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## Trade Promotion Authority: Fast Track for the Twenty-First Century

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# TRADE PROMOTION AUTHORITY: FAST TRACK FOR THE TWENTY-FIRST CENTURY?\*

## INTRODUCTION

Trade Promotion Authority (TPA) is the name given to the presidential authority previously known as “fast track.”<sup>1</sup> TPA is the delegation of power by Congress to the executive branch in order to facilitate the implementation of international trade agreements in the United States.<sup>2</sup> International trade agreements negotiated on the fast track are reviewed by Congress on an accelerated time frame and are subject to a yes or no vote by Congress without any amendments.<sup>3</sup> In August 2002, Congress granted TPA to President Bush,<sup>4</sup> providing a fast-track mechanism to the presidency for the first time in eight years.<sup>5</sup> Although the Bipartisan Trade Promotion Authority Act of 2002 has been heralded as a vital tool in the creation of additional international trade agreements,<sup>6</sup> the Act subjects the

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\* I would like to extend my appreciation to my parents for their encouragement and support.

<sup>1</sup> Bob Deans, *With “Fast Track” Going Nowhere, Bush Pulls A Switch*, COX NEWS WASH., Apr. 23, 2001, at <http://www.coxnews.com/washingtonbureau/staff/deans/04-23-01COXBUSHFAST0423.html> (on file with author).

But fast track powers were derailed seven years ago, and now the term itself is snakebitten. President Bush will have nothing to do with it. . . . Instead, the Bush team uses the term “trade promotion authority,” and Bush hopes that before the year is out Congress will grant him the power it long withheld from his predecessor, Bill Clinton.

*Id.*; see also Bruce J. Janigian, *Global and Regional Trade Developments*, 15 TRANSNAT’L LAW. 99, 100 (2002); *What Economic Integration in the Hemisphere Means to Florida Industries*, Panel Discussion, 14 FLA. J. INT’LL. 79 (2001) [hereinafter *Economic Integration Panel Discussion*]. The terms “fast track” and “trade promotion authority” have become interchangeable. LENORE SEK, CONGR. RES. SERV., PUB. NO. IB10084, TRADE PROMOTION AUTH. (FAST-TRACK AUTHORITY FOR TRADE AGREEMENTS): BACKGROUND & DEVS. IN THE 107TH CONGRESS (2003).

<sup>2</sup> U.S. Dep’t of Commerce, *Questions & Answers on U.S. Trade Promotion Authority*, at <http://www.tpa.gov/qanda.htm>.

<sup>3</sup> See Joseph G. Block & Andrew R. Herrup, *Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT’L L. 221, 229 (1995).

For the purposes of this Note, I will use the terms “fast-track” or “fast-track procedures” to refer to the accelerated review in both the 1974–1994 legislation and the rules in the current Act. I will use the terms “trade promotion authority” or “TPA” to refer to the accelerated review specifically implemented by the current Act.

<sup>4</sup> See Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.A. §§ 3801–13 (West Supp. 2003).

<sup>5</sup> See 148 CONG. REC. S7775 (daily ed. Aug. 1, 2002) (statement of Sen. McCain).

<sup>6</sup> See *id.* at S7789 (statement of Sen. Brownback) (“I don’t think there is another thing

negotiation process to a degree of congressional interference that did not exist under previous fast-track procedures.

Fast-track procedures have been the source of considerable debate over the last ten years. Free-trade advocates tout the procedures as a vital tool to enact international free-trade agreements.<sup>7</sup> Opponents have included both those individuals generally opposed to free trade and those who argue that the fast-track procedures curtail public discourse on important social issues.<sup>8</sup>

Part I of this Note recounts the historical separation of power to negotiate and implement international trade agreements, beginning with the constitutional demarcation of powers. Part II describes the provisions of the Bipartisan Trade Promotion Authority Act of 2002 that affect the power distribution between the President and Congress. Part III examines the rationale given for adopting fast-track procedures, compares the previous fast-track procedures to the newly implemented TPA, and examines the political reasons for the changes. Part IV evaluates whether the Bipartisan Trade Promotion Authority Act of 2002 resolves the problems it was adopted to address.

By enacting the Bipartisan Trade Promotion Authority Act of 2002, Congress usurped the constitutional authority of the President to negotiate international treaties,<sup>9</sup> including trade agreements. Although the House of Representatives, in concert with the Senate, has the constitutional power to regulate trade,<sup>10</sup> history has shown that Congress is ill-suited to do so directly on an international scale. The pressures placed on Congress by domestic interest groups are likely to impede, if not halt, fruitful negotiations. This Note will demonstrate that Congress should delegate to the executive branch the power to regulate trade with foreign nations independently.

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we could do in the near term for us to be able to grow this economy that would be more important than to pass trade promotion authority. I think it is that critical a piece of legislation . . ."); *id.* at S7792 (statement of Sen. Baucus) ("[W]e believe this legislation is vital in putting the United States on a similar playing field with agreements that are negotiated around the world.") (quoting a letter from various Montana commerce agencies); *id.* at S7775 (statement of Sen. McCain) ("Enactment of this legislation will go a long way toward re-establishing faith and trust in the United States as a trading partner."); Proclamation No. 7564, 67 Fed. Reg. 35,893 (May 17, 2002) ("[TPA] is vital to securing new free trade agreements with potential negotiating partners.").

<sup>7</sup> See *infra* text accompanying notes 107–27.

<sup>8</sup> See *infra* text accompanying notes 134–47.

<sup>9</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>10</sup> See U.S. CONST. art. I, § 8, cl. 3.

## I. HISTORY OF INTERNATIONAL TRADE AGREEMENT NEGOTIATION AND IMPLEMENTATION

### A. Constitutional Delegation of Powers

The Constitution divides powers dealing with foreign relations between all three branches of government.<sup>11</sup> Although the Constitution grants broad authority to the federal government in the area of foreign affairs, it does not paint a clear line of demarcation between powers of the Executive and the Legislative branches.<sup>12</sup> Article II grants the President the power to make treaties but only with the approval of a supermajority of the Senate.<sup>13</sup> Congress has the power to regulate foreign trade,<sup>14</sup> including the power to “[l]ay and collect Taxes, Duties, Imposts and Excises,”<sup>15</sup> and the Judiciary has power within several areas of foreign affairs.<sup>16</sup>

Based on their experiences with the Articles of Confederation, the drafters of the Constitution recognized the need to focus the authority over foreign affairs.<sup>17</sup> Fearing the centralization of power,<sup>18</sup> however, the drafters “limit[ed] the powers of each branch and construct[ed] checks and balances to prevent concentrations of power.”<sup>19</sup> Although the formation of treaties is more of a legislative function,<sup>20</sup> the President was given power to negotiate because of the need to demonstrate clear

<sup>11</sup> E.g., Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT’L LAW. 715, 719–20 (1992).

<sup>12</sup> See Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT’L L. & ECON. 687, 688–89 (1996).

<sup>13</sup> U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”) The President’s authority to appoint ambassadors provides power over foreign affairs. See Carrier, *supra* note 12, at 689–90.

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have the power “to regulate Commerce with foreign Nations . . .”).

<sup>15</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>16</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and *Treaties made, or which shall be made*, under their Authority; — *to all Cases affecting Ambassadors . . . — to all Cases of admiralty and maritime Jurisdiction . . .*”) (emphasis added).

<sup>17</sup> See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 730–31 (1998).

<sup>18</sup> See Carrier, *supra* note 12, at 691.

<sup>19</sup> Paul, *supra* note 17, at 723.

<sup>20</sup> See 148 CONG. REC. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

Until the closing days of the Constitutional Convention of 1787, the Framers had intended for the Senate to have the sole authority to make treaties. And in the Federalist Papers, Alexander Hamilton acknowledged that treaty making “will be found to partake more of the legislative than of the executive character . . .”

leadership and a unified front when dealing with other nations.<sup>21</sup> Vesting the power to negotiate in the President also provides a single point of contact for foreign powers.<sup>22</sup> The Senate was given the power to ratify treaties because, as the more “contemplative” arm of the legislature, it was less subject to short-term interests than the House while still directly representing the interests of the People.<sup>23</sup> The drafters gave Congress the power to set tariffs and to regulate commerce in order to check the powers of the Executive.<sup>24</sup>

Although the drafters discussed the commerce power and the power to make treaties,<sup>25</sup> very little information is available as to how they intended to allocate the powers of foreign commerce among the branches.<sup>26</sup> “The well-recognized utility of Congressional involvement in treaty and international agreement negotiation applies with even greater force when it comes to international trade. For here, the making of international agreements intersects with the Constitution’s express grant of authority to Congress to regulate commerce with foreign nations.”<sup>27</sup>

The President has the power to negotiate international treaties but does not have the constitutional authority to regulate commerce or to determine tariffs and duties. Congress, on the other hand, has the power to regulate commerce with foreign nations but does not have the power to negotiate international agreements directly. Therefore the demarcation of power in the area of international trade agreements cannot be determined directly from the Constitution.

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<sup>21</sup> See THE FEDERALIST NO. 75 (Alexander Hamilton). Another concern was that the legislative branch would not represent the best interests of the nation as a whole, whereas the President would place the national interests ahead of those of individual states. See Robert Knowles, Comment, *Starbucks and the New Federalism: The Court’s Answer to Globalization*, 95 NW. U. L. REV. 735, 771 (2001) (referring to the “concerns raised by Madison that the treaty-maker should represent the interests of the entire nation”).

<sup>22</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

<sup>23</sup> See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 760 (2002).

<sup>24</sup> See Carrier, *supra* note 12, at 693.

<sup>25</sup> See generally 1 THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., Burt Franklin reprints, photo. reprint 1987) (2d ed. 1836); THE FEDERALIST NO. 75 (Alexander Hamilton); JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION (E.H. Scott ed., Books for Libraries Press 1970) (1840); 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., 1987).

<sup>26</sup> John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 DICK. J. INT’L L. 203, 224 (1995) (“Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce.”).

<sup>27</sup> 148 CONG. REC. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

*B. Separation of Powers: Early America*

After establishing its independence, the United States had a weak military and depended on trade policies to assert itself in world politics.<sup>28</sup> Congress implemented these trade policies through legislation<sup>29</sup> and through the ratification of commercial treaties negotiated by the President.<sup>30</sup> Throughout the 1800s, the President negotiated treaties, including trade treaties, and obtained the necessary Senate approval.<sup>31</sup> The President also determined which countries would be entitled to "Most Favored Nation" status.<sup>32</sup> Congress and the President seemed to have established a mutually beneficial distribution of power in trade policy.<sup>33</sup>

Beginning in the 1920s, however, Congress began reasserting power over the development of international trade policy.<sup>34</sup> Congress began passing protectionist legislation in response to pressure from domestic industries and agriculture.<sup>35</sup> In 1930, Congress passed the Smoot-Hawley Tariff Act of 1930,<sup>36</sup> which increased tariffs to an average of fifty-three percent and increased the number of products that were dutiable.<sup>37</sup> Under Smoot-Hawley, "Congress refused to delegate responsibility for international trade administration and instead set every tariff level itself."<sup>38</sup> The United States quickly became subject to similar tariffs as other countries retaliated against the tariff hike.<sup>39</sup> In the mid-1930s, Congress realized that having the most

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<sup>28</sup> See Koh & Yoo, *supra* note 11, at 720.

<sup>29</sup> See Theresa Wilson, Note, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 *DRAKE L. REV.* 141, 164 (1998).

<sup>30</sup> See Linarelli, *supra* note 26, at 208–09.

<sup>31</sup> See *id.* at 208.

<sup>32</sup> See *id.* at 209.

<sup>33</sup> See *id.* at 210.

<sup>34</sup> See Wilson, *supra* note 29, at 166.

<sup>35</sup> See *id.* (referring to the Tariff Act of 1922).

<sup>36</sup> The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930). The Smoot-Hawley Tariff Act was the ultimate display of U.S. protectionism, Linarelli, *supra* note 26, at 210, and resulted from Congress caving to special interests. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 *N.Y.U. J. INT'L L. & POL.* 1191, 1194 (1986) ("Because congressional logrolling and horsetrading contributed to every individual duty rate, Smoot-Hawley set the most protectionist tariff levels in U.S. history.").

<sup>37</sup> Wilson, *supra* note 29, at 166.

<sup>38</sup> Koh, *supra* note 36, at 1194.

<sup>39</sup> See *id.* Scholars have suggested that the Smoot-Hawley Tariff Act and the reactionary increases in tariffs may have contributed to the Great Depression. See C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 *GEO. WASH. J. INT'L L. & ECON.* 1, 17 & n.62 (1994).

political branch of the government try to set tariffs was at best inefficient<sup>40</sup> and therefore passed the Reciprocal Trade Agreements Act of 1934.<sup>41</sup>

This Act permitted the President to reduce tariffs within guidelines set by Congress.<sup>42</sup> The Act allowed the President to issue a Presidential Proclamation enacting international agreements that lowered tariffs without any further action by Congress.<sup>43</sup> The Act was a significant delegation of Congress's power to set tariffs. With each extension of the Act, however, Congress issued more guidelines, further restricting the powers that it had delegated to the President.<sup>44</sup>

### *C. Modern Power Distribution and Fast Track*

In 1974, Congress drastically altered the U.S. approach to negotiating international trade agreements.<sup>45</sup> Rather than making additional changes to the Reciprocal Trade Agreements Act, Congress passed the Trade Act of 1974, which created the modern procedures known as the fast track.<sup>46</sup> The 1974 Act expanded the scope of powers delegated to the President, giving the President the authority to create international trade agreements that affected both tariffs and nontariff barriers.<sup>47</sup> In enacting the 1974 Act, Congress delegated to the Executive both the power to set tariffs and the power to regulate commerce with foreign nations.

Although the scope of the powers granted to the President was broader, the extent of the grant was limited. Unlike in previous legislation that dealt only with

<sup>40</sup> See Linarelli, *supra* note 26, at 211.

<sup>41</sup> Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934) (allowing President to negotiate tariff agreements with foreign nations and implement them by Presidential Proclamation without congressional approval).

<sup>42</sup> See *id.*; Linarelli, *supra* note 26, at 211.

<sup>43</sup> See Linarelli, *supra* note 26, at 211–12 (citing Reciprocal Trade Agreements Act of 1934).

<sup>44</sup> See Koh, *supra* note 36, at 1196.

<sup>45</sup> See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 143–48 (1992).

<sup>46</sup> Trade Act of 1974, 19 U.S.C.A. §§ 2191–94 (West 1974).

<sup>47</sup> See Wilson, *supra* note 29, at 169–71. Nontariff barriers (NTBs) are essentially anything other than a tariff or quota that is used to restrict trade. The General Agreement on Tariffs and Trade (GATT) broadly defines NTBs as “[l]aws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to . . . requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use . . .” General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. X, para. 1. Examples include customs valuation, import licensing rules, subsidies, compatibility standards, quality standards, health and safety regulations, and labeling laws. JOHN J. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 411 (4th ed. 2002).

tariffs, Congress did not give the President the ability to enact these agreements by a simple proclamation.<sup>48</sup> Instead, the President had to seek congressional approval.<sup>49</sup>

In order to facilitate the approval, the fast-track mechanism was developed, involving specific procedures that provided for congressional review of the agreement during the negotiation process.<sup>50</sup> The most notable aspect of the fast-track procedures was that Congress could only give a “thumbs-up” or “thumbs-down” response and could not modify the text of the agreement.<sup>51</sup> This power gave the President greater credibility when negotiating international agreements because foreign nations knew that the agreements would not be subject to prolonged debates and potentially drastic changes in the hands of the U.S. Congress.<sup>52</sup>

Legislation passed during the 1980s made the fast-track procedures increasingly complicated.<sup>53</sup> First, the Trade and Tariff Act of 1984 added a requirement that the President consult with the House Ways and Means Committee and the Senate Finance Committee prior to giving notice of his intent to sign the agreement<sup>54</sup> so that the committees could disapprove the negotiations before formal talks even began.<sup>55</sup> The changes curtailed presidential discretion in negotiations by “empower[ing] an ad hoc coalition of key committee members to jeopardize a proposed [free trade agreement] that otherwise enjoyed general congressional

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<sup>48</sup> See Wilson, *supra* note 29, at 170 (citing Trade Act of 1974).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 171; Koh, *supra* note 45, at 147; Linarelli, *supra* note 26, at 219.

<sup>52</sup> See Koh, *supra* note 36, at 1200–03.

Before fast track, presidents had been embarrassed by the refusal of Congress to implement negotiated agreements. After Woodrow Wilson made a point of excluding the Senate from negotiation of the Treaty of Versailles, the Senate repeatedly refused to ratify the agreement. See Senator Thad Cochran, The James McClure Memorial Lecture in Law Delivered at the University of Mississippi School of Law (Oct. 13, 1997), in 67 MISS. L.J. 383, 391–92 (1997); Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 281 n.24 (2001). Congress refused to approve the modifications to the GATT resulting from the Kennedy Round, which would have repealed the American Selling Price method of customs valuation. See Koh, *supra* note 36, at 1199. “The European parties to the agreement extended the deadline for acceptance several times, but finally refused to wait any longer, causing the agreement to lapse.” *Id.* at 1200 n.24.

<sup>53</sup> See, e.g., Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948; Omnibus Trade and Competitiveness Act of 1998, Pub. L. No. 100-418, 102 Stat. 1107 (extending fast track).

<sup>54</sup> See Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

<sup>55</sup> See Koh, *supra* note 45, at 149.



support . . . .”<sup>56</sup> Congress was effectively retaining a larger share of its constitutional authority over the regulation of international trade.<sup>57</sup>

In 1988, Congress passed the Omnibus Trade and Competitiveness Act of 1988.<sup>58</sup> The Act further “enhance[d] Congress’s power in two respects: by reserving for either house the power to block *extension* of the Fast Track authority past the original expiration date and for both houses to *derail* already authorized agreements from the Fast Track.”<sup>59</sup> In addition to the House Ways and Means and the Senate Finance Committees, the House Rules Committee was given the power to “derail” an extension of fast track.<sup>60</sup> The Act extended the fast-track procedures for only three years.<sup>61</sup>

<sup>56</sup> *Id.* at 150.

The 1984 Act’s modified Fast Track procedure not only enhanced congressional influence over the negotiation of trade agreements, it dramatically expanded the influence of the gatekeeper committees [House Ways and Means Committee and Senate Finance Committee] vis-a-vis the rest of Congress. In effect, the modified Fast Track procedure afforded Congress three bites at the apple. Under the committee gatekeeping procedure, a majority vote of either key committee could “derail” a presidential proposal from the Fast Track — and in many cases, effectively kill it — thereby giving the Executive strong incentives to consult with the committee’s members at each step of the process. Thus, the statutory requirement of a sixty-day prenegotiation consultation period with the two committees secured their involvement in the Canada FTA negotiations months before formal talks began and allowed them to extract concessions from the President as a condition of letting negotiations proceed. Second, the Administration’s awareness that any negotiated agreement would ultimately return to the same committees for subsequent approval promoted continuing consultation as the agreement evolved. Third and finally, either house retained the option to vote down the fully negotiated agreement even after its discharge from committee.

*Id.* at 149.

<sup>57</sup> *Id.* at 150.

<sup>58</sup> Pub. L. No. 100-418, 102 Stat. 1107.

<sup>59</sup> Koh, *supra* note 45, at 151.

<sup>60</sup> *See id.* (referring to the 1988 Act § 1103(b)(5)(A)-(B)). Section 1103(b)(5)(A) defines the term “extension disapproval resolution” as:

a resolution of either House of the Congress . . . [that] disapproves the request of the President for the extension . . . of the [fast-track] provisions to any implementing bill submitted with respect to any trade agreement entered into under section 1102(b) or (c) of such Act after May 31, 1991, because sufficient tangible progress has not been made in trade negotiations.

Section 1103(b)(5)(B) provides that extension disapproval resolutions “may be introduced in either House of the Congress by any member of such House [and] shall be jointly referred, in the House of Representatives, to the Committee on Ways and Means and the Committee on Rules.”

<sup>61</sup> *See Taylor, supra* note 39, at 31:

The President’s agreements were only to receive fast track treatment if they were

The negotiation of the United States-Canada free-trade agreement occurred under the 1984 and 1988 versions of fast-track procedures. During those negotiations, the reintroduction of Congress into the process resulted in exactly the type of problems that had existed prior to fast track. For example, the maritime industry sought a "Senate resolution denying the Fast Track to any bill that would have implemented maritime provisions of the FTA requiring national treatment."<sup>62</sup> Rather than lose a needed trade agreement, Canada and the President agreed to leave maritime provisions out of the FTA "in exchange for an agreement by the Senate sponsors to drop their Fast Track denying resolution."<sup>63</sup>

In 1991, President Bush requested an extension of fast-track authority in order to complete the Uruguay Round negotiations and to pursue the North American Free Trade Agreement (NAFTA).<sup>64</sup> The ensuing debate in Congress resulted in a two-year extension of fast track, subject to a series of additional conditions for the negotiation of the NAFTA.<sup>65</sup> The congressional debate revealed waning support for fast track<sup>66</sup> and foreshadowed the problems that President Clinton would face in obtaining an additional extension to fast track.

Due to the changes in fast-track procedures, lobbyists began to influence trade negotiations through legislators, making international trade agreements subject to domestic interest groups.<sup>67</sup> The negotiation of the NAFTA became a battleground

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entered into before June 1, 1991. For agreements entered into after May 31, 1991, but before June 1, 1993, fast track was available only if the President requested an extension of negotiating authority and neither house adopted an extension disapproval resolution before June 1, 1991.

<sup>62</sup> Koh, *supra* note 45, at 152.

<sup>63</sup> *Id.*

<sup>64</sup> Taylor, *supra* note 39, at 33-34. NAFTA creates a free-trade area including the United States, Canada and Mexico.

<sup>65</sup> *See id.* at 48-51.

<sup>66</sup> *See id.* at 36-42. Professor Taylor notes:

Because international trade policy making by means of fast track was designed as a power-sharing measure, this loss of congressional power was perceived to be a gain for the President. Most fast track opponents were not concerned that the Executive branch was not fulfilling its statutory obligations — such as consulting with Congress — but rather, that the President had too much control over the content of international trade agreements.

*Id.* at 38-39 (footnotes omitted). *See also* Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183, 192 (1992). Opponents in Congress "decried the 'abrogation,' 'abdication,' 'surrender,' or 'relinquish[ment]'" of congressional power, prerogatives, and responsibilities." *Id.* (alterations in original) (footnotes omitted).

<sup>67</sup> *See* Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 481 (1990).

for special interests.<sup>68</sup> After the antagonistic debates over the enactment of NAFTA, Congress refused to extend fast-track as requested by President Clinton.<sup>69</sup>

#### *D. Recent Developments*

Despite repeated attempts by President Clinton to renew fast track, the existing fast-track legislation expired in 1994.<sup>70</sup> For the first time in fifty years, the Executive branch was left without the authority to enter into international trade agreements except through the creation of treaties subject to the approval of the Senate. From 1994 until August 2002, Congress refused to grant the executive branch the power to enter directly into international trade agreements.<sup>71</sup>

Both President Clinton and President Bush lobbied extensively to persuade Congress to grant some authority to the Executive to create trade agreements.<sup>72</sup> President Bush argued that “the lack of [trade promotion authority] has placed American exporters at a disadvantage,”<sup>73</sup> pointing out that during the eight years without presidential trade promotion authority the United States failed to pursue

<sup>68</sup> See Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 724 (1993); see also Taylor, *supra* note 39, at 34–35.

<sup>69</sup> See Robert F. Housman, *The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*, 10 CONN. J. INT'L L. 301, 310–14 (1995).

<sup>70</sup> *Id.* at 311–13:

Initially, the [Clinton] administration sought a virtually unfettered extension of fast-track authority for a seven year period. . . . This first proposal was met with immediate and unified opposition. . . . [T]his first surge of opposition amounted to a game of “policy chicken.”

Facing continuing opposition, the administration floated a second fast-track proposal. . . . Republicans and the business community once again came out against this new proposal. . . . [T]he administration dropped its second fast-track proposal and floated in its place yet another proposal. . . . While the third proposal garnered quick support from opponents of the prior two proposals, it did not fare well [with other groups]. The administration rushed to counter this opposition, relying heavily on the argument that the extension of fast-track was vital to give the administration credibility. . . . In the end, the Uruguay Round bill went forward without any fast-track extension.

*Id.* (footnotes omitted).

<sup>71</sup> See John R. Schertz & Mike Meier, *U.S. Enacts New “Fast-Track” Trade Bill*, 8 INT'L L. UPDATE 126 (2002).

<sup>72</sup> See Sek, *supra* note 1 (detailing multiple proposals and speeches made by Clinton and Bush requesting renewal of fast-track authority); *Clinton Makes Fast Track Plea To Congress*, (Nov. 5, 1997), at <http://www.cnn.com/ALLPOLITICS/1997/11/05/trade/> (last visited Mar. 4, 2003); David Schepp, *Bush Wants More Trade Powers*, BBC NEWS ONLINE (Mar. 23, 2001), available at <http://news.bbc.co.uk/1/hi/business/1238717.stm>.

<sup>73</sup> See *Approved Trade Bill Grants President Broad Negotiating Authority*, 44 NO. 30 GOV'T CONTRACTOR, Aug. 14, 2002.

free trade agreements.<sup>74</sup> Finally, in August 2002, Congress enacted the Bipartisan Trade Promotion Authority Act of 2002 (Trade Act of 2002),<sup>75</sup> which included revised fast-track procedures under the new label “trade promotion authority.”<sup>76</sup>

## II. THE BIPARTISAN TRADE PROMOTION AUTHORITY ACT OF 2002

### A. *Distribution of Powers*

The Trade Act of 2002 was billed as “establish[ing] a partnership of equals. It recognizes that Congress’s constitutional authority to regulate foreign trade and the President’s constitutional authority to negotiate with foreign nations are interdependent. It requires a working relationship that reflects that interdependence.”<sup>77</sup> The purpose of the Act was to make another attempt to resolve the ambiguity in the constitutional separation of powers in the area of international trade.

Congress was determined to retain its constitutional authority, while allowing the President to perform his role as a negotiator.<sup>78</sup> Congress, however, intended for the new Act to allow Congress to keep a closer watch on the President.<sup>79</sup> In addition to providing strict negotiating objectives to the President, Congress reserved the right to veto a negotiated agreement.<sup>80</sup>

The President’s power is limited by specific guidelines and concerns identified by Congress. The President’s negotiations may address only the issues identified by Congress in the statute and must follow specific guidelines.<sup>81</sup> Authorization to negotiate is granted if the President determines that foreign trade is “unduly burden[ed] and restrict[ed]” and “the purposes, policies, priorities, and objectives

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<sup>74</sup> Proclamation No. 7564, 67 Fed. Reg. 35,893 (2002). In the proclamation President Bush notes, “[T]here are about 150 free trade agreements in effect worldwide, nearly 25 percent of which involve countries in the Western Hemisphere. The United States is a party to only three of these pacts.” *Id.*

<sup>75</sup> 19 U.S.C.A. §§ 3801–13 (West Supp. 2003).

<sup>76</sup> Trade Act of 2002 § 3804 (detailing the new fast-track procedures).

<sup>77</sup> 148 CONG. REC. S10,661 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

<sup>78</sup> See 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (“This will give Congress a chance to affect the outcome of the negotiations well before they occur.”).

<sup>79</sup> 148 CONG. REC. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus) (“Indeed, the Trade Act of 2002 contemplates an even closer working relationship between Congress and the Administration . . .”).

<sup>80</sup> See Trade Act of 2002 § 3805(b). If the agreement negotiated by the administration does not meet the congressional requirements, “there are ways that either House of Congress can derail a trade agreement.” 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to Trade Act of 2002 § 3805(b)).

<sup>81</sup> Trade Act of 2002 section 3803 provides the authorization for the President to negotiate a trade agreement with a foreign country regarding tariff and/or nontariff barriers and the guidelines he must follow.

of [the Trade Act of 2002] will be promoted” by the negotiations.<sup>82</sup> The Act states five additional limitations on the negotiation of agreements regarding tariff barriers.<sup>83</sup> Negotiation of agreements regarding nontariff barriers are subject to the objectives provided in section 3802 of the Act, the limitations provided in section 3803(b)(3), and the consultations and notice required by section 3804.<sup>84</sup>

Section 3802 details the trade negotiating objectives. There are nine broad objectives, that include not only promotion of free trade, but also promotion of environmental and labor standards.<sup>85</sup> Specific negotiating objectives are provided in the areas of “trade barriers and distortions” and “trade in services,”<sup>86</sup> “foreign investment,”<sup>87</sup> “transparency,”<sup>88</sup> “improvement of the WTO and multilateral trade agreements,”<sup>89</sup> “regulatory practices” and “reciprocal trade in agriculture,”<sup>90</sup> “dispute settlement and enforcement,”<sup>91</sup> “trade remedy laws,”<sup>92</sup> and several others.

<sup>82</sup> Trade Act of 2002 § 3803.

<sup>83</sup> *Id.* § 3803(a). Limitations on modifications to tariff barriers primarily set minimums for rate of duty reductions. *See id.*

<sup>84</sup> *Id.* § 3803(b) (limiting agreements as provided in sections 3802 and 3804). The President’s actions are considerably more restricted under the Trade Act of 2002 than under previous legislation. *Compare* Trade Act of 1974, 19 U.S.C.A. §§ 2101–2495 (1974) and Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 with Trade Act of 2002, §§ 3801–13.

<sup>85</sup> Trade Act of 2002 § 3802(a). This is a marked shift from prior legislation, which did not include provisions catering to special interest groups. The inclusion of environmental and labor goals was the issue that blocked consensus in efforts to renew trade promotion authority between 1994 and 2002. *See* Housman, *supra* note 69, at 310–14.

<sup>86</sup> Trade Act of 2002 § 3802(b)(1)–(2). These provisions encourage negotiations with the basic goal of promoting free trade by removing barriers to trade in the areas of goods and services.

<sup>87</sup> *Id.* § 3802(b)(3). This provision provides detailed explanations of eight types of concessions (with subcategories) that Congress wants the President to pursue in agreements.

<sup>88</sup> *Id.* § 3802(b)(5). Transparency refers to the accessibility of information regarding trade rules, regulations, policies, and practices. *See* GATT, *supra* note 47, art. X, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm). For more information regarding transparency in the context of trade negotiations, see Luis Miguel Diaz & Nancy A. Oretskin, *Mediation Furthers The Principles Of Transparency and Cooperation to Solve Disputes in The NAFTA Free Trade Area*, 30 DENV. J. INT’L L. & POL’Y 73–75 (2001).

<sup>89</sup> Trade Act of 2002 § 3802(b)(7). Congress’s objectives for improving the WTO and multilateral trade agreements are, *inter alia*, “to achieve full implementation and extend the coverage . . . to products, sectors, and conditions of trade not adequately covered.”

<sup>90</sup> *Id.* § 3802(b)(8), (10).

<sup>91</sup> *Id.* § 3802(b)(12). Congress was particularly concerned that the President attempt to address the World Trade Organization (WTO) dispute settlement process in future negotiations. Using strongly worded language criticizing recent WTO dispute settlement decisions, Congress stated:

Support for continued trade expansion requires that dispute settlement procedures under international trade agreements not add to or diminish the rights and obligations provided in such agreements. Therefore —

(A) the recent pattern of decisions by dispute settlement panels of the WTO and

The President must notify Congress prior to initiating negotiations, in order for the final negotiated agreement to be eligible for TPA.<sup>93</sup> The President must also consult Congress regarding the negotiations “before and after submission of the notice.”<sup>94</sup> Section 3804 also provides that the President must make specific determinations and special consultations with Congress in the areas of agriculture and textiles.<sup>95</sup>

### B. Oversight

In order to ensure that the President follows the guidelines laid out by Congress, the Trade Act of 2002 creates a Congressional Oversight Group (COG) composed of members of Congress to provide direct participation and oversight to trade negotiations initiated under the Act.<sup>96</sup> The membership of the COG includes four members of the House Committee on Ways and Means, four members of the Senate Committee on Finance, and members of the committees of the House and Senate “which would have . . . jurisdiction over provisions of law affected by a [sic] trade agreement negotiations . . . .”<sup>97</sup> The U.S. Trade Representative (USTR) must accredit each member of the COG as an official advisor to the U.S. delegation in

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the Appellate Body to impose obligations and restrictions on the use of antidumping, countervailing, and safeguard measures . . . has raised concerns; and

(B) the Congress is concerned that dispute settlement panels of the WTO and the Appellate Body appropriately apply the standard of review . . . to provide deference to a permissible interpretation by a WTO member of provisions of that Agreement, and to the evaluation by a WTO member of the facts where that evaluation is unbiased and objective and the establishment of the facts is proper.

*Id.* § 3801(3). “[T]he Administration is directed to develop a strategy to counter or reverse this problem, or lose fast track.” 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus). The Trade Act of 2002 identifies concerns regarding dispute settlement procedures in the Congressional findings section, § 3801(3), and in the section on principal trade negotiating objectives, *Id.* § 3802(b)(12).

<sup>92</sup> *Id.* § 3802(b)(14). The issue of protecting U.S. trade remedy laws was addressed multiple times in the Act, including the congressional findings and the trade negotiating objectives. *See* 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (stating that the Trade Act of 2002 “contains a principal negotiating objective directing negotiators not to undermine U.S. trade laws”). Protection of the trade laws is an essential element of any negotiations. *Id.* at S7772 (statement of Sen. Craig) (“Sixty-two Senators said: Do not negotiate away our trade laws, or suffer the consequence.”).

<sup>93</sup> *Id.* § 3804(a).

<sup>94</sup> *Id.* § 3804.

<sup>95</sup> *Id.* § 3804(b)–(c).

<sup>96</sup> *See id.* § 3807.

<sup>97</sup> *Id.* § 3807(a)(2)–(3).

negotiations for any trade agreement under the Act.<sup>98</sup> The COG was created “to provide an additional consultative mechanism for Members of Congress and to provide advice to the [USTR] on trade negotiations.”<sup>99</sup>

In order to enact an international trade agreement using the TPA procedures, the President must first consult with the Senate Committee on Finance, the House Committee on Ways and Means, and the COG.<sup>100</sup> The President must then provide written notice to Congress of his intention to enter into negotiations.<sup>101</sup> The notice must include the date that negotiations are scheduled to begin, the specific objectives for the negotiations, and whether the President seeks to create a new agreement or modify an existing agreement.<sup>102</sup>

Six months before signing an agreement, the President must “send a report to Congress . . . that lays out what he plans to do with respect to [U.S.] trade laws.”<sup>103</sup> At that time, Congress reviews the proposed agreement. The Trade Act of 2002 “provides for a resolution process where Congress can specifically find that the proposed changes are ‘inconsistent’ with the negotiating objectives.”<sup>104</sup>

Congress defends the complexity of the legislation as a necessary evil. “The negotiating objectives and procedures . . . represent a very careful substantive and political balance on some very complex and difficult issues such as investment, labor and the environment, and the relationship between Congress and the Executive branch during international trade negotiations.”<sup>105</sup> The Trade Act of 2002 ultimately places much more stringent limitations on the President’s ability to negotiate effectively with foreign nations than previous fast-track legislation had.<sup>106</sup>

<sup>98</sup> See *id.* § 3807(a)(4). Without accreditation, congressional representatives would be bystanders and would not be permitted to participate directly in negotiations. As accredited representatives, the members of the COG have the authority to act on behalf of the United States in negotiations.

<sup>99</sup> 148 CONG. REC. S9108 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley); see also *id.* § 3807(a)(4). The purpose of the COG is “to provide advice to the Trade Representative regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the negotiated commitments under the trade agreement.” *Id.*

<sup>100</sup> *Id.* § 3804(a)(2).

<sup>101</sup> *Id.* § 3804(a)(1) (requiring that written notice be provided at least ninety days prior to the commencement of negotiations).

<sup>102</sup> *Id.*

<sup>103</sup> 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to section 3804(a)(3)).

<sup>104</sup> *Id.* (setting limitations on trade authorities procedures § 3805(b)).

<sup>105</sup> 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley).

<sup>106</sup> See *supra* notes 81–84 and accompanying text.

## III. FREE TRADE, TRADE PROMOTION AUTHORITY, AND THE TRADE ACT OF 2002

Free trade benefits society by reducing consumer prices and expanding consumer options.<sup>107</sup> International trade agreements focus on removing or reducing barriers to trade. Barriers to free trade include not only “taxes or other charges, whether made effective through quotas, import or export licences or other measures,”<sup>108</sup> but also any “internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations . . . applied to imported or domestic products so as to afford protection to domestic production.”<sup>109</sup>

Barriers to trade are imposed primarily to protect a domestic industry that cannot produce a good or service as efficiently as a foreign industry can.<sup>110</sup> The theory of comparative advantage is that countries should not produce items that they can buy from other countries that produce those items more efficiently.<sup>111</sup> This theory is an essential element of the rationale to encourage free trade.<sup>112</sup>

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<sup>107</sup> See Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 272 (2000).

Free trade increases opportunities to obtain goods and services otherwise unavailable in the importing country. Free trade provides cheaper and better quality products to importing nations; reciprocity allows importing nations to pay for their imports by the revenue gained from exports; trade develops international cooperation and maintains political alliances with trading partners; trade increases competition and spurs increased quality of domestic goods and services; trade infuses capital into the developing countries, raises their standard of living, creates jobs for the otherwise unemployed, and enables the developing nations to compete in the international trade arena.

*Id.*; see also Nathan Hale, *The American System or the Effects of High Duties on Imports* (1828), reprinted in 1 FREE TRADE AND PROTECTIONISM IN AMERICA: 1822–1890, at 152 (Lars Magnusson ed., 2000) (arguing that high taxes on foreign goods do not promote domestic industry).

<sup>108</sup> GATT, *supra* note 47, art. XI, § 1.

<sup>109</sup> *Id.* art. III, § 1.

<sup>110</sup> See generally 4 FREE TRADE AND PROTECTIONISM IN AMERICA: 1822–1890 (Lars Magnusson ed., 2000). Other reasons for barriers to trade include, *inter alia*, enhancing national security, promoting religious or aesthetic goals, and preserving or encouraging a specific type of economic activity. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 19–24 (2d ed. 1997).

<sup>111</sup> “Trade allows countries to concentrate on what they can do best. No two countries are exactly alike in natural resources, climate or work force. Those differences give each country a ‘comparative advantage’ over the others in some products.” JACKSON, *supra* note 110, at 12 (quoting BILL BRADLEY & FRITZ LEUTWILER, *TRADE POLICIES FOR A BETTER FUTURE: PROPOSALS FOR ACTION* 23 (1985)). For a more detailed discussion of the theory of comparative advantage, see *id.* at 14–18.

<sup>112</sup> See *id.* at 11–12.



Reducing or removing barriers encourages international trade.<sup>113</sup> “[T]he lower the barriers between the nations, the less obstructions to trade, the more business that will be conducted . . . .”<sup>114</sup> Trade promotion authority is intended to facilitate the implementation of international trade agreements in order to promote free trade and to act as a stimulus for the economy.<sup>115</sup> Trade promotion authority makes it possible for Congress and the President “to work together to open new markets for American exports, set fair rules of conduct for U.S. investors overseas, and help raise the standard of living for millions of people around the world.”<sup>116</sup>

Despite the many changes to previous fast-track legislation, the purpose was always “to give the administration the tools it need[ed] to liberalize trade and create new opportunities for America’s farmers, ranchers and workers;” the new TPA continues to pursue the same goal.<sup>117</sup> “By empowering the President to negotiate bilateral and multilateral trade agreements, TPA will enable the President to eliminate trade barriers, reduce tariffs, and open foreign markets to American goods and services.”<sup>118</sup>

To facilitate the reduction of barriers, the President must have credibility when negotiating. Without TPA, foreign countries know that the President does not have the authority to enact the agreements that he is negotiating.<sup>119</sup> Trade promotion authority gives the President credibility at the international negotiating table.<sup>120</sup>

<sup>113</sup> *Id.*

<sup>114</sup> *Economic Integration Panel Discussion, supra* note 1, at 89 (statement of panelist Manny A. Mencia, Vice President and Chief Operating Officer of Enterprise Florida, Inc., Division of International Trade and Economic Development).

<sup>115</sup> *See* 148 CONG. REC. S7789 (daily ed. Aug. 1, 2002) (statement of Sen. Brownback). The current economic decline has been blamed on the lack of TPA over the last eight years. Terese Carr, Comment, *The Executive Trade Promotion Authority and International Environmental Review in the Twenty-First Century*, 25 HOUS. J. INT’L L. 141, 159 (2002) (“[T]he U.S. is party to only three of the 131 international trade agreements currently in effect. The result: U.S. exports have suffered, and U.S. jobs continue to be exported abroad . . . .”) (quoting Richard S. Dunham, *How Bush Should Push Trade*, BUS. WK. ONLINE, Aug. 12, 2002, available at 2002 WL 5146824).

<sup>116</sup> 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley).

<sup>117</sup> *Id.* at S9108.

<sup>118</sup> *See* 148 CONG. REC. S7775 (daily ed. Aug. 1, 2002) (statement of Sen. McCain).

<sup>119</sup> *Cf.* Koh, *supra* note 45, at 148 (asserting that fast-track procedures “bolstered the Executive Branch’s negotiating credibility”).

<sup>120</sup> 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (stating that the TPA “will make it easier for the President to negotiate strong trade agreements”). *See, e.g.*, U.S. DEP’T OF STATE, FACT SHEET: A TIMETABLE FOR GLOBAL TRADE NEGOTIATIONS, at <http://usinfo.state.gov/topical/econ/wto/wwwwh01120401.html> (last visited Mar. 4, 2003) (quoting Pascal Lamy, European Union Commissioner for Trade, following the Doha launch of global negotiations: “If [President Bush] doesn’t get [trade promotion] authority fairly quickly, then no one will negotiate. Useful negotiations won’t be able to commence.”).

Foreign nations have more reason to believe that the President has the ability to enact the promised changes when he is negotiating under the authority of TPA.<sup>121</sup>

In addition to enhancing credibility in negotiations, Congress was concerned with putting the United States back into a leadership position in international trade.<sup>122</sup> By taking the lead in international trade, the United States can exert greater influence on the course of negotiations.<sup>123</sup> “[Congressional] proposals will be propelled with added force” as a result of the TPA legislation.<sup>124</sup> The executive branch also advocated TPA in order to “take the offense on America’s trade negotiating agenda.”<sup>125</sup>

During the congressional hearings regarding the Act, legislators gave a variety of other reasons in support of granting TPA to the President. For example, the Act would “reestablish[] the traditional partnership on trade between the Congress and the Executive branch.”<sup>126</sup> Furthermore, the procedures ensure that the President remains accountable when exercising powers constitutionally granted to Congress “because Congress still participates in drafting and adoption of the implementing legislation.”<sup>127</sup>

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<sup>121</sup> Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 236 (1995) (stating that TPA “provides the President with flexibility and credibility when negotiating trade agreements because trading partners have greater confidence that Congress will not unravel hard-won trade agreements”).

<sup>122</sup> 148 CONG. REC. S7772 (daily ed. Aug. 1, 2002) (statement of Sen. Grassley) (“Nations around the world are waiting for . . . the United States to reestablish its leadership that we haven’t had for 9 years. I hope we will not let them down.”). During the eight years without TPA, the rest of the world actively pursued agreements liberalizing trade. “Mexico has made bilateral trade agreements with everybody . . . while we have been sitting here arguing about fast-track . . . . So Mexico is putting pressure on all of us. And Chile is doing the same thing.” *Economic Integration Panel Discussion*, *supra* note 1, at 94 (statement of panelist Kenneth H. “Buddy” MacKay).

<sup>123</sup> See *Extraterritorial Income Laws and U.S. Competitiveness: Hearing Before the Senate Fin. Comm.*, 107th Cong. (2002) [hereinafter *Extraterritorial Income Laws*] (statement of Robert B. Zoellick, U.S. Trade Representative); see also 148 CONG. REC. S7775 (daily ed. Aug. 1, 2002) (statement of Sen. McCain) (stating that enactment of the Trade Act of 2002 will reestablish a strong negotiating role for the United States).

<sup>124</sup> *Extraterritorial Income Laws*, *supra* note 123 (statement of Robert B. Zoellick) (referring to a U.S. “proposal in the global Doha WTO negotiations to liberalize the world agricultural trade” made in July 2002).

<sup>125</sup> *Id.* (statement of Robert B. Zoellick).

<sup>126</sup> 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley) (speaking in favor of the Trade Act of 2002 Conference Report). “[T]he history of Congressional involvement in the negotiation of treaties and other international agreements has its roots in the very origins of our Nation.” 148 CONG. REC. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

<sup>127</sup> Straight, *supra* note 121, at 236.

Despite the recognition of the loss of international negotiating power, Congress was slow to delegate power to the President. The new TPA was granted “only after nearly 10 years of careful consideration and negotiation of terms, and close votes in the Senate and House.”<sup>128</sup> Congress granted TPA to the President with strong reservations and jealously guarded its power, refusing to delegate any more than necessary. The Trade Act of 2002 does “not give the President a blank check. Far from it.”<sup>129</sup>

Congress retained far more control over the negotiation of international trade agreements than it had in previous legislation. Although Congress claimed to “provide the President with the flexibility that he needs to negotiate strong international trade agreements while maintaining [its own] constitutional role over U.S. trade policy,”<sup>130</sup> it still acknowledged that the Act is “much stronger than previous fast-track bills.”<sup>131</sup>

The “all or nothing” methodology of fast-track procedures reduces the pressure on representatives by special-interest groups.<sup>132</sup> Despite that, Congress included a variety of restrictions in the Act designed to appease special-interest groups. As a result, “[i]t is far from clear . . . whether the President will receive the bipartisan support he needs to use the trade promotion authority effectively.”<sup>133</sup>

Opponents of TPA comprise a diverse cross-section of society.<sup>134</sup> Environmental groups,<sup>135</sup> labor groups<sup>136</sup> and even religious groups<sup>137</sup> have spoken

<sup>128</sup> Editorial, *Chile and US: Promising Partner with a Troubled Past*, PITTSBURGH POST-GAZETTE, Oct. 1, 2002, at 22.

<sup>129</sup> 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (promoting the Trade Act of 2002 conference report).

<sup>130</sup> 148 CONG. REC. S7771 (daily ed. Aug. 1, 2002) (statement of Sen. Grassley).

<sup>131</sup> *Id.* at S7768 (statement of Sen. Baucus).

<sup>132</sup> Brian J. Schoenborn, Note, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 138 (1995) (“For the most part, fast-track was a successful attempt at reducing the special interest politics which often plague the federal government.”).

<sup>133</sup> Carr, *supra* note 115, at 143.

<sup>134</sup> See Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195, 197 (1994). The recent trend toward protectionism has been labeled “New Protectionism.” Unlike old protectionism, with which big business protected its interests, new protectionism “seeks to protect *public* interests, like health or the environment or safety standards or reduction of poverty.” *Id.*

<sup>135</sup> Letter from the Center for International Environmental Law, to House of Representatives, *Reject the Trade Promotion Act of 2001 (June 27, 2001)*, available at [http://www.ciel.org/Tae/Trade\\_Crane.html](http://www.ciel.org/Tae/Trade_Crane.html) (also signed by six other environmental organizations); Reed McManus, *Ten Reasons to Oppose “Fast Track”*, SIERRA MAGAZINE, Mar./Apr. 2002, at <http://www.sierraclub.org/sierra/200205/1013.asp>. The argument that free trade is harmful to the environment is relatively new. See Charnovitz, *supra* note 134, at 196–97. Environmentalists argue that free trade negatively impacts the environment in many ways. For example: “Free trade may spur economic development. Nations that develop

out in opposition to TPA. These groups argue that TPA is not necessary. As evidence, they point out that few agreements have been enacted under similar legislation.<sup>138</sup> Only five international trade agreements were ever enacted using the fast-track procedures of previous legislation.<sup>139</sup>

This argument ignores the fact that all but one international trade agreement in effect for the United States were passed using the fast-track process.<sup>140</sup> In addition, countries that had previously indicated an interest in negotiating free-trade agreements with the United States abandoned those plans after fast track expired in 1994.<sup>141</sup> Since the Trade Act of 2002 was passed, those countries have again expressed a willingness to begin negotiations toward a free-trade agreement with the United States.<sup>142</sup>

without sufficient environmental controls may suffer from increased pollution and depleted natural resources. . . . Also, natural resources are finite. A nation that squanders natural resources by failing to recycle or conserve could conceivably use up resources needed by other nations." Block & Herrup, *supra* note 3, at 239.

<sup>136</sup> See AM. FED'N OF LABOR & CONGRESS OF INDUS. ORG. (AFL-CIO), STOP FTAA - IT'S THE WRONG CHOICE, at <http://www.aflcio.org/issuespolitics/globaleconomy/ftaamain.cfm>; see also Housman & Orbuch, *supra* note 68, at 759 (claiming the primary concern of American labor groups is the fear that "cheaper imported products . . . will cause job loss in the United States").

<sup>137</sup> See Letter from Interfaith Working Group on Trade & Investment, to Congress (Oct. 16, 2001), available at <http://www.mcc.org/us/globalization/partners/trade.html> (arguing that free trade must be pursued subject to "moral principles" and opposing H.R. 3005 which granted TPA); see also GEN. BD. OF CHURCH & SOC'Y, UNITED METHODIST SOCIAL AGENCY CALLS FOR TRADE LEGISLATION THAT BENEFITS COMMON GOOD, at <http://www.umc-gbcs.org/news/viewsnews/php?newsId=181> (Oct. 5, 2001).

<sup>138</sup> 148 CONG. REC. S7779 (daily ed. Aug. 1, 2002) (statement of Sen. Hollings) ("You will find, in essence, five trade agreements as a result of fast track, and thereafter some 200 agreements without fast track. The contention that you can't get an agreement unless you have fast track is totally absurd.").

<sup>139</sup> See LAEL BRAINARD & HAL SHAPIRO, BROOKINGS INST., FAST TRACK TRADE PROMOTION AUTHORITY: A PRIMER AND A PRESCRIPTION FOR PROGRESS (2001), available at <http://www.brook.edu/comm/policybriefs/pb91.htm>; Taylor, *supra* note 39, at 13 n.49:

These agreements are: the Tokyo Round of the GATT in the Trade Agreements Act of 1979; the U.S.-Israel FTA in the United States-Israel Free Trade Area Implementation Act of 1985; the U.S.-Canada FTA in the United States-Canada Free-Trade Agreement Implementation Act of 1988; the NAFTA in the North American Free Trade Agreement Implementation Act; and most recently, the Uruguay Round of the GATT.

See also JOHN SWEENEY, THE HERITAGE FOUND., EXECUTIVE MEMORANDUM: FAST-TRACK NEGOTIATING AUTHORITY: THE FACTS (1998), available at <http://www.heritage.org/Research/TradeandForeignAid/em549.cfm>.

<sup>140</sup> See Carr, *supra* note 115, at 148-49.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

Opponents also argue that TPA is “undemocratic”<sup>143</sup> and violates the power structure created in the Constitution.<sup>144</sup> They argue that the drafters of the Constitution intentionally separated the authority to negotiate international agreements and the power to implement the agreements.<sup>145</sup> Additionally, they argue that the drafters intentionally made Congress solely responsible for regulating commerce.<sup>146</sup> Therefore, the delegation of that authority to the President is unconstitutional.<sup>147</sup>

Congress is permitted to delegate its power, however.<sup>148</sup> The “separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.”<sup>149</sup> The standard for determining whether delegation of Congressional power to the Executive is constitutional rests on the “intelligible principle standard.”<sup>150</sup> The courts have recognized that Congress must be permitted to delegate some of its powers in order to be able to function.<sup>151</sup> The standard is relatively broad because “in our

<sup>143</sup> Housman & Orbuch, *supra* note 68, at 724. For a critical analysis of the reasons why fast track is *not* undemocratic, see Koh, *supra* note 45, at 161–71. Some supporters of fast track go so far as to suggest that fast track *promotes* democracy. E.g., F. Amanda DeBusk, *Mapping the Landscape: Perspectives on the Implementation of Free Trade Agreements*, 2 RICH. J. GLOBAL L. & BUS. 141, 141 (2001).

<sup>144</sup> See Paul, *supra* note 17, at 723 (arguing that the various mechanisms used to bypass the advice and consent procedures of Article II, including fast track, “frustrate[] representative government”).

<sup>145</sup> See, e.g., Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT’L L.J. 631 (1994) (opposing fast-track legislation); see also 148 CONG. REC. S7789–90 (statement of Sen. Byrd). See generally Paul, *supra* note 17, at 722–37.

<sup>146</sup> 139 CONG. REC. S8322 (daily ed. June 30, 1993) (statement of Sen. Thurmond) (“Article I, section 8 of the Constitution gives to Congress alone the right and responsibility to regulate foreign commerce.”).

<sup>147</sup> Holmer & Bello, *supra* note 66, at 192 n.57 (quoting two members of the House of Representatives who claimed fast track was unconstitutional).

<sup>148</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); *Cargo of Brig Aurora, Burn Side v. United States*, 11 U.S. (7 Cranch) 382 (1813). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002) (arguing that “there is no such nondelegation doctrine: A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power. Agents acting within the terms of such a statutory grant are exercising executive power, not legislative power.”).

<sup>149</sup> *Mistretta*, 488 U.S. at 372.

<sup>150</sup> Linarelli, *supra* note 26, at 206 n.8. The intelligible-principle standard is restated in *Mistretta*: “So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” 488 U.S. at 672 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409) (alteration in original).

<sup>151</sup> See, e.g., *Mistretta*, 488 U.S. at 372.

increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."<sup>152</sup> The Trade Act of 2002 and the previous fast-track legislation all clearly provided sufficient guidance to demonstrate that Congress had provided an intelligible principle for the executive branch to carry out its delegated tasks.

President Bush has specifically indicated that he will use the Trade Act of 2002 to negotiate the Free Trade Agreement of the Americas (FTAA) and free-trade agreements with Chile, Singapore, and Morocco.<sup>153</sup> The trade agreement with Chile could potentially be the first legislation passed under the new TPA<sup>154</sup> with "the remainder of the hemisphere not far behind."<sup>155</sup> President Bush promoted the TPA

<sup>152</sup> *Id.*

<sup>153</sup> Notification to the Congress of Trade Negotiations, Memorandum for the USTR, 67 Fed. Reg. 62,163 (Oct. 1, 2002). The memorandum instructed the USTR to notify Congress of the President's intent to "enter into negotiations on a Free Trade Agreement with the Kingdom of Morocco and a Free Trade Agreement with Central American Countries" pursuant to the Trade Act of 2002. *Id.* The memorandum also instructed the USTR to notify Congress of the "ongoing negotiations on Free Trade Agreements with the Republic of Singapore and the Republic of Chile, negotiations to establish a Free Trade Area for the Americas, and negotiations under the auspices of the World Trade Organization." *Id.*

<sup>154</sup> Editorial, *Chile and US*, *supra* note 128 (suggesting that if U.S.-Chilean negotiations reach a successful conclusion and "the new trade promotion authority process [works] smoothly," Congress could approve the new agreement early in 2003); accord John O'Leary, Editorial, *Talks with Chile Resume at Crucial Moment*, S. FL. SUN-SENTINEL, Sept. 24, 2002, at A15 ("Chile tops the Washington trade agenda now. Chile has earned the right to be our first free-trade partner in South America.").

Negotiations with Chile have been on hold since fast track authority was lost in 1994. See *Economic Integration* Panel Discussion, *supra* note 1, at 94 (statement of panelist Kenneth H. "Buddy" MacKay, Special Envoy for the Americas in the Executive Office of the President under President Clinton).

President Clinton was unsuccessful in obtaining fast-track negotiating authority for trade negotiations with Chile in August of 1994. Several Congressmen staunchly opposed linking labor and environmental issues with trade agreements. On September 13, 1994, when the Clinton administration officially announced it was withdrawing its plan to seek fast-track negotiating authority from Congress, it looked as though a U.S.-Chile free trade agreement would be delayed until at least the beginning of 1995. But U.S. Trade representative Mickey Kantor reassured Chilean government officials once again that the United States remained "firmly committed" to negotiating a free trade deal with Chile.

Kevin M. Jordan, *Intellectual Property Under NAFTA: Is Chile Up to the Challenge?*, 2 TULSA J. COMP. & INT'L L. 367, 370 (1995) (citations omitted). Despite such reassurances, a free-trade agreement with Chile has not been forthcoming. See *Economic Integration* Panel Discussion, *supra* note 1, at 94 (statement of panelist Kenneth H. "Buddy" MacKay).

<sup>155</sup> O'Leary, *supra* note 154 ("[T]he focus on free trade already is moving from Chile to the Americas.").

as a “critical step for U.S. economic growth,”<sup>156</sup> emphasizing that other countries had implemented numerous trade agreements while the U.S. was left without an effective means to negotiate.<sup>157</sup> President Bush, therefore, has begun an aggressive campaign to initiate negotiations for international trade agreements under the new Trade Act of 2002.<sup>158</sup>

#### IV. TRADE PROMOTION AUTHORITY AS A SOLUTION

Congress’s refusal to enact fast-track or trade promotion authority legislation between 1994 and 2002 indicates legislators’ unease with the delegation of international trade regulation authority.<sup>159</sup> In enacting the Trade Act of 2002, Congress delegated some power to the executive branch,<sup>160</sup> however, it attached so many strings that the result is a piece of legislation that gives lip service to the goals of fast track. The Trade Act of 2002 grants very little power to the President, allowing Congress to retain ultimate control and discretion over all trade agreements. The Trade Act of 2002 “makes Congress a full partner in trade [negotiations] by laying out negotiating objectives on a number of topics and creating a structure for consultations.”<sup>161</sup>

Congress’s reluctance to delegate the authority to enact trade agreements is understandable. Members of Congress are under considerable pressure from a wide variety of special-interest groups to protect American business interests. Free trade stimulates efficient sectors of the economy, but inefficient sectors suffer.<sup>162</sup> No individual wants to be forced out of business in the interest of free trade. Despite

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<sup>156</sup> Proclamation No. 7564, 67 Fed. Reg. 35,893 (May 17, 2002).

<sup>157</sup> President George W. Bush, Remarks at the Signing of the Trade Act Of 2002 (Aug. 6, 2002), available at <http://www.tpa.gov/WH-Pres-TPA-signing.htm>.

With trade promotion authority, the trade agreements I negotiate will have an up-or-down vote in Congress, giving other countries the confidence to negotiate with us. Five Presidents before me had this advantage, but since the authority elapsed in 1994, other nations and regions have pursued new trade agreements while America’s trade policy was stuck in park.

With each passing day, America has lost trading opportunities, and the jobs and earnings that go with them. Starting now, America is back at the bargaining table in full force.

*Id.*

<sup>158</sup> O’Leary, *supra* note 154.

<sup>159</sup> See Holmer & Bello, *supra* note 66, at 192–93 (explaining the positions of some fast-track opponents).

<sup>160</sup> See Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.A. §§ 3801–13 (West Supp. 2003).

<sup>161</sup> 148 CONG. REC. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus).

<sup>162</sup> 148 CONG. REC. S7775 (daily ed. Aug. 1, 2002) (statement of Sen. McCain) (“Are there people who are hurt by this free and open trade? Absolutely.”).

that, it is the duty of Congress to protect the interests of the United States.<sup>163</sup> By relinquishing the power to regulate commerce to the President, Congress absolves itself of responsibility for the final negotiated agreement.<sup>164</sup>

In addition, Congress should learn from history and restrict its interference with the President's ability to negotiate. The sixty-year delegation of authority to the

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<sup>163</sup> See generally 5 U.S.C. § 3331 (2004). This provides the Oath of Office for members of Congress:

I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

<sup>164</sup> Chip Roh, Opening Remarks at the NAFTA: Reflections on the First Year and Visions for the Future Symposium in Tucson, Arizona (Feb. 22–24 1995), 12 ARIZ. J. INT'L & COMP. L. xv, xxiii (1995).

Congress doesn't like fast track in theory because it is, after all, giving up a bit of its powers. On the other hand, some in Congress, and this is one reason that the veteran members of Congress sometimes like it better, realize that the handy thing about fast track is that you've delegated all this responsibility to the President to make the tradeoffs that come in a trade agreement. What members of Congress can do then is explain to their constituents who may be disappointed by one aspect or another of the agreement that: Well, gee, you know, that dumb President did it, but I had to vote for the agreement because, you know, I had other constituents that were for it. So by delegating in that way, you can also delegate blame, which is always a popular thing to do in Washington.

*Id.*

Congress has shown an increased willingness to delegate substantial legislative powers to the Executive in the last two years. In addition to reenacting fast-track legislation permitting the President to regulate international commerce in the fall of 2002, Congress made a "sweeping delegation of 'Category I' war power to the President" in the fall of 2001. Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 251 (2002). In authorizing the President "to use force against not only 'nations,' but also 'organizations or persons' that 'he determines' 'planned, authorized, committed or aided' the September 11 attacks 'or harbored' such organizations or persons," Congress made "an extraordinarily broad delegation [of power] — arguably the broadest congressional delegation of war power in our nation's history." *Id.* at 251–52 (quoting 50 U.S.C. § 1541, Authorization for Use of Military Force); see also 139 CONG. REC. S14,780 (daily ed. June 30, 1993) (statement of Sen. Thurmond) (speaking against fast-track legislation on the grounds that fast track is merely a means "of avoiding the constitutional obligations of this body"); John Hart Ely, *Kuwait, The Constitution, And The Courts: Two Cheers For Judge Greene*, 8 CONST. COMMENT. 1 (1991) (arguing that Congress willingly shirks responsibility whenever it is politically expedient to do so). *Contra* Linarelli, *supra* note 26, at 207 ("Congress . . . has in no way abdicated its prerogative over the regulation of foreign commerce. In fact, Congress has more vigorously asserted its authority in recent trade legislation by imposing substantial limitations on the President's authority.").



President resulted from the painful lesson of the Great Depression.<sup>165</sup> Congress passed the Smoot-Hawley Tariff Act, which drastically increased tariffs,<sup>166</sup> in response to protectionist efforts.<sup>167</sup> The high tariffs resulted in retaliatory trade policies by many trading partners and the U.S. economy suffered.<sup>168</sup>

Congress has demonstrated historically that it is ill-suited to directly create international trade agreements.<sup>169</sup> Fast-track procedures “reduce[] the haggling, pork-barreling, and log-rolling typically associated with important political issues.”<sup>170</sup> Legislators recognize the need to provide some social regulations<sup>171</sup> but have proven to be unable to appropriately balance the desires of special interest groups against the well-being of the nation.

TPA “demonstrates to our trading partners the alliance that exists between the executive and legislative branches to help raise living standards through out [sic] the world. This is vital to securing new free trade agreements with potential negotiating partners.”<sup>172</sup> Congressional skepticism regarding international agreements “ha[s] been created by groups seeking greater environmental and labor protections; and . . . from businesses leery of increased competitive pressures at a time of domestic economic downturn.”<sup>173</sup>

The degree of Congressional oversight and intervention provided in the Trade Act of 2002 will make it difficult for the United States to negotiate trade agreements under the Act. One of the main advantages of fast track was that the President could negotiate agreements without pandering to individual lobbies. The creation of international agreements requires that sacrifices be made in exchange for gains.<sup>174</sup>

<sup>165</sup> See Taylor, *supra* note 39, at 17 n.62 (arguing that tariff increases were a cause of the Great Depression).

<sup>166</sup> See Koh, *supra* note 36, at 1194.

<sup>167</sup> See *id.*

<sup>168</sup> See Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 202 n.25 (1987).

<sup>169</sup> See *supra* notes 34–40 and accompanying text.

<sup>170</sup> Schoenborn, *supra* note 132, at 139.

<sup>171</sup> See Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 30 (2002). Social regulations may prevent “exposure to lower standards of goods, services, labor conditions, and environmental abuses existing in importing nations,” and may be designed to preserve national security or protect aspects of a culture. Tiefenbrun, *supra* note 107, at 272.

<sup>172</sup> Proclamation No. 7564, 76 Fed. Reg. 35,893 (May 17, 2002).

<sup>173</sup> Janigian, *supra* note 1, at 99.

<sup>174</sup> See Holmer & Bello, *supra* note 66, at 198–99.

Congress must be prepared to shoulder the burden of making trade-offs if it wishes to be a responsible partner in trade negotiations. The classic public injunction of the Congress to any administration in trade negotiations is to achieve 100 percent of all U.S. objectives and to make no concessions. While

Inserting the extremely political legislative branch directly into the negotiating forum complicates the process.<sup>175</sup> For example, NAFTA-implementing legislation was almost killed as a result of Congress's reluctance to extend fast track, which resulted from lobbying by environmental and labor groups.<sup>176</sup>

Congress should not interfere in the development of additional free-trade agreements. "Free Trade Agreements have been good for workers at home and in other countries"<sup>177</sup> because they "promote exports [and] . . . economic efficiency and foster competitive advantage."<sup>178</sup> Although some areas of industry are harmed, generally, the American public benefits from free trade. "Competition and integration lead to stronger growth, more and better jobs, more widely shared gains. Renewed protectionism . . . would lead to a spiral of retaliation that would diminish the standard of living for working people everywhere."<sup>179</sup>

The Bush Administration has argued that "Trade Promotion Authority deepens the partnership between the Executive branch and the Congress. It enhances the trade-related prerogatives of the legislative branch, while providing a structure and orderly process for the consideration of presidentially-negotiated trade agreements."<sup>180</sup> The Trade Act of 2002 is an improvement over the last eight years without any fast-track procedure, but it falls far short of the degree of delegation needed for the President to be able to negotiate effectively. Specifically, the President is subject to so many limitations and is required to pursue so many objectives that the give-and-take required to negotiate will be hindered, if not made completely impossible.

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this is an understandable starting point, it is impossible to realize. Negotiations are based upon compromise. Trade agreements are likely to endure only if they embody compromise, since sovereign governments adhere over time only to arrangements that, on balance, serve their interests.

. . . [M]embers must be prepared to prioritize their objectives and to share with the administration their advice about negotiating positions.

*Id.*

<sup>175</sup> *Id.*; see also Koh, *supra* note 45, at 148, arguing that:

[Fast track] allowed Congress to overcome both the political inertia and the procedural obstacles that frequently prevent a controversial measure from coming to a vote at all. Second, it controlled domestic special interest group pressures that might otherwise have provoked extensive, ad hoc amendment of a negotiated trade accord. Third, it bolstered the Executive Branch's negotiating credibility with United States allies.

<sup>176</sup> See *supra* notes 135–36.

<sup>177</sup> DeBusk, *supra* note 143, at 141.

<sup>178</sup> *Id.*

<sup>179</sup> William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, 80 NEB. L. REV. 715 (2001) (quoting President William Jefferson Clinton).

<sup>180</sup> UNITED STATES TRADE REPRESENTATIVE, TRADE PROMOTION AUTHORITY AND THE CONGRESS, (2001), at <http://www.ustr.gov/new/2001-12-03-tpa-congress.htm>.

Despite the fact that the President and Congress are now of the same political party,<sup>181</sup> the Trade Act of 2002 leaves the President in a position where he must continually consult with Congress and follow its guidance. For example, during debate in the Senate following passage of the Trade Act of 2002, Senator Baucus pointed out that members of Congress would be permitted to attend negotiations.<sup>182</sup> Any deviation from the “approved” plan will result in a “thumbs-down” vote on a proposed trade agreement. Ultimately, if international trade agreements are approved, they will be the result of successful lobbies in Congress rather than the pursuit of free trade, and will benefit a small group rather than the United States as a whole.

## V. CONCLUSION

Despite claims that great strides have been taken toward promoting free trade,<sup>183</sup> Congress has not granted the President sufficient discretion in international trade negotiations with the Trade Act of 2002. Instead, Congress has enacted a piece of legislation that actually usurps presidential powers under the guise of promoting free trade. In reality, members of Congress continue to hold the reins of commerce, afraid to let go due to the political ramifications for their constituencies should they do so. Fear and protectionism abound in the current Congress and will undermine any real attempts by the President to exert leadership in the arena of free trade. The Congressional Oversight Group provides a means for Congress to not only keep tabs on the negotiations through the President, but also to be present and active in negotiations.<sup>184</sup>

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<sup>181</sup> When the Trade Act of 2002 was enacted, the Senate was controlled by the Democratic party. The Republicans won control of both houses of Congress in the 2002 elections.

<sup>182</sup> See 148 CONG. REC. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus) (stating “[c]ongressional trade advisers and staff should have access to regularly scheduled negotiating sessions”).

<sup>183</sup> See 148 CONG. REC. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley): [T]he underlying premise of the TPA Act of 2002 is to provide the President and our trade negotiators with flexibility so they can negotiate the best trade agreements for the American people. It is not intended, nor should it be used, to try to tie the President’s hands on any particular issue.

<sup>184</sup> See Christopher S. Rugaber, *Trade Policy: Baucus, Other Senators Press Zoellick on Trade Consultation Issues*, 19 INT’L TRADE REP. 1901, Nov. 7, 2002, at 1901. (“[D]esignated congressional trade advisers and their staff should be able to ‘attend and observe’ trade negotiations, and . . . should have access to negotiating documents, with sufficient opportunity to comment on them. . . . [T]here should be enough time for reasonable congressional suggestions to be incorporated into U.S. negotiating positions.”) (quoting letter from Senator Max Baucus et al., to Robert B. Zoellick, U.S. Trade Representative (Oct. 31, 2002)).

Recognizing that the Constitution gives Congress power over foreign trade policy, it would be inappropriate for the President to negotiate international trade agreements without regard to Congressional opinions. Congress is unable to rationalize the concessions that are necessarily part of the negotiation process, however. Therefore, it should delegate the determination of the details to the Executive branch. That will allow the President to follow the policy objectives provided by Congress while pursuing a realistic strategy of negotiations.

The early fast-track legislation provided this balance of power. The Trade Act of 2002 does not; it is a sham in which Congress purports to delegate power to the Executive but keeps such a tight rein that the President cannot effectively negotiate. When the President goes to the negotiating table, he will get concessions from other countries and will make concessions in exchange. When he returns to Congress to report the status of the negotiations, Congress may respond that he violated one of its directives and may not approve the agreement, forcing the President to return to the negotiating table. It is unrealistic for Congress to expect to get everything that it wants without any sacrifices; that is no way to negotiate. Ultimately, the President holds the constitutional authority to negotiate.<sup>185</sup> The Trade Act of 2002 puts Congress at the negotiating table, which it is not authorized to do under the Constitution. It is a clear usurpation of presidential power.

Congressional mistrust of the President in the negotiation of international trade agreements dates back to the Kennedy Round — before fast track was introduced. It is unreasonable to refuse the President discretion in negotiations based on the behavior of Presidents prior to the enactment of fast-track legislation. With fast track, Congress retains the power to ultimately control trade policy without relinquishing full responsibility.

Because the current Act is effective for seven years, it is impractical to start from scratch. An initial step would be to modify the Trade Act of 2002 to reduce the number of requirements by stating them in broader terms. Congressional participation should be limited to input — setting trade policy goals, which is what the Constitution authorizes. Congress should not be able to derail negotiations midway, and certainly should not be permitted to participate in the negotiations — a power clearly granted to the President. If Congress is dissatisfied, it can inform the President and discuss what trade-offs it would prefer. If the negotiated agreement is truly unpalatable to Congress, it can simply refuse to pass the implementing legislation. Arguments that fast track is an unconstitutional grant of power to the President are unpersuasive because Congress retains ultimate control over the legislative process.

Just as the Trade Act of 2002 is not an effective balance of powers, a return to the status between 1994 and 2002, when the United States had no fast-track legislation, would be equally inappropriate. The United States has lost credibility

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<sup>185</sup> See U.S. CONST. art. II, § 2, cl. 2.

in negotiations and has lost its position as a leader in trade policy over the last eight years. Therefore, rather than leaving the President to rely on a purported delegation of power that does not resolve any of the problems inherent in constitutional separation of powers, Congress should revise the Trade Act of 2002, removing the restrictions on the President's constitutional power to negotiate. The President would then be able to effectively negotiate trade agreements that benefit all people of the United States.

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