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## Fast Track Trade Promotion Authority: A Primer and a Prescription for Progress

By Lael Brainard and Hal Shapiro

Fast track trade promotion authority has become the premier legislative vehicle for airing America's ambivalence about trade and globalization. Opponents decry fast track as a blank check for the president to pursue trade agreements that undermine hard won social and environmental protections. Proponents portray fast track as a litmus test of America's leadership on trade and as a patriotic imperative. Fast track was intended to be neither. It was conceived as a mundane procedural mechanism to enhance the president's credibility in negotiating complex multilateral trade agreements by streamlining the congressional approval process into an up-or-down vote in return for enhanced congressional oversight.

The best way out of the current impasse would be to examine anew what procedures best facilitate cooperation between the president and Congress in advancing America's interests on trade. The real power of fast track is the underlying political compact between the Congress and the president rather than its statutory guarantees, which are technically quite fragile. The convention of providing an open-ended but time-limited grant of fast track invites a regular, heated debate over the abstract questions of whether trade is good or bad and whether trade agreements should cover labor and environmental standards. This approach has led to eight years of stalemate. Far better to weigh the concrete benefits and costs to different segments of American society and to America's international interests in the context of specific trade agreements. The impasse can be overcome through three procedural fixes: strengthening congressional input into the negotiating process, seeking to limit the application of fast track to only those agreements whose complexity and scope clearly warrant it, and targeting the grant of authority and the associated substantive guidance from Congress to particular trade agreements.

### **Introduction: The Debate**

President Bush has signaled that, like President Clinton before him, fast track, or trade promotion authority, is his top legislative trade priority. Fast track has become the Moby Dick of American trade politics. Since it was last in effect, presidents and trade supporters have expended enormous political capital in zealously pursuing the great white whale, and the hunt for this elusive quarry at times has come close to capsizing the ship of American trade policy.

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But is fast track the prize that its proponents claim it to be? Would its reenactment indeed bridge the chasm on trade? Or is the protracted stalemate a symptom of a more profound divide in American public opinion?

The answers lie somewhere in the middle. Fast track is important precisely because it has become a political symbol of America's commitment to free trade. Several trading partners now claim they are reluctant to enter into trade negotiations with the United States without fast track. This perception, however, stands in stark contrast to what fast track actually does as a piece of legislation. Fast track was conceived as a relatively narrow, procedural measure. Previous fast track laws did not authorize any agreements the president could not negotiate under his own constitutional powers, require inclusion of any specific provisions in any agreements, or guarantee ratification of any agreements. A close examination suggests that fast track is a highly conditional grant of authority from a legal point of view; its considerable power in practice has derived from convention and the implicit political compact between the president and Congress.

### **Fast Track's Origins**

Fast track is the product of many years of rebalancing the responsibilities of the legislative and executive branches in international trade policy. Prior to the 20<sup>th</sup> century, regulation of foreign commerce was almost exclusively a congressional prerogative. Tariffs were considered to be more a function of domestic tax policy than of foreign affairs and, as such, were subject to change only by an act of Congress. The president's main responsibilities on trade were to collect the tariffs set by Congress and to negotiate bilateral Treaties of Friendship, Commerce, and Navigation, which extended to treaty partners the most favorable tariff rates available.

The growing recognition of the damage done by high tariffs around the world marked a major change in U.S. trade policy. For the first time, the Trade Act of 1934 effectively "pre-approved" presidential authority to lower U.S. tariffs within certain limits by authorizing the president to enter into reciprocal tariff-reduction agreements. The Act was extended 11 times through 1962.

Congress again expanded the president's authority in the Trade Act of 1962, authorizing the elimination of certain U.S. tariffs in the Kennedy Round of negotiations under the General Agreement on Tariffs and Trade (GATT). But this grant of authority was conditioned on enhanced congressional oversight, requiring the president to provide Congress with copies of agreements and the rationale for entering into them, as well as to accredit four Members of Congress as part of the U.S. negotiating delegation. The Kennedy Round concluded successfully in 1967 with an array of tariff-reduction commitments, but also included two "non-tariff" agreements governing antidumping and customs valuation, which sparked controversy as some in Congress concluded that the president had overstepped his authority.

As a result, when Congress considered a new grant of authority for the GATT Tokyo Round, it decided to maintain final control over non-tariff agreements. In the 1974 Trade Act, Congress mandated that non-tariff agreements be implemented only through legislation, and that the president consult with Congress prior to entering into them. In return, to reassure trading partners and enhance the credibility of U.S. negotiators, Congress established new procedures to ensure a timely vote with no amendments. Thus was fast track born.

## How Fast Track Works

The provisions of past fast track laws can be loosely divided into three categories.

1. The *Congressional Oversight Procedures* establish requirements the president must meet for fast track to apply. They enumerate *overall trade negotiating objectives* and industry- or issue-*specific principal trade negotiating objectives* that Congress expects U.S. negotiators to pursue. The principal objectives have changed over time to reflect evolving congressional priorities and are the focus of the current debate over labor and environmental standards. The oversight provisions also require the president to provide *notice* before entering into negotiations or signing an agreement, prompt *transmittal* of the text of a proposed agreement along with a statement certifying that the agreement advances Congress's objectives, and an *implementing bill* as the vehicle for Congress to give an agreement effect under U.S. law.

2. *Fast Track Legislative Procedures* establish limitations on Congress, ensuring a streamlined legislative process. It guarantees *mandatory introduction* of the implementing bill in both Houses of Congress, *referral to relevant committees* (at minimum the House Ways and Means and Senate Finance Committees), and *automatic discharge* after 45 legislative days if the bill has not been reported out of the committees. Fast track permits *no amendments* to the implementing bill and *limits floor debate* to 20 hours in each House. It requires a *timely vote* on the implementing bill in both chambers within 15 legislative days of being reported out (or automatically discharged) by the committees and ensures *no conference committee*, since both chambers vote on the same implementing bill.

3. *Methods of Withdrawing Fast Track* allow Congress (or one House or a Committee) to withdraw fast track from a trade agreement. Fast track can be withheld if there is a *failure to meet the notice, consultation, transmittal, and implementing bill conditions* described above. This may occur if a majority in both Houses passes, within 60 days of each other, a *procedural disapproval resolution* on the basis of a failure to consult, which provides ample congressional discretion. The "gatekeeper" committee provision permits either the Ways and Means or Finance Committees to deny fast track application to a bilateral or regional agreement by voting a disapproval resolution within 60 days of the president indicating his intention to enter into negotiations. Fast track can be withdrawn outright at any time through *unicameral repeal*, since fast track is considered an exercise of the rulemaking power of the House and the Senate. Finally, *sunset and extension provisions* have limited fast track's duration to five years. The most recent fast track legislation to be enacted, part of the 1988 Omnibus Trade Act, was more restrictive, providing a renewal for only 3 years with a 2-year extension subject to an *extension disapproval resolution* by either chamber.

These withdrawal provisions have been seldom used. They make fast track a highly fragile and easily retractable mechanism from a technical standpoint and underscore that the power of fast track in practice derives from the underlying political compact between Congress and the president. If the president appeared to violate congressional intent in negotiating an agreement, the withdrawal mechanisms could be triggered, sounding the death knell not only for fast-track review of that agreement but likely also for the agreement itself.

## Uses of Fast Track

One of the great anomalies of fast track is that, while it has acquired great symbolic significance in the trade debate, it was invoked only five times during the 20 years it was in effect – for a small minority of the trade agreements concluded by the United States during that time:

1. Tokyo Round GATT Agreements, 1979.
2. U.S.-Israel Free Trade Agreement (FTA), 1985.
3. U.S.-Canada FTA, 1988.
4. North American Free Trade Agreement, 1993.
5. Uruguay Round WTO Agreements, 1994.

But if the bulk of U.S. trade agreements can be implemented without fast track, it raises the question whether fast track is really necessary at all.

Fast-track agreements are not distinguished from other trade agreements by their size, complexity, or importance. For example, the bilateral agreement on China's WTO accession, implemented without fast track, will affect far more trade than has the U.S.-Israel FTA. Rather, what most distinguishes fast-track agreements is the extent to which changes to U.S. law are required and Congress expects to be involved in the process. Trade agreements approved without fast track have generally required only rather narrow changes to U.S. law. The China agreement involved one significant but narrow legislative change – granting permanent normal trade relations status to China. But even this distinction, while broadly true, is qualified. For instance, the U.S.-Israel FTA was approved under fast track procedures while the nearly identical U.S.-Jordan FTA was not. This suggests that there is a political overlay to these distinctions.

### **A Prescription for Progress**

The stalemate over fast track revolves around two central issues. Most attention is devoted to whether and how Congress should mandate inclusion of labor and environmental standards in trade negotiations. This debate is fundamentally about what political accommodation Congress will reach on the substantive guidance it gives to the president regarding the content of trade agreements. The second issue is how to facilitate a productive relationship between Congress and the President in advancing America's trade interests. This question deserves more attention than it has received and likely will be at the heart of any Senate debate.

Procedurally, fast track can serve valuable purposes. America's negotiating position is stronger when foreign governments are assured that complex trade agreements requiring extensive changes to U.S. laws will be given a timely up-or-down vote. And meaningful congressional input into negotiations will result in agreements informed by political realities that have a better chance of commanding domestic support.

Is the current form of fast track the best way of doing this? The answer is almost certainly not. The current impasse does not serve the interests of the American people, Congress, or the president. The main problem is the abstract nature of the fast-track debate. Asking Congress for an open-ended grant of authority to pursue trade agreements whose benefits are as yet undefined and far into the future is a recipe for trouble. A powerful coalition of trade opponents has repeatedly mobilized effectively to thwart fast track legislation. But supporters galvanize to mount a full counter-offensive only when there are concrete benefits in the offing. A simple comparison makes the case. In 1997 and 1998, with no trade agreement pending, fast track failed in the House, but in 1994, when the hard won gains of the Uruguay Round hung in the balance, the vote was 295 to 125 in the House, with nearly 60 percent of Democrats in support.

Neither the president nor Congress nor the American people win from this recurring debate. In seeking fast track, the president is inevitably compelled to make the case that it is vital to his ability to negotiate on trade. This gives foreign trade partners the perfect excuse to blame failure on the president's lack of authority from Congress. And the succession of failed votes has put Members of Congress in the no-win position of being forced to declare every few years whether they are for or against trade in the abstract.

It is counterproductive to turn fast track into a quest in its own right. Rather, the key is to find a pragmatic mechanism for negotiating and expeditiously implementing strong trade agreements. Is there a way to achieve a balance between enhanced congressional oversight and congressional procedural restraint without inviting the protracted stalemate seen for the past eight years? The answer is almost surely yes. A more effective fast track would require meaningful congressional input into negotiations, more selective application of fast track by the president, and closer targeting of fast-track provisions to particular agreements.

### **A. Enhanced Consultations**

Through fast track, Congress promises self restraint on voting procedures in return for enhanced input into and oversight of trade negotiations. This is accomplished only in part through enumeration of the negotiating objectives. It is difficult to draft sufficiently precise negotiating objectives in a grant of authority that will cover a number of very different agreements over three to five years. Moreover, however well the negotiating objectives are crafted, it is very difficult for Congress to test if they have been adequately advanced for purposes of disapproval. The reality that there have been only two instances of a concerted effort to deny fast track treatment to an agreement underscores that the disapproval mechanisms serve as a fallback check rather than the first line of defense against the president's ability to secure fast track consideration of a controversial agreement.

In practice, although negotiating objectives draw much of the fire and fury in the fast track debate, far more important are mechanisms ensuring meaningful consultations between the president and key members of Congress during negotiations. Former fast track rules were vague as to the extent, frequency, and timing of consultations. That must change. Strengthened procedures should provide for:

- the Chairs of the Ways and Means and Finance Committees to establish detailed schedules and topics for consultations, which would intensify during critical junctures;
- more formalized reporting and assessment of whether the executive branch is working in good faith to develop a negotiating strategy in line with congressional guidance;
- the Congressional Trade Advisers – called for under prior fast-track laws – should be required to consult regularly with the Majority and Minority Leadership in both chambers and all committees having relevant jurisdiction to ensure broader congressional input;
- Congressional Advisers should be responsible for providing the president and U.S. negotiators with the sense of the Congress on the state of negotiations;
- Members charged with oversight must devote adequate time, attention, staff, and resources to track negotiations that may involve thousands of products and more than a hundred countries; and

- dedicated trade staffers need to be involved early in negotiations, stay current through years of talks, be available to travel overseas for protracted negotiations, and develop suitable procedures for safeguarding classified U.S. negotiating materials and positions.

The creation of a nonpartisan group of professional congressional staff dedicated to trade would help make congressional oversight meaningful. Members now are highly dependent on the Executive Branch, the ITC, and the GAO for analysis of trade negotiations and disputes. Greater in-house expertise would afford the opportunity for more in-depth and timely input as negotiations proceed, thereby increasing the ability of Congress to formulate innovative positions and reducing the need to legislate detailed negotiating instructions in the abstract.

### **B. More Selective Use of Fast Track**

Since 1999, the U.S. Congress has enacted six pieces of trade legislation in the absence of fast track authority. Moreover, although the Israel and Jordan FTAs are nearly identical, and the political support for both was similarly strong, the Israel FTA was approved under fast track procedures, while the Jordan FTA was not. Despite this, there was no attempt to introduce amendments during consideration of the U.S.-Jordan FTA, and an attempt to delay consideration of the agreement failed. In addition, a growing number of countries, including Chile, Singapore, and Australia, have indicated willingness to negotiate free trade agreements with the U.S. without the safety net of fast track.

This record suggests there is greater scope to secure approval of trade agreements without fast track than is generally acknowledged, and that the president could be more selective in the agreements for which he seeks fast track. Only those agreements that require extensive changes to U.S. laws and involve multiple partners hinge centrally on fast track procedures. Since such agreements are rare, important and years in the making, it is reasonable for Congress to expect the president to provide greater specificity up front on the uses of a particular grant of authority. It raises the question whether the Bush Administration erred in making an immediate bid for an open-ended grant of trade promotion authority its top priority rather than first putting their own stamp on the trade agenda, committing to a limited set of agreements for which fast track would be used, and making sure key initiatives were ripe for congressional scrutiny.

More generally, presidents would be well advised to postpone seeking fast track until a compelling case can be made that contemplated negotiations will yield agreements of sufficient complexity and scope to necessitate fast track. Conversely, the president should continue to seek and the Congress to grant fast track authority for particular agreements that truly merit it. It would be extremely detrimental to U.S. leadership if the current impasse continued, encouraging negotiation of only those agreements that are sufficiently uncontroversial that they would not risk being picked apart by Congress under normal procedures.

### **Congressional Oversight: Targeted Fast Track**

The most difficult challenge is to strike a better balance on the oversight provisions of fast track. In principle, if confronted with a controversial agreement, Congress has the authority to withhold fast track treatment on the simple grounds of “failure to consult,” but in practice, Congress has never withheld fast track procedures. Neither are critics correct that it is a blank cheque; the Senate Finance Committee wrested major concessions before permitting negotiations with Canada to

proceed, and although resolutions disapproving NAFTA failed in committee, the underlying concerns were nonetheless addressed in the negotiating endgame. These are only the most extreme examples where the president made accommodations to overcome congressional opposition; cases where such course corrections preempted incipient congressional action are likely far more common.

Although Congress has repeatedly failed to grant approval for renewal of general fast track authority, no trade agreements have been voted down under fast track or denied fast track treatment. This suggests that congressional members are more uneasy providing a broad grant of authority that could be used in unanticipated circumstances than with the actual agreements that have been submitted for consideration. As long as fast track must be defended on the basis of the worst agreement that might be submitted, reenactment will remain difficult.

There is an inherent tension between making fast track sufficiently flexible to apply to a broad variety of potential agreements and sufficiently precise to convey the expectations of an often divided Congress regarding the substantive content of such agreements. Mandate too much detail and fast track applies a one-size-fits-all approach to widely diverse and complex subject matters, sets a perhaps unachievable bar for U.S. trade negotiators, and forces Congress to have a contentious and often paralytic debate over the abstract dimensions of trade. But fast track without details and precision inevitably runs the risk of seeming to be an abdication of congressional oversight.

Currently, this is most apparent in the debate over labor and environmental standards. How these issues are treated conveys an important political statement, determining the priority given to these objectives. But it is unclear that a workable paradigm for these complex matters can be neatly inserted into a fast-track law designed to cover a wide array of agreements and countries with enormous variation in their levels of development and their commitment to social and environmental protections.

Striking the right balance hinges on the interaction of several provisions of fast track: 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. There are likely to be several different combinations that could be comparably effective in more closely targeting the substantive debate to particular agreements, while retaining the procedural value of greater cooperation between the branches.

One alternative would be to make each grant of authority specific to the negotiation of a particular agreement and the duration coterminous with the length of the negotiation. This would permit much more precision in the negotiating objectives. It would also allow Congress to confine debate to the potential merits of a particular trade agreement. However, it might prove overly restrictive, unintentionally signaling that the president does not have the authority to enter into any launch of negotiations until after congressional approval had been obtained.

At the other end of the spectrum, Congress could establish fast track procedural mechanisms for a longer duration or even on an indefinite basis and with open-ended application, but institute an additional hurdle for authorizing the application of the procedures to a particular agreement and for specifying the principal negotiating objectives. This would push the president to consult at the start of negotiations (or early in the process), and it would allow Congress to establish more specific

objectives for each agreement than is possible in an omnibus fast-track bill. The balance could be further fine tuned by specifying whether the additional hurdle would require involvement of only the Gatekeeper Committees or set a more difficult threshold of floor action, and second whether the hurdle would entail obtaining approval or the lower bar of simply withstanding disapproval. The bigger and broader the overarching authority given by Congress, the greater should be the oversight afforded by the additional hurdle to secure application to particular agreements, and conversely.

Simply put, providing Congress with strengthened oversight on specific agreements in return for a more durable procedural agreement between Congress and the president would go a long way toward breaking the unproductive stalemate that has characterized the last several years.