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The Global Trade Accountability Act And Its Effects On Congressional Power And International Trade

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**THE GLOBAL TRADE ACCOUNTABILITY
ACT AND ITS EFFECTS ON
CONGRESSIONAL POWER AND
INTERNATIONAL TRADE**

*By Dallas Kephart**

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I. INTRODUCTION

How would you feel if a President could increase your taxes without congressional approval? What if the President could increase the price of essential goods, such as fresh foods and fuel, without Congress? Would such power be in accordance with the United States Constitution and its text? What if someone told you that the President does have such power: would you want to change it?

The questions posed are not so much hypothetical possibilities, but rather, they are the current state of affairs in the United States. The changes to who may implement tariffs did not occur overnight, but instead, like many other matters in Washington, D.C., they took place over several decades. The Global Trade Accountability Act is a legislative proposal that is currently pending in the United States Congress, introduced by United States Representative Warren Davidson (R-OH-8)¹ and United States Senator Mike Lee (R-UT),² that would change the answers to the questions posed above. The Global Trade Accountability Act would amend current law to subject unilateral executive tariff increases to congressional approval.³ Currently, multiple statutes governing trade would be affected by this legislative proposal, such as the Trade Act of 1974, the Trade Expansion Act of 1962, and the International Economic Emergency Powers Act of 1977.⁴ The Global Trade Accountability Act would amend these laws, and others, to subject tariff increases to congressional approval.

The Global Trade Accountability Act applies to unilateral actions to “suspend[], withdraw[], or prevent[] the application of trade

¹ Global Trade Accountability Act of 2019, H.R. 723, 116th Cong. (2019).

² Global Trade Accountability Act of 2019, S. 1284, 116th Cong. (2019).

³ See Press Release, Mike Lee, U.S. Sen. Mike Lee (May 2, 2019), <https://www.lee.senate.gov/public/index.cfm/2019/5/sen-lee-reintroduces-global-trade-accountability-act>.

⁴ *Id.*

agreement concessions.”⁵ Although, the Global Trade Accountability Act provides one exception to its general rule: a one-time, ninety-day exemption period of congressional approval of any unilateral tariff increase if the President declares that such tariffs are needed for “a national emergency, an imminent threat to health or safety, for the enforcement of criminal laws, or for national security.”⁶ But the President must provide Congress with “written notice” that she/he is implementing the ninety-day exception.⁷ Additionally, the Act would only apply to increases in tariffs, not the reduction of tariffs initiated by the President.⁸ Also, the Act would amend current free trade agreements minimally, such as the Dominican Republic-Central America-United States Free Trade Implementation Act (CAFATA-DR) and the United States-Israel Free Trade Implementation Act of 1985 (to name a couple), to simply make the trade agreements compliant with the Act’s provisions.⁹

The Global Trade Accountability Act would allow Congress to begin the process of regaining its original Article I jurisdiction over trade that it delegated to the executive branch over the years.¹⁰ Article I, Section 8 of the United States Constitution states, among other things, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States,” and that Congress has the power “To regulate Commerce with foreign Nations. . . .”¹¹

The President, by contrast, does not have explicit authority over trade in the Constitution.¹² Instead, the President relies on

⁵ H.R. 723.

⁶ *Id.*

⁷ *Id.*

⁸ Lee, *supra* note 3.

⁹ H.R. 723.

¹⁰ See CAITLAIN DEVEREAUX LEWIS, CONG. RESEARCH SERV., R44707, PRESIDENTIAL AUTHORITY OVER TRADE: IMPOSING TARIFFS AND DUTIES (2016), <https://fas.org/sgp/crs/misc/R44707.pdf>.

¹¹ See U.S. CONST. art. I, § 8.

¹² See U.S. CONST. art. II; IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43491, TRADE PROMOTION AUTHORITY (TPA):

statutory delegation to exercise authority over trade.¹³ Although, for purposes of negotiating and making trade agreements, such as CAFATA-DR, the President has power to make treaties with the advice and consent of the Senate.¹⁴ In the precise words of Article II, Section 2 of the United States Constitution, “He [*i.e.*, the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur”¹⁵ Trade promotional authority, which is discussed below, has allowed for a simple majority vote when the President negotiates an agreement within the confines of the congressional trade authority and the trade promotional authority is current.¹⁶

Regarding a related matter, Congress’s delegation of powers to the executive branch has been litigated in the federal courts over the years.¹⁷ Congressional delegation is a topic of great controversy, and with that, much scholarship and opinion has been written on the issue of congressional delegation.¹⁸ Included in delegation-related opinions is a recent United States Supreme Court dissenting opinion authored by Justice Gorsuch that could very well evolve into a majority opinion in the near future.¹⁹ However, the question of general congressional delegation of legislative powers is a subject beyond the scope of this comment.

Instead, this paper presents the following. The first section below will go over some of the history of trade legislation subject to amendment by the Global Trade Accountability Act, from the Trading with the Enemy Act of 1917 to Smoot-Hawley to the International Emergency Economic Powers Act of 1977. The following section will

FREQUENTLY ASKED QUESTIONS 2 (2019), <https://fas.org/sgp/crs/misc/R43491.pdf> (“[T]he Constitution assigns no specific responsibility for trade to the President.”).

¹³ See Lee, *supra* note 3.

¹⁴ See FERGUSON & DAVIS, *supra* note 12.

¹⁵ U.S. CONST. art. II, § 2.

¹⁶ See FERGUSON & DAVIS, *supra* note 12.

¹⁷ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹⁸ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 341-45 (5th ed. 2015).

¹⁹ *Gundy*, 139 S. Ct. at 2131-148 (Gorsuch, J., dissenting).

review the applicability of the Global Trade Accountability Act today. The economic effects of the Global Trade Accountability Act, the views on tariffs by members of Congress, how the Act will apply regardless of who is President, and the potential downsides of the Act will all be discussed. Finally, the conclusion will be last and will serve as a wrap-up.

II. HISTORY

This section highlights the history of enacted trade legislation that would be affected by the Global Trade Accountability Act. As to the applicability of the Global Trade Accountability Act, this section will start in 1917, with the Trading with the Enemy Act of 1917. But first, a brief discussion on the first tariff bill passed by the United States Congress in 1789.²⁰

A. The Tariff Act of 1789

The first tariff bill passed by Congress was the Tariff Act of 1789.²¹ The bill provided a means for the government to obtain revenue.²² The Tariff Act of 1789 placed a five percent tariff on imported goods.²³ The Tariff Act of 1789 is included here to show how Congress has been involved in trade policy since the beginning of the Republic and that the debate over trade is by no means a new phenomenon.

B. Trading with the Enemy Act of 1917

In 1917, Congress delegated some of its power to the executive; the Trading with the Enemy Act of 1917 provided that “[d]uring the time of war or during any other period of national emergency declared by the President, the President may” restrict trade

²⁰ John M. Dobson, *Two Centuries of Tariffs: The Background and Emergence of the U.S. International Trade Commission*, UNITED STATES INTERNATIONAL TRADE COMMISSION, 6 (Dec. 1976), <https://www.usitc.gov/publications/other/pub0000.pdf>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

between the United States and foreign nations.²⁴ It is important to understand the historical backdrop of enacted statutes that delegated Congress's trade authority. For instance, in 1917, the first World War was ongoing. Congress may have wanted to allow the President to act fast and react to national security concerns. Congress continued its theme in delegating its power to the President to set the nation's tariff rates with the next bill of consideration.

C. Tariff Act of 1930; Smoot-Hawley

In 1930, Congress enacted the Tariff Act of 1930,²⁵ better known as "Smoot-Hawley" (named after Senator Reed Smoot and Congressman Willis Hawley).²⁶ Smoot-Hawley is a widely known tariff bill that arguably made the Great Depression worse.²⁷ The Tariff Act of 1930 allowed the President, by proclamation, to issue duties²⁸ on those countries found to be discriminating against the United States in its commercial activities.²⁹ For purposes of the Global Trade Accountability Act, the section at issue in Smoot-Hawley is Section 338, which deals with discrimination by foreign countries.³⁰ Section 338 would be amended by the Global Trade Accountability Act to allow for congressional approval of the President's determination that a country has discriminated against the United States.³¹ Not a lot is known about the extent and authority behind Section 338, as

²⁴ Trading With The Enemy Act of 1917, ch. 106, § 3, 40 Stat 411, <https://tile.loc.gov/storage-services/service/ll/uscode/uscode1940-00705/uscode1940-007050a002/uscode1940-007050a002.pdf>.

²⁵ Kimberly Amadeo, *What the Smoot Hawley Act Can Teach Protectionists Today*, THE BALANCE (updated Aug. 6, 2019), <https://www.thebalance.com/smoot-hawley-tariff-lessons-today-4136667>.

²⁶ *Id.*

²⁷ Louis Jacobson, *Is protectionism a big part of the Great Depression, as Ben Sasse said?*, POLITIFACT (May 31, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/may/31/ben-sasse/protectionism-big-part-great-depression-ben-sasse/>.

²⁸ *Definition of 'Customs Duty'*, THE ECONOMIC TIMES, (2020), <https://economictimes.indiatimes.com/definition/customs-duty> (last visited Jan. 15, 2020) (a duty "is a tax imposed on imports and exports of goods").

²⁹ LEWIS, *supra* note 10; 19 U.S.C.A § 1338 (West 2020).

³⁰ *See* Lee, *supra* note 3.

³¹ *Id.*

Presidents have rarely invoked it.³² Nonetheless, Smoot-Hawley would be effectively amended and consistent with the Global Trade Accountability Act, which would no longer allow the President to unilaterally raise tariffs without congressional approval.

D. Reciprocal Trade Agreement of 1934

In 1934, Congress passed the Reciprocal Trade Agreement of 1934. With this legislation, Congress delegated more of its Article I power to regulate trade to the President. In this case, President Franklin Delano Roosevelt (“FDR”) was the beneficiary of Congress delegating its powers.³³ Given Congress passed this statute in 1934, during the Great Depression, the law intended to alleviate some of the pressures felt by the agriculture community.³⁴

Not all representatives in Congress favored the bill. Some members of Congress foresaw the abrogation of Congress’s trade authority.³⁵ One of these members was the Ranking Member of the House Committee on Ways and Means, Allen Treadway (R-MA).³⁶ Congressman Treadway stated that the bill “would surrender the taxing power of Congress to the President and his subordinates in violation of both the letter and spirit of the Constitution.”³⁷ Congressman Treadway’s argument against the bill then seems to resemble similar arguments today about trade abrogation. Both congressional delegation and the surrendering of Congress’s taxing power are arguments that are used in favor of passing the Global Trade Accountability Act.

³² Danny Vinik, *Trump’s six hidden trade weapons*, POLITICO (Feb. 28, 2017, 3:34 PM), <https://www.politico.com/agenda/story/2017/02/how-trump-could-overhaul-trade-without-quitting-the-wto-000329>.

³³ See *The Reciprocal Trade Agreement Act of 1934*, UNITED STATES HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES, OFFICE OF THE HISTORIAN, <https://history.house.gov/Historical-Highlights/1901-1950/The-Reciprocal-Trade-Agreement-Act-of-1934/> (last visited Aug. 24, 2020).

³⁴ See *The Reciprocal Trade Agreement Act of 1934*, *supra* note 33.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

E. Trade Expansion Act of 1962

In 1962, Congress passed the Trade Expansion Act of 1962,³⁸ which allows the President to implement actions “to adjust the imports of [an] article” so that the article of importation no longer poses a national security threat to the United States.³⁹ Section 232 is the governing section of the Trade Expansion Act that allows for this.⁴⁰

Section 232 has recently produced a lot of news as the Trump Administration has invoked it to implement tariffs against a wide range of imported articles, including steel and aluminum imports from foreign countries.⁴¹ Section 232 provides the President with broad discretion, with little oversight, as the President may levy these tariffs as he “deems necessary.”⁴² There is no requirement that the President receive congressional approval.⁴³

1. Trade Expansion Act of 1962: Applicability to Today

Many have disputed whether President Trump’s implementation of national security tariffs were actually based on national security reasons.⁴⁴ In a memorandum to Secretary of Commerce Wilbur Ross, former Defense Secretary James Mattis stated that “U.S. military requirements for steel and aluminum each represent only about 3 [percent] of U.S. production. Therefore, [the Department of Defense] does not believe that the findings in the reports impact the ability of [the Department of Defense] programs to acquire the steel

³⁸ LEWIS, *supra* note 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *What You Need to Know About Implementing Steel and Aluminum Tariffs on Canada, Mexico, and the European Union*, THE WHITE HOUSE (May 31, 2018), <https://www.whitehouse.gov/articles/need-know-implementing-steel-aluminum-tariffs-canada-mexico-european-union/>.

⁴² LEWIS, *supra* note 10.

⁴³ John Brinkley, *Trump’s National Security Tariffs Have Nothing To Do With National Security*, FORBES (Mar. 12, 2018, 11:41 AM), <https://www.forbes.com/sites/johnbrinkley/2018/03/12/trumps-national-security-tariffs-have-nothing-to-do-with-national-security/#78d65856706c>.

⁴⁴ *Id.*

or aluminum necessary to meet national defense requirements.”⁴⁵ This memorandum begs the question: Given that the Department of Defense only needs three percent of U.S. steel and aluminum production, is there a real national security concern?

Additionally, as an article in *The Hill* points out, President Trump implemented these tariffs against the United States’ allies, including Canada, Mexico, and European Union countries.⁴⁶ Canada, Mexico, and many of the European Union countries are part of the North Atlantic Treaty Organization (NATO):⁴⁷ people may find it hard to believe that these tariffs were truly implemented for national security reasons. The implementation of these tariffs is a policy question that should be made by the people’s representatives in Congress and the President, instead of the President alone.

These examples show the impact a unilateral executive action can have on a wide array of affairs, both domestic and foreign. An important question to consider is whether Americans would like their President to solely hold this power, unchecked by an elected representative body? Additionally, the Constitutional framers granted Congress authority over trade, and there has been no constitutional amendment to change such authority.⁴⁸ Rather, Congress’s trade authority has been statutorily delegated.

F. Trade Act of 1974

In 1974, Congress passed the Trade Act of 1974.⁴⁹ The Global Trade Accountability Act would apply to the Trade Act of 1974.⁵⁰ Section 301 of the Trade Act of 1974 grants the President authority to assure that trade agreements are properly carried out and to “resolve

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *EU member countries in brief*, EUROPEAN UNION (Oct. 10, 2019), https://europa.eu/european-union/about-eu/countries/member-countries_en; *What Is NATO?*, NORTH ATLANTIC TREATY ORGANIZATION (2020), <https://www.nato.int/nato-welcome/index.html#basic>.

⁴⁸ See U.S. CONST. art. 1, § 8.

⁴⁹ See LEWIS, *supra* note 10.

⁵⁰ Lee, *supra* note 3; H.R. 723.

trade disputes, and open foreign markets to U.S. goods and services.”⁵¹ The Trade Act of 1974 is the main statute that grants presidential power to enact “trade sanctions on foreign countries that either violate trade agreements or engage in other unfair trade practices.”⁵² If discussions “to remove the offending trade practice fail, the United States may take action to raise import duties on the foreign country’s products as a means to rebalance lost concessions.”⁵³ The goods to be taxed are placed on a “retaliation list,” and then the tariffs are applied.⁵⁴ The Trade Act of 1974 also allowed for the fast-track of trade agreements.⁵⁵

G. International Emergency Economic Powers Act of 1977

In 1977, Congress passed the International Emergency Economic Powers Act, which allows the President to declare a national emergency and block or modify imports.⁵⁶ The Global Trade Accountability Act would subject the International Emergency Economic Powers Act of 1977 to modification. The International Emergency Economic Powers Act of 1977 allows a President “to impose economic-based sanctions.”⁵⁷ The International Emergency Economic Powers Act of 1977 was first used following the 1979 Iranian hostage crisis.⁵⁸ When implementing the act, the President is to confer with Congress.⁵⁹ But Congress has never revoked the President’s authority under the Act as of March 2019.⁶⁰ Concurrent resolutions are insufficient to overturn presidential actions; therefore,

⁵¹ *Section 301*, INT’L TRADE ADMIN. (Jul 25, 2018) https://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *What is the History of Fast Track?*, CLINTON WHITE HOUSE ARCHIVES, <https://clintonwhitehouse2.archives.gov/Initiatives/FastTrack/history.html> (last visited Aug. 24, 2020).

⁵⁶ LEWIS, *supra* note 10.

⁵⁷ CHRISTOPHER A. CASEY ET AL., CONG. RESEARCH SERV., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE (2020), <https://fas.org/sgp/crs/natsec/R45618.pdf>.

⁵⁸ *Id.*

⁵⁹ LEWIS, *supra* note 10.

⁶⁰ CASEY ET AL., *supra* note 57.

Congress needs a two-thirds majority to overturn an action taken by the President (if the President vetoes).⁶¹

The International Emergency Economic Powers Act of 1977 was recently called into question when President Trump said he could use it to direct firms to quit their business relations with China.⁶² This proposed idea shows the extent to which the Global Trade Accountability Act would have an impact on the International Emergency Economic Powers Act of 1977, as the President would need congressional support to implement new or additional tariffs.

III. THE GLOBAL TRADE ACCOUNTABILITY ACT AND TRADE TODAY

Today, trade has become a hotly debated issue. Whether one thinks the United States should have trade proliferation (or not) is a policy question that will not be addressed here. The question this paper seeks to address and discuss is how the Global Trade Accountability Act would change the current statutory law, congressional power over trade, and foreign trade. One can see that the Global Trade Accountability Act would give Congress more authority over trade—not to the extent as originally set out in the Constitution, but more than Congress currently possesses. Enacting the Global Trade Accountability Act would be an important first step in making Congress more accountable to “We the People.” The legislation would be a step in the right direction in restoring Congress’s constitutional authority in regulating commerce with other countries, imposing taxes on “We the People,” and restoring Congress’s Article I powers as a whole.⁶³

The United States participates in trading relationships with many countries. Previously, NAFTA governed trade between the United States, Canada, and Mexico, but recently, President Trump replaced NAFTA with the United States-Mexico-Canada Agreement

⁶¹ See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (The Supreme Court invalidated the legislative veto); See also U.S. CONST. art. I, § 7.

⁶² Peter Baker & Keith Bradsher, *Trump Asserts He Can Force U.S. Companies to Leave China*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/world/europe/trump-g7-summit.html>.

⁶³ U.S. CONST. pmb1.

(USMCA). Here, much of the focus will be to discuss the relevance of the Global Trade Accountability Act as it generally relates to Canada and Mexico. The reasoning behind doing so is that Mexico and Canada are currently significant trading partners of the United States, and with the USMCA's passage, the countries will surely continue to be significant trading partners.

A. Economic Effects of the Global Trade Accountability Act

In 2018, President Trump enacted tariffs on Canada and Mexico, among other countries, using Section 232 tariffs (national security tariffs) on steel and aluminum imports.⁶⁴ The United States imports about 16 percent of its steel and about 56 percent of its aluminum from Canada.⁶⁵ The effect of implementing these tariffs has been a net negative for the United States in Gross Domestic Product (GDP) calculations.⁶⁶ According to the Tax Foundation, when considering the effects of President Trump's tariffs as a whole, (calculations are against all countries and all products), per April 2018, they have reduced the United States' GDP by 62.5 billion dollars, or 0.25 percent, and lowered wages by 0.16 percent.⁶⁷ Although, the United States has brought in an additional 86.13 billion dollars in tariff revenue.⁶⁸ These numbers reflect the negatives (reduced GDP and a cost on consumers to some extent) and the positives (additional revenue)—opinions may vary as to how much consumers pay and how much producers pay the tariff.

In regards to Canada, the steel and aluminum tariffs imposed by the Trump Administration resulted in taxing 12.8 billion dollars of goods.⁶⁹ Then, Canada retaliated with its own set of tariffs after the

⁶⁴ See White House, *supra* note 41.

⁶⁵ Thomas Franck, *Canada, Brazil — but not China — will be hit hardest by Trump's steel tariffs*, CNBC (updated Mar. 5, 2018, 4:43 PM), <https://www.cnbc.com/2018/03/01/canada-brazil--but-not-china--will-be-hit-hardest-by-trumps-steel-tariffs.html>.

⁶⁶ See Erica York, *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUND. (updated Sept. 18, 2020), <https://taxfoundation.org/tariffs-trump-trade-war/>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Trump Administration implemented tariffs against them.⁷⁰ When countries implement tariffs against others, those countries often respond by imposing retaliatory tariffs. Hence, many characterize such disputes as “trade wars” as the countries go back and forth, implementing more and more tariffs.⁷¹ When countries implement tariffs back and forth, any benefits of free trade begin to disappear.⁷² According to the Tax Foundation:

Economists generally agree that free trade increases the level of economic output and income, and conversely, that trade barriers reduce economic output and income. Historical evidence shows that tariffs raise prices and reduce available quantities of goods and services for U.S. businesses and consumers, which results in lower income, reduced employment, and lower economic output.⁷³

The Global Trade Accountability Act could have subjected the tariffs against Canada to congressional approval, which could have very well stopped their implementation, as many GOP Senators also opposed or expressed dissatisfaction with these tariffs.⁷⁴ The note about the GOP senators is made as Republican senators are needed to make a majority in the Senate. Of course, the President could have used the 90-day exception rule provided in the Global Trade Accountability Act, but the exception would have only been good for 90 days.⁷⁵ Although this is much speculation as some tariffs on China may have been approved. Senators have expressed differing views depending on which countries the tariffs were implemented against, such as Canada

⁷⁰ *Id.*

⁷¹ See James Chen, *Trade War*, INVESTOPEDIA (updated Nov. 2, 2020) <https://www.investopedia.com/terms/t/trade-war.asp>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Press Release, U.S.Sen. Ben Sasse, Statement on Trade War (May 31, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/5/sasse-statement-on-trade-war>.

⁷⁵ See H.R. 723.

and Mexico, compared to China.⁷⁶ People may view China more harshly, and many would say rightfully so, given their history and actions relating to trade, such as intellectual property theft.⁷⁷ Given China's bad reputation as a trade partner, and the Trump Administration's tariffs against them in an attempt to bring them to the table to negotiate, many may want the United States to cooperate with other countries to apply additional pressure on China. For instance, the United States could work with its European allies, Japan, South Korea, and others to pressure China by getting allies to help crackdown on China's behavior.

If Congress had halted these other tariffs, the other countries may not have implemented their own retaliatory tariffs. Thus, the Global Trade Accountability Act would have likely affected the United States's trade policy and other countries's trade policies. This scenario shows the true potential impact of the Global Trade Accountability Act on international trade policy.

Over the years, Mexico and Canada's trade partnership has resulted in the yearly exchange of billions of dollars of goods and services.⁷⁸ Going back to the national security tariffs, the question should be asked: Should one person jeopardize what millions of consumers and producers have depended on, that is, transactions and

⁷⁶ Burgess Everett, *Republicans gobsmacked by Trump's tariffs*, POLITICO (Updated May 31, 2018, 5:36 PM), <https://www.politico.com/story/2018/05/31/trump-tariffs-canada-mexico-republican-response-615479>.

⁷⁷ See Michael Collins, *It is Time to Stand Up to China*, INDUSTRYWEEK (June 13, 2016), <https://www.industryweek.com/trade/it-time-stand-china> (the article highlights currency manipulation, state owned enterprises, and technology transfers, among other ways that China distorts the trading system); Louis Jacobson, *Newt Gingrich says China stole \$360 billion in intellectual property from U.S.*, POLITIFACT (May 17, 2016), <https://www.politifact.com/punditfact/statements/2016/may/17/newt-gingrich/newt-gingrich-says-china-stole-360-billion-intelle/> (Former Speaker of the United States House of Representatives, Newt Gingrich, stating, "When you hear, for example, that the Chinese last year [2015] probably stole \$360 billion in intellectual property from the United States, I think being tough about that's a good thing,"] and "I think conservatives can be for very tough-minded trade.").

⁷⁸ See *U.S.-Canada Trade Facts*, OFF. OF THE U.S. TRADE REPRESENTATIVE (2020), <https://ustr.gov/countries-regions/americas/canada> (visited Aug. 24, 2020); See *U.S.-Mexico Trade Facts*, OFF. OF THE U.S. TRADE REPRESENTATIVE (2020), <https://ustr.gov/countries-regions/americas/mexico> (visited Aug. 24, 2020).

business relationships with other countries, without a check by Congress?

Later, the Trump Administration proposed tariffs against Mexico due to illegal immigration concerns.⁷⁹ President Trump proposed a 5 percent tariff, with the possibility of progressing as high as 25 percent.⁸⁰ The impact of these tariffs would have been quite substantial, given the United States and Mexico's trade relationship.⁸¹ The United States, in 2018, imported roughly 347 billion dollars of goods alone (not taking into account services here).⁸² It is possible that Mexico could have also retaliated if the Trump Administration would have went ahead and implemented these tariffs, which would have probably hurt the United States's exports.

The Trump Administration claimed authority to impose tariffs against Mexico because of the illegal immigration crisis on the United States's southern border.⁸³ Specifically, the Trump Administration claimed it was an emergency under the International Emergency Economic Powers Act of 1977.⁸⁴ This national security determination would have likely been challenged in court,⁸⁵ which is beyond the scope of this paper; but if Congress were to pass the Global Trade Accountability Act, then Congress would have had to approve of the President's proposed tariffs.⁸⁶ The President could have used the 90-day exception, which would then trigger other actions,⁸⁷ but it would still only be a 90-day exemption.

To put an across the board five percent tax into context, consider the following. In 2018, the United States imported 93 billion

⁷⁹ Paul Davidson, *How tariffs on Mexican imports could affect what you pay for vegetables and cars*, USA TODAY (updated June 24, 2019, 4:38 PM), <https://www.usatoday.com/story/money/2019/05/31/tariffs-trump-mexico-import-tariffs-could-hurt-consumers/1299579001/>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *U.S.-Canada Trade Facts*, *supra* note 78.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Lee, *supra* note 3.

⁸⁷ See H.R. 723.

dollars of goods in vehicles and 16 billion dollars in mineral fuels.⁸⁸ Additionally, Mexico is the United States's largest source of agricultural imports, at 26 billion dollars.⁸⁹ Included in this category are fresh vegetables and fruit, both at almost 6 billion dollars each; wine and beer, over 3.5 billion dollars; and other types of foods at around 4 billion dollars.⁹⁰

There are many questions that come to mind upon considering these numbers and the goods that would be subject to a potential tariff. First, how do these goods translate into a national security threat? Additionally, one has to ask, does one really want to pay 5 percent more for essential goods, such as fruits and vegetables? Now, one may think that a 5 percent tax on fruit is a minimal price in exchange for more border security and a way to combat illegal immigration. That may be true as a policy matter, depending on one's views, and such determination is beyond the scope of this paper. The question here is whether such a determination should be voted on by the People's representatives?

Additionally, think of the impact on consumers if all vehicle imports faced a 5 percent tariff. If the United States imported a whole car at a price of say 20,000 dollars, the consumer would pay an additional 1,000 dollars; this amount seems to be more than pocket change and may start to change one's opinion on the matter. But, as stated before, many may believe that such a cost is worth the security, but should one person be able to have such an impact on consumers without congressional approval? If one does believe that the cost is justified, the individual's elected representative may vote in favor of the tariff. Their representative votes on other major bills, such as immigration measures or tax laws, so they could do the same here.

As for economic effects, yes, the tariff will benefit some American producers, but a net loss remains due to the effects on consumer surplus—consumers will seek substitutes to replace these

⁸⁸ *U.S.-Canada Trade Facts*, *supra* note 78.

⁸⁹ *Id.*

⁹⁰ *Id.*

goods we import too.⁹¹ There are many possible repercussions of applying such tariffs, but that is beyond the scope of this paper. On a more legal note of major concerns, deviating from the Constitution's text and structure should be a major concern to people.

B. Views on Tariffs in the Congress

If the Global Trade Accountability Act was enacted, one must wonder whether these proposed tariffs would be approved if President Trump tried to enact them. Per the many news reports, would enough Republican senators vote in favor of these tariffs to receive majority approval?⁹² In a PBS article, Senate Majority Leader Mitch McConnell (R-KY) stated, "There is not much support in my conference for tariffs, that's for sure."⁹³ In the same article, Senator Ted Cruz (R-TX) gave his take on the Republican Conference's view of the once proposed tariffs against Mexico. The article states:

"Deep concern and resistance," is how Sen. Ted Cruz of Texas characterized the mood. "I will yield to nobody in passion and seriousness and commitment to securing the border, but there's no reason for Texas farmers and ranchers and manufacturers and small businesses to pay the price of massive new taxes."⁹⁴

These Republican senators represent half of Congress, and the tariff proposals would have to pass the Senate under the Global Trade Accountability Act. The tariffs would also need approved in the House of Representatives.⁹⁵ If one had to guess, Senator Cruz might be suggesting that there are better ways to secure the southern border. To name a few alternative measures, Congress could appropriate money to hire more border agents, improve and add more technology to the

⁹¹ Colin Danby, *Basic Analysis of a Tariff*, UNIV. OF WASH. (1998), <https://faculty.washington.edu/danby/bls324/trade/tariff.html>.

⁹² Lisa Mascaro et al., *GOP senators line up against Trump's Mexico tariff plan*, PBS (June 5, 2019, 7:44 AM), <https://www.pbs.org/newshour/politics/gop-senators-line-up-against-trumps-mexico-tariff-plan>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ H.R. 723.

border, or what President Trump ran on: build a wall; or maybe Congress could authorize and appropriate money for all the ideas mentioned. Nonetheless, all these ideas represent alternatives to implementing tariffs against Mexico (no judgment is issued on any of the proposals here). These are policy decisions that must be made by the people's representatives in Congress.

C. Global Trade Accountability Act's Non-Political/Applicability to All Presidents

Much analysis and examples of the Trump Administration's tariff enactments and proposals have been made here for two reasons: these examples are recent, and the administration's actions have caused much debate amongst scholars, the public, members of Congress, and the media. This analysis is done because the Trump Administration is using these statutes and measures, and President Trump is the current executive in office. The Global Trade Accountability Act would apply regardless of who is President and their party affiliation. To remove any speculation of the Act's partisan bias, it is worth noting that Congressman Davidson and Senator Lee, the Act's sponsors, are both Republicans and amongst the most conservative members of their respective bodies and parties, per Heritage Action.⁹⁶ "The Heritage Action Scorecard is the leading conservative scorecard. It allows constituents to hold their members accountable based on how they vote on specific key pieces of conservative legislation."⁹⁷

If President Obama, a Democrat, was still in office, the Global Trade Accountability Act would have applied to him also. In providing additional examples of the Global Trade Accountability Act's potential impact and to show how it would apply regardless of the President or

⁹⁶ *Rep. Warren Davidson*, HERITAGE ACTION FOR AMERICA (2020), <https://heritageaction.com/scorecard/members/D000626/116>; *Sen. Mike Lee*, HERITAGE ACTION FOR AMERICA (2020), <https://heritageaction.com/scorecard/members/L000577/116>.

⁹⁷ *About*, HERITAGE ACTION FOR AMERICA (2020), <https://heritageaction.com/about> (The scorecard is essentially a percentage score of how representatives vote per the votes that the organization identifies and takes a position on. Members of Congress may be rated from 0 to 100.)

party in office, below is a brief discussion of examples of how the Act would have applied many decades ago.

In the 1960s, when President Lyndon Johnson (LBJ) was in office,⁹⁸ a “chicken war” began between the United States and Europe.⁹⁹ In 1962, Europe increased “tariffs on imported chicken, effectively shutting U.S. producers out of a growing and lucrative poultry market.”¹⁰⁰ The two sides were unable to resolve the issue using other means, and therefore, in 1963, “the United States retaliated by boosting tariffs on four products important to European exporters: potato starch, dextrin, brandy, and light trucks.”¹⁰¹ The tariff was set at 25 percent and went into “effect in January of 1964.”¹⁰² So why did President Johnson impose tariffs on trucks when Europe targeted agriculture? Well, the answer may be that the President wanted to satisfy a constituency group, that being the labor union bosses.¹⁰³ “Lyndon Johnson wanted support from the United Auto Workers union . . . and he wanted to avoid a strike before the 1964 election. UAW chief Walter Reuther wanted the President to stifle import of Volkswagen trucks into the U.S. They high-fived and the rest is history.”¹⁰⁴

With these considerations in mind, one would question whether the President should have such unilateral executive power over trade. If you agree with President Johnson’s position, ask yourself: what if a President were to target goods that you find are needed in this country, but the next President needs a political win that you may

⁹⁸ *Lyndon B. Johnson Biography*, BIOGRAPHY.COM (Updated Aug. 14, 2019), <https://www.biography.com/us-president/lyndon-b-johnson> (Johnson served as President from November 1963 to January 1969).

⁹⁹ Daniel J. Ikenson, *Ending the “Chicken War”: The Case for Abolishing the 25 Percent Truck Tariff*, CATO INST. (June 18, 2003), http://www.cato.org/pub_display.php?pub_id=6806 [https://web.archive.org/web/20110921113753/http://www.cato.org/pub_display.php?pub_id=6806].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Marco den Ouden, *Chicken Tax Makes Trucks Expensive and Unavailable*, FOUND. FOR ECON. EDUC. (Jan. 16, 2017), <https://fee.org/articles/chicken-tax-makes-trucks-expensive-and-unavailable/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

not agree with? What if you believe that the United States should be using more solar panels to meet its energy demands, and a coal association convinces a President they need protection, would you feel the same? Or, to the contrary, what if a President wants to ban imports of materials that are used for fracking and coal production to satisfy their constituents that want to ban fracking and coal? How would this make one feel if it meant that they would lose their job or pay more for electricity?

Keeping today's issues in mind is crucial because one may agree with President Trump's actions in these scenarios, but that does not mean that the next administration's trade policies will be the same; thus, Congress should pass the Global Trade Accountability Act and restore their Article I powers. Suppose a presidential candidate such as Elizabeth Warren was elected and unilaterally implemented a 100 percent tariff on imports of natural gas, coal, or products that help produce those resources for national security reasons. Would one like to have the Act in place to allow congressional oversight? To further illustrate, consider if one were in the natural resource business and used an import to help furnish the production of goods. Use the example of metal pipe for oil pipelines or heavy operational equipment. How would one feel about a significant increase in production costs because one person, to satisfy a political promise, implements a tariff for supposedly national security reasons? My guess is that person would not be content, as their business would be dramatically hurt. The product subject to the tariff may not necessarily be a true national security concern derived from the import itself. Rather, the tariff is a vehicle to hurt an activity that the executive disapproves of doing. And who would say the limit would be 100 percent tariff, as maybe the tariff would be 200 percent? The point is that a President Warren, or whomever, could come up with whatever they wanted.

Another area that may catch the hearts of many would be gun parts. How would one feel if a President Warren (or another presidential candidate) decided that any imports of gun parts is a national security threat, and those imports would be subject to a certain percentage tariff? Now, a President Warren would likely use other means, such as issuing a national emergency, due to the ways around

such restrictions on imports such as domestic suppliers increasing production of their goods, but imposing tariffs on these goods would still most likely increase their price.

It should not matter which political party possesses the presidency for the Global Trade Accountability Act to be deemed good or bad legislation. One may think that as long as their President of choice is in office, then checks and balances are not as important. But what about when the political winds change and the opposing party takes over? Would one feel the same way? One could ask this about an array of things in American life, such as regulatory affairs, but the Global Trade Accountability Act would at least adjust the checks and balances for trade.

Over the last several years, we have seen what a change in administrations has done when one President comes in, and with the stroke of a pen, creates a regulation. Then the next President comes into office and reverses previous actions. For example, outside of trade, look no further than to the Paris Climate Accords, and on the domestic front, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Both were unilateral executive actions taken by President Obama that President Trump rescinded upon taking office. The constitutionality of some executive orders, policy aside, such as DAPA has caused much debate, but it is an issue outside the scope of this paper.¹⁰⁵

Although, if President Obama would have followed the Constitution and made his case to Congress to pass immigration reform, then President Trump would have been unable to rescind his actions so easily. President Trump would have needed Congress to pass a law, and then he would have had to sign the law to repeal the enacted legislation. But instead, President Obama took matters into his own hands and went around the Constitution's legislative process. Another example is the Affordable Care Act, or Obamacare. President Trump may tweak the Affordable Care Act via an executive order, but a lot of the Affordable Care Act remains on the books because

¹⁰⁵ *United States v. Texas*, 136 S. Ct. 2271 (2016) (equally divided Court upheld lower court's ruling granting injunction to the DAPA program).

Congress has not completely repealed it (as the ACA was passed via the legislative process).¹⁰⁶ The same rationale would apply to tariff implementation.

The point above is to expand upon the need for Congress to reassert its authority over trade as a whole. The Global Trade Accountability Act is at least a good first step in this process of Congress reasserting its Article I powers, and Congress should reassert its powers in other areas also.

One may ask, what if there is a real emergency where the President must swiftly implement tariffs to protect the United States' interests? The Global Trade Accountability Act takes into consideration such national security concerns with its one-time 90-day exception to the general rule. It is then up to the President to make his/her case before Congress to have them approve such measure.¹⁰⁷ I have noted what several senators have said in regards to the recent trade concerns, but the next statement highlights the differences between imposing tariffs on different countries (as previously alluded to above). Following an announcement on the removal of tariffs on goods from Mexico and Canada, Senator Ben Sasse (R-NE) issued the following statement:

China is our adversary; Canada and Mexico are our friends. The President is right to increase pressure on China for their espionage, their theft of intellectual property, and their hostility toward the rule of law. The President is also right to be de-escalating tension with our North American allies. Today's news that the Administration is dropping steel tariffs on Canada and

¹⁰⁶ The constitutionality of the Affordable Care Act was decided in 2012 by the Supreme Court in *NFIB v. Sebelius*, 567 U.S. 519 (2012). Although many question whether the Supreme Court rendered the correct decision, see MIKE LEE, WHY JOHN ROBERTS WAS WRONG ABOUT HEALTHCARE: A CONSERVATIVE CRITIQUE OF THE SUPREME COURT'S OBAMACARE RULING (2013), as it stands, the key provision of the individual mandate was upheld in the Affordable Care Act. See *Sebelius*, 567 U.S. 519 (2012).

¹⁰⁷ H.R. 723.

Mexico is great for America, great for our allies, and certainly great for Nebraska's agriculture industry.¹⁰⁸

Again, this statement highlights the varying perceptions by members of Congress and the American people on the implementation and reduction of tariffs.

As Senator Sasse indicates, people may feel quite differently about implementing tariffs against China compared to Mexico or Canada. These sentiments on tariffs mean that some tariffs would have a broader consensus and would receive an affirmative vote in Congress and would go into effect; other tariffs do not have such consensus, and they would not go into effect. However, as previously mentioned, it would be up to the President to make his case to Congress.

D. Possible Negatives of the Global Trade Accountability Act

One may ask, what are the downsides of the Global Trade Accountability Act? To start, if Congress passed the Act, it would be better than the current situation where Congress has little say on how tariffs are implemented. As previously stated, the Global Trade Accountability Act would give Congress a vote. With that being said, one may argue that it still does not restore Congressional approval to all votes on trade. To provide that remedy, Congress could still implement additional legislation or amend the Act, which would allow a congressional vote to decrease tariffs. If the President opposes raising or decreasing tariffs, then he could invoke his veto power; however, like other matters, Congress could override the President's veto with a two-thirds vote. But, yes, the complete congressional authority would not be restored with the current version of the Global Trade Accountability Act.

Another possible negative is the way the Act is set up; it could leave itself open to constitutional challenges. In a way, the Act codifies the legislative veto (mentioned above). If someone argues that the Act

¹⁰⁸ See Press Release, U.S. Sen. Ben Sasse, Statement on Distinction Between Chinese Cold War and North American Trade Tensions (May 17, 2019), <https://www.sasse.senate.gov/public/index.cfm/2019/5/sasse-statement-on-distinction-between-chinese-cold-war-and-north-american-trade-tensions>.

violates the Presentment Clause,¹⁰⁹ then the Act could be fixed by allowing Congress to completely legislate on tariffs by introducing them, and the President can sign them into law. In essence, Congress could simply amend the Act to regain its original constitutional authority over trade.¹¹⁰ This would be the best version of the Act: Congress proposes tariff rates, votes, and the President vetoes or signs the bill into law.

Over time, the consequences of deviating from the original constitutional framework (separation of powers) have come to the forefront, and the need to restore Congress's power over trade, and other areas such as regulatory affairs, are much needed.¹¹¹ Although some may argue that the President may need to take swift action to protect the United States's interests, the Global Trade Accountability Act addresses such national security concerns with its one-time, 90-day exception.¹¹² Therefore, the Act has potential national security concerns covered. In the end, the Global Trade Accountability Act is a step in the right direction for trade policy in its attempt at restoring Congress's constitutional authority over trade, as laid out in Article I, Section 8 of the Constitution.¹¹³

Also, the Global Trade Accountability Act would allow for a majority vote on the tariffs (a simple majority vote may be a good or

¹⁰⁹ See U.S. CONST. art. I, §7.

¹¹⁰ See Bill Funk, *Why the REINS Act Is Unconstitutional*, THE CENTRE FOR PROGRESSIVE REFORM BLOG, <http://progressivereform.org/cpr-blog/why-the-reins-act-is-unconstitutional/> (mentions how *INS v. Chada* applies to a bill with a similar procedural mechanism, the REINS Act, that deals with the regulatory state, and argues that the bill unconstitutional; my goal here is to highlight possible criticisms of the Global Trade Accountability Act).

¹¹¹ The consequences of deviating from federalism has also come to the forefront in other areas.

¹¹² See H.R. 723.

¹¹³ See U.S. CONST. art. I, §8 ; see also Press Release, U.S. Sen. Mike Lee, Make Trade Accountable Again (Jun 14, 2019), <https://www.lee.senate.gov/public/index.cfm/the-chairman-s-note?ID=F40A5593-F673-43A1-8E1A-084CDE3562C6> (provides background regarding the Global Trade Accountability Act and asserts that, during the “progressive era,” Congress began delegating its powers, including power of levying tariffs, to the President; Senator Lee states that “what legislative powers Congress has given the executive branch, Congress can also take back”).

bad idea, depending on how one feels about the Senate filibuster).¹¹⁴ But currently, trade agreements are usually subject to simple majority votes also, per fast-track legislation, or Trade Promotional Authority (TPA).¹¹⁵

E. Fast-Track Legislation/Trade Promotional Authority (TPA)

Expanding on what TPA is exactly and how it came about is important in understanding trade relations with other countries and trade policy debates between the President and Congress. TPA is a “fast-track” mechanism that allows trade agreements negotiated by the executive branch to be considered before Congress and approved by an up or down vote, which is a majority vote.¹¹⁶ The trade agreement is proposed, with no floor amendments allowed.¹¹⁷ Therefore, the Senate filibuster would not come into play (the same filibuster mentioned previously in footnote 127).

Per the Congressional Research Service, here is how TPA works:

Under TPA, an implementing bill may be eligible for expedited consideration if (1) the trade agreement was negotiated during the limited time period for which TPA is in effect; (2) the agreement advances a series of U.S. trade negotiating objectives specified in the TPA

¹¹⁴ For more information about what a “filibuster” is, see VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE* (2017), <https://crsreports.congress.gov/product/pdf/RL/RL30360>. To see a video discussing the filibuster more, see Mike Lee, *Filibusters: History, Purpose, & Controversy [POLICYbrief]*, FED. SOC’Y. (Jan. 17, 2019), <https://fedsoc.org/commentary/videos/filibusters-history-purpose-controversy-policybrief> (the video is presented by Senator Mike Lee, who introduced the Global Trade Accountability Act in the United States Senate). Understanding the filibuster is essential to understanding the significance of receiving an up or down vote. Many bills remain bills and do not become laws in the Senate due to the filibuster. The filibuster may be viewed as a good or bad tool, depending on how one feels about a particular piece of legislation or the role of the United States Senate being a super-majoritarian deliberative body. I will not delve into that debate here.

¹¹⁵ FERGUSSON & DAVIS, *supra* note 12.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

statute; (3) the negotiations were conducted in compliance with an extensive array of notification and consultation with Congress and other stakeholders; and (4) the President submits to Congress a draft implementing bill, which must meet specific content requirements, and a range of required supporting information. If, in any given case, Congress judges that these requirements have not been met, TPA provides mechanisms through which the eligibility of the implementing bill for expedited consideration may be withdrawn in one or both chambers. TPA is authorized through July 1, 2021. The United States has renegotiated the North American Free Trade Agreement (NAFTA), now known as the United States-Mexico-Canada Agreement (USMCA) for which TPA could be used to consider implementing legislation.¹¹⁸

TPA was “reauthorize[d]” in 2015 per the “Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015), [which] was signed into law by former President Obama on June 29, 2015 (P.L. 114-26).”¹¹⁹

Why talk about TPA? Because TPA is one of those pieces of legislation that can get lost in the acronym heavy world of Washington, and TPA is critical to understanding trade policy. TPA, when authorized and in effect, gives the President guidance for congressional approval. But, at the same time, TPA allows Presidents to negotiate trade agreements and receive up or down votes from Congress.¹²⁰ In some respects, as to congressional approval with an up or down vote and congressional oversight, TPA and the Global Trade Accountability Act are similar. One must not overlook the significance of allowing for straight up or down votes in the United States Senate. Trade agreements subject to the Senate Filibuster would likely need a minimum of 60 votes (treaties with other countries need the Senate’s

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

advice and consent by two-thirds vote).¹²¹ Two-thirds of the current amount of United States senators would be 67 senators. The need for 67 senators almost anytime would require several senators from the opposing party to vote for approval. This means it would be more difficult to pass the agreement, compared to the need of a simple majority of senators, which may be all from the President's party if that party is in control of the United States Senate.¹²²

To show the magnitude of what a simple up or down vote can do, consider the Smoot-Hawley Tariff Act previously discussed. When Smoot-Hawley was considered, there were 1,253 amendments voted on when the bill was on the House floor.¹²³ Imagine Congress subjecting a trade agreement that President Trump's Administration negotiated, such as USMCA, to over 1,000 amendments. The trade agreement could end up being vastly different than what was originally negotiated. The agreement would likely need to go to conference and be reconciled into a uniform bill, and then be passed by both chambers of Congress.¹²⁴

If the President uses TPA, then Congress would vote on the agreement without any amendments, and the agreement would only be subject to an up or down vote.¹²⁵ TPA makes it easier for the President to negotiate and enact trade agreements with foreign countries. Although, keep in mind that Congress still has a say with TPA, as a

¹²¹ See U.S. CONST. art. II, § II.

¹²² *Party Division*, UNITED STATES SENATE (2020), <https://www.senate.gov/history/partydiv.htm> (provides a history of the makeup of the United States Senate by party division). In the 116th Congress, there are 53 Republicans. *Id.*

¹²³ Michael Barone, *Tariffs: Where Does the President Get His Power?* [POLICYbrief], FED. SOC'Y. (Jan. 21, 2019), <https://fedsoc.org/commentary/videos/tariffs-where-does-the-president-get-his-power-policybrief>. This source offers perspective and history on presidential trade authority. One of the points the narrator of the video tries to make is that Congress began to delegate its trade authority to the executive after Smoot-Hawley bill because of the vast complexities of voting on 1253 congressional amendments to the bill. The narrator of the video also briefly touches on the constitutionality and congressional delegation of Congress delegating its constitutional powers to the executive to regulate trade.

¹²⁴ FERGUSSON & DAVIS, *supra* note 12.

¹²⁵ *Id.*

congressional chamber could refuse to bring the trade agreement to the floor for a vote or simply vote down the proposed agreement.

One may think that trade effects are small, but when considering the reciprocal impact and the effect on iterations and cooperation with other countries, especially the United States's allies, does trade policy really have a minimal impact? Additionally, actions on trade affect everyday life. One should want a more accountable government, and holding the representatives closest to the People responsible for the nation's policies is a good first step. Suppose one does not like how their elected official voted. In that case, that person may vote against them, express their concerns to the representative, donate money to an opposing candidate in an upcoming election, or even run against them or campaign against them. In essence, "We the People" will have more say on local representatives than we do the President of the United States.¹²⁶

As the Federalist Papers¹²⁷ state: "The House of Representatives will derive its powers from the people of America. . . .The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters."¹²⁸ The Congress "will derive its powers from the People of America."¹²⁹ (The Federalist Papers were written before the adoption of the 17th Amendment, which resulted in the Senate being elected by direct election, rather than by the State legislatures).¹³⁰ It is Congress who "derive[s] its

¹²⁶ U.S. CONST. pmbl.

¹²⁷ Ken Brexler & Robert Brammer, *The Federalist Papers: Primary Documents in American History*, LIBRARY OF CONGRESS (updated Aug 13, 2019), <https://guides.loc.gov/federalist-papers> ("The Federalist Papers were a series of eighty-five essays urging the citizens of New York to ratify the new United States Constitution. Written by Alexander Hamilton, James Madison, and John Jay, the essays originally appeared anonymously in New York newspapers in 1787 and 1788 under the pen name 'Publius.' The Federalist Papers are considered one of the most important sources for interpreting and understanding the original intent of the Constitution.").

¹²⁸ THE FEDERALIST NO. 39, at 414 (James Madison) (Clinton Rossiter ed., 2003).

¹²⁹ *Id.*

¹³⁰ *See* U.S. CONST. amend. XVII.

powers from the People of America.”¹³¹ Americans that disagree with their elected officials’ decisions are likely to contact their representative more easily than the President of the United States. Additionally, members of Congress have smaller constituencies than the President.

IV. CONCLUSION

In conclusion, the Global Trade Accountability Act would amend several statutes to make them compliant by subjecting unilateral executive tariff increases to congressional approval. Congressional approval of the tariffs would allow for congressional oversight over the matter, and in doing so, the Global Trade Accountability Act provides a step towards Congress regaining its original Article I power over trade.¹³² The Global Trade Accountability Act would have widespread effect, including, potentially, a foreign country’s retaliatory tariffs against the United States, which affects their trade policy.

If Congress were to vote on the Global Trade Accountability Act and pass it, the United States’ foreign relations and its trade policy would be greatly affected, especially given the size and reach of the American economy. Although the Global Trade Accountability Act does not subject all tariff activity to a congressional vote for approval, it does subject unilateral tariff increases to such approval. In this sense, the Act, in its current form, does not reinstate Congress’s original congressional powers and authority over trade that the Constitution grants in Article I, Section 8. But if Congress were to adopt the Act, some of its original Article I power over trade would be regained (one can hope Congress regains all of its Article I power though).

From existing free trade agreements, such as the United States-Israel Free Trade Implementation Act of 1985,¹³³ to statutes such as the Trade Expansion Act of 1962 (which includes Section 232 National Security Tariffs),¹³⁴ the Global Trade Accountability Act would amend the mentioned legislation in some form or another, with

¹³¹ THE FEDERALIST NO. 39, *supra* note 128.

¹³² See U.S. CONST. art. I § 8.

¹³³ H.R. 723.

¹³⁴ LEWIS, *supra* note 10.

the former being minimally and the latter being more significantly.¹³⁵ Legislation such as the Trade Expansion Act and its wide congressional delegation of power is what the Global Trade Accountability Act seeks to amend most significantly.

With the Act still pending in Congress's respective committees, the House Ways and Means Committee¹³⁶ and the Senate Finance Committee,¹³⁷ it is time for the committees to vote on the Global Trade Accountability Act. The American people should know how their elected members of Congress feel about accountability to the people they have a privilege to represent.¹³⁸ It is also time for Congress to regain its Article I powers and for the Constitution's text and structure to be restored in all areas, including trade.

¹³⁵ H.R. 723.

¹³⁶ *Id.*

¹³⁷ Global Trade Accountability Act of 2019, S. 1284, 116th Cong. (2019)

¹³⁸ *Hon. Michael Lee: Article I Reform and the Global Trade Accountability Act [Restoring Article I]*, YOUTUBE (Apr. 2, 2018), <https://www.youtube.com/watch?v=mkuZZHcfxwc> (Senator Lee discussing restoring Article I power and his Global Trade Accountability Act).