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THE FAST TRACK AND UNITED STATES TRADE POLICY

Harold Hongju Koh*

In the waning days of Watergate and Vietnam, a legislative innovation known as the "Fast Track" unexpectedly became the keystone of modern United States trade policy. An expedited legislative procedure found throughout United States foreign affairs statutes — particularly international trade, foreign assistance, emergency economic powers, and war powers legislation — the Fast Track authorizes the President to initiate a foreign affairs action (for example, negotiation of an international trade agreement), but requires him to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval.¹ Under modified House and Senate rules, Congress "promises" the President that it will automatically discharge the completed initiative from committee within a certain number of days, bar floor amendment of the submitted proposal, and limit floor debate, thereby ensuring the President and our trading partners that the submitted legislative package

* Professor, Yale Law School. The ideas developed here borrow and build upon earlier work, particularly Harold Hongju Koh, *History of the Fast Track Approval Mechanism*, in GUIDE TO THE U.S.-CANADA FREE-TRADE AGREEMENT: TEXT, COMMENTARY, SOURCE MATERIALS 1 (Judith H. Bello & Alan F. Holmer, Supp. 1991) [hereinafter Bello & Holmer]; Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191 (1986) [hereinafter Koh, *Congressional Controls*]; Harold Hongju Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 201-18 (1987) [hereinafter Koh, *Legal Markets*], and presentations made to the International Economic Law Interest Group at the 1991 Annual Meeting of the American Society of International Law and the Brooklyn Law School Symposium on "The Uruguay Round and the Future of International Trade." Judy Bello, Gary Horlick, Alex Platt, Edmund Sim, and Saikrishna Prakash deserve many thanks for their exceptional comments and contributions, although none, of course, bears any responsibility for the result.

1. See generally Koh, *Congressional Controls*, *supra* note * at 1211-21 (describing how this technique has been used in the trade area). The Fast Track procedure has also been included in several other foreign affairs statutes, including the foreign assistance and war powers legislation. See Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69, 78-79 & n.38, 86-88 (1988) (citing statutes). For recent proposals to employ Fast Track provisions for arms control and arms sales, see, e.g., Ronald A. Lehmann, Note, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 YALE L.J. 885, 896-903 (1989); Vanessa Patton Sciarra, Note, *Congress and Arms Sales: Tapping the Potential of the Fast Track Guarantee Procedure*, 97 YALE L.J. 1439, 1448, 1453-57 (1988).

will be voted up or down without alteration within a fixed time period.

The Fast Track serves two goals: at the same time as it enhances presidential negotiating credibility, it promotes presidential accountability to Congress. By guaranteeing swift legislative approval of an unaltered trade agreement, the Fast Track assures our allies that the President can deliver on promises made in his name at the international negotiating table. At the same time, it guarantees Congress both information about, and early and ongoing input into, presidential negotiation of important international trade agreements.

Since its inception in the Trade Act of 1974 (1974 Act), this expedited legislative-approval mechanism has exhibited enormous versatility as a procedural device to secure congressional-executive cooperation in the management of United States international trade policy.² But the recent battle over the initiation of North American Free Trade Agreement (NAFTA) talks among the United States, Canada, and Mexico has not only modified the way that the Fast Track will likely apply in the future, but has also cast doubt on the Fast Track's viability as a linchpin of future trade negotiations. Most intriguing, during the most recent political struggle, NAFTA opponents lodged a new policy objection against the Fast Track's use that directly challenged its supposed policy advantage: that its use does not enhance, but rather stifles, accountability and democratic decision-making in the forging of United States trade accords.

The NAFTA debate raised the tantalizing question whether the Fast Track has or will soon outlive its usefulness for United States trade policy. Part I of this article reviews and evaluates the Fast Track's role during the most recent NAFTA episode and enumerates the ways that Congress may continue to exert influence over the substance of the accord in the months ahead. Part II considers, and largely rejects, the "democracy" objection lodged against the Fast Track, relying in part upon recent academic analyses of democratic decisionmaking in the legislative process. Finally, Part III speculates more broadly on the Fast

2. See Trade Act of 1974, Pub. L. No. 93-618, §§ 151-153, 88 Stat. 1978 (1975), 19 U.S.C. §§ 2191-2193 (1988) (1974 Act). The best illustration came at the close of the 1979 Tokyo Round, when, thanks primarily to the Fast Track, the entire United States legislative process for approving the nine multilateral agreements negotiated there consumed only thirty-four legislative days from presidential notification to final approval. See Koh, *Congressional Controls*, *supra* note *, at 1203.

Track's future in the evolution of United States trade policy and suggests possible modifications of the Fast Track that would address those valid policy concerns that some have raised against it.

I. THE FAST TRACK: HOW IT WAS, HOW IT IS

The current version of the Fast Track began life in the 1974 Act, which authorized the United States participation in the Tokyo Round of multilateral trade negotiations.³ As I have chronicled elsewhere, the 1974 Act was wreathed with provisions that manifested Congress' pervasive post-Watergate, post-Vietnam distrust of unchecked executive discretion in foreign affairs: specified negotiating objectives; sunset provisions on presidential negotiating authority; extensive consultation, certification and reporting requirements; and dramatic "judicialization" of trade remedies.⁴

The best-known of these executive discretion-controlling devices were the 1974 Act's six legislative vetoes, whereby Congress delegated various statutory authorities to the President, but retained the right by simple or concurrent resolution to subsequently approve or disapprove the result of his actions.⁵ The legislative veto had numerous disadvantages, both constitutional and political, and as everyone knows, the Supreme Court struck it down less than a decade later.⁶ Yet despite these defects, the

3. See Trade Act of 1974, 19 U.S.C. §§ 2191-2193.

4. The 1974 Act dramatically expanded citizen access to the trade process by: empowering private individuals to initiate proceedings directly against foreign industries by private complaint, easing standing requirements, requiring executive branch action on private complaints within strict statutory time limits, and subjecting that action to extensive judicial oversight. In the process, Congress created much of the modern United States statutory law of import relief, including the modified escape clause, antidumping and countervailing duty provisions, customs fraud penalties, statutory remedies against infringement and unfair trade practices, and the now notorious Section 301. See generally Koh, *Congressional Controls*, *supra* note *, at 1205-06.

5. A legislative veto is a simple resolution approved by a majority of one house ("one-house veto"), or a concurrent resolution approved by majority votes in both houses ("two-house veto"), which purports to alter or override completed executive action. Both types of vetoes are actions with legislative effect — in the sense that they alter the rights and duties of those outside the legislative branch — but are not accomplished by formal legislative procedures.

6. In *INS v. Chadha*, 462 U.S. 919 (1983), the Court held that Article I, § 7 of the United States Constitution requires that all actions with legislative effect be approved by a majority of both the House and the Senate (the so-called "bicameralism" requirement) and then presented to the President for his signature or veto (the so-called "presentment" requirement). Concurrent resolutions satisfy bicameralism, but not presentment;

legislative veto effected a crucial political compromise: while the President gained current legislative authorization for his acts, his need to gain subsequent congressional approval (or to avoid subsequent disapproval) provided assurances to Congress that consultation would continue while his activities proceeded.

Similar policy concerns drove the creation of the Fast Track. Before 1974, trade agreements had been accepted into United States law either as "congressional-executive" agreements — authorized in advance by omnibus legislation, or after negotiation by implementing legislation approved by a majority of both houses of Congress — or less frequently, as "sole" executive agreements ostensibly accepted by the President on his inherent constitutional authority without legislative approval.⁷ But each of these approval mechanisms had exhibited proven policy defects. The 1965 United States-Canada auto pact and interbranch struggles during the Kennedy Round had demonstrated that sole agreements and congressional-executive agreements negotiated without prior legislative oversight offered Congress too little input into the trade process.⁸ At the same

simple resolutions satisfy neither. The legislative veto's most prominent policy defect was the freedom it gave members to avoid visible responsibility for their actions by avoiding roll-call votes. For policy critiques of the legislative veto, see generally Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977) [hereinafter McGowan]; David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982) [hereinafter Martin].

7. Yet another method of legislative approval — by formal treaty advised and consented to by two-thirds of the Senate — excluded the House altogether and accorded primacy to the Senate Foreign Relations Committee (which had jurisdiction over treaties), not the expert trade committees. Congress abandoned the use of formal treaties in the trade field beginning with the 1934 Reciprocal Trade Agreements Act, and the United States accepted the General Agreement on Tariffs and Trade (GATT) itself by executive agreement. See Koh, *Congressional Controls*, *supra* note *, at 1197.

8. During the Kennedy Round, the Executive Branch accepted the GATT Antidumping Code over congressional objection, relying not on the President's delegated statutory authority, but upon his sole constitutional authority as President to accept executive agreements. Although Congress ultimately permitted domestic application of Code provisions to the extent that they did not conflict with the wording or administration of domestic law, it retaliated by refusing to approve the proposed repeal of the American Selling Price method of customs valuation, which the Executive had also negotiated, during the Kennedy Round, without congressional approval. Similarly, for more than a year, the Johnson Administration secretly negotiated the 1965 United States-Canada Automotive Products Agreement — which eliminated most bilateral transborder tariffs on specified vehicles and auto parts and accessories — and then presented it to Congress as a *fait accompli*. These skirmishes inspired Congress to approve the auto pact with reluctant implementing legislation that strictly limited the President's future ability to enter into such bilateral accords without previously consulting with Congress. See generally Koh, *Congressional Controls*, *supra* note *, at 1197-1200.

time, congressional-executive agreements negotiated pursuant to prior authorization and subsequent approval by implementing legislation afforded Congress too much freedom to undo trade deals made by the executive through delay, amendment, and filibuster.

The Fast Track, like the statutory delegation accompanied by legislative veto, compromised between these extremes by offering a device that both authorized and constrained the President's negotiating discretion.⁹ Sections 102 and 151 of the 1974 Act delegated to the President broad advance authority to negotiate agreements reducing nontariff barriers and other trade distortions. These sections simultaneously obliged him to complete numerous procedural steps before gaining access to the Fast Track procedures, most significantly, notification of the House Ways and Means Committee and the Senate Finance Committee at least ninety days before entering any such agreement.¹⁰ Once these prerequisites were met, the statute modified the House and Senate rules to add "anti-bottling," "anti-Christmas Tree" and "anti-filibuster" provisions, producing a streamlined legislative procedure that would guarantee negotiated agreements and implementing legislation an up-or-down vote without amendments within sixty legislative days after their introduction.¹¹

9. The original proposal was for trade agreements to be approved subject to legislative veto. For a history of the Fast Track's adoption, see Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471 (1992) [hereinafter Sim].

10. See 19 U.S.C. §§ 2112, 2191 (1982). More specifically, the 1974 Act required the President, before gaining access to the Fast Track procedures: to consult with both the Senate Finance Committee and the House Ways and Means Committee and any joint committee whose jurisdiction would be affected by such a trade agreement, see Trade Act of 1974, § 102(c); to notify both houses ninety days before entering the agreement and promptly thereafter to publish notice in the *Federal Register* of his intent to enter such an agreement, *id.* § 102(e)(1); to supply to the International Trade Commission lists of all articles whose duties might be modified, *id.* § 131(a); to seek information and advice from various departments and agencies, *id.* § 132; to arrange for and receive a summary of public hearings, *id.* § 133; to seek guidance from private sector advisers, *id.* § 135; to negotiate and complete the tentative international agreement; to notify Congress and consult with the key committees ninety days before signature, *id.* § 102(e); then to complete the final agreement and submit a draft of proposed implementing legislation to the appropriate committees in the form of a normal bill, *id.* § 102(e)(2)(A).

11. Trade Act of 1974, 19 U.S.C. § 2191-2193. The 1974 Act specified first, that a negotiated nontariff barrier agreement and its draft implementing legislation would be automatically discharged from committee consideration after forty-five legislative days, with or without committee action, thus preventing any committee member from bottling up the package to prevent it from coming to a floor vote. Second, the 1974 Act provided that a bill or resolution approving each agreement would be placed on the appropriate

On examination, the Fast Track procedure served four policy ends. First, it allowed Congress to overcome both the political inertia and the procedural obstacles that frequently prevent a controversial measure from coming to a vote at all. Second, it controlled domestic special interest group pressures that might otherwise have provoked extensive, *ad hoc* amendment of a negotiated trade accord. Third, it bolstered the Executive Branch's negotiating credibility with United States allies, which had suffered serious damage during the Kennedy Round, by reassuring trading partners that negotiated trade agreements would undergo swift and nonintrusive legislative consideration. Fourth and finally, it acted functionally like a one-house legislative veto to control executive discretion, for it authorized either House to block passage of a fully negotiated trade agreement simply by voting down the agreement or its implementing legislation.¹²

Since 1974, the Fast Track has undergone two substantial modifications, first in the Trade and Tariff Act of 1984 (1984 Act)¹³ and then the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act).¹⁴ The 1984 Act, enacted in anticipation of the United States' first comprehensive bilateral Free Trade Agreements (FTA) with Israel and Canada, amended the Fast Track procedure to incorporate a "committee gatekeeping" device.¹⁵ The amended procedure provided that if a country other than Israel requested free trade negotiations with the United

calendar for a final vote on the floor of each house without possibility of amendment, thereby averting the "Christmas Tree" phenomenon that is characteristic of much federal legislation. Third and finally, the 1974 Act limited debate on the floor of each house to twenty hours and required that the package be voted upon within fifteen legislative days, thereby forestalling the time-honored practice of one or more members of Congress "filibustering" a proposal they oppose to prevent it from coming to a final vote in their house. Slightly different rules apply to "implementing revenue bills," which go first to the House (for a maximum of fifteen legislative days in committee and fifteen days on the floor) and then to the Senate, for a maximum of fifteen days in committee and fifteen days on the floor). See *id.* § 151(e)(2).

12. Significantly, however, the Fast Track procedure did not itself constitute a legislative veto, because it required trade agreements to be approved by *formal legislation* that was both bicamerally enacted and formally presented to the President, albeit on an expedited basis. See generally Koh, *Congressional Controls*, *supra* note *, at 1216-17. Nor did the Fast Track carry the legislative veto's proven policy defects. See *supra* note 6. Article I, § 5, clause 3 of the United States Constitution authorizes one-fifth of the members present in each house to require a roll-call vote on any matter, thus making it highly unlikely that individual members could conceal their votes on Fast Track approval resolutions.

13. Pub. L. No. 98-573, 98 Stat. 2948 (1984) [1984 Act].

14. Pub. L. No. 100-418, 102 Stat. 1107 (1988) [1988 Act].

15. See 1984 Act § 401(a)(4), 98 Stat. 2948, 3014-3015.

States, the President would be required to notify two "gatekeeper" committees — the House Ways and Means and the Senate Finance Committees — and to consult with those committees for a period of sixty legislative days *before* giving the statutorily required ninety-day notice of his intent to sign an agreement.¹⁶ If neither committee disapproved of the negotiations during this sixty-day committee consultation period, any subsequently negotiated agreement would receive Fast Track legislative consideration. If, however, either committee disapproved the negotiations in advance, or either committee or house refused to approve the postnegotiation package submitted by the President, the Executive Branch would remain free to resubmit it for consideration under normal legislative procedures.

The 1984 Act's modified Fast Track procedure not only enhanced congressional influence over the negotiation of trade agreements, it dramatically expanded the influence of the gatekeeper committees vis-a-vis the rest of Congress. In effect, the modified Fast Track procedure afforded Congress three bites at the apple. Under the committee gatekeeping procedure, a majority vote of either key committee could "derail" a presidential proposal from the Fast Track — and in many cases, effectively kill it — thereby giving the Executive strong incentives to consult with the committee's members at each step of the process. Thus, the statutory requirement of a sixty-day prenegotiation consultation period with the two committees secured their involvement in the Canada FTA negotiations months before formal talks began and allowed them to extract concessions from the President as a condition of letting negotiations proceed. Second, the Administration's awareness that any negotiated agreement would ultimately return to the same committees for subsequent approval promoted continuing consultation as the agreement evolved. Third and finally, either house retained the option to vote down the fully negotiated agreement even after its discharge from committee.

The extraordinary powers afforded to the two gatekeeper committees under the 1984 Act were graphically illustrated at the opening of the negotiations over the United States-Canada

16. The United States-Israel Free Trade Agreement (FTA), which was not subject to the committee gatekeeping process, became law subject to pre-1984 fast track procedures set forth in the Trade Acts of 1974 and 1979. See Israel-United States: Free Trade Area Agreement, April 22, 1985, *reprinted in* 24 I.L.M. 653 (entered into force Aug. 19, 1985).

FTA. Shortly before the sixty-day prenegotiation consultation period was scheduled to expire, a majority of the Senate Finance Committee threatened to disapprove the negotiations, and even urged the President to withdraw his request. After last-minute presidential concessions and an eleventh-hour switch by one Senator, the twenty-member committee ultimately divided evenly on the motion to disapprove, permitting formal negotiations to proceed.¹⁷

As the Canadian episode demonstrated, the modified Fast Track procedure empowered an *ad hoc* coalition of key committee members to jeopardize a proposed FTA that otherwise enjoyed general congressional support in order to signal their broader discontent with the President's trade policies. Even more significant, fallout from the incident continued months after formal FTA talks commenced as President Reagan later made good on promises he made in exchange for the key Senate votes necessary to avert committee disapproval.¹⁸ These early skirmishes placed United States negotiators on notice that they could avoid future interbranch confrontation at the approval stage of the FTA only by keeping Congress fully apprised of, and involved in, the negotiations as they progressed.

Not surprisingly, the demonstrated effectiveness of the modified Fast Track procedure in assuring congressional input into the United States-Canada free trade negotiations inspired Congress to fine tune that procedure even further to restrain presidential negotiations of future trade accords. With regard to both multilateral and bilateral trade agreements, the 1988 Trade Act extended the President's nontariff agreement negotiating authority for five years and extended the Fast Track privilege to implementing legislation submitted within the next three years,

17. See generally Koh, *Legal Markets*, *supra* note *, at 211.

18. In exchange for senatorial support for the FTA, President Reagan reportedly promised to take specific action against Canada over alleged softwood lumber subsidies. Responding to this promise, only two days before formal FTA talks began, the United States softwood lumber industry filed a petition alleging that Canada's administrative pricing system for collecting stumpage fees constituted a subsidy that should be subject to United States countervailing duties. The petition triggered a preliminary determination by the International Trade Commission that the Canadian practice had threatened or caused material injury to the United States lumber industry. Under the rigid statutory deadlines for countervailing duty actions, the action would have required the President to impose duties upon Canadian lumber imports in early 1987, but for a last-minute intergovernmental pact signed in December 1986, which achieved the same result via imposition of a Canadian export tax. See generally Koh, *Legal Markets*, *supra* note *, at 212-13.

with the possibility of a two year extension.¹⁹ But the new law also modified the committee gatekeeping procedure — which authorized the committees to block *presidential access* to the Fast Track — to enhance Congress' power in two respects: by reserving for either house the power to block *extension* of the Fast Track authority past the original expiration date and for both houses to *derail* already authorized agreements from the Fast Track.

With regard to Fast Track extension, the 1988 Trade Act declared a one-house disapproval rule: that the Fast Track procedure could be applied to implementing bills submitted after May 31, 1991, but only if, before that date, the President requested an extension with reasons, and neither house of Congress adopted a nonamendable "extension disapproval" resolution reported out of the Senate Finance Committee and jointly by the House Ways and Means, and Rules Committees. The 1988 modifications not only gave the House Rules Committee a role commensurate with the two gatekeeper committees when Fast Track extension is at stake, but also specified *in haec verba* the wording that must be used in any Fast Track extension disapproval resolution.²⁰ Second, the 1988 Trade Act established a two house derailment procedure — now commonly called the "reverse Fast Track" procedure — whereby the Fast Track approval procedure could be terminated at any time if the chairs or ranking members of the Senate Finance Committee and the House Ways and Means or Rules Committee introduced, their committees reported, and both houses then approved within any sixty-day period, expedited resolutions disapproving use of the Fast Track on the grounds "[t]hat the President had failed or refused to consult with Congress on trade negotiations and trade agreements in accordance with the provisions" of the 1988 Trade Act.²¹

Additional disapproval and leverage options for Congress derived from the oft-overlooked fact that, as a legal matter, the Fast Track "emperor" has no clothes: the statutory Fast Track procedures that modify internal house rules in no way legally "bind" Congress. Although the various statutory Fast Track procedures contemplate and require certain modifications in inter-

19. Pub. L. No. 100-418, § 1103(b)(1)(A)-(B), 102 Stat. 1107 (1988).

20. *Id.* § 1103(b)(5)(A)-(B).

21. *Id.* § 1103(c).

nal house rules, the Constitution specifically authorizes "[e]ach House [to] determine the Rules of its Proceedings."²² Thus, notwithstanding the formal incorporation of these provisions into legislation, each house fully retained its constitutional discretion to change those internal rules at any time and to deny the President Fast Track treatment even in cases where he could claim statutory entitlement to it.

During the United States-Canada FTA negotiations, the powerful maritime industry exploited this Achilles' heel by seeking a Senate resolution denying the Fast Track to any bill that would have implemented maritime provisions of the FTA requiring national treatment. To avoid a confrontation with Congress over the issue, the Executive Branch and Canada agreed to eliminate the FTA's maritime provisions in exchange for an agreement by the Senate sponsors to drop their Fast Track denying resolution.

In sum, by the start of the NAFTA negotiations, it had become clear that the amended Fast Track afforded Congress at least five major devices by which to express disapproval or exert leverage over a trade agreement: (1) through *gatekeeper-committee denial of initial access* to the Fast Track, (2) through *one-house extension disapproval*, (3) through the ongoing possibility of *two-house derailment* of an agreement from the Fast Track under the reverse-Fast Track procedure, (4) through *ad hoc modification of Chamber rules to eliminate the Fast Track* and (5) through the *final up-or-down vote* on the implementing legislation.

That all but the last of these required votes on the applicability of the Fast Track, not the merits of the trade accord in question, illustrates how thoroughly the Fast Track has shifted battles over the substance of United States trade policy onto the battleground of procedure. Indeed, the Fast Track has become so critical to United States trade policy that the timetables for concluding both the NAFTA and the Uruguay Round have come to revolve largely around its availability.²³ In addition, the trade

22. U.S. CONST. art. I, § 5, cl. 2.

23. See Sim, *supra* note 9, at 493 ("As the USTR insisted for sufficient time before the Fast Track deadline for introducing legislation (March 1, 1991) to build political support in Congress, GATT negotiators scheduled the final ministerial meeting for December 1990"). Of course, other factors — most prominently, the European Community's position on agricultural trade — have also affected the Uruguay Round's negotiation timetable.

laws now formally contemplate that congressional and constituent views about the substance of trade negotiations will be communicated to the Executive through two additional leverage points: (6) *direct congressional participation* in trade negotiations, a practice that has expanded since 1974,²⁴ and (7) several layers of advisory committees that render *private industry advice* regarding the negotiations.²⁵

The 1991 NAFTA struggle revealed the full extent to which the 1988 amendments had fostered enhanced congressional control over the trade process. On September 25, 1990, President Bush gave the statutorily required notification to the gatekeeper committees of his intent to negotiate the NAFTA. But unlike the United States-Canada FTA episode, in which the gatekeeper committees exercised their influence by threatening to deny the agreement initial access to the Fast Track — the first of the seven leverage points named above — the NAFTA battle was fought at the second stage: one-house extension disapproval.

On March 1, 1991, ninety days before the Fast Track would expire, President Bush formally requested Congress to grant a two-year extension of Fast Track rules for both the Uruguay Round and the NAFTA. The President had previously informed the Advisory Committee for Trade Policy and Negotiations (ACTPN) of his extension request, and ACTPN overwhelmingly reported in favor of extension.²⁶

In the next two weeks, one-house extension disapproval resolutions were introduced in both the House and the Senate by Representative Dorgan and Senator Hollings, respectively.²⁷ To head off these resolutions, the chairs of the two key gatekeeper

24. See generally Trade Act of 1974, § 161, 19 U.S.C. § 2211 (mandating the dispatch of congressional delegates to trade negotiations). Senate advisers come from the Finance Committee; House advisers from the Ways and Means, Energy, and Commerce committees. 133 CONG. REC. H508 (daily ed. Mar. 2, 1989); 133 CONG. REC. H375 (daily ed. Feb. 23, 1989); 136 CONG. REC. H13274 (daily ed. Oct. 27, 1990).

25. See Trade Act of 1974, § 135, 19 U.S.C. § 2155 (concerning advice from private sector); 1988 Act, § 1103(b)(3) (requiring Advisory Committee for Trade Policy and Negotiations (ACTPN) to submit to Congress no later than March 1, 1991, a report containing its view regarding extension of the Fast Track and regarding progress that has been made in multilateral and bilateral negotiations to achieve purposes, policies and objectives established by Congress in the 1988 Trade Act).

26. Only the two labor representatives dissented from the pro-extension recommendation of the 44-member ACTPN. *President, as Expected, Requests Extension of "Fast-Track" Trade Authority Until 1993*, 8 Int'l Trade Rep. (BNA) No. 10, 340, 341 (Mar. 6, 1991).

27. H.R. Res. 101, 102d Cong., 1st Sess. (1991) (Dorgan resolution); S. Res. 78, 102d Cong., 1st Sess. (1991) (Hollings resolution).

committees, Representative Rostenkowski and Senator Bentsen, urged the President to submit an "Action Plan" to Congress that would deal, *inter alia*, with various environmental and labor concerns raised against the potential NAFTA agreement.²⁸ On May 1, the President complied with their request, submitting a detailed Action Plan whereby he pledged to work with Congress on drafting implementing legislation that would aid dislocated workers, to negotiate safeguards for threatened American industries, and to avoid tampering with United States environmental laws.²⁹

Following the Action Plan's submission, a number of key Congressional members and certain environmental interest groups announced their support for Fast Track extension, while reserving the right to reject any eventual agreement. In particular, two key Representatives, Gephardt and Rostenkowski, introduced a sense-of-the-House resolution that listed objectives for the Administration to consider while negotiating with Mexico, asked the President to keep his promises made in the Action Plan, and emphasized that Congress could later suspend the Fast Track (under the reverse Fast Track procedure) if the Executive Branch failed to keep its promises.³⁰ On May 14th, the two gatekeeper committees voted by large majorities to reject the extension disapproval resolutions before them.³¹ At the same time, however, they made the crucial decision to not simply let those resolutions die in committee, but instead to send them to

28. Letter to the President from Senator Lloyd Bentsen, Chairman, Senate Committee on Finance, and Representative Dan Rostenkowski, Chairman, House Committee on Ways and Means (Mar. 7, 1991), reprinted in STAFF OF HOUSE COMM. ON WAYS AND MEANS, EXCHANGE OF LETTERS ON ISSUES CONCERNING THE NEGOTIATION OF A NORTH AMERICAN FREE TRADE AGREEMENT, 102d Cong., 1st Sess. 87 (Comm. Print 1991). House Majority Leader Richard Gephardt wrote a similar letter to the President three weeks later, asking the Administration to detail its plans regarding, *inter alia*, wage disparity, rules of origin, environmental protection, health and safety standards, labor mobility, worker and human rights, and worker adjustment programs. See Letter to the President from Representative Richard Gephardt, House Majority Leader (Mar. 27, 1991), reprinted in *id.* at 89-98.

29. He also promised that any agreement would include a gradual transition period, rules of origin for goods, and discussion with Mexican officials regarding Mexican labor laws. John E. Yang & Guy Gugliotta, *Bush Seeks to Allay Fears on Free Trade Pact*, WASH. POST, May 2, 1991, at A27; 8 Int'l Trade Rep. (BNA) No. 19, 713 (May 8, 1991).

30. H.R. Res. 146, 102d Cong., 1st Sess. (1991).

31. The extension disapproval resolutions failed by votes of 9-27 before the House Ways and Means Committee and 3-15 before the Senate Finance Committee. See Keith Bradsher, *Congress Panels Vote to Advance Free-Trade Plan*, N.Y. TIMES, May 15, 1991, at A1.

the floor for plenary consideration. Within ten days, the House and Senate rejected the extension disapproval resolutions before them by votes of 231-192 and 59-36, respectively.³²

In retrospect, the 1991 Fast Track extension battle turned on little-noticed language in the 1988 Trade Act that prescribed the wording for one-house extension disapproval resolutions.³³ That language did not appear to contemplate that Congress could disapprove extension of Fast Track procedures for implementing bills for *some* trade agreements, but not others. This capacious language allowed the President to couple extension of the Fast Track for the NAFTA, which proved to be quite controversial, with Fast Track extension for the Uruguay Round accords, which, relatively speaking, enjoyed far broader congressional support. Had the two sets of agreements been decoupled from one another, the President may have lacked sufficient legislative support to secure Fast Track extension for the NAFTA alone.

Furthermore, although the congressional decision to extend the Fast Track for both the NAFTA and the Uruguay Round represented a substantial presidential victory, the episode also established three informal precedents that the branches will likely follow, even without specific statutory directive, when seeking Fast Track treatment for future trade accords. The first and most important was the Bentsen-Rostenkowski requirement that, as a precondition to securing Fast Track extension, the President submit some form of Action Plan to Congress placing on the record his goals and intentions. Second, immediately after the House voted down extension disapproval, it passed by an overwhelming vote of 329-85 the accompanying Gephardt-Rostenkowski "sense" resolution, which not only holds the President to his Action Plan commitments, but also calls on the United States Trade Representative and other executive officials to consult closely and on a regular basis (as has been the case with the Uruguay Round) regarding the status of the negotia-

32. 137 CONG. REC. H3588-89 (daily ed. May 23, 1991); 137 CONG. REC. S6829 (daily ed. May 24, 1991).

33. Pub. L. No. 100-418 (codified at 19 U.S.C. § 2903(b)(5)(A)) (prescribing that the resolution say only that the House or Senate "disapproves the request of the President for the extension . . . of the [Fast Track] provisions of [the 1974 Act] to *any implementing bill* submitted with respect to *any trade agreement* entered into under section 1102(b) or (c) of such Act after May 31, 1991, because sufficient tangible progress has not been made in trade negotiations . . .") (emphasis added).

tions and the progress in achieving congressionally prescribed objectives.³⁴ The gatekeeper committees' decision to send the extension disapproval resolutions to the floor, even after they had been reported unfavorably, marked a third important precedent favoring fuller congressional involvement in Fast Track extension decisions.³⁵ By creating institutional custom, these precedents *de facto* amended the Fast Track procedure above and beyond the formal requirements of the 1988 Trade Act to ensure even greater congressional input into the negotiation process.³⁶ It would hardly be surprising if Congress chose to incorporate one or all of them into its future statutes implementing the Uruguay Round accords and the NAFTA.³⁷

One final point, which bears upon the discussion that follows in Part II: although Congress has now extended the Fast Track's availability through June 1, 1993, it has hardly sacrificed its continuing influence over the substance of the NAFTA. At this writing, the agreement has cleared only the first two of the seven formal hurdles described above, leaving Congress with numerous viable options for derailing an unsatisfactory accord from the Fast Track. In addition to these hurdles, two new congressional possibilities have emerged for denying a completed NAFTA Fast Track treatment: (8) the *limited amendment option* and (9) the *nonapplicability of the Fast Track to regional agreements*. In April 1991 Senator Riegle offered the first of these in the form of a resolution that would modify the fast track to permit certain types of amendments in the areas of fair

34. H.R. Res. 146, 102d Cong., 1st Sess. § 2 (1991).

35. Some members had suggested that the House Ways and Means Committee not report the extension-disapproval resolution to the House floor. See David E. Rosenbaum, *Trade Issues Enter Crucial Political Phase*, N.Y. TIMES, Apr. 9, 1991, at D1. Rather than simply allowing the resolutions to die in committee, however, the committee chairs elected to report the resolutions for floor action. See, e.g., 137 CONG. REC. S6550-54 (daily ed. May 24, 1991) (comments of Chairman Bentsen).

36. Cf. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 70 (1990) [hereinafter KOH] (defining "quasi-constitutional custom" as "a set of institutional norms generated by the historical interaction of two or more federal branches with one another [that] represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters").

37. Indeed, the original Senate version of the 1988 Trade Act explicitly contained a similar requirement: that Congress grant the President Fast Track authority subject to the express condition that the United States Trade Representative submit to Congress detailed trade policy statements that subsequently received legislative approval. See S. 490 §104(b)(2), (d)(2)-(3), 100th Cong., 1st Sess. (1987), reprinted in 133 CONG. REC. S1851 (daily ed. Feb. 5, 1987).

labor standards, environmental protection, rules of origin, dispute resolution, and worker adjustment assistance.³⁸ Representative John LaFalce raised the second possibility when he requested a General Accounting Office opinion on the question whether the Fast Track extension, which is limited to nontariff barrier agreements and bilateral agreements to reduce both tariff and nontariff barriers, necessarily applies to a *regional* accord like the trilateral NAFTA.³⁹ Representative LaFalce's letter also raised the broader issue whether the Fast Track can legally bind Congress *not* to offer amendments during future consideration of a trade agreement, suggesting that members opposed to either the NAFTA or the Uruguay Round accords could invoke a whole array of derailment possibilities beyond those already envisioned by the procedures established by the 1988 Trade Act.

In an excellent recent article, Edmund Sim has suggested three such derailment options that are currently available under existing congressional rules: (10) their modification in the Senate by *unanimous consent* procedures; (11) the remote possibility that Congress could simply *ignore its own rules*; and (12) modification of the Fast Track by *passage of new legislation*.⁴⁰ Encompassed under this last option is the ever-present possibility that the recently granted two-year extension simply will not afford enough time for the Uruguay Round accords and/or the NAFTA to be negotiated and concluded.

Should that eventuality arise, the President could face four unpalatable options. First and most likely, he could ask Congress to extend the Fast Track yet again, which would almost certainly lead to the imposition of new constraints on his negotiating discretion. Second, he could let the two-year extension period expire on June 1, 1993, then submit the completed agreements and their implementing legislation for congressional approval under the "slow track" — *i.e.*, normal unexpedited congressional procedures — an option that our negotiating part-

38. S. Res. 109, 102d Cong., 1st Sess.; *Sen. Riegle Introduces Resolutions to Modify Fast-Track Procedure to Permit Amendments*, 8 Int'l Trade Rep. (BNA), No. 17, at 600-01 (Apr. 24, 1991). Sen. Riegle could not offer his resolution as an amendment to the rejected nonamendable disapproval resolution, but vowed to bring up and append the resolution in a future year to a "must-pass" piece of legislation. Representative Levin has introduced a similar bill on the House side. See David S. Cloud, *Lawmakers Offer Plans to Modify Fast Track*, 49 CONG. Q. 1047 (1991).

39. *LaFalce Suggests Fast-Track Procedures Were Not Intended for Application to NAFTA*, 8 Int'l Trade Rep. (BNA) No. 32, at 1181 (Aug. 7, 1991).

40. See Sim, *supra* note 9, at 506-18.

ners would likely find unacceptable.⁴¹ Third, the President could submit the completed legislative packages to Congress after negotiation, but request that each House modify its rules to give them *ad hoc* Fast Track consideration, notwithstanding the expiry of his statutory authority.

Fourth, most risky, and least likely, the President could seek to accept the negotiated agreements on behalf of the United States on his own constitutional authority, even without legislative approval.⁴² In such a case, however, Congress would almost certainly protest that the President lacked any inherent constitutional authority to accept any aspect of a trade agreement providing for the modification or elimination of *tariff* barriers, which arguably fall within Congress' exclusive authority under Article I of the Constitution to "lay and collect Taxes, Duties, Imposts and Excises."⁴³ In response, the President might claim that the 1988 Trade Act already grants him certain statutory proclamation authority over tariffs⁴⁴ and that his inherent constitutional authority permits him to accept at least those aspects of the negotiated package relating to *nontariff* barriers without congressional approval of any kind. Should such an impasse arise, it seems highly unlikely that any of these disputes could be judicially resolved if the two branches could not resolve them politically.⁴⁵ As a political matter, however, such an asser-

41. President Johnson, for example, successfully employed this option with regard to the 1965 United States-Canada auto pact. *See supra* note 8.

42. President Johnson chose this controversial course, for example, with regard to the Antidumping Code during the Kennedy Round regime. *See supra* note 8. The President could also theoretically resurrect the treaty method of ratification, but such a course would be extraordinarily unlikely, given the twin requirements of securing a two-thirds vote in the Senate and House-enacted implementing legislation.

43. U.S. CONST. art. I, § 8, cl. 1. Alternatively, Congress could assert that the various trade acts have wholly preempted the trade negotiating field, thus eliminating any residual presidential authority to act on his own in this area, and obliging the President to comply with the clearly specified statutory terms.

44. *See* Pub. L. No. 100-418, § 1102(a) (1988) (codified at 19 U.S.C. § 2902(a)(1)(B)(ii)) (subject to certain limitations, the President may proclaim such modification or continuance of any existing duty, duty-free or excise treatment, or such additional duties "as he determines to be required or appropriate to carry out" certain trade agreements).

45. Numerous judicial doctrines would potentially bar United States courts from reaching the merits in such cases, including ripeness, the political question doctrine, and, if the action were challenged by legislator plaintiffs, the doctrine of congressional standing. For judicial arguments in favor of Congress' position should this scenario arise, *cf.* *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Consumers Union v. Kissinger*, 506 F.2d 136, 146 (D.C. Cir. 1974) (Leventhal, J., dissenting), *cert. denied*, 421 U.S. 1004 (1975). To the extent that

tion of presidential authority would be so sweeping and contrary to customary practice, that it almost certainly would encounter furious congressional opposition.

In sum, although the NAFTA has cleared the earliest derailment hurdles, neither its political future, nor the Uruguay Round's, is assured. At the same time as the NAFTA episode gave the President a temporary victory, it exposed significant cracks in the Fast Track's armor, which current and future opponents may yet exploit. Not only are some derailment possibilities explicitly envisioned by the procedures established by the 1974, 1979, 1984, and 1988 Trade Acts, others stem from the reality that, notwithstanding these statutes, neither Congress nor the President are legally bound to comply with the Fast Track.

At bottom, the Fast Track rests on a grand illusion. As a political device, the Fast Track has worked because it has appeared to bind both Congress and the President to a future course of action. Just as Ulysses tied himself to the mast to avoid being seduced by the Sirens, once certain cooperative preconditions are met, both the President and Congress commit themselves to an expedited legislative procedure to avoid being seduced by future political exigencies. As a legal matter, however, the rules that comprise the Fast Track approval mechanism are internal house rules, not legislation. Thus, the Fast Track does not legally bind the two branches so much as it erects a legislative framework within which political accommodation can occur.⁴⁶ As the figure below shows, that framework affords Congress numerous leverage points at which it may exercise influence over the substance of the agreement.

such adjudication would turn on judicial interpretation of the trade laws, Congress could seek to override presidential claims of nonjusticiability by citing the Supreme Court's recent ruling in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), which proclaims: "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230.

46. Like the War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541-1548 (1988), and the International Emergency Economic Powers Act, Pub. L. No. 95-223, Title II, § 202, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701-1706 (1988), the Fast Track constitutes what I have called elsewhere "framework legislation": a law "that Congress enacts and the president signs within their zone of concurrent authority [over international trade], not simply to 'formulate policies and procedures for the resolution of specific trade problems, but rather . . . to implement constitutional policies'" favoring power-sharing among the branches in international trade. Koh, *supra* note 36, at 69-70.

SUMMARY OF LEVERAGE POINTS IN THE FAST TRACK PROCESS

Before Negotiations

President notifies House Ways and Means and Senate Finance Committees and private advisory committees of intent to negotiate Free Trade Agreement.

Advisory Committees decide whether to support Fast Track request (device 7).

Gatekeeper Committees vote on whether to deny the FTA initial access to the Fast Track (device 1).

Before May 31, 1991

President was obliged, by March 1, 1991, to request two-year extension, with reasons, and *Advisory Committee for Trade Policy and Negotiations* was similarly obliged to submit a report opining whether the extension should be approved (device 7).

President submitted action plan (not mandated by statute).

Either house had opportunity to disapprove extension of the Fast Track for two years (device 2).

Gatekeeper committees and House Rules Committee reported extension-disapproval unfavorably, and resolutions were voted down on the floor.

House passed "sense" resolution enumerating NAFTA negotiating objectives.

During Negotiations

Congressional Observers may participate in trade negotiations (device 6).

President must give notice at least 90 calendar days before agreement is initialled.

After Negotiations

Both Houses

- engage in nonhearings and nonmarkups before implementing bill is formally submitted;
- under reverse-fast track procedure, retain option of two-House derailment of agreement from the Fast Track if *President* fails to consult (device 3);
- may modify the Fast Track by passage of new legislation (device 12).

Either House

- may engage in *ad hoc* modification of Chamber rules by separate rules resolution to eliminate the Fast Track (device 4) or to permit amendment (device 8);
- could ignore its own standing rules (subject to points of order) (device 11);
- may simply vote down the implementing legislation after *President* formally submits it (device 5). Legislation will be automatically discharged from gatekeeper committee within 45 legislative days after *President* submits implementing bill to Congress, and voted on the floor in each house within 15 legislative days after discharge. (Slightly different rules apply to implementing revenue bills, which go first to the House and then to the Senate).

The Senate

- may modify Fast Track procedures at any time through unanimous consent procedures (device 10).

Any Individual Member

- could conceivably attempt to block consideration of NAFTA by raising point of order claiming the nonapplicability of the Fast Track to regional agreements (device 9).

As a procedural device that imposes a statutory structure upon the hazy constitutional battleground between overlapping presidential and congressional trade jurisdictions, the Fast Track creates moral commitments, mutual assurances, credible threats, and settled expectations among the branches in the trade field. By so doing, it has made possible a *modus vivendi* that allows both branches to achieve their shared policy goal: interbranch consultation and cooperation in the negotiation and conclusion of international trade accords.

II. UNPACKING THE "DEMOCRACY OBJECTION" TO THE FAST TRACK

One cannot remain a stalwart advocate of the Fast Track after the NAFTA episode without considering and rebutting a new policy objection that surfaced during the recent Fast Track extension struggle. That objection was voiced by Joan Claybrook, President of Public Citizen, in the following way:

It's an undemocratic provision. . . . And it undermines the whole concept of our national government that has checks and balances so that the public is protected as those checks and balances do their work. The administration wants fast track to put the Congress in the position of either having to vote "yes" or "no" and not being able to have any leverage on the decision-making in these talks.⁴⁷

Upon examination, this "democracy objection" to the Fast Track really breaks into two: what I shall call the "no-amendment objection" and the "accountability objection." The first, and in my view, more serious objection challenges the Fast Track procedure as undemocratic because it permits no amendments. The second objection claims that the Fast Track consti-

47. *News Conference: Mobilization on Development, Trade, Labor and the Environment*, Federal Information Systems Corporation, May 2, 1991, available in LEXIS, Nexis library, Current File [hereinafter Claybrook]. See also Letter to the Editor from Lori Wallach, Staff Attorney, Public Citizen Congress Watch, N.Y. TIMES, Mar. 8, 1991, A28, col. 5 ("The Fast Track procedure allows Congress only a yes or no vote on a completed trade agreement. Members can do nothing to correct weak safety and environmental provisions in an otherwise strong trade agreement. Congress will be faced with a big lose-lose situation; vote no, and they lose the entire agreement; vote yes and they undermine United States health and safety laws."); Clyde H. Farnsworth, *Revival of GATT Talks Stirs Political Fight in U.S.*, N.Y. TIMES, Feb. 25, 1991, at D1 (statement of Thomas R. Donahue, AFL-CIO) (Fast Track "seriously limits both public and Congressional involvement in discussions with Mexico and dilutes the lawmaking authority of Congress").

tutes an abdication of congressional responsibility because Congress delegates negotiating authority to the President without reserving any effective means of rejecting unsatisfactorily negotiated agreements. Both objections recall similar criticisms lodged against the legislative veto when it was the tool-of-choice in trade legislation.⁴⁸

The "democracy objection" warrants inspection for three reasons. First, unlike objections that go to the substance of agreements that result from the Fast Track procedure, this objection goes to the very nature of the Fast Track procedure itself. Hence, it can and almost certainly will be heard again, both from opponents of the substantive accords likely to emerge from the Fast Track and from advocates of those accords who share their opponents' process concerns. Second, if valid, the criticism would undermine the Fast Track's central policy advantage: to increase, not decrease, the accountability of the political branches to one another, and indirectly to the people. Third, the peculiar objection lodged against the Fast Track differs quite strikingly from other kinds of "democratic" objections being lodged these days, by legal scholars, economists, and public choice theorists, against the legislative process as a whole.⁴⁹ The new objection is not the now-familiar one that the legislative process *as a whole* is not perfectly democratic because of legislator self-interest and rent-seeking, agenda control, strategic voting, and what economist Kenneth Arrow calls "cycling."⁵⁰ Instead, the Fast Track's critics claim that the specific

48. Cf. McGowan, *supra* note 6, at 1147 (legislative veto promotes congressional "tendency . . . to 'pass the buck' . . . through profligate delegation and then to join constituents in scoffing at the agencies' handling of the difficult matters"); Martin, *supra* note 6, at 271-73 (legislative veto "tempts members of Congress, pressed hard by affected interest groups, to act irresponsibly," because "a legislative veto generally calls for a single up-or-down vote on the full package of regulations, with all their attendant details").

49. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1990) (reviewing this massive literature). See also KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) [hereinafter ARROW]; JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

50. Nobel Laureate Arrow's famous theorem, derived from Condorcet, shows that when there are three or more exclusive alternatives, a majority voting system can produce any of them depending largely upon how these alternatives are introduced and considered. Arrow's work raised the troubling possibility that the whole concept of the public interest might be incoherent, because political outcomes reflect strategic voting, not collective utility. See generally ARROW, *supra* note 49.

modifications of ordinary legislative procedures for trade agreements somehow reduce the democratic nature of the resulting decisionmaking. Let me examine and unpack both the no-amendment objection and the accountability objection in turn.

A. *The No-Amendment Objection*

At bottom, the Fast Track procedure differs from normal legislative process in six respects: it is an *accelerated* process that results from *self-imposed congressional limits* upon ordinary *committee deliberation*, *committee and floor amendment*, and *filibuster*, that effectively *bundles* disparate substantive provisions together in a take-it-or-leave-it package.

It should be self-evident that none of these features, by itself, is inherently undemocratic. An accelerated legislative process may force interest groups to band together and lodge their objections earlier and faster than they otherwise would, but so long as the process is not unduly truncated, acceleration need not silence interested voices. Similarly, shortening the period for committee deliberation may have the disadvantage of preventing the most expert legislators from considering a trade bill at length, but in exchange, it enhances democracy by preventing one committee (or one interested member) from bottling up a bill, thus ensuring that the bill will be voted on the floor.⁵¹ Nor is a no-amendment rule inherently anti-democratic. Many controversial bills, especially revenue bills, are brought to the floor under either "closed rules," which allow no amendments on the floor, or restrictive rules, which provide that only a certain number of amendments are in order.⁵² Similarly, democracy does not require unlimited floor debate. If a filibuster could not be closed off without offending democracy, all bills could be held hostage by a single opposing Senator. The bundling together of disparate legislative proposals, which are then subject to an up-or-down

51. Other methods exist to circumvent committee power, particularly the discharge petition, see WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 133-34 (3d ed. 1989) [hereinafter OLESZEK], but the Fast Track provides a more certain device for assuring discharge after forty-five days of expert committee deliberation.

52. OLESZEK, *supra* note 51, at 126. When the House Acts through suspension of rules, floor amendments are not permitted. A recent study by the Congressional Research Service shows that from 1979-88 the House took 587 roll-call votes on suspension of the rules out of a total of 4823 roll-call votes, or approximately 12% of the total. Undelivered Testimony of Louis Fisher, Prepared for Hearings on Fast Track Procedures in Trade Legislation, House Committee on Small Business, Apr. 24, 1991, at 9 (on file with author).

veto, frequently occurs throughout the legislative process, particularly in the context of continuing budget resolutions.⁵³

Finally, even if some combination of these features rendered the Fast Track undemocratic, that concern would be alleviated by the fact that all of them are congressionally self-imposed. In the original language of the 1974 Act authorizing the Fast Track, Congress explicitly declared that it could change its own procedures at will.⁵⁴ This language operates, in effect, as a safety valve for democracy, for if any feature of the Fast Track rules operates to stifle particular views, those rules can be altered by a simple majority vote in each House. Yet far from altering those rules, majorities in both houses have voted *for* the Fast Track on five separate occasions: when they enacted the Trade Acts of 1974, 1979, 1984, and 1988 and most recently when both houses voted down extension disapproval resolutions in May 1991.

What, then, is the core of the complaint? At base, it is that the Fast Track disables Congress from holding formal hearings on implementing bills after trade accords have been submitted by the President, and from offering amendments to those bills either in committee or on the floor. As a result, critics argue, some amendments that would otherwise enjoy majority support in both chambers will never come to the floor for a vote. Moreover, critics claim, the Fast Track puts pressure on members to accept agreements as originally drafted, even if they have substantial concerns with them, because their only other option is to vote against an agreement whose negotiation they have approved and which has taken many long years to negotiate. As Senator Ernest Hollings put it: "Fast Track operates like a gun to our heads — no amendments, no reservations."⁵⁵

The democracy objection cannot rest on the absence of hearings, for in fact "nonhearing hearings," "nonmarkup mark-ups" and "non-conference conferences" have been familiar fea-

53. Continuing resolutions are funding devices that are enacted whenever Congress is unable to pass one or more of the thirteen regular appropriations bills by the end of the budget year. Such resolutions are frequently enacted subject to internal rules that preclude debate and amendment, and are then presented to the President (usually one day before the end of an appropriations cycle). See LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 143 (1975); Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 DUKE L.J. 389.

54. Trade Act of 1974, 19 U.S.C. § 2191(a) (1988).

55. David S. Cloud, *Democrats Weigh the Politics of Battling Bush and Mexico*, 49 CONG. Q. 660 (1991) [hereinafter Cloud, *Democrats Weigh*].

tures of the Fast Track process since the very beginning.⁵⁶ Thus, the objection must reduce to a complaint about the no-amendment rule. Yet upon reflection, two points emerge. First, no legislative system can function without *some* procedure for limiting amendments (and for limiting the time for debate thereon); otherwise, the process would degenerate into one in which recalcitrant members could force interminable debate by offering infinite numbers of amendments. The House Rules Committee, which proposes the rule under which a bill is voted upon by the full House, exists precisely to provide such amendment-limiting procedures.⁵⁷

Second, the Fast Track does not so much affect *whether* an agreement can be amended as *when* it can be amended. In the typical situation, the Executive Branch develops an initial strategy for negotiating with our trading partners, but the amended Fast Track process encourages the President to alter that strategy over time through consultation with private industry groups and through dialogue with a Congress (especially the key committees) that is empowered to exercise the full panoply of derailment possibilities outlined in Part I. The ensuing process of legislative and executive dialogue does lead to amendment of the accord, but by amending the Executive Branch's negotiating strategy *before actual negotiations begin and while they are proceeding*, rather than after they have been completed. In short, the Fast Track may be thought of as a process whereby an agreement is subject to essentially as much amendment as one approved under the slow-track, but with the major congressional amendments to the agreement coming before or during negotiations.⁵⁸ That process occurs against both branches' background awareness that a disgruntled Congress possesses full legal power to step in and amend an agreement that it does not like. Thus,

56. See JOHN H. JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984); I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 65 (1986) (describing this process).

57. On the Senate side, the body usually proceeds by Unanimous Consent agreements in which Senators all agree to follow certain procedures in the agreements and to ignore standing rules. See OLESZEK, *supra* note 51, at 122, 185.

58. During the NAFTA episode, Congress effectively forced such prenegotiation amendments by calling for the President's action plan and by the House passing the Gephardt-Rostenkowski Resolution, H.R. Res. 146, 102d Cong., 1st Sess. (1991), at the same time as it rejected the extension disapproval resolution. See *supra* text accompanying notes 28-37.

as Representative Gephardt recently put it, "[t]he bottom line is that the president not only has to earn [F]ast [T]rack on the front end, he has got to keep on earning it. If Congress grants him [F]ast [T]rack, that not the end of the process, it's just the beginning."⁵⁹ What this means in the context of NAFTA, again in Gephardt's words, is that "[i]f the administration sends to this Congress a trade treaty that trades away American jobs, or tolerates pollution of the environment or abuse of workers, we can, and we will, amend it or reject it."⁶⁰

B. *The Accountability Objection*

The accountability objection takes a somewhat different form: that Congress, by delegating negotiating authority to the President under the Fast Track, subject only to a later up-or-down vote, escapes responsibility for enacting the President's negotiated package. Under this view, once the President has gained access to the Fast Track, Congress is reduced to a spectator in the negotiating process and has little ultimate choice but to accept the negotiated result.⁶¹ Thus, the Fast Track undercuts accountability in the same way as any blank-check delegation does. Moreover, members can have it both ways and disguise their positions from their constituents. In theory, they could vote to extend the Fast Track (while claiming to have no view on the merits of the subsequent accord), then later vote to support the subsequent agreement, claiming that they do not favor it, but that too much energy and resources have been invested to reject an otherwise unamendable agreement.

This objection overstates both the transparency of ordinary legislative procedures to voters and the extent to which the Fast Track, once triggered, remits Congress to a passive role in the agreement-making process. If trade agreements were approved under ordinary, rather than Fast Track procedures, the opportunities for members to engage in obfuscatory tactics would multi-

59. Gephardt Presses For Inclusion of Labor, Environmental Issues in Mexico Trade Talks, *Int'l Trade Daily* (BNA) (April 12, 1991).

60. Gephardt Backs Fast Track, 49 CONG. Q. 1181 (1991). Notwithstanding Representative Gephardt's threats, however, Congress could not amend the NAFTA without first modifying the Fast Track rules that currently govern its ratification.

61. Karen Tumulty, *Groups Oppose "Fast Track" To Negotiate Pacts*, L.A. TIMES, March 21, 1991, at D2 (statement of Ralph Nader) (Fast Track is "an obscure legislative procedure that allows Congress to go on autopilot while the Administration negotiates sweeping trade agreements that can gut vast stretches of United States environmental, health and safety laws").

ply, not diminish. Members could add so-called "killer" amendments,⁶² substitute amendments,⁶³ and riders to implementing bills,⁶⁴ or employ points of order⁶⁵ and motions to recommit bills to committee,⁶⁶ all with an eye toward obscuring their true position from the public. The more complicated the available procedures, the greater the ability of any single member to avoid public accountability for her actions.

By contrast, the straight up-or-down roll-call vote required at the end of the Fast Track imposes an irreducible minimum of political accountability. In the end, the member must declare himself for or against the trade agreement, warts and all. Indeed, it is precisely *because* the member knows that he will eventually be held accountable for the entire package that he gains an incentive to take interest in a trade accord earlier in the negotiation process, to ensure that some feature of the agreement that is offensive to him or his constituents will not be enshrined in the final accord.

Spread over many members, this incentive explains why Congress has not left the Fast Track alone, but rather, has continually amended it since 1974. As Part I described, through both formal legislation and informal practice, Congress has steadily increased the number of intermediate leverage points through which it can exercise influence over the substance of trade accords. These leverage points, most of which are subject to roll-call votes, subject a member's actions with regard to an evolving trade agreement to considerable public scrutiny. Cer-

62. A killer amendment is one that is likely to be adopted, but which is so offensive to the bill's manager that the manager would rather see the bill fail than see the amended bill enacted. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 406-07 (1989) [hereinafter TIEFER]. Members often strategically support both a killer amendment and the underlying bill, knowing that the adoption of the killer amendment could lead to the death of the other.

63. Substitute amendments rewrite an entire bill, but keep the same bill or act number. See *id.* at 407-11. This tactic allows members to support a bill publicly while its substance changes dramatically.

64. See OLESZEK, *supra* note 51, at 303. Riders are nongermane amendments to bills. A member can vote against a bill carrying such a rider explaining that he opposes the bill, the rider, or both.

65. A point of order is a means whereby a member may object to the alleged violation of a chamber or committee rule. Such procedural objections are often used to disguise substantive ones. See generally KOH, *supra* note 36, at 177 & 308 n.83; TIEFER, *supra* note 62, at 24.

66. A motion to recommit to committee formally asks the committee to take back a bill for re-evaluation, but often effectively signals the bill's death. See OLESZEK, *supra* note 51, at 301.

tainly, there were many members who would have preferred to avoid taking a public stand on the NAFTA before negotiations had even begun. But the introduction of extension disapproval resolutions in both houses and the gatekeeper committees' decisions to send those resolutions to the floor obliged all members to take a stand on Fast Track extension, and by implication on the NAFTA and the Uruguay Round as well. Thus, the Fast Track extension fight promoted accountability by clarifying members' positions and forcing interest groups to coalesce in support or opposition to the NAFTA.

Nor can critics persuasively argue that the Fast Track process offends accountability by overly delegating to the President constitutional powers that Congress is obliged to exercise. The Supreme Court long ago made clear that the largely moribund nondelegation doctrine does not apply with equal force in the foreign affairs realm.⁶⁷ Furthermore, the various Trade Acts enacted since 1974 certainly contain detailed substantive standards, as well as an unusual range of procedural safeguards, sufficient to immunize them against any claim of an unconstitutional delegation.⁶⁸

The Fast Track critics' most persuasive critique is of the President's tactic of *bundling* disparate trade proposals, both within the NAFTA, and between the NAFTA and the Uruguay Round and placing them before Congress for a single vote. Taken to extremes, they argue, bundling makes it too painful for Congress to vote against a completed trade accord, in much the same way that the bundling of many appropriations bill into a single continuing resolution virtually immunizes such a resolution against a presidential veto. For that reason, opponents muster policy arguments against the Fast Track similar to those mustered by advocates of a presidential line-item veto.⁶⁹

67. Compare *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating domestic statute on nondelegation grounds) with *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936) ("congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

68. See *supra* note 10.

69. See, e.g., J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U. L. Rev. 437, 449 (1990) (making arguments against legislative bundling). Opponents of the Fast Track cannot make the same *constitutional* arguments, however, because the text of the United States Constitution appears to preclude a presidential line-item veto, but has nothing to say about Congress' right to unbundle. See generally Letter from Laurence H. Tribe and Philip Kurland to Senator

Despite their superficial similarities, important differences ultimately separate trade agreements from continuing resolutions. As a political matter, continuing resolutions are most "veto-proof" when the government will shut down unless the President signs the continuing resolution. No similar pressure operates to compel the Congress to approve the NAFTA or the Uruguay Round accords. Moreover, unlike the President, who lacks a line-item veto, Congress retains the power under its rules to unbundle agreements and vote on them separately. Finally, even if unbundling proves politically difficult, history demonstrates that the Senate has not been afraid to reject comprehensive, painstakingly negotiated treaties in the past, ranging from the Treaty of Versailles to the Charter of the International Trade Organization.⁷⁰ In short, critics simply have not made a persuasive case against the use of the Fast Track procedure on the grounds of political accountability. So long as Congress remains an active participant in the Fast Track process, as Part I demonstrates it must, members will remain accountable for their votes and actions.

C. Congress' Real Complaint

On closer inspection, the Fast Track's critics are really making an objection quite different from the "democratic deficit" claim outlined above. At base, they are not claiming that the Fast Track process is inherently undemocratic, but rather, that its use tends to give the President greater leverage and influence over the substance of trade negotiation processes than he would have under ordinary procedures. As Joan Claybrook recently put it, "this anti-democratic procedure is being used as a ramrod to try and get the Congress to submit to the administration's anti-regulation, anti-health and safety agenda."⁷¹

To test this proposition, we can look to recent political science literature studying this very question in an analogous legis-

Edward Kennedy, *reprinted in* 135 CONG. REC. S14,387 (daily ed. Oct. 31 1989) (arguing that "any attempt to exercise such a [presidential] 'line-item veto' would clearly be unconstitutional"); Paul R.Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838 (1987).

70. In the case of the Strategic Arms Limitation Treaty II accord, the President chose to not even submit the treaty to the Senate because he knew it could not be ratified after the Soviet invasion of Afghanistan. See generally Michael Krepon, *The Politics of Treaty Ratification* (Stimson Center Working Paper) at 9, 35-36 (Jan. 1991) (on file with the *Brooklyn Journal of International Law*).

71. See Claybrook, *supra* note 47.

lative context. In one recent study, political scientists used mathematical models to study the relative influence that a congressional committee has when it reports its bill to the floor of the House or Senate under an open (*i.e.*, freely amendable) or closed (no amendment) rule.⁷² That study confirmed the intuition that a committee gains substantially more leverage over the final content of legislation when it reports the legislation under a rule that permits no amendments.⁷³

The Fast Track procedure places the President in essentially the same position as the committee that introduces its legislation under a closed rule, inasmuch as he also has the ability to introduce an agreement without any subsequent congressional amendments.⁷⁴ By analogy to the committee which operates under a closed rule, the Fast Track enables the President to obtain trade agreements that are closer to his policy ideal than if amendments were freely allowed, and thus effectively affords him greater influence over the final legislative outcome. Viewed in this light, the Fast Track's critics may have a valid concern, but it is not about democracy. Their central concern is that the Fast Track gives the President greater ability than he would otherwise have to shape the substance of the trade agreement, and thus cuts into Congress' power to regulate foreign commerce and international trade. Agreements enacted under the Fast Track thus tend to reflect the President's trade priorities and agenda more closely than Congress'. This concern deepens if the President is not only able to bundle various parts of the same agreement together, but also to bundle together two completely different agreements for a single vote (as occurred *de facto*, when the recent Fast Track extension vote applied to ratification of both the NAFTA and the Uruguay Round).

Certainly, this concern can be overstated. Most significantly, it does not account for all of the procedural avenues described in Part I whereby Congress may shape the substance of an accord before it returns to Congress in unamendable form. During the United States-Canada FTA negotiations, for exam-

72. See Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, AM. J. POL. SCI. 741 (1983).

73. See *id.* at 759 ("Under the closed rule, . . . more sophisticated committee behavior, based on compromise and a careful crafting of committee bills, is shown to move legislative outcomes closer to the committee's preferred outcome.").

74. I am grateful to Saikrishna Prakash for drawing my attention to this parallel.

ple, Congress used those avenues to shape important provisions of the agreement involving dispute-resolution, subsidies, uranium, potatoes, lobsters, and steel.⁷⁵ Indeed, because of the unusual "nonmarkup" process used in the Fast Track process, it was the House and Senate who transmitted the proposed United States-Canada FTA implementing legislation to the President (reversing the ordinary legislative process), with the President simply transmitting it back, word-for-word (with typographical corrections) eleven days later.⁷⁶

Even accounting for this congressional input, however, at the core of the Fast Track critics' "democracy" objection may lie the nub of a valid concern, namely, that the Fast Track gives the President greater freedom to shape trade agreements to his programmatic agenda than would otherwise be possible under ordinary legislative process. Whether or not this is in fact true, the growing congressional and public *perception* of its truth has led both to the steady modification of the Fast Track process over time and to ever-increasing suggestions that the Fast Track be abrogated. So long as different political parties control the Presidency and Congress, this perception will likely contribute to greater and greater pressure to amend the Fast Track still further or even to abolish it. In short, the Executive Branch may soon be faced with a stark choice regarding the Fast Track: change it or lose it.

III. THE FUTURE OF THE FAST TRACK

If the Fast Track is to survive as a viable instrument of United States trade policy, should it be modified, and if so, how? In Part I, I suggested three *de facto* amendments that will now likely become part-and-parcel of any future Fast Track renewal episode: the requirement of some kind of administration action plan, the coupling of Fast Track approval with "sense of the Congress" resolutions specifying particular congressional negotiating objectives, and the requirement that all decisions to extend the Fast Track be voted on the floor, not simply resolved by the gatekeeper committees. If, as I have suggested, the Fast

75. See Joshua B. Bolten & Rufus H. Yerxa, *A Congressional Perspective on the Implementation Legislation*, in BELLO & HOLMER, *supra* note *, 47, 54-57.

76. See Alan F. Holmer, *An Administration Perspective on the Implementation Legislation*, in BELLO & HOLMER, *supra* note *, 37, 44 [hereinafter Holmer] ("In fact, the Congress had the ultimate control over the process — the bill was on congressional computers!").

Track critics' central concern is not so much about democracy or accountability as a fear of presidential dominance of the trade agenda, several modifications, ranging from the banal to the dramatic, suggest themselves.

A. *Modifying the Statutory Timetable*

The first, most simple change would be to modify the statutory timetable under which the Fast Track currently operates. As noted above, the current procedures require the President to give Congress prior notice at least ninety *calendar* days before he enters into a trade agreement, but once the agreement and the implementing bill have been submitted, the Fast Track clock begins to operate, requiring an up-or-down vote within sixty *legislative* days.⁷⁷ Significantly and appropriately, this statutory timetable places no minimum or maximum limit on the number of days after the entering of the agreement within which the President must submit the agreement to Congress, along with draft implementing legislation.⁷⁸

Even so, this timetable arguably gives Congress too little time to examine the agreement after presidential notification, but before it is initialled and entered into, thus creating the possibility that Congress will insist upon changes that render the draft implementing legislation inconsistent with the initialled agreement. At the same time, the timetable appears to give Congress too much time to consider the agreement *after* the draft implementing legislation has been submitted. At that point, experience shows, the nonmarkups are over, hard interbranch bargaining has been completed, and the texts are not subject to amendment. The lengthy sixty-legislative-day waiting period thus serves little purpose, other than providing an opportunity for opponents of the agreement to scuttle what is essentially a "done deal" by contemplating modification of the Fast Track procedures themselves.

77. See Pub. L. No. 100-418 (codified at 19 U.S.C. § 2903(c)).

78. During the United States-Canada FTA episode, for example, Congress and the Administration negotiated a timetable whereby the Administration agreed not to submit the draft bill *before* June 1, 1988, to allow ample time for consultations with Congress and resultant modification of the draft implementing bill. In return, the congressional leadership agreed to schedule a vote on the implementing bill before the end of 1988, and if possible, before the August recess. Holmer, *supra* note 75, at 39-40. In fact, it was not until nearly two months after the agreed-upon date that the President formally transmitted the implementing legislation, which was enacted unchanged about one month later by the House and about two months later by the Senate. *Id.* at 44-45.

One simple adjustment would thus be to extend the pre-entry notification period to say, 120 calendar days, while shrinking the post-submission approval period to thirty or forty-five legislative days. This modest adjustment would give Congress more time to bargain for changes during the crucial period before the agreement and the implementing bill are introduced, and less time to quibble after the unamendable legislative package has been submitted.

B. Separate Fast-Tracking for Each Agreement

A second obvious change would be a requirement that different trade agreements not be bundled together for purposes of receiving Fast Track treatment, whether initial or extended. Until now, individual trade agreements have generally been accorded separate and independent Fast Track authority.⁷⁹ But as noted in Part I, when Fast Track *extension* is at stake, a quirk of statutory language in the 1988 Trade Act made it difficult to decouple the NAFTA from the Uruguay Round.⁸⁰ During the extension battle, several efforts were made to decouple the extension of the Fast Track for one accord from the Fast Track extension for the other.⁸¹ Ironically, these efforts were resisted by many *opponents* of extension, on the ultimately unsuccessful theory that "by combining the various trade issues into One Big Vote . . . opponents can pull together those who want to embarrass Bush, those who do not want a free-trade agreement with Mexico and those who feel threatened by the GATT talks."⁸²

In the future, separate legislative approval should be obtained for the fast-tracking of each trade agreement being contemplated, whether initial or extended. When the issue is initial authorization, separate fast-tracking is required. When the issue is Fast Track extension, there seems to be no good reason why

79. 19 U.S.C. § 2191(b)(1), however, defines an "implementing bill," which is to be accorded Fast Track treatment, as "a bill of either House . . . which is introduced . . . with respect to one or more trade agreements submitted . . ." (emphasis added).

80. See *supra* note 33 and accompanying text.

81. See, e.g., H.R. Res. 149, 102d Cong., 1st Sess. (1991) (Levin Resolution); Cloud, *Democrats Weigh*, *supra* note 55 (stating that Rep. Terry Bruce planned to introduce a bill removing the United States-Mexico negotiations from the Fast Track without affecting Uruguay Round); David S. Cloud, *Lopsided Vote Seen Signaling Win for Bush on Fast Track*, 49 CONG. Q. 1257, 1260 (1991) (discussing Pease Resolution, which requested separate House floor vote on rejecting fast track authority for the NAFTA).

82. William Schneider, *Trade Vote Will Test Bush's Clout*, 23 NAT'L J. 968 (Apr. 20, 1991).

the President should be free to bundle unrelated accords, which may result either in the accord with greater legislative support carrying the less supported one to enactment or in the latter dragging the former down to legislative defeat.

C. *Staged Fast-Tracking*

The NAFTA debate illustrated that a significant number of members were hesitant about according Fast Track treatment, particularly nonamendability, to an entire agreement in advance of negotiation, particularly given that labor, environmental, worker adjustment assistance, dispute-resolution, and foreign content in goods provisions were likely to become controversial. This concern led several members to suggest a variety of "middle ground" options between a yes or no vote on blanket extension of the Fast Track. Representative Levin, for example, proposed an amendment of House rules to permit up to four amendments to the United States-Mexico agreement.⁸³ Representative Gephardt proposed some kind of "mid-course review" before granting Fast Track treatment.⁸⁴ As noted above, Senator Riegle, joined by four other Democratic Senators, suggested a limited amendment option, whereby Senate rules would be adjusted to permit amendments in the five subject matter areas mentioned above.

Proponents of the Fast Track could object that all of these options are theoretically available already, simply by *ad hoc* adjustments of internal Congressional rules. But as the maritime industry episode during the United States-Canada FTA negotiations demonstrated, such *ad hoc* adjustments, or threats thereof, can reintroduce into the trade process precisely the dangers that the Fast Track was originally designed to prevent: namely, loss of executive negotiating credibility with our allies and a skewing of trade agreements to favor powerful interest groups with access to particular key members. On the other hand, there may well be merit in Representative Levin's notion that there should be "something between nitpicking and no role at all for Congress" that is between Fast Track authorization and the final up-or-down vote, particularly for those Members who do not be-

83. David S. Cloud, *Lawmakers Offer Plans To Modify Fast Track*, 49 CONG. Q. 1047 (1991) [hereinafter Cloud, *Lawmakers Offer*].

84. See, e.g., Keith Bradsher, *Gephardt Backs Effort On Trade With Mexico*, N.Y. TIMES, May 10, 1991, at D2.

long to the key gatekeeper committees.⁸⁵

Of the various "middle ground" options already proposed, Representative Levin's option of permitting a very small number of subsequent amendments (a limit of four) makes the least sense. Amendments, after all, are not peremptory challenges, and Congress as a whole might find it difficult in advance to determine how many amendments it might want to use (not to mention how many changes to the proposed implementing bill would constitute a "single amendment"). Perhaps more important, a four-amendment rule would offer our negotiating partners little or no certainty that any particular negotiating provision would not be later modified by the use of one of these "reserved" amendments. Similarly, a mid-course review, in which Congress could undo any or all of what has already been agreed upon, would afford Mexico and Canada no certainty, and might encourage one or even both sides to delay negotiating the most controversial issues until after the mid-course review had occurred.⁸⁶

Senator Riegle's proposal, to allow amendments limited to particular subject matter areas, might provide the best alternative if modified into a proposal for "staged fast-tracking." The trade statutes could be amended to require the President to enumerate, in his action plan, the broad subject matter areas to be negotiated. Congress could then, by a majority vote in each house, exempt the most controversial areas from Fast Track treatment until formal submission of an executive progress report at a date certain in the future, while agreeing to accord Fast Track treatment to the less controversial subject matters. Upon submission of the progress report, the two Houses could then take a second vote on whether those issues should also be placed on the fast track. To create a meaningful opportunity for negotiation outside the shadow of amendability, the dates would need to be set so that the entire agreement would be subject to Fast Track treatment for a substantial period — say, six months — before its submission to Congress.

The main advantage of this proposal is that it would subdivide the negotiations into those issues which could be negotiated

85. Cloud, *Lawmakers Offer*, *supra* note 83, at 1047-48.

86. Witness, for example, the sweeping changes in the Uruguay Round negotiations that have occurred after the so-called "mid-term review" of December 1988. See, e.g., Peter Montagnon & William Dullforce, *The Home Stretch in the Trade Stakes*, *FIN. TIMES*, April 10, 1989, at I-20.

with assurances that Fast Track treatment could be forthcoming, and those which would proceed under greater uncertainty, but with knowledge that the issue of Fast Track treatment would be resolved by a date certain. The progress-report deadline could be used as a spur for negotiating difficult issues in the same way that the Fast Track expiration deadline currently does.

The proposal's disadvantages are equally obvious. Staging would subdivide the trade agreement into two (or conceivably more) packages and thereby make it difficult for the negotiators to trade off concessions in the less controversial areas (*e.g.*, tariff reductions) against those in the more controversial ones (*e.g.*, environmental issues). It may be unrealistic to believe, and unwise to require, that certain issues be fully negotiated, then closed, before turning to the negotiation of other, inevitably related issues. Furthermore, staging would withhold Fast Track treatment at the outset for precisely those issues on which our negotiating partners would most desire certainty of nonamendability at the outset. Finally, the modification would certainly stimulate executive cries of congressional micromanagement and claims of unconstitutional congressional interference with the President's authority to conduct negotiations. Many Executive Branch officials insist that any possibility of post-negotiation amendment — however limited — will wholly gut the Fast Track's usefulness by destroying the Executive's negotiating credibility with our allies.

While these are serious objections, the alternative could be far worse: that Congress would accord Fast Track treatment at the outset of negotiations but then remove it on an *ad hoc* basis upon seeing how a particular issue is being negotiated. Staged Fast-Tracking simply recognizes the reality that in most trade negotiations, some issues will be especially controversial and should perhaps be subject to more extended debate before voting. If staging provisions were written into the statute, all parties would be assured of somewhat greater notice of likely problem areas and given an incentive to make progress on those issues by a date certain, thereby reducing the uncertainties that a wholly *ad hoc* process would introduce.

D. Reserving the Fast Track for Multilateral Accords

Yet another possibility would be to reserve the Fast Track for the multilateral context in which it originated, while using a

staged or otherwise modified Fast Track for bilateral accords.⁸⁷ The rationale would be that complex multilateral accords like the Uruguay Round simply could not reach closure if they were amendable or even staged, because amending even a single provision might pull down the entire house of cards. In bilateral accords, by contrast, Congress and President may be more likely to be able to gauge at the outset of negotiations how much the other side wants the agreement, and whether the uncertainty of possible amendment would likely dissuade that country from negotiating altogether. It seems likely, for example, that Mexico (like Israel before it) is sufficiently interested in concluding an FTA with the United States that it will agree to negotiate with the Executive even without the Fast Track guarantee, thus tolerating the possibility of post-negotiation congressional amendment.⁸⁸

This prediction could be challenged on the ground that any comprehensive FTA, whether multilateral or bilateral, will energize a broad range of interest groups, thus creating the need for nonamendable Fast Track treatment. Furthermore, this possibility raises the spectre that the Fast Track device would become a rich man's procedure, a privilege the United States would grant only to negotiating partners with whom there is a rough parity of bargaining power. As a counterexample, however, one could cite the United States-U.S.S.R. bilateral arms control treaties, important and complex agreements that have been negotiated between parties of comparable bargaining strength, largely without any Fast Track process. Particularly if the statutory modification did not *eliminate* the possibility of Fast Track treatment for bilateral accords, but simply deferred it until after the submission of a progress report after some period of initial negotiations (as in the staging proposal), this option might succeed in preserving the Fast Track for the multilateral negotiations for which it has become a *sine qua non*.

87. Numerous members have endorsed some variant of this view. See Int'l Trade Daily (BNA) (May 15, 1991) (Senator Mitchell); 137 CONG. REC. H3500 (daily ed. May 23, 1991) (remarks of Representative Pease) (Fast Track "is warranted when negotiating trade agreements with as many as 107 partners"); 137 CONG. REC. at S6598-99 (remarks of Senator Sarbanes); 137 CONG. REC. S6787 (daily ed. May 24, 1991) (remarks of Senator Kennedy); 137 CONG. REC. at S6825 (remarks of Senator Biden) ("Fast track was designed with multilateral negotiations in mind.").

88. See 137 CONG. REC. S6602-03 (daily ed. May 23, 1991) (remarks of Senator Metzenbaum noting that Mexican newspaper had quoted chief Mexican negotiator as saying "With the [F]ast [T]rack or without it, in any case the negotiations will be carried out").

E. Statutory Modifications to Coopt Potential Mavericks

One curious omission from the current Fast Track procedures is the exclusion of the Senate Rules and Administration Committee from the group of committees that determines Fast Track extension.⁸⁹ To the extent that that committee helps determine the Senate rules being applied at any time, it has power to bypass the Fast Track procedure altogether if its members feel that their interests have been ignored or overridden in battles conducted within the statutorily authorized Fast Track process. If, as I believe, framework legislation facilitates the development of settled expectations, orderly procedures, and mutual compliance with interbranch accords,⁹⁰ then including the Senate Rules Committee by law in the "gatekeeping group" may have the desirable effect of cooptation and informal estoppel. While inclusion would make the process even more unwieldy, it might also diminish the chance of *ad hoc* abrogation of the Fast Track.

Edmund Sim has made a similar proposal for coopting another set of potential mavericks: the other congressional committees that have competing jurisdictional claims over portions of the agreement. Rather than allowing each interested committee to conduct its own separate nonmarkup — a Senate Finance Committee practice that began with the Tokyo Round and has persisted to this day — Sim proposes that as a matter of internal practice, the gatekeeper committees follow the House Ways and Means Committee custom of conducting a "super-nonmarkup" and demanding that other committees who are interested in the trade accord at issue waive their jurisdictional claims over those issues as the price for being allowed to participate.⁹¹

Both of these ideas grow out of a common strategy: that the best way to preserve a statutory Fast Track procedure is to coopt those potentially maverick committees who might be in a position later to effectuate *ad hoc* bypassing of the statute

89. See Sim, *supra* note 9, at 523.

90. See KOH, *supra* note 36, at 207 ("Formal framework legislation . . . [is] a public act, jointly legitimated by Congress and the president, comprehensive in scope, and not subject to momentary abandonment [which] inform[s] all observers of the institutional . . . allocation of decision-making responsibility and . . . protects settled expectations by providing higher assurance of mutual compliance.").

91. See Sim, *supra* note 9, at 523. Alternatively, the demand could be made by the congressional leadership.

through internal rules changes. If these modifications were adopted by statutory amendment, they could be voted on by all members, behind at least a partial veil of ignorance as to how these changes would affect their own constituents. In that context, members would be more likely to adopt a uniform procedure that would be less hostage to special-interest-group influence than an *ad hoc* rules modification of the kind attempted by the maritime lobby during the United States-Canada FTA talks.

F. Permitting Committee Amendment, But Not Floor Amendment

A final possible modification of the current Fast Track procedure would allow the House Ways and Means and Senate Finance Committee to offer a limited number of amendments to a negotiated agreement within a narrowly defined time window (say five legislative days), but to still require that those committees deliver the amended implementing bill to the floor under a closed (no-amendment) rule. The proposal would satisfy the concerns of those who want to preserve some later amendment option, but would not make a trade accord subject to free floor amendment. To limit the proposal even further, the statute could require the gatekeeping committees to "reserve" possible subject matter areas for future amendment at the time that they grant the agreement as a whole access to the Fast Track, much as I have suggested under the Staged Fast-Tracking proposal described above.

As with the Staged Fast-Tracking proposal, the disadvantage of this proposal is that it would further enhance the power of the gatekeeping committees and disrupt our negotiating partners' certainty that the accord to which they agree will not be amended. More fundamentally, the drive for amendments, once loosed, will not be easily cabined. But only time will tell, whether allowing limited amendment will invariably amount to allowing the camel's nose under the edge of the tent. The committees granted this limited amendment power would include all of the congressional trade experts, especially those members most likely to have directly observed or participated in the negotiations themselves, and therefore the number of amendments introduced might be relatively small. In the best case, the members with power of postnegotiation amendment would also be the ones most likely to have a broader vision of how a particular trade pact would or would not fit into the landscape of our inter-

national trade policy, thus acting as a counterweight to interest-group pressure. Thus, if Congress demands *some* amendment option as the price for maintaining the Fast Track, the committee amendment option may prove to be the most palatable.

IV. CONCLUSION

The recent Fast Track extension battle illustrates both how central the Fast Track has become to United States trade policy and how fragile it has become as a device for confining political expediency on the part of both branches. Although the "democracy objection" lodged against it during the recent episode is largely unfounded, there may be a nub of valid concern that warrants further modification to the process. It may well be that no amount of statutory tinkering can save a procedure whose useful life has now passed. At some point, the Fast Track provisions may become so barnacled with amendments and congressional control devices that it will no longer serve its intended purposes, at which point one or both branches will no doubt urge that it simply be jettisoned. But, while memories of the most recent Fast Track battle are still fresh, there is no reason why creative lawyers and legislators should not think hard about which aspects of this remarkable procedural innovation are worth saving and worth revising.