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Congressman Walter Jones
U.S. House of Representatives
Washington, D.C. 20515

Re: Constitutional Infirmary in Fast Track Authority

Dear Congressman Jones:

This letter responds to your request to assess the constitutionality of President Obama's request for Trade Promotion Authority, i.e., Fast Track, to negotiate international trade agreements and to gallop them through the legislative branch. I believe such a statute, would violate the Constitution's separation of powers and the exclusive authority of the House of Representatives to determine the rules of its proceedings enshrined in Article I, section 5. That power cannot be delimited by any statute—even if the delimitation can be withdrawn at any time—that gives the President the upper hand in the regulation of foreign commerce. Line-item veto authority conferred on the President by Congress was held unconstitutional by the Supreme Court in *Clinton v. New York*, 524 U.S. 417 (1998), despite the delegation's subjection to revocation by Congress with a superseding statute. Members are elected to be responsible for the exercise of legislative powers enumerated in Article I, section 8, including the regulation of foreign commerce, not to surrender that responsibility to the President.

Congress began intermittently to crown the President with extraordinary international "Fast Track" authority in 1974. See 19 U.S.C. 2191. Traditional legislative decisions were delegated to the President.

*The President in lieu of Congress determined the foreign partners in trade negotiations.

*The President in lieu of Congress decided on the substantive rules for international commercial agreements. Congress set forth only advisory negotiating objectives.

*The President signed trade pacts before approval by Congress, which exposed the United States to international repercussions if Congress balked.

*Ordinary legislative procedures designed to promote deliberation and alternatives to pending bills were abandoned in favor of a virtual presidential ultimatum, i.e., take the President's trade legislation "as is," or crater the entire package. Amendments were prohibited. Relevant committees were compelled to act on the President's bill within 45 days. The House was required to take a floor vote within 15 days thereafter, and a Senate vote was required within 30 days after the House vote. Only 20 hours of debate was permitted in each chamber..

These Fast Track infirmities cause Congress to deny President Clinton such authority in 1988, and constitutional reasons justify repudiating President Obama's euphemistically styled sequel "Trade Promotion Authority" legislation.

Article I, section 5, clause 2 provides in relevant part: "Each House may determine the Rules of its Proceedings...." Its purpose is to enable both the House and Senate to tailor procedural rules for the consideration of legislative matters to promote deliberation, including a range of approaches for pursuing a legislative objective. Rules that might befit a large body like the House might not be suitable for a smaller chamber like the Senate. Moreover, the President was to be excluded from House or Senate rules to fortify the Constitution's separation of powers. Procedures commonly affect substantive outcomes, and the President's role in legislation was to be confined to the exercise of veto authority.


The plenary power of the House to determine its own rules would be upended by enactment of Trade Promotion Authority legislation. House rules for considering trade legislation—characteristically voluminous--submitted by the President would be set by statute, not by a vote of the House alone. Further, the statutory rules would impair the deliberative process: no amendments; truncated committee hearings and floor debate; and, abbreviated opportunity for public scrutiny and advocacy. In addition, the statute, not House rules, would set the agenda for floor time.

The constitutionally illicit purpose of the Trade Promotion Authority legislation is to endow the President with a decisive voice over international trade legislation in violation of the separation of powers by usurping the power of the House to determine its own rules. James Madison elaborated in *Federalist 48* that the separation of powers is violated when one branch exercises an "overruling" influence over the exercise of powers by a co-equal branch. The Supreme Court has been faithful to Madison's original understanding. See e.g., *Commodity Future Trading Commission v. Schor*, 478 U.S. 833, 856-57 (1986). The Trade Promotion Act would give the President an overruling influence over Congress in exercising its power to regulate foreign commerce under Article I, section 3, and thus would be unconstitutional. The legislative game would be procedurally rigged in the President's favor. *Every one of the sixteen trade bills submitted by various presidents under Fast Track has been enacted.*

The TPA's constitutional infirmity is not answered by the fact that Fast Track authority has been periodically granted by Congress since 1974. Legislative vetoes were held unconstitutional despite a much greater longevity in *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

In sum, I believe the TPA would violate the Constitution's separation of powers by giving the President an overriding influence over trade legislation by superseding the power of the House to make its own rules to govern its proceedings.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Bruce Fein", with a stylized flourish at the end.

Bruce Fein
