the new proposal: "We're tired of playing defense. We're here to play offense."[264]

This bill builds on past congressional reform efforts and the proposals of various academics and civil society groups. Its Fast Track replacement proposal includes:

>> Specific "readiness criteria" set by Congress for selecting future U.S. trade negotiating partners. In order for the president to initiate negotiations, the gatekeeper committees must confirm that countries with whom the executive proposes to negotiate meet Congress' statutory readiness criteria;

262. Palmer, 2008.
263. Information about the TRADE Act (H.R. 6180) is available at http://thomas.loc.gov/.
264. Statement by President Larry Cohen of the Communication Workers of America, cited in Drajem, 2008.

>> Mandatory congressional negotiating objectives that list what must be and must not be included in future trade agreements. The bill's middle section enumerates these objectives in detail;

>> Enhanced consultations with (and briefings of) Congress by executive-branch trade officials throughout the negotiating process;

>> Creation of a Congressional Trade Agreement Review Committee that includes the chair and ranking member of each House and Senate committee whose jurisdiction is covered in today's international commercial agreements. This committee is designed to supplement the role of the gatekeeper committees, by providing a mechanism for other legislators to access trade briefings and provide input to executive officials;

>> Certification by the Congressional Trade Agreement Review Committee that mandatory negotiating objectives have been met *before* a trade agreement can be brought to a vote. This would ensure that executive-branch negotiators — and their counterparts from other countries — have an incentive to meet Congress' negotiating objectives;

>> A congressional vote to approve an agreement's text *before* the president can sign and enter into it. This critical measure would ensure that Congress has the ability to review and decide on the merits of an agreement at a point when the pact may still be altered, if necessary. This would also create a strong incentive for executive negotiators not to try to use trade pacts to push non-trade measures otherwise opposed by Congress through a procedural back door;

>> A privileged vote on final implementing legislation making necessary changes to U.S. law. Because Congress would have had the opportunity in a front-loaded manner to ensure pacts and negotiating partners meet their criteria, this final vote would no longer become a high-stakes proxy for non-implementation-related disagreements;

>> A process to provide subfederal officials a role in deciding whether their states will agree to be bound to trade pacts non-trade regulatory constraints regarding land-use, service-sector, procurement, and investment policies. However, unlike the Bricker amendment (or the Articles of Confederation), this mechanism does not block the federal government from adopting trade policy suited to its jurisdiction.

Such arguments for increased democratic participation in the trade policymaking process are compelling. While perfect democratic debate about globalization policy is impossible, a bias towards more voices is likely to better represent the public interest.[265] Further, the expansive non-trade scope of today's international commercial agreements argues for Congress to have a more prominent role in their negotiation and approval than ever before in the nation's history.

One Fast Track advocate hit the nail on the head when he wrote, "the president is well-situated to accumulate foreign affairs power [while Congress is not]. Congress thus could benefit by utilizing tools that would redress the balance-of-powers weakness vis-à-vis the executive."[266] Elements of such redress would include a trade authority-delegation mechanism broken up into stages of

265. Goodin, 2007.
266. Carrier, 1996, at 694-695.

executive-legislative cooperation, over which the Congress retains leverage — and indeed control — regarding whether the next stage of delegation is provided. In addition, a trade-agreement negotiation and approval process that recognizes the broad scope of today's international commercial negotiations through greater and more diverse congressional involvement could redress the current power imbalance.

As this review has shown, delegation of Congress' trade authority has taken different forms over the course of the nation's history, with a new system of delegation being established every few decades since 1890 in response to changing circumstances. The next few years will show whether the U.S. political system is sufficiently dynamic to embrace a change towards a new trade delegation mechanism that can reduce political tension about trade-agreement policy and be able to secure prosperity for the greatest number of Americans, while preserving the vital tenants of American democracy in the era of globalization.

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Public Citizen's Global Trade Watch

Public Citizen is a nonprofit organization founded in 1971 that is based in Washington, D.C. Public Citizen Foundation produces scores of research and investigative reports and legal and medical journal articles annually. It operates numerous websites that present searchable, publicly accessible government and other data, including information we obtain through Freedom of Information Act requests and compile through investigative research. Public Citizen Foundation's areas of interest include openness and accountability in government; health, safety and environmental protections; energy policy; health care and prescription drug safety; and the economic and social implications of trade and globalization policies.

Public Citizen's Global Trade Watch division was created in 1995 to explore an array of globalization issues that touch on Public Citizen's core agenda. Thus, Global Trade Watch conducts research on the implications for health and safety, environmental protection, economic justice, and democratic, accountable governance of various trade and globalization policies. We have built unique substantive and analytical capacities, including by investing in the development of staff with expertise in trade law, economics, and international and domestic regulatory regimes. Global Trade Watch's work seeks to make the measurable outcomes of the current trade and globalization model accessible to the public, press and policy-makers to promote informed dialogue on these critical issues. We work with researchers around the world in this effort. A significant aspect of our work is translating technical trade agreement text into prose that is accessible to a non-expert audience. For instance, we created a searchable database of all U.S. commitments at the World Trade Organization's General Agreement on Trade in Services (GATS) — translated into accessible text. We also operate several in-depth monitoring projects which track the outcomes of various trade agreements within the United States and in trade partner countries. Among the data services we provide in this arena is the only searchable database providing U.S. Trade Adjustment Assistance (TAA) trade-related job loss findings.