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A Failure to Consider: Why Lawmakers Create Risk by Ignoring Trade Obligations

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A FAILURE TO CONSIDER:
WHY LAWMAKERS CREATE RISK BY IGNORING INTERNATIONAL TRADE OBLIGATIONS

David R. Kocan*

The U.S. Congress frequently passes laws facially unrelated to trade that significantly impact U.S. trade relations. These impacts are often harmful, significant, and long-lasting. Despite this fact, these bills rarely receive adequate consideration of how they will impact trade. Without this consideration, Congress cannot properly conduct a cost-benefit analysis necessary to pass effective laws. To remedy this problem, the U.S. Trade Representative should evaluate U.S. domestic law to determine whether it is consistent with international trade obligations. Moreover, the U.S. Congress committee structure should be amended so that laws that might impact trade are considered within that light. In the end, Congress may decide that the costs to trade are justified by a bill’s benefits. But failing to make that determination fully-informed by a bill’s unintended consequences almost guarantees poor outcomes.

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I. Introduction

In the early 2000s, shocking videos of cows shaking uncontrollably hit the airwaves. To the public’s horror, doctors soon discovered that humans too could be infected with this irreversible, deadly disease by consuming infected beef. This disease was spongiform encephalopathy, commonly known as Mad Cow Disease, and the public reaction was frenzied. Despite very few actually discovered instances world-wide of the virus, trade in beef dropped dramatically by an estimated 10% world-wide, with some instances as high as 50%. And while no infections had been detected in the U.S., Congress felt constituent pressure and acted

swiftly, adding a country-of-origin labeling requirement to the 2002 Farm Security and Rural Investment Act’s (“Farm Act”).

Facially, the provision addressed an agricultural health issue, but in reality the requirement’s only impact was hindering trade. As a result, countries filed disputes against the U.S. in the World Trade Organization and ultimately prevailed. In the end, the bill did little to help public health. But it did much to harm U.S. trade relations.

This provision’s likely impact on trade was foreseeable. As mentioned, the beef trade with countries found to have instances of Mad Cow Disease plummeted almost overnight. Despite this fact, lawmakers never seriously considered the bill’s trade implications. Even sadder is the fact that the bill’s original justification seems doubtful.

But this Article is not about Mad Cow Disease. This Article is about the many laws, like the Farm Act, that seriously implicate trade but never receive adequate consideration thereof. The impact that these bills may have on trade relations should be considered. U.S. relations with foreign exporters, established by delicate trade balances ranging in the trillions of dollars, hinge on the implementation of trade rules. Ultimately, Congress may decide that the harm to trade is justified by a bill’s benefits. Often this may be the wrong conclusion. But the odds of harmful legislation

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5 Stephanie Strom, Case of Mad Cow Disease Is Found in U.S., N.Y. TIMES (Apr. 24, 2012).
are much greater if Congress passes legislation uninformed on the law’s major unintended consequences.

This Article proposes that the U.S. Trade Representative should have a more active role in evaluating whether U.S. laws are consistent with international trade obligations. It also proposes a change to the Congress’ committee structure so that House committees evaluate laws for their impact and trade. Part I outlines how trade law in its most apparent form is created. Part II contrasts this process by illustrating the many entities that create laws and regulations that are not facially trade related, but nonetheless impact trade. Part III will analyze three examples that illustrate how this dynamic plays out: the Country-of-Origin Labeling provision in the Farm Act; the Western Hemisphere Travel Initiative’s passport requirements; and the ban on Clove Cigarettes. Part IV will provide and analyze theories that might offer explanation to why these problems exist. Finally, Part V will suggest that amends the Congressional House Rules and expands U.S. Trade Representative’s role.

II. HOW U.S. TRADE POLICY IS MADE

Administrative agencies and congressional committees jointly create trade policy. In the legislative and rulemaking systems there are agencies and committees that have specific jurisdiction over trade. Yet the evolving practice within the legislative and executive branches has been to decentralize trade policymaking by overlapping trade jurisdiction or allowing various non-trade committees and agencies to make policy that substantially affects trade. This section will first outline those entities that are specifically task with trade issues. It will then outline other entities whose authority does not include trade but

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7 There exist both independent agencies with legislative authority and executive agencies with executive type of authority. The term “administrative agency” means both independent and executive agencies.

8 Supra note Error! Bookmark not defined.
nonetheless have the ability to significantly impact international trade.

A. Policymakers that Oversee Trade

i. U.S. Congress

The Congressional trade policy function rests with the committee system. In the House, the Rules delegate authority over trade to the Ways and Means Committee’s Subcommittee on Trade. This Committee—commonly viewed as the most powerful—focuses on appropriations and revenues. The Ways and Means Committee’s Subcommittee on Trade has jurisdiction over customs, imports, trade-related problems to market access, trade competitiveness, and export policy and promotion. In the Senate, trade authority is shared between the Committees on Finance; Foreign Relations; and Banking, Housing, and Urban Affairs. Each chamber’s rules determine how the leader or speaker should assign bills to committees. The House’s rules first list all the standing committees, their general jurisdictions, and that the speaker must refer a bill to each committee that has jurisdiction over to the “maximum extent feasible.” Furthermore, the rules

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9 David Hanson, Limits to free trade: non-tariff barriers in the European Union, Japan and 53.
14 Id.
15 Id.
grant the speaker the ability to assign bills to multiple committees.\textsuperscript{17} A similar process exists for the Senate, whereby a presiding officer assigns incoming bills to committees based on jurisdiction.\textsuperscript{18} Like the House, the Senate Rules envision the possibility of multiple committees.\textsuperscript{19}

\textbf{B. The Executive Branch}

Since the Reciprocal Trade Agreements Act of 1934, Congress has delegated significant authority to the executive branch to administer trade policy.\textsuperscript{20} While many entities within the executive branch are involved with this process, there are three primary entities: the U.S. Trade Representative; the Department of Commerce; and the International Trade Commission.\textsuperscript{21} This section analyzes these agencies’ and the roles they play in trade law.

Likely the most well-known player in U.S. trade law is the U.S. Trade Representative, commonly referred to as the USTR. Established in 1979, the USTR’s mission is to develop and coordinate U.S. international trade, commodity, and direct investment policies and to oversee trade negotiations with other nations.\textsuperscript{22} The head of the USTR—a Cabinet-level appointee—

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{17} H.R. Doc. No. 112-162 House Rule XII(c) (2011).
\item \textsuperscript{20} Supra note \textbf{Error! Bookmark not defined.}, at 114. \textit{See also} David Hanson, Limits to free trade: non-tariff barriers in the European Union, Japan and United States 55 (Edward Elgar Publishing 2010) (noting that Congress has significantly delegated trade authority since the Cold War).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} 19 U.S.C. §§ 2501–2581; Jae Wan Chung, \textit{The Political Economy of International Trade: U.S. Trade Law, Policy, and 103-04 (); Mission of the USTR, http://www.ustr.gov/about-us/mission (last visited Jan. 25, 2010). The Special Trade Representative, established in 1962, was actually the predecessor of the U.S. Trade Representative. The Kennedy Administration
\end{itemize}
\end{footnotesize}
serves as the principal trade advisor, negotiator, and spokesperson on trade issues to the President.2324

The Department of Commerce also plays a significant part in U.S. trade policy.25 Unlike the USTR’s economy-wide agenda, Commerce has a micro-economic approach that targets narrow, often industry specific, aspects of trade26 and, in particular, it administers anti-dumping and countervailing laws.27 Under this role, the Department examines complaints filed by private U.S. companies alleging that foreign competitors have engaged in unfair business practices.28 For example, it is against international trade law for a foreign government to subsidize a domestic company so that it can sell goods into the U.S. market at a price below cost, thereby eliminating competition.29 The Department also monitors

created the Representative to implement trade policies and negotiate agreements. Id. 23
25 Id. at 118.
27 Supra note Error! Bookmark not defined., 118.
28 Id.
29 Id. The Department of Commerce will examine the complaint, decide if an unfair practice exists, and if it does, apply a duty that would make up for the unfair trade practice.
foreign governments for compliance with the hundreds of active trade agreements.\footnote{Id.; Trade Compliance Center, http://tcc.export.gov/ (‘‘The Trade Compliance Center . . . in the U.S. [DOC’s] International Trade Administration, is the U.S. Government’s focal point for monitoring foreign compliance with trade agreements) (last visited Jan. 18, 2010).

\footnotetext[30]{Id.}}

As to exports, the Department of Commerce has two very different roles. First, the Department supports U.S. exports by advising domestic businesses. This primarily comes through marketing data and advice from overseas attachés. But it also administers programs designed to enhance U.S. high-tech export competitiveness. Second, the Department often acts as an expert to the executive branch on the state of domestic manufacturing and service sectors. To this end, the Department provides information on the domestic effects of import competition. Lastly, Commerce is a major player in administering U.S. export control laws that closely regulate the exportation of sensitive materials, like high-tech or military goods.\footnote{Id.}

Finally, while the International Trade Commission (ITC) has no formal role in policymaking, its congressionally mandated duty to investigate trade relations strongly affects how trade policy is executed.\footnote{Id.} The ITC’s primary role is to investigate complaints alleging unfair trade practices\footnote{Harry First, THE INTERSECTION OF TRADE AND ANTITRUST REMEDIES, 12-FALL Antitrust 16 (1997); Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251. The ITC analyzes complaints under the escape clause, antidumping, and other duty statutes. Id.} and to determine whether there was actual harm.\footnote{Jarrod M. Goldfeder, 2008 International Trade Decisions of the Federal Circuit, 58 Am. U. L. Rev. 975, 976 (2009); 19 U.S.C. §§ 1673a-1673d (2006).} If a majority of commissioners determines that U.S. business suffered injury or there is the potential for injury, the ITC may recommend to the President to take retaliatory trade measures, such as new import barriers via higher tariffs or
The ITC also investigates whether certain imports violate U.S. intellectual property rights. Where a violation is found, the ITC may bar the goods from entering the U.S. market altogether. The ITC also conducts annual studies on the impact of current trade barriers and the health of various industries. The ITC is an independent agency that maintains a level of objectivity, respect, and influence with policymakers.

Lastly, interagency coordinating groups play a significant role in trade policy formation by shaping consensus and advancing policy objectives between government agencies. The Trade Policy Staff Committee and the Trade Policy Review Group are examples of such groups. Chaired by the USTR, these groups are comprised of nineteen agencies and offices, and exist at the sub-cabinet level. The TPSC is an operating group comprised of senior civil service members. The Trade Policy Staff Committee has over ninety supporting subcommittees that specialize on specific issues and often operate as task forces. Meanwhile, the Trade Policy Review Group, at the Under Secretary level, handles any issues that the Trade Policy Staff Committee cannot resolve as well as those that Trade Policy Review Group considers serious policy concerns.

The Trade Promotion Coordinating Committee is one of the few entities that focus on trade exports. Comprised of over twenty agencies, the Committee is an interagency task force that coordinates and develops government-wide export promotion

35 Supra note Error! Bookmark not defined., at 119.
36 Id.
37 Id. at 120. Section 337.
38 Id.
39 Id.
40 Supra note Error! Bookmark not defined..
41 Id.
42 Id.
43 Id.
44 Id.
III. TRADE POLICIES THAT BYPASSED TRADE AUTHORITIES

Despite the seemingly clear delegation of trade authority to trade policymakers, laws that significantly impact trade are passed without meaningful trade consideration. This occurs despite the fact that provisions exist that could allow trade authorities to have concurrent or supplemental involvement in these considerations. The following section details three examples where this was the case: Congress’ Country of Origin Labeling provision; Congress’ Western Hemisphere Travel Initiative; and the Food and Drug Administration’s Clove Cigarettes ban. And as each examples illustrates, the trade implications were serious.

A. Country of Origin Labeling

By the mid-2000s, public sentiment was that the “global meat system [was] broken.” Driving this sentiment, in part, were a series of recent cases of bovine spongiform encephalopathy,

46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
commonly known as Mad Cow Disease, turning up in cattle across the world. Countries where the disease was found noticed an almost immediate dip in their beef trade. Experts estimated in 2001 a decline in world-wide trade as high as 10%, with some countries dropping by as much as 50%.  

The U.S. market was not immune from this frenzy. The start is often associated with the 1996 Oprah Winfrey show, where guest Howard Lyman, a former cattle rancher turned vegetarian and Humane Society activist, claimed that Mad Cow Disease could make AIDS look like a common cold. It was this claim, along with Oprah’s vow to “never eat a burger again,” that resulted in a lawsuit issued by a group of livestock owners. cattle ranchers

It was not until seven years later, in December, 2003, that a single case of the disease was identified in a U.S. cow. But even before that, groups such as the National Farmers Union were lobbying Congress hard to require country of origin labels on all imported meats. Congress’ response was the introduction of country-of-origin labeling (COOL) requirements for all imported beef in the Farm Security and Rural Investment Act of 2002. This provision mandated the USDA to make rules that would require retailers to inform customers of the country of origin of beef, lamb,
pork, fish, and certain agriculture commodities like peanuts.\textsuperscript{58} The USDA’s final rule went into effect on March 16, 2009.\textsuperscript{59}

In hindsight, the actual threat of Mad Cow disease was not even negligible. According to the Centers for Disease Control and Prevent, from 1993 to 2012, only four Americans died from the disease.\textsuperscript{60} Moreover, starting in 2003 the U.S. Department of Agriculture began randomly sampling for the disease. In that time to 2012, the Department only came across six instances of the disease found in cattle, at least one of which was attributed to a natural and unavoidable genetic mutation.\textsuperscript{61} Even the prior fears about the disease’s ability to transmit to humans proved overblown.\textsuperscript{62}

While the bill’s benefits proved nonexistent, their harms to trade were substantial. Particularly, the economic impact was significant. For one, compliance was particularly costly. As meatpackers explained, like most agricultural products, the practical impact of the vast similarities between cattle and beef products makes comingling customary practice.\textsuperscript{63} Segregating cattle and beef based on their country of origin would require drastic restructuring. Moreover, this did not include the costs

\textsuperscript{58} Id.
\textsuperscript{60} BSE (Bovine Spongiform Encephalopathy, or Mad Cow Disease), CDC, available at http://www.cdc.gov/ncidod/dvrd/bse/ (last visited Nov. 30, 2012).
associated with mandatory record keeping requirements.\textsuperscript{64} An Agricultural Marketing Service study published in the Federal Register estimated these costs could total $1.968 billion in the first year alone.\textsuperscript{65} Other studies advanced by the law’s proponents argued that the study’s figures were excessively high, noting to a University of Florida study that estimated the first year recordkeeping costs between $70 million and $193 million.\textsuperscript{66} Those who would suffer the most were smaller businesses, whose economies of scale made compliance disproportionately costly.

Country of origin labeling also exposed the U.S. to legal liability. On December 17, 2008, Mexico initiated WTO consultations with the U.S. alleging that these provisions violated several international obligations.\textsuperscript{67} On December 30, 2008, Canada requested to join these consultations.\textsuperscript{68} On June 19, 2012, after several appeals, the Appellate Body found that the U.S. acted inconsistent with its international trade obligations.\textsuperscript{69} In particular, the Body held that disproportionate harm that the record-keeping measure had on upstream producers and processors could not be attributed to the regulation’s goal of protecting consumers.\textsuperscript{70} This was particularly true given that the information ultimately conveyed to consumers at the retail level was small, not understandable, and inaccurate.\textsuperscript{71} Further buttressing this

\textsuperscript{64} \textit{Id.}
\textsuperscript{67} \textit{Supra} note \textit{Error! Bookmark not defined.}.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm
\textsuperscript{70} \textit{Id.}
\textsuperscript{71}
conclusion was the fact that the law exempted a large portion of meat sold in the U.S. 72

Meanwhile, the bill’s likely impact on trade received little consideration. The Speaker of the House referred the bill to the House Agriculture and International Relations Committees.73 The Bill was not assigned, even secondarily, to the Ways and Means Committee and its Subcommittee on Trade. The House Agriculture Committee held more than ten hearings across the country and five in Washington, D.C. over the implementation the Farm Bill.74 None discussed the trade implications of COOL.

Prior to the Farm Act, the trade implications of COOL were raised in Congressional hearing, but dismissively and without analysis.75 The two non-trade experts at the hearing, a U.S. Representative and the Secretary of Agriculture, stated that a country could adopt a labeling law without violating trade laws,76 if it were not “overly burdensome.”77 The trade expert at the hearing, the USTR, was less committal, stating only that the issue had not been raised at the World Trade Organization.78 The record is silent as to whether the USTR ever gave an assessment on the provision’s actual legality. Meanwhile, the House Ways and Means’ Subcommittee on Trade did not follow up on an industry

72 Supra note 4.
75 Id.
76 Id.
77 Id.
78 Id.
request to consider COOL’s impact on trade during a July 17, 2001 hearing on the World Trade Organization.\textsuperscript{79}

On May 13, 2002, after President Bush signed H.R. 2646 into law with the COOL provisions set to take effect in September 2004.\textsuperscript{80} Yet after the COOL provision passed, the issue continued to be a matter of discussion for the House Agriculture committee. In a June 26, 2003 hearing, the House Agriculture Committee asked about COOL’s impact on trade.\textsuperscript{81} Representative Nick Smith (R-MI) asked the panel if whether COOL might start a “trade war” at the U.S. disadvantage, to which several witnesses answered yes.\textsuperscript{82} Despite this horrible possibility, the record does not illustrate any follow up or further analysis to this response.

Similar dismissiveness was given to the provision’s trade implications during the USDA’s notice and comment period.\textsuperscript{83} Several voiced concern that the provision would violate numerous U.S. trade obligations.\textsuperscript{84} In a cursory response, the USDA indicated that it had considered the implications on U.S. trade throughout the rulemaking process.\textsuperscript{85} But the USDA never indicated how it determined that the rules were legal. Moreover, the USDA never explained whether it consulted any trade authorities in coming to those conclusions. In fact, the Department only noted working with its own Foreign Agricultural Service, but

\textsuperscript{79} Industry testimony, provided by Michael Laden, Chairman of American Associations of Exporters and Importers
\textsuperscript{80} Id.
\textsuperscript{81} Mandatory Country of Origin Labeling, 3 CIS H 16116, House Committee on Agriculture (June 26, 2003).
\textsuperscript{82} Id.
only to “educate U.S. trading partners on the [provision’s] requirements.”

B. Clove Cigarettes

On September 22, 2009, the U.S. Food and Drug Administration (FDA) banned the sale of clove cigarettes in the U.S. market. For sure, the FDA’s ban was founded on solid health reasons. But by banning a single product (clove cigarettes) that is produced almost entirely in a single region (Indonesia), the Agency exposed the United States to a World Trade Organization Complaint filed by Indonesia. Considering the fact that Indonesia’s complaint is rather strong one would assume that the FDA considered the unintended consequences that a ban as constructed might have to areas like international trade law. It did not.

The Agency’s ban on clove cigarettes was pursuant to the Family Smoking Prevention and Tobacco Control Act. That Act, which became law in June of 2009, focused entirely on limiting the negative health effects of smoking. Moreover, a very large


portion of the Act focused on preventing smoking in youth. To that end, banning the sale of clove cigarettes made sense since studies showed overwhelmingly that youth smokers were attracted to flavored cigarettes. Not surprisingly, some studies showed that tobacco companies intentionally used sweet flavors to attract youth smokers.

While there is ample evidence that Congress rightfully considered the impact that the law would have on curbing youth smoking, there is little evidence that Congress considered the impact that the law might have on the United States’ trade obligations. The Subcommittee on Health first considered the bill in the 110th Congress. While the subcommittee held two hearings on flavored cigarettes, no trade experts appeared. While the term “international trade” appears in the hearing, it is only mentioned in passing; that the FDA should try to minimize the impact on trade, but only if doing so is consistent with public health. Besides this passing reference, international trade is not mentioned again. International trade legal obligations were never raised. After these

94 Id. at 120.
hearings, the bill went to the Subcommittee on Health and then discharged by the full Committee.  

In less than a year, Indonesia filed a Request for Consultation with the World Trade Organization against the United States. Indonesia claimed that the Family Smoking Prevention and Tobacco Control Act was inconsistent with several international trade obligations. Indonesia’s largest claim was that the Act violated the national treatment rule, which requires a country to treat local and foreign market participants the same. In this case, Indonesia argued that the United States’ ban on clove cigarettes was unfair because the FDA did not also ban other flavored cigarettes, like menthol. Moreover, the ban focused on cigarettes produced entirely by foreigners. Meanwhile, other flavored cigarettes were produced within the U.S. market.

Both the WTO Panel and Appellate Body found in favor of Indonesia. The Appellate Body held that the United States’ ban violated the national treatment principle found in Article 2.1 of the TBT Agreement. First, the Appellate Body found that clove and menthol cigarettes are “like products” in the competitive sense. For one, both have the same end uses: to satisfy a nicotine addiction and to create a pleasurable experience from the taste and smoke. Moreover, the Body found that menthol and clove

95 http://thomas.loc.gov/cgi-bin/cpquery/?&sid=TSOPvw7gj&refer=&r_n=hr058p1.111&db_id=111&item= &w_p=603&&dbname=cp1111&w_p=clove&&sel=TOC_12547&
96 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm
97 Id.; Article III:4 of the 1994 General Agreement on Tariffs and Trade (GATT), Article 2 of the Agreement on Technical Barriers to Trade (TBT), and other provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures
99 Id.
100 WT/DS406/AB/R
101 WT/DS406/AB/R Para. 132.
102 WT/DS406/AB/R Para. 132.
cigarettes are substitutable products, despite the fact that only a subsection of consumers would substitute one for the other. Both products mask the harsh taste of tobacco in order to facilitate smoking. But studies showed that very different consumers smoked menthol versus clove cigarettes. New smokers tended to prefer clove cigarettes while those who had been smoking longer menthol cigarettes. To that end, longer smokers were less likely to substitute menthol cigarettes with clove cigarettes. But new youth smokers were likely to substitute clove with menthol cigarettes. The Appellate Body held that likeness could exist even if a subsection of a consumer population could substitute one product for another. In other words, to find likeness between two products a party need not show that all consumers of those products could substitute them for each other. Since a significant subsection of a consumer population—youth cigarette smokers—would likely substitute the banned clove cigarettes for menthol ones, the law hinders competitive opportunities for producers and sellers of clove cigarettes enough to support a finding of likeness.

As a result, the Appellate Body held that if the United States wanted to ban cigarettes to curb youth smoking it had to do so in a way that included menthol cigarettes and any other “like” cigarette products. Since the United States failed to do so the law violated international law. While the WTO cannot award remedies, it can grant Indonesia the right to take countermeasures equal to the amount of trade lost. In this case, Indonesia could retaliate up to $16 million each year.

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103 WT/DS406/AB/R Para. 225.
104 WT/DS406/AB/R
105 WT/DS406/AB/R
106 WT/DS406/AB/R Paras. 234-236.
C. Western Hemisphere Travel Initiative (WHTI)

i. Background

After September 11, 2001, domestic security became a primary concern to U.S. policymakers.\(^{108}\) Of major focus was gaps in information gathering and sharing by U.S. agencies. Congress’ response was the 2004 Intelligence Reform and Terrorism Protection Act (2004 Act). As the new Act took form, the 5,522 mile U.S.-Canada border, one of the “longest undefended borders” in the world, came into focus.\(^{109}\) The Western Hemisphere Travel Initiative was included in the 2004 Act to strengthen security at the border.\(^{110}\) The Western Hemisphere Travel Initiative (Travel Initiative), through section 7209(a), requires all travelers coming from Canada into the United States to show a passport at the border.\(^{111}\) Before that time, the Departments of State and Homeland Security could waive this requirement at their discretion.\(^{112}\)

Congress developed the Travel Initiative relying on voluminous security studies; it paid little attention to its economic impacts. The Senate Committee on Government Affairs drafted the legislation, relying heavily on the 9/11 Commission’s recommendations.\(^{113}\) Over a twenty month period, the Committee conducted nineteen days of hearings, interviewed one-hundred and


\(^{109}\) Id.


\(^{113}\) 150 Cong Rec. S 9700
sixty witnesses, and reviewed over 2.5 million documents.\footnote{Id.} The scope of these hearings was almost exclusively national security.\footnote{108 Congress Hearings, Senate Committee on Homeland Security & Governmental Affairs, http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.ListAll&Congress=108 (last visited Mar. 10, 2010)}

Once the Act became law, the State Department sought notice and comment.\footnote{Documents Required for Travel Within the Western Hemisphere, 70 Fed. Reg. 52,037 (Sept. 1, 2005).} Among the comments, thirty-eight expressed concerns about the negative impact on tourism between the U.S., Canada, and Mexico.\footnote{Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. 68,412 (Nov. 24, 2006).} Despite these concerns, the Department was dismissive.\footnote{Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere, 71 Fed. Reg. 46,155 (Aug. 11, 2006).} The Department explained that the benefits to national security were “virtually impossible to quantify in monetary terms.”\footnote{Id. at 46,166.} Despite the immeasurableness of national security’s value, the Department concluded that the Initiative would create gains in domestic consumption that would offset losses to tourism.\footnote{Id. In economics, comparative advantage holds that the benefits of trade is that sellers can specialize in areas. This specialization can improve quality at a reduced price, when compared to the buyer making the good or service on their own.}

Not only did the department not address how it came to this conclusion, but it also failed to address other potential losses that would arise from the new rule. For one, it did not analyze the loss to tourism’s comparative advantage, which is what makes it fundamentally attractive: people travel to places that are different from the ones in which they live.\footnote{Id.} Moreover, the Department did
not address whether the added costs and burdens for travelers to obtain a passport might shift the traveler’s focus to farther more exotic destinations. For one, it does not appear that the Department analyzed the extent to which tourism between Canada and the U.S. relies on its simplicity. If regional tourism relied on the ease of traveling to a new and different country, would tourists chose a regional destination if the complexity of the trip is matched by that of a trip to Central America?

In fact in 2006 studies from Canada and the United States suggested that the new rule would have significant economic impacts for both countries. For instance, the U.S. Customs and Border Protection Office conducted an impact assessment that showed that at least 14 million people would be impacted by the new passport rule, with an added cost of roughly $650 million to travelers. A similar 2005 Canadian Tourism Commission report estimated that the rule would impact 14.1 million tourists at a tune of $3.6 billion in tourism revenues. Professor Donald Abelson, University of Western Ontario, noted that in a 2007 panel discussion the WHTI would cause losses of $3.5 billion to Canada and $2 billion to the U.S. in tourism alone between 2005 and 2010 by potentially slowing the nearly $1.5 billion in daily trade that crosses the border. While these figures would drop the second

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122 Regulatory Assessment for the Final Rule Documents Required for Travel within the Western Hemisphere, The Western Hemisphere Travel Initiative Implemented in the Air Environment, at i, U.S. Customs and Border Protection Office (Nov. 2006).
123 Regulatory Assessment for the Final Rule Documents Required for Travel within the Western Hemisphere, The Western Hemisphere Travel Initiative Implemented in the Air Environment, at i, U.S. Customs and Border Protection Office (Nov. 2006).
year, other costs would remain, like those associated with passport renewals or border enforcement. Moreover, not included in the report was how the new rule would impact trade at the border by slowed traffic flows.

Economic impacts were realized shortly after the law’s passage. From 2006 to 2007 the number of overnight trips from the United States to Canada dropped by 4% with a 3.7% drop in revenues, from 5.7 to 5.5 billion dollars. An even larger drop occurred from 2007 to 2008, with a 7.5% drop in overnight trips and a 9% drop in revenues, from $5.5 to $5 billion. By November 2009, the Ministry of Tourism estimated that the total number of international border crossings from the U.S. was 12,220,810, down 12.3% from the prior year. That same year, travel from Canada to the U.S. was down 11%. While it is difficult to point to any specific law as the cause of economic harm, it is worth noting that similar declines occurred after past attempts to tighten the Canada-U.S. border. After the 2001 Smart Borders Initiative, the city of Windsor—a border city that relies heavily on its ease of access for Michigan tourists—saw its business from America drop from $10.86 million to $4.27 million between 1999 and 2004. This is constituent with a 2008 Brookings Institute report that found that security delays at the border cost an average of $11.5 billion dollars annually between 2000 and 2004.

129 Id.
131 John Austin, Elaine Dezenski, and Brittany Affolter-Caine, The Vital Connection: Reclaiming Great Lakes Economic Leadership in the Bi-National
In isolation, these figures may seem insignificant. After all, in 2006 Canada’s Gross Domestic Product was 1.2 trillion dollars. But U.S.-Canadian tourism occurs largely within just a few cities along the border. For instance, in 2006 the total number of foreign tourists traveling to Ontario alone approximated 19 million.

In 2008, tourism accounted for 2%, $30.3 billion, of Canada’s GDP. In a 2005 report conducted by the Conference Board of Canada, WHTI would result in a reduction of an estimated 7.7 million inbound person-trips to Canada and nearly $1.76 billion in tourism export receipts between 2005 and 2008. Notably, the study estimated most of the losses would fall on border provinces such as Ontario, with an estimated 13% reduction in tourism revenues. All other provinces would experience 3% or less reduction in tourism revenues.

Additionally, not all Canadians and Americans possess the requisite identification. The same Canadian Tourism Commission study found that 41% of Canadians over eighteen have a passport,
while only 34% of U.S. residents over eighteen have a passport. With the average American and Canadian passports costing close to one-hundred dollars, studies show that the costs of obtaining passports will deter individuals from travelling between the U.S. and Canada. According to a 2006 Zogby International Poll, 34.5% of American non-passport holders and 29.2% of Canadian non-passport holders said they were less likely to cross the shared border if they needed a passport or other secure document to do so. Of those surveyed, 7% of Americans and 19% of Canadians indicated that they would be “very unlikely” to purchase a border identification card that would enable them to cross the U.S.-Canadian Border.

Vague legal exemptions within the NAFTA and WTO for matters of national security have left the WHTI unchallenged. It would be one thing if evidence that the law would address the national security concern in a meaningful way. It would be another if the costs associated with the law were minimal. But neither are true here. In fact, absent the exception, the law would violate two extremely important rules within the NAFTA. First, it would violate the Most Favored Nation principle, which forbids a Party from treating another in a less favorable manner. Second, it is inconsistent with NAFTA overall purpose of encouraging easy

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139 The Impact of the Western Hemisphere Travel Initiative on Travel to/from Ontario, Ontario Ministry of Tourism (Oct. 2005).
141 Id.
143 Id. arts. 1202, 1203.
short-term trips across the border, which encourages cross-border business and tourism. Meanwhile, border towns in New York and Ontario continue to suffer.

IV. WHY DOES THIS HAPPEN?

A. Too Many Cooks?

One possible explanation for this problem is the vast number of individuals who pass laws that significantly impact trade but who have no trade expertise or authority.

Numerous Congressional committees other than the House Ways and Means consider laws that impact trade. The House rules are silent about concurrent committee assignments. As a result, when the chair receives a bill, he looks at the subject on its face and sends it to the most relevant committee. This binary process directs bills containing subsidiary trade issues away from the trade experts. As a result, it is not uncommon for the Agricultural Committee, House Foreign Affairs Committee, Committee on Governmental Affairs, and House Committee on Homeland Security. A. Too Many Cooks?

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144 Id. arts. 1601 and 1603.
146 Supra note Error! Bookmark not defined., at 121 (For example, the Country-of-Origin Labeling bill, discussed infra, requires agricultural products to be labeled with their country of origin yet was sent to the Committee on Agriculture).
Security to review bills which dramatically impact the U.S. trade obligations.\textsuperscript{147}

It would be misguided to think that the Executive Branch is immune from this problem. The U.S. Trade Representative is tasked with representative the U.S. in trade relations and is on equal footing with other executive branch agencies. But the department’s ambiguous lines of command and limited staff have prevented it from taking a leadership role on these matters. Moreover, as a Presidential office, it has no direct authority over many major programs affecting U.S. trade policy. Last, but not least, the U.S. Trade Representative reports both to the President and Congress.\textsuperscript{148} This double role might explain the lack of comment on the how bills make their way through the legislative process.

Several White House councils are indirectly involved with trade policymaking. For instance, the National Economic Council is also responsible for administering trade policy as a cabinet-level coordinating group.\textsuperscript{149} It is the National Economic Council’s first

\textsuperscript{147} \textit{Supra} note 14 (The Agriculture Committee has jurisdiction over “[a]griculture generally” and other specific agriculture issues, the House Committee on Foreign Affairs over, among many things, “[e]xport controls, including nonproliferation of nuclear technology and nuclear hardware, . . . [t]rading with the enemy . . . and [i]nternational economic policy”, and the House Committee on Homeland Security over, among others, “customs administration”).

\textsuperscript{148} The U.S. Trade Representative only has a staff of roughly one-hundred and fifty people. \textit{Supra} note \textbf{Error! Bookmark not defined.}, at 116.

\textsuperscript{149} \textit{Id.} First created by Richard Nixon, the office has undergone many name changes. President Clinton created the most recent version of the group, known as the National Economic Council (NEC), through Executive Order 12835 in 1993. The National Economic Council is chaired by the President and has four goals: (i) to coordinate domestic and international economic policy; (ii) to give economic advice to the President; (iii) to ensure policy decisions are in line with the President’s goals; and (iv) to monitor the implementation of the President’s economic plan and agenda.
goal—coordinating international economic policy—that has the most impact on trade. The fourth office, the Council of Economic Advisers, bears responsibility for offering the President objective economic advice on domestic and international economic policy.

The Department of Treasury has a broad powerful, albeit indirect, role in international trade policy. While its duty is to determine which trade policies would be best for the domestic economy, it routinely works on strategic trade policy abroad. Because imports impact inflation, the Department of Treasury tends to favor maximum competition from abroad. The Department of Treasury also considers the impact of trade on national security and economic issues like the value of the dollar, which has a direct impact on U.S. trade balances.

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150 For example, in one National Economic Council session the Council held a discussion with industry leaders over job creation and concluded that one way to increase jobs is through export and custom reform. National Economic Council, White House Forum on Jobs and Economic Growth 31-34 (Dec. 3, 2009).


152 Id. at 117.

153 See e.g. Deputy Treasury Secretary Wolin to Visit Saudi Arabia, United Arab Emirates, Kuwait (Jan. 25, 2010), http://www.ustreas.gov/press/international.html (describing a meeting with Middle Eastern countries to discuss development abroad); Acting Assistant Secretary Baukol’s Speech at the 2009 Globes Israel Business Conference (Dec. 14, 2009), http://www.ustreas.gov/press/international.html (transcribing Assistant Secretary Baukol’s speech in which he states that Treasury “worked with the major economies of the world on a coordinated program of macroeconomic stimulus and financial stabilization.”)

154 Id. (Assistant Secretary Baukol noted that “Israel must continue to promote competitiveness” and its exports in order to protect itself against emerging East-Asian economies.); See also Advocates for competition, 41 U.S.C. § 418 (2003) (requiring the Department of Treasury to “serve as the advocate for competition”).

155 Supra note Error! Bookmark not defined., at 117;
Counterintuitively, the National Security Council is also involved with trade policymaking. While the National Security Council coordinates international political and military policy, it also has a professional staff in charge of economic affairs. Yet, this staff only works on economic issues that have an impact on national security. As a result, the Council has had a checkered past in its involvement with economic issues. Moreover, other agencies like the Department of Treasury and the Federal Reserve have not taken the Council seriously on economic issues. Lastly, because both the National Security Council and the White House economic policy coordinating group have overlapping jurisdiction on trade issues, conflicts between the two are common.

Since the Department of State conducts the nation’s foreign policy, it examines many facets of trade policies for how they might affect U.S. interests via the nation’s relations with other countries and the overall global atmosphere. In the Department’s eyes, the distinction between security and economic policies are fading. As a result, The Department of State has increasingly viewed trade issues as a significant part of its “national security” objective. The Department of State often has a very broad interest in trade by the mere fact that the strength of the U.S. domestic economy affects America’s power and influence worldwide. Within the Department of State, regional bureaus, as well as the Bureau of Economic, Energy, and Business Affairs,

156 Id.
159 Id.
160 Id.
161 Hillary Clinton, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL AND DEVELOPMENT REVIEW 41 (specifically mentioning the goal of elevating “trade” as part of the Department’s U.S. foreign policy goals).
162 Id.
monitor trade related policies. Among other things, this Bureau is tasked with resolving trade and investment disputes. The Under Secretary for the Bureau of Economic, Energy, and Business Affairs is responsible for coordinating with the USTR. Finally, while the Department of State was stripped of its chief negotiator status on trade, it still maintains leadership control over international aviation, maritime negotiations, and is one of the major departments charged with export control. The Department of State primarily focuses on the exportation of defense items. Moreover, the Department’s central role in determining sanctions places it within the purvey of trade issues.

The U.S. Department of Agriculture (USDA) addresses trade actions that affect the import or export of agriculture commodities. Congress has vested in the USDA broad powers to administer farm programs. Thus, the Department assumes leadership roles in agriculturally related trade policy, and setting U.S. agricultural negotiating agendas in international trade talks. In performing this role, the USDA has two opposing constituents, import-sensitive farmers (e.g., dairy, meat, sugar, and peanuts) and

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165 Hillary Clinton, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL AND DEVELOPMENT REVIEW 40.
166 Supra note Error! Bookmark not defined., at 117.
168 Id.; See Marketing and Trade, U.S. Department of Agriculture, http://www.usda.gov/wps/portal/utp/_s7_0_A/7_0_1OB?navid=TRADE_POL ICIES&parentnav=MARKETING_TRADE&navtype=RT (last visited Jan. 18, 2010) (outlining the Department’s varying involvement with trade issues).
169 Id.; Making special considerations for agriculture is not uncommon in trade.
highly efficient and successful export farmers (e.g., soybeans, corn, and wheat).\footnote{Id.} Finally, the USDA monitors agricultural import quotas, administers government funded programs that aim to finance exports, and runs the Foreign Agriculture Service.\footnote{Id.}

The Labor Department’s primary concern is how trade policy affects jobs.\footnote{Id.} This Department administers the adjustment assistance program, whereby the Department issues money and re trains those who have lost jobs from changes in imports.\footnote{Id.}

Moreover, many other departments and agencies are more narrowly involved in trade policymaking. For example, the Department of Energy considers the effects of the U.S. dependency on foreign energy supplies, such as imported petroleum.\footnote{Id.} The Department of Defense primarily works on trade issues that affect national security; for example, in the exportation of dual-use goods.\footnote{Id.} The Transportation Department assists international shipping and civil aviation negotiations.\footnote{Id.} Antitrust matters related to trade often involve the Department of Justice.\footnote{Id.} The advent of environmental law has brought the Environmental Protection Agency into trade policymaking by providing interagency advice and U.S. trade delegations to international trade discussions on trade issues that affect the environment.\footnote{Id.} The Export-Import

\footnotesize\footnote{Id.} \footnote{Id.} \footnote{Id.} \footnote{See also ILAB Mission Statement, United States Department of Labor http://www.dol.gov/ilab/mission.htm (last visited Jan. 24, 2010).} \footnote{Id.} \footnote{Id.; See Statement of Katharine Fredriksen Office of Policy and International Affairs U.S. Department of Energy Before the Energy and Natural Resources Committee, 110\textsuperscript{th} Cong. 1 (2008) available at http://www.congressional.energy.gov/documents/February_26_-_SENR_Fredriksen.pdf (discussing the role the Department of Energy plays with the Strategic Petroleum Reserve against petroleum imports).} \footnote{Id.} \footnote{Id.} \footnote{Id. at 119.} \footnote{Id.}
Bank operates a multi-billion dollar program to subsidize U.S. industries in order to promote exports.\textsuperscript{179} Even agencies presumably having no interest in trade often take on trade related matters.\textsuperscript{180}

V. THE POLITICAL PROBLEM IN TRADE

“[International economic policy] is a hybrid, combining foreign policy with elements of economic policy.” - Benjamin J. Cohen\textsuperscript{181}

Trade policy is inherently political. International trade is interwoven with domestic policy.\textsuperscript{182} Nationalistic laws on issues like labor rights, the environment, and product safety are all important issues that can impact the efficiency of international markets.\textsuperscript{183} International trade law is an attempt to reduce transactional costs by countering nationalistic interests against legally binding treaties. There are numerous theories on domestic and international legal systems. Two of the most common analyze the committee structure and interest groups.\textsuperscript{184} But not explains

\textsuperscript{179} Id.
\textsuperscript{180} Id. For example, the Federal Communications Commission decided in the mid-1990s to use a high-definition standard for televisions based out of the U.S., instead of Japan, and thereby cut off billions of dollars worth of potential Japanese imports.
\textsuperscript{181} Id.
\textsuperscript{182} Philip A. Mundo, NATIONAL POLITICS IN A GLOBAL ECONOMY 3.
\textsuperscript{183} Id.
\textsuperscript{184} Another popular line of thinking analyzes how Congress delegates authority to administrative agencies to avoid accountability. David A. Herman, To Delegate or Not to Delegate—That is the Presumption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power, 28 PAC. L.J. 1157, 1190-91 (1997). If the public is dissatisfied with an agency’s rule, they blame the agency not Congress. Congress can then call the agency to testify in an effort to publicly condemn the action and score political points. Id. The incentives that compel a bill to be sent to a specific committee are similar to those that compel a law to be sent to a certain agency. Thus, a bill sent to the Committee on Agriculture is likely to be sent off to the Department of Agriculture. Therefore, this Article will focus on the committee assignment decision.
this breakdown. This section will analyze several theories and explain why their combination the proper approach.

A. The Congressional Committee

If we are to survive, we must have ideas, vision, and courage. These things are rarely produced by committees. –Arthur Schlesinger, Jr.

If you want to kill any idea . . . get a committee working on it. – Charles F. Kettering

There are numerous theories that attempt to explain how Congress’ structure impacts legislative decisions. In 200 years, Congress has centralized its authority in the committee, going from no committees, to ad hoc committees, and ultimately forming standing committees. Then, in the 1930s Congress took major steps towards decentralizing the legislative trade process. While centralization explains how a committee’s specialized knowledge can be lost to the floor’s interests, it does not explain why non-trade bills that impact trade are referred to non-trade committees and receive thereafter little or no trade consideration.

The Informational Theory, developed by Keith Krehbiel, assumes that while committees are better informed about specific policies, the floor ultimately maintains control over the committee’s decisions. In doing, information coming from the committee will reflect the average interests of the floor. When the committee’s views vary from the floor’s the committee has an incentive to guard information in order to advance its policy.

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187 Keith Krehbiel, Information and Legislative Organization.
188 DESTLER Id.
objectives. To avoid this, the floor is very reluctant to relinquish power to the committee in the form of closed rules. While Informational Theory identifies how competing interests within Congress can affect a bill’s procedural history and whether the expertise of a committee is followed, it does not explain why certain bills are sent to one committee without the consideration of others. The Majority-Party Cartel theory provides some answer to this question.

The Majority-Party Cartel theory posits that committees are a tool for party leaders to gain control over members in an environment that gravitates towards weak party discipline. Majority-Party Cartel theory states that party leaders distribute and withdraw power through the committee system as a means to control other members. This theory advances three findings. First, committee appointments are used as a reward and thus committees themselves must have power. Second, the alignment in preference between the majority-party members within a committee and the majority members of the caucus is explained by the majority caucus exercising tight control over the committees. Third, the committee process allows leadership to create a process for considering bills that maximizes the possibility that leadership preferences will pass. This theory is helpful because it suggests that bills are assigned not only by subject matter but also by favoritism. If this theory is true, then the speaker has an incentive to maintain value in the committee assignment. It would undercut the speaker’s reward system to include multiple committees in a bill’s consideration because that would dilute a committee’s value.

189 Id.
190 Id.
191 Id. at 194.
192 Id.
193 Id.
194 Id.
195 Id. at 194-95.
B. Impact of Constituents

Congressional structure cannot fully explain why laws impacting trade are not always given trade consideration. At the end of the day, Congress members are very concerned about appeasing constituents that will help them gain reelection.\(^\text{196}\) To understand why Congress acts the way it does one must look to their primary concern: fundraising and constituents.

The Bicameral Rival Theory focuses on the cynical implications of policymaking, that the committee system maximizes a member’s ability to receive contributions from lobbyists.\(^\text{197}\) The committee system increases campaign contributions by creating hurdles in the legislative process that make it more difficult for outsiders to maneuver a bill through Congress.\(^\text{198}\) For a bill to pass a hurdle, outsiders must “pay to play.”\(^\text{199}\) These hurdles include: (1) a committee’s legislative veto power, (2) committee chairs that can refuse to hold necessary hearings for bills, (3) a speaker or a Rules Committee that can kill a bill via scheduling, or (4) a rule requiring super majority to pass a bill.\(^\text{200}\) These hurdles may explain why legislative leaders hold final votes until after major fundraisers, doing so allows politicians to leverage their vote in exchange for contributions from donors that have an interest in the vote’s outcome.\(^\text{201}\) This also explains why committees can only stop legislation, cannot implement legislation, and that Congress may, at many points, veto a bill.\(^\text{202}\) If the Bicameral Rival Theory were correct, House members would have an incentive to maximize the roadblocks a bill may face by fragmenting the legislative process. However, if this theory is


\(^\text{197}\) *Id.* at 196.

\(^\text{198}\) *Id.*

\(^\text{199}\) *Id.*

\(^\text{200}\) *Id.*

\(^\text{201}\) *Id.*

\(^\text{202}\) *Id.*
correct, it fails to fully explain why Congress has settled on the current number of “hurdles” within the system. Some other forces that push back on Congress’ attempt to develop political hurdles must exist; otherwise Congress would have very little incentives to actually pass legislation. Moreover, this theory ignores other possible explanations of the committee structure—such as greater efficiency or organization—that the other theories advance. In addition to the theoretical reasons behind a decentralized committee system, several practical reasons have been posited to explain Congress’ move toward decentralization since the 1970s. Author I.M. Destler posits that decentralization was a specific objective of the post Watergate Congress. The purpose of this objective was to open the policymaking process to provide more seats at the table and prevent the closed system that benefited “special interests.” While the prior closed system did benefit special interests, it also insulated members from outside influences.

While Destler’s theory offers a great explanation as to what caused further decentralization after Watergate, it falls short in three ways. First, it fails to explain the decentralization that occurred before the Watergate scandal. Second, Destler’s theory does not explain why the system remains decentralized. Third, his theory does not take into account possible other factors that may have led to decentralization. However, Destler’s theory does, along with the Majority-Cartel Theory, explain why committees are purposely kept subservient to the Majority Leader so that the Leader may exercise control over members. This accounts for the weak nature of committees and subcommittees. Moreover, the Post Watergate theory explains why decentralization accelerated during the nineteen-seventies.

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203 DESTLER, supra note Error! Bookmark not defined. at 68 (4TH ED. 2005).
204 Id.
205 Id. at 69.
A Congress Member is also concerned about satisfying constituents. But not any constituent. Specifically, those he needs to obtain reelection. Not surprisingly, politicians seem most concerned with satisfying the core base that they need to win reelection, sometimes called the winning coalition. But new theories suggest that politicians will attempt to satisfy this group even if it is to the detriment of the majority of citizens or to the country’s detriment. If this is true, then competing coalitions will exist for every Congressional decision and the winner will often depend on simply whether they can help a legislator gain reelection. International trade policies place domestic constituents against their foreign counterparts. Sometimes these interests align, other times they do not. Domestic constituents’ interests are represented by their vote. Foreign constituents are represented by the strength of trade treaties, their own ability to organize and lobby, and any domestic parties that share their concerns. In the examples mentioned, one can see why certain domestic groups prevail over their foreign counterparts. In the example of Country of Origin Labeling there exists a very large constituency: domestic farmers who benefit from disadvantaging foreign producers and consumer safety groups. Conversely, the foreign constituent is low: weak treaty obligations and foreign farmers. Thus, it makes sense

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206 See Bruce Bueno de Mesquita and Alastair Smith, THE DICTATOR’S HANDBOOK: WHY BAD BEHAVIOR IS ALMOST ALWAYS GOOD POLITICS (PublicAffairs 2011).
207 See Bruce Bueno de Mesquita and Alastair Smith, THE DICTATOR’S HANDBOOK: WHY BAD BEHAVIOR IS ALMOST ALWAYS GOOD POLITICS 4 (PublicAffairs 2011); See also Sharon O’Halloran, POLITICS, PROCESS, AND AMERICAN TRADE POLICY 27 (1994).
that Congress would pass Country of Origin Labeling even while there was little evidence to suggest it was necessary.

C. A Hybrid Approach

As mentioned, no one theory adequately explains why Congress passes laws that negatively impact trade without taking into account that impact. Rather, each theory offers some explanation of what influences a Congress Member’s decisions. First, in an effort to consolidate power through favors, the speaker has incentive to send a bill to one committee for consideration. Since the purpose of this is to consolidate decision making in order to create value in committee assignments, involving more than one committee would dilute the speaker’s objectives. Congress’ consideration of bills that put two interest groups at loggerheads will force legislators to favor one outcome. In this situation, Congress will be inclined to choose the constituency that favors their reelection even if it means that in the long-term. This is true even if the decision is at the expense of the nation, the greater citizenry, or, secondarily, the core constituents long-term interests.

VI. SOLUTION: BRINGING TRADE AUTHORITIES BACK TO THE TABLE

A. Amending the House Rules

As mentioned in Section V, House leadership exercises control over members by exploiting the committee system and in the process decentralizes the lawmaking process. The Speaker can only do this because the House rules grant the speaker complete discretion on whether to assign bills that have significant impacts on trade to the Subcommittee on Trade. Moreover, political deal-making pressures House leadership to ignore the subject matter of bills in order to strike deals. Therefore, amending the House Rules is an important step toward ensuring that Congress properly vets trade issues within non-trade bills. As mentioned in Section II(A), both the House Ways and Means Committee and the
Subcommittee on Trade already have jurisdiction over trade issues. Thus, the House rules need to be amended to require House leadership to give the House Ways and Means and its Subcommittee on Trade final authority over trade issues.

Rule XII of the Rules of the House of Representatives addresses how the House Speaker assigns committees bills based on the jurisdictions outlined in Rule X. Yet, Rules X and XII address jurisdiction in a mutually exclusive manner by only granting the Speaker the discretion, not obligation, to subdivide bills by issue. Therefore, Rule XII should be amended to encourage the speaker to assign jurisdiction of trade issues to the House Ways and Means Committee. The following should be inserted after Rule XII(2)(c)(1): “shall refer portions of the matter that are substantial to the bill and reflect substantially different subjects and jurisdictions to one or more additional committees jurisdiction over that subject matter.” This amendment is an adaption of Rule XII(2)(c)(3) which states: “may refer portions of the matter reflecting different subjects and jurisdictions to one or more additional committees.” There are two differences between these rules. First, the added rule mandates the speaker to refer potions of the bill to relevant committees rather than gives him discretion. Second, the suggested rule only applies to subject matter within a bill that is “substantial to the bill” and reflects “substantially different subjects and jurisdictions.” The first provision restricts the Speaker’s discretion so that he is required to assign trade issues to the House Ways and Means Committee while the second gives him a degree of control within that restriction. However, the degree of control remaining from such an amendment requires a second amendment in order to further restrict his choice over trade issues. Thus, the following should be inserted after Rule X(t)(2) “Trade issues generally.” This addition will increase the House Ways and Means Committee’s, and it’s Subcommittee on Trade’s, jurisdiction over trade matters and will provide the important trigger mechanism that will make the

Speaker assign all trade issues via Rule XII to the House Ways and Means Committee.

While these amendments are an important step to ensuring that trade issues are properly vetted by the House Ways and Means Committee and its Subcommittee on Trade, two aspects of the rulemaking process could undermine this effort. First, as mentioned in Part II(A), the Constitution vests in Congress the ability to set its own rules. Therefore, even if Congress adopts these rules, nothing prevents future sessions from altering them. Second, as mentioned in Part II(A), the Speaker of the House ultimately determines how and when to implement House rules. Thus, even with these rules, there is always the chance that the speaker will not follow them or will choose to interpret them in a way that prevents the House Ways and Means Committee from reviewing trade issues.

B. Amending the Jurisdiction of Administrative Agencies

As mentioned in Part II(B), many non-trade entities within the executive branch often address issues that have substantial effects on trade. As a result, administrative agencies often pass rules and regulations that have enormous impacts on trade without seriously considering trade issues. Administrative agencies have faced similar problems in the past, the solution to which has been a Presidential executive order. The President may issue executive orders that guide the rulemaking process. For example, the Environmental Effects Abroad of Major Federal Actions Executive Order, incorporated into the Code of Federal Regulations, required any government agency to consult the Department of State over any procedure that has significant effect on the environment outside the geographical borders of the U.S. The president should issue a similar executive order that requires any agency that

212 See discussion infra Part II(B) (outlining the numerous non-trade legislative committees and administrative agencies that create non-trade policy that has substantially effects on trade.).

213 7 C.F.R. § 1b.2.; Exec. Order No. 12114 (Jan. 4, 1979), 3 C.F.R.
issues a rule that has a substantial impact on international trade to consult the U.S. Trade Representative. Such a mandate would ensure that trade experts weigh in on trade issues within new rules. This would not result in Congressional resistance because it does not conflict with Congress’ preference to delegate authority to administrative agencies, explained in Section V. Moreover, Congress would actually find it easier to play the “good cop” role described in Section IV because it would have one individual to turn to on trade issues: the U.S. Trade Representative. Finally, this centralization in the U.S. Trade Representative would actually increase political accountability because the U.S. Trade Representative would become more in tune with the wills of Congress, which is itself directly accountable to constituents.

C. Amendment to the World Trade Organization

As described in Section V, political pressures and deal-making are significant factors in why trade issues are considered in an increasingly decentralized manner. Given the political nature of lawmaking, it is important to achieve a counterbalance that will keep political influences in trade matters in check. Amending the WTO framework would provide this important balance. There is no provision within the WTO framework that requires a country to vet domestic laws that substantially effect trade through trade committees and agencies. Any amendment to the WTO that creates new WTO enforcement authority would run contrary to the WTO’s inherent lack of enforcement authority. However, WTO members could still amend the WTO provisions to in a way that would apply pressure to countries to concentrate trade policy consideration, whether within trade agreements or other domestic laws, with Members’ trade authorities. The closest provision is found in the WTO agreement, which provides for a Trade Policy Review Mechanism. This Mechanism body periodically reviews

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214 International Tribunals: A Rational Choice Analysis, 157 U. Pa. L. Rev. 171, 225 (2008) (noting that the WTO has no authority to independently enforce its provisions. Instead, it is more akin to an arbiter.).

215 WTO Annex 3(A)(ii).
the impact of a Party’s trade practices on a multilateral trading system.\textsuperscript{216} The WTO agreement puts the Trade Policy Review Mechanism’s objectives into context through Annex 3(B), entitled “Domestic Transparency,” and explains the purpose of the body as transparency.\textsuperscript{217} Yet, the Trade Policy Review Mechanism’s duty ends with issuing reports on general trade practices and trade agreements.\textsuperscript{218} Thus, WTO Members must amend Annex 3 to give the Trade Policy Review Mechanism authority to evaluate whether local laws that have substantial impacts on trade were properly considered by domestic trade authorities.

To resolve the Trade Policy Review Mechanism’s lack of authority to analyze domestic laws, the Mechanism’s objectives should be amended. Annex 3(A)(i) first outlines the Trade Policy Review Mechanism’s objectives, stating that: “Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.” This section narrowly defines the scope of review to cover only trade agreements. Thus, this section should be amended as follows: “Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies, trade practices, and domestic laws that substantially effect trade for their impact on the functioning of the multilateral trading system.” Similarly, Annex 3(A)(ii) reiterates what laws the Trade Policy Review Mechanism will review, reading: “the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system.”\textsuperscript{219} In the same vein, this section should be amended to include certain domestic laws. Thus, this

\textsuperscript{216} Id. at 3(C)(ii).
\textsuperscript{217} Id. at 3(B).
\textsuperscript{218} Id. at 3(D); \textit{Continued openness is key at a time of economic uncertainty}, Trade Policy Review Board, World Trade Organization, PRESS/TPRB/300 (June 2008) available at http://www.wto.org/english/tratop_e/tpr_e/tp300_e.htm.
\textsuperscript{219} WTO Agreement, Annex 3(A)(ii).
section should read as follows: “the function of the review mechanism is to examine the impact of a Member's trade policies, trade practices, and domestic laws that substantially effect trade on the multilateral trading system.”

D. Does Benefit-Cost Analysis Hold the Answer?

One option might be to issue a Presidential Executive Order requiring agencies to consider a rule’s trade implications. The most likely approach would be to add this requirement on top of Executive Orders 13563 and 12866. These Executive Orders set guidelines for regulatory analysis, with the primary focus on benefit-cost analysis. They require agencies to use the best techniques available to quantify the present and future benefits of a regulation. They also allow agencies to consider other non-quantifiable values, such as “equity, human dignity, fairness, and distributive impacts.” Of note is the fact that these orders do not require agencies to use these findings in their rulemaking process. Rather, the idea is that if agencies gather and review this information and make it public they will ultimately make more informed decisions. But would this be effective?

Many scholars have noted the effectiveness of regulatory analysis. In his essay *Empirically Informed Regulation*, Cass Sustein notes nine examples of regulatory analyses that have led to more effective regulations at reduced costs. Of these, the retrospective analysis conducted by the Departments of State and Commerce is noteworthy. In particular, the agencies are focusing on improving trade for both American companies and their foreign partners. This focus seems oddly familiar to the

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220 Executive Order 12866, 3 CFR § 638.
221 Executive Order 12866, 3 CFR § 638.
222 Executive Order 12866, 3 CFR § 638.
226 Cass Sustein, *Empirically Informed Regulation* at 1391; Department of Commerce Plan for Retrospective Analysis of Existing Rules (Aug. 18, 2011),
greater problem at hand. Moreover, it seems to show that in at least one example it is possible to conduct a cost-benefit analysis that effectively considers foreign stakeholders.

But regulatory analysis also has its critics. For one, few statutes require regulators to conduct this analysis and in fact others actually prohibit it.\textsuperscript{227} To this end, Executive Order 12866 only applies “to the extent permitted by law.”\textsuperscript{228} Moreover, the regulatory analysis has no clear constituent, except maybe the President.\textsuperscript{229} \textsuperscript{230} As a result, an agency’s mandate and constituents will typically influence policymaking far more than the results of a benefit-cost analysis, especially when the two conflict. This seems to be a particular problematic when the rules involve issues like national security that are often exempt from standard rulemaking procedures.\textsuperscript{231} Moreover, often benefit-cost analyses are conducted after an agency has already made a decision. In other words, available at http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentofcommerceregulatoryreformplanaugust2011a.pdf.


\textsuperscript{228} Executive Order 12866.


\textsuperscript{231} Two examples include the TSA rules related to the shoe bomber or the DHS passport rules within the Western Hemisphere Travel Initiative.
agencies may be cherry picking the costs and benefits that best justify their predetermined decisions, not the best regulation. Lastly, it may be that multi-agency regulatory analysis depends on a retrospective, rather than a prospective, approach. Retrospective analyses involve changes to existing regulations. It is more difficult to fix an existing regulation than it is to prevent one from being adopted in the first place. Thus, there is real question over the relative effectiveness of retrospective analyses.

While these criticisms are valid, they do not outweigh the benefits of moving forward with this specific cost-benefit analysis. First, while not all agencies can consider costs, those who can have done so, and do so well. Moreover, it would be misguided to assume that an executive order that falls short of covering all rulemaking is a failure. But this would actually be a safeguard. Congress should be able to mandate that an agency not consider costs in rulemaking; by doing so, the legislature is making a determination on the importance of the rule. Additionally, it is not clear that this lack of universal coverage has harmed previous benefit-cost analysis orders in the last thirty years. Second, the narrow constituency—namely the President—also cuts in favor of a benefit-cost analysis for trade law. That is because trade law falls within international relations, which is primarily the purview of the president. So while benefit-cost analyses will involve different interests depending on the subject matter, these analyses will most often involve the President’s interests. And since the President issues Executive Orders, he will oversee their implementation and can decide whether agencies are properly balancing trade implications against other issues. Third, while some agencies may conduct benefit-cost analyses just for show, they still conduct the


analyses. Going through this process creates an important public record. If the public disagrees with an agency’s course of action, they can act through the Congress, which can subpoena agencies. Lastly, it is relatively straightforward to foresee whether a rule would have trade implications that would require consideration. The standard could be focused on whether it is reasonably foreseeable that the regulation of a good would slow the speed of an import or export.

VII. CONCLUSION

Every year legislatures pass laws, rules, and regulations that have serious implications on trade, both economically and legally. And while trade agreements are reviewed for their trade implications, other laws are not. As a result, many laws place the United States at legal and economic risk. Three such examples presented in this article were Country of Origin Labeling, the Western Hemisphere Travel Initiative, and the FDA’s ban on clove cigarettes. The problem highlighted in these examples is not that lawmakers chose poor measures. Rather, the problem is that lawmakers never weighed these measures against the costs they would have on trade issues. To that end, lawmakers did not consider other, less costly, alternatives.

The reason for this tendency is that Congress and U.S. agencies adopt rules, regulations, and laws in silos, based on issues. For example, because Country of Origin Labeling was primarily seen as an agriculture law, only the House Committee on Agriculture considered the law. The House Subcommittee on Trade, along with other trade experts, provided little input. Later, as trade experts predicted, this law led to complaints against the U.S. in the WTO.

Like the example above, many other similar laws not only have lasting economic impacts on international trade, but also leave the U.S. open to legal consequences. To remedy this problem
this article suggests two solutions. First, the U.S. Congress should amend its rules so that laws that are likely to impact trade obligations receive the serious input of the House Subcommittee on Trade. Second, the President should require, by Executive Order, that when agencies conduct a benefit-cost analysis they consider trade implications specifically.

Ultimately, Congress may at times decide to turn its back on U.S. trade obligations. Such decisions may be wise, but never when done without first understanding the consequences.