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There Is No Acceptable “Version” of Fast Track

Fast Track Trade Authority Must be REPLACED so Congress Can Steer a New Direction and Create Agreements that Work for Most Americans

Under the U.S. Constitution, Congress writes the laws and sets our trade policy. And so it was for 200 years. Yet, over the last few decades, presidents have increasingly grabbed those powers through a mechanism known as Fast Track. Fast Track supporters renamed the process “Trade Promotion Authority” in 2002. But that last delegation of Congress’ authority, which sunset in 2007, was the same extraordinary Nixon-era executive branch power-grab procedure.

Fast Track delegated to the executive branch four elements of congressional authority: power to select trade partners, set terms and sign agreements before Congress votes on them; unprecedented authority to write implementing legislation, skirt congressional committee review and amendment processes and directly submit it for a vote; power to override congressional leaders’ control of House and Senate floor schedules and force votes within a set number of days; and an override of normal voting procedures, including a ban on all amendments and limits on debate. Although it was rarely used, Fast Track was essential to pushing damaging pacts like the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) through Congress. In its last years, Fast Track became increasingly controversial as Democratic and Republican administrations alike used it to internationally preempt state policies, seize Congress’ constitutional prerogatives and “diplomatically legislate” significant changes to U.S. domestic non-trade laws. Under Fast Track, Congress faced political accountability for job loss and other problems caused by trade pacts, yet had no authority to ensure that the damaging terms of past pacts were not repeated or expanded.

There is no way to “fix” Fast Track. Its very design forecloses meaningful congressional oversight – or control. Fast Track must be replaced to create trade pacts that deliver economic benefits to the majority, and to shut down the imposition via “trade” negotiation of retrograde one-size-fits-all non-trade policies on federal, state and local governments. Such a new mechanism must put a steering wheel, and when necessary, brakes, on trade negotiators so Congress can ensure that trade agreements promote the public interest. Only by replacing the undemocratic, outdated Fast Track trade authority delegation system can Congress deliver on the public’s strong message of each of the last five elections: no to staying the course on our failed trade policy.

- **Fast Track’s 2007 sunset provides the 114th Congress with a unique opportunity to improve *how* U.S. trade agreements are made and to change the course of our failed trade policy.** In June 2007, “Fast Track” trade authority (cynically rebranded as “Trade Promotion Authority” in 2002) expired. To meet the U.S. public demand for an improved U.S. trade policy, Congress must sunset Fast Track permanently and replace it with a different mechanism that keeps Congress in the driver’s seat. There is no way to “fix” Fast Track. The very structure of Fast Track, which was created in the 1970s when trade agreements only dealt with narrow tariff and quota issues, is entirely inappropriate to the realities of

today's expansive international commercial agreements that delve into vast areas of congressional authority over financial regulation, copyrights, patents, immigration, energy policy, healthcare policy, procurement and more. Today's "trade" agreements require that Congress and state legislatures conform all U.S. laws, regulation and administrative procedures to the expansive terms of the pacts. Trade sanctions can be imposed against the United States for failure to do so. By delegating away to the executive branch in one lump sum huge swaths of Congress' Article I, Section 8 authority, Fast Track allowed trade negotiators to impose an array of non-trade policies, including those that Congress had previously rejected, through the back door of "trade" agreements.

- **Politically, Congress needs a new procedure for trade negotiations because members are being held responsible for the damage but have no control over the formative aspects of agreements.** Under Fast Track, Congress ceded its ability to control the contents of U.S. international commercial agreements, yet members of Congress are stuck with the political liability for the damage bad trade pacts cause – from job offshoring to floods of unsafe imported food and products.
- **The last five elections show that most Americans understand that our current trade policy, symbolized by the Fast Track-enabled NAFTA and WTO, has failed.** The 2014 elections revealed a bipartisan race to align campaign positions with the U.S. public's opposition to current U.S. trade policies, which repeated polls have shown to be the predominant position among Democrats, Republicans and independents alike. Some of 2014's most high-profile races featured both candidates competing to portray themselves as the greater opponent of unfair trade. Republican challengers sought to outdo the fair-trade voting records of Democratic incumbents by proclaiming their own rejection of existing Free Trade Agreements (FTAs), while the incumbents touted their votes against the FTAs and their opposition to Fast Track. Incumbents who could not themselves claim a fair trade record still campaigned against status quo trade by attacking their opponents on offshoring, voicing opposition to tax policies that incentivize offshoring or citing instances of being "tough on China."
- **Most members of Congress were not in office before 1974 when Fast Track was first passed, so they do not know that trade delegation has been done in different ways over the years – with Congress having significantly more control prior to the development of Fast Track.** For Congress to change how it delegates its constitutional authority regarding trade is not only reasonable, but simply restores the balance of powers on trade established in the Constitution. Over the course of America's history, there have been five different regimes of legislative-executive branch coordination on trade agreement policy.* Approximately every 40 years, a new coordination system was created as the subject matter of negotiations changed. A replacement for Fast Track is overdue.

HOW FAST TRACK GOT US INTO BAD TRADE AGREEMENTS

- **While the U.S. Constitution gives Congress exclusive authority to "regulate commerce with foreign nations" (Article I-8), Fast Track delegated away to the executive branch Congress' constitutional authority to set the content of U.S. trade agreements,** as well as other important powers. Under Fast Track, Congress did not have any role in choosing U.S. trade partners. Congress also had no control over the content of trade agreements. The president was authorized to negotiate, sign and enter into agreements before Congress had a chance to vote. In one lump sum:
 - Fast Track delegated away Congress' ability to choose with which countries to launch negotiations. This allowed President Bush, for example, to select Colombia – the world's deadliest country for labor unionists – leaving Congress with no ability to even veto this outrageous choice. Now the Obama administration is prioritizing negotiations for a Trans-Pacific Partnership (TPP) Free Trade Agreement that would include Vietnam, a country cited by the U.S. Department of Labor and U.S. Department of

State for banning independent unions and using child labor and forced labor. In addition, Vietnam's minimum wages are a fraction of those paid even in China.

- Fast Track delegated away Congress' constitutional authority to *set the substantive rules* for international commercial agreements. Congress listed "negotiating objectives" in Fast Track, but these were not mandatory or enforceable and executive branch negotiators regularly ignored them.
 - Fast Track permitted the executive branch to sign trade pacts *before* Congress voted on them, locking in the text and creating a false sense of crisis if Congress wished to change provisions of a signed pact.
 - Fast Track empowered the executive branch to write legislation, circumvent normal congressional committee review, and suspend Senate cloture and other procedures. This meant that under Fast Track, not only was Congress stuck with pre-signed trade agreements, but there was no opportunity even for Congress to tweak the agreements' "implementing legislation" – legislation that could force the change of hundreds of existing U.S. laws to conform them to a trade agreement's terms.
 - Fast Track guaranteed "privileged" House and Senate floor votes within a set time period, regardless of the views of congressional leaders. A House vote was required within 60 days after the president submitted executive-branch-authored implementing legislation and the signed agreement – with the Senate having 30 additional days after House action to vote.
 - Fast Track pre-set extraordinary floor procedures even before negotiations on a deal had started. Fast Track rules forbid all amendments and permitted only 20 hours of debate on a signed deal and all conforming changes to U.S. law.
- **All of these authorities were transferred to the executive branch conditioned only on the executive branch giving Congress a 90-day notice of its intent to start negotiations** with a country and then another 90-day notice before it signed a completed agreement. Fast Track did not allow Congress to revoke its delegation of authority if the executive branch ignored Congress' negotiating objectives. The executive branch alone decided when negotiations were "complete." The no-amendments floor rules and expedited procedures for consideration could only be revoked for failure to comply with the specific notices and certain formal consultations with several congressional committees. Failure to respect Congress' instructions about agreements' terms was not actionable.
 - **Fast Track established private sector "trade advisory committees" through which approximately 600 private advisors, most explicitly representing corporate interests, have privileged access to documents and negotiators.** If it seems like U.S. trade pacts have been written to only suit big business special interests, it is because that is who has had a privileged role in negotiations. Only a few dozen labor, environmental or public health advisors are cloistered in a few of these committees, while numerous corporations, including those most notorious for offshoring U.S. jobs, have multiple representatives in the official trade advisory system. These corporations enjoy unparalleled access to trade negotiators and otherwise secret negotiating texts, granting them the privileged opportunity to say how vast swaths of domestic U.S. law could better conform to their interests.
 - **Under Fast Track, Congress, state officials and the public were sidelined and could not hold U.S. negotiators accountable *during* trade talks.** By the time Congress had a formal say on a trade agreement under Fast Track, it was too late to change the agreement's contents. Congress only got a "yes" or "no" vote *after* an agreement had been signed and "entered into." That vote, on legislation written by the executive branch that bypassed committee markups and amendments, also approved changes to wide swaths of U.S. non-trade law to conform domestic law to the "trade" deal's requirements. The result was "trade" agreements that were not mainly about trade *per se*, but rather that provided new investor privileges that promoted American job offshoring, new limits on domestic regulation of food safety and the environment, and even a new ban on Buy American procurement preferences for all firms operating in

trade pact countries. Fast Track even allowed anti-free-trade provisions to be back-dooed into U.S. law, such as WTO patent extensions that raised U.S. drug costs by over \$6 billion (just with respect to the medicines then under patent in 1995). Meanwhile, the model of “trade” pacts generated under Fast Track has frozen middle class wages and gutted the tax base that supported vital services and infrastructure throughout our country, while increasing poverty and instability overseas.

- **Adding new negotiating objectives to the Fast Track structure – for instance, labor or environmental objectives – will not result in better trade agreements.** Fast Track’s structural design ensured Congress could not hold executive branch negotiators accountable to meet negotiating objectives that Congress set in Fast Track legislation. That is because Congress delegated away the right for the agreements to be signed before Congress had any formal role in approving the contents. **In fact, the 1988 Fast Track, used to negotiate and pass NAFTA and the WTO, explicitly required that labor rights be included in U.S. trade agreements. President George H.W. Bush and his negotiators simply ignored these objectives,** while satisfying the negotiating objectives desired by their business supporters. Under Fast Track, that Bush administration was empowered to sign such agreements despite failing to meet Congress’ labor rights objectives, and then submit them for a no-amendments, expedited vote.
- **Federalism was also flattened by Fast Track.** In a form of international pre-emption, state officials also had to conform local laws to hundreds of pages of non-trade domestic policy restrictions in the “trade” pacts, though state officials did not even have Congress’ cursory post-facto role in the process. State and local officials were bound to comply with many aspects of these pacts – such as limits on public health programs, land-use and zoning policy, product safety and toxics standards and buy-local procurement rules. **There was no mechanism by which to obtain the consent of state legislators before federal negotiators offered to permanently bind state and local policy to comply with the terms of international “trade” agreements that directly implicated state authorities.**
- **Fast Track eliminated “checks and balances” that are essential to our democracy.** The U.S. Constitution gives Congress exclusive authority to set trade policy and gives the executive branch power to conduct international negotiations. This design is one of many checks and balances in the Constitution to avoid one branch of government from having absolute control over a vital policy area. This constitutional design means the president cannot enter into trade agreements unless Congress grants the authority to do so. Historical documents from the time of the Constitution’s framing show that granting Congress the authority to regulate foreign commerce was an intentional decision to move away from the European model, which gave control of such matters to the “king,” and instead to put that power in the body “closest to the people.” The goal was to ensure that power would not be concentrated in a manner that would allow foreign policy concerns or the interests of powerful economic sectors to outweigh the national interest in trade agreements.

THE OUTDATED FAST TRACK CONCEPT IS NOT APPROPRIATE TO THE EXPANSIVE SCOPE OF MODERN “TRADE” AGREEMENTS

- **When Fast Track was passed in 1974, the issues under consideration in trade negotiations were narrowly limited to traditional trade matters.** Trade agreements only dealt with trade in goods – not investment, procurement, services or food safety. The 1970s-era trade deals set tariff levels (taxes charged at the border on imports) and quota levels (how much of an imported good would be allowed). For instance, the first use of Fast Track was for the 1979 General Agreement on Tariffs and Trade (GATT) Tokyo Round Agreement, the text of which was a few dozen pages. The second use of Fast Track was the U.S.-Israel Free Trade Agreement of 1985 – a deal with an implementing bill of less than four pages that only covered tariff cuts and rules on government procurement. Only with Fast Track’s third use, for the

1988 U.S.-Canada FTA, did the issues under discussion in “trade” talks begin to expand into new areas. That FTA made some changes to domestic agriculture, banking, investment, food inspection and other policies. This was the first trade agreement implementing bill that spanned more than 100 pages.

- **The 1993 NAFTA and 1994 WTO agreements exploded the boundaries of what was included in “trade” agreements.** Today’s “trade” pacts affect a broad range of domestic non-trade issues including procurement policy – from Buy American rules to prevailing wage laws, financial regulation, patent and copyright standards, energy policy, healthcare policy, food safety, zoning and land use, the environment and more. Plus, the extensive trade and non-trade rules of NAFTA and the WTO, and of subsequent agreements based on the NAFTA-WTO model, are uniquely enforceable. Past trade agreements, like GATT, had included a “sovereignty emergency brake” – typical of many international agreements – that allowed any signatory country the ultimate right to block certain decisions. In contrast, the WTO and NAFTA permitted trade tribunals to issue *binding* rulings. These tribunals are empowered to rule whether any signatory country’s domestic national, state or local laws are out of compliance with the agreement’s requirements, and to authorize trade sanctions – to be imposed indefinitely – on any country that fails to follow WTO or NAFTA tribunal orders to change domestic laws. Just in 2012, the WTO issued orders for the United States to eliminate or change our country-of-origin meat labeling policy, our “dolphin-safe” tuna labeling regime, and our ban on candy-, clove- and cola-flavored cigarettes used to lure young people into smoking.
- **Whether or not Fast Track was a suitable way to negotiate trade pacts in the past, this process clearly is no longer appropriate,** given the increasing amount of *domestic* federal, state and local policy that is being determined in the context of “trade” negotiations. Creative thinking about a better, modern U.S. trade policymaking process must start with the clearing up of a major misconception propagated by defenders of the status quo: Fast Track is not synonymous with “trade authority.” President Clinton was denied Fast Track authority for six of his eight years in office, but still the Clinton administration estimated it completed hundreds of trade pacts – without Fast Track. A new negotiating system to replace Fast Track could still foster trade expansion, while ensuring that the model of expansion meets the needs of working families, farmers and small businesses.

What should replace Fast Track? Visit www.TradeWatch.org for a framework of an alternative trade negotiating system that can deliver trade policy that works for the majority.

* Historically, the way the branches have shared authority for international commercial rule-making has changed, as have the circumstances of international commerce. Prior to 1934, Congress maintained tight control over every detail of trade negotiations. Executive branch negotiators were allowed to negotiate agreements with foreign sovereigns only on specific tariff and quota rates approved by Congress. With the 1934 Reciprocal Trade Agreements Act, Congress delegated to the executive branch multi-year authority to *set* tariff and quota levels within a specified range, *without requiring further congressional approval*, called “tariff proclamation authority.” This procedure was used for the first five rounds of the General Agreement on Tariffs and Trade (GATT) negotiations. The next process was Fast Track, passed in 1974. It established a dramatic shift in trade agreement authority away from Congress to the executive branch. At issue was how to deal with non-tariff trade issues, such as customs classifications, dumping and subsidies, then newly arising in negotiations. The executive branch only had tariff proclamation authority, but in the Kennedy Round of GATT negotiations, negotiators committed to provisions changing U.S. law. This move caused a turf fight between branches over how to coordinate negotiations that might require changes to domestic law – Congress’ jurisdiction. Then-president Nixon claimed that by only approving the tariff aspects of the Kennedy Round, Congress had caused the United States international embarrassment and would cause other nations to stop negotiating with us. Although in fact the next round of GATT talks was launched without any new trade authority delegation in place, Nixon pushed Congress for expanded authority. Nixon proposed that Congress allow him simply to *proclaim* changes to U.S. law required to implement trade pacts. Besides being unconstitutional, this was politically unacceptable to Congress. Fast Track was the “compromise.”