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NAFTA and Obama's Proposed 'Trade' Deals Are Unconstitutional

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NAFTA and other mega-'trade' deals are actually about lots more than merely 'trade'; they're about sovereignty — the ability of each of the participating nations to establish laws and regulations restricting toxicity of products, environmental pollution, protecting workers' rights, and many other things that are essential to the public's welfare. These 'trade' deals lock-in existing laws and regulations so that no matter what is found by future scientific studies which may indicate, for example, that a given product is actually far more toxic than had previously been known, the laws and regulations can't be increased, because any such increase would subject the given nation to multi-billion-dollar lawsuits by international corporations for 'infringing on the rights of stockholders to profit' by any stiffening of those regulations existing at the time the 'trade' deal became law.

Thus, for the first time in world history, the rights of the holders of the controlling blocs of stock in international corporations are coming to supersede the rights of any government, so that those stockholders can sue taxpayers of any such country, not in any democratically accountable court and judicial system, but in private panels of unaccountable international 'arbitrators' who won't be subject to any nation's laws. It's an international-corporate world government now forming, and the U.S. Constitution prohibits the U.S. from being any part of it (because what's forming is an international-corporate dictatorship); so, in the U.S., it's being done entirely unConstitutionally.

The Treaty Clause of the U.S. Constitution says:

> [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 Trade Act of 1974 introduced a new way to pass a treaty, the way now called Fast Track Trade Promotion Authority, by means of which that two-thirds requirement can be eliminated and 'trade' deals can now become law merely by being approved by 50%+1 members of the Senate. This was done because President Richard Nixon and some members of Congress wanted to be able to pass into law treaties that would be so controversial (so odious, actually) that approval by two-thirds of the Senate wouldn't be possible; such proposed treaties wouldn't be able to become approved in this country unless the two-thirds-rule were eliminated for them.

By means of the Trade Act of 1974, these very controversial treaties would be able to become law in the U.S. by the simple device that, though America's Founders would certainly have called them "treaties," and though they actually *are* called "treaties" by all of

the other nations that sign them, our government would instead call them merely "international agreements" not "treaties" (though the two aresynonymous with one-another) and would thus nullify the Treaty Clause without needing to amend the U.S. Constitution (and, of course, the only way *legitimately* to amend anything in the Constitution is by means of its Amendment-process).

America's Founders were wise, and were extraordinarily learned about history; and the U.S. Constitution embodies this unique wisdom and learning; the Treaty Clause's two-thirds requirement exemplifies that. It is a crucial part of their determination to prevent any President from having too much power — from becoming a dictator (something that becomes even worse if the dictator has rammed through not only mere laws, but also *treaties*, since those are *far harder to undo*). For example: it was intended to block any President from making a treaty with a foreign nation if that treaty would be so bad that he couldn't get two-thirds of the U.S. Senate to support it. (That's a tough requirement for any President to meet on anything, but a treaty is far more difficult than any other law is to cancel; and, so, passing it is passing a law that's virtually permanent and virtually impossible to modify.

The Constitution wasn't designed in order to meet the convenience of Presidents, nor of Presidents plus half of the U.S. Senate, but *to protect the public*.) And their wisdom is why our constitution remains the world's longest-lasting one. But, at least in this regard, it has been abandoned — and only the U.S. Supreme Court can decide now whether to restore it.

As Alexander Hamilton wrote on 9 January 1796, defending the new Constitution, and especially its Treaty Clause: "I aver, that it was understood by all to be the intent of the provision [the Treaty Clause] to give to that power the most ample latitude to render it competent to all the stipulations, which the exigencies of National Affairs might require—competent to the making of Treaties of Alliance, Treaties of Commerce, Treaties of Peace and every other species of Convention usual among nations and competent in the course of its exercise to controul & bind the legislative power of Congress. And it was emphatically for this reason that it was so carefully guarded; the cooperation of two thirds of the Senate with the President being required to make a Treaty. I appeal for this with confidence."

He went further: "It will not be disputed that the words 'Treaties and alliances' are of equivalent import and of no greater force than the single word Treaties. An alliance is only a species of Treaty, a particular of a general. And the power of 'entering into Treaties,' which terms confer the authority under which the former Government acted, will not be pretended to be stronger than the power 'to make Treaties,' which are the terms constituting the authority under which the present Government acts." The phrase "international agreement" was not mentioned by him because no one at that time had even so much as suggested that the term "treaty" was anything else than identical in meaning to an "international agreement"; everyone understood and accepted that any "treaty" was an "international agreement," and that any "international agreement" was a "treaty." So: there can be no doubt that the term "treaty" refers to any and all types of international agreements. This was the Founders' clear and unequivocal intent. No court under this Constitution possesses any power to change that, because they can't change history.

Furthermore, George Washington's famous Farewell Address asserted that, "It is our true policy to steer clear of permanent alliance with any portion of the foreign world"; and the third President Thomas Jefferson said in his equally famous Inaugural Address, that there

should be « Peace, commerce, and honest friendship with all nations — entangling alliances with none." Jefferson's comment there was also a succinct tip-of-the-hat to yet another major concern that the Founders had regarding treaties — that by discriminating in favor of the treaty-partners, they also discriminate *against* non-partner nations, and so endanger "peace, commerce, and honest friendship with all nations," which was the Founders' chief goal in their foreign policies. But, the Founders' chief concern was the mere recognition that treaties tend to be far more "permanent" and "entangling" than any purely national laws. This was the main reason why treaties need to be made much more difficult to *become* laws.

Hamilton was quite explicit that the Treaty Clause pertained « to the making of Treaties of Alliance, Treaties of Commerce, Treaties of Peace and every other species of Convention usual among nations and competent in the course of its exercise to controul & bind the legislative power of Congress. And it was emphatically for this reason that it was so carefully guarded; the cooperation of two thirds of the Senate with the President being required to make a Treaty." He did not exclude "Treaties of Commerce." Even the *possibility* of allowing such an exception to the Treaty Clause was denied by him. And yet, starting with the Trade Act of 1974, it happened.

Each one of the 37 Senators (4 more than would have been required under the Treaty Clause to block) who voted against Fast Track Trade Promotion Authority (and here almost exactly the same 37 Senators voted against Fast Track the final time around) should possess the standing to bring this issue to the U.S. Supreme Court for the Court's determination as to what the Founders meant, and didn't mean, by their asserting, « [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." Each one of these Senators might be able to make history here. Each one of the Senators might thus affect the future course of world history by bringing this terrifically important issue to the Supreme Court to be decided, once and for all. However, none has cared enough even to try. But it's clear: any "international agreement" is a "treaty," and any "treaty" is an "international agreement." No one even questioned that at the time the Constitution was written.

THE MAIN U.S. CONSTITUTIONAL ISSUE

In June 1954, Morris D. Forkosch headlined in *Chicago-Kent Law Review*, "Treaties and Executive Agreements," and summarized the status of this issue up into the start of the Eisenhower Administration. It was a different nation then. He noted: "Suppose, however, that a treaty conflicts with a provision of the United States Constitution or contradicts the terms of a federal statute. Which, then, governs? In the first of these situations, the United States Supreme Court has indicated, albeit the language is obiter, that the treaty would be ineffective.29" (His footnote included: "DeGeofroy v. Riggs, 133 U. S. 258 at 267, 10 S. Ct. 295, 33 L. Ed. 642 at 645 (1890), and Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525 at 541, 5 S. Ct. 995, 29 L. Ed. 264 at 270 (1885).") So: **according to U.S. Supreme Court decisions up till at least 1954, any one of the five Fast-Tracked international trade agreements that has been passed since the Fast-Track law, the Trade Act of 1974, was passed, would have been blocked by the Supreme Court, were it not for the Trade Act of 1974 — a mere law that, supposedly, has changed the Constitution without amending it, but that did this simply by asserting that when the Founders said "treaty" they weren't referring to any and all forms of international agreement — which they clearly were referring to, in their era.** (If you doubt it, you'll find in my "The Two Contending Visions of World Government," this issue being discussed

within its broader context. Key there is that the term “treaty” in the Founders’ era meant any type of international agreement, no exceptions. An originalist interpretation of the Constitution would thus be obliged to outlaw the Fast Track Trade Promotion Authority provision of the Trade Act of 1974.)

Obviously, the power to interpret the Constitution rests solely with the U.S. Supreme Court. And the Supreme Court is supposed to interpret the words that are in the Constitution as closely as possible to the way the Founders who wrote it intended those terms to be understood to mean. That’s just basic, to any constitutional democracy. (Even non-originalist theories of Constitutional interpretation affirm that the overriding concern is the « larger purpose — the animating spirit — of the Constitution, » which ultimately refers to the intentions of the majority of the people who signed the document.) There is no getting around the fact that Fast Track Trade Promotion Authority is unConstitutional. But attempts have been made to get around its *being* unConstitutional.

In February 2001, *Michigan Law Review* published John C. Yoo’s January 2000 article, “Laws as Treaties: The Constitutionality of Congressional-Executive Agreements,” in which Yoo, the lawyer who subsequently provided to George W. Bush the rationalization for Bush’s authorization to use torture after 9/11, argued that the two-thirds Senate rule needs, for practical purposes, to be nullified for certain types of international trade agreements, including for the five that had already been Fast-Tracked. Rather than his dealing with the question of whether the Executive and the Legislative branches possess Constitutional authority to interpret the Constitution, he wrote there the argument that he would present to the Judicial branch, at the U.S. Supreme Court, if he were to be the attorney arguing there for the Constitutionality of Fast-Track. (Perhaps this paper was even one of the reasons why he was selected by Bush.) His entire argument was pragmatic as he saw it, such as, this: “Today, however, the Senate has about fifty percent more members than the first House of Representatives envisioned by the Constitution, suggesting that the Senate no longer has the small numbers that the Framers believed necessary for successful diplomacy.”

This sort of thing constituted his argument for why treaties that don’t concern national security and so fall under the President’s Commander-in-Chief authority, shouldn’t be considered to be “treaties,” but only as “Congressional-Executive Agreements.” That’s as far as anyone has yet gone to rationalize the Fast Track Trade Promotion Authority as being ‘acceptable’ under the Constitution.

However, even Yoo noted, at the time, that the most-prominent scholarly argument in favor of the Constitutionality of Fast-Track, “Is NAFTA Constitutional?” by Bruce Ackerman and David Golove, in the February 1995 *Harvard Law Review*, was a “provocative and idiosyncratic theory of unwritten constitutional amendments,” whereas Yoo didn’t have the nerve to demean, but only to note, the article by Laurence Tribe, “Taking Text and Structure Seriously, » in that same publication, which utterly demolished the Ackerman-Golove article. In December 1998, Golove came forth in *New York University Law Review*, with a 152-page treatise, “Against Free-Form Formalism,” trying to overcome Tribe’s case. But, more recently, Michael Ramsey posted online his 13 August 2012 review of all of that, “Laurence Tribe on Textualism (and Congressional-Executive Agreements),” where he devotes most of his attention to the two original pro-and-con articles in the 1995 *HLR*, and says that Tribe’s case was far more persuasive than Ackerman-Golove’s; and, then, he notes parenthetically near the end: “(David Golove makes an attempt, in a reply article published at 73 N.Y.U. L.Rev. 1791 (1998), but I don’t think he makes much headway against them [Tribe’s ‘points’]).” Golove’s 152-page treatise failed to impress anyone. Among the legal scholars,

it's pretty much a settled matter: Tribe was right. Not even Yoo had the temerity to challenge it.

However, Yoo argued that there is a pragmatic need to uphold Fast Track Trade Promotion Authority; and that this pragmatic need (to violate the U.S. Constitution) is « that the Senate no longer has the small numbers that the Framers believed necessary for successful diplomacy."

Thus: the current academic status of the issue is: The Supreme Court would have little choice but to overturn the Fast-Track provision of the Trade Act of 1974, if the matter were to be accepted by the Court for adjudication, unless the high Court were willing to be despised not only by the public but especially by legal scholars. If the Court were to decline to consider such a case, then it would be accepting the authority of the Executive branch in conjunction with some members of the Legislative branch, to interpret the meaning of "treaty" in the U.S. Constitution — and, in the entire history of the United States, the Supreme Court has never done that.

Well, in a sense, that's not entirely correct: the 2001 appeals-court case, *Made in the USA Foundation v. U.S.*, was the only case to deal with this issue, and it concluded, citing as its chief authority a non-dispositive Supreme Court decision that was written by Justice William H. Rehnquist, in the 1979 case *Goldwater v. Carter*, which said that a certain action that President Jimmy Carter had done under both his treaty authority and his Commander-in-Chief authority could not be Constitutionally challenged by Senator Barry Goldwater.

But that Supreme Court decision, which some suppose to constitute authority for this trade-treaty matter, concerned not international trade, but instead the President's authority as Commander-in-Chief, and so it wasn't even a "trade" case at all; it wasn't even relevant, and thus really shouldn't have been cited, because it dealt with different Constitutional provisions regarding what does and what does not reside within the President's authority — namely, as Commander-in-Chief, and as the negotiator on mutual-*defense* treaties.

So, there wasn't even a question in this matter as to whether it concerned a "treaty." Not relevant at all. On that shoddy basis, the appeals court said: "We nonetheless decline to reach the merits of this particular case, finding that with respect to international commercial agreements such as NAFTA, the question of just what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question." It said this even despite denying that the meaning of the Constitutional term "treaty" should be determined by the Executive and the Legislative branches, instead of by the Judicial branch:

> It is true that the Supreme Court has rejected arguments of nonjusticiability with respect to other ambiguous constitutional provisions. In Munoz-Flores, the Court was confronted with the question of whether a criminal statute requiring courts to impose a monetary "special assessment" on persons convicted of federal misdemeanors was a "bill for raising revenue" according to the Origination Clause of the Constitution, Art. I, § 7, cl. 1, in spite of the lack of guidance on exactly what types of legislation amount to bills "for raising revenue." The Court, in electing to decide the issue on the merits, rejected the contention that in the absence of clear guidance in the text of the Constitution, such a determination should be considered a political question.
>
> To be sure, the courts must develop standards for making [such]

> determinations, but the Government suggests no reason that developing such standards will be more difficult in this context than in any other. Surely a judicial system capable of determining when punishment is "cruel and unusual," when bail is "[e]xcessive," when searches are "unreasonable," and when congressional action is "necessary and proper" for executing an enumerated power, is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.

So: even that appeals court was not saying that the Legislative and Executive branches, working in concert, should determine what a "treaty" is and what it isn't, but instead this court reaffirmed the exclusive authority of the Judicial branch to make such determinations. It simply refused to exercise the authority. Its argument here was:

> We note that none of these cases [the cited ones on the Supreme Court's determinations regarding the meanings of specific terms and phrases in the Constitution], however, took place directly in the context of our nation's foreign policy, and in none of them was the constitutional authority of the President and Congress to manage our external political and economic relations implicated. In addition to the Constitution's textual commitment of such matters to the political branches, we believe, as discussed further below, that in the area of foreign relations, prudential considerations militate even more strongly in favor of judicial noninterference.

So, why didn't those jurists even make note of the fact that their chief citation, *Goldwater v. Carter*, concerned military instead of economic matters, and not the meaning of "treaty," at all? Stupidity, or else some ulterior motive — because *no reason at all was cited by them*.

Their decision closed by saying:

> We note that no member of the Senate itself has asserted that body's sole prerogative to ratify NAFTA (or, for that matter, other international commercial agreements) by a two-thirds supermajority. In light of the Senate's apparent acquiescence in the procedures used to approve NAFTA, we believe this further counsels against judicial intervention in the present case.

This assertion totally ignored that "the Senate's apparent acquiescence" had occurred, and been measured, only according to the 50%+1 Fast-Track standard, *never* according to the Constitution's two-thirds standard. According to the Constitution's standard, which was applied nowhere in the process along the road toward approval of any of the five Fast-Tracked treaty-bills into law, the Senate never actually 'acquiesced in' any of them. This court was simply accepting the Constitutional validity of that 'acquiescence,' so as to determine whether or not it was Constitutionally valid. Circular reasoning — prejudice.

However, in order to assist nullification of Fast Track for Obama's proposed 'trade' treaties, it would greatly help if one or more of the very vocal opponents in the U.S. Senate, *against* Fast-Tracking these treaties — any of the 37 Senators who voted "Nay" on it, for examples — would petition the Supreme Court to rule on the Constitutionality of the provisions in the Trade Act of 1974 (and subsequent legislation) that introduced Fast Track, and thus on Fast Track's abolition of the Constitution's two-thirds rule. The rights of each one of those 37 Senators, **and of everyone who elected them (including the present writer)**, are being violated by the Fast Track provision's denying the victory to them when they

constituted 37 votes and the Constitution says that anything more than 33 votes will successfully block a treaty from becoming law. Supposedly, the 60/40 requirement for cloture enables a mere 51/49 vote for the treaty itself in order for the treaty to pass into law — **despite the two-thirds-of-Senate rule for treaties.** This is crazy.

It could salvage American democracy, and the world (the sovereignty of each one of the participating nations), by ending U.S. participation in those treaties, and thus ending those treaties.

The current plan is for Obama's TPP treaty, and either or both of the others that might also be available for U.S. signature, to be approved after this November's elections, so that voters won't be able to expel from Congress the members who do it. However, even if they get passed this way, a Supreme Court ruling against Fast Track would overturn them all (and NAFTA).

Lawyers Bruce Fein and Alan Grayson have presented a separate way in which Fast Track is unConstitutional.

The likeliest way to bring the case to the Supreme Court (in order to meet the Court's stiff "standing" test for it to be able to be considered) will be in the name of petitioner(s) who concretely and demonstrably suffered severe financial damage as a consequence of NAFTA, since the enabling Act for that was the same as for Obama's proposed deals: the Trade Act of 1974. That would be the law which would be overturned, and the overturning of which would not only end NAFTA, it would block TPP, TTIP & TISA from going into effect. If this has happened to you, you may contactdelphicpress@yahoo.com in order to be considered to be (or to be included among) the named petitioner(s) on behalf of whom this case will be brought. (Though none of your losses could be recouped, your name could become prominent in history-books, because of the enormous impact this case will have if it is won.) The subject-line for that email should be: Case #5831

Whenever it happens, this will be the most important decision in the history of the U.S. Supreme Court — perhaps even more important than any President's Presidency has been. It will be a global decision, because these treaties are creating a global government, and the U.S. is central to all of them: without U.S. participation, each one of these multinational 'trade' treaties will end. If all three of Obama's mega-'trade' deals (TPP, TTIP, and TISA) become law and stay, then the participating democracies will become so hamstrung by international corporations, there won't be any real democracy remaining; and, for example, the increases in CO2 regulations that have been 'agreed' in the recent Paris accord to limit global warming, will be blocked — the planet will cook uncontrollably. Opponents of "regulation" might think that that would be worth the enormous harms — to the environment, to workers' rights, to product-safety, and all the rest that would be crippled by these treaties — but even many opponents of "regulation" favor democracy, and favor the sovereignty of nations. Only the billionaires who own controlling blocs of stock in the major international corporations would have any authentic reason to be happy, though their own descendants might end up sharing the hell of an incinerating planet.

Ultimately, the U.S. Supreme Court will have to decide whether the term "treaty" in the U.S. Constitution means "international agreement," and whether "international agreement" means "treaty." If they rule that those two are not synonymous, then the U.S. Constitution will be dead — in the sense that it will then be gone.

*Investigative historian **Eric Zuesse** is the author, most recently, of They're Not Even Close: The Democratic vs. Republican Economic Records, 1910-2010, and of CHRIST'S VENTRILOQUISTS: The Event that Created Christianity.*

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