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# Building Political Will for Accountable, Equitable Trade Policy Making

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## COMMENT

### Building Political Will for Accountable, Equitable Trade Policy Making

#### INTRODUCTION

Trade policy is at an inflection point. Even in the best of times, trade policy suffers from systemic dysfunction. International trade policy purports to offer broad benefits: economists find that trade increases economic output – or, in layman’s terms, “grows the pie.”<sup>1</sup> Domestic economic policy is then supposed to redistribute those gains equitably. However, American trade policy consistently fails at this second step. Foreign competition has disrupted local labor markets, leading to greater job churn and lower lifetime income for lower-wage workers.<sup>2</sup> The presumptive solution to this problem is Trade Adjustment Assistance (TAA), a program to help workers who lose their jobs due to import competition. Yet Congress persistently underfunds TAA.<sup>3</sup> The unsurprising result is a trade system unpopular among American workers.<sup>4</sup>

Although President Donald Trump’s trade policy did not create this dysfunction, events since his election have thrown the problems with our policy-making system into sharp relief. The President and relevant agencies, led by the Office

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1 See, *How Preferential Trade Agreements Affect the U.S. Economy*, CONG. BUDGET OFF. 1-4 (Sept. 2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51924-tradeagreements.pdf> [<https://perma.cc/25PK-D3ZP>].

2 David H. Autor et al., *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 229-34 (2016).

3 Stephen Kim Park, *Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment*, 43 GEO. J. INT’L L. 797, 847-48 (2012).

4 See Jacob Poushter, *American Public, Foreign Policy Experts Sharply Disagree over Involvement in Global Economy*, PEW RES. CTR. (Oct. 28, 2016), <http://www.pewresearch.org/fact-tank/2016/10/28/american-public-foreign-policy-experts-sharply-disagree-over-involvement-in-global-economy> [<https://perma.cc/KEM3-9FX7>].

of the U.S. Trade Representative (USTR), have long asserted unitary authority over trade policy. This purported authority includes negotiating and exiting trade agreements, imposing tariffs, and bringing actions against other countries for violations of trade agreements. Enabled by this concentration of power and facing little oversight, President Trump has engaged in aggressive trade actions, such as imposing tariffs on imported goods and threatening trade wars with rivals and allies alike.<sup>5</sup> Experts generally believe these efforts are not only harmful but irrational: they threaten to imperil the American economy for little gain<sup>6</sup> and hurt the workers and consumers that President Trump claims they will help.<sup>7</sup>

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5. See, e.g., Scott Horsley, *Trump Formally Orders Tariffs on Steel, Aluminum Imports*, NPR (Mar. 8, 2018, 5:00 AM ET), <https://www.npr.org/2018/03/08/591744195/trump-expected-to-formally-order-tariffs-on-steel-aluminum-imports> [<https://perma.cc/4DW4-GUYT>]; *President Trump Approves Relief for U.S. Washing Machine and Solar Cell Manufacturers*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/president-trump-approves-relief-us> [<https://perma.cc/2C6M-PUL9>]; Jim Tankersley & Keith Bradsher, *Trump Hits China with Tariffs on \$200 Billion in Goods, Escalating Trade War*, N.Y. TIMES (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/trump-china-tariffs-trade.html> [<https://perma.cc/83WQ-PQLS>]; see also Doug Palmer & Jon McClure, *Where We Stand in Trump's Trade War*, POLITICO (July 9, 2018, 8:00 AM ET), <https://www.politico.com/interactives/2018/where-we-stand-in-the-trade-war> [<https://perma.cc/7ZMM-7L5Q>] (summarizing tariffs imposed by the United States on foreign goods and by foreign countries on U.S. goods).
  6. WORLD BANK GRP., *GLOBAL ECONOMIC PROSPECTS, JUNE 2018: THE TURNING OF THE TIDE?* 35-36 (2018) (describing how an escalation of tariffs between the United States and China could lead to economic losses in both countries); Dorine Boumans & Carla Krolage, *Experts: US Tax Reform and Trade Policy Will Negatively Impact World Economy*, CESIFO (June 7, 2018), [https://www.cesifo-group.de/ifoHome/presse/Pressemitteilungen/Pressemitteilungen-Archiv/2018/Q2/pm-20180607\\_US-Handelspolitik.html](https://www.cesifo-group.de/ifoHome/presse/Pressemitteilungen/Pressemitteilungen-Archiv/2018/Q2/pm-20180607_US-Handelspolitik.html) [<https://perma.cc/S3EU-Z9PF>] (reporting that 66% of 913 economists surveyed worldwide indicated that President Trump's trade policy would hurt the United States).
  7. Nathan Bomey, *How President Trump's Chinese Tariffs Affect American Consumers*, USA TODAY (July 6, 2018, 1:34 PM ET), <https://www.usatoday.com/story/money/2018/07/06/president-trumps-china-tariffs-consumer-impact/762982002> [<https://perma.cc/2AD8-D4ZQ>] (predicting that many of the costs of tariffs will be passed on to consumers); Fred Imbert, *Red States Will Lose the Most in Trade War with China: Citigroup*, CNBC (July 6, 2018, 2:48 PM ET), <https://www.cnbc.com/2018/07/06/red-states-will-lose-in-china-trade-war-citi.html> [<https://perma.cc/7UJB-KY6J>] (reporting that states that voted for then-candidate Trump in 2016 have more jobs linked to foreign trade and produce more goods impacted by China's retaliatory tariffs); Danielle Wiener-Bronner, *Trump Trade Policies Threaten 2.6 Million U.S. Jobs, Chamber of Commerce Says*, CNN MONEY (May 31, 2018, 5:56 PM ET), <https://money.cnn.com/2018/05/31/news/chamber-of-commerce-trade-jobs/index.html> [<https://perma.cc/3KCU-FF7H>] (reporting on a Chamber of Commerce estimate that tariffs will result in the loss of millions of jobs among "the very constituents Trump is courting").

In a well-functioning system, the public would pressure Congress to constrain the executive; however, traditional mechanisms of democratic accountability have failed. A dearth of objective information about trade has disenfranchised the public and disarmed Congress. Without accurate information from trusted sources, the public cannot determine whether the federal government is redistributing gains from trade or compensating for trade's negative effects.<sup>8</sup> The public therefore does not effectively petition Congress for redistribution. Lacking information and public pressure, Congress has limited ability to redistribute wealth and monitor the executive.

This democratic deficit has been growing for decades but is now at a breaking point. President Trump's recent attacks on the media and experts have made objective truth a site of partisan conflict, making it more difficult for voters to assess their self-interest.<sup>9</sup> Moreover, members of the President's party fear standing up to the President – even if they privately oppose the executive's policies – because of the potential electoral ramifications.<sup>10</sup> Voters – lacking or ignoring credible information about the effects of different policies – may choose to elect representatives whose policies align themselves with a charismatic partisan figure rather than candidates who align with voters' interests. This combination of a powerful executive and weak interbranch and public checks allows the President to adopt harmful trade policies with little opposition.

Regardless of the optimal balance of trade-policy objectives, the existing policy-making process is neither democratic nor just. American trade policy can serve different goals: economic growth, efficiency, distribution of wealth, national security, or some combination thereof. The initial underpinnings of trade policy were growth and efficiency. Over time, trade has become a tool of diplomacy and national security.<sup>11</sup> However, even as our goals have changed and developed, our policy-making system remains insufficiently attuned to the public

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8. Interpretations of events – rather than the events themselves – often shape public opinion. In these cases, not just the quantity but also the *quality* of information is critical. BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES* 339–41, 354 (2010).

9. *See Americans' Views on the Media*, IPSOS (Aug. 7, 2018), <https://www.ipsos.com/en-us/news-polls/americans-views-media-2018-08-07> [<https://perma.cc/5BMF-AVRZ>] (finding that twenty-nine percent of Americans, including forty-eight percent of Republicans, agree that “the news media is the enemy of the American people”).

10. Jim Tankersley & Ben Casselman, *Republicans Opposing Trump on Trade Face Election Quandary*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/business/economy/republicans-trump-trade.html> [<https://perma.cc/WK6W-5HDK>].

11. For example, supporters of the Trans-Pacific Partnership (TPP) highlighted its importance to American security interests in Asia. *See, e.g.,* Samuel Locklear & John Hamre, *Don't Forget the National-Security Case for TPP Trade Deal*, WALL ST. J.: WASH. WIRE (Oct. 23, 2015, 9:57 AM

will and lacks the democratic accountability that would legitimate trade policy. Our policy-making system should therefore include structural mechanisms that empower Congress—the most representative branch of the federal government<sup>12</sup>—and pressure it to respond to democratic input. Such changes to the process could also lead to changes in policy outcomes: gains from trade remain unevenly distributed in part because we lack a mechanism to recognize the political will of those hurt by trade and make actual—rather than nominal—adjustments, such as reforms to create healthy labor markets. Crucially, these policies would better reflect public input.

Without a system based on democratic support and oversight of trade, the United States will continue to subject itself to trade policy that harms workers and threatens peace and stability. Getting trade policy right the first time is critical: trade agreements have long-term (often practically permanent) implications for domestic law and policy in diverse areas.<sup>13</sup> To build a better policy-making system, the United States must rethink how it enters into agreements and manages its existing commitments. Without mechanisms to force discussion about the distributional consequences of trade, the federal government has little incentive—and the public, little ability—to make corrections that will benefit Americans broadly.

Given that our long-teetering trade system is under threat of collapse, how do we move forward? The Trump Presidency has emphasized the need for reform, which should include efforts to catalyze political pressure to produce more democratic trade policy. In response to this need, this Comment proposes that Congress establish a nonpartisan, expert body to produce public-facing trade analysis: the Congressional Office on Trade Analysis (COTA). This body, based on similar bodies Congress has created in the domestic context such as the Congressional Budget Office (CBO), would lead to more equitable and democratically legitimate trade policy.

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ET), <https://blogs.wsj.com/washwire/2015/10/23/dont-forget-the-national-security-case-for-tpp-trade-deal> [<https://perma.cc/4M8Z-SCSB>]. These appeals failed to save the agreement but demonstrate the close link between modern trade agreements and national-security interests.

12. “Most representative” is of course a relative term. Reforms in areas such as campaign finance, voter access, and redistricting could enhance Congress’s democratic responsiveness.
13. See *Missouri v. Holland*, 252 U.S. 416, 431-32 (1920) (discussing the implications of the Migratory Bird Treaty Act); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM* 223 (2011) (discussing the effects of the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) on domestic regulation). See generally SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003) (discussing the rise in importance of intellectual property law in international trade agreements).

COTA's primary goal would be to enhance democratic accountability by shifting power in the policy-making process away from the executive and towards Congress and the public. Two primary factors would facilitate this goal: (1) increased availability of information for Congress to assess trade policy, leading to (2) increased information dissemination to the American public. Although my proposal is process oriented—emphasizing democratic input—and outcome neutral, COTA could have policy effects such as increasing redistribution. Though such an institution alone cannot repair our broken trade policy, it is a necessary reform for restoring the credibility of information and ensuring that information is available to political actors and advocates.

This Comment proceeds as follows: Part I outlines how the President has come to dominate the trade policy-making system. Part II explains the pathologies of the current system and argues that Congress should ensure trade commitments are understandable to the voting public to increase political accountability. Finally, Part III proposes creating a new office, COTA, to conduct trade analysis with the aim of promoting the public interest.

## I. THE EVOLUTION OF THE TRADE POLICY-MAKING PROCESS

This Part traces the evolution of trade policy making from the partnership model at the Founding to the executive-led model of today. In particular, Congress has abdicated its designated role by (1) elevating the President in trade negotiations; (2) expediting the adoption of agreements; and (3) failing to exercise oversight. This long-term trend of abdication has ultimately set the stage for the unilateral actions that President Trump has taken on trade.

The Constitution assigns Congress the power “[t]o regulate Commerce with foreign Nations”<sup>14</sup> and conditions presidential treaty power on the approval of two-thirds of the Senate.<sup>15</sup> The Framers imposed the supermajority requirement to ensure significant congressional deliberation over international agreements.<sup>16</sup> But the balance of power has shifted toward the President.<sup>17</sup> Congress has delegated significant international negotiating discretion to the President, beginning with the Reciprocal Trade Agreements Act of 1934.<sup>18</sup> The 1934 Act granted ex

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14. U.S. CONST. art. I, § 8, cl. 3.

15. *Id.* art. II, § 2, cl. 2.

16. See THE FEDERALIST NO. 64, at 358-61 (John Jay) (Clinton Rossiter ed., 1961).

17. See Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1206-44 (2018); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (granting the President broad deference in foreign affairs).

18. Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2018)).

ante authorization, allowing the President to reduce tariffs within a specific range. However, Congress eventually supplanted this process with one in which Congress ratified agreements *after* the executive made them.<sup>19</sup> Presidents themselves hastened this shift by ignoring congressional restraints. After Congress granted President Kennedy negotiating authority, he entered into agreements that extended beyond the authority delegated by Congress.<sup>20</sup> Congress has also delegated powers outside of trade negotiations. For example, the President can adjust tariff schedules when necessary to serve national-security interests or during national emergencies.<sup>21</sup>

Concurrent with this delegation to the President, Congress has shifted its procedures to expand trade policy's reach and to favor the executive. First, it has mostly abandoned Article II treaties in favor of Article I congressional-executive agreements.<sup>22</sup> Congressional-executive agreements are passed like domestic legislation and require simple majorities in both chambers of Congress and the signature of the President. This change has produced a massive expansion in international commercial agreements.<sup>23</sup> Second, Congress has adopted "fast-track" procedures.<sup>24</sup> Originally introduced in the Trade Act of 1974, fast track provides for a majority vote in each chamber of Congress with no amendments on the day the President introduces the bill.<sup>25</sup> These procedural changes, combined with presidential discretion in foreign relations, have allowed executive-branch preferences to dominate trade policy.<sup>26</sup>

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19. Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1499-1503 (2016); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1298-1301 (2008); see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 824, 827, 847-51 (1995).

20. Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 698 (1996).

21. *E.g.*, 19 U.S.C. §§ 1862, 2132; 50 U.S.C. §§ 1702, 4305(b) (2018).

22. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 195 (1990); Hathaway, *supra* note 19, at 1298-1301.

23. See generally Ackerman & Golove, *supra* note 19 (exploring the constitutionality of international accords like NAFTA, which was approved as a congressional-executive agreement).

24. Hathaway, *supra* note 19, at 1304-05.

25. Trade Act of 1974, Pub. L. No. 93-618, §§ 151-153, 88 Stat. 1978, 2001-08 (1975) (codified at 19 U.S.C. §§ 2191-2193)

26. See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 349 (2003) (arguing that there is a separation-of-powers concern where "the legislature statutizes the rules of debate, [giving] the president a say in a sphere of activity where, constitutionally speaking, he should have no voice").

To counter the growth of executive power in international trade, modern Congresses have conditioned fast-track procedures on compliance with congressional oversight.<sup>27</sup> These procedures have included transparency requirements,<sup>28</sup> congressional-executive consultations,<sup>29</sup> and the provision of information to members of Congress upon request.<sup>30</sup> If Congress determines that the executive branch has not complied with its obligations, Congress can withdraw its delegated authority.<sup>31</sup> These efforts have had mixed results. Although congressional staff have indicated dissatisfaction with the executive's consultations with Congress,<sup>32</sup> Congress has never withdrawn its authority on procedural grounds.<sup>33</sup> Meanwhile, Congress has decimated its own capacity to conduct policy analysis and monitor the executive. As part of Newt Gingrich's campaign to centralize power in the Speaker's office and reduce opposition to his policies, he slashed the budgets and staff of committees and expert bodies in the 1990s.<sup>34</sup> Subsequent Congresses have failed to restore these staffing levels. From 1994 to 2015, the number of committee staff in both houses has fallen by a third, and the combined staffs of key congressional-support agencies have shrunk by nearly forty percent.<sup>35</sup> Accordingly, in its current oversight role, Congress often lacks the authority and ability to deliberate over trade goals.

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27. For a longer explanation of oversight provisions, see Margaret M. Kim, *Trade Promotion Authority: Evaluating the Necessity of Congressional Oversight and Accountability*, 40 SETON HALL LEGIS. J. 317, 336-42 (2016).
28. 19 U.S.C. §§ 4204-4205.
29. *Id.* § 3804.
30. *Id.* § 4203.
31. *Id.* § 4205.
32. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-59, INTERNATIONAL TRADE: AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATIONS UNDER TRADE PROMOTION AUTHORITY 43-46 (2007) [hereinafter GAO REPORT].
33. See Kim, *supra* note 27, at 343.
34. Bruce Bartlett, *Gingrich and the Destruction of Congressional Expertise*, N.Y. TIMES: ECONOMIX (Nov. 29, 2011, 6:00 AM), <https://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise> [<https://perma.cc/257G-HS6M>].
35. *Vital Statistics on Congress: Data on the U.S. Congress*, BROOKINGS ch. 5 at 10-11 (May 21, 2018), [https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats\\_ch5\\_full.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch5_full.pdf) [<https://perma.cc/6YFN-85WD>]. The agencies included in the forty percent figure are the Government Accountability Office, Congressional Budget Office, and Congressional Research Service.



## II. THE CONSEQUENCES OF TODAY'S TRADE POLICY-MAKING SYSTEM

The executive-led model of trade creates law not through congressional deliberation and public accountability, but rather through an executive influenced by special interests. This Part examines the problem created by the current trade policy-making system, wherein weak congressional checks have resulted in ever-greater executive authority. This problem has resulted in two primary pathologies: (1) the outsized influence that private interests wield over the executive's conduct in trade policy; and (2) weakened democratic accountability. This Part concludes by arguing that executive accountability is insufficient to counter these negative consequences. These problems create a system that does not serve broad public interests like the fair distribution of gains from trade.<sup>36</sup> To correct this structural failure, Congress and the public need the analysis of an independent, nonpartisan congressional body.

### A. Weak Congressional Checks

Congress remains at a disadvantage in monitoring executive authority in international trade policy. It lacks the institutional knowledge and expertise necessary to understand and check the executive during trade negotiations. The executive controls the flow of information to the legislative branch and has the power to set the agenda for negotiations. A majority of congressional staff surveyed believe that they “[do] not have any real input or influence on the trade negotiations,” despite USTR's required consultations.<sup>37</sup> Moreover, several staff reported that USTR briefings had omitted important information and that they often did not know to ask specific questions about critical changes to agreement text.<sup>38</sup> The knowledge gap widens when national-security classifications reduce access—as they did with the Trans-Pacific Partnership (TPP).<sup>39</sup> This information asymmetry is particularly problematic because USTR is invested in its

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36. See, e.g., Dave Johnson, “Free Trade”: *The Elites Are Selling It but the Public Is No Longer Buying*, HUFFPOST (Mar. 11, 2016, 2:26 PM ET), [https://www.huffingtonpost.com/dave-johnson/free-trade-the-elites-are\\_b\\_9441498.html](https://www.huffingtonpost.com/dave-johnson/free-trade-the-elites-are_b_9441498.html) [<https://perma.cc/5MM7-VZCV>].

37. GAO REPORT, *supra* note 32, at 43.

38. *Id.* at 45-46.

39. Adkins & Grewal, *supra* note 19, at 1511-12.

own policies and therefore has an incentive to overstate their benefits and minimize their negative consequences.<sup>40</sup>

Yet Congress's powers to check the executive's trade policy when members feel misled or underinformed are limited. Congress can theoretically withhold fast track's advantages by letting the authority expire or finding the executive in noncompliance with statutory procedural requirements. However, Congress has never actually voted down a trade agreement on procedural grounds.<sup>41</sup> If Congress had more information about a proposed trade policy's effect, its members might feel more confident holding the President accountable for procedural faults. Free trade does not always increase economic growth and lower consumer prices, but Congress struggles to identify such situations. Congress needs its own source of analysis to understand trade policy and corroborate the executive's claims.

Information is not always sufficient: even when aware that the executive is pursuing unwise trade policy, members of Congress – particularly those of the President's party – may not constrain the President for fear of the political ramifications. This phenomenon has become particularly apparent during the Trump Presidency. Although individual Republican members of Congress have expressed misgivings about President Trump's actions on trade, Congress as a whole has failed to act.<sup>42</sup> Members may be afraid to oppose an unorthodox President who may characterize actions calculated to serve the national interest as an attack on him and his base. Partisan gerrymandering and political polarization mean that legislators viewed as disloyal to the President or his party are likely to be subject to a primary challenge.<sup>43</sup> Absent countervailing pressure, legislators may therefore tolerate unsound trade policy to preserve their electoral chances.

A congressional institution that provides trade analysis could help reduce concerns about partisanship and encourage congressional checks. With more reliable, public information, legislators can predict trade policy's effects and offer

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40. See ROBERT HOWSE, *How to Begin to Think About the "Democratic Deficit" at the WTO*, in *THE WTO SYSTEM: LAW, POLITICS & LEGITIMACY* 57, 63 (2007).

41. Kim, *supra* note 27, at 343.

42. Kevin Breuninger, *107 House Republicans Send Letter to Trump Asking Him Not to Do His Tariff Plan*, CNBC (Mar. 8, 2018, 11:42 AM EST), <https://www.cnn.com/2018/03/07/107-house-republicans-express-opposition-to-broad-tariffs-call-on-trump-to-only-target-bad-actors.html> [https://perma.cc/3SFA-D9VH]; Burgess Everett, *'I'd Like to Kill 'em': GOP Takes on Trump Tariffs*, POLITICO (July 3, 2018, 5:05 AM EDT), <https://www.politico.com/story/2018/07/03/trump-tariffs-republicans-congress-hatch-687911> [https://perma.cc/5Z8X-G3UZ].

43. See, e.g., John Verhovek & Kendall Karson, *Sanford Loss Magnifies 'Trump Effect' on GOP Primaries*, ABC NEWS (June 13, 2018, 11:31 AM ET), <https://abcnews.go.com/Politics/Sanford-loss-magnifies-trump-effect-gop-primaries/story?id=55862833> [https://perma.cc/W9SQ-FP26].

principled reasons to support or oppose particular trade policies. For example, a senator who opposes the President's policies can reduce the appearance of partisanship by justifying her decision based on the policies' harm to particular constituents, such as farmers or manufacturing workers. In essence, independent, objective analysis of trade's effects can provide political cover to members of Congress – especially members of the President's party – who oppose the executive's trade policy. Voters can then evaluate the member's policy justifications.<sup>44</sup> Moreover, releasing objective, expert analysis about the effects of trade policy can provide an impetus for external pressure. Opinion leaders, such as academic institutions, advocacy groups, and the media, can disseminate accurate information to voters who can hold politicians accountable.<sup>45</sup>

Some may raise a counterargument against increased congressional influence on separation-of-powers grounds, arguing that such influence would infringe on executive power. But subjecting trade policy to greater congressional scrutiny does not interfere with the President's authority over foreign relations.<sup>46</sup> Greater congressional involvement can serve as a counterweight to presidential policy preferences and special interests that may have negative effects on the public and workers. The critique that such congressional involvement in trade interferes with the President's authority assumes (1) that trade policy implicates “foreign affairs;” and (2) that the President should have unitary control over foreign affairs. Both assumptions are questionable.

First, modern international trade policy has significant domestic effects, resulting in a weaker linkage to the typical justifications for executive control over foreign affairs.<sup>47</sup> Louis Fisher contends that a clear line between foreign and do-

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44. Even in partisan contexts, voters can develop reasoned policy views with more policy information. See Cheryl Boudreau & Scott A. MacKenzie, *Informing the Electorate? How Party Cues and Policy Information Affect Public Opinion About Initiatives*, 58 AM. J. POL. SCI. 48, 60 (2014); John G. Bullock, *Elite Influence on Public Opinion in an Informed Electorate*, 105 AM. POL. SCI. REV. 496, 512-13 (2011).

45. See PAGE & SHAPIRO, *supra* note 8, at 364.

46. See KOH, *supra* note 22, at 204-06 (arguing that interbranch friction in foreign affairs promotes the Constitution's vision of separation of powers).

47. For a more extended discussion of this point, see Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 48-51), <https://ssrn.com/abstract=3136086> (outlining the “domestic economics” and “foreign affairs” paradigms of trade law and arguing that, while the latter paradigm has dominated since the mid-twentieth century, trade law has become increasingly divisive and contentious since the Cold War).

mestic affairs has never existed.<sup>48</sup> At the very least, foreign affairs and the domestic economy are closely connected and becoming more so.<sup>49</sup> This shift has begun to erode the justifications for the treatment of foreign policy as an exceptional area under executive control.<sup>50</sup> Trade is at the forefront of this shift. Rather than being concerned with the relationships among sovereigns, modern trade agreements focus on regulations traditionally understood as domestic in nature, such as environmental and labor standards.

Second, an executive with unilateral authority over foreign affairs is neither inevitable nor constitutionally required. Such a position ignores the text of the Constitution, such as Congress's express power "[t]o regulate Commerce with foreign Nations."<sup>51</sup> As political scientist Edward Corwin noted, "the Constitution . . . is an invitation to struggle for the privilege of directing American foreign policy."<sup>52</sup> Congress and the public have begun to dispute the President's unilateral authority. For example, Congress prohibits providing direct assistance to a foreign government if its democratic government has been overthrown by a military coup.<sup>53</sup> When the Obama Administration attempted to avoid this restriction by not declaring formally that a coup had occurred in Egypt in 2013, critical media coverage forced (at least partial) compliance with the statute.<sup>54</sup>

### *B. Influential Private Interests*

The executive branch's increasing influence over trade policy is particularly concerning given industry's influence over USTR—the agency that advises the President on trade policy—and the content of trade agreements. This influence threatens the democratic legitimacy of the trade system by elevating corporate interests over those of the American public and leading to policy with negative distributional consequences for workers. The Trade Act of 1974 requires the executive branch to consult with Industry Trade Advisory Committees (ITACs) of

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48. LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 307 (2014); *see also* KOH, *supra* note 22, at 211 (arguing that foreign affairs has never been a "realm apart . . . [where] checks and balances [do] not apply").

49. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997).

50. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

51. U.S. CONST. art. I, § 8, cl. 3.

52. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 200 (2d ed. 1941).

53. *See* Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 HARV. L. REV. 2499, 2502-03 (2014).

54. *Id.* at 2508-09.

private-sector advisors during negotiations over trade agreements.<sup>55</sup> The ITACs have outsized influence in the negotiating process. During negotiations over the TPP, for example, ITAC members had access to proposed drafts—even when members of Congress and their staff did not.<sup>56</sup> Nearly six hundred industry executives and lobbyists had extensive access to and influence over the draft text of the TPP.<sup>57</sup> ITACs’ membership also privileges particular industries such as pharmaceuticals and financial services.<sup>58</sup> ITACs’ involvement thus entangles private interests with those of USTR and the President.<sup>59</sup>

This influence leads to negotiating positions and outcomes that prioritize special interests. During TPP negotiations, for example, USTR produced proposals highly protective of pharmaceutical patents.<sup>60</sup> These provisions would have strengthened pharmaceutical monopolies, granted intellectual property rights holders the power to sue sovereign governments for lost future profits,

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55. 19 U.S.C. § 2155 (2018); *Industry Trade Advisory Center*, INT’L TRADE ADMIN., <https://www.trade.gov/itac> [<https://perma.cc/VB56-GS4J>].
  56. 161 CONG. REC. S3210 (daily ed. May 21, 2015) (statement of Sen. Warren) (describing how members of Congress had limited access to the text of TPP and how even those who had access were subject to limitations on public disclosure); William New, *Confidential USTR Emails Show Close Industry Involvement in TPP Negotiations*, INTELL. PROP. WATCH (May 6, 2015), <http://www.ip-watch.org/2015/06/05/confidential-ustr-emails-show-close-industry-involvement-in-tpp-negotiations> [<https://perma.cc/6ZKH-VW42>].
  57. George Zornick, *Congress Is Sick of the Secrecy Around the TPP*, NATION (Aug. 20, 2015), <https://www.thenation.com/article/congress-is-sick-of-the-secrecy-around-tpp> [<https://perma.cc/492T-R5LB>].
  58. Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees>. The influence that these particular industries exert over American policy is well documented. See, e.g., Theodore T. Lee et al., *The Politics of Medicare and Drug-Price Negotiation (Updated)*, HEALTHAFFAIRS (Oct. 20, 2016), <https://www.healthaffairs.org/doi/10.1377/hblog20160919.056632/full> [<https://perma.cc/3FZ9-F64Z>]; Gautam Mukunda, *The Price of Wall Street’s Power*, HARV. BUS. REV. (June 2014), <https://hbr.org/2014/06/the-price-of-wall-streets-power> [<https://perma.cc/N4M2-PWUE>].
  59. Adkins & Grewal, *supra* note 19, at 1515; see also Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 988-1005, 1015-31 (2014) (discussing the influence of private interests on intellectual property law in U.S. trade agreements); Meyer & Sitaraman, *supra* note 47 (manuscript at 50) (arguing that private interests’ “privileged access translate[s] into privileged outcomes”).
  60. Brook K. Baker, *Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*, PLOS MED. 2 (Mar. 8, 2016), <https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1001970&type=printable> [<https://perma.cc/X3HA-HTWG>].

and given industry opportunities to influence and challenge government decisions whether to reimburse for pharmaceuticals and medical devices; the result would have reduced global access to medicines.<sup>61</sup>

This private influence is particularly concerning when corporate interests pursue what they cannot achieve domestically through international law. One TPP provision proposed by USTR—a twelve-year data exclusivity period for biologic drugs—was even inconsistent with President Obama’s budget, which proposed decreasing the U.S. data exclusivity period to seven years.<sup>62</sup> Although some of these provisions were not included in the final negotiated text of the TPP,<sup>63</sup> USTR pursued similar provisions in NAFTA renegotiations.<sup>64</sup> The NAFTA text signed by President Trump in November 2018 included a ten-year data exclusivity period.<sup>65</sup>

Access to USTR and proposed text allows special interests to use the operations of the trade regime to their advantage by capturing trade policy within the executive branch.<sup>66</sup> This dynamic contrasts with other contexts like the budget, where broad public access to proposals and objective analysis can balance the lobbying power of special interests. Although equity and distribution do not always triumph in domestic budgeting or tax, advocacy organizations and think

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61. *Id.* at 3-5.

62. Amy Kapczynski, *The Trans-Pacific Partnership—Is It Bad for Your Health?*, 373 *NEW ENG. J. MED.* 201, 202 (2015). Some attempts to extend market exclusivity can violate antitrust law. *See, e.g.*, *FTC v. Actavis, Inc.*, 570 U.S. 136, 147-48 (2013); Cecilia (Yixi) Cheng & Theodore T. Lee, *When Patents Are Sovereigns: The Competitive Harms of Leasing Tribal Immunity*, 127 *YALE L.J.F.* 848 (2018), <http://www.yalelawjournal.org/forum/when-patents-are-sovereigns> [<https://perma.cc/LX9P-AAF3>] (arguing that attempts to use tribal sovereign immunity to shield patents from challenge and extend market exclusivity violate antitrust law). However, existing antitrust doctrine generally shields lobbying from liability. *See, e.g.*, *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

63. *See TPP Final Table of Contents*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/BY66-2QBW>].

64. *See Renegotiating NAFTA: Threats to Affordable Medicines*, PUB. CITIZEN (Mar. 23, 2018), [https://www.citizen.org/sites/default/files/a2m\\_nafta\\_fact\\_sheet.pdf](https://www.citizen.org/sites/default/files/a2m_nafta_fact_sheet.pdf) [<https://perma.cc/KH49-9TEB>].

65. Alexander Bolton, *Trump’s New NAFTA Faces Uphill Battle in Congress*, HILL (Dec. 1, 2018, 7:45 PM ET), <https://thehill.com/policy/finance/trade/419222-trumps-new-nafta-faces-uphill-battle-in-congress> [<https://perma.cc/WJ8E-2NGR>].

66. *See Kaminski, supra* note 59, at 992-1003 (describing how private industry can use access and relationships to capture the U.S. trade regime, which is vulnerable due to its lack of procedural and transparency protections).

tanks can at least put political pressure on Congress to consider these values when legislating.

Broader access to information about trade policy could involve groups that are currently excluded but would provide a countervailing force to the ITACs. These groups could influence congressional votes or demand domestic distributional legislation as a condition for supporting an international trade agreement. Because members of Congress are beholden to more local interests, these interests—such as labor unions and small businesses—may have a better chance of gaining political influence through one of the 535 voting members of Congress than through the executive branch.<sup>67</sup> This pluralistic balance could prevent the dominance of large corporate interests or at least mitigate their preferred policies and alleviate concerns about private capture.

Some may argue against increased congressional influence on public-choice grounds, worrying that Congress has little incentive to fix the trade system. Congress may avoid accountability for trade policy just as easily as the President and is subject to manipulation by the same special-interest groups. However, I argue that an expert congressional body mitigates these concerns: COTA could help members win reelection by highlighting opportunities to aid in redistribution to their constituents and exposing the process to a different set of interest groups, who may themselves promote redistribution efforts or who will, at the very least, balance industry lobbying.

Proponents of public choice might argue that Congress will shirk a greater role in trade policy making because trade policy can yield diffuse benefits and concentrated harms. The public-choice economic model assumes that political actors are primarily self-interested. One assumption underlying this model is that legislators' primary motivation is reelection.<sup>68</sup> In theory, legislators want to avoid being accountable for laws and policies that harm interest groups that may retaliate. Congress therefore prefers to pass laws with concentrated benefits and diffuse costs (such as channeling tax breaks or grants to constituents), and to

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67. Meyer & Sitaraman, *supra* note 47 (manuscript at 44-45).

68. See MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 37-66 (2d ed. 1989); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 11-77 (1974). It is important to note that public choice has its limits. In their review of the empirical evidence, Daniel Farber and Philip Frickey conclude that the economic view does not fully explain legislator behavior. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-33 (1991). Legislators often have motivations other than reelection, such as public service, personal aggrandizement, or ideology. See RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1-15 (1973).

not pass laws with diffuse benefits and concentrated harms (such as taking action in foreign policy).<sup>69</sup>

My response to the public-choice counterargument is that in today's globalized world, a self-interested Congress has an incentive to anticipate the potential future preferences of voters and rely on an expert body on trade. R. Douglas Arnold argues that members of Congress not only respond to existing policy preferences but also anticipate the opinions that citizens might hold in the future.<sup>70</sup> Trade has become one of the country's most salient economic issues. Because Congress cannot delegate all trade decisions to the executive, and voters may not distinguish between the two branches' policies without additional information, future voters may retaliate against legislators for what they perceive to be negative trade outcomes. This creates an incentive for Congress to support a body that provides reliable information on trade policy.

Such a body may help members of Congress win reelection by helping them identify the constituents and industries that will be hurt by trade. Legislators can then channel benefits to these groups to mitigate trade's negative effects, offsetting the risk to reelection. Information about how trade policy is affecting jobs (as opposed to trends such as automation) may also give members of Congress the opportunity to shift blame credibly from trade policy to other factors. Members of Congress that represent those hurt by trade can then negotiate with colleagues. Practically speaking, members' power to forge deals will vary depending on political dynamics; however, when their votes are key to passage these members can use their leverage to seek mitigating actions. Although Congress may not have an incentive to participate in all areas of the international sphere, additional information can prevent trade policy from becoming a liability in future elections.

Even though Congress itself is also subject to special interests, a greater role for the legislative branch could ultimately provide a counterweight to the ITACs. The reality in modern international negotiations is that Congress has little influence in the final text of trade agreements, so there is little threat Congress will add giveaways to specific interests to an agreement itself. A more likely consequence is that smaller constituencies not currently represented in trade policy making would have the opportunity to influence congressional votes or demand domestic distributional legislation as part of a legislative package that includes the international agreement.

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69. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-89 (1988); see also I.M. DESTLER, AMERICAN TRADE POLITICS 14-16 (4th ed. 2005) (describing congressional delegation of trade policy making to overcome this problem).

70. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 10-11 (1990).



### C. *Little Democratic Accountability*

The trade policy-making system ultimately suffers from a lack of democratic accountability. In this context, a democratically accountable system is one in which voters can meaningfully influence the policy process so that it produces outcomes that further their goals. This definition of democratic accountability relies on what political scientists Benjamin Page and Robert Shapiro call “collective deliberation,” a system in which the public uses information and helpful interpretations to form policy preferences that correspond to its needs and values.<sup>71</sup> Democratic accountability requires voters to have (1) actionable information that allows them to evaluate whether elected officials are acting in their interest;<sup>72</sup> and (2) the opportunity to affect policy outcomes.

In the American collective-deliberation system, organizations such as government bodies, universities, think tanks, and private industry produce relevant information and analyses.<sup>73</sup> Another set of individuals and organizations interprets this information, which is then transmitted to the public by mass media and through social networks.<sup>74</sup> The public can then base its votes on accurate, independent information about the policies that candidates support, rather than empty promises about those policies’ effects. Political science research demonstrates that policy information helps voters make better choices—even in partisan environments.<sup>75</sup> This information thus exposes and punishes policies that are hypocritical or irrational.

Our current trade policy-making process, however, suffers from a structural failure of democratic accountability: traditional means of holding politicians accountable—such as public deliberation, elections, and partisan friction—are inadequate without sufficient information. Although Congress has attempted to combat this problem by conditioning fast-track approval on executive compliance, these efforts have largely been ineffective.<sup>76</sup> Moreover, these provisions do not help the public understand the effects of international commercial agreements or hold Congress accountable for their votes.

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71. PAGE & SHAPIRO, *supra* note 8, at 363, 365.

72. *Id.* at 363 (“The point of democracy is not merely responsiveness of government policy to citizens’ preferences but responsiveness to *well-informed* preferences, which accurately reflect the basic needs and values of the citizenry.”).

73. *Id.* at 364.

74. *Id.* at 364-65.

75. Boudreau & MacKenzie, *supra* note 44; Bullock, *supra* note 44.

76. See *supra* Section II.A.

The public can typically engage in policy making through real-time monitoring. For example, constituents can effectively pressure members of Congress by showing up to town halls, calling members' offices, and protesting.<sup>77</sup> However, uncertainty about the effects of trade, coupled with inadequate time for analysis and dissemination, prevents the public understanding required for public engagement. The latest fast-track reauthorization requires publication of negotiated text before the President enters into an agreement.<sup>78</sup> However, transparency postnegotiations cannot help the public influence the negotiations themselves.

To hold members of Congress accountable through elections, the public must understand what Congress voted for and how such policies led to certain outcomes. Recent empirical work suggests that information about the distributional effects of trade barriers can help achieve this accountability.<sup>79</sup> However, an election devoid of information about candidates' and parties' performances fails to provide accountability. Because trade policy is complex and information about its outcomes scarce, elections alone are insufficient in the current policy-making process. Although President Trump was elected in part because of his opposition to trade liberalization, his victory will not necessarily result in the pursuit of policies that will benefit his anti-trade liberalization voters. Election winners must continue to be subjected to discipline at the ballot box, which requires information about their performance.<sup>80</sup>

Finally, we cannot rely on the party system to ensure accountability. Increasing partisanship in American politics may lead to a focus on the roles of parties rather than the balance of power between branches.<sup>81</sup> One could argue that the

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77. See *Indivisible: A Practical Guide for Resisting the Trump Agenda*, INDIVISIBLE 3, 10-11, 16-25 (2017), <https://www.indivisible.org/resource/guide-english-pdf/wpdmml=1777> [<https://perma.cc/4KGT-XBNK>].

78. 19 U.S.C. § 4205 (2018).

79. See generally Sungmin Rho & Michael Tomz, *Why Don't Trade Preferences Reflect Economic Self-Interest?*, 71 INT'L ORG. SUPPLEMENT S85 (2017) (finding that information about trade's distributional effects makes people more likely to express self-serving policy preferences and more sensitive to the needs of others).

80. *Id.* at S91-102 (showing that many voters are not aware of the economic effects of trade policy and that their preferences change when informed); cf. Bradley & Goldsmith, *supra* note 17, at 1284-85 (discussing the impact of electoral incentives and public attention on Congress's oversight of the President).

81. When the government is unified under one party, competition between the executive and legislative branches "may all but disappear," requiring reconsideration of separation-of-powers doctrine and theory. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

increasing prevalence of straight-ticket voting<sup>82</sup> links the electoral chances of the two branches, making democratic accountability in both political branches moot. However, members of Congress often disagree with the foreign policy of presidents from their own party. During the Obama Administration, rifts opened between many Democratic senators and the President on foreign policy.<sup>83</sup> Democratic Senators Elizabeth Warren<sup>84</sup> and Bernie Sanders<sup>85</sup> were outspoken critics of the TPP. President Trump has also faced criticism from Republican members of Congress for his foreign policy positions and conduct.<sup>86</sup> Since party identification does not always predict positions on trade, we should distinguish between the branches when evaluating accountability for trade policy.

Although public dissemination of information is critical to democratic accountability, some commentators argue that trade policy should be subject to strict secrecy.<sup>87</sup> The first worry is that disclosures to Congress and the public may reveal negotiation positions and strategies, thereby handicapping USTR negotiators. The second worry is that more transparency will chill negotiations. In theory, confidentiality lubricates negotiations by allowing parties to discuss potential positions without justifying these decisions to the public before they are final.

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82. See Amber Phillips, *Is Split-Ticket Voting Officially Dead?*, WASH. POST: FIX (Nov. 17, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/is-split-ticket-voting-officially-dead> [<https://perma.cc/9QC7-DDSL>].
83. Jackson Diehl, Opinion, *Obama's Fight with His Own Party over Foreign Policy*, WASH. POST (Feb. 1, 2015), [https://www.washingtonpost.com/opinions/jackson-diehl-obamas-fight-with-his-own-party-over-foreign-policy/2015/02/01/10ecec938-a7e4-11e4-a2b2-776095f393b2\\_story.html](https://www.washingtonpost.com/opinions/jackson-diehl-obamas-fight-with-his-own-party-over-foreign-policy/2015/02/01/10ecec938-a7e4-11e4-a2b2-776095f393b2_story.html) [<https://perma.cc/FB85-ATH2>].
84. Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html) [<https://perma.cc/S6MQ-2YH4>].
85. Bernie Sanders, *The TPP Must Be Defeated*, HUFFPOST: BLOG (May 21, 2016), [http://www.huffingtonpost.com/rep-bernie-sanders/the-tpp-must-be-defeated\\_b\\_7352166.html](http://www.huffingtonpost.com/rep-bernie-sanders/the-tpp-must-be-defeated_b_7352166.html) [<https://perma.cc/SU9X-VPSX>]. Though technically an independent, Senator Sanders caucuses with the Democratic Party.
86. See, e.g., Aaron Blake, *John McCain Just Systematically Dismantled Donald Trump's Entire Worldview*, WASH. POST: FIX (Feb. 17, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/17/john-mccain-just-systematically-dismantled-donald-trumps-entire-worldview> [<https://perma.cc/6GNH-CBVF>]; *Sasse Statement on Steel and Aluminum Tariffs*, U.S. SENATOR FOR NEB. BEN SASSE (Mar. 8, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/3/sasse-statement-on-steel-and-aluminum-tariffs> [<https://perma.cc/86TX-HTX2>].
87. See, e.g., Benjamin A. Field & Kian J. Hudson, *The Bonds of Peace: A Defense of the National Security Perspective on Trade*, 42 N.C. J. INT'L L. 307, 341, 362-63 (2017).

The first worry overstates the existence of secrecy in actual trade negotiations. Advocates for greater transparency have focused primarily on access to draft language. Because USTR's foreign counterparts already have access to draft language, releasing this draft text—as opposed to negotiators' notes or strategies—would not undermine the United States' negotiating position relative to its foreign counterparts.<sup>88</sup> Special interests such as ITACs' membership of nearly six hundred industry executives and lobbyists have also had broad access to text during negotiations.<sup>89</sup> Moreover, partners such as the European Union voluntarily release information about their proposals and negotiating positions.<sup>90</sup> This information is not “secret” but instead hidden in the U.S. system from members of Congress and, derivatively, the general public.

The second worry assumes that confidentiality in trade negotiations promotes agreement. However, this argument misses the point. Secrecy's benefits arise primarily by excluding the public's input, which reduces the ability of the public to check special interests. Lubrication is only positive insofar as the machinery of the trade policy-making system produces outcomes consistent with the public's preferences. Secrecy may also be unnecessary for agreement. This debate stretches back to the Founding. While Publius recognized the need for secrecy in all treaty negotiations,<sup>91</sup> the Federal Farmer drew a distinction between “treaties of peace and alliance,” which benefit from secrecy but do not interfere with domestic laws, and “commercial treaties,” which do not require secrecy.<sup>92</sup> Many modern commentators remain unconvinced that all trade

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88. See Meyer & Sitaraman, *supra* note 47 (manuscript at 42-43).

89. See *supra* Section II.B.

90. Margot E. Kaminski, *Don't Keep the Trans-Pacific Partnership Talks Secret*, N.Y. TIMES (Apr. 14, 2015), <https://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html> [<https://perma.cc/D6U8-2M38>]; see, e.g., *EU Negotiating Texts in TTIP*, EUROPEAN COMMISSION (July 27, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230> [<https://perma.cc/UH84-W6NS>]. It is insufficient, however, for U.S. media and advocacy groups to rely exclusively on the European Union's transparency policy since the European Union is only one of many trade partners. Congressional influence over U.S. trade policy generally would therefore require disclosures by the executive branch.

91. THE FEDERALIST NO. 64, *supra* note 16, at 360 (“It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite.”).

92. Federal Farmer, Letter XI (Jan. 10, 1788), in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 301, 308-310 (John P. Kaminski & Gaspare J. Saladino eds., 1995); see also Meyer & Sitaraman, *supra* note 47 (manuscript at 41-42).

agreements should be protected by high levels of secrecy.<sup>93</sup> Given their resemblance to domestic legislation, modern trade agreements could be subjected to increased transparency without endangering national security.<sup>94</sup>

Traditional mechanisms of democratic accountability have failed. We need a new institution to galvanize the public to pressure Congress to act. Without COTA, the public will continue to lack the information necessary to mobilize.

#### *D. Why Powerful Executives Do Not Provide Accountability*

Even in the best of times, democratic accountability for the President is insufficient to address these pathologies. As I discuss below, the President represents a smaller proportion of the American public than does Congress as a whole due to the vagaries of the Electoral College. Moreover, the President cannot protect the regional interests that the Founders intended to serve and is particularly unaccountable for his or her trade policy given the lack of judicial review in this context.

Admittedly, there are some benefits to the trade policy-making system's installation of a powerful executive. As then-Professor Elena Kagan famously argued, "presidential administration" can make the federal government more effective and accountable.<sup>95</sup> In the context of foreign relations, the argument for executive control is often even stronger, given the branch's intelligence and diplomacy apparatuses as well as the expertise of the federal bureaucracy.<sup>96</sup> The President can often act more quickly, with greater flexibility, and in a manner that preserves secrecy.<sup>97</sup> While these points may be well taken with respect to the administrative state, they do not overcome the pathologies of the current trade policy-making system.

National democratic accountability is far from assured. The President does not always serve broad national interests and may in fact "cater to a narrower

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93. See, e.g., Meyer & Sitaraman, *supra* note 47 (manuscript at 42-43); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2241 & n.85 (1999).

94. Sitaraman & Wuerth, *supra* note 50, at 1940-42.

95. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-46 (2001).

96. See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608-09 (2016).

97. See *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) ("Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'" (quoting THE FEDERALIST NO. 70, *supra* note 16, at 392 (Alexander Hamilton))).

geographic and population constituency than . . . Congress.”<sup>98</sup> The Electoral College and winner-take-all elections have allowed Presidents such as President George W. Bush and President Trump to win elections without winning the popular vote. Accordingly, Presidents are likely to cater to their winning coalitions and have little incentive to expand their coalition beyond the necessary minimum.<sup>99</sup> Even when the President has a national coalition, the difficulty of demanding justifications for presidential actions and the lack of meaningful choices in presidential elections tend to erode accountability for any particular policy.<sup>100</sup> After all, the President and Vice President are the only elected members of the executive branch, and they do not face reelection concerns during the second term.

Moreover, the Founders did not intend for trade policy to favor purely majoritarian interests. Instead, the Founders intended for trade policy to serve the American public through the protection of regional interests, even when those interests were in the minority. Defending the supermajoritarian treaty requirement in *Federalist 64*, John Jay, writing as Publius, argued that “the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole.”<sup>101</sup> Publius’s theory was that the high bar for treaties would prevent one region’s economic interests from dominating another’s. The President, however, unlike a Senate composed of representatives of all the states, cannot adequately reflect all regional interests. The shift toward less congressional involvement has thus abandoned the original understanding of treaties, which were supposed to be difficult to pass since they allowed a minority who would experience a concentrated harm to object.<sup>102</sup>

Finally, presidential control of foreign affairs lacks many of the accountability mechanisms available in other contexts. Curtis Bradley and Jack Goldsmith point out that similar arguments about executive-branch efficiency are made in the context of administrative law, but executive agencies have long faced criticism about their accountability.<sup>103</sup> To address these concerns, Congress has con-

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98. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1217 (2006); see *id.* at 1232-46.

99. See WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 42-46 (1962).

100. See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

101. THE FEDERALIST NO. 64, *supra* note 16, at 363; see Adkins & Grewal, *supra* note 19, at 1505.

102. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 191 (2005) (characterizing Article II’s supermajoritarian requirement as a safeguard for regional minorities).

103. Bradley & Goldsmith, *supra* note 17, at 1281; see also Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 441 (2003) (citing Ralph Nader’s criticism of agencies as having failed to promote public safety and as subject to regulatory capture).

strained executive power in administrative law and created opportunities for judicial review.<sup>104</sup> Because international law lacks such constraints and information about the effects of presidential control is scarce, Congress may struggle to determine which constraints to employ.<sup>105</sup>

Although executive accountability has long been absent from U.S. trade policy and past Presidents have taken significant unilateral action on trade, the unorthodox Trump Presidency has thrown this lack of oversight into sharp relief. Many of President Trump's actions on trade – such as attempting to renegotiate trade deals,<sup>106</sup> imposing protectionist tariffs,<sup>107</sup> and threatening to withdraw from the World Trade Organization<sup>108</sup> – appear designed to appeal to his electoral base rather than serve the national interest. These actions threaten irreparable damage to the international trade system and America's diplomatic relationships, jeopardizing long-term economic growth.<sup>109</sup> These policies are also highly unlikely to deliver redistribution to the President's base.<sup>110</sup> Although redistribution was the purported motivation for these actions, support among President Trump's base remains high, and he may win reelection.<sup>111</sup> Increased congressional influence would increase the ability to inform the public about this disconnect between what a President might promise and then subsequently fail to deliver.

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104. See, e.g., Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

105. See Bradley & Goldsmith, *supra* note 17, at 1281-82.

106. See, e.g., Binyamin Appelbaum & Glenn Thrush, *Trump's Day of Hardball and Confusion on Nafta*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/us/politics/trump-says-he-will-renegotiate-nafta-or-terminate-it.html> [<https://perma.cc/Q8AL-9HRB>]; Bolton, *supra* note 65; see also Palmer & McClure, *supra* note 5 (cataloging trade agreements that President Trump has broken or threatened to break).

107. See sources cited *supra* note 5.

108. E.g., Jonathan Swan, *Scoop: Trump's Private Threat to Upend Global Trade*, AXIOS (June 29, 2018), <https://www.axios.com/trump-threat-withdraw-wto-world-trade-organization-f6ca180e-47d6-42aa-a3a3-f3228e97d715.html> [<https://perma.cc/M7WD-3MWZ>].

109. WORLD BANK GRP., *supra* note 6, at 35-36; Boumans & Krolage, *supra* note 6.

110. Bomey, *supra* note 7; Imbert, *supra* note 7; Wiener-Bronner, *supra* note 7.

111. See Heather Long & Scott Clement, *Trump Voters Hit Hard by Tariffs are Standing by Him – for Now*, WASH. POST: WONKBLOG (July 12, 2018), <https://www.washingtonpost.com/business/2018/07/12/trump-voters-hit-hard-by-tariffs-are-standing-by-him-now> [<https://perma.cc/S62U-BBB6>]; see also Nelson D. Schwartz, *Tariffs Trim a Factory's Profit, but Loyalty to Trump Endures*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/business/economy/trade-factory-trump.html> [<https://perma.cc/YQ25-MQM6>] (describing the view among Americans harmed by President Trump's trade policies that personal sacrifice is worth "what's best" for the national economy).

From both a policy and an accountability perspective, these decisions are deeply troubling. Today, it is clear that powerful executives are largely not subject to checks in trade. President Trump has promised outcomes through policies that experts agree will produce the opposite effects. Even if President Trump does not win reelection or a subsequent President reverses his policies, the international trade system and the U.S. economy will likely suffer long-term damage.<sup>112</sup> A policy-making process that allows these outcomes cannot be democratic or just. The system must build the political will for policies that actually respond to voters' desires.

### III. REFORMING TRADE POLICY MAKING

The pathologies in the trade policy-making system have led to policies inconsistent with worker preferences. As a result, Americans have opposed international trade or resigned themselves to harmful executive policies unchecked by Congress. This Part proposes a different way forward. To build broader support for trade policy that is democratically accountable, Congress should create a nonpartisan, independent advisory body for trade policy analysis: COTA. The secondary benefits of this body may include the formation of better trade deals *ex ante* while also supporting the development of redistribution and active labor-management policies *ex post*. This proposal draws on congressional-support bodies such as the staff of the Joint Committee on Taxation (JCT) and CBO. Through these bodies, Congress has been able to enhance its capacity and engage the public in understanding how policy connects to outcomes. A similar body for international trade has the potential to give Congress more influence in trade negotiations and enhance democratic accountability.

Although information alone will not solve the democratic deficit in trade policy making, the body I propose is an important step in building the political will for ensuring that such policy making is accountable and equitable. This advisory body could galvanize the public behind sound, equitable trade policy, putting external pressure on Congress to rein in the executive branch's excesses and redistribute the economic gains from trade.

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112. See Peter Coy, *Trump's Damage to International Trade Will Take Years to Repair*, BLOOMBERG BUSINESSWEEK (July 19, 2018, 4:00 AM EDT), <https://www.bloomberg.com/news/articles/2018-07-19/trump-s-damage-to-international-trade-will-take-years-to-repair>; Kyle Handley, *Here's the Real Economic Damage from Trump's Growing Trade 'Cold War'*, CNBC (Mar. 14, 2018, 3:35 PM ET), <https://www.cnbc.com/2018/03/14/trumps-trade-cold-war-will-have-disastrous-economic-consequences-commentary.html> [<https://perma.cc/22VA-DKBL>].



*A. Current Redistribution Policy's Limits*

Attempts to redistribute trade-policy gains have focused on the policy's consequences rather than incorporating redistribution mechanisms into the trade-policy system itself. Since its creation in 1962, the TAA program has been the primary form of compensating workers for trade-related harms. Groups of three or more workers employed by the same firm who lose or expect to lose their jobs because of import competition can apply to the Secretary of Labor for benefits.<sup>113</sup> The Secretary then determines whether the workers are eligible for benefits, such as worker training, wage, and relocations supports.<sup>114</sup>

Yet Congress has failed to provide adequate support for TAA. The TAA program is persistently underfunded<sup>115</sup> and has to be periodically renewed (unlike the trade deals whose effects it is intended to mitigate).<sup>116</sup> Despite intensifying pressures on workers,<sup>117</sup> during the most recent reauthorization in 2015 Congress reduced the statutory cap on TAA funding for reemployment services from \$575 million per year to \$450 million per year.<sup>118</sup> Compared to other developed countries, the United States funds adjustment assistance at much lower levels and spends less of those funds on effective policies.<sup>119</sup> Moreover, TAA may not work very well as an employment program.<sup>120</sup> Some research suggests that TAA

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113. 19 U.S.C. § 2271(a) (2018).

114. *Id.* § 2272.

115. Frank J. Garcia & Timothy Meyer, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 90 (2018).

116. Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 1011 (2017).

117. See, e.g., Autor et al., *supra* note 2, at 206 (discussing difficulties in low-skill employment and pay prospects).

118. Emp't & Training Admin., *Side-by-Side Comparison of TAA Program Benefits Under the 2002 Program, 2009 Program, 2011 Program, and 2015 Program*, U.S. DEP'T LAB. 2 (Nov. 9, 2015), <https://www.doleta.gov/tradeact/pdf/side-by-side.pdf> [<https://perma.cc/A5FS-7KQC>].

119. See David Card et al., *What Works? A Meta Analysis of Recent Active Labor Market Program Evaluations* (Nat'l Bureau of Econ. Research, Working Paper No. 21431 2015), <https://www.nber.org/papers/w21431.pdf> [<https://perma.cc/7ASU-TJWF>]; *Active Labour Market Policies: Connecting People with Jobs*, ORG. ECON. CO-OPERATION & DEV., <http://www.oecd.org/employment/activation.htm> [<https://perma.cc/37ME-Y56U>].

120. TAA may be more successful as a compensation program. See Tom DiChristopher, *Sizing Up the Trade Adjustment Assistance Program*, CNBC (June 26, 2015, 1:54 PM ET), <https://www.cnbc.com/2015/06/26/is-aid-to-trade-displaced-workers-worth-the-cost.html> [<https://perma.cc/4JSB-SJKF>].

participants have worse employment and wage outcomes relative to similarly situated, TAA-ineligible workers.<sup>121</sup>

Scholars have proposed policies to improve TAA and redistribute the gains from trade, such as improving the administrative process to apply for and receive TAA benefits,<sup>122</sup> expanding TAA benefits and funding these benefits through a financial-transactions tax,<sup>123</sup> and requiring developed countries to address domestic inequality in future trade agreements.<sup>124</sup> One could also imagine a system that taxes the winners from trade and transfers those gains to the losers.<sup>125</sup>

Each of these policies proposes redistribution but fails to address why this redistribution has not occurred. TAA's failure demonstrates that postnegotiation redistribution will never fully address workers' needs. TAA receives support from both antitrade and protrade legislators.<sup>126</sup> Yet its persistent underfunding suggests the current system produces symbolic restitution rather than adequate compensation. A true commitment to American workers, as opposed to political expediency, would entail much more generous benefits for individuals and efforts to promote economic development in communities affected by trade. Such efforts would likely include both monetary support and active government efforts to promote a healthy labor market. Empirical evidence suggests that active labor-management programs—such as job training, job-search assistance, and subsidized employment—can effectively reduce unemployment.<sup>127</sup> However, Congress currently lacks the incentives to pass such programs or otherwise increase its efforts to mitigate the negative effects of trade policy after its adoption

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121. See Sarah Dolfin & Peter Z. Schochet, *Estimated Impacts for Participants in the Trade Adjustment Assistance (TAA) Program Under the 2002 Amendments*, MATHEMATICA POL'Y RES., at i-ii (2012), <https://www.mathematica-mpr.com/download-media?MediaItemId={7AFC8CC7-63C8-454C-A92C-57D5828EA1BA}> [<https://perma.cc/K2KZ-XB3W>]; see also Kara M. Reynolds & John S. Palatucci, *Does Trade Adjustment Assistance Make a Difference?*, 30 CONTEMP. ECON. POL'Y 43 (2011) (finding that, on average, TAA had no discernible impact on the employment outcomes of the TAA beneficiaries within the dataset).
122. See, e.g., William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 HOUS. J. INT'L L. 1, 50-60 (2007).
123. See, e.g., Garcia & Meyer, *supra* note 115, at 87-89, 93.
124. See, e.g., Meyer, *supra* note 116, at 1014-20 (proposing that trade agreements include binding commitments to increase spending on economic development that benefits those dislocated by the agreement).
125. A general tax-and-transfer policy may not gain as much public support as one that is perceived to serve a corrective purpose. See Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1105 (2016).
126. See Stephanie J. Rickard, *Compensating the Losers: An Examination of Congressional Votes on Trade Adjustment Assistance*, 41 INT'L INTERACTIONS 46, 49 (2015).
127. See Card et al., *supra* note 119.

because the public lacks reliable knowledge about the scope of the redistribution problem and how Congress can address it effectively. Accordingly, the public cannot easily hold Congress accountable for failing to address redistribution. This problem indicates not only a lack of political will, but also a structural failure in the trade policy-making system to produce that will.

To enhance democratic accountability and effectively redistribute the gains from trade consistent with popular desires, we must implement structural changes to our current system. For Congress to have the knowledge to balance redistribution and growth, it must be able to rely on objective, trustworthy analysis about the distributional effects of trade. For Congress to have the incentive to balance redistribution and growth, the Washington apparatus of think tanks, academic institutions, advocacy groups, and the media must have reliable, trusted analysis. By sharing analysis with the public, these groups could encourage voters to act in their rational best interests, pressuring Congress to address their concerns rather than offer empty promises.<sup>128</sup> Analysis would also empower certain members of Congress to demand significant mitigation and create an incentive for political parties to support redistribution in order to attract voters.

### *B. Precedents for a Congressional Office on Trade Analysis*

A new congressional-support agency that independently analyzes and evaluates trade policy could reshape the trade policy-making process. The benefits of such an agency are evident from the histories of the JCT and CBO, which were similarly created to provide neutral information to Congress and check executive authority.<sup>129</sup>

#### *1. The Creation of the JCT and CBO*

The JCT is an important source of nonpartisan tax analysis for Congress. Prior to the creation of the JCT, the Department of the Treasury leveraged its access to data, superior expertise, and large professional staff to direct the tax

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128. Rho & Tomz, *supra* note 79; see PAGE & SHAPIRO, *supra* note 8, at 353-54 (discussing a schematic model for demonstrating the various pathways by which public opinion is influenced); Boudreau & MacKenzie, *supra* note 44; Bullock, *supra* note 44.

129. See Carol H. Weiss, *Congressional Committees as Users of Analysis*, 8 J. POL'Y ANALYSIS & MGMT. 411, 417 (1989); George K. Yin, *Codification of the Tax Law and the Emergence of the Staff of the Joint Committee on Taxation* 3-4 (Va. Law & Econ. Research Paper No. 2017-20, Va. Pub. Law & Legal Theory Research Paper No. 2017-39, 2017), <https://ssrn.com/abstract=3008878>.

lawmaking process.<sup>130</sup> Congress, with its limited resources, was in the unenviable position of “mak[ing] somewhat uninformed choices between the Treasury’s position on proposed legislation and those of the private sector.”<sup>131</sup> One senator expressed concern that members of Congress were often “mere rubber stamps” for the Treasury’s preferred policies.<sup>132</sup> Over time, the JCT has evolved to become an independent source of ideas and information about tax legislation.<sup>133</sup>

CBO also arose out of a desire to check presidential power in spending. Responding to the financial burdens of World War I, Congress delegated the power to propose and submit an annual budget to the President.<sup>134</sup> To aid the President, the Act created the Bureau of the Budget, later renamed the Office of Management and Budget (OMB).<sup>135</sup> This delegation ceded significant spending control to the President, who could now set the domestic agenda through his budget.<sup>136</sup> Eventually, this led to executive/congressional friction over spending.<sup>137</sup> In an effort to reclaim power in budgeting, Congress introduced a congressional budget that would compete with the President’s in the Congressional Budget and Impoundment Control Act of 1974.<sup>138</sup> To give Congress the capacity to formulate this budget, the Act created CBO.<sup>139</sup> CBO estimates the budgetary effects of proposed legislation and provides information about policy reforms in different areas.<sup>140</sup>

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130. Yin, *supra* note 129, at 39-40.

131. *Id.*

132. *An Act to Reduce and Equalize Taxation, to Provide Revenue, and for Other Purposes: Hearing on H.R. 1 Before the S. Comm. on Finance, 69th Cong. 215 (1926)* (statement of Sen. Andrieus Jones).

133. See John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation*, 30 J. POL. 1046, 1058-62 (1968).

134. See Budget and Accounting Act of 1921 § 201, 31 U.S.C. § 1105 (2018) (original version at ch.18, § 201, 42 Stat. 20, 20-21 (1921)).

135. See *id.* § 207; see also HOWARD E. SHUMAN, *POLITICS AND THE BUDGET: THE STRUGGLE BETWEEN THE PRESIDENT AND THE CONGRESS* 25 (1984) (discussing the transition of the Bureau of the Budget to OMB, and the transfer of that office from the Department of the Treasury to the Executive Office of the President).

136. See SHUMAN, *supra* note 135, at 24-25.

137. See, e.g., LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 223-24 (6th ed. 2014) (describing a series of skirmishes between the Nixon Administration and Congress over impoundments).

138. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

139. *Id.* §§ 201-02, 88 Stat. at 302-05 (codified at 2 U.S.C. §§ 601-602 (2018)).

140. *Id.*

The state of our trade policy-making system resembles that of spending and tax policies prior to the institution of these congressional-support bodies. Congress is at a disadvantage relative to the President in trade policy and lacks the information and expertise required to monitor the executive branch. This has occurred because Congress has delegated much of its appointed power and abdicated responsibility for this area of law. However, the experience of the JCT and CBO also demonstrates that Congress can reclaim the initiative.

## 2. *Lessons from the JCT and CBO*

Congress's experience with the JCT and CBO suggests that a similar body providing technical advice on trade could (1) reduce its reliance on the executive branch for information and (2) promote democratic accountability. The JCT has transformed the tax-policy landscape, and CBO is one of the major successes of the 1974 Budget Act. By giving Congress and the public an independent source of information and policy analysis, the JCT and CBO have leveled the playing field between the executive and legislative branches on domestic issues.

Several factors have contributed to this success, and an effort to create a similar body for trade should replicate these factors. First, the work produced by the JCT and CBO is viewed as high-quality and nonpartisan.<sup>141</sup> Accordingly, members of Congress and their staff have felt comfortable relying on them. Second, the JCT and CBO have expanded Congress's technical capacity, allowing Congress to rely on their analysis rather than the executive's.<sup>142</sup> Third, both organizations have access to information and data from across the federal government, including executive-branch agencies.<sup>143</sup> Finally, the JCT and CBO are trusted because they are geographically closer to and professionally more aligned with the legislature.<sup>144</sup>

Perhaps most importantly, the JCT and CBO have also promoted democratic accountability. Although Congress's primary motivation in creating them was to increase its power over the executive branch, their creation engaged the public

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141. See SHUMAN, *supra* note 135, at 288 (“[CBO] has gained strength and credibility not only for the accuracy of its estimates but for the independence of its analysis and boldness and audacity of its presentation of budget alternatives. Whatever the criticisms, the annual cost of the agency is about the best and most productive [money] the government spends.”); Yin, *supra* note 129, at 38-39.

142. See Yin, *supra* note 129, at 41-45.

143. See 2 U.S.C. § 601(d)-(e); I.R.C. § 8023 (2018).

144. See PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE: HONEST NUMBERS, POWER, AND POLICYMAKING 2009-10* (2011); Yin, *supra* note 129, at 44.

in policy debates. Because the JCT and CBO make much of their analyses public,<sup>145</sup> they serve as sources of public information about the mainstream view on the budget and its economic effects. In particular, they transform complicated policy proposals into digestible information. For example, the JCT played a critical role in the public's understanding of the 2017 Republican tax plan.<sup>146</sup> Its analysis contributed to the public's understanding that the law primarily benefited the wealthy.<sup>147</sup>

Public-facing analysis of policy proposals can also affect political outcomes by putting external pressure on Congress. For example, CBO's analysis contributed to the demise of President Clinton's health-care reforms.<sup>148</sup> CBO determined that the plan would increase the deficit and showed that controversial aspects of the plan had a budgetary impact, allowing opponents to characterize it as an unwelcome federal expansion into health care.<sup>149</sup> More recently, CBO released analyses of the health plans proposed by President Trump and congressional Republicans in 2017. Those estimates suggested that upwards of twenty million Americans would lose health insurance over the next ten years and that premiums would increase.<sup>150</sup> These estimates galvanized public opposition against the bills and led to their rejection in the Senate.<sup>151</sup> In particular, these trustworthy estimates—amplified by media coverage—mobilized advocacy groups, think tanks, and academic institutions to force Congress to grapple with

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145. See 2 U.S.C. § 603 (permitting, in general, public access to CBO data and analysis); *Recent Publications*, JOINT COMMITTEE ON TAX'N, <https://www.jct.gov/publications.html> [<https://perma.cc/M7CP-55SR>].

146. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017). For an example of how CBO's analysis contributed to public understanding, see Jugal K. Patel & Alicia Parlapiano, *The Senate's Official Scorekeeper Says the Republican Tax Plan Would Add \$1 Trillion to the Deficit*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/interactive/2017/11/28/us/politics/tax-bill-deficits.html> [<https://perma.cc/4VQJ-HRLC>].

147. See, e.g., *Support for GOP Tax Plan Could Hurt Candidates, Quinnipiac University National Poll Finds; U.S. Voters Say 7-1 DACA Immigrants Should Stay*, QUINNIPAC U. POLL (Dec. 13, 2017), [https://poll.qu.edu/images/polling/us/us12132017\\_upil22.pdf](https://poll.qu.edu/images/polling/us/us12132017_upil22.pdf) [<https://perma.cc/L6DX-GA42>].

148. JOYCE, *supra* note 144, at 169-73.

149. *Id.* at 167-68, 172.

150. See *Congressional Budget Office Cost Estimate: H.R. 1628: Better Care Reconciliation Act of 2017*, CONG. BUDGET OFF. 4, 7-9 (June 26, 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/52849-hr1628senate.pdf> [<https://perma.cc/TT5L-ACN6>].

151. See, e.g., Amy Goldstein & Kelsey Snell, *Senate GOP Health-Care Bill Appears in Deeper Trouble Following New CBO Report*, WASH. POST (June 26, 2017), [https://www.washingtonpost.com/national/health-science/imminent-cbo-report-could-prove-pivotal-for-senate-republicans-health-care-bill/2017/06/26/cb8d61e2-59f7-11e7-a9f6-7c3296387341\\_story.html](https://www.washingtonpost.com/national/health-science/imminent-cbo-report-could-prove-pivotal-for-senate-republicans-health-care-bill/2017/06/26/cb8d61e2-59f7-11e7-a9f6-7c3296387341_story.html) [<https://perma.cc/6YPD-YM5L>].

the bills' trade-offs. If trade policies were subject to similarly rigorous analysis, the public would better understand their potential effects and be able to put pressure on Congress and the President to adopt policies beneficial to workers, who compose the vast majority of the voting public.

*C. A Proposal for Reform: The Congressional Office on Trade Analysis*

To balance the branches' decision-making authority in international trade and facilitate public dialogue of trade's effects, I propose that Congress commission a professional, independent, nonpartisan staff of experts to advise members on trade issues. This body, COTA, would estimate the economic effects of international commercial agreements and other areas of trade policy. These estimates would help achieve the goal of enhancing democratic accountability. In addition, COTA could lead to better trade policies *ex ante* and more effective redistribution *ex post*.

*1. COTA's Operations*

COTA would (1) advise Congress on proposed trade policies; (2) obtain information from the executive; (3) keep USTR honest; and (4) respond proactively to congressional needs. In each of these areas, COTA's operations would resemble the JCT's and CBO's functions.

*a. Advising Congress*

COTA would analyze proposed executive actions on trade. When the executive pursues a particular trade policy—whether negotiating an agreement, imposing tariffs, exiting an existing agreement, or bringing an action against another country for trade violations—COTA economists would conduct an independent quantitative analysis of the proposed action. Estimated effects would include outcomes like job gains and losses in different industries, changes to consumer prices, and total distributional impacts. Though initial estimates are likely to be rough, they would at least provide a directional estimate, and with adequate funding and the right personnel, COTA would build expertise over time. In addition to this quantitative analysis, COTA lawyers and policy experts could provide a qualitative analysis of the trade policies at issue.

This process would be iterative and involve multiple consultations between Congress and COTA. Congress would consult with COTA to determine what policies would result in desired outcomes, much the way it consults with the JCT and CBO on domestic policy. For example, while USTR is negotiating with its international counterparts, COTA could work with the agency to understand the

emerging contours of the agreement. COTA could then develop and disseminate early positions on draft language as it emerges, and update its analysis throughout the decision-making process. By increasing the availability of reliable information to Congress, these analyses could lead to better trade policies *ex ante*.

COTA would also examine legislation intended to address trade's distributional problems. COTA would evaluate congressional proposals to mitigate any negative effects of the proposed trade policies or to redistribute gains from trade. These efforts might include expansions of TAA, workforce development programs, tax credits, subsidies, or other policies. When these efforts intersect with spending and tax policy, COTA would work with the JCT and CBO to understand their budgetary impact, while COTA would focus on estimating the effects on jobs and consumer prices. COTA could therefore help Congress tailor its redistributive solutions *ex post* to ensure they are sufficient to address the problems created by trade policy.

*b. Obtaining Information from the Executive Branch*

To create meaningful estimates, COTA would need access to executive-branch data and information. Congress granted the JCT and CBO statutory authority to obtain information from federal agencies, which are required to supply this information.<sup>152</sup> Replicating the success of these bodies would require COTA to have similar powers. Accordingly, Congress should require USTR to disclose necessary information to COTA. To ensure compliance, Congress could also impose penalties for noncompliance, such as a statutory trigger that automatically withdraws fast-track authority.<sup>153</sup>

Limited disclosures may suffice when it is difficult to ensure compliance with disclosure requirements. USTR could still use confidentiality requirements or national-security classifications to restrict access or limit disclosures. All COTA needs is enough information to serve its intended function, rather than all relevant information from the executive branch. If the penalty were strong enough to induce compliance and COTA had access to the necessary information (even if not all members of Congress did), then limited disclosures could still be effective.

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<sup>152.</sup> 2 U.S.C. § 601(d)-(e) (2018); I.R.C. § 8023 (2018).

<sup>153.</sup> Presumably the chair and ranking member of the relevant committees—such as the Senate Finance Committee and the House Ways and Means Committee or their subcommittees on trade—would have the power to activate this trigger. To provide a check on this authority, Congress also could include an override of such a trigger by some subset of Congress.



c. *Keeping USTR Honest*

When USTR produces its own estimates of the effects of its trade policies, COTA could play an important role by influencing this analysis. Independent congressional bodies can provide a check on executive agencies by providing an alternative source of analysis. In the domestic context, both OMB and CBO estimate budgetary effects. This helps keep OMB, the executive body, honest. As Philip Joyce explains, “CBO has substantially influenced OMB because it creates bounds for OMB analysis . . . . If OMB is going to be substantially different from CBO on any issue, there has to be a good reason why.”<sup>154</sup> A well-functioning COTA would play a similar role by providing a comparison point. USTR and COTA might agree in some circumstances, but given the critical role that congressional-support agencies play in keeping federal agencies honest, similar results might in fact be an indication that COTA was working effectively to constrain the executive branch.

d. *Responding to Congressional Needs*

For COTA to be most effective, it should anticipate and satisfy the needs of members of Congress and their staff.<sup>155</sup> When not analyzing trade agreements or other executive proposals, COTA could play a proactive role in shaping trade policy by responding to congressional requests for analyses of policies that it is considering. COTA could also affirmatively produce analyses that explore long-term, big-picture policy options. CBO founding director Alice Rivlin wanted to ensure that the organization conducted this type of analysis, and organized CBO to promote “longer-range thinking.”<sup>156</sup> COTA could similarly create a division that prioritizes this kind of analysis. To encourage flexibility, COTA should have a broad mandate to analyze trade policies and discretion to adapt as necessary.

2. *COTA’s Benefits*

COTA would encourage congressional and public involvement in trade policy making, mitigating the negative effects of fast-track authority and ex post

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<sup>154</sup>. JOYCE, *supra* note 144, at 210.

<sup>155</sup>. Congressional-support agencies generally view congressional members and staff as their clients and entrepreneurially identify ways to engage them through strategies such as providing useful resources, fulfilling congressional requests, and holding seminars. See Weiss, *supra* note 129, at 419.

<sup>156</sup>. JOYCE, *supra* note 144, at 22-23.

ratification while maintaining many of their benefits, such as efficiency. The President would continue to lead trade negotiations, but Congress would have a greater opportunity for involvement earlier in the process. Although existing processes may increase presidential leverage over Congress, restructuring the trade policy-making process itself could constrain the executive.<sup>157</sup>

The public dissemination of COTA's analysis would inform the public about trade policy's distributional and economic effects, allowing the American public to pressure Congress to provide a trade regime consistent with its policy preferences. Relying on COTA's expertise, Congress would have the knowledge to act accordingly. This increased availability of information to Congress and the public would consequently increase democratic accountability. Through these mechanisms, COTA would lead to trade policies *ex ante* that are aligned with popular desires, while also encouraging redistributive efforts *ex post*. Although in cases involving national security COTA might wait to release detailed analyses to the public until after negotiations have concluded, Congress could still benefit from the advice and expertise of COTA in early discussions about substance.

COTA addresses issues that other proposals fail to because it systematically creates the circumstances for the political will necessary to overcome congressional partisanship and deference to the executive. In essence, COTA creates a mechanism for collective deliberation.<sup>158</sup> With its analysis, COTA would foreground trade's distributional effects and mitigation efforts. If COTA found that trade policies would negatively affect a significant number of Americans, or workers in particular geographies, the media would report on the estimates. Think tanks and academic institutions could then debate and validate the estimates, while advocacy groups could use the information to help voters understand the implications of the policies. The political branches would then be under pressure to adopt mitigating policies. A nonpartisan trusted source providing more transparency would thereby help the public hold Congress and the executive accountable for the policies they supported. Political science research finds that voters can better defend their interests when trusted opinion leaders clearly

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157. Cf. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 *BROOK. J. INT'L L.* 143, 169-80 (1992) (describing how fast-track authority gives the President leverage over the substance of trade policy and how it might be modified to increase congressional involvement in trade policy making).

158. See PAGE & SHAPIRO, *supra* note 8, at 363-65 (articulating the need for dissemination of information for collective deliberation on public policy).

explain and simplify the complex consequences of policy.<sup>159</sup> By mobilizing a policy apparatus around trade, more information thus helps provide greater democratic accountability.

With an active Congress, involved public, and increased information, COTA could ultimately bring about more equitable trade agreements and policies *ex ante* and more effective redistributive efforts *ex post*. Congress would have substantive reasons to reject harmful policies because a more informed public provides legislators the political cover to oppose the executive branch. An executive wary of legislative failure to ratify an agreement or reversal of harmful policies would be more reluctant to propose trade policy likely to result in job losses or skewed distributional outcomes without a plan to mitigate those results. Broad distribution of COTA's analysis could provide an access point for those representing American workers and small businesses. These groups could propose legislation to mitigate the negative effects of trade, and COTA's evaluation of these proposals could lead to the adoption of effective jobs policies such as active labor-management policies used in other countries. More transparency for members of Congress, their staff, and the staff of COTA could thereby ensure decision makers are informed and provide a counterweight to corporate influence during trade negotiations.

COTA could also help Congress oversee USTR by providing additional research and analysis.<sup>160</sup> Congressional staff have expressed frustration at the fact that USTR briefings are "one-way."<sup>161</sup> They have also mentioned that USTR often offers reports late in the process or on the last business day before officials leave for the next round of negotiations, which prevents substantive input.<sup>162</sup> Rather than relying on USTR or industry, Congress would have its own source of analysis, which could help satisfy legislators' desire for influence in trade. A similar desire for analysis and influence independent of the executive branch and private industry justified the creation of both CBO and the JCT. COTA could also keep USTR honest by providing an alternative perspective on trade.<sup>163</sup>

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159. *Id.*; see also Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994) (arguing that, rather than fully educating the public about policy choices, the provision of information "signals" or "shortcuts" "may be a more efficient and cost-effective way" to promote rational voting).

160. See GAO REPORT, *supra* note 32, at 50.

161. *Id.* at 43.

162. *Id.* at 44.

163. See *supra* note 154 and accompanying text.

Some may wonder whether extensive public disclosures are wise. However, the need for secrecy in trade is likely overstated.<sup>164</sup> Moreover, even if we accept the importance of secrecy in some areas of trade policy, additional public disclosure and analysis need not mean the end of secrecy in all situations. When genuine national-security interests are at stake, COTA could delay public disclosures until after the negotiating process much as CBO does.<sup>165</sup> For example, Congress could limit USTR's disclosures of negotiating positions and strategies to COTA (rather than members who might have political reasons to leak), while still making draft language and COTA's analyses available to members and limiting public disclosure. As discussed above, secrecy may not be necessary to promote agreement in many circumstances, and COTA need not diminish secrecy when it does matter for negotiations.

Although COTA is not a comprehensive fix to trade policy making, it would give Congress the tools necessary to repair our broken system. By precommitting to consider objective estimates of the economic effects of trade policy, Congress could create the circumstances for sound policy making. Enacting COTA might seem like an uphill battle, but Congress has proven itself capable of similar reforms with the creation of bodies such as the JCT and CBO.<sup>166</sup>

### 3. *Strengthening Existing Institutions Is Insufficient*

One potential criticism of COTA is that it is a new institution. Why create something new, one might ask, when strengthening existing institutions like USTR or the Senate Subcommittee on Trade might suffice? The answer is that these alternatives to COTA do not, and cannot, address the structural issues with trade policy making that this Comment identifies. First, congressional committees are not equipped to provide objective, comprehensive analysis. Second, an office within the executive branch remains subject to presidential capture and industry lobbying. Finally, expanding the mandate of existing congressional-support organizations into trade policy would dilute their missions and confuse their priorities.

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164. See *supra* notes 87-94 and accompanying text.

165. See 2 U.S.C. § 603(c) (2018).

166. See *supra* Section III.B; see also KOH, *supra* note 22, at 185-89 (describing the conditions necessary for enacting ambitious framework legislation).

*a. Congressional Committees*

One alternative to COTA that might be proposed is the expansion of committee staff, such as the staff of the Senate Subcommittee on Trade. However, this reform would not close the congressional information gap. Congress tends to rely on congressional-support agencies – such as CBO – for information and to “translate objective analysis into politically relevant recommendations.”<sup>167</sup> Congress has taken this approach because information from committee staff is often tainted by partisanship and split loyalties. Although some committees have nonpartisan staff, the committees with primary jurisdiction over trade issues – the Senate Finance Committee and the House Ways and Means Committee – are not among them. The Finance and Ways and Means Committees do not have one “staff” but two: majority- and minority-party staffs that typically do not share information with each other.<sup>168</sup> Moreover, some committee staff serve at the pleasure of more junior members rather than the leadership of the committee. Although these staffers nominally work on committee business, they sit within the member’s personal office and are presumptively loyal to that member.<sup>169</sup> Because this approach shoehorns a technocratic function into a political enterprise, it would not provide objective, comprehensive analysis about the likely effects of trade policy necessary to inform Congress and provide a counterweight to information from the executive branch and special interests.

*b. Executive-Branch Agencies*

Another approach might be to create an “office of goodness” within USTR that keeps Congress informed about the executive’s trade policy. Congress has created similar offices in the past when it sought to instill certain values within an agency. However, such an approach would not promote congressional decision-making in trade because the office would be in danger of executive capture. Although the purpose of such an office would be to constrain the agency, the reality is that offices within the executive branch are subject to influence by the President and the colleagues they are supposed to monitor. An office within USTR, which is part of the Executive Office of the President, would likely be subject to significant pressure. As Margo Schlanger has argued, staff within executive-branch offices are under collegial and careerist pressure that can cause “offices of goodness” to lose their commitment to the values they are supposed

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167. Weiss, *supra* note 129, at 417.

168. *Id.* at 414-15.

169. *Id.* at 415.

to serve.<sup>170</sup> A proposed office within USTR would similarly be subject to pressure from other employees of the organization who are committed to serving the President and executing trade deals.

Because one of the major issues facing Congress is a lack of objective analysis about trade, and Congress has historically been skeptical of the veracity of information from executive agencies, this approach would struggle to solve the problems this Comment identifies. Because COTA would serve as a congressional-support body, it would be better aligned with Congress itself and therefore be viewed as more credible and independent of executive-branch influence. The JCT and CBO were able to help Congress regain the initiative in domestic policy making because they were trusted sources that provided balance to executive-branch entities. An office within USTR likely would not be able to perform the same function. It is notable that an office intended primarily to inform Congress would be *sui generis*. Although there are relatively independent offices within federal agencies, these offices serve roles related to the agencies' missions. To the extent they conduct oversight or provide information to external sources such as Congress, it is in furtherance of that mission.

One could also imagine an expanded advisory role for the U.S. International Trade Commission (USITC).<sup>171</sup> After all, the USITC is an independent, quasi-judicial agency with a bipartisan leadership that already conducts economic and industry analysis.<sup>172</sup> However, the USITC is subject to presidential influence since the President appoints the Commissioners.<sup>173</sup> Moreover, the USITC will not be able to serve the same "checking" function as a purely congressional body like CBO. Finally, the USITC's primary role is regulatory rather than advisory. For example, it conducts trade investigations on issues such as dumping and adjudicates intellectual property disputes. Expanding its analysis and advisory role may detract from these other aspects of its mission. Although the data and analysis that the USITC produces can be useful to members of Congress, Congress as a whole will best be able to increase its influence if it can rely on its own trusted source.

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170. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 53, 112-16 (2014).

171. See Timothy Meyer & Ganesh Sitaraman, *A Trade Policy for All*, *FOREIGN AFF.* (June 26, 2018), <https://www.foreignaffairs.com/articles/2018-06-26/trade-policy-all> [<https://perma.cc/N9M3-TRVR>].

172. See 19 U.S.C. § 1330 (2018); *About the USITC*, U.S. INT'L TRADE COMMISSION, [https://www.usitc.gov/press\\_room/about\\_usitc.htm](https://www.usitc.gov/press_room/about_usitc.htm) [<https://perma.cc/44TQ-85DV>].

173. See 19 U.S.C. § 1330(a).

c. *Existing Congressional-Support Organizations*

Expanding the mission of an existing congressional-support organization like CBO would lead to mission creep and create jurisdictional issues within Congress.<sup>174</sup> Expanding the mission of an existing organization designed for a specific purpose may negatively affect its ability to carry out its current duties. The organization's structure and culture may also be poorly equipped to support the new function. For example, CBO primarily focuses on budget issues, and adding trade duties may distract it from this work. A Congress determined to expand capacity within existing bodies could earmark significant funds to develop trade-analysis capabilities, but the advantage of such an approach is unclear. Moreover, placing COTA's proposed duties within an organization like CBO could create jurisdictional issues. Although CBO serves the entire Congress, its primary duty is to serve the budget committee of each chamber.<sup>175</sup> COTA's duties, however, fall primarily within the jurisdiction of the Senate Finance Committee and the House Ways and Means Committee. Housing a trade function within CBO would therefore create a situation in which reporting lines for CBO are unclear. This lack of clarity could lead to conflicts within Congress for CBO's resources or result in CBO deprioritizing trade policy.

## CONCLUSION

Independent, nonpartisan analysis of international trade will not solve all problems that ail America's trade policy. But it is an essential first step toward much-needed reform.

It is important to recognize that COTA will not guarantee congressional support for broad distribution of trade benefits or the prioritization of public over private interests. To provide an effective counterweight to an executive branch that has pursued trade policies that serve elite corporate interests, Congress must be willing to take on the role of coequal branch. As Louis Fisher wrote of inter-branch conflicts in foreign policy, "Congress may stand against the President or it may stand behind him, but it should not stand aside . . . [T]he crucial ingredient is willpower, not constitutional power."<sup>176</sup> COTA can only be as effective as Congress wants it to be.

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174. If Congress were to place COTA's proposed duties within an existing congressional-support organization, CBO seems like the most natural fit since it has a relatively broad scope and expertise in rapid, quantitative analysis.

175. 2 U.S.C. § 602(a) (2018).

176. FISHER, *supra* note 137, at 332.

Nevertheless, COTA is the first step on the road to creating effective inter-branch checks on trade policy. Moreover, broader and increased participation in trade through increased dissemination of information will give legitimacy to a system that suffers from a democratic deficit. After the demise of the TPP and the election of President Trump, proponents of free trade have wondered what the future holds for America's place in the global economy. No single answer will be appropriate for every situation. Trade policy making should instead incorporate public deliberation and sound analysis of its economic and distributional trade-offs. Without a process to create democratic support for international trade, the United States risks retrenchment from the world, rather than active engagement with it.

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