

TPA “Fast Track” – What Every American Should Know

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When everyone seems to be contradicting everyone else, it’s a good bet that at least someone is ill-informed, confused or straight-up lying. We’re going to try to explain TPA as we understand it and as clearly as we can. If any of the below is wrong, we will be first to admit and correct it. But after reading the TPA, we think we have this right.

In order to understand what’s going on with the TPA, a little background civics is necessary.

Our Constitutional Structure:

We’ve seen a lot of nonsense being spread about U.S. trade policy as if it were bound by some completely separate constitutional structure than every other area of U.S. policy. U.S. trade policy is, in theory, under the same general constitutional structure as every other area of U.S. policy.

Under the U.S. Constitution, there are three separate branches of government—the Legislative, the Executive and the Judicial. Their general responsibilities in lawmaking are as follows:

Legislative (Congress)	Executive (White House)	Judiciary (Courts)
Enact STATUTORY LAW.	Issue and enforce REGULATORY LAW.	Interpret and apply STATUTORY and REGULATORY law; develop CASE LAW. ³

In theory, the three branches are separate and coequal, with each having its role to play in lawmaking.

The Supremacy Clause and the Hierarchy of Law:

In addition to the separate branches, the U.S. Constitution also sets up a hierarchy of law.⁴ Whenever there is a conflict between two laws, the law having a higher position in the hierarchy controls. Here is the basic hierarchy of law under the Constitution:

U.S. Constitution
Federal Statutory law, U.S. Treaties
Federal Regulatory Law / Executive Order
State Law

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³ Some may dispute whether it is proper to refer to the body of judicial decisions as “case law.” The terminology, while interesting to discuss, is not particularly relevant to this discussion. While there may be a better term, the body of judicial decisions is generally referred to as “case law.”

⁴ See U.S. Const, Article VI, para. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...”)

Thus:

A federal statute that conflicts with the U.S. Constitution is null and void.

A regulation or executive order that conflicts with a federal statute is null and void.

A state law that conflicts with a treaty is null and void.

Understanding this hierarchy is critical to understanding what's going on with TPA "Fast Track."

Amendment of the Law:

In general, bodies of law higher up in the hierarchy of law are more difficult to change:

U.S. Constitution	Congress + three-fourths of the state legislatures
Treaty	President + two-thirds of the U.S. Senate
Federal Statute	House + 60% of Senate ⁵ + President
Federal Regulation / Executive Order	Executive Branch

Thus, the President can negotiate international agreements, issue Executive Orders and issue new regulations, but only within the boundaries established under constitutional and statutory law. Any international agreement, Executive Order or federal regulation that conflicts with federal constitutional or statutory law is null and void.

The President's Role in Trade Policy:

All that said, the Constitution and federal statutory law place in the hands of the President a great deal of power over international matters. There are certain areas of international relations which the President controls almost unilaterally, without any need for the consent of the Congress. One example of this power relates to the importation of firearms. Under existing law, the President of the United States has a great deal of power over the importation of firearms, and recent presidents have used this power from time to time as a lever, to reward and punish foreign governments.⁶ With or without the proposed "Fast Track" TPA, the President will continue to retain this power, and will be able to wield the power with or without the specific consent of Congress.

So, What is TPA "Fast Track" For?

If Obama already has power over the actions of the Executive Branch, and controls so many areas of trade policy, what is TPA "Fast Track" all about?

The short and simple answer: TPA "Fast Track" is largely about changing federal statutory law via expedited congressional procedures.

⁵ The 60-vote cloture rule in the Senate is a product of Senate procedure.

⁶ See, e.g., Obama Administration Bans Import of Popular Russian Firearms,

<https://www.nraila.org/articles/20140717/obama-administration-bans-import-of-popular-russian-firearms>

Obama can issue Executive Orders and revise regulations to his heart's content, but he can only do so to the extent that the Executive Orders and regulations do not conflict with federal statutory law. Under the hierarchy of law, executive orders and regulations by Obama inconsistent with statutory law are, in theory, null and void. Obama cannot, however, rewrite federal statutory law unilaterally. In order to rewrite federal statutory law, Obama needs the cooperation of Congress (see above).

Unfortunately for Obama and his allies, passing statutory changes through Congress can be a difficult and lengthy process. Both chambers must conduct hearings and receive public input, the proceedings are generally open to the public, there is extended debate on the pros and cons of the bills, there is the potential for amendment and both chambers must pass the bill in the exact same form. There are many procedural rules that must be followed, including but not limited to the Senate's "cloture" rule, by which most bills require a 60-vote supermajority in order to be voted on in the Senate. TPA "Fast Track" does away with a great deal of this—in particular, it eliminates the possibility for extended debate, for amendment and the 60-vote threshold in the Senate for any bills that fall within its scope.

The fundamental change brought on via TPA "Fast Track" is that Obama can pass portions of his agenda by "fast-tracking" controversial changes in federal statutory law that would simply not be possible without it.

Let us repeat this: TPA "Fast Track" is designed to fast track changes to U.S. law that would not be possible under normal congressional procedures.

What Changes to U.S. Statutory Law Will be Implemented via TPA "Fast Track"?

At this point, we have no way of knowing which of our existing laws will be changed via TPA "Fast Track" or how they will be changed. The actual changes are considered top secret and highly confidential. After passage of TPA "Fast Track," Obama is (theoretically) required to advise Congress as to the changes to be made to U.S. law. This is expressly provided in the TPA bill. Some examples:

Section 3 (b)(3)(B)(ii):

...if changes in existing laws or new statutory authority are required to implement such trade agreement or agreements, only such provisions as are strictly necessary or appropriate to implement such trade agreement or agreements, either **repealing or amending existing laws or providing new statutory authority.**⁷

Section 5 (b)(2)(C):

...the implementation of the agreement under section 6, including **the general effect of the agreement on existing laws.**⁸

⁷ Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=3_b_3_B_ii&nearest=HBD2E4BE42F724A9EB4CC1A1D9A213C94

⁸ Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=5_b_2_C_~T1&nearest=H71779418633B4446A49B91CC3B0183A8

Section 6 (2)(A)(i):

...an explanation as to how the implementing bill and proposed administrative action will **change or affect existing law**...⁹

Section 6 (a)(1)(C):

...within 60 days after entering into the agreement, the President submits to Congress a description of those **changes to existing laws** that the President considers would be required in order to **bring the United States into compliance** with the agreement.¹⁰

So, to the extent there was any confusion on this point: TPA “Fast Track” authority is largely about a means of changing U.S. law.

The Congressional Research Service has expressly addressed this question, as follows:

Would legislation implementing the terms of a trade agreement submitted under the TPA supersede existing law?

If the implementing legislation amends or changes U.S. law, then it would supersede existing U.S. law. However, under previous grants of TPA, changes to U.S. law made by an implementing bill are to be “necessary or appropriate” to implement the commitments under the trade agreement. TPA-2015 changes this provision to “strictly necessary or appropriate.”¹¹

If anyone tells you that the above is in some way incorrect, you can ask them this simple “yes or no” question:

“Will “fast track” authority be used to make changes in the laws of the United States?”

If they give you some long-winded answer, demand a simple, “yes or no.” The honest answer is “**YES.**”

Does TPA Require 60-days of Review of the Final Agreement?

In a word, **NO**. The TPA bill **does not** require the final legal text to be published for 60 days before congressional action. The TPA bill merely requires that Obama publish the text of the agreement in whatever form it exists 60-days prior to his signature:

Section 6 (a)(1)(B):

⁹ Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=6_a_2_A_i~T1&nearest=H5A12B99200074720B3EC751BF3EB1425

¹⁰ Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=6_a_1_C~T1&nearest=HE013E36605B54B72B1EED2D57C1DAB5E

¹¹ Congressional Research Service, “Trade Promotion Authority (TPA): Frequently Asked Questions,” p. 30. (emphasis added). Beyond the up / down vote, there is no specific enforcement mechanism for the “strictly necessary or appropriate” language.

the President, at least 60 days before the day on which the President enters into the agreement, publishes **the text of the agreement** on a publicly available Internet website of the Office of the United States Trade Representative¹²

Later on, after he signs an agreement, Obama **IS** required to submit to Congress the “final legal text” of the agreement as signed:

the President, at least 30 days before submitting to Congress the materials under subparagraph (E), submits to Congress—

(i) a draft statement of any administrative action proposed to implement the agreement; and

(ii) a copy of **the final legal text of the agreement**;¹³

Obama is obligated to publish “the text” of the proposed agreement in whatever form it may exist 60 days prior to execution. He is then obligated to publish “the final legal text” of the agreement that he actually signed. In other words, “the text” and “the final legal text” refer to two different things. If the “final legal text” was exactly the same as “the text” published 60 days prior to signature, there would be no need for “the final legal text” to be submitted to Congress. In other words, the “text of the agreement” refers to a preliminary text of the agreement, 60 days prior to final agreement and signature.

Question for you to ponder: do you think there’s any chance in the world that Barack Obama might delay the inclusion of controversial provisions until after the publication date and then work those in within the last 60 days?

¹² Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=6_a_1_B&nearest=id8ee40d40426f43908050de121422bd73

¹³ Direct link:

https://www.govtrack.us/congress/bills/114/s995/text/rs#link=6_a_1_D~T1&nearest=id8ee40d40426f43908050de121422bd73