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President Obama and Congress Are Out of Control

President Obama has been pushing Trade Promotion Authority for some time and now has it on his desk for signature. The bill authorizing Trade Promotion Authority is unconstitutional as will be explained below. The President already has authority to negotiate treaties under the Constitution. An agreement with 12 nations is undeniably a treaty, but treaties have to be approved by two-thirds of the Senate, which Obama cannot achieve. The TPA is an end-run around the Constitution, which the Foundation will challenge in court if the President is able to get an agreement approved. He now has the "authority," but getting an agreement approved will take further Congressional action.

The House of Representatives panicked and caved in when the World Trade Organization (WTO) ruled that the U.S. Country of Origin Labeling Act (COOL) imposes illegal non-tariff barriers on international trade. The WTO is not a legitimate international court and has no authority to order the United States to rescind a law. The WTO complaint was brought by Canada and Mexico challenging COOL because meat from Canada and Mexico is required to be labeled as imported from those countries. The Foundation urges the Senate, and President Obama to STAY COOL, and not cave in like the House of Representatives has done. Ninety percent of the American public wants country of origin labeling on their food, so American politicians should stay firm and stay cool and keep COOL in effect.

Trade Promotion Authority is Unconstitutional

By Joel D. Joseph, Chairman, Made in the USA Foundation

The Senate passed Trade Promotion Authority (TPA) 62-38 giving President Obama the authority to negotiate the Trans Pacific Partnership and other trade deals. This TPA

legislation is clearly unconstitutional. The President of the United States is required to submit all proposed treaties to the United States Senate for approval under the Constitution and approval must be by a two-thirds vote.

The Constitution provides in Article II, Section 2, Clause 2: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."

The first question is whether the Trans Pacific Partnership is a treaty. There are some minor international agreements other than treaties that the Supreme Court has allowed. However, these lesser agreements were entered into under the President's power to receive ambassadors. The President's proposed Trans Pacific Partnership does not involve his power to receive ambassadors, nor any other presidential power except the treaty clause and thus cannot be implemented without Senate approval by a two-thirds vote.

Black's Law Dictionary defines a treaty as "an agreement between two or more independent states." By independent states the dictionary means nations. It is hard to imagine agreements that are more important than a trade agreement with 11 nations. If the treaty clause has any meaning left it must be applied to this agreement because they will outlive President Obama's term of office and will affect the nation for decades to come. This is not a simple agreement that the President can enter into by himself, or with a simple majority in Congress.

Agreements involving international trade are no less treaties than those involving war and peace. The first U.S. trade agreement in a treaty was the Jay Treaty, or more formally, The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and The United States of America entered into in 1795 with two-thirds Senate approval. Since this was enacted soon after the Constitution was approved, the treaty clause was fresh in the country's mind. Two hundred and thirty years later, however, we have disregarded the treaty clause.

Ignoring the Treaty Clause

The North American Free Trade Agreement bypassed the treaty clause because it failed to achieve two-thirds Senate approval. It was signed by President Clinton as simple legislation, not as a treaty. The Made in the USA Foundation and the United Steelworkers Union challenged NAFTA under the treaty clause. The 11th Circuit Court of Appeals found that we had raised a "political question" and would not decide the case. Courts in China often use the "political question" argument to allow the Chinese government to do anything that it wants to. The U.S. Supreme Court ducked the issue as well by declining to review the case. Mexico, on the other hand, called NAFTA a treaty (tratado) and approved it as such under the Mexican constitution.

The political question doctrine is a judge-made concept. A recent Supreme Court decision (*Zivotovsky v. Clinton*) has severely undermined the political question doctrine

paving the way for the courts to review a challenge to a Presidential agreement that is not ratified as a treaty by the Senate. In an eight to one decision the Supreme Court ruled in 2012, "At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.' *INS v. Chadha* (1983)."

Constitutional Framework

Presidents have regarded the Article II treaty process as necessary where an international accord would bind a future president. For example, Theodore Roosevelt explained in his 1913 autobiography:

> The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo (Dominican Republic). But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress. But it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office. I therefore did my best to get the Senate to ratify what I had done.

President Obama should follow President Theodore Roosevelt's advice and submit his proposed Trans Pacific Partnership treaty to the United States Senate for its advice and consent as our Founding Fathers wisely engrained into the Constitution of the United States.

Stay COOL

By Joel D. Joseph, Chairman, Made in the USA Foundation

Open Letter to the Members of the United States Senate

Recently, The House of Representatives panicked and caved in to demands from Canada, Mexico and the World Trade Organization (WTO) gutting the Country of Origin Labeling Act (COOL). These are the same Congress members who want President Obama to "get tough" with Iran and Russia, yet cower when threatened by third-rate

powers.

California has a population greater than Canada. Mexico is a drug cartel operating as a country. Every day we allow substandard Mexican delivery trucks to cross our borders and enter into the United States.

With regards to our northern neighbors, we have not complained that Canada has refused to allow American beer imports into their country, yet, we let Canadian Molsons beer to flow freely into the United States.

We need to get tough; we should take the gloves off and fight Canada and Mexico on unfair trade. We should also expose the World Trade Organization for what it is: an undemocratic, unfair clique of small countries that love to skewer the United States.

Canada and Mexico filed a complaint with the WTO charging that COOL was a barrier to free trade because it required grocery stores to label meat products with their country of origin. Ninety percent of American consumers want to have the country of origin labels on their meats. If mad cow disease is coming from Canada (which it has), consumers and processors should have the right to know where their beef is coming from.

At the same time, President Obama said that his new Trans Pacific Partnership (TPP) would not force the United States to change its laws. The President said recently, *"critics warn that parts of this deal (TPP) would undermine American regulation -- food safety, worker safety, even financial regulations. They're making this stuff up. This is just not true. No trade agreement is going to force us to change our laws."* Mr. President, your critics are not making this stuff up; our little trade agreement that created the WTO is doing just that.

The World Trade Organization sounds like a legitimate international organization, but it is not. The WTO operates in secret by handpicked delegates from around the world. Cases reviewed by the WTO are determined by "judges" selected for one case *even if* they have

demonstrated conflicts of interest. WTO decisions make a mockery of U.S. and European laws that have been designed to protect the health of consumers and the environment. The WTO is unfair, unethical and undemocratic. It needs to be overhauled.

WTO court appointees should not be allowed to be partisans who have represented one county involved in the trade disputes. The panel chair in the COOL case was Ricardo Ramirez-Hernandez, a Mexican citizen who has represented Mexico in trade matters. Ramirez-Hernandez holds the chair of International Trade Law at the Mexican National University in Mexico City.

Ramirez-Hernandez was deputy general counsel for Trade Negotiations of the Ministry of Economy in Mexico for more than a decade and represented Mexico in international trade litigation and investment arbitration proceedings. He acted as lead counsel to the Mexican government in several WTO disputes. He has also served on various NAFTA panels.

Quite simply, Mr. Ramirez-Hernandez should not have been allowed to serve on the appellate panel in a case involving Mexico as his presence on this panel represented a direct conflict of interest. The WTO should implement a system for parties to raise conflict of interest (and ethical matters) concerns calling for the disqualification of a judge as is the system used by U.S. courts.

The United States Senate should keep COOL in force. In fact, the Senate should pass a resolution challenging the validity of the WTO ruling for conflict of interest reasons.

In the event that the Senate passes a bill that guts COOL (like the House bill) and sends it to the President, the President should veto the bill. As the President said, *"No trade agreement is going to force us to change our laws."* If he is true to his word, the President must veto the COOL amendments.