

Congress, the President, and Trade: A Marriage of Convenience?

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**An Introductory Essay for the Congress Project Seminar on
“Congress and Trade Policy”**

Woodrow Wilson International Center for Scholars

Monday, November 17, 2003

And remember, under our constitution, the authority over trade belongs with the Congress. We have to borrow that authority and we have to give it back now and then.

–Robert Zoellick
U.S. Trade Representative
April 24, 2003

The Twentieth Century has so conditioned us to the dominance of the president in foreign policymaking and the conduct of international relations that most of us do not think twice about the president’s prerogatives in striking trade agreements with other nations. Any role Congress might have in trade policy, we reflexively think, is either one of interference with the President’s trade goals and strategies, or acquiescence after the fact in approving what the president has negotiated. Few people realize that the Constitution gives Congress the power to “regulate commerce with foreign nations,” and set tariff rates.

As U.S. Trade Representative Zoellick acknowledges in the epigraph above, what trade authority the executive has is delegated or loaned to it by Congress, and can be taken back. Unlike the war power, which Congress has gradually ceded to presidents over time, trade authority is on a more elastic string that expands and contracts depending on domestic, economic and political conditions.

How did modern presidents come to acquire trade authority from Congress over time, and what prompted Congress, at least conditionally, to delegate one of its most important constitutional prerogatives? How tight or loose a leash does Congress keep on the Executive in delegating to it the authority to negotiate trade agreements? How do process and procedures affect trade policy outcomes? What are the internal and external forces influencing trade policy? Under what circumstances do trade issues play a significant role in campaigns and elections results? These are just some of the questions posed by this seminar on “Congress and trade policy.” The purpose of this introductory essay is to provide a historic overview and context in which to better understand and explore the answers to these questions.

The Founders on Trade

The American revolution was sparked in large part over matters of trade and tariffs. Among the bill of particulars in the Declaration of Independence against King George III were the charges that the King had combined with others, “giving his assent to their acts of pretended legislation:...for cutting off our trade with all parts of the world; [and] for imposing taxes on us without our consent....” The familiar, revolutionary rallying cry was, “No taxation without representation.” The familiar image is that of the “Boston Tea Party” patriots, disguised as Mohawk Indians, dumping crates of tea into the harbor to protest customs duties on the beverage.

Even with independence and representation, the new government was not inclined to make taxing easy. Because the Articles of Confederation (1781-1789) did not grant the Confederation Congress the authority of direct taxation, any attempt to obtain such power would require the approval of all 13 states.¹ In 1781 and 1783, Congress passed legislation requesting the states to grant it authority to levy customs duties on certain classes of imports. In both instances it was not able to garner unanimous approval by the states. In the meantime, there was nothing to prevent the states from taxing both foreign goods and those entering their borders from other states. The 1785 Pennsylvania Tariff, for instance, is said to have laid the basis for the revenue act passed by the first Congress under the Constitution in 1789 (see below).

The inability of the national government to adequately finance its own operations and to coordinate and integrate commerce among the states and with foreign nations were major contributors to the failure of the new government under the Articles of Confederation. Alexander Hamilton, writing under the pseudonym of the “Continentalist,” observed in a 1782 newspaper column that, “vesting Congress with the power of regulating trade ought to have been a principal object of the confederation for a variety of reasons. It is as necessary for the purposes of commerce as of revenue.”² And James Madison, in his “Preface to Debates in the Convention of 1787,” underscored just how doubly destructive the Confederation’s lack of control over commerce and trade had been:

The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy injurious to the trade of the U.S. and destructive to their navigation. . . . The same want of a general power over commerce led to an exercise of this power separately, by the States, which not only

proved abortive, but engendered rival, conflicting and angry regulations.³

Indeed, the impetus for the constitutional convention came from a commission of states convened in Annapolis in September 1786 to discuss problems of “commerce and trade.” Although only five states participated in the Annapolis conference, the author of its final report, Alexander Hamilton, struck upon a way to involve the others and extend the commission’s work beyond ways of improving the regulation of trade and commerce: “[T]he power of regulating trade is of such comprehensive extent...that to give it efficacy...may require a correspondent adjustment of other parts of the Federal System.” Consequently, it recommended to Congress that the 13 states appoint delegates to a convention to convene in Philadelphia “on the second Monday of May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitutional of the Federal Government adequate to the exigencies of the Union....”⁴

Congress was at first indignant at this affront, but, when it learned that George Washington had been appointed as one of Virginia’s delegates, it approved the planned convention in February 1787. However, it made clear in its authorization for the convention that it was to be limited to “the sole and express purpose of revising the Articles of Confederation... [to] render the federal constitution adequate to the exigencies of Government and the preservation of the Union.”⁵

The Virginia Plan to correct and enlarge the Articles of Confederation, submitted to the convention on May 29, 1787, by Governor Edmund Randolph, did not directly address the problems of commerce and trade, and instead gave the proposed national legislature the power to enjoy the rights vested in the Congress by the Articles “and moreover to legislate in all cases to which the separate states are incompetent, or in which harmony of the United States may be interrupted by the exercise of individual legislation,” and to “negative all laws passed by the several states contravening in the opinion of the National Legislature the articles of Union.”⁶

On the same day, delegate Charles Pinckney of South Carolina submitted his own proposed amendments to the Articles, which included giving the national legislature “the exclusive power of regulating trade and levying imposts.”⁷

On June 15, William Patterson of New Jersey laid before the convention a proposed substitute for the Virginia Plan. Among other things, the plan proposed that Congress “be authorized

to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture imported into any part of the United States. . .; and to pass acts for the regulation of trade and commerce as well with foreign nations as with each other....”⁸

While the New Jersey Plan was rejected a few days later because it was considered much weaker than the Randolph Plan, the Committee of Detail that reported back to the convention on August 6 opted for the enumerated powers for Congress, as proposed by Patterson, as opposed to the more general delegation of powers proposed in the Virginia Plan. Indeed, the 16 clauses of enumerated powers proposed by the committee began with the following two clauses:

The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;
To regulate commerce with foreign nations, and among the several states....⁹

After the Committee on Detail’s draft was distributed, the convention adjourned to allow state delegations to discuss the details. Giving Congress these new powers of taxation and the regulation of trade and commerce, James McHenry told his Maryland delegation, meant that “the dearest interests of trade” would come under the control of four large states. He asked what would become of the southern export trade in staples like tobacco, rice, indigo. “We almost shuddered at the fate of the commerce of Maryland should we be unable to make a change in this extraordinary power....and agreed that our deputation ought never to assent to this article in its present form.”¹⁰

The real controversy, however, was over the fate of the slave trade, and threatened to bring down the entire Convention. However, the subsequent “slavery compromise” saved the Constitution and the Union, at least for the time being. Under the compromise, the import tax on slaves could not exceed ten dollars a head, Congress could not prohibit the importation of slaves until 1808, and slaves would be counted as three-fifths of a free person for purposes of taxes and representation.

The other issue at the convention that could affect trade and commerce with other nations was the treaty power. The original Randolph Plan made no mention of it, perhaps because it was assumed the power to make treaties would remain with the Congress as it had under the Articles of Confederation. The draft of the Committee on Detail, however, specified that the Senate would have the power to make treaties. That was further amended by the report of committee of eleven on September 4 recommending that the “President by and with the advice and consent of the Senate,

shall have power to make treaties.” It was further amended to require that consent be by a vote of three-fourths of the senators present, and finally, modified down to a two-thirds vote.

The juxtaposition of the president’s treaty powers with those of Congress to regulate foreign commerce and establish tariffs on imports was an obvious “invitation to struggle” between the branches, as Edward Corwin has characterized the Constitution’s shared powers over foreign affairs. This conflict became especially pertinent since only the Senate is required to ratify treaties, whereas revenue measures, which include legislation setting tariffs, must originate in the House. House precedents are filled with instances in which the House and, eventually the Senate forcefully argue that the President cannot impose new tariff rates through a treaty absent legislation from Congress giving him that authority or legislation that implements proposed tariff changes.

The First Congress and Mixed Duties

The first major bill considered by the House in the First Congress (1789-91) was a bill to provide for “duties on imports.” James Madison, acting as de facto floor leader, called up the bill on April 8, noting that “the deficiency in our Treasury has been too notorious to make it necessary for me to animadvert upon that subject.” And he went on:

Let us content ourselves with endeavoring to remedy the evil. To do this a national revenue must be obtained; but the system must be such a one that, while it secures the object of revenue, it shall not be oppressive to our constituents. Happy it is for us that such a system is within our powers; for I apprehend that both these objects may be obtained from an impost on articles imported into the United States.¹¹

Madison said he hoped the House would approve his plan “as an expedient rendered eligible by the urgent occasion there is for the speedy supplies of the federal treasury, and a speedy rescue of our trade from its present anarchy.” The bill listed 12 imported goods on which duties would be imposed, but left blank the amount of duty on each, e.g., “On rum, per gallon, ____ of a dollar...,” plus, “on all other articles ____ per cent on their value at the time and place of importation.”¹²

Little had Madison expected that his emergency plans for supplying the Treasury with badly needed revenues would run into the larger discussion of protecting and encouraging domestic manufacturers. But, as Thomas Hartley of Pennsylvania observed, “no argument...can operate to discourage the committee from taking such measures as will tend to protect and promote our domestic manufactures....I think it both politic and just that the fostering hand of the General

Government should extend to all those manufactures which will tend to national utility.” Madison responded that in offering the plan, it was his intention to restrain the subject “principally to the object of revenue, and make this rather a temporary expedient rather than any thing permanent.” And he continued, “I presume however much we may be disposed to promote domestic manufactures, we ought to pay some regard to the present policy of obtaining revenue.”¹³

Thus began the long-running debate on free trade versus protection, and on addressing both revenue needs and the needs of domestic manufacturing and agricultural interests. On April 11, just three days after Madison introduced his original plan for duties on imports, the debate was joined by the people in the form of a petition presented to the House by Representative William Smith of Maryland, from “the tradesmen, manufacturers, and others, of the town of Baltimore.” The petition noted that, since the end of the Revolution, “the manufacturing and trading interest of the country [has been] rapidly declining, while the wealth of the people hath been prodigally expended in the purchase of those articles from foreigners, which our citizens, if properly encouraged, were fully competent to furnish. After going into some detail, the petition called upon Congress to provide--

...that aid and assistance which alone can dissipate their just apprehensions, and animate them with hopes of success in future, by imposing on all foreign articles, which can be made in America, such duties as will give a just and decided preference to their labors; discountenancing that trade which tends so materially to injure them and impoverish their country; measures which, in their consequences, may also contribute to the discharge of the national debt and the due support of Government....¹⁴

Finally, to assist Congress in this task, the petitioners attached “a list of such articles, as are or can be manufactured in this place, on moderate terms.” This was just the first of several similar petitions Congress received from interested parties during the course of its debates on import duties. Given their timeliness, they were initially referred to the “committee of the whole” debating the tariff bill.

The preamble to the law as finally enacted in July 1789 cited protection of domestic industries as one of several purposes of the legislation: “Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufacturers, that duties be laid on goods, wares and merchandizes imported.” While observers have termed the first tariff act as, “modestly protective,” most accounts agree that

Congress generally resisted pressures to impose even higher tariffs that some interests had urged. The new law provided tariffs on some 30-odd specific products, including ale, manufacturing hemp, iron, and glass; rates of 7.5 percent and 10 percent on manufactures and “luxuries” such as earthenware and jewelry; and a general, 5 percent levy on unenumerated imports. [see Appendix A]

It is apparent from what followed that domestic interests were not satisfied by the extent of protection they received, and they had a sympathetic ear in the executive. In his first annual address to Congress in January 1790, President George Washington urged that, “Safety and interest require that [a free people] should promote such manufacturers as tend to render them independent of others for essential, particularly military, supplies.” Congress responded to the President’s call a week later by directing Treasury Secretary Alexander Hamilton to prepare a report on plans to encourage and promote “such manufactures as will tend to render the United States independent of other nations for essential, particularly for military supplies.”¹⁵

On December 5, 1791, Hamilton the House his “Report on Manufactures” which has been cited as the philosophical justification for protectionism over most of the nation’s history. In his report, Hamilton said it was necessary to protect domestic manufacturers for economic as well as national security reasons. While conceding that completely free and open international trade would be far preferable to protection, he argued that the U.S. did not have that option so long as other nations continued to utilize protectionist measures. Hamilton recommended a combination of high tariffs and federal “bounties” (i.e., subsidies) for domestic manufactures. While some of Hamilton’s recommendations were included in the 1792 tariff act, his ideas of giving the federal government additional powers to guide industrial development were rejected.¹⁶

The Politics of Protection

According to one account, “Hamilton lost the battle but won the war.” Over the next 140 years, Congress increased the average level of tariffs “by fits and starts.” While most of the numerous tariff increases enacted between 1794 and the War of 1812 were designed primarily to provide revenues, following the war “the overwhelming determinant of an increasingly protectionist U.S. import policy was the responsiveness of lawmakers to industrialists’ demands for protection against import competition.”¹⁷

Although the virtual absence of imports during the war had stimulated domestic

manufacturing, primarily in the northern states, the resumption of imports from Britain after the war, combined with the debt load from the costs of the war, prompted a sharp rise in import duties in the Tariff Act of 1816. This in turn led to a larger historical development of widening the gulf between the North and South that would culminate in the Civil War. The failure of the 1816 act to curb British imports laid the groundwork for the 1828 “tariff of abominations,” a highly protectionist bill (with some tariffs as high as 100 percent of the value of the imported item). The bill was the product of a major political miscalculation by opponents of increased protectionism who had quietly encouraged loading up the bill with so many major tariff increases that it would be too odious to be approved on final passage. The amendment process developed into a classic case of congressional log-rolling, with members willing to accept other members’ proposed tariffs in return for getting tariff benefits favorable to their own constituents.¹⁸

The high tariffs in the 1828 act further exacerbated the frustration of Southern states whose overseas customers for tobacco and cotton were increasingly angered by the high rates. The act was also primarily responsible for the nullification crisis of 1832-33 in which Senator John C. Calhoun of South Carolina questioned whether the Constitution allowed for the imposition of taxes for purposes other than raising revenue, and argued that states had a right to nullify the enforcement of federal laws within their borders. A South Carolina convention subsequently voted to nullify the tariffs of 1828 and 1832, forcing President Andrew Jackson to support a reduction in the tariffs in 1833. The resulting act provided for a gradual reduction of tariffs to 20 percent which was completed by 1842.¹⁹

Nevertheless, the “tariff of abominations” became a symbol for the South of what was perceived as an attack by the North on its economic and social systems, eventually leading to its secession from the Union in 1861. Even after the Civil War, tariffs continued to move up and down depending on the party in power, and the issue remained a defining one for the parties well into the twentieth century. Interestingly, it was always viewed during this period as a domestic political issue and not one of international significance or consequence. As one group of authors put it, “Conspicuous by their absence for more than a century in the debate were two of the most basic concepts of trade policy: (1) concerns about trade theory such as comparative advantage; and (2) concerns about the impact of trade barriers on U.S. political and economic relations with other

countries.” Also missing for most of this period was any presidential discretion or direction in the conduct trade policy.²⁰

One of the exceptions to presidential disengagement from tariff issues was Grover Cleveland who made tariff reduction a major issue in his 1888 reelection campaign. Cleveland lost, and Republicans, interpreting the loss as a victory for protective tariffs, proceeded to enact the McKinley Tariff Act of 1890 (William McKinley of Ohio was then chairman of the House Ways and Means Committee). The public did not agree with the interpretation, and pushed Republicans out of power, returning a three-to-one Democratic majority in the House. Cleveland was returned to the White House in the 1892 elections with his party in control of both houses of Congress. The Wilson-Gorman Tariff Act of 1894 was a mixed bag, containing some modest tariff reductions along with some protectionism amendments. Cleveland let the bill become law without his signature. Republicans returned to power in both houses in 1894, and retook the White House in 1896 with the election of William McKinley. The Republican Dingley Tariff Act of 1897 returned to the protectionist policies of the 1890 Act, and remained in effect for 12 years. Tariffs were temporarily replaced as a major campaign issue by new concerns such as the free silver and gold standard, the Spanish American War and imperialism, and trusts.²¹

A slight shift occurred in Republican trade doctrine with its 1908 party platform in which it attempted to establish a “true principle” of tariff rates as the difference between cost of production at home and abroad together with a reasonable profit to American industries. The resulting Payne-Aldrich Act of 1909 (named after Representative Sereno E. Payne of New York and Senator Nelson W. Aldrich of Rhode Island) fell short of establishing a precise meaning of “true principle,” but did introduce a system of minimum and maximum rates within which the president could “retaliate against rates established by other countries. The Act also created a Tariff Board to advise the president on his new authority. President William Howard Taft managed to use his veto threat to secure a reduction in duties in the bill before it was finally passed. While the measure was still protectionist, it was not as much so as previous measures had been.²²

Republicans lost their majority party control of both houses of Congress in the 1910 elections, and in 1912 Democrat Woodrow Wilson of New Jersey became president, beating Republican Taft and Bull Moose Theodore Roosevelt. One of the top items on the Democrats’

agenda was to lower tariff rates. The resulting Underwood Tariff Act of 1913 was fittingly named after Representative Oscar W. Underwood (D-Ala.), House majority leader and chairman of the Ways and Means Committee. Underwood had engineered the replacement of “Czar Speaker,” as Republican Joe Cannon’s dictatorial reign had been termed, with “King Caucus,” in which the Democratic Caucus served as a plenary, legislative body to draft the details of major bills and then to enforce party discipline in committees and on the floor. In the case of the tariff bill and other items in President Wilson’s “New Freedom” legislative package, the Congress worked as close to Wilson’s ideal of “party government” as can be expected in a non-parliamentary system.

The key terms in the Underwood tariff bill were “legitimate” industries and “competitive” rates of duty which would permit both foreign and domestic industries to compete. Sugar and wool ended up on the free list while rates on cotton and woolen goods were lowered substantially.²³ Although the demand for revenue tariffs was reduced considerably with the institution of the income tax in 1913, the demands for protection were not subdued. Republicans regained control of the Congress in 1919, and in 1922, duties on agricultural products were raised across the board. Not only were the cotton and woolen goods rates restored, but duties on iron and steel imports were increased as well. Duties on chinaware were increased 60 percent, while lace window-curtain manufactures were sheltered by a 90 percent tariff.²⁴

But even more egregious was the Smoot-Hawley Act signed into law by President Hoover in 1930. It raised average duties to their highest levels ever: 60 percent of the value of products imported. As with the 1928 “tariff of abominations,” the act was the product of congressional log-rolling, only this time with even more disastrous consequences. Since the end of World War I, the U.S. had become a first class industrial superpower—not only the number one exporter but also the most important importer of semifinished goods and raw materials. Nevertheless, with the country pulling back into an isolationist mode after the war, American trade policy decision-making remained tied to purely internal considerations. The timing of Smoot-Hawley could not have been worse as the depression spread from the U.S. Other countries began retaliating against the high tariffs and quotas imposed by the U.S., resulting in a global trade war that produced all losers and no winners. By 1933, U.S. imports had dropped 70 percent from their 1929 levels, while worldwide trade activity was just one-third of what it had been prior to the depression.²⁵

Presidents, Trade, and Process

As the depression worsened, Democrats were returned to majority status in the House in the 1930 elections, and the Senate and presidency followed in the 1932 elections. The Democratic Party's platform in 1932 condemned the high tariffs of the Smoot-Hawley Act as damaging to U.S. industry and agriculture by causing a loss American export markets and increases in domestic production costs. The platform went on to call for reciprocal tariff-cutting agreements and other steps to restore international commerce. Although the new president, Franklin D. Roosevelt was wary of committing to such a course, his secretary of state, Cordell Hull, was an ardent free trade advocate who saw it as the key to a peaceful, stable, and cooperative world political order. Hull won over the president to his cause and became the administration's point man in Congress for securing approval of reciprocal trade agreements in which the U.S. would lower its tariffs in return for comparable concessions by other countries. It was an especially tough sell in light of continuing high unemployment. But Hull approached the task with astute negotiating and marketing abilities, first seeking temporary negotiating authority for the president in the form of an amendment to the Smoot-Hawley Act. In return for this authority, the administration accepted a congressional amendment limiting the duration of the authority to three years so that Congress could assess its value before extending it.²⁶

The resulting Reciprocal Trade Agreements Act (RTAA) of 1934, enacted by lopsided, partisan majorities in Congress, represents a major turning point in international trade developments. It delegated to the Executive the authority to enact up to 50 percent tariff reductions in return for similar moves by other countries, and it thereby paved the way for the first in an ongoing series of bilateral negotiations for the purpose of reducing tariff barriers to trade. Although similar authority had been given to Republican Presidents Taft in 1909 and Harding in 1922, it was used primarily to increase rates. For instance, in the eight years following the authority granted in the 1922 Fordney-McCumber Tariff Act, presidents increased duties in 32 of the 37 instances in which the authority was used..²⁷

By the mid-1940s, bilateral trade agreements had been made with 25 countries, mostly in Europe and the Western Hemisphere. As a consequence of the most-favored nation principle in the act, the new rates flowing from each of these agreements were automatically extended on a non-

discriminatory basis to all countries. In effect the Executive had been entrusted with rewriting the entire U.S. tariff schedule.²⁸

The new Act was especially welcomed in Congress which for so many years had been buffeted by myriads of special interest petitions begging for import protection. Congress's relative contentment with the new arrangement is evidenced in the fact that between 1934 and 1945, not once did it significantly alter trade agreement law. Meanwhile, the president's authority was extended in 1937, 1940, and 1943. When the Act was renewed in 1945, the base from which 50 percent reductions in tariffs could be made was changed from those in effect in 1934 to those in effect on enactment (in 1945). The vote on the new law also reflected considerable Republican support for the first time.

Following closely on the heels of the 1945 Act, the State Department proposed the creation of an International Trade Organization (ITO). In 1947, meetings in Geneva led to the formation of the General Agreement on Tariffs and Trade (GATT). Although the GATT treaty was never ratified by Congress, the U.S. continued to participate in it under the executive authority of the president.²⁹ But, without U.S. participation, the ITO was effectively dead, and no international organization existed to administer the rules of the trading system until the World Trade Organization (WTO) was launched in 1995.³⁰

The post-War trend in trade liberalization culminated with the 1962 Trade Expansion Act, which authorized across the board tariff cuts of up to 50 percent, and set in motion the Kennedy Round of multilateral trade negotiations that concluded in 1967 in an agreement between the European Community and the U.S. providing for the largest single tariff-cutting agreement ever (about 35 percent on a worldwide basis). The 1962 Trade Expansion Act also removed the State Department as the chief U.S. trade negotiator, and replaced it with a new cabinet-level Special Representative for Trade Negotiations in the Executive Office of the President (now called the U.S. Trade Representative or USTR).³¹

By the end of the 1960s, American leadership in the international economic economy was in decline as balance of payments deficits worsened and East Asia posed an increasing competitive threat. The decline in America's international competitiveness raised doubts about the continued viability of a liberal trade approach. This was reflected in Congress with the introduction of

numerous quota bills in response to complaints by several manufacturing and primary product producers. The incoming Nixon Administration moved immediately in 1969 to limit the importation of synthetics and supported pending legislation to impose unilateral quotas on textiles.³²

Encouraged by the new Administration's mood, both Houses of Congress passed the Trade Act of 1970, reminiscent of the log-rolling done during the Smoot-Hawley Act in 1930. New quotas would have been imposed on synthetic textiles, footwear, and numerous minor products. The bill died at the end of the Congress. In 1971 an even more protectionist bill was introduced, the so-called Burke-Hartke Act, was drafted largely by the AFL-CIO. It called for across-the-board quotas and sweeping changes in U.S. tax laws that would have virtually ended U.S. direct investment abroad.³³ It too went nowhere in Congress but its broad support signaled a new protectionist mood that was only defused by a radical change in U.S. international economic policy by the Nixon Administration. The so-called New Economic Policy centered on a 10 percent surcharge on all import duties and the termination of the U.S. obligation to convert U.S. dollars held by foreign central banks into gold at fixed rates.

The Nixon Administration also called on other industrial countries to join it in a new round of international trade negotiations. This in turn necessitated the Administration going to Congress to request the necessary negotiating authority. The resulting Trade Act of 1974 marked another turning point in U.S. trade policy, containing as it did numerous innovative provisions that today, nearly 30 years later, remain at the heart of contemporary trade policy issues. In essence, the Act established a somewhat contradictory two-track policy toward imports: trade liberalization on a broad sector basis, and restraints on imports of selected, politically sensitive products. The Act continued past practices of authorizing the president to reduce tariffs, but more significantly, it recognized the need to for any new negotiations to address non-tariff barriers (NTBs), including such matters as quotas, health and safety standards, and government procurement policies.³⁴

However, instead of granting the president full authority to revise existing U.S. law in trade agreements to reduce non-tariff barriers, the 1974 Act established a new process of partnership between the president and Congress called, "fast track authority." Under the terms of fast-track, Congress committed itself to providing an up-or-down vote within ninety-days on the trade legislation necessary to implement the agreement. Put another way, no amendments would be

allowed.³⁵

The other instance of congressional re-involvement in trade policy was a provision in the 1974 act giving Congress the ability to override presidential decisions to ignore International Trade Commission (ITC) recommendations under the escape clause for import relief (a “legislative veto” device subsequently held unconstitutional by the Supreme Court in 1983).³⁶

Assessing the Marriage of Convenience

Just as the 1974 Act made possible the successful Tokyo Round of multilateral trade negotiations and helped ensure greater cooperation and consultation between the president and Congress, subsequent trade acts in 1984 and 1988 reasserted and readjusted the extent of congressional control over trade policy. This was especially true of the 1988 Omnibus Trade and Competitiveness Act which stands as a legal milestone in U.S. trade policy by tightening the partnership between the two branches while maintaining the two-track approach of US. trade policy of reducing trade barriers where possible, and dealing with them where not.

These acts also paved the way for the Uruguay Round of trade negotiations that among other things produced the blueprint for the WTO as the successor to GATT. The failure of Congress and President Clinton to renew “fast track” authority in the mid-1990s, brought a temporary separation in this partnership (although a free trade agreement with Jordan was approved by Congress in 2001 with minimal changes and without fast track procedures).

The marriage was reconciled in August, 2002, when President George W. Bush signed into law a renewal fast-track authority, now renamed “trade promotion authority,” or TPA, (just as another term rooted in the 1974 Trade Act, “most favored nation” status or MFN, had been changed to “permanent normal trade relations” status or PNTR). That the renewal of fast-track took over eight years and was finally won by a single vote in the House (hard-fought and bought by a concession made to a southern member representing a textile district), is an indication of just how difficult approving future trade agreements could be.

If liberalization is one side of the the trade policy coin, then remedies against perceived unfair foreign trade practices is the other. Here the Congress has done a masterful job over the years of diverting and delegating attention, complaints, and pressures to its partner in the Executive Branch.

Brookings Senior Scholar Pietro S. Nivola has likened the discrete changes Congress has made in

trade laws over the years as small stitches that have “turned trade statutes into a regulatory patchwork—an expanding fabric of rules, with new layers stitched to older ones.” And he goes on:

The congressional urge to embroider the administrative remedies every few years has not been prompted only by actual defects in the laws (though there were plenty: the alterations have been politically profitable. . . .In almost every instance the pattern has been recognizable: groups of legislators seem to start by unfurling colorful excesses, while specialized aides and trade lawyers weave less flashy technical changes. A sober House-Senate conference then strikes the indelicacies, leaving the subtler sections intact. When the sewing is finished, the quilt is thicker, and heavier.³⁷

The patchwork quilt is perhaps a fitting cover for the marriage bed described in this essay. “Even when Congress pretends to legislate or merely murmurs that it might, trade regulation can expand,” writes Nivola. “Some of the costliest import restraints of recent years have been joint ventures in which the White House has played more than a reactive role,” with the president playing good cop to Congress’s bad cop by taking certain restrictive actions to avoid harsher protectionist moves by Congress. Why do presidents act this way? Nivola argues that in part is it to maintain credibility with Congress so that it can retain its delegated power to make trade policy:

Executive leeway on policy can thus come heavily mortgaged to preemptive pacts with various trade-sensitive factions. In a sense, executive-legislative relations have resembled an exacting marriage of convenience: the pragmatic partners periodically endear themselves, not just by reacting to each other’s demands, but also by anticipating one another’s wishes.³⁸

Nivola says its simplistic to view Congress as a constituent minded institution clamoring for import bars, and a globally minded president standing steadfast for open trade, since “both dread the strain of protectionism and neither can resist scoring points in domestic politics by departing from free trade for the sake of fair trade.”³⁹

Although the above-quoted article was written in 1988, Nivola’s observations have as much if not more validity today as the country heads into the 2004 presidential elections. Nivola had argued that the modern presidential selection process may account for much of the politicization of trade policy in such national campaigns. “Seeking nominations and financing campaigns, presidential aspirants become weighted with obligations to special interests,” he writes.

How closely presidents adhere to the letter or spirit of campaign pronouncements on fair trade depends among other things on the nature and size of their electoral mandate, the strength of their party in Congress, the extent of inflationary pressures in the economy, their foreign policy, and the latitude Congress is willing to grant them in discharging their delegated functions.⁴⁰

Certainly we have already seen this force at work in President George W. Bush's actions against steel imports and in some of the pronouncements on trade by the Democratic presidential contenders in 2003. Whether such presidential actions and campaign rhetoric will accelerate in the coming election year will depend in large part on the state of the economy and employment and, more importantly, on the electorate's perceptions of whether the country is on the right track and people are going back to work. Nivola concludes his discussion of the politics of trade by cautioning against assuming that presidents will always strive to liberalize international commerce, just because they have, for the most part, since World War II. "Recent deviations," from that norm, he writes, "have been serious, and, recalling who did what at various other junctures of American history, one must understand that vesting powers in the executive provides no inherent guarantee of steady trade liberalization."⁴¹

Conclusion

It is perhaps fitting to conclude this essay for a seminar at the Woodrow Wilson International Center for Scholars by quoting the institution's namesake. On February 10, 1916, appearing before the U.S. Chamber of Commerce in Washington, D.C., President Wilson praised some of the "instrumentalities which have been put at the disposal of the businessmen of the country," such as the Federal Reserve Banking System, the Federal Trade Commission, and the Bureau of Foreign and Domestic Commerce at the Department of Commerce. But he went on to argue for the creation of a new instrumentality which would deal with all matters affecting tariffs. "We ought to have a really scientific tariff board," he told his audience," and I think we are going to have one" (he had sent a legislative message to Congress earlier that month requesting such an entity). Wilson went on to explain that before the war, he did not favor a tariff board because "the purpose of it then apparently was to keep alive an unprofitable controversy." Wilson then explained where he came down on the controversy:⁴²

I am not interested in the doctrine of protection. I am not interested in the doctrine of free trade. I have been a college professor and know why I am not interested—because there is nothing in either doctrine. The only thing that is interesting are the facts of commerce and industry, and the only thing that it is right to deduce from the facts is something that has nothing properly to do with party politics at all.

As if anticipating the charge of being naive, Wilson explained that he was not totally confident about the prospects of removing such decisions from politics. “I am not sure that God can, overnight, alter human nature. We have got so ingrained in us the passions and the prejudices of this controversy that men think their salvation lies where nothing but controversy lies.” But, since no one would know what the new face of the international economy would be after the war “until the new facts have been collected and digested. . . I am heartily in favor of a tariff board.”

While Wilson’s call for a tariff board did come to fruition just seven months later when he signed into law legislation creating the United States Tariff Commission (now called the United States International Trade Commission), his larger dream that such an entity could remove trade issues from politics is just as illusory today as it was then. If anything, Congress’s delegation of trade policy and decision making to various entities in the executive branch, while still retaining the ability to act on its own when necessary, has increased the potential recipients to which the political football of trade can be punted, passed, or kicked.

Lest this essay be accused at its conclusion of not reconciling its mixed metaphors: suffice it to say that trade is one example, at least, of a marriage that has not been ruined by football. And that, perhaps, is what makes it all so convenient.

* * *

Endnotes

1. Article XIII of the Articles of Confederation state in part: “...And the Articles of this confederation shall be inviolably observed by every state and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.”
2. Alexander Hamilton, *Continentalist*, No. 5, 18 Apr. 1782, in *The Founders’ Constitution*, Philip B. Kurland and Ralph Lerner, editors (Chicago: The University of Chicago Press, 1987), vol. 2, 477.

3. James Madison, "Preface to Debates in the Convention of 1787" (*Farrand* 3:547-48), in *The Founders' Constitution*, op. cit., vol. 2, 483.
4. "Proceedings of Commissioners To Remedy Defects of the Federal Government," *Documents Illustrative of the Formation of the Union of the American States* (Washington: Government Printing Office, 1927; 69th Congress, 1st Session, House Document No. 398), 42-43.
5. "Report of the Proceedings in Congress, Wednesday, Feb. 21, 1787, *Documents*, op. cit., 45.
6. "Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787, Text A," *Documents*, 954.
7. "The Plan of Charles Pinckney (South Carolina), Presented to the Federal Convention, May 29, 1787, *Documents*, 965.
8. "Variant Texts of the Plan Presented by William Patterson (N.J.) to the Federal Convention, June 17, 1787, Text A, *Documents*, 967.
9. "Report of the Committee of Detail, Monday, August 6th," (Article V, sec. 1), in "Debate in the Federal Convention of 1787 as Reported by James Madison," *Documents*, 475.
10. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little, Brown and Company, 1966), 200.
11. *Annals of Debates in Congress*, April 9, 1789, 107.
12. Ibid, 107, 108.
13. Ibid, April 9, 1789, 114, 115.
14. Ibid, April 11, 1789, petition presented by Mr. Smith of Maryland.
15. Robert W. Barrie, "Tariffs and Trade," *The Encyclopedia of the United States Congress*, Donald C. Bacon, Roger H. Davidson, and Morton Keller, editors (New York: Simon and Schuster, 1994), volume 4, 1910.
16. Ibid; and, Stephen D. Cohen, Robert A. Blecker, and Peter D. Whitney, *Fundamentals of U.S. Foreign Trade Policy* (Cambridge, Mass.: Westview Press, second edition, 2001), 29.
17. Cohen, Blecker, and Whitney, 30.
18. Ibid.
19. Barrie, 1911.
20. Cohen, Blecker, and Whitney, 29.

21. Barrie, 1913.
22. Ibid.
23. Ibid.
24. Ibid, 1914.
25. Cohen, Blecker, and Whitney, 33.
26. Ibid, 33-34.
27. Pietro S. Nivola, "Trade Policy: Refereeing the Playing Field," in *A Question of Balance: The President, The Congress, and Foreign Policy*, Thomas E. Mann, editor (Washington: The Brookings Institution, 1990), 244.
28. Ibid, 34.
29. Barrie, 1915.
30. Cohen, Blecker, and Whitney, 36.
31. Ibid, 37-38.
32. Ibid, 38.
33. Ibid, 39.
34. Ibid, 40.
35. Ibid, 40.
36. Ibid.
37. Nivola, 239.
38. Ibid, 241.
39. Ibid, 242.
40. Ibid, 243.
41. Ibid, 244.
42. Woodrow Wilson, An Address to the Chamber of Commerce of the United States, Feb. 10, 1916, in *The Papers of Woodrow Wilson*, Arthur S. Link, editor (Princeton, New Jersey: Princeton University Press, 1981), Volume 36, 155-56.

