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RESTRAINING THE PRESIDENT: CONGRESS AND TRADE POLICY

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INTRODUCTION

The first sentence of Article 1, Section 8 of the United States Constitution gives Congress the power to "lay and collect taxes, duties, imposts and excises." Controlling the terms of international trade is therefore unambiguously Congress's responsibility. Today, however, by its own design and through the actions of many decades, the legislative branch has made itself a marginal player in trade—a body that complains about the president's actions without actually making any effort to override them, as is their constitutional right.

Since the 1930s, Congress has delegated much of its Article 1 authority over trade policy to the executive branch. The assumption has been that Congress is too prone to geographical parochialism and too easily captured by rent-seeking lobbies that benefit from protectionism, while the executive branch takes a more holistic view of the economy. For roughly 90 years, then, the prevailing balance of power produced a bipartisan policy trajectory in favor of broad trade liberalization.

While the results of greater trade liberalization are overwhelmingly positive,[1] not all the gains have been shared equitably and globalization writ large thus has plenty of opponents, including those who lost their jobs because of foreign competition. Indeed, the 2016 campaign was noteworthy in that neither party's standard bearer endorsed the prevailing trade consensus. Both Hillary Clinton and Donald Trump opposed the Trans-Pacific Partnership (TPP), a promising trade agreement negotiated between the United States and 11 Pacific Rim nations that would have encompassed more than 40 percent of global GDP.[2] As Secretary of State in the Obama administration, Clinton had fully endorsed the TPP, calling it the "gold standard" of trade agreements. However, during her presidential run, she distanced herself from it.[3]

That defensive maneuver was partially due to Trump's relentless attack on trade. Eschewing the post-World War II Republican Party's orthodoxy in favor of trade liberalization, Trump rode a populist wave to capture the GOP nomination and then the presidency. Then, three days after his inauguration in January 2017, Trump withdrew the United

1. Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, "The Payoff to America from Globalization: A Fresh Look with a Focus on Cost to Workers," The Peterson Institute for International Economics, May 2017. https://piie.com/system/files/documents/pb17-16.pdf.

2. Kevin Granville, "What Is TPP? Behind the Trade Deal That Died," *The New York Times*, Jan. 23, 2017. https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.htm.

3. Glenn Kessler, "Fact Check: Clinton did call TPP 'the gold standard,'" *The Washington Post*, Sept. 25, 2016. https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-first-presidential-debate/fact-check-clinton-dod-call-tpp-the-gold-standard/?utm_term=.6963c6f1d145.

States from the TPP,[4] which was then awaiting congressional ratification. This marked a turning point in the long arc of liberalization, as it was the first time a trade agreement that was negotiated to completion was not ratified and implemented by the United States.

In spring 2017, President Trump notified Congress of his intent to renegotiate the North American Free Trade Agreement (NAFTA) with Mexico and Canada,[5] a process that began in August 2017 and recently concluded in September 2018.[6] Also in 2017, dusting off long-dormant trade authorities, the Trump administration launched investigations into whether imported steel and aluminum jeopardize the national security of the United States under Section 232 of the Trade Expansion Act of 1962[7] and whether China engages in unfair trade practices pursuant to Section 301 of the Trade Act of 1974.[8]

Since the beginning of 2018, the Trump administration has aggressively imposed tariffs and other restrictions on the importation of a number of products originating in a myriad of countries, including some of our closest allies.[9] In addition, the president has threatened to withdraw from NAFTA and the World Trade Organization (WTO).[10] These unilateral decisions and threats have not been popular with many members of Congress, including the chairmen of the relevant committees with jurisdiction over trade policy, House Ways and Means Committee Chairman Kevin Brady (R-Texas)[11] and Senate Finance Committee Chairman Orrin Hatch (R-Utah).[12] To date, however, Congress has not advanced meaningful legislation that would reassert its own authority over trade policy or that would in any way restrict the president's unilateral decision-making.

Accordingly, the present study explains how and why Congress put itself in this position; analyzes what the appropriate stance of Congress should be; and then surveys current efforts to restore the relevancy of the legislative branch with respect to trade issues, which come in a wide variety of forms. It concludes with concrete recommendations for how Congress can reassert some Article 1, Section 8 authority while continuing the United States' longstanding, bipartisan policy in favor of trade liberalization.

HOW WE GOT TO WHERE WE ARE TODAY

Since the earliest days of the Republic, trade policy has been a contentious issue. The tide of trade liberalization has ebbed and flowed over time. As Douglas Irwin, a leading trade policy historian and Dartmouth University economist, notes in *Clashing Over Commerce: A History of US Trade Policy*, trade policy has served three principal goals: to raise revenue for the government through tariffs; to protect domestic producers from foreign competition and to reduce barriers for reciprocal trade agreements with foreign countries.[13] Irwin notes that these eras of ebb and flow were delineated by "two major exogenous shocks that produced a transition from one objective to another": the Civil War and the Great Depression.[14] And, although the primary actor in setting trade policy in the United States is now the executive branch, this has not always been the case.

Congressional Log-rolling and the Beginning of Trade Policy Delegation

For most of its history, Congress micromanaged tariff schedules and set trade policy pursuant to its Article 1, Section 8 powers. Between the founding of the country and the Civil War, it used tariffs to raise revenue for the federal government.[15] Between the Civil War and the onset of the Great Depression, Congress primarily used tariffs as a sort of quid pro quo to reward constituent producers by protecting them from foreign competition. This complex, power-sensitive, vote trading, bargaining process was generally referred to as "log-rolling." The culmination of this trend came in the late 1920s, just as the economic boom turned to bust. After the 1928 elections, Republicans dominated Congress and the House went particularly hog wild in 1929, passing a bill that contained 845 tariff increases against just 82 decreases. This

4. Granville. https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.htm.

5. Office of the United States Trade Representative, "Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement," Executive Office of the President, May 17, 2017. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces.

6. Alan Rappeport, "U.S. and Canada Reach Trade Deal to Salvage Nafta," *The New York Times*, Sept. 30, 2018. https://www.nytimes.com/2018/09/30/us/politics/us-canada-nafta-deal-deadline.html.

7. Ana Swanson, "Trump administration launches national security investigation into steel imports," *The Washington Post*, April 20, 2017. https://www.washingtonpost.com/news/wonk/wp/2017/04/20/trump-administration-launches-national-security-investigation-into-steel-imports/?utm_term=.4caa71d493b7.

8. Office of the United States Trade Representative, "USTR Announces Initiation of Section 301 Investigation of China," Executive Office of the President, Aug. 18, 2017. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section.

9. Chad P. Bown and Melinda Kolb, "Trump's Trade War Timeline: an Up-to-Date Guide," Peterson Institute for International Economics, Sept. 24, 2018. https://piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide.

10. Christine Wang, "Trump threatens to withdraw from World Trade Organization," *CNBC*, Aug. 30, 2018. https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html.

11. Berkeley Lovelace, Jr., "GOP Rep Kevin Brady: Tariffs are taxes that impede the nation's economic growth," *CNBC*, July 25, 2018. https://www.cnbc.com/2018/07/25/gop-rep-kevin-brady-tariffs-are-taxes-impede-economic-growth.html.

12. Jacob Pramuk, "Key Republican Orrin Hatch threatens to check Trump's tariff policy," CNBC, July 17, 2018. https://www.cnbc.com/2018/07/17/key-republican-orrin-hatch-threatens-to-check-trumps-tariff-policy.html.

13. Douglas A. Irwin, *Clashing Over Commerce: A History of US Trade Policy* (University of Chicago Press, 2017), p. 2.

14. Ibid.

15. Ibid., pp.31-218.

raised the average duty on imports from 34.6 to 43.1 percent.[16] In the minority report, Rep. Cordell Hull (D-Tenn.) stated that the bill ensured "that the worst type of log-rolling and political pressure of conflicting interests will be continued."[17] The Senate bill went through a tortuous committee process and eventually emerged in March 1930, with 620 tariff increases of its own, against 202 cuts.[18]

President Herbert Hoover, who had been elected after a triumphant seven years as Commerce Secretary during the Harding and Coolidge administrations, harshly criticized his fellow Republicans' efforts as having strayed from campaign promises to focus increases on agricultural commodities and reduce industrial tariffs.[19] Accordingly, he asked Congress for "flexible tariff" powers that would allow the president to make adjustments in line with the recommendations of the bipartisan Tariff Commission.[20] When it seemed he would not get them, he threatened a veto and the final version of the law included the delegation.[21] Although the bill and the process that produced it were widely lambasted in the press and, in spite of his own reservations about its substance, Hoover signed the Smoot-Hawley bill that had emerged from conference into law in June 1930.[22] It increased about 900 tariffs and decreased 235—and was the last time Congress directly legislated general revisions to the United States' tariff code.[23]

The onset of the Great Depression brought Smoot-Hawley into even greater disrepute and in 1932, the Democratic majority that swept into Congress revisited tariffs under the leadership of Hull, who had become Secretary of State. The Reciprocal Trade Agreements Act of 1934 (RTAA) empowered the president to reduce tariffs without further congressional involvement for three years.[24] Democrats, and Hull in particular, hoped that the president would thus be empowered to negotiate a series of trade deals that would stimulate commerce and promote world peace.[25] Republicans offered a number of criticisms, including the contention that the RTAA represented an unconstitutional delegation of power to the president.[26] But the revulsion toward Smoot-Hawley largely insulated Democrats from criticism.[27]

As Irwin argues in *Clashing Over Commerce*, the RTAA forever altered the political dynamics of trade in American politics, in favor of lower tariffs.[28] When Congress returned its attention to trade, the question was now simply framed as whether the RTAA program should be continued—a question that could be put to a simple majority vote, in contrast to the approval of treaties, which requires two-thirds of the Senate.[29] During the 1930s, trade agreements facilitated by the RTAA basically reversed the increases implemented by Smoot-Hawley.[30] The RTAA was renewed in 1937, 1940 and 1943.

Delegation and Birth of the Multilateral Trading System

In the wake of the Second World War, isolationism was discredited and both parties largely supported an expansion of international trade. Congress's renewal of the RTAA in 1945 gave the president the authority to make deeper cuts to tariff rates than ever before, and it received considerable support from Republicans.[31] Still, after their midterm election victories in 1946, Republicans who were worried about the complete loss of protection for American industries were in a position to make some demands on the Truman administration, as it sought a major international trade pact.[32] Accordingly, they asked for a "safeguard" procedure that would allow domestic firms to petition the government for temporary restrictions, if they were injured as a result of import competition. Truman created such a procedure through Executive Order 9832 in February 1947. As Irwin notes, the creation of the safeguard "was one of several critical moments in the process of forging a bipartisan consensus in favor of creating a system of open trade after World War II."[33] Indeed, it allowed Truman to forge ahead in negotiations at Geneva that eventually produced what became known as the General Agreement on Tariffs and Trade (GATT), Article XIX of which would codify the safeguard process for domestic industries threatened by new imports.

GATT was finalized in October 1947 and became effective in the United States through Truman's executive order on Jan.

16. Ibid., pp. 221-410, esp. 374-75.

17. Ibid.

18. Ibid., p. 382.

19. Ibid., p. 374.

20. Ibid., p. 376.

21. J. Richard Snyder, "Hoover and the Hawley-Smoot Tariff: a View of Executive Leadership," *The Annals of Iowa* 41:7 (Winter 1973), pp. 1185-86.

22. *Clashing Over Commerce*, p. 388.

23. Ibid., p. 389.

24. Ibid., p. 426.

25. Douglas A. Irwin, "Trade Liberalization: Cordell Hull and the Case for Optimism," Council on Foreign Relations, July 31, 2008, p. 6. https://cfrd8-files.cfr.org/sites/default/files/pdf/2008/07/CGS_WorkingPaper_4.pdf.

26. Clashing Over Commerce, p. 426.

27. Ibid., pp. 426-30.

28. Ibid., pp. 431.

29. Ibid., pp. 431-32.

30. Ibid., p. 439.

31. Ibid., p. 470.

32. Ibid., pp. 475-77.

33. Ibid.

1, 1948, pursuant to the authority delegated to him through the RTAA. In the coming years, the new framework allowed a massive reduction of tariffs: whereas during the war, the average tariff was 33 percent, by 1951, it was down to 13 percent, the lowest level since the eighteenth century.[34] Much of this reduction was attributable to inflation reducing the impact of fixed-dollar-amount duties, which was never really confronted as a policy choice, but GATT-related reductions were still significant.[35] As the American economy became increasingly export-oriented, the constituency for protectionism shrank. Even critics of the GATT no longer wished for a return to congressional rate-setting, which had come to be seen as backward.[36]

Growth of Administrative Import Relief

During the 1950s and 1960s, America's participation in the GATT came to be seen as an important bulwark against communism in Europe.[37] More than an appetite for further trade liberalization, this motivated Congress to reauthorize the RTAA in 1955 and 1958.[38] Meanwhile, western European nations were creating the European Economic Commission and European Free Trade Association, which eliminated tariffs between members but kept tariffs on outside nations.[39] To operate in this environment, President John F. Kennedy sought to further increase the president's room to maneuver beyond what the RTAA facilitated. His administration championed what became the Trade Expansion Act of 1962 (TEA), which allowed across-the-board rate cuts (RTAA had allowed only product-by-product), created the Trade Adjustment Assistance program to aid workers displaced by foreign competition and created the position of Special Trade Representative within the Executive Office of the President.[40] It also contained Section 232, which empowered the president to unilaterally raise tariffs, if the Director of the Office of Emergency Planning (amended in 1980 to the Secretary of Commerce) found that a particular import threatens "to impair the national security" of the United States.[41] In addition, the TEA's definition of "national security" is exceedingly vague and amorphous to the point that it provides little check on the powers conferred by Section 232.[42] The passage of the TEA allowed the United States to push forward the next round of the GATT and conclude it with major tariff reductions in 1967, such that by 1975 the average tariff was down to about 6 percent.[43]

In 1973, Richard Nixon sought to push trade liberalization further, including by getting the power to eliminate some tariffs entirely without congressional approval.[44] His administration also found that non-tariff barriers, rather than tariff rates, had become the main issue in trade negotiations.[45] The delegation of authority under the TEA did not address these, and so Congress was faced with the prospect of having to vote on every provision. In order to discipline and streamline that process, in the Trade Act of 1974 it therefore created the "fast-track" procedure for considering agreements negotiated by the executive branch.[46] Instead of subjecting them to an open amendment process and thereby returning to the log-rolling dynamics of the Smoot-Hawley era, Congress would commit to give proposed agreements an expedited up-or-down vote.[47]

At the same time, Congress also sought to make it easier for firms harmed by import competition to seek relief. Section 201 of the Trade Act of 1974, the new safeguard provision, required only that imports be a "substantial cause of serious injury," rather than having to show that the injury came specifically from concessions granted under trade agreements.[48] The old Tariff Commission, now renamed the International Trade Commission (ITC), would have to make determinations within 60 days.[49] In short, Congress made it much easier for the executive branch to mollify some critics of trade liberalization through administrative processes. The fast-track authority under the Trade Act of 1974 was extended another eight years with the passage of the Trade Agreements Act of 1979.[50]

Aggressive Administrative Protectionism and the Dawn of the WTO and NAFTA

By the early 1980s, a strengthening dollar hurt exports by making them more expensive abroad, while making imports cheaper. This led to an increase in the trade deficit and with it, protectionist calls in Congress to address the trade imbalance.[51] In order to combat this growing protectionism, the

34. Ibid., p. 483.

35. Ibid., pp. 484-85.

36. Cong. Rec. 8049-8050 (1948) ["Statement of Senate Foreign Relations Committee Chairman Arthur Vandeberg"].

37. *Clashing Over Commerce*, p. 495.

38. Ibid., pp. 518-19.

39. Ibid., pp. 519-21.

40. Ibid., pp. 523-26.

41. 19 U.S.C. §1862(b)– (c).

42. Simon Lester, "Fixing Section 232," Cato Institute, June 1, 2018. https://www.cato.org/blog/fixing-section-232.

43. *Clashing Over Commerce*, p. 535.

44. Ibid., p. 549.

45. Ibid., p. 550.

46. Ibid., p. 551.

47. Ibid.

48. Ibid., pp. 549-53.

49. Ibid., p. 553.

50. Ibid., p. 558.

51. Ibid., p. 601.

Reagan administration embraced a two-pronged approach. First, in what became known as the "Plaza Accord," it would pressure other countries to strengthen their currencies against the dollar through coordinated central bank interventions in currency markets.[52] Second, through the use of Section 301 of the Trade Act of 1974, it would unilaterally and aggressively confront foreign trade practices determined to be "unreasonable or discriminatory" or those that "burden" or "restrict" United States commerce,[53] while expanding multilateral and bilateral trade negotiations.[54] The United States would eventually use Section 301 to enact import restrictions to combat Japanese semiconductor protectionism, South Korean insurance industry restrictions, and Brazil's protectionism in computer hardware and software.[55] Later in the decade, the dollar depreciated against other currencies, reducing the trade deficit and thereby relieving protectionist pressures in Congress.

While the 1980s featured a resurgence of targeted protectionism, the 1990s were marked by a period of drastic trade liberalization.[56] In 1988, Congress renewed fast-track authority and then renewed it again in 1991, facilitating the Uruguay Round GATT negotiations and trilateral negotiations with Mexico and Canada that produced the North American Free Trade Agreement (NAFTA) in August 1992.[57] Negotiated by President George H.W. Bush but shepherded to passage by President Bill Clinton and the Republican congressional minority, NAFTA eliminated nearly all tariffs between the three member-countries and established rules for the trade of many other goods and services.[58] After intense debate in both the public sphere and in Congress, the NAFTA Implementation Act was passed in November 1993.[59] It is somewhat unclear whether that law gives the president unilateral authority to withdraw from the agreement. Article 2205 of the NAFTA text provides that a party "may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties." This provision and the extent to which the executive branch can unilaterally withdraw from NAFTA is discussed in more detail below.

Shortly after NAFTA was passed, the United States and about 120 other countries finalized the Uruguay Round of GATT negotiations.[60] Begun in 1986, the Uruguay Round addressed longstanding priorities including agricultural subsidies, trade in services and intellectual property protections. It also addressed what many observers saw as a major flaw of the GATT system: its lack of binding dispute settlement.[61] In April 1994, the participants finally settled on an agreement (known as the Marrakesh Agreement), which converted the GATT into the World Trade Organization (WTO), which featured a binding dispute settlement mechanism.[62] Throughout negotiations, it became apparent that the United States' unilateral use of Section 301 was a major point of contention. In exchange for allowing the creation of binding dispute settlement, the European Union demanded that the United States stop using Section 301 to unilaterally impose import restrictions to combat foreign trade practices.[63]

Binding the United States to accept the results of the WTO's new dispute settlement procedures required congressional assent, which came with the Uruguay Round Agreements Act (URAA) passed under fast-track in the lame-duck session of 1994.[64] Two provisions of URAA significantly constrained executive branch authority over trade policy. First, the URAA restricted the United States Trade Representative (USTR) to invoke Section 301 only to address those foreign trade barriers not covered by WTO agreements.[65] Where WTO resolution procedures were available, the URAA committed the USTR to use them, rather than to turn to unilateral executive branch action.[66]

Second, the URAA clearly requires that the president must go through Congress in order to leave the WTO. As previously mentioned, Article XV of the Marrakesh Agreement states that any member of the WTO can withdraw from the agreement six months after notifying the Director-General, without specifying how the process must take place in each country if it tried to withdraw. But, when Congress ratified the Uruguay Round, it established in Section 125 of the URAA that the United States can withdraw from the WTO "if, and only if" Congress passes a joint resolution terminating participation.[67] In other words, unlike NAFTA, which is ambiguous about withdrawal, it would clearly take an act of Congress to withdraw from the WTO.

52. Ibid., p. 605. The "Plaza Accord" was named after the hotel in New York where the conference was held.

53. 19 U.S.C. § 2411 (b)(1).

54. *Clashing Over Commerce*, p. 606.

55. Ibid., p. 607.

56. Ibid., p. 625.

57. Ibid., p. 629.

58. Ibid., p. 629.

59. Ibid., pp. 640-43.

60. Ibid., p. 644.

61. Ibid., p. 614.

62. Ibid.

63. Andrew T. Guzman and Joost H.B. Pauwelyn eds., *International Trade Law*, 2nd edition (Wolters Kluwer, 2012), pp. 161-62.

64. *Clashing Over Commerce*, p. 652.

65. Scott Lincicome, "Chinese Intellectual Property Policies Demand a Smart U.S. Trade Policy Response -- One President Trump Doesn't Appear to be Considering," Cato Institute, Jan. 2, 2018. https://www.cato.org/blog/chinese-intellectual-property-policies-demand-smart-us-trade-policy-response-one-president.

66. Statement of Administrative Action for WTO Dispute Settlement Understanding Concerning Section 301.

67. 19 U.S.C. § 3535.

Since the Uruguay Round was implemented, further liberalization has proceeded largely through a series of bilateral and multilateral agreements.[68] The termination provisions of these agreements and their implementing legislation largely mirror NAFTA's rather than the URAA's. They therefore leave ambiguous the unilateral authority of the executive branch to withdraw from such agreements.

The Trump Administration and the Protectionist Executive

As a presidential candidate, Donald Trump offered a withering critique of the United States' trade agreements made during the preceding decades, promising he would end the "era of economic surrender" and secure a "fair deal for the American people."[69] Since becoming president, he has continued his attacks and used the extensive powers that Congress has delegated to his office to stake out an aggressive position on trade. He has raised tariffs on imported solar panels, washing machines, steel and aluminum, as well as tariffs on some $250 billion in Chinese goods.[70] To date, the president's tariffs cover 12 percent of all imports in 2018.[71] He has threatened to go considerably further, suggesting that the United States may impose tariffs on all remaining Chinese imports[72] and impose national security tariffs on automobiles. However, the president's existing powers may not satisfy his appetite for increased protection. Apparently at Trump's behest, the administration drafted a bill that would empower the president to repudiate the basic principles of the World Trade Organization and essentially allow him to raise tariffs at will.[73]

Congress, however, shows no signs of being interested in further empowering the president. Rather, numerous legislators have voiced concerns about Trump's trade policies. Republican legislators especially have been openly hostile to Trump's tariff increases and threats of trade wars. Senator Orrin Hatch (R-Utah), for example, who is chairman of the Senate Finance Committee, has warned that if the administration continues along its current path, Congress will take up legislation in response.[74] Some members are reconsidering whether large-scale delegation of Article 1, Section 8 powers serves the public's interest now that the executive branch has pursued aggressive protectionism.

And, while some reassertion of trade policy authority by Congress is certainly desirable, policymakers should tread carefully when considering how aggressive they should be**.** The benefits of broad delegation are straightforward. As the unseemly log-rolling process that led to the passage of Smoot-Hawley demonstrated, Congress has inherent weaknesses when setting tariff schedules: namely, its members are too easily captured and too prone to sectionalism. Even ardent opponents of the RTAA, which was passed in order to mitigate the damage done by Smoot-Hawley, came to concede that Congress was incapable of setting tariff rates on individual products in a thoughtful manner.

As the United States pushed forward with trade liberalization, Congress increasingly sought to insulate itself from the political pressure involved in import relief by creating administrative processes in the executive branch. This was done mainly through the ITC, which is an independent executive branch agency, and to a lesser extent, through the USTR and the United States Department of Commerce.

Likewise, through the RTAA and then more recently through Trade Promotion Authority (also known as "fast-track" authority), Congress routinely delegates temporary authority to negotiate and sign free- trade agreements with foreign countries to the president, while retaining the ultimate authority to approve or disapprove such agreements. This has led the United States to negotiate and ratify 14 free-trade agreements with 20 different countries.[75] Negotiating free-trade agreements would be virtually impossible if foreign nations had to bargain with 535 members of Congress, rather than one agency.

For roughly 90 years, the delegation of authority to presidents committed to expanding trade created a bias toward trade-policy liberalization, which has generated huge net-benefits for America's (and the world's) economy. But the current dynamic, which features a president who is more protectionist than Congress, has turned the so-called "gentlemen's agreement" between elected branches of government on its head, at least for now.

68. These include the Central America Free Trade Agreement with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic, as well as agreements with Australia, South Korea and others. Office of the United States Trade Representative, "Free Trade Agreements," Executive Office of the President of the United States, accessed Oct. 29, 2018. https://ustr.gov/trade-agreements/free-trade-agreements.

69. Text of Donald Trump's trade speech, Monessen, Pennsylvania, June 28, 2016. Available at: http://time.com/4386335/donald-trump-trade-speech-transcript.

70. Yoni Blumberg, "Trump's $250 billion in China tariffs are now in effect – here's what could get more expensive," *CNBC*, Sept. 25, 2018. https://www.cnbc.com/2018/09/25/with-trumps-250-billion-in-china-tariffs-heres-what-will-cost-more.html.

71. Chad P. Bown et al., "Trump and China Formalize Tariffs on $260 Billion of Imports and Look Ahead to Next Phase," Peterson Institute for International Economics, Sept. 20, 2018. https://piie.com/blogs/trade-investment-policy-watch/trump-and-china-formalize-tariffs-260-billion-imports-and-look.

72. Jenny Leonard and Jennifer Jacobs, "U.S. Plans More China Tariffs If Trump-XI Meeting Fails, Sources Say," *Bloomberg*, Oct. 29, 2018. https://www.bloomberg.com/news/articles/2018-10-29/u-s-said-to-plan-more-china-tariffs-if-trump-xi-meeting-fails.

73. Jonathan Swan, "Exclusive: A leaked Trump bill to blow up the WTO," *Axios*, July 1, 2018. https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html.

74. "Frustrated lawmakers threaten action on Trump's tariffs," *CBS News*, July 19, 2018. https://www.cbsnews.com/news/frustrated-lawmakers-threaten-action-on-trumps-tariffs.

75. Ibid.

While the delegation of trade policy authority has led to declines in tariff rates and the expansion of trade in general, there are certain drawbacks. For starters, it has created the pretense that trade policy is largely technocratic and apolitical—to be handled by judges and administrators, not elected legislators. A close corollary of this is the general avoidance of responsibility by Congress. This means that messy fights over tariffs and trade policy are often fought through opaque administrative processes, rather than in legislative bodies.

A prime example of this is playing out right now as firms scramble to secure exemptions from certain tariffs levied by the Trump administration. High-priced lawyers and lobbyists are furiously petitioning the USTR and the Department of Commerce for product exclusions. One former partner at a major D.C. law firm said of the product exclusion process: "The dinner bell is ringing for the trade bar and associated lobbyists and consultants."[76] Meanwhile, lawmakers who oppose legislation to rein in the president's unilateral tariff powers are pressing the administration for favorable treatment for constituents' companies, a process which has garnered significant media scrutiny.[77] Objecting to this haphazard system, a recent bipartisan coalition of nearly 170 members of the House has asked the USTR for a clear product exclusion process from the Section 301 tariffs on Chinese products.[78]

Perhaps most troublesome is the executive branch's lack of accountability under the current system. A good example is President Trump's recent imposition of steel and aluminum tariffs under the guise of national security, pursuant to Section 232 of the Trade Expansion Act of 1962. After departing from the G-7 summit in Quebec in June 2018, President Trump tweeted that the steel and aluminum tariffs "are in response to [Canada's] 270% [tariffs] on dairy."[79] Through this and other public comments, it is clear the administration does not believe that Canadian and European steel, for instance, poses a genuine national security threat to the United States; rather, the administration believes the tariffs give the United States leverage to force Canada and the European Union to make trade concessions that will benefit American exporters.[80]

Many bills would seek to rebalance policymaking power for trade back toward Congress and thus, the following sections focus on the efficacy of particular proposals. None of these proposals alone would entirely correct the imbalance of power but Congress must start somewhere. And any of these would, very likely, be improvements.

THE CURRENT LEGISLATIVE LANDSCAPE

The Global Trade Accountability Act

The first and most sweeping bill introduced in the 115th Congress to address Congress's role in setting tariffs is Senator Mike Lee's (R-Utah) Global Trade Accountability Act,[81] with a companion later introduced by Rep. Warren Davidson (R-Ohio).[82] Put simply, the bill would make all tariff-instituting or import-restricting actions subject to congressional approval, except for a 90-day period of interim applicability, in some cases. The president could still initiate "unilateral trade actions," which earlier laws had entitled him to take independently but these would only become permanent with the approval of Congress.[83]

Under the Global Trade Accountability Act, a president looking to institute a new tariff (or raise an existing one) would make a report, which would be required to discuss likely retaliation by America's trading partners. If the president asserts that the action is necessary for national security, health or safety, enforcement of the criminal laws or for some other emergency, he or she can get the unilateral action imposed for 90 calendar days, without renewal. For the action to remain in effect past that date, Congress must pass a joint resolution. Congress is required to schedule a vote promptly, thereby ensuring that legislators hold themselves responsible for the ultimate decision. After a year, the U.S. International Trade Commission would be required to write a report on the action's economic effects.

The Global Trade Accountability Act's definition of a "unilateral action" also includes any attempt by the president to

76. Ana Swanson and Kenneth P. Vogel, "Trump's Tariffs Set Off Storm of Lobbying," *The New York Times*, March 16, 2018. https://www.nytimes.com/2018/03/16/us/politics/trump-tariffs-lobbying.html.

77. Jim Tankersley, "Lindsey Graham Welcomed Trump's China Tariffs, Then Helped Companies Avoid Them," *The New York Times*, Oct. 4, 2018. 'https://www.nytimes.com/2018/10/04/us/politics/lindsey-graham-china-tariffs.html.

78. Mark Niquette, "U.S. Lawmakers Urge Exclusion Process for Latest Trump Tariffs," *Bloomberg*, Oct. 16, 2018. https://www.bloomberg.com/news/articles/2018-10-16/u-s-lawmakers-urge-exclusion-process-for-latest-trump-tariffs.

79. Donald J. Trump (@realDonaldTrump), "PM Justin Trudeau of Canada acted so meek and mild during our @G7 meetings only to give a news conference after I left saying that, 'US Tariffs were kind of insulting' and he 'will not be pushed around.' Very dishonest and weak. Our Tariffs are in response to his of 270% on dairy!," June 9, 2017, 4:04PM. Tweet. https://twitter.com/realDonaldTrump/status/1005586562959093760.

80. Michael C. Bender et al., "Trump Steps Up Attacks on Fed Chairman Jerome Powell," *The Wall Street Journal*, Oct. 23, 2018. https://www.wsj.com/articles/trump-steps-up-attacks-on-fed-chairman-jerome-powell-1540338090?mod=hp_lead_pos1.

81. S.177, Global Trade Accountability Act, 115th Cong.

82. H.R. 5281, Global Trade Accountability Act, 115th Cong.

83. More precisely, covered actions are defined as including prohibition of import, imposition or increase of duty on import, tightening of quota on import, suspension of trade agreement concession or any other restriction. Covered sections of the law include: 122, Title III, Sections 406, 421, 422 and 338 of Tariff Act of 1930, 232 of Trade Act of 1962, 103(a) of Trade Priorities and Accountability Act of 2015, Trading with the Enemy Act, International Emergency Economic Powers Act and any other provision of law implementing trade agreements. Technical corrections to the harmonized tariff schedule are exempted.

suspend, withdraw or prevent the application of any concessions made by the United States pursuant to the trade agreement's implementing law. As a result, any such action would require congressional approval to take effect. In other words, if enacted, the bill would prevent the president from unilaterally withdrawing from trade agreements.

It is worth noting that this bill (like all the others discussed here) does not cover any actions removing or relaxing tariffs or other import restrictions, thereby liberalizing trade. Such actions would continue to be treated under fast-track authority.

The Trade Authority Protection Act

The Trade Authority Protection Act, H.R. 5760, introduced by Rep. Ron Kind (D-Wisc.) is similarly broad but would leave the president with more leverage than Lee's bill.[84] It covers exactly the same set of trade-restricting actions (although it refers to them as "congressionally delegated trade actions" rather than "unilateral trade actions"). However, instead of mandating congressional approval, it creates a fast-track procedure for congressional disapproval through the mechanism of the Congressional Review Act (CRA). Within 60 days of the action, Congress could pass a procedurally privileged joint resolution of disapproval that would prevent it from going into effect.

The bill's new section 155(d)(2) also offers a definition of "joint resolution" specific to trade actions. It appears that this is simply for the purpose of specifying the form that the language of such resolutions must take but it introduces some confusion, as it reads: "For purposes of this subsection, the term 'joint resolution' means only a joint resolution of either House of Congress." Presumably, this does not imply that the resolution can be passed by only one chamber without the other; such a one-house legislative veto would almost certainly run afoul of the Supreme Court's *INS v. Chadha* (1983) decision.[85]

Instead, it more likely means that the CRA's normal procedure would be required, in which case, the joint resolution would need to be signed by the president. That, in turn, means that the Trade Authority Protection Act would suffer from the same general weakness as the CRA. Because the president is able to veto a joint congressional resolution under the CRA, since its passage in 1995, the law has only facilitated the rejection of rules when a policy was put in place by an outgoing administration giving way to opposite-party control of the White House.

84. H.R. 5760, The Trade Authority Protection Act, 115th Cong.

85. 462 U.S. 919 (1983).

GENERAL NATIONAL SECURITY CONCERNS AND CFIUS

The Trump administration actions that have spurred the most criticism from Congress have been those using Section 232 of the TEA. Under section 232, the Secretary of Commerce is empowered to conduct investigations into any import's national security implications, including on domestic production essential to defense requirements. Commerce Secretary Wilbur Ross has made it clear that he interprets this provision very broadly: "Economic security is military security. And without economic security, you can't have military security."[86] Ross's recommendations prompted the increased steel and aluminum tariffs already in place, and he has ongoing investigations into the national security effects of auto and uranium imports.

Congress has indicated its concerns about these actions in a number of ways. Two actions from July 2018 are especially noteworthy: First, a letter signed by a bipartisan group of 149 members of the House warned Ross against proceeding in his auto investigation;[87] and Senators Jeff Flake (R-Ariz.) and Bob Corker (R-Tenn.) pushed forward and secured a vote on a non-binding resolution to instruct Senate conferees (on an unrelated spending bill) to include language to give Congress an active role in deciding whether tariffs should be imposed under Section 232.[88] It passed 88-11.[89]

In light of the amorphous definition of "national security" contained in the TEA and the Trump administration's expansive interpretations, legal scholars have also suggested ways for Congress to revise the statute in a way that would encompass true national security issues, while also explicitly exempting products from countries with whom the United States has defense treaties or mutual security agreements.[90] To date, no bill has been introduced in Congress that would revise the definition to restrain the types of actions taken by the Trump administration but writing one would be a fairly straightforward matter.

Although it does not bear directly on Section 232, a closely related issue also deserves mention. Senator Pat Toomey (R-Penn.) introduced an amendment to the National Defense Authorization Act that would have required Congress to vote

86. Berkeley Lovelace, Jr., "Commerce Secretary Wilbur Ross on auto import probe: 'Economic security is military security'," CNBC, May 24, 2018. https://www.cnbc.com/2018/05/24/wilbur-ross-on-auto-import-probe-economic-security-is-military-security.html.

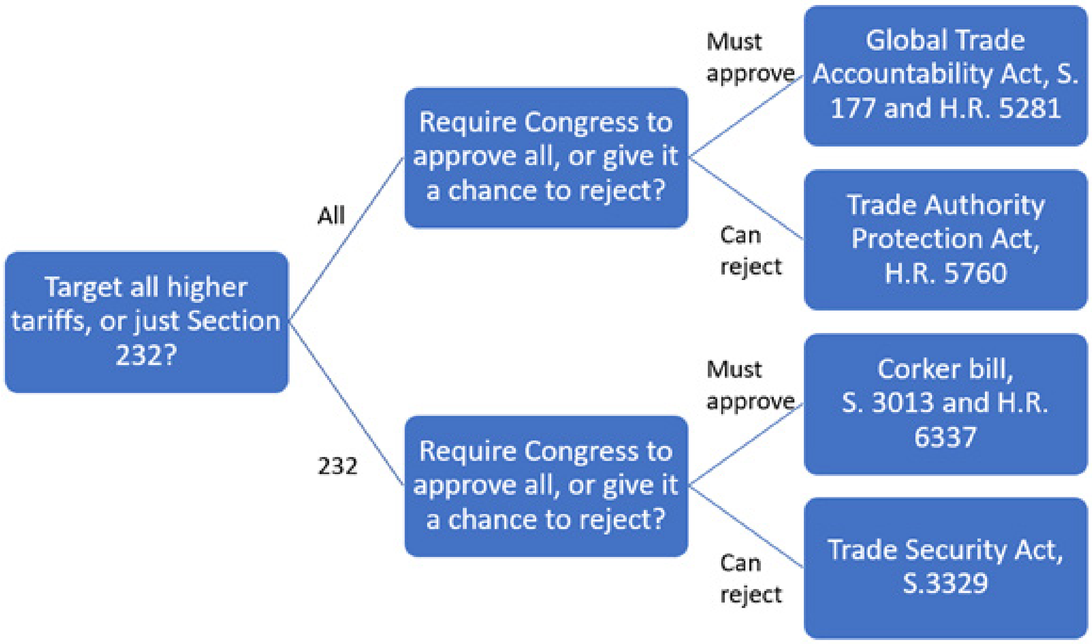
87. Rep. Jackie Walorski et al., "Letter to Commerce Secretary Wilbur Ross," July 18, 2018. https://walorski.house.gov/wp-content/uploads/2018/07/20180718_232_Auto_Letter.pdf.

88. Justine Coyne, "US Senate rebukes Trump's Section 232 tariffs in symbolic vote," S&P Global, July 11, 2018. https://www.spglobal.com/platts/en/market-insights/latest-news/metals/071118-us-senate-rebukes-trumps-section-232-tariffs-in-symbolic-vote.

89. Ibid.

90. Lester.

FIGURE 1: BILLS TO INCREASE CONGRESS'S ROLE IN RAISING TARRIFFS (115TH CONGRESS)



SOURCE: Created by the authors.

to approve all rules related to national security promulgated by the Committee on Foreign Investment in the United States (CFIUS).[91] Toomey argued that Congress should hold itself responsible for balancing national defense considerations against the risks of chilling foreign direct investment.[92] The amendment, which was discussed as "REINS for Foreign Investment Reviews,"[93] failed to secure cloture, 35-62, with all Democrats opposing it.[94]

S. 3013

To date, the bill that has gotten the most traction is Senator Corker's S. 3013,[95] for which the companion bill is H.R. 6337, introduced by Rep. Mike Gallagher (R-Wisc.).[96] It would greatly alter the entire process put in place by Section 232, forcing all decisions about raising tariffs for national security reasons to run through Congress. With some imprecision, it can be thought of as following the same plan as Senator Lee's Global Trade Accountability Act but with its scope limited only to Section 232 actions.

As Section 232 currently stands, in cooperation with the Secretary of Defense, the Secretary of Commerce investigates and then reports to the president; if the Secretary agrees there is a national-security threat, the president then makes a determination, including as to the necessary response. Under the law as amended, upon the conclusion of a 232 investigation by the Secretary of Commerce, the president would proceed to submit a report and recommendation to Congress. Legislators would then be responsible for voting on a joint resolution of approval, without which the change would not take effect. Fast-track procedures would ensure that the vote would be taken within 60 days.

Importantly, the law would cover all 232 determinations made within the two years *preceding* its passage, with rates reverting to their previous levels pending congressional approval. This means that in the short run, the Trump administration's steel and aluminum tariffs would be suspended and Congress would then be required to vote on whether to reinstate them.

Sen. Corker attempted to attach this as an amendment to the National Defense Authorization Act but was blocked from doing so. Some critics, including Senator Sherrod Brown

91. S.Amdt. 2700 to S.Amdt. 2282 to H.R. 5515, John S. McCain National Defense Authorization Act for Fiscal Year 2019, 115th Cong.

92. Office of Sen. Pat Toomey, "ICYMI -- Toomey: Congress Should Have Say Over New CFIUS Regs," June 13, 2018. https://www.toomey.senate.gov/?p=op_ed&id=2200.

93. The Editorial Board, "Reining In Investment Reviews," *The Wall Street Journal*, May 21, 2018. https://www.wsj.com/articles/reining-in-investment-reviews-1526946125.

94. Roll Call Vote, Vote Number 123, June 14, 2018. https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00123.

95. S.3013, 115th Cong.

96. H.R. 6337, 115th Cong.

(D-Ohio), have argued that it would inappropriately limit the president's authority to ensure the nation's security.[97]

Senator Portman's Trade Security Act

Finally, introduced in August 2018, Senator Rob Portman's (R-Ohio) Trade Security Act, S. 3329, would put in place a congressional review provision for Section 232 actions.[98] Whereas Corker's 232 bill is parallel to Lee's broader bill, Portman's is parallel to Kind's congressional review bill affecting all "congressionally delegated trade actions."

To include congressional review for Section 232 actions would build on a congressional review procedure already built into the law. In 1980, Congress passed the Crude Oil Windfall Profit Tax Act, which amended Section 232 by establishing a congressional review procedure to prevent the president's imposition of petroleum-import quotas, if a Joint Resolution by Congress is enacted disapproving of such action.[99] Portman's bill would make that procedure apply to all imports.

The Trade Security Act would also change the procedures for 232 investigations. For example, with consultation from the Secretary of Commerce, the Secretary of Defense would now be charged with making national-security determinations. Public hearings would be required. If the Secretary of Defense determined a threat exists, only then would the Department of Commerce develop and propose a remedy to the president. Once the president decided to act, Congress would have the chance to pass a joint resolution of disapproval. As with Kind's broader bill, this disapproval procedure might either be a constitutionally infirm legislative veto or would likely be limited in its effectiveness because of the need to override a presidential veto.

Lack of a Bill to Clarify Congress's Role in Withdrawing from Trade Agreements

Although many proposals have been made to increase Congress's role in raising tariffs and its trade statutes have clearly set out procedures for entering into trade agreements, the process of withdrawal is much more ambiguous. It is therefore unclear exactly what steps a determined president could take to extract the United States from its previous trade commitments, and when that president would be compelled to work through Congress. Offering clarification on this front would therefore be one of the most constructive ways that Congress could reassert its constitutional responsibility.

So far, no bill has been introduced for the sole purpose of reasserting congressional authority over withdrawing from trade agreements. This is probably because some members and congressional staff believe that current law—indeed, the very structure of the Constitution—already requires this.[100] Some in Congress are afraid that if they introduce a bill meant to clarify Congress's responsibility, their action could be interpreted as a concession that the president currently possesses the legal power to proceed unilaterally, perhaps influencing a court to accept administration claims of existing authority, if a dispute ever played out in the judiciary.

However, Congress should be willing to put these concerns aside and take responsibility for the ambiguity in its own statutes. The truth is that the process of withdrawing from trade treaties—something the United States has no experience with whatsoever—is badly underspecified in federal law. The one clear exception is Section 125 of the URAA, which makes it very clear that a joint resolution of Congress is required to pull the United States out of the WTO.[101] To take such a momentous decision, which is sure to have major diplomatic and economic implications, full congressional involvement is undoubtedly the appropriate procedure. Congress therefore ought to consider taking the language from Section 125 and copying it into the corresponding sections of the implementing legislation of NAFTA, CAFTA and other trade agreements.

If a bill proposing such changes were to fail, that would hardly be a definitive statement that the current law leaves the president free to act unilaterally. If the judiciary were to become involved in a dispute over such an action, it would have to rely first and foremost on statutory text. To further allay concerns, a bill of this nature could contain appropriate prefatory language clarifying that its sponsors do not believe that the president can act without Congress under current law.

It is worth noting that Senator Lee's Global Trade Accountability Act does address presidential actions meant to withdraw the country from trade agreements. It provides for a congressional-review process if the executive branch tries to suspend or withdraw concessions made by the United States pursuant to trade agreements to which it is a party. However, this is still less clear than the restraint imposed by the URAA, and so it makes sense to pursue further clarification through other legislation.

97. Jordan Carney, "Bill reining in Trump on tariffs blocked in Senate," *The Hill*, June 12, 2018. https://thehill.com/blogs/floor-action/senate/391924-bill-reining-in-trump-on-tariffs-blocked-in-senate.

98. S.3329, Trade Security Act, 115th Cong.

99. 19 U.S.C. §1862(f).

100. See, e.g., Joel Trachtman, "Trump can't withdraw from NAFTA without a 'yes' from Congress," *The Hill*, Aug. 16, 2017. https://thehill.com/blogs/pundits-blog/international-affairs/346744-trump-cant-withdraw-from-nafta-without-a-yes-from.

101. 19 U.S.C. § 3535(b), (c) and (d).

Other Proposals

Finally, it is worth briefly noting some other proposals that seek to reverse specific aspects of the Trump administration's trade policy, rather than making permanent changes to the institutional balance of trade policymaking. Some contemplate reversing specific Trump administration tariffs. For example, the Automotive Jobs Act of 2018, sponsored by Senator Doug Jones (D-Ala.), would suspend the investigation into national security effects of automobile and auto-supply imports currently being conducted by the Department of Commerce.[102] Others would accept the permanence of new tariffs but seek to provide targeted relief to those industries hurt most by them.[103] Others would seek to alter the process of instituting new tariffs by requiring more disclosures from the president and other administration officials about how their own business interests would be affected.[104]

CONCLUSION

It is unlikely that any of these bills will become law in the waning days of the 115th Congress. As members of Congress look to renew the efforts to restrict the president's discretionary trade powers in the 116th Congress, they will have the opportunity to recalibrate their strategy. After reviewing the history and effects of trade-policy delegation to the executive branch, R Street offers the following recommendations.

Efforts to completely reverse all of the delegation and reestablish Congress as the responsible actor for setting individual tariff rates would dramatically undermine our ability to pursue future trade liberalization or tariff cuts. Likewise, the United States should continue to have one, formal trade negotiator in the executive branch: the USTR.

At the same time, similar to the authority Congress retains to ultimately approve or disapprove of trade agreements negotiated by the executive branch, it should reassert that it requires a joint resolution of Congress to formally withdraw the United States from trade agreements already in effect, or to alter any tariff reductions or other concessions contained in such agreements.

This would be similar to the withdrawal provision in the Uruguay Round Agreements Act (URAA). Section 125 of the URAA specifies that the United States' participation in the WTO can be terminated only by a joint resolution of Congress.[105] Other trade agreements and implementing legislation are less clear about the executive branch's unilateral authority to terminate participation in such agreements and in recent years, the subject has generated significant debate by legal scholars.[106] Given this ambiguity, which has been highlighted by the president's repeated threats to withdraw the United States from the WTO and NAFTA, Congress should clarify the process by which withdrawal can occur—especially in light of the enormous economic and diplomatic consequences.

In addition, Congress should seek to establish a mechanism of approval or disapproval for various trade- policy decisions made by the executive branch that seek to restrict imports under various trade statutes, including Section 201 and Section 301 of the Trade Act of 1974 and Section 232 of the Trade Expansion Act of 1962. Such an up-or-down approval process would protect against poorly considered import restrictions by adding an additional procedural hurdle before such restrictions can be implemented. At the same time, such a mechanism would increase congressional accountability over ultimate trade- policy authority consistent with Article 1, Section 8.

Likewise, Congress should change the process for national-security investigations undertaken pursuant to Section 232 of the TEA. Making the Secretary of Defense, rather than the Secretary of Commerce, the ultimate arbiter of whether certain imports pose a national-security threat to the United States is appropriate.

Finally, Congress should redefine "national security" under the TEA so as to ensure that only true national-security threats are covered by the statute, while also ensuring that products from countries with whom the United States has mutual defense agreements or treaties are excluded. Tightening the definition of "national security" would ensure that the executive branch maintains fidelity to the intent behind Section 232—ensuring the United States is not reliant on foreign adversaries for supplies of materials necessary to protect national security.

By taking these concrete steps, Congress can reassert its Article 1, Section 8 power in ways that improve congressional control over trade policy without backsliding toward the rampant parochialism and log-rolling that plagued trade policy prior to the 1930s.

102. S.3266, the Automotive Jobs Act of 2018, 115th Cong.

103. See, e.g., H.R. 6395, Assistance for Workers Harmed by Tariffs on Exports Act, 115th Cong.; H.R. 6396, Assistance for Firms Harmed by Tariffs on Exports Act, 115th Cong.; H.R. 6483, Trade Assistance for Farmers Act of 2018, 115th Cong.

104. H.R. 1172 and S.408, Presidential Trade Transparency Act of 2017, 115th Cong.

105. Cathleen D. Cimino-Isaacs, "The World Trade Organization (WTO): U.S. Participation at Risk?", Congressional Research Service, July 31, 2018. https://fas.org/sgp/crs/row/IN10945.pdf.

106. See, e.g., "U.S. Withdrawal from Free Trade Agreements: Frequently Asked Legal Questions," Congressional Research Service, Sept. 7, 2016. https://www.everycrsreport.com/reports/R44630.html#ifn52; and Joel P. Trachtman, "Power to Terminate U.S. Trade Agreements: The Presidential Dormant Commerce Clause versus an Historical Gloss Half Empty," Oct. 15, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015981.

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