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Understanding Congress's Voluntary Delegation of Its Trade Powers

The "Vesting Clause" of the Constitution, that "All legislative Powers herein granted shall be vested in a Congress of the United States,"[1] is generally considered the foundation of the "Non-Delegation Doctrine." Simply put, this is an element of constitutional design that prevents Congress from giving away its powers to other branches of government. It's considered a fundamental structure in the separation of powers. As Supreme Court Justice Samuel Alito wrote in his concurring opinion for *Department of Transportation v. Association of American Railroads*: "Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded."[2]

Yet a recurring theme in the last century of American politics has been the consistent delegation of congressional power, primarily to the executive branch. This occurs both passively and actively. For example, the increasing use of Executive Orders to legislate in American government is a *passive* delegation of authority: Congress frequently refrains from responding to these legislative acts, creating precedent for future executive legislation. However, Congress sometimes *actively* delegates away its powers. The 20th century saw Congress increasingly delegate war powers (see the 1964 Gulf of Tonkin Resolution), control over immigration (see the 1952 Immigration and Nationality Act), and monetary powers (see the 1913 Federal Reserve Act).

[1] U.S. Constitution, Article 1, Section 1.
[2] Samuel A. Alito, concurring opinion, *Department of Transportation v. Association of American Railroads*, 575 U.S. (2015), https://www.courtlistener.com/opinion/2784697/department-of-transportation-v-association-of-american-railroads/.

But the American constitutional system was built upon the idea that each branch of government would do the very opposite—the ambition of one branch should counteract the ambition of the others. So why would Congress ever *actively* give away its powers?

To answer this question, this paper will trace Congress's gradual, active delegation of its powers over international trade. Article 1, Section 8 of the Constitution explicitly gives Congress powers over international trade: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." "Imposts," or tariffs, were the primary source of revenue for the federal government during most of the 19th century.[3] In the same section, the Constitution is very clear that Congress has the power "to regulate Commerce with foreign Nations."[4]

In order to understand *why* Congress voluntarily delegates its powers, this research paper will conduct a case study of Congress's voluntary delegation of its trade powers. This trend began in the 1890s and expanded over the next century. Understanding the political, economic, and institutional reasoning for this political shift will help to explain why Congress gives away its powers more generally, but it also provides a more nuanced view of the situation the United States has found itself in as of May 2025, as this paper is being written: for the last few months, President Donald Trump has *unilaterally* directed American trade policy.[5] Why did Congress give away these constitutional powers to a unitary actor?

The story begins in 1890, when the McKinley Tariff Act was passed.[6] It authorized the President to set and suspend tariffs on countries that imposed tariffs on the United States that "he may deem to be reciprocally unequal and unreasonable."[7] The McKinley Tariff Act was

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[3] Ana Swanson and Alan Rappeport, "Trump Tariffs on Canada, Mexico and China Snap Into Effect," *The New York Times*, January 21, 2025, https://www.nytimes.com/2025/01/21/us/politics/trump-tariffs-external-revenue-service.html.
[4] U.S. Constitution, Article 1, Section 8.
[5] Danielle Kaye, "Trump's Tariffs on Canada, Mexico and China Snap Into Effect," *The New York Times*, March 4, 2025, https://www.nytimes.com/2025/03/13/business/economy/trump-tariff-timeline.html.
[6] Sayre, Francis B. "The Constitutionality of the Trade Agreements Act." *Columbia Law Review* 39, no. 5 (1939): 751–75. https://doi.org/10.2307/1116457.
[7] "Tariff of 1890 (McKinley Tariff)," *Federal Reserve Bank of St. Louis*, accessed May 6, 2025, https://fraser.stlouisfed.org/title/tariff-1890-mckinley-tariff-5869/fulltext.

challenged before the Supreme Court in *Field v. Clark*, where it was argued that these broad and ill-defined criteria effectively allowed the President to legislate by placing tariffs. But Supreme Court Justice John Marshall Harlan, delivering the opinion of the majority, decided that this decision-making *was not* a form of legislating: “The words ‘he may deem,’ in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products.”[8] Essentially, the Court viewed the President’s role as *formulaic*—the President would make a calculation of whether or not another country had placed “unequal and unreasonable” tariffs on the United States—the legislative action was still taken by Congress since the President could only switch the tariffs on and off.[9]

The Supreme Court would later expand this power in *J. W. Hampton, Jr. & Company v. United States* (1928), allowing Congress to give the President the power to modify tariff rates up to 50%.[10] Again, the President’s role was still understood as formulaic: as William Howard Taft (then serving as Chief Justice), explains in his decision: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”[11]

But another major leap in the expansion of the President’s tariff power would arrive six years later with the 1934 Reciprocal Trade Agreements Act (RTAA). The RTAA was, in large part, a reaction to the 1930 Smoot-Hawley Act, when Congress raised average tariffs by approximately 20%, resulting in a 40% reduction in imports and exports over the following two years.[12] Arriving at the outset of the Depression, these tariffs crippled the economy further. In these years, international trade was an evenly divided partisan issue: Democrats supported liberalized free international trade and low tariffs; Republicans supported protectionism and high

[8] Field v. Clark, 143 U.S. 649, 692 (1892).
[9] Meyer, Timothy, and Ganesh Sitaraman. “Trade and the Separation of Powers.” *California Law Review* 107, no. 2 (2019): 599. https://www.jstor.org/stable/26732682.
[10] "J. W. Hampton, Jr. & Company v. United States." Oyez. Accessed May 6, 2025. https://www.oyez.org/cases/1900-1940/276us394.
[11] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)
[12] Meyer and Sitaraman, “Trade and the Separation of Powers, 600”

tariffs. Whenever either party would seize power, tariffs would sway in the direction of their choosing.[13]

But the RTAA threw a wrench in this back-and-forth dynamic. It granted the President power to negotiate reciprocal *reductions* in tariffs (importantly, not increases!) between the United States and its trading partners—and allowed these agreements to be approved by a *simple majority* in Congress. The RTAA made it easier for Presidents to *decrease* tariffs, but gave them no power to *raise* tariffs. Raising tariffs would have to come in the form of a treaty—which the Constitution requires a 2/3 majority to pass.[14] Thus, the RTAA set up an institutional structure that made reductions in tariffs easy, and increases in tariffs difficult.[15] Republicans had dominated national elections since Reconstruction in the 70 years leading up to the Depression, raising tariffs whenever they could—but now the Democrats had passed a bill essentially institutionalizing lower tariffs.[16]

There is a common theory that the RTAA was an attempt to eliminate the sway of special interest groups that supported a protectionist high-tariff regime.[17] Members of the House of Representatives, who represent industries that play major roles in their home districts, felt obligated to protect those interests. Bailey, Goldstein, and Weingast theorize that this setup makes members of Congress more likely to support protectionist policies than presidents, whose *national constituencies* make them more likely to support agendas beneficial to the country generally.[18] In the face of President Donald Trump's exceptional approach to tariffs—raising them to levels that have not been seen since the Smoot-Hawley tariffs[19]—it is difficult to believe this is the case. But this logic is generally sound; Trump should be considered the exception that proves the rule. Still, the idea that Congress would toss away its power in order to rid itself of

[13] Ibid., 311.
[14] U.S. Constitution, Article 2, Section 2.
[15] Bailey, Goldstein, and Weingast, "Institutional Roots," 323-326.
[16] Ibid., 318.
[17] Jide O. Nzelibe, "The Illusion of the Free-Trade Constitution," *New York University Journal of Legislation and Public Policy* 19, no. 1 (2016): 6.
[18] Bailey, Michael A., Judith Goldstein, and Barry R. Weingast. "The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade." *World Politics* 49, no. 3 (1997): 325.
[19] Ana Swanson, Alan Rappeport, and Tony Romm, "Trump Announces Sweeping Tariffs on All Imports: Live Updates," *New York Times*, April 2, 2025, https://www.nytimes.com/2025/04/02/business/economy/trump-tariffs-us-business-groups-response.html.

these groups' sway doesn't hold up to scrutiny: would Congress—theoretically influenced by these groups—toss away its power in order to rid itself of these groups' sway?

Farrier examines how congressional delegation of power results in a more permanent loss: "Members often say they will rely on oversight to get back power later, but then complain bitterly that the executive or other agent is uncooperative down the road. And when the possibility of taking power back is clearly on the table, Congress does not grab what it could,"[20] she argues. Farrier describes a "cycle of ambivalence" in Congress's power-delegation. In response to a perceived need for swift action, Congress will delegate its powers to the President. Months or years later, they enter a phase of regret for this delegation. Members of Congress call for increased oversight or laws to take back a delegated power. But Farrier argues that the need for swift action easily returns; Congress often opts to delegate its power once again, and the cycle continues.[21]

Bailey, Goldstein, and Weingast describe a similar dynamic with trade-liberalization and increasing executive authority, though with a more positive feedback-loop. Because the RTAA set up an institutional arrangement that favored tariff reductions, export industries became more important to constituents. "The general conclusion that emerges from this analysis is that exports affect congressional voting on trade," they write. "Higher levels of exports led to increased support for free trade."[22] This, in turn, led more congressional representatives to support free trade, which in turn led to increased congressional support for the expansion of presidential trade powers: "The expansion of presidential authority to negotiate cuts in American and foreign tariffs was forthcoming because the RTAA increased the importance of exports to constituents in congressional districts, which, in turn, changed the trade policy preferences of key congressional representatives."[23] Indeed, the RTAA required Congress to periodically renew the President's authority. This approval would serve as pre-authorization for the President's trade agreements,

[20] Jasmine Farrier, "The Contemporary Presidency: Executive Ambition Versus Congressional Ambivalence," *Presidential Studies Quarterly* 40, no. 2 (June 2010): 312.
[21] Ibid., 311.
[22] Bailey, Goldstein, and Weingast, "Institutional Roots," 334.
[23] Ibid., 327.

though the terms of the RTAA could change with each iteration. Yet the RTAA was repeatedly re-approved and Congress took no steps to retrieve trade authority.

At the same time, the RTAA was, in reality, not attached to any "intelligible principle" that allowed Congress to guide the President's actions. In this way, it grew distant from the tether that required the President to negotiate within the boundaries set by Congress.[24] The President made changes to the tariff rates through executive orders. Congress did not set up any mechanism for transparency, nor any principles for setting tariff rates.[25] Even more startling is that the rate the President set would remain in place even if Congress modified the RTAA[26] to change how the President could wield the tariff power. This insulated the President's trade policies from changing congressional tides, another piece of institutional design that kept tariffs low by increasing the power of the President.

During the Cold War, trade was increasingly viewed as a key component in national security. This is obvious: trade is a tool that can be used as a carrot or stick, for punishing sanctions or injections of wealth.[27] Indeed, since World War Two, trade has been a key element in the United States' sway over other nations. International monetary institutions like the World Bank were established both as a method of financing reconstruction and promoting American interests abroad. President Harry Truman entered the General Agreement on Tariffs and Trade (GATT) in 1947,[28] an organization with the goal of reducing tariffs.[29] Binding its signatories to rules and agreements to *lower* tariffs, Truman entered the GATT with the power he was granted under the RTAA. Neither congressional approval nor Senate supermajority was required. Meyer and Sitaraman explain this changing conception of trade as foreign relations:

"In 1947, President Harry Truman joined the General Agreement on Tariffs and Trade (GATT), relying on the RTAA's ex ante grant of authority to enter into tariff-reducing trade agreements. Indeed, in running for reelection in 1948, President Truman defended the RTAA as

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[24] Meyer and Sitaraman, "Trade and the Separation of Powers," 600.
[25] Ibid., 601.
[26] Ibid., 600-601
[27] Ibid., 597.
[28] Ibid., 602
[29] Francine McKenzie, "GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947–1959," *Journal of Cold War Studies* 10, no. 3 (Summer 2008): 78–109.

one of the 'best assets we can have for peace.' In 1949, Secretary of Defense James Forrestal told Congress that the Pentagon viewed renewing the RTAA as 'a step in the interest of national security.' In the same debate, Senator A. Willis Robertson asked rhetorically, 'What is the cold war about? It is over trade.' Presidents Dwight E. Eisenhower and John F. Kennedy also argued for trade agreements on the ground that they would help expand freedom against the ongoing threat from communism."[30]

The combination of trade entering a foreign relations paradigm alongside the GATT's complexities forced Congress to reckon with the new reality that trade deals had to expand beyond tariff negotiations: the 6th round of GATT negotiations that took place between 1964 and 1967 resulted in international agreements that would force the United States to modify the way it priced goods through customs enforcement and required changes to the way the U.S. responded to artificially deflated prices of foreign imports.[31] A report from the Congressional Research Service describes Congress's response: "Because U.S. adherence to these agreements would have required changes in U.S. law or regulations beyond tariff modifications, many in Congress concluded that the President had exceeded the authority delegated to him. In fact, Congress passed a resolution in 1966 instructing the Johnson Administration against negotiating 'nontariff commitments.' When he ignored it, Congress declined to implement the NTB changes, setting up the debate that would eventually be resolved with the creation of the fast track authority for trade agreements."[32]

Fast track agreements were the next iteration of Congress's delegation of international trade authority to the President. These types of agreements were introduced in the Trade Act of 1974. The Trade Act maintained the powers delegated to the President under the RTAA and authorized the President to negotiate trade deals beyond tariff reductions.[33] Although the Trade Act mandated that fast track agreements had to be ratified by Congress, the method of this check resulted in even greater authority for the President. A trade agreement negotiated through fast track authority (which expanded the trade scope of what the President could negotiate) was only

[30] Meyer and Sitaraman, "Trade and the Separation of Powers," 602.
[31] U.S. Congressional Research Service, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, RL33743 (Washington, DC: Congressional Research Service, 2014), 3-4.
[32] Ibid., 4.
[33] Congress.gov. "Trade Promotion Authority (TPA)." May 8, 2025 https://www.congress.gov/crs-product/IF10038.

subject to a “yea” or “nay” vote in Congress. Congress only gave itself the right to “mock markups,” or *non-binding* (and easily and often ignored) feedback for the President on his negotiations.[34] Yet fast track authority was relatively uncontroversial in the decade after its authorization. Members of Congress were generally in favor of increasing free trade and saw executive authority over the matter as a method of increasing global trade liberalization.[35]

But after President Bill Clinton used fast track authority to negotiate and pass the *North American Free Trade Agreement* (NAFTA), fast track quickly grew subject to partisan fighting and failed to be renewed after 1994.[36] Yet recall Farrier’s “cycle of ambivalence” in Congress’s power-delegation. President George W. Bush pushed for fast track with a new name—"trade promotion authority." In the wake of 9/11, there was an increased appetite to delegate powers to the President, and “trade promotion authority” renewed the powers enacted in the Trade Act of 1974.[37] It was renewed again in 2011, and again in 2015, but expired in 2021 and has not been renewed since,[38] likely due to Congress’s recent extreme trouble passing legislation.

But on April 2, 2025, President Trump announced sweeping tariffs on more than 100 countries.[39] But if trade promotion authority hasn’t been renewed since 2021, where did he derive the power to enact this trade policy? The answer lies in the President’s declaration that trade deficits constitute a National Emergency.[40] Because of this, Trump was able to trigger the 1977 International Emergency Economic Powers Act (IEEPA), which gives him sweeping economic powers. He is the first President to use the law to impose tariffs.[41]

Ironically, the IEEPA originates from concern over executive overreach. Following the Vietnam War, Watergate, and other abuses of power by the executive branch in the 1960s, a

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[34] Farrier, “The Contemporary Presidency,” 316.
[35] Ibid.
[36] Ibid.
[37] Ibid., 317.
[38] Congress.gov. "Trade Promotion Authority (TPA)." May 8, 2025 .https://www.congress.gov/crs-product/IF10038.
[39] Doug Palmer and Daniel Desrochers, “Trump Imposes 10 Percent Universal Tariff, Higher for Top Trade Partners,” *Politico*, April 2, 2025, https://www.politico.com/news/2025/04/02/trump-tariff-trade-partners-liberation-day-00267350.
[40] Ibid.
[41] Ibid.

special committee was formed in the Senate to investigate Presidential emergency authority.[42] Congress grew concerned over the 1917 Trading with the Enemy Act, which granted the President power to regulate trade with enemy powers.[43] In 1977, Congress wrote IEEPA with the intention of creating a set of emergency authorities for the President more limited in scope than what the Trading with the Enemy Act allowed.[44] IEEPA gave the President the power to "investigate, regulate, or prohibit transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or national thereof."[45]

But what triggers such powers? According to the bill, it is the need "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat"[46]—unbelievably broad criteria.

Thus, here we are: the President has drawn on the powers delegated to him by Congress to unilaterally control America's international trade. But we've seen how Congress's gradual delegation of trade authority was not simply a lack of ambition, but a gradual response to institutional demands and incentives. The McKinley Tariff Act and the Smoot-Hawley Act led to a reaction resulting in the RTAA. The RTAA set off a cycle of trade liberalization and increasing delegation of trade powers to the President. Eventually, global trade developed the need for more complex negotiations with the fast track authorization. Responses to seemingly unrelated factors produced the IEEPA. The number of factors that guided Congress to give up its control over international trade by delegating power to the President are countless: special interest groups, a reaction to special interest groups, institutional design in congressional legislation, the inability of Congress to legislate the economy out of the Great Depression, the increased relevance of

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42 Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CRS Report No. R45618 (Washington, DC: Congressional Research Service, January 30, 2024), 6-7.
43 Ibid., Page 2 of PDF.
44 Ibid., 9.
45 Ibid., 10, quoting from the IEEPA.
46 Ibid.

global trade in the realm of foreign affairs, the relative efficiency of the President to negotiate trade deals, the Vietnam War, loose language in legislation, Congress's precarious position in the separation of powers…the list goes on. All of these ingredients are thrown into the soup of politics, and the outcome—the President now single-handedly shapes the national and international economy—could not have been predicted. Politics is a system of high entropy, and trying to form a general theory won't work out.

My true goal in seeking to understand why Congress delegated away its trade powers to the executive branch is with the goal of understanding why Congress has lost prominence more generally. It seems to me that the best practice for answering a broad question like this is to zoom in—"why did Congress voluntarily delegate away its trade powers to the President?" To answer this question, we must gather the theory surrounding history, economy, and institutional design. From there, as I hope to have shown above, a hazy picture can form, but never a sharp, high-definition image.

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