

**TRADE PROMOTION AUTHORITY: EVALUATING THE  
NECESSITY OF CONGRESSIONAL OVERSIGHT AND  
ACCOUNTABILITY**

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I. INTRODUCTION.....	318
II. AN OVERVIEW OF THE TPA.....	321
A. What is the TPA?.....	321
i. Significance of the TPA vis-à-vis Trade Negotiations.....	322
ii. Substantive vs. Procedural Aspects of the TPA	324
B. Doctrinal Framework for the TPA: Presidential and Congressional Powers.....	325
III. THE EVOLUTION OF THE TPA: FROM FAST-TRACK AUTHORITY TO THE TPA.....	326
A. Inception of Fast-Track Authority: A Political Tug-of- War.....	326
B. Historical Concerns over Presidential Abuse of Fast- Track Authority.....	327
C. Creation of Modern Fast-Track Authority: the Trade Act of 1974.....	329
i. Implementation of Procedural Requirements ..	329
ii. Establishment of Timeline.....	330
iii. Substantive Monitoring Requirement.....	330
iv. Guarantee of Agreed upon Content; Up-Or- Down-Vote.....	331
IV. CONGRESSIONAL OVERSIGHT: BEYOND THE 2002 TRADE ACT	331
A. Principles and Purpose of Congressional Oversight in the Context of the TPA.....	332
B. Political Context of the 2002 Trade Act.....	333
C. The TPA under the 2002 Act: Expansion of	

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Congressional Oversight – Was it Effective? .....	333
i. The GAO Report.....	334
1. Quality of Consultation .....	335
2. Timeliness of Consultation .....	335
3. Shortcomings of the COG.....	335
D. TPA-2015: Improved Congressional Oversight, Consultations, and Access to Information.....	336
i. Section 4202: Trade Agreements Authority .....	337
ii. Section 4203: Congressional Oversight, Consultations, and Access to Information .....	337
iii. Section 4204: Notice, Consultations, and Reports.....	339
iv. Section 4205: Implementation of Trade Agreements.....	340
v. Potential Concerns That May Arise From TPA- 2015.....	341
V. ADMINISTRATIVE CONCERNS REGARDING CURRENT CONGRESSIONAL OVERSIGHT.....	342
A. Evaluating the Efficacy of the TPA as an Ex-post Veto Power vis-à-vis <i>INS v. Chadha</i> .....	344
B. Viability of Judicial Review: No Alternative Under Political Question Doctrine.....	347
C. Going Forward: How to Evaluate TPA-2015.....	349
VI. CONCLUSION .....	351

My proposed legislation. . .calls upon the Congress to delegate significant new negotiating authorities to the executive branch. For several decades now, both the Congress and the President have recognized that trade policy is one field in which such delegations are indispensable...the questions which remain concern the degree of delegation which is appropriate and the conditions under which it should be carried out.

President Richard M. Nixon<sup>1</sup>

#### I. INTRODUCTION

On June 29, 2015, President Barack Obama signed legislation to reauthorize the Trade Promotion Authority (“TPA”) and the Bipartisan Congressional Trade Priorities and Accountability Act of

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<sup>1</sup> Richard M. Nixon, President, Special Message to the Congress Proposing Trade Reform Legislation (Apr. 10, 1973), *available at* American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=3800>.

2015 (“TPA-2015” or “the Legislation”), about two and a half months after the bills were introduced in the House and the Senate, and eight years after they expired in 2007.<sup>2</sup> On June 24, 2015, the Legislation passed the House by a vote of 218 to 206, and subsequently the Senate, sixty to thirty-eight, with thirteen Democrats joining all but five Republicans.<sup>3</sup> The TPA, previously known as “fast-track authority” until it was renamed in 2002, refers to “[the] authority of the U.S. president to negotiate international agreements that Congress can approve or disapprove, but not amend or filibuster.”<sup>4</sup> It re-establishes an expedited legislative process for presidents to submit trade deals to Congress. The TPA was last renewed under the Trade Act of 2002 during the George W. Bush Administration.<sup>5</sup> Until it expired on July 1, 2007, eleven Free Trade Agreements (“FTAs”) had been implemented during the tenure of a Republican president and a Democratic president.<sup>6</sup>

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<sup>2</sup> David Nakamura, *In Bipartisan Ceremony, Obama Signs Trade Legislation, Calls for Infrastructure Bill*, THE WASHINGTON POST (June 29, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/29/in-bipartisan-ceremony-obama-signs-trade-legislation-calls-for-infrastructure-bill/>; Bipartisan Congressional Trade Priorities And Accountability, Pub L. 114-26 (codified at 19 U.S.C. §§ 4201-4210 (2016)) (referred to as TPA-2015); *see also* H.R. 1890, 114th Cong. (1st Sess. 2015); S. 995, 114th Cong. (1st Sess. 2015). *See* Press Release, United States Senate Comm. on Fin., Hatch, Wyden and Ryan Introduce Trade Promotion Authority Legislation (Apr. 16, 2015), *available at* <http://www.finance.senate.gov/newsroom/chairman/release/?id=7701eb50-a0ef-4257-bfc1-b06efe725b8c>; Jonathan Weisman, *Deal Reached on Fast-Track Authority for Obama on Trade Accord*, N.Y. TIMES (Apr. 16, 2015), *available at* [http://www.nytimes.com/2015/04/17/business/obama-trade-legislation-fast-track-authority-trans-pacific-partnership.html?\\_r=0](http://www.nytimes.com/2015/04/17/business/obama-trade-legislation-fast-track-authority-trans-pacific-partnership.html?_r=0) (announcing that “key congressional leaders” agreed to give President Obama trade promotional authority and outlining the consequences of passing the new bill).

<sup>3</sup> Jonathan Weisman, *Trade Authority Bill Wins Final Approval in Senate*, N.Y. TIMES (June 24, 2015), *available at* [http://www.nytimes.com/2015/06/25/business/trade-pact-senate-vote-obama.html?\\_r=0](http://www.nytimes.com/2015/06/25/business/trade-pact-senate-vote-obama.html?_r=0).

<sup>4</sup> John Remensperger, *What's the Deal with Fast-Track Authority?*, UNC CTR. FOR MEDIA L. & POL'Y (Feb. 7, 2014), <https://medialaw.unc.edu/2014/02/whats-the-deal-with-fast-track-authority/> (explaining the potential effect of fast-track authority in future trade negotiations).

<sup>5</sup> Trade Act of 2002, 19 U.S.C. §§ 3801-3805 (2002) (referred to as the “2002 Trade Act”). The Trade Promotion Authority in the 2002 Act is found in its Title XXI under the Bipartisan Trade Promotion Authority. *See* Trade Act of 2002, H.R. 3009, 107th Cong. § 2101(a) (2002).

<sup>6</sup> *See* NICHOLAS BAYNE & STEPHEN WOOLCOCK, THE NEW ECONOMIC DIPLOMACY: DECISION-MAKING AND NEGOTIATION IN INTERNATIONAL ECONOMIC RELATIONS 50 (3d ed. 2012) (explaining that the TPA was given out “reluctantly,” and President Obama does not have it at all, since it ran out in 2007). This Article adopts the official World Trade Organization (“WTO”) definition of PTAs, but the PTAs are also commonly referred to as Free Trade Agreements and Regional Free Trade Agreements (“RTAs”). *See generally*, *Scope of RTAs*, WORLD TRADE ORGANIZATION, *available at*

Despite its historical status, reviving the TPA has been more controversial and difficult in recent years; for example, a bill to renew the expired TPA was introduced in January 2014, but it never became law.<sup>7</sup> Fifteen months later, the 114th Congress was faced with the choice of whether the TPA is a “Genie in the Lamp” that must be kept bottled up, or whether it should be renewed in order to facilitate the negotiation and the implementation of pending Preferential Trade Agreements. From an administrative law point of view, the important consideration was if Congress chose to renew the TPA, what should it do to ensure that its delegation to the executive branch is properly accounted for, including securing the congressional role in ever evolving U.S. trade policy.

This Article proceeds under the premise that the renewal of the TPA was a necessary legislative decision for securing congressional involvement in the trade negotiation process, and for successfully concluding pending trade agreements, such as the Trans-Pacific Partnership (“TPP”) and the bilateral trade agreement with the European Union, the Transatlantic Trade and Investment Partnership (“TTIP”). Part I.A provides a brief overview of the doctrinal framework of the TPA, and its constitutional basis as a unique political mechanism in the United States. Part I.B illustrates the significance of the TPA in the context of trade negotiations, and differentiates the procedural versus substantive aspects of the TPA.

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[https://www.wto.org/english/tratop\\_e/region\\_e/scope\\_rta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm) (last visited May 18, 2016) (defining RTAs as reciprocal trade agreements between two or more partners, including free trade agreements and customs unions). See IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 21 (2015) (listing negotiations concluded under TPA granted under the Trade Act of 2002, which are: the Free Trade Agreement (FTA) with Chile (2003); Singapore (2003); Australia (2004); Morocco (2004); [Bahrain (2004)]; Dominican Republic-Central America (2005); Monaco (2006); Peru (2007); Colombia (2011); Korea (2011); and Panama (2011)). Of these eleven, the three FTAs enacted after 2007—Colombia, South Korea, and Panama—were signed before the expiry date under the George W. Bush administration, although President Obama enacted them into law. See also DAVID M. OLSON, *Multilateral Negotiations in American Trade Policy: Free Trade Agreements from Bush to Obama*, in INTERNATIONAL TRADE NEGOTIATIONS AND DOMESTIC POLITICS: THE INTERMESTIC POLITICS OF TRADE LIBERALIZATION 49, 65 (Oluf Langhelle ed., 1<sup>st</sup> ed. 2014) (describing the Obama Administration’s actions to “renegotiate . . . pending agreements (Panama, South Korea, and Colombia) to be able to submit them for congressional approval”).

<sup>7</sup> Bipartisan Congressional Trade Priorities Act of 2014 (“BCTPA”), H.R. 3830, 113th Cong. (2d Sess. 2013); see Press Release, United States Senate Comm. on Fin., Baucus, Hatch, Camp Unveil Bill to Bring Home Job-Creating Trade Agreements (Jan. 9, 2014), <http://www.finance.senate.gov/newsroom/chairman/release/?id=7cd1c188-87f1-4a0b-8856-3fc139121ca9> (explaining the purpose and significance of the TPA legislation).

Part II explains how the TPA evolved in U.S. trade policy since it was first introduced as the fast-track authority. This historical account will show that the TPA, as a congressional-executive agreement, requires Congress's watch over how the president exercises the delegated power by revisiting the political situation that demanded the institution of procedural requirements in the 1970s, standards that became the foundation of the modern TPA. Part III engages in an in-depth analysis of the congressional oversight mechanisms of the TPA, examining its evolution from the Trade Act of 2002 to the recent TPA-2015. Here, the new procedural requirements and legislative tools implemented in the TPA-2015 are described, and their merits, such as ensuring democratic but efficient engagement with the executive branch, are evaluated.

Shifting gears, Part IV navigates potential limitations and administrative law concerns regarding the TPA from a judicial point of view. This Part contemplates a scenario in which the executive branch breaches the procedural requirements prescribed by the TPA, and whether Congress would be able to resort to appropriate judicial remedies in a court of law. Finally, the Article concludes by emphasizing that the new administration, whichever it may be upon the presidential election in November 2016, should ensure an inter-branch cooperation between Congress and the executive branch in exercising the TPA authority, in order to provide transparency and accountability, which the TPA-2015 has set out to do.

## II. AN OVERVIEW OF THE TPA

### A. *What is the TPA?*

The TPA is a political mechanism through which Congress delegates its authority to the president for the purpose of negotiating and entering into certain PTAs.<sup>8</sup> Through an expedited set of legislative procedures, and in conjunction with extensive congressional consultations, the president can submit trade agreements to Congress for an up-or-down vote.<sup>9</sup> In exchange for

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<sup>8</sup> See *infra* Part I.B for an in-depth description of the TPA (outlining the source and inception of fast-track authority).

<sup>9</sup> J.F. HORNBACK & WILLIAM H. COOPER, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 1 (2011); *Trade Promotion Authority (TPA): What is TPA?* COAL. SERV. INDUS. <https://servicescoalition.org/services-issues/trade-promotion-authority-tpa> (last visited May 18, 2016) ("TPA helps create a strategic framework for U.S. trade policy and establishes a critical relationship between the President and Congress in order to

this authority, the executive branch is required to provide various notices, consultations, and reports to Congress on the progress of a trade agreement under negotiation, to ensure Congress's influence over such agreements.<sup>10</sup> Throughout this Article, these procedures will collectively be referred to as "congressional oversight mechanisms."<sup>11</sup> As an *ex-ante* congressional-executive agreement, the TPA creates a symbiotic relationship within both branches' constitutionally vested authorities.<sup>12</sup> Indeed, it is a creative and practical political compact between the president and Congress, designed to adapt to the increasingly complex nature of PTA negotiations.<sup>13</sup>

#### i. Significance of the TPA vis-à-vis Trade Negotiations

In the sphere of trade agreement negotiations, the TPA is often viewed as a necessary tool for enhancing the United States' credibility when its representatives sit at a negotiation table with their counterparts. In the context of trade diplomacy, the following expectations exist: (1) that the United States would be able to guarantee the negotiated terms that were discussed at a negotiating table, and (2) that the final agreements will be given timely and

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pursue trade negotiations.").

<sup>10</sup> COAL. SERV. INDUS., *supra* note 9; *see generally*, White House Fact Sheet: Transatlantic Trade and Investment Partnership (TTIP), Office of the United States Trade Rep. (June 2013), available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2013/june/wh-ttip>; U.S. GOV'T ACCOUNTABILITY OFFICE (hereinafter 2007 GAO REPORT), GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY 33 (2007).

<sup>11</sup> *See infra* Part I.A. for further discussion on the significance of congressional oversight in the context of TPA.

<sup>12</sup> *See* MICHAEL JOHN GARCIA & R. CHUCK MASON, *Congressional Oversight and Related Issues Concerning International Security Agreements Concluded by the United States*, in CONGRESSIONAL OVERSIGHT: AN OVERVIEW, A MANUAL AND SELECT DEVELOPMENTS 189, 192 (2010) (explaining that Congressional authorization takes the form of a statute passed by a majority of both Houses of Congress unlike treaties, where only the Senate plays a role in authorization). For an overview of the political context in which the TPA was born, *see generally*, I.M. DESTLER, *AMERICAN TRADE POLITICS* (4<sup>th</sup> ed. 2005) (describing political reasons and factors behind U.S. trade policy for the past fifty years, and recounting how fast-track authority evolved over time).

<sup>13</sup> In the international trade world, the phenomenon of countries engaging in complex chains of various PTAs has been described as the "Spaghetti Bowl Effect," first coined by Professor Jagdish Bhagwati. *See generally* Jagdish N. Bhagwati, *U.S. Trade Policy: The Infatuation with FTAs* 4-9 (Colum. Univ. Dep't of Econ. Working Paper, Paper Series No. 726), available at <http://hdl.handle.net/10022/AC:P:15619> (1995) (describing problems with preferential trading arrangements, such as increasing "arbitrary and nonsensical" operation of trade policies).

unamended consideration.<sup>14</sup> Especially in complex plurilateral trade negotiations, any withdrawal from, or amendment of, concessions promised by a member state can upset its negotiation efforts. President Obama and the Office of the United States Trade Representative (“USTR”) have publicly spoken on the importance of the TPA for concluding ambitious PTAs that are currently under negotiations.<sup>15</sup> As of April 2016, the closest conclusion on the horizon is the Trans-Pacific Partnership (“TPP”), which intends to expand trade and investment with eleven other countries in the Asia-Pacific area. While the TPP was signed on February 4, 2016, after more than five years of negotiations, it has not yet entered into force. Other major trade agreements under discussion include the TTIP with the European Union (“E.U.”), which recently concluded its twelfth round of negotiation, and the Trade in Services Agreement (“TISA”), a proposed international trade treaty among twenty-three parties with an aim of liberalizing the worldwide trade of services, such as banking, health care, and transport.<sup>16</sup> In spite of the

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<sup>14</sup> See *What is Fast Track? Nat’l Archives & Records Admin.*, available at <http://clinton2.nara.gov/Initiatives/FastTrack/what.html> (last visited May 18, 2016) (“[U]ltimately, fast track gives the President credibility to negotiate tough trade deals, while ensuring Congress a central role before, during and after negotiations.”). Supporters of the TPA legislation include private sector and trade associations, including the U.S. Chamber of Commerce, the American Farm Bureau Federation, Boeing, Pfizer, and Walmart. Such major corporations have aggressively lobbied for the authority to be granted, since the last TPA bill was introduced in January 2014. See, e.g., Brian Wingfield et al., *Congressional Deal Reached on Obama Trade-Talks Authority*, BLOOMBERG (Jan. 9, 2014), <http://www.businessweek.com/news/2014-01-09/congressional-deal-reached-on-obama-trade-negotiating-powers> (explaining that a coalition of approximately 160 groups support the legislation).

<sup>15</sup> See, e.g., Michael Froman, Ambassador and U.S. Trade Representative, Remarks at the U.S. Conference of Mayors (Jan. 21, 2015) (“America has always been strongest when it speaks with one voice, and that’s exactly what Trade Promotion Authority, or TPA, helps us to do.”).

<sup>16</sup> Trade policy experts have opined on how the role and timing of the TPA would be crucial for the passage and implementation of the TPP. See, e.g., IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS 50 (2015). Press Release, Office of the United States Trade Rep., Trans-Pacific Partnership Ministers’ Statement (Feb. 4, 2016), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>. The twelfth round of the TTIP negotiations was conducted from February 22-26, 2016 in Brussels, Belgium, focusing on market access, regulatory cooperation, and rules issues. See Ignacio García Bercero, E.U. Chief Negotiator, Statement by the EU Chief Negotiator on the 12th TTIP Negotiation Round, available at <http://trade.ec.europa.eu/doclib/html/154325.htm>. For discussion of previous presidents’ and the private sector’s views of the TPA’s advantages, see Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J. L. & POLITICS 345, 345–346 (2003) (explaining that President George W. Bush and President Bill

unpredictable political climate, when the United States further engages in the TTIP and the TISA, former Secretary of State Condoleezza Rice stated that the TPA will remain “a critical tool in the conduct of U.S. diplomacy.”<sup>17</sup>

ii. Substantive vs. Procedural Aspects of the TPA

Trade agreements are often criticized for their impact on sensitive political and economic issues in the U.S. domestic sphere, such as labor and the environment. As such, the TPA has most frequently been debated on the *substantive* matters of Congress’s negotiating objectives.<sup>18</sup> For many, the TPA-2015 discussion revolves around the expanded scope of its non-traditional trade negotiating objectives, such as currency manipulation and the State-Owned and State-Controlled Enterprises.<sup>19</sup> While it is difficult to separate the TPA dialogue into a binary of substantive versus procedural issues, this Article focuses on the *procedural* aspects, namely the congressional oversight mechanisms that will drive the conversation on the degree of accountability that should be required of the executive branch. In its design, these oversight mechanisms will ensure that the executive branch does not receive a “carte

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Clinton both set the TPA as their top legislative priorities for free trade agreements). See also Jasmin Farrier, CONGRESSIONAL AMBIVALENCE: THE POLITICAL BURDENS OF CONSTITUTIONAL AUTHORITY 85 (2010) (citing President Nixon’s Special Message to the Congress Proposing Trade Reform Legislation in April 1973: “[F]or several decades now, both the Congress and the President have recognized that trade policy is one field in which such delegations are indispensable.”). *Trade in Services Agreement*, OFFICE OF THE UNITED STATES TRADE REP., available at <https://ustr.gov/TiSA> (summarizing the launch of the TISA and its likely financial impact in the services trade) (last visited May 18, 2016).

<sup>17</sup> See Condoleezza Rice, *Give Obama Trade-Promotion Authority*, THE WASHINGTON POST (June 5, 2015), available at [https://www.washingtonpost.com/opinions/restore-america-standing-through-trade/2015/06/05/4a28af42-0b77-11e5-95fd-d580f1c5d44e\\_story.html](https://www.washingtonpost.com/opinions/restore-america-standing-through-trade/2015/06/05/4a28af42-0b77-11e5-95fd-d580f1c5d44e_story.html).

<sup>18</sup> See, e.g., Eli J. Kirschner, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 CORNELL INT’L L.J. 385, 394 (asserting that “perhaps the most important tool that Congress has for controlling the contents of trade agreements negotiated under fast track authority is its ability to set negotiating objectives within the TPA legislation”).

<sup>19</sup> A famous example of how a negotiating objective can thwart renewal of fast-track authority is illustrated in President Bill Clinton’s inclusion of labor and environmental issues in side agreements to North American Free Trade Agreement (“NAFTA”). 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. 2 (1994). See also, Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine-Labor-Augmented U.S. Trade Agreements*, 26 COMP. LAB. L. & POL’Y J. 1 (arguing that the inclusion of “non-trade” provisions like labor and environment were one of the main reasons that the fast-track legislation lapsed for an extended period from 1994 until 2002).



blanche" delegation.<sup>20</sup> As this Article examines more closely in Part III below, the TPA-2015 arguably enhanced the congressional rein over the executive branch's exercise of the delegated authority through the new consultation and reporting requirements.

*B. Doctrinal Framework for the TPA: Presidential and Congressional Powers*

As Hal Shapiro has noted, the TPA is "a peculiarly American institution, reflecting the unique challenge of making trade policy in a system where power is divided between the Executive and Legislative Branches."<sup>21</sup> Indeed, the TPA is a unique compromise and solution to a decades-old debate between Congress and the executive branch on how best to carry out the United States' international trade policy objectives through means of trade agreements. This is in sharp contrast to most of the United States' foreign counterparts, where approval of trade agreements is fairly straightforward, especially in countries with a parliamentary governance system, which is led by the prime minister, the leader of the majority party in the legislature. For example, in Canada, the ratification process is wholly controlled by the executive, although Parliament has had an ad hoc involvement, which is not constitutionally mandated.<sup>22</sup>

To understand why the TPA is an inherently fragile political compact, examining its constitutional basis is helpful. As is well known, the separation of powers is a fundamental political doctrine embodied in the Constitution, which confers different powers to the executive, legislative, and judicial branches of the U.S. government. Article II, Section 2 of the Constitution grants the president exclusive authority to negotiate international agreements and treaties, and to conduct foreign affairs.<sup>23</sup> When the president negotiates a trade agreement that requires changes in U.S. tariffs or other domestic laws, however, such agreement is subject to approval by the Senate's

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<sup>20</sup> See Hal Shapiro & Natalie R. Minster, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107 (1995).

<sup>21</sup> HAL SHAPIRO, *FAST TRACK: A LEGAL, HISTORICAL, AND POLITICAL ANALYSIS* 92 (2006).

<sup>22</sup> Laura Barnett, *Canada's Approach to the Treaty-Making Process*, PARL. OF CANADA (Nov 6, 2012), available at <http://www.lop.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm#a6>.

<sup>23</sup> See JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RL97-896, *WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL-EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES* 1 n.1 (2010) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 319 (1936)).

two-thirds super majority vote.<sup>24</sup> As for Congress, Article I, Section 8, Clauses 1 and 3 of the Constitution give exclusive power to set tariffs, to regulate commerce with foreign nations, and to enact other legislation governing international trade.<sup>25</sup> An interesting caveat to this authority is that this express power can be delegated to the president.<sup>26</sup> This institutional flexibility creates an opportunity for the Congress to consider congressional-executive agreements, as opposed to Article II treaties, allowing for inter-branch cooperation in the form of the TPA without depriving either branch of its constitutionally enumerated powers.<sup>27</sup>

### III. THE EVOLUTION OF THE TPA: FROM FAST-TRACK AUTHORITY TO THE TPA

#### A. *Inception of Fast-Track Authority: A Political Tug-of-War*

For the first 150 years of the United States' existence, Congress used its power over foreign trade to set tariff rates on all imported products.<sup>28</sup> The Constitution permits this practice, as the establishment of tariff rates was more a function of domestic tax policy rather than foreign affairs, based in large part on Congress's power to regulate foreign commerce and the conventional treatment of trade legislation as a bill for raising revenue.<sup>29</sup> However, two legislative events occurred in the 1930s that dramatically changed the contours of U.S. trade policy. As a result of these occurrences, the fast-track authority was born.

At the outset of the Great Depression, the Smoot-Hawley Tariff Act of 1930 established prohibitively high tariff rates in response to U.S. producers seeking protection.<sup>30</sup> As a remedial measure,

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<sup>24</sup> U.S. CONST. art. II, § 2.

<sup>25</sup> U.S. CONST. art. I § 8, cls. 1 & 3.

<sup>26</sup> See DESTLER, *supra* note 12, at 2 n.2.

<sup>27</sup> There has been lively scholarly debate on whether congressional-executive agreements are more advantageous than treaties. See John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 2, 2-4 (arguing that treaties and congressional-executive agreements have different "trade-offs" that "make one or the other better suited for different types of pacts").

<sup>28</sup> FERGUSSON, *supra* note 6, at 2.

<sup>29</sup> U.S. CONST., art. I, § 8, cls. 1 & 2 (establishing the power of the Congress, which includes: "power to lay and collect taxes, duties, imports and excises[;]" and, power to "regulate commerce with foreign Nations, and among the several States.").

<sup>30</sup> Smoot-Hawley Tariff Act of 1930, 19 U.S.C. § 1352 (2016) (enacted on June 17, 1930). While economists debate possible causes for the Great Depression, the Smoot-Hawley tariff certainly played an important role. See, e.g., Bill Krist, *Did the Smoot-Hawley Tariff Cause the Great Depression?* AM. TRADE POL'Y (June 16, 2014), available at <http://americatradepolicy.com/did-the-smoot-hawley-tariff-cause-the-great->

Congress developed and enacted the Reciprocal Trade Agreements Act of 1934 (“1934 Trade Act”), which authorized President Franklin D. Roosevelt to enter into reciprocal trade agreements and reduce tariffs within pre-approved levels. This was the first time Congress granted the president power to negotiate bilateral trade agreements without receiving prior congressional approval.<sup>31</sup> Some argue that the 1934 Trade Act signified Congress’s aim to lessen the political pressure from special interests it often faced.<sup>32</sup> Whether or not that was the intention of Congress, what is clear is that from its inception, fast-track authority has been contentious due to its fragile nature as a political compact between the Administration, the House, and the Senate, requiring a significant “give-and-take” by and between these three groups. This concern is evidenced by a statement by Representative Allen Treadway of Massachusetts, the ranking Republican on the Ways and Means Committee at the time, who opposed the 1934 Trade Act: “[Congress] would surrender [its] taxing power to the President and his subordinates in violation of both the letter and spirit of the Constitution.”<sup>33</sup> To this day, the concern of balancing the authority of the executive and the legislative branch remains highly relevant in every subsequent fast-track renewal discussion.

*B. Historical Concerns over Presidential Abuse of Fast-Track Authority*

Presidents seeking fast-track authority from Congress have underscored its necessity to successfully conclude international trade negotiations for the benefit of Americans. For instance, under the Trade Expansion Act of 1962, President John F. Kennedy was granted fast-track authority for five years for the negotiation of the General Agreement on Tariffs and Trade (“GATT”) that aimed to reduce and eliminate tariff walls, which he called “the best protection possible . . . for our American consumers.”<sup>34</sup> When

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depression/#.VU27e0v0-Ns (“Today, the Smoot-Hawley tariffs represent a cautionary tale.”).

<sup>31</sup> 19 U.S.C. § 1351 (2016) (enacted on Jun. 12, 1934). *The Reciprocal Trade Agreement Act of 1934*, U.S. HOUSE OF REP. HISTORY, ART & ARCHIVES, <http://history.house.gov/HistoricalHighlight/Detail/36918> (last visited May 5, 2015).

<sup>32</sup> DESTLER, *supra* note 12, at 14–15.

<sup>33</sup> HORNBACK & COOPER, *supra* note 9 (adding that to assuage such concerns, the bill leading to the Trade Act of 1934 was amended with a three-year expiration date on all trade agreements).

<sup>34</sup> Trade Expansion Act of 1962, 19 U.S.C. § 1801 (2016) (referred to as the “1962 Trade Expansion Act”); John F. Kennedy, President of the United States, Remarks Upon Signing the 1962 Trade Expansion Act (Oct. 11, 1962), *available at*

asking Congress for fast-track authority, President Kennedy sought “two basic kinds of tariff-cutting authority”: (1) “[g]eneral authority to reduce tariffs by 50 percent—including negotiations on broad categories of products—in exchange for concessions from other nations”; and (2) “special authority to reduce or eliminate all tariffs on those products where the United States and the Common Market nations dominate world trade.”<sup>35</sup>

In retrospect, some scholars have observed that in the effort to implement multilateral agreements, the series of fast-track extensions resulted in the “pendulum in the arena of international trade [t]o sw[i]ng toward the President,” going beyond the topics covered by the congressional trade agreements authority.<sup>36</sup> For example, President Kennedy entered into agreements in two areas related to non-tariff barriers (“NTBs”), namely the GATT Anti-dumping Code that would have required changes in U.S. anti-dumping practices, and an agreement requiring U.S. customs valuation to eliminate the American Selling Price method of pricing products at the border.<sup>37</sup> Such action arguably undermined the limitations imposed by the sunset provisions within the 1962 Trade Expansion Act. While the Kennedy Round, as it was called, successfully concluded on June 30, 1967, the last day before the expiration of the 1962 Trade Expansion Act, Congress did not renew the authority for seven subsequent years, as it was concerned over “presidential encroachment on its legislative authority.”<sup>38</sup>

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<http://www.presidency.ucsb.edu/ws/?pid=8946>.

<sup>35</sup> Morris K. Udall, *Congressman's Report: The Trade Expansion Act of 1962: A Bold New Instrument of American Policy* (May 17, 1962), available at <http://www.library.arizona.edu/exhibits/udall/congrept/87th/620517.html>.

<sup>36</sup> Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 698 (1996).

<sup>37</sup> Carrier, *supra* note 36, at 697. See also Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1,191, 1,195 (1986); I.M. DESTLER, RENEWING FAST-TRACK LEGISLATION 6 (1997).

<sup>38</sup> For discussion on the importance of sunset provisions within fast-track authority, see *infra* Part III; see John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 253–54 (1967) (noting that the GATT was not submitted to the Senate to be ratified); WILLIAM H. COOPER, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 4 (2014); see also John Jackson et al., *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 346–51 (1982) (observing that the reason for the unwillingness of Congress to grant the president advance authority to negotiate, accept, and implement the new trade agreements stemmed from addressing the “increasingly troublesome [NTBs] in the GATT negotiations”); see also Koh, *supra* note 37, at 1,194 n.10.

*C. Creation of Modern Fast-Track Authority: the Trade Act of 1974*

The result of the Kennedy Round became the precursor to the creation of fast-track authority in the Trade Act of 1974 (the “1974 Trade Act”), which expanded the congressional role in defining terms for allowing expedited legislative procedures.<sup>39</sup> The 1974 Trade Act provided President Nixon with authority to negotiate the NTBs, such as government procurement practices, customs regulations, and rules for administering anti-dumping (“AD”) and countervailing duty (“CVD”) procedures, as well as the U.S. Generalized System of Preferences (“GSP”) for a 5-year Tokyo Round of GATT through January 2, 1980.<sup>40</sup> The original fast-track processes that the 1974 Trade Act instituted became the foundation for the current TPA. Notably, section 151 the 1974 Trade Act (19 U.S.C. § 2191) strengthened congressional oversight by implementing the following key features.

i. Implementation of Procedural Requirements

The 1974 Trade Act incorporated procedural requirements that the executive branch must follow, such as briefing and consulting congressional committees and private-sector advisory committees during the course of the negotiations, as well as giving advance notice of the president’s intention to conclude an agreement before entering into it.<sup>41</sup> With respect to the briefing requirement, the 1974 Trade Act stated that the USTR is required to keep official advisers of the Committee on Ways and Means or the Finance Committee (“congressional advisers”) currently informed on matters affecting the trade policy and with respect to possible agreements:

negotiating objectives, the status of negotiations in progress, and the nature of any changes in domestic law or the administration thereof which may be recommended to Congress to carry out any trade agreement or any requirement of, amendment to, or recommendation under, such agreement.<sup>42</sup>

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<sup>39</sup> 19 U.S.C. §§ 2010–2476 (2016) (referred to as the “1974 Trade Act”).

<sup>40</sup> DEANNA TANNER OKUN ET AL., *THE IMPACT OF TRADE AGREEMENTS: EFFECT OF THE TOKYO ROUND, U.S.-ISRAEL FTA, U.S.-CANADA FTA, NAFTA, AND THE URUGUAY ROUND ON THE U.S. ECONOMY* 8 (2003).

<sup>41</sup> *E.g.*, 19 U.S.C. § 2152 (2016) (Advice from Departments and Other Sources); *Id.* § 2155 (Advice from Private Sector); *Id.* § 2212 (Transmission of Agreements to Congress). DESTLER, *RENEWING FAST-TRACK LEGISLATION*, *supra* note 37, at 7 (explaining that in 1974, the agreement to which fast-track authority applied was the recently initiated multilateral Tokyo Round for GATT).

<sup>42</sup> 19 U.S.C. § 2211 (b)(1)-(3) (2016).

ii. Establishment of Timeline.

Second, the 1974 Trade Act included a deadline date for conclusion of the agreements to which fast-track authority applied.<sup>43</sup> In addition to the briefing requirement, Congress required the executive branch to notify congress ninety calendar days before signing an agreement.<sup>44</sup> Another essential requirement was to establish a timetable resulting in an expedited vote by each chamber of Congress within sixty legislative days *with no amendments allowed*.<sup>45</sup> As will be shown later in this Article, this timeline requirement has become more sophisticated with different notification requirements.

iii. Substantive Monitoring Requirement.

Furthermore, Congress implemented the monitoring and consultation component by requiring the USTR to consult with the Ways and Means Committee in the House, and the Senate Finance Committee and other appropriate committees, on a "continuing basis," on the "development, implementation, and administration of overall trade policy," including, but not limited to, the following elements of such policy:

- The principal multilateral and bilateral negotiating objectives and the progress being made toward their achievement;
- The implementation, administration, and effectiveness of recently concluded multilateral and bilateral trade agreements and resolution of trade disputes;
- The actions taken, and proposed to be taken, under the trade laws of the United States and the effectiveness, or anticipated effectiveness, of such actions in achieving trade policy objectives; and
- The important developments and issues in other areas of trade for which there must be developed a proper policy response.<sup>46</sup>

Furthermore, the 1974 Trade Act included rules concerning presidential submission of the negotiated agreement to Congress, combined with the draft of a proposed implementing bill and

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<sup>43</sup> DESTLER, RENEWING FAST-TRACK LEGISLATION, *supra* note 37, at 8.

<sup>44</sup> 19 U.S.C. § 2112 (e)(1) (2016).

<sup>45</sup> DESTLER, RENEWING FAST-TRACK LEGISLATION, *supra* note 37, at 8 (emphasis added).

<sup>46</sup> 19 U.S.C. § 2211 (c) (1)-(4) (2016).

supporting documentation as would be specified in the authorizing legislation.

iv. Guarantee of Agreed upon Content; Up-Or-Down-Vote.

Finally, the 1974 Trade Act created expedited legislative procedures which limited debate, especially in the Senate. When the president formally introduced the implementing bill to both houses of Congress, Congress would either approve or disapprove on the day the president submitted it, in the form in which it was presented to Congress, with the language unamended. This procedural requirement, commonly referred to as the “up-or-down vote,” became the crux of fast-track authority.<sup>47</sup>

While the expedited legislative procedures have not changed since first enacted in 1974, how Congress built upon the safeguard measures first introduced in the Trade Act of 1974 in recent forms of the TPA remains highly relevant.<sup>48</sup> Part III examines the evolution of the congressional oversight mechanism in the 2002 Trade Act, the predecessor to the recently passed TPA-2015, and highlights noteworthy procedural changes.

IV. CONGRESSIONAL OVERSIGHT: BEYOND THE 2002 TRADE ACT

This Part compares and contrasts the 2002 Trade Act, the last legislation that extended the TPA, with the new TPA mechanism introduced by the TPA-2015. With an overview of the significance of oversight features in Part III.A, Parts III. B and C revisit the effectiveness of the congressional oversight embedded in the 2002 Trade Act. Part III.D discusses the merits of the new elements in the TPA-2015, and offers a comment on potential concerns arising from the procedural enforcement as well.

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<sup>47</sup> Procedurally, this guarantee of an “up-or-down vote” on the implementation of legislation is seen as the real advantage of fast-track for the president. See Steve Charnovitz, *Fast-Track: A Legal, Historical, and Political Analysis*, J. INT’L ECON. L. 10(1) 153, 155–56 (book review) (agreeing with Hal Shapiro that “fast-track prevents Congress from amending an agreement, from filibustering it, from bottling it up in committee, or from otherwise engaging in delaying or other tactics to frustrate an up-or-down vote”).

<sup>48</sup> FERGISSON, *supra* note 6, at 5 (stating that the initial grant of fast track trade negotiating authority and the authority to enact tariff modifications by proclamation under the 1974 Trade Act were in effect for five years until January 2, 1980).

A. *Principles and Purpose of Congressional Oversight in the Context of the TPA*

For the purposes of this discussion, the term “congressional oversight,” encompasses “the review, monitoring, and supervision” of the president and the USTR’s trade negotiation activities.<sup>49</sup> The philosophical underpinning for congressional oversight is found in the Constitution’s mechanism of checks and balances among the legislative, executive, and judicial branches. As James Madison famously stated in *The Federalist*, “The structure of the Government must furnish the proper checks and balances between the different departments,” and must establish “subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other.”<sup>50</sup>

There are several overlapping objectives and purposes that congressional oversight ideally serves:

- *improving the efficiency, economy, and effectiveness of governmental operations;*
- *detecting and preventing poor administration, waste, abuse, arbitrary and capricious behavior, or illegal and unconstitutional conduct;*
- *protecting civil liberties and constitutional rights;*
- *inform the general public and ensure the executive policies reflect the public interest;*
- *ensure administrative compliance with legislative intent; and*
- *prevent executive encroachment on legislative authority and prerogatives.*<sup>51</sup>

The draft version of this Article had argued Congress must find effective ways to hold the executive branch accountable for the delegated authority by balancing oversight and accountability—achieving the objectives emphasized above—with practicality—ensuring the executive branch complies with the requirements for receiving the TPA. Part III.D illustrates the textual development of congressional oversight, which failed to translate into the effective implementation required in the 2002 Trade Act. The TPA-2015 will be available to the incoming president with the inauguration scheduled in January 2017. Accordingly, the new president and his

<sup>49</sup> See L. ELAINE HALCHIN & FREDERICK M. KAISER, CONG. RESEARCH SERV., RL797-936, CONGRESSIONAL OVERSIGHT 1, 2 (2012).

<sup>50</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>51</sup> See WALTER J. OLESZEK, CONG. RESEARCH SERV., RL41079, CONGRESSIONAL OVERSIGHT: AN OVERVIEW 1 (2010) (listing ideal objectives and purposes of congressional oversight) (emphasis added); HALCHIN & KAISER, *supra* note 49, at 2.



or her executive branch must work with Congress to adopt the new procedural requirements of the TPA-2015, to ensure the political compact stays effective and relevant in defining the U.S. trade policy for the next decade.

*B. Political Context of the 2002 Trade Act*

Although the primary focus of the 2002 Trade Act was not the procedural improvement of increasing congressional oversight provisions, congressional oversight remained vital to the discussion. When President George W. Bush sought to renew fast-track authority—which was renamed “Trade Promotion Authority”—Congress recognized that if it were to grant the TPA, it must be coupled with proper congressional oversight, and “hold executive officials accountable for the implementation of delegated authority.”<sup>52</sup> Such quid-pro-quo arrangement was necessary, as “the real power of TPA is the underlying political compact between Congress and the President rather than its statutory guarantees, which are technically quite fragile.”<sup>53</sup> In crafting the TPA, Congress drafted the following provisions that can limit the use of the expedited procedures. As shown below, they serve as important checks to the delegated authority, so Congress would not simply surrender its constitutional authority over trade-related matters, as it has seen in the past.

*C. The TPA under the 2002 Act: Expansion of Congressional Oversight – Was it Effective?*

The TPA under the 2002 Trade Act enhanced the congressional oversight provisions in two significant ways. First, the legislation introduced the new requirement of executive-congressional consultations. It strengthened congressional clout by requiring that a schedule and guidelines for consultations include the president sending notification and seeking consultation with Congress before beginning negotiations.<sup>54</sup> It created a new Congressional Oversight Group (“COG”), a body tasked with leading consultations with the Administration and formulating the consultation guidelines.<sup>55</sup> This

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<sup>52</sup> OLESZEK, *supra* note 51, at 1.

<sup>53</sup> See Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change*, 35 GEO. WASH. INT’L L. REV. 1, 1 (2003).

<sup>54</sup> H.R. 3009, 107th Cong., § 2107 (2d Sess., 2002) (codified at 19 U.S.C. § 3807 (2006)).

<sup>55</sup> *Id.* § 2104 (a)–(f) (codified at 19 U.S.C. § 3804 (2006)) (Most of the requirements for notification and consultation in the 2002 Trade Act are found in this

group is jointly led by the chairmen of the revenue committees, namely the House Ways and Means Committee and the Senate Finance Committee, replacing the “congressional advisers” formerly introduced in the 1974 Trade Act.<sup>56</sup>

Second, the new legislation provided more detailed requirements from the executive branch, especially the USTR, while negotiating directly with foreign governments:

- the USTR must “consult closely and on a timely basis with, and keep fully apprised of the negotiations, the Congressional Oversight Group;” and
- the USTR must identify domestic laws that would be affected by a trade agreement resulting from the negotiations to the COG.<sup>57</sup>

Despite these progressive changes to the congressional oversight mechanisms, the degree of their implementation remains questionable at best. While the 2002 Trade Act preserved most of the withdrawal mechanisms that had previously been in effect in the 1974 Trade Act, which in theory, should have allowed Congress to deny fast-track treatment if the “president fails to comply with certain required procedural steps,” the political reality makes it extremely difficult for Congress to actually exercise these extreme provisions.<sup>58</sup>

#### i. The GAO Report

The 2007 Government Accountability Office (“GAO”) Report to the Senate Finance Committee accurately presents the need to improve the content and process of congressional and private sector consultations.<sup>59</sup> The GAO Report showed that from August 2002 to April 2007, the USTR held 1,605 consultations with congressional committee staff. Contrary to what one would expect from the high volume of consultation, the responses showed that satisfaction with

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section.).

<sup>56</sup> DESTLER, RENEWING FAST-TRACK LEGISLATION, *supra* note 37, at 8.

<sup>57</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVES, *About Us*, <http://www.ustr.gov/about-us> (last visited April 22, 2016). H.R. 3009, 107th Cong., § 2102(d)(1) (2d Sess., 2002) (codified at 19 U.S.C. § 3802(d)(1) (2006)) (“Consultations with congressional advisers”).

<sup>58</sup> HAL SHAPIRO, FAST TRACK: A LEGAL, HISTORICAL, AND POLITICAL ANALYSIS, *supra* note 21, at 25 (explaining that while the 2002 Trade Act provisions make fast-track an easily retractable mechanism from a technical standpoint, in practice, its efficacy derives from the underlying political compact between Congress and the president).

<sup>59</sup> 2007 GAO REPORT, *supra* note 10, at 41 n.60 (“Of 28 committee staffs (from seven committees of jurisdiction in each House, each with a majority and minority staff) that we contacted, we were able to secure interviews with individuals from 18.”).

input and influence was “mixed.”<sup>60</sup>

### 1. Quality of Consultation

Although the committee staff the GAO interviewed said that “USTR provided high-quality information that provided them with insight into the progress of the negotiations” and demonstrated “willingness to answer questions and follow up on particular issues of interest,” the staff felt that the USTR’s consultation meetings had not met their expectations “because they had not provided an opportunity for a two-way exchange of information that the staff considered a true consultation.”<sup>61</sup> Some members of Congress, especially committee chairs of the trade advisory committee, have also expressed dissatisfaction with the executive branch’s execution of the trade negotiation and consultation process, which were required under the TPA in the 2002 Trade Act.<sup>62</sup> In fact, more than half believed “the consultation did not provide the opportunity for meaningful input or influence into trade negotiations.”<sup>63</sup>

### 2. Timeliness of Consultation

With respect to the timing of the consultations, most, but not all, of the staff of the trade and agriculture committees said the timelines of consultations were good; however, staff from the other committees of jurisdiction often said that “the consultations were not timely.”<sup>64</sup>

### 3. Shortcomings of the COG

The COG, which was a new creation under the 2002 Trade Act, was not perceived as particularly successful, according to the 2007 GAO Report. The intention of the COG was to draw members of Congress into the consultation process, particularly members from non-trade committees, and to provide them with a private and confidential opportunity to have a consultative and advisory role in

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<sup>60</sup> See the 2007 GAO REPORT, *supra* note 10, at 57.

<sup>61</sup> The 2007 GAO REPORT, *supra* note 10, at 43.

<sup>62</sup> The 2007 GAO REPORT, *supra* note 10, at 57 (reporting that some chairs expressed dissatisfaction with the feedback from the USTR, explaining that they thought the USTR was either biased against their committee or that their opinions were not truly valued or taken into consideration); see also, *Inside Trade*, “Grassley Presses USTR to Improve Consultations on FTAs,” WORLD TRADE ONLINE (Jul. 7, 2006); 2007 GAO REPORT, *supra* note 10, at 21.

<sup>63</sup> See 2007 GAO REPORT, *supra* note 10, at 5.

<sup>64</sup> 2007 GAO REPORT, *supra* note 10, at 44.

trade policy.<sup>65</sup> According to the USTR consultation log, the “COG was convened only nine times before TPA lapsed in July 2007,” and worse yet, most staff outside of the trade and agriculture committees were unfamiliar with, or unaware of, the COG, and those staff who knew the COG “did not find it to be useful.”<sup>66</sup>

There are two possible explanations for such dissatisfaction among congressional staff and committee members. The first is that the TPA did not include enough oversight mechanisms in the text of the 2002 Trade Act. The second, and the more likely reason based on the 2007 GAO Report, is that while the provisions were adequately written on paper, the problem lies in their implementation. TPA-2015 attempts to address the first concern by including further oversight and consultation requirements in the Legislation. The second concern, however, can only be addressed when the executive branch works with Congress, and is subject to future reviews. Meanwhile, Part III.D explores how TPA-2015 has improved.

*D. TPA-2015: Improved Congressional Oversight, Consultations, and Access to Information*

TPA-2015 expands on the 2002 Trade Act’s efforts to secure greater congressional oversight mechanisms. TPA-2015 provides more safeguards in various stages of the trade negotiations process, which require more from both the president and the executive branch. Specifically, it attempts to expand access to information and requests greater accountability to supplement the meager consultations and coordination efforts that existed under the 2002 Trade Act.

TPA-2015’s emphasis on enhanced consultation requirements is clear from the language in its preamble.<sup>67</sup> The preamble of the Bill, S. 995, in part, reads: “A BILL to establish congressional trade negotiating objectives and *enhance consultation requirements* for trade negotiations, to provide for consideration of trade agreements, and for other purposes.”<sup>68</sup> Furthermore, the name of the Legislation added the word “accountability,” which shows Congress’s belief

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<sup>65</sup> 2007 GAO REPORT, *supra* note 10, at 46 (citing a congressional staff familiar with the creation of the COG).

<sup>66</sup> 2007 GAO REPORT, *supra* note 10, at 46-47.

<sup>67</sup> Jonathan Law & Elizabeth A. Martin, *A Dictionary of Law*, OXFORDREFERENCE.COM (7th ed. 2014), <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2955?rskey=Br6pqc&result=3115> (defining “preamble” as “The part of a statute that sets out its purposes and effects.”).

<sup>68</sup> See H.R. 1890, S. 995, 114th Cong. § 2 (1st Sess. 2015) (emphasis added).

that it is a crucial factor in gaining bipartisan support.<sup>69</sup>

Among the eleven sections in TPA-2015, four sections are particularly noteworthy for their discussion of congressional oversight. Section 4202 outlines “Trade agreements authority”; section 4203 provides for “Congressional oversight, consultations, and access to information”; section 4204 imposes increased “Notice, consultations, and reports”; and section 4205 lays out “Implementation of trade agreements.”<sup>70</sup> I will discuss improvements to congressional involvement under each of these sections.

i. Section 4202: Trade Agreements Authority<sup>71</sup>

This section permits the president, subject to congressional notification requirements and certain limitations, to enter into trade agreements with foreign countries to modify duties or other import restrictions that unduly burden U.S. trade before July 1, 2018 (or July 1, 2021 if the trade authorities procedures are extended), and to make changes to duties the president determines to be required or appropriate to carry out such trade agreements.<sup>72</sup> Importantly, this section gives teeth to the trade authorities procedures, as it establishes the process to gain an extension that the president must complete, as well as the procedure by which either house of Congress can deny the president’s request for an extension of the TPA authority.<sup>73</sup> This procedure is a reminder to the executive branch that the availability of the expedited procedures is “a congressional prerogative” that can be withdrawn if Congress becomes dissatisfied with how the president has conducted trade agreement negotiations.<sup>74</sup>

ii. Section 4203: Congressional Oversight, Consultations, and Access to Information<sup>75</sup>

This section provides detailed requirements that the

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<sup>69</sup> Compare Bipartisan Congressional Trade Priorities Act of 2014, H.R. 3830, 113th Cong. § 1 (2014), with Bipartisan Congressional Trade Priorities and Accountability Act of 2015, H.R. 1890, 114 Cong. 1st Sess. §1 (2015).

<sup>70</sup> 19 U.S.C. § 4202 (2016); 19 U.S.C. § 4203 (2016); 19 U.S.C. § 4204 (2016); 19 U.S.C. § 4205 (2016).

<sup>71</sup> 19 U.S.C. § 4202 (2016).

<sup>72</sup> *Id.* § 4202(a)(1)(A)-(B).

<sup>73</sup> *Id.* § 4202 (a)(5)(A)-(D).

<sup>74</sup> FERGUSSON, *supra* note 6, at 14.

<sup>75</sup> 19 U.S.C. § 4203 (2016).

administration must follow in its consultations with Congress.<sup>76</sup> It specifies that in the course of trade negotiations, the USTR shall: “meet upon request with any member of Congress”; provide access to pertinent documents, including classified materials, to any member of Congress who requests them; and engage in close and timely consultation with the Senate Finance Committee, the House Ways and Means Committee, the House and Senate Advisory Groups on Negotiations, all committees of the House and the Senate with jurisdiction over laws that could be affected by the trade agreement, and the House and Senate Committees on Agriculture concerning negotiations and agreements relating to agricultural trade.<sup>77</sup>

Also, this section promotes enhanced coordination with Congress through the production of written guidelines by the USTR that require that office to share important information with concerned members of Congress and affected federal agencies. The USTR must develop these guidelines in consultation with the chairmen and the ranking members of the House Ways and Means Committee and the Senate Finance Committee respectively, within 120 days after TPA-2015 is enacted, which was October 27, 2015.<sup>78</sup> In accordance with this requirement, the USTR produced its “Guidelines for Consultation and Engagement.”<sup>79</sup> Additionally, in the course of trade negotiations, the USTR must also consult closely and on a timely basis with these congressional advisers, keeping them “fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement,” before their entry into force.<sup>80</sup>

In terms of access to information, the greatest improvement under TPA-2015 is making the “pertinent documents” related to negotiations, including “classified information,” available to congressional staff, in addition to members of Congress, under the condition they receive proper security clearances as needed.<sup>81</sup> In this regard, the USTR Consultation Guidelines specify that it will make U.S. text proposals and consolidated text available to the following

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<sup>76</sup> *Id.* § 4203(a)(1).

<sup>77</sup> *Id.* § 4203(a)(1)(A)-(E).

<sup>78</sup> *Id.* § 4203(a)(3)(A) (providing for written guidelines to promote enhanced coordination with Congress).

<sup>79</sup> U.S.T.R., *Guidelines for Consultation and Engagement* (Oct. 27, 2015), available at <https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf> [hereinafter “USTR Consultation Guidelines”].

<sup>80</sup> *Id.* § 4203(a)(2) (2016).

<sup>81</sup> *Id.* § 4203(a)(3)(B)(ii).

individuals:

- all members of Congress;
- relevant professional staff of the Committees on Finance and Ways and Means with an appropriate security clearance;
- professional committee staff with an appropriate security clearance from other committees interested in reviewing text relevant to the committee's jurisdiction;
- any personal office staffer with an appropriate clearance of a member of the Committees on Finance and Ways and Means; and
- any personal office staffer with an appropriate security clearance accompanying his or her Member of Congress.<sup>82</sup>

iii. Section 4204: Notice, Consultations, and Reports<sup>83</sup>

Notably, the notice requirement has become more rigorous under TPA-2015: the president is required to give at least ninety days notice before initiating negotiations with a country, in addition to providing written notice to Congress of the president's intention to enter into the negotiations, the specific U.S. objectives for the negotiations with that country, and whether the president intends to seek an agreement or changes to an existing agreement.<sup>84</sup> Furthermore, the Legislation allows congressional advisory groups to compel meetings "upon the request of a majority of the members of either the House Advisory Group on Negotiations or the Senate Advisory Group on Negotiations" before initiating the negotiations or at any other time concerning the negotiations.<sup>85</sup>

In light of the objective of promoting more transparency to the public, this section also added a requirement for the USTR to publish on its website "a detailed and comprehensive summary of the specific objectives with respect to the negotiations and a description of how the agreement, if successfully concluded, will further those objectives and benefit the United States" at least thirty days before initiating negotiations with a country upon consulting with the revenue committees.<sup>86</sup> This section also added consultation requirements pertaining to trade in sensitive

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<sup>82</sup> USTR Consultation Guidelines, *supra* note 79, at 4-5.

<sup>83</sup> 19 U.S.C. § 4204 (2016).

<sup>84</sup> 19 U.S.C. § 4204(a)(1)(A) (2016).

<sup>85</sup> *Id.* § 4204(c)(1).

<sup>86</sup> *Id.* § 4204(a)(1)(D).

industries, such as fishing and textiles.<sup>87</sup> The combination of these provisions enforces congressional oversight of the delegated powers to a greater degree than it had been in the past.

iv. Section 4205: Implementation of Trade Agreements<sup>88</sup>

To implement any agreement, the president, in addition to satisfying the notice and consultation requirement above, must do the following. First, TPA-2015 adds another new requirement, that the full text of a completed trade agreement be made public at least sixty days before the president enters into the agreement on the USTR website, giving citizens “new and unprecedented access and knowledge . . . well before they are even submitted to Congress for approval.”<sup>89</sup> Also, the president must submit to Congress a draft statement of any administrative action proposed to implement the agreement, and a copy of the final legal text of the agreement, at least thirty days before the president submits final documents after entering into an agreement.<sup>90</sup> These layers of requirements ensure that the executive branch remains accountable to the public and to Congress throughout the implementation process.

Finally, TPA-2015 explicitly places limitations on trade authorities procedures when Congress finds lack of notice or consultations. The existence of this limitation should discourage any attempt by the executive branch to abuse the delegated authority.<sup>91</sup> Moreover, this section includes an action under which the delegated authority can be withdrawn through “procedural disapproval resolution,” defined in section 4205 (b)(1)(B) of TPA-2015 as follows:

The term ‘procedural disapproval resolution’ means a resolution of either House of Congress, the sole matter after the resolving clause of which is as follows: “That the President has failed or refused to notify or consult in accordance with the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 on negotiations with respect to \_\_\_\_\_ and, therefore, the trade authorities procedures under that Act shall not apply to any implementing bill submitted with respect to such trade agreement or agreements”, with the blank space being filled with a description of the trade agreement or agreements with respect to which the President is considered to have failed or refused to notify or

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<sup>87</sup> *Id.* § 4204(a)(2).

<sup>88</sup> 19 U.S.C. § 4205 (2016).

<sup>89</sup> Sen. Orrin Hatch, Speech on the Senate floor (June 11, 2015), *available at* <http://www.finance.senate.gov/chairmans-news/hatch-trade-promotion-authority-enhances-congress-role-in-trade> (last visited April 22, 2016).

<sup>90</sup> 19 U.S.C. § 4205(a)(1)(D)(i)-(ii) (2016).

<sup>91</sup> *Id.* § 4205(b).



consult.<sup>92</sup>

The grounds for finding that the president has “failed or refused to notify or consult” in accordance with TPA-2015 are exhaustive and concrete. Congress may exercise procedural disapproval if:

- The president has failed or refused to consult in accordance with sections 4203 and 4204 and the requirements with respect to negotiations or agreements;
- The consultation and transparency guidelines (under section 4203) have not been developed or met with respect to the negotiations or agreements;
- The president has not met with the House or Senate Advisory Group on Negotiations when requested under section 4203(c)(4) with respect to the negotiations or agreements; or
- The agreements fail to make progress in achieving the purposes, policies, priorities, and objectives expressed in TPA-2015.<sup>93</sup>

These provisions are the “emergency brakes” available to Congress for lack of notice or consultations with respect to the trade agreements. The definition of the procedural disapproval resolution language is strong, which indicates that Congress is willing to enforce its conditions in exchange for the TPA. Thus, under the new Legislation, failure to comply with any of these requirements in the implementation procedure can cause the revocation of the TPA, or worse yet, the failure of a potentially long-negotiated trade agreement.

v. Potential Concerns That May Arise From TPA-2015.

In reality, the strengthened congressional oversight mechanism may face potential challenges in the following ways. The first issue is related to granting every member of Congress, as well as her staff with proper security clearances, access to negotiating text.<sup>94</sup> This provision requires careful consideration as to who should be able to access the negotiating text to ensure that the effective and timely negotiation of agreements is not hampered by the involvement of more officials than needed. A side effect of that is ensuring confidentiality, which the USTR Guidelines list as an important matter to comply with certain legal requirements.<sup>95</sup> This is

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<sup>92</sup> *Id.* § 4205(b)(1)(B)(i).

<sup>93</sup> *Id.* § 4205(b)(1)(B)(ii)(I)-(IV).

<sup>94</sup> USTR Consultation Guidelines, *supra* note 79, at 4.

<sup>95</sup> USTR Consultation Guidelines, *supra* note 79, at 10.

significant, as the over-engagement of Congress might impede or disincentivize the executive branch from meaningfully engaging Congress.

Second, the Legislation calls for the establishment of a Chief Transparency Officer within the USTR's office, who would be responsible for consulting with Congress on transparency policy, coordinating transparency in trade negotiations, engaging and assisting the public, and advising the USTR on transparency policy.<sup>96</sup> Again, historical accounts have shown the importance of transparency between the two branches, but the executive branch may view this as an uncomfortable, and worse yet, an unwelcome encroachment into its ability to negotiate. Some may complain about the diminishing independence of agencies, a problem that hampers their ability to negotiate with the necessary degree of secrecy and autonomy. The legislative and executive branches must balance their priorities and concerns to adhere to the procedural requirements under TPA-2015, centering on their common objective.

#### V. ADMINISTRATIVE CONCERNS REGARDING CURRENT CONGRESSIONAL OVERSIGHT

In previous Parts, this Article has examined the historical context and the progress of the congressional oversight mechanisms integrated with the TPA. The significance of these developments becomes clearer when weighed against the potential administrative and constitutional ramifications when the TPA breaks down. This Part argues that the conditions provided within TPA-2015 must be strictly enforced, because if they are not, the legal and political avenues available to Congress are arguably limited.

Scholars have argued that the procedural safeguards built within the fast-track arrangement allow Congress to exercise considerable influence over the conduct of trade negotiations.<sup>97</sup> Unfortunately, these procedural safeguards may be as influential as the proponents of the TPA may claim, based on the previous practice of Congress and judicial decisions on legislative veto.

To summarize, the TPA allows Congress to safeguard the delegated authority through three procedural means.<sup>98</sup> First, Congress can threaten to withhold negotiating authority unless the

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<sup>96</sup> USTR Consultation Guidelines, *supra* note 79, at 1.

<sup>97</sup> Eugenia da Conceicao-Heldt, NEGOTIATING TRADE LIBERALIZATION AT THE WTO: DOMESTIC POLITICS AND BARGAINING DYNAMICS 53 (2011).

<sup>98</sup> *Id.*

president accepts the conditions imposed by the legislature. Second, Congress can attempt to influence the negotiations while they are under way by threatening to disapprove any agreement that does not include aspects favorable to the views of Congress. Finally, Congress ultimately would have a veto power—an up or down vote—over the trade agreement negotiated by the USTR.<sup>99</sup> Under TPA-2015, the limitations on Trade Authorities Procedures have been strengthened, as explained in the previous Part.

*Political Disincentive to Vote “Down.”* This conclusion is supported by looking at Congress’s history with regard to trade agreements and judicial treatment of the legislative veto. First, Congress’s history with regard to trade agreements reveals that there is no precedent where Congress actually voted down a trade agreement because either the House or the Senate were displeased with the consultation or negotiating processes. Even if either house of Congress is unsatisfied with the president’s consultation and reporting performance, it would be extremely difficult to exercise congressional disapproval authority for two substantial reasons. First, many members of Congress, as elected representatives with political priorities that include creating jobs and expanding the American economy through trade, may not want to vote down a trade agreement if it has the strong prospect of increasing exports and boosting the American economy.<sup>100</sup> Even those opposed to the TPA aspect of TPA-2015, including the Senate Majority Leader Harry Reid and House Minority Leader Nancy Pelosi, believe that free and fair trade is good for Americans.<sup>101</sup> So a member of Congress’s disappointment with the consultation or negotiating processes used by the president is unlikely to override that member’s desire to support free trade. Second, voting down a trade agreement will generate enormous strain in the diplomatic relations with the negotiating countries, especially given how long and arduous many of these negotiations can be. Therefore, even if TPA procedurally guarantees a *de facto* veto power, its actual effectiveness is questionable. And this political reality raises the question, what

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<sup>99</sup> *Id.*

<sup>100</sup> U.S. Chamber of Commerce, *Assessing the Record of America’s Trade Agreements* (Nov. 16, 2015), available at <https://www.uschamber.com/issue-brief/assessing-the-record-america-s-trade-agreements> (summarizing the historical impact of trade agreements on the U.S. economy).

<sup>101</sup> Vicki Needham, *Pelosi Comes out Against Fast Track Bill*, THE HILL (Feb. 12, 2014), <http://thehill.com/homenews/house/198297-pelosi-comes-out-against-fast-track-bill> (last visited on May 5, 2015) (citing Pelosi, “We’re the party of free trade, fair trade, and we believe that the global economy is here to stay, and we’re part of it.”).

would ensue if the TPA's consultative mechanisms fail?

A. *Evaluating the Efficacy of the TPA as an Ex-post Veto Power vis-à-vis INS v. Chadha*

The withdrawal of expedited procedures in the TPA is a form of *ex-post* veto power available to Congress. While this power appears to be significant, it is undermined by the legislative reality and its arguably weak legal legitimacy, judging by how the courts have treated legislative veto. Procedurally, a Senate or House committee has the ability to reverse fast-track procedures if the president fails to meet the requirements for consultation with congressional committees. In such a circumstance, fast-track procedures for implementing bilateral or multilateral trade agreements may be withdrawn.

To proceed with the withdrawal in the House, a resolution of disapproval must be launched by the chair or by a member of the Ways and Means or Rules Committees. If the process is initiated in the Senate, it has to be introduced by the Finance Committee.<sup>102</sup> As gatekeeper committees, they are given the power to deny the TPA application to trade agreements. Considering that the TPA is an exercise of the House and Senate's rulemaking power, from the constitutional law perspective, it can be reversed at any time through unicameral annulment.<sup>103</sup>

The existence of the *ex-post* veto power under the TPA should be considered in the context of Congress's prior practice of legislative vetoes. Historically, the possibility of legislative vetoes encouraged broad delegation of authority, as it gave room for Congress to reject agreements it disliked.<sup>104</sup> Under the TPA, Congress is empowered by the *ex post* veto power, as one of the last-resort reins on the executive branch.

However, the constitutionality of the *ex-post* veto power under the TPA remains unclear, as the Supreme Court sounded the death knell for legislative vetoes in the landmark case, *Immigration and Naturalization Service v. Chadha*.<sup>105</sup> Although the decision could have been based on the unique facts surrounding the particular legislative veto, Chief Justice Burger wrote a very broad decision that

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<sup>102</sup> Susanne Lohmann & Sharyn O'Halloran, *Divided Government and U.S. Trade Policy: Theory and Evidence*, 48 INT'L ORG. 595, 620 (1994).

<sup>103</sup> DESTLER, RENEWING FAST-TRACK LEGISLATION, *supra* note 37, at 5-7.

<sup>104</sup> DESTLER, RENEWING FAST-TRACK LEGISLATION, *supra* note 37, at 5-7.

<sup>105</sup> I.N.S. v. Chadha, 462 U.S. 919 (1983) [hereinafter *Chadha*].

may invalidate all legislative vetoes in federal statutes.<sup>106</sup>

In *Chadha*, the Court declared unconstitutional a statutory provision that authorized either House of Congress to reverse decisions of the attorney general concerning whether or not to deport aliens.<sup>107</sup> In that particular case, the Immigration and Naturalization Service (“INS”) had ordered Mr. Jagdish Rai Chadha, an East Indian, who was born in Kenya and held a British passport, to be deported after an adjudicatory hearing.<sup>108</sup> The attorney general had suspended that order, and the House of Representatives had reinstated it by vetoing the attorney general’s decision.<sup>109</sup>

In its majority decision, the Court found that congressional procedural rules may be an exception to its holding, by noting that it might be permissible “to accomplish what has been attempted by one House of Congress in the case [where] action [is required] in conformity with the express procedures of the Constitution’s prescription for legislative action.”<sup>110</sup> However, the Court also limited the circumstances to which the foregoing exception to the ban against legislative vetoes can be applied, as “narrow, explicit, and separately justified.”<sup>111</sup> In this regard, it is unclear whether the withdrawal of expedited procedures under the TPA would satisfy such a narrow exception if Congress were to exercise what can essentially be interpreted as a legislative veto.

Although *Chadha* was a case involving an adjudicatory decision, the Court quickly indicated that its decision deserves a wide application by affirming two decisions by the Court of Appeals for the District of Columbia, which had invalidated one and two-house vetoes of agency rules, one of which is *Consumer Energy Council of America v. Federal Energy Regulatory*, a D.C. Circuit case decided *per curiam*.<sup>112</sup>

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<sup>106</sup> See Beth A. Honetschlager, Comment, *Immigration and Naturalization Service v. Chadha: The Death Knell for the Legislative Veto?* 69 Iowa L. Rev. 513, 514 (1984).

<sup>107</sup> *Chadha*, 462 U.S. at 920; 8 U.S.C. § 1254(c)(1) (1976); Section 244(c)(1) of the Immigration and Nationality Act provided, in part, “Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien.” *Id.*

<sup>108</sup> *Chadha*, 462 U.S. at 922.

<sup>109</sup> *Id.* at 923-28.

<sup>110</sup> *Id.* at 968.

<sup>111</sup> *Id.* at 955.

<sup>112</sup> *Consumer Energy Council of Amer. v. Fed. Energy Regulation Commission*, 673 F.2d 425 (D.C. Cir. 1982), *aff’d* in *Process Gas Consumers Group v. Consumers Energy Council of Amer.*, 463 U.S. 1216 (1983).

*Consumer Energy Council of America v. FERC*. In *FERC*, the D.C. Circuit invalidated the one-house veto when it was used to review a proposed Incremental Pricing Rule of the FERC. A group representing residential customers supported FERC's proposed rule that would shift natural gas price increases to industrial customers. The same day FERC issued the final rule, the Subcommittee on Energy and Power reported favorably on a resolution of disapproval, and the full committee did the same the next day. On the constitutionality of the legislative veto, the D.C. Circuit stated:

Indeed, it is ironic that Congressional *amici* attempt to place great significance on the Commission's independence *and* on the need for having a politically accountable check on the agency's decision. *The fundamental justification for making agencies independent is that since they exercise adjudicatory powers requiring impartial exercise, political interference is undesirable* (emphasis added).<sup>113</sup>

*Relevance of these Cases to the TPA Withdrawal Mechanism*. There is a caveat to analogizing the TPA's *ex-post* veto power with these legislative veto cases. Under the TPA, fast-track authority is delegated from Congress to the president, not to any independent executive agencies, as seen in *Chadha* and *FERC*. Also, as examined in Part I, *ex-post* veto power under the TPA is a part of a political agreement between the executive branch and Congress. This means it is a prescribed, predetermined contingency mechanism, which is different from the way Congress exercised its veto in *Chadha* or *FERC*. However, despite such differences, the jurisprudence that heavily suggests that legislative vetoes are most likely all unconstitutional is significant in evaluating the efficacy of the congressional oversight mechanism embedded in the TPA.

The implications of the *Chadha* decision and the subsequent *FERC* decision are substantial, as these cases switch the playing field for Congress. In the words of Prof. Oona A. Hathaway, the Supreme Court arguably "pulled away this last strand" of congressional power over *ex-ante* congressional-executive agreements, with *Chadha*, leaving behind the delegations of congressional authority to the president without the potential of exercising its most powerful legislative procedure in TPA-2015.<sup>114</sup> Prof. Hathaway observes, "when Congress responded to *Chadha* by simply removing the legislative vetoes, it left in place broad delegations that Congress never intended to leave unsupervised."<sup>115</sup> This potential for an

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<sup>113</sup> *Id.* at 472.

<sup>114</sup> Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, *YALE L.J.* 140, 254 (2009).

<sup>115</sup> Hathaway, *supra* note 114 at 254 (explaining how to rethink delegations of

imbalance of authority is also identified in the dissenting opinion of Justice White in the *Chadha* decision:

Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the executive branch and independent agencies.<sup>116</sup>

The Court's findings may be especially problematic when the TPA is viewed as a delegation that must be carefully supervised. Fueling this concern, the TPA is prone to the "Hobson's choice" described by Justice White, in which Congress cannot simply "refrain from delegating the necessary authority" because once granted, the TPA could be delegated for a long period of time, until July 1, 2021, provided an extension disapproval resolution is not introduced and passed by either chamber by July 1, 2018.<sup>117</sup> The question of how long fast-track authority can be given to the president without an adequate mechanism to oversee the effect of trade agreements was one of the major reasons for the congressional refusal to renew fast-track authority in the past. For example, USTR Kantor faced a particularly difficult battle for congressional approval in the 1990s.<sup>118</sup> During that time, the Senate Finance Committee was very concerned about the problem of procedural controls, although Congress mostly declined to grant fast-track authority on substantive grounds (*i.e.*, labor standards and environmental provisions).<sup>119</sup>

#### *B. Viability of Judicial Review: No Alternative Under Political Question Doctrine*

In light of the potential unconstitutionality of the withdrawal procedures of the TPA, the rest of the congressional oversight mechanisms under the TPA, such as consultation and reports, are all the more crucial. Barring all the domestic and diplomatic disincentives for Congress to actually exercise its *ex-post* veto power, Congress will not be able to make a claim to the Court against the executive branch, even if the president or his agents violate the procedural requirement, as trade negotiation would be deemed a

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lawmaking authority to the president).

<sup>116</sup> *Chadha*, 462 U.S. at 968.

<sup>117</sup> FERGISSON, *supra* note 6, at 8.

<sup>118</sup> Joyce Barrett, *U.S. Trade Representative urges Fast-Track Extension*, DAILY NEWS-RECORD (May 18, 1995) available at <https://www.highbeam.com/doc/1G1-16884423.html>.

<sup>119</sup> See DESTLER, *AMERICAN TRADE POLITICS*, *supra* note 12, at 17–19.

non-justiciable issue under the political question doctrine.

Under the political question doctrine, a court will decline to rule on the merits if it finds that the underlying matter is committed to the discretion and expertise of the legislative and executive branches. Most notably for the purposes of this Article, *Made in the USA Foundation v. United States* dealt with a challenge to the NAFTA, in which it was alleged that the failure to use the treaty process rendered the agreement and its implementing legislation unconstitutional.<sup>120</sup> The court held that “ruling on the policy merits would require it to consider areas beyond its expertise.”<sup>121</sup> In that case, the court noted that the Treaty Clause did not set forth circumstances under which its procedures must be followed when approving international commercial agreements, and that determining the “significance” of an international agreement would force the court to make “policy judgments of the sort unsuited for the judicial branch.”<sup>122</sup>

Most applicable to the hypothetical situation here is the court’s discussion of the need for the nation to speak with uniformity in the area of foreign affairs and commerce. In the court’s view, a judicial order declaring the NAFTA invalid “could have a profoundly negative effect on this nation’s economy and its ability to deal with other foreign powers”; the court emphasized that such an order would not only affect the validity of the NAFTA, but would “potentially undermine every other major international commercial agreement made over the [past half-century].”<sup>123</sup> Importantly, the court expressed the need for the judicial branch to remain impartial when adjudicating between the Congress and the president.<sup>124</sup>

In light of such strong deference provided to the president under the trade negotiating authority, and the political question doctrine generally, it remains questionable whether Congress can successfully seek a judicial remedy when it is unsatisfied with the executive branch’s adherence to the procedural requirements of the TPA.

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<sup>120</sup> *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2011).

<sup>121</sup> *Id.* at 1314 (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

<sup>122</sup> *Id.* at 1317. See also, CAROLYN C. SMITH, CONG. RESEARCH SERV., RS21004, TRADE PROMOTION AUTHORITY AND FAST-TRACK NEGOTIATING AUTHORITY FOR TRADE AGREEMENTS: MAJOR VOTES, 6 (2011).

<sup>123</sup> *Made in the USA*, 242 F.3d at 1268, 1312, 1318.

<sup>124</sup> *Id.* at 1268.



*C. Going Forward: How to Evaluate TPA-2015*

With the enactment of TPA-2015, the president and Congress will test whether the enhanced oversight mechanisms effectively achieve accountability and transparency, while trying to avoid the pitfalls that occurred during the implementation of the 2002 Trade Act. Though it is difficult to predict the effectiveness of the new measures, with various mercurial factors such as presidential transition and progress on negotiations involved, the TPA can, and should be assessed on its procedural value of greater inter-branch cooperation. Such an assessment would consider “the duration, the scope, the precision of the negotiating direction given to the president, and the mechanisms for withholding fast-track treatment from a particular agreement.”<sup>125</sup>

Prof. Hal Shapiro and Lael Brainard have introduced two alternative forms of the TPA, which are beneficial in contemplating both potential advantages and disadvantages of each model. On one end of the spectrum, they present a notion of making each grant of authority “specific to the negotiation of a particular agreement and the duration coterminous with the length of the negotiation,” or a case-by-case TPA.<sup>126</sup> The advantage of a case-by-case TPA is that it would permit much more precision in the negotiating objectives, and allow Congress to confine debate to the potential merits of a particular trade agreement. In the current context, Congress could grant the TPA for the negotiation with the E.U. in TTIP, but refuse it for implementing the TPP. The problem with this approach, however, is that it may prove overly restrictive, unintentionally signaling to international counterparts that the president does not have the authority to enter into any negotiations until after congressional approval has been obtained.<sup>127</sup> However, with such a variety of trade agreements on the table, future Congresses may find this to be an ideal option to ensure its involvement in the negotiating process without being bound to the binary “up-or-down” vote.

The opposite approach is Congress establishing fast-track procedural mechanisms “for a longer duration or even indefinitely, but requiring an additional hurdle for the application of the

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<sup>125</sup> Hal Shapiro & Lael Brainard, *Fast Track Promotion Authority*, BROOKINGS INSTITUTION (Dec. 1, 2001), available at <http://www.brookings.edu/research/papers/2001/12/globaleconomics-brainard>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

procedures to a particular agreement.”<sup>128</sup> I call this option a proportional TPA. According to Shapiro and Brainard, the president would be pushed to “consult Congress at the start of (or early in) negotiations, and it would permit Congress to establish more specific negotiating objectives for each agreement than is possible in previous fast-track legislation.”<sup>129</sup> The advantage in this model is that if the TPA is granted, Congress could further specify whether the application to a specific agreement would require a vote by only the gatekeeper committees or a more difficult floor action, and whether it would require a vote of approval or the easier standard of withstanding possible congressional disapproval.

Shapiro and Brainard additionally suggest that the “degree of congressional oversight afforded by the hurdle for application to particular trade negotiations could be made directly proportional to the overarching authority granted to the President by Congress.”<sup>130</sup> In other words, this proportional approach can potentially allow the longer and broader trade negotiations to receive more oversight. Although this appears to be a convincing solution in theory, the trade agreements currently being negotiated can all make a meritorious claim, to a degree, of their significance in the international trading system. More importantly, it can defeat the entire advantage of expedience in curtailing the legislative process, which may eliminate the political incentive of the president to seek the TPA.

Prof. Hathaway’s recommendation precisely addresses these administrative and political concerns. She suggests that if Congress authorizes the TPA on a periodic basis, it could better ensure that the authority is not abused.<sup>131</sup> A president who uses the authority in ways that are regarded by Congress as abusive would see the authority disappear shortly thereafter. In her view, that potential withdrawal would provide an incentive for the president to communicate effectively with Congress and to use the fast-track authority in a responsible and judicious manner.<sup>132</sup>

While the periodic review is one way of ensuring the congressional delegation does not go unaccounted for, the 2007 GAO Report shows that absent proper cooperation, the most

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Hathaway, *supra* note 114, at 265 (discussing advantageous aspects of adopting a fast track process for trade negotiations).

<sup>132</sup> Hathaway, *supra* note 114, at 264.

comprehensive consultation and monitoring requirements can be futile. Many interviewed political staff did not even know what the COG was, nor what role it was supposed to carry out. If the political and legal concerns of the TPA are not hashed out through more comprehensive and workable congressional oversight mechanisms, Congress may have decreasing leverage in including terms for its desired level of involvement in the future.

This observation circles back to the reality that the difficulty lies in the implementation phase, and Congress must reinforce adhering to statutory representation requirements without disincentivizing the executive branch from meaningfully engaging with Congress. It is an important means for Congress to “not only keep tabs on the negotiations through the President, but also to be present and active in negotiations.”<sup>133</sup> With this in mind, Congress must decide whether the current form of the TPA satisfies its legislative objectives during the next five years. Another non-legal avenue Congress may pursue in motivating executive compliance would be mobilizing constituents to urge the executive for more transparency and greater involvement of Congress through the TPA mechanism. As examined above, TPA-2015 includes the unprecedented notice to the public requirement even before seeking congressional approval of the negotiated text. Given the precarious political nature of the TPA, the president and his executive agencies will improve information access and the timeliness of congressional consultations, if there are political pressures for them to make this available.

## VI. CONCLUSION

This Article examined the congressional oversight mechanisms of the Trade Promotion Authority, from its creation to the most recent version contained in TPA-2015. It first introduced the evolution of fast-track authority and examined how this congressional-executive agreement is a unique creation of the United States. As seen through various trade legislation, the power struggle between the executive branch and Congress necessitates

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<sup>133</sup> Laure L. Wright, *Trade Promotion Authority: Fast Track for the Twenty-First Century?*, 12 WM. & MARY BILL OF RTS. J. 979, 1003 (2004); see also, Christopher S. Rugaber, *Trade Policy: Baucus, Other Senators Press Zoellick on Trade Consultation Issues*, 19 INT’L TRADE REP. 1901, 1901 (2002) (stating that “designated 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.”).

clear procedures and congressional oversight mechanisms that will ensure that Congress's delegated authority does not end in the executive branch's unfettered authority without proper consultative process. Congress has continued to expand and clarify the oversight mechanism that mandates executive-congressional consultation, as demonstrated by the Trade Act of 2002 and after a long hiatus, it was revived and strengthened in TPA-2015.

The importance of a proper consultation mechanism is especially heightened given the unwillingness of some members of Congress to vote down trade deals and the doubtful constitutionality of the *ex-post* veto power of Congress. With such meager political and judicial recourse available, Congress must remain vigilant and ensure proper balance between itself and the executive branch. The executive branch also has greater responsibility under TPA-2015, in notifying, briefing, and consulting various stakeholders in the public and private spheres. This can be achieved when both the executive branch and Congress dedicate themselves to adhering to the procedural aspect of the TPA and engage in a frank dialogue in a timely manner.

As it stands currently, the efficacy of TPA-2015 remains undetermined, but the USTR's release of the Consultation Guidelines is a good start. Crucially, TPA-2015's effectiveness and relevance will be evaluated based on how the next president sets the trade negotiating objectives and strategies, which in turn, will determine how the president exercises the TPA. Considering the significance of pending PTAs, such as the TPP and the TTIP, Congress must maximize its role in congressional oversight to make certain that the direction of the executive branch remains in line with the general will of Congress. As President Nixon stated in his speech in 1973, trade policy is a field that requires significant collaboration between the two branches of the government. Almost half a century later, his words still ring true, and such inter-branch cooperation remains an important goal for the 114th Congress, President Obama, and his successor, for the determination of future U.S. trade policy.