HOW TO SAVE TRADE:

Five Bipartisan, Bicameral Trade Policy Recommendations for the 118th Congress

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INTRODUCTION

Article I, Section 8 of the Constitution vests Congress with the responsibility to "regulate commerce with foreign nations" and to "lay and collect taxes, duties, imports and excises." Until the economic disaster of the Smoot-Hawley tariff increases in the 1930s, Congress retained sole power over trade policy—including by setting tariff rates directly on individual goods. That balance of power began to shift in 1934 with the passage of the Reciprocal Trade Agreements Act, which delegated conditional authority from Congress to the president to cut tariffs unilaterally.

In the seven decades following the end of World War II, the incremental but steady delegation of trade authorities to the Executive Branch served the interests of freer trade. The United States led the world in pioneering multilateral trade liberalization and reaped the benefits of supply chain diversification and increased specialization in the production of goods globally. Between 1950 and 2016, the Peterson Institute estimated that such trade liberalization directly increased U.S. GDP per capita by over $7,000 (measured in 2016 dollars).

The economic growth enabled by freer trade is now in peril. In 2016, Executive Branch support for trade liberalization plummeted as trade protection surged in political popularity on the left and the right. Both of us were outspoken critics of the trend toward protectionism and managed trade, which showers benefits on politically favored industries at the expense of all others in the economy.

Rebuilding a bipartisan pro-trade consensus is possible, but it will require leadership from Congress. We have spent our careers advocating for freer trade because it leads to greater economic prosperity, disproportionately benefits lower-income Americans, enhances our security ties to friendly nations, and is morally right.

For members of the 118th Congress eager to take up this mantle, we offer the following five policy recommendations.

POLICY RECOMMENDATIONS

1. *Aggressively Work to Conclude Comprehensive Free Trade Agreements—inclusive of Market Access—with U.S. Allies; Reject So-Called "Sole Executive Agreements"*

2. *Clarify the Legal Process for Withdrawal from Free Trade Agreements*

3. *Renew & Strengthen Trade Promotion Authority*

4. *Rein in Executive Abuse of Tariff Authorities, including Section 232*

5. *Support Efforts to Positively Reform the World Trade Organization; Reaffirm the United States' Commitment to the WTO*

Recommendation #1: Aggressively Work to Conclude Comprehensive Free Trade Agreements—inclusive of Market Access—with U.S. Allies; Reject So-Called "Sole Executive Agreements"

Under the Trump Administration, the U.S. formally initiated—but did not complete—comprehensive free trade agreement (FTA) negotiations with the United Kingdom (UK), the European Union (EU), and Kenya. The Trump Administration also concluded so-called "mini deals" with China and Japan. In addition, the Biden Administration is currently leading executive agreement negotiations with Taiwan and 13 Indo-Pacific countries.

We appreciate that the Biden Administration has worked to re-engage U.S. trading partners and allies, particularly in the Indo-Pacific region. However, the agreements being pursued by the Biden Administration suffer from the same flaw as President Trump's "mini deals": They are not true trade agreements. In particular, Congress should be concerned with the following two aspects of the Biden Administration's current negotiations:

- Lack of market access. "Market access" provisions—that is, the mutual cutting of tariffs between the parties to an agreement, ideally to zero—has traditionally been the cornerstone of FTAs. When the U.S. lowers its tariffs, American consumers and businesses that import foreign products benefit from reduced prices. In exchange, American exporters benefit from the cutting of tariffs abroad, which allows them to increase their global market share, sell more product, and grow their domestic businesses. The importance of increased export opportunities is well-embodied by the agricultural and service sectors, in which the U.S. is a net exporter. Many of our trading partners maintain high tariffs on various agricultural products, which makes the inclusion of market access provisions in FTAs all the more critical.

- No congressional approval. The Biden Administration has indicated that it does not intend to submit any of the agreements it is currently negotiating to Congress for approval. This is a major mistake that will affect the ultimate enforceability of the agreements and circumvents Congress's constitutionally-mandated responsibilities over trade policy. Regardless of whether U.S. law must be changed in order to implement the terms of an agreement, such an agreement is not a trade agreement without Congress's approval. Further, without congressional approval, any agreement could be torn up, ignored, or renegotiated by a future U.S. president—as exemplified by the functional failure of President Trump's U.S.-China agreement under the Biden Administration.

Perhaps most important for the 118th Congress to appreciate is the that the U.S. has fallen behind the rest of the world in securing trade agreements with favorable economic terms to American consumers, workers, and producers—including both importers and exporters. For example, in the Indo-Pacific region, the United States is not a party to either of the two large regional FTAs—the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). Lack of membership in either of these regional pacts means that, from a tariff perspective, the U.S. faces higher barriers vis-à-vis members of those agreements. Trade liberalization without the participation of the U.S. also contributes to the reality that, for nearly all countries in the Indo-Pacific region, China has now displaced the U.S. as their largest trading partner.

Fortunately, the vast majority of our trading partners and allies are eager to engage in comprehensive FTA negotiations with the United States. Congress should direct the U.S. Trade Representative (USTR) pursue negotiations with countries where an FTA is quickly achievable, such as the UK and Kenya, and consider rejoining the CPTPP pending modifications that could win bipartisan congressional support.

Recommendation #2: Clarify the Legal Process for Withdrawal from Free Trade Agreements

In 2018, then-President Trump infamously threatened to withdraw the United States from NAFTA, despite him having, in our view, no legal authority to do so. Like all trade agreements, NAFTA required the approval of both chambers of Congress to become legally operable; a president can no more unilaterally repeal a congressionally approved trade agreement than he or she can repeal a law without congressional consent.

Despite his lacking the ability to unilaterally terminate the U.S.'s participation in NAFTA, President Trump used the threat of withdrawal to extract protectionist concessions from Mexico and Canada and to coerce business groups into supporting the deal under the auspices of increased certainty in North American trade.

Congress should develop legislation that not only heads off future Executive withdrawal threats, but also reasserts Congress's role in regulating international trade. At minimum, Congress should make clear that the Executive has no power to unilaterally withdraw the United States from a congressional-executive agreement—such as an FTA previously approved by Congress—and that Congress must vote on whether to terminate the participation of the United States in such an agreement. This would provide legal clarity domestically as well as reassure our trading partners and allies that no U.S. president would be able to tear up a congressionally approved FTA by fiat.

Recommendation #3: Renew & Strengthen Trade Promotion Authority

Since the 1980s, various iterations of Trade Promotion Authority (TPA)—commonly called "fast track"—have been enacted by Congress in order to delegate to the president conditional authority to negotiate free trade agreements. FTAs have almost universally been approved by Congress under TPA procedures, which permit expedited consideration of an agreement, limited debate with no amendments, and an up-or-down vote in the Senate. In exchange for such "fast track" consideration, the president must follow certain rules set by Congress, including requirements to notify, consult, and make progress towards meeting specific negotiating objectives.

TPA was last enacted in 2015 after passing both chambers of Congress by slim margins. However, since its expiration in the summer of 2021, the Biden Administration has not asked Congress for its renewal. By renewing TPA, Congress would send a strong signal to the Executive Branch that it is ready to vote on new FTAs that expand trade, open new markets for American producers, and raise the standard of living for consumers. Further, targeted improvements to TPA would help to strengthen Congress's procedural and policy role in covered trade agreement negotiations.

In an updated version of TPA, Congress should consider the following improvements:

- Update negotiating objectives. On balance, TPA's negotiating objectives are comprehensive and cover areas of policy interest to both parties, such as market access, services, agriculture, investment, digital trade, labor and environment, trade remedies, and dispute settlement enforcement. One area for improvement could be the inclusion of a targeted set of "negative" negotiating objectives—red lines which, if crossed, would result in an agreement becoming ineligible for fast track. For example, Congress could require that no FTA include a so-called "sunset clause"—as USMCA infamously did—that would result in the agreement's automatic termination at a future date.

- Tighten consultation requirements. TPA requires that the USTR "consult closely and on a timely basis" with the relevant congressional committees, as well as meet with any member of Congress upon request regarding trade negotiations. In recent years, members on both sides of the aisle have lamented that this consultation process has broken down. Instead of meaningful engagement with Congress during the development of an agreement, "consultation" often happens after major policy decisions have already been cemented. If Congress wants to play an active role in shaping the direction of trade agreement negotiations, it needs to amend TPA to more clearly define and require robust consultation—including by making it easier to turn off fast track should consultation requirements be violated.

- Require the Executive Branch to incorporate amendments from mock markups, so long as they are consistent with agreement text. Under TPA rules, the implementing legislation for a trade agreement is unamendable in both chambers once it is formally transmitted from the Executive Branch. In practice, however, congressional committees have an opportunity to provide feedback on a draft version of the implementing legislation by holding a "mock markup," during which advisory amendments may be proposed. For certain past FTAs, including the U.S.-Canada FTA, the Executive has agreed to accept mock markup amendments from Congress so long as they do not violate the underlying FTA text. Congress should include language in the next iteration of TPA to better formalize this handshake agreement with the Executive, as well as set parameters for which mock markup amendments must be included in the final implementing bill.

- Empower the Senate to "turn off" fast track if TPA requirements are violated. Adherence to TPA's requirements by the Executive Branch is better encouraged if Congress has the ability to deny an agreement fast track. In the House, it is possible to shut off fast track with a special rule, as then-Speaker Pelosi did for the U.S.-Colombia FTA in 2008. However, in the Senate, unanimous consent is required. TPA does contain two disapproval mechanisms to turn off fast track in one or both chambers, but the single chamber mechanism only becomes available if the committee of jurisdiction fails to favorably report out the implementing legislation for a trade agreement. Further, that disapproval resolution is not privileged which means the likelihood that it receives a floor vote is low. Two changes that would improve this process would be: (1) permit any member to introduce a disapproval resolution and (2) provide privilege for that resolution so that a vote is guaranteed.

Recommendation #4: Rein in Executive Abuse of Tariff Authorities, including Section 232

Our trade laws are riddled with arcane statutes that empower the Executive to raise tariffs unilaterally—without so much as merely consulting with Congress. In the past, such powers have been used in a targeted, sparing manner by U.S. presidents. For example, President Reagan used the authorities under Section 301 of the Trade Act of 1974 to pry open foreign markets. Likewise, Section 232 of the Trade Expansion Act of 1962 was passed by Congress for the narrow purpose of defending U.S. national security and, prior to President Trump, was last used by a president in 1986.

The Trump Administration threw out the playbook on trade when it decided to use Section 301 to tariff over $335 billion worth of imports from China and Section 232 to slap global tariffs of 25% and 10% on steel and aluminum, respectively. President Trump also threatened to invoke the International Emergency Economic Powers Act (IEEPA) to place across-the-board tariffs on all goods from Mexico as a point of leverage in immigration policy.

These tariff statutes were never intended by Congress to serve as blank checks for a president of either party to unilaterally enact entire policy agendas unrelated to trade. Further, the unilateral imposition of tariffs without any say from the legislature allows individual members of Congress to evade the responsibility of voting on behalf of their constituents, who are often directly and always indirectly impacted by changes in import taxes.

Our bipartisan, bicameral legislation to reform Section 232—the Bicameral Congressional Trade Authority Act (S. 2934/H.R. 8666)—is a strong starting point for Congress to reassert its Constitutional responsibility over tariff policy. Despite never being approved by Congress, the current Section 232 tariffs on steel and aluminum have laid the groundwork for a complex, ever-evolving regime of tariffs, quotas, tariff-rate quotas, side agreements to monitor "overcapacity," and negotiations on the carbon intensity of steel and aluminum—all on a country-by-country basis. It's no wonder a World Trade Organization (WTO) panel recently found that the U.S.'s haphazard implementation of Section 232 tariffs violated anti-discrimination commitments.

Our legislation would make the following important changes to Section 232:

- Congress must approve tariffs before they may take effect. Under what we call an "approval" mechanism, both Congress and the president must agree that tariffs should be put into place before they go into effect. Necessarily, the requirement that Congress vote to approve tariffs means that the president must go to Congress to make his or her case for tariffs, thereby creating a greater incentive for the president to limit the scope of tariffs and ensure minimal harm to various constituencies.

- Defines "national security". The Section 232 law, despite being referred to as the "national security" tariff law, does not limit the use of import restrictions to defense or other security related purposes. Any update to the law should include amendments to narrow the scope of products that can be tariffed under Section 232, in line with Congress's original intent.

- Transfers Section 232 investigations to the Department of Defense. This provision is simple: If tariffs are being imposed for national security reasons, our nation's defense experts should make that determination—not the Commerce Department.

- Retroactivity. President Trump's Section 232 tariffs on steel and aluminum, initially imposed in 2018, remain in effect today with the support of the Biden Administration. Whether members of Congress support the continuation of these tariffs or not, Congress should hold a vote to make that determination.

Recommendation #5: Support Efforts to Positively Reform the World Trade Organization; Reaffirm the U.S.'s Committment to the WTO

The WTO is the institution that enforces the world's rules-based trading system, and without it we would be in a race to the bottom. However, its dispute settlement process is laborious and its requirement of total member unanimity in order to implement new multilateral commitments has made updating WTO rules for the 21st century elusive. But this does not mean the United States should ignore the WTO; indeed, even President Trump's globalization skeptical USTR once wrote, "if we did not have the WTO, we would need to invent it."

WTO rules govern 95 percent of all global trade; 164 countries are members. Near-universal application of WTO rules benefits the U.S. by ensuring non-discrimination against U.S. exports (termed "most-favored nation" treatment) and facilitating a process by which the United States can file complaints against countries that have broken the rules. And, generally, the U.S. has been successful when filing WTO complaints, prevailing in more than 85 percent of cases.

To ensure that the WTO serves American interests for years to come, Congress should encourage the Executive Branch to engage in negotiations to reform the WTO's broken dispute settlement system, which remains without an appellate quorum. In addition, the U.S. should work with WTO members to achieve reforms that will increase transparency at the WTO, improve the speed and predictability of dispute settlement, ensure that WTO members invoke special and differential treatment reserved for developing countries only in fair and appropriate circumstances, and update WTO rules to address the needs of the U.S. and other free and open economies in the 21st century. Finally, members of Congress should vote against legislation that would terminate the U.S.'s participation in the body, which procedurally becomes available every five years—mostly recently in 2020.

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