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APPOINTMENTS CLAUSE PROBLEMS IN THE DISPUTE RESOLUTION PROVISIONS OF THE UNITED STATES-CANADA FREE TRADE AGREEMENT

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This essay deals with the constitutionality of the alternatives to judicial review that are included in the United States-Canada Free Trade Agreement[1] and its enabling legislation.[2] When the matter was pending before Congress, the principal focus of the debate was on the constitutionality of the denial of the right to judicial review and of the legality of an international arbitral tribunal which decided trade disputes.[3] In my view, this scheme does not present the right to judicial review because the persons objecting to the legislation will have prevailed below and therefore will not be the ones who are "denied" judicial review. Moreover, if the legislation simply denied judicial review to everyone, or required all disputes to be arbitrated in the first instance, there would be no substantial constitutional objections. But there is another issue that received very little attention in the debates upon which this essay will focus: The Appointments Clause problems with the alternatives to judicial review under the Agreement.[4]

Stated simply, my proposition is that the United States-Canada dispute resolution provisions permit persons who are *not* officers of the United States, and who are not appointed under the Appointments Clause, to overrule federal officials who *are* officers of the United States. These persons overrule federal officials on the grounds that the officials did not follow United States law as construed by persons who are not officers of the United States. No other law gives such sweeping powers to private citizens to perform what is, in effect, a kind of judicial or administrative review of

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1. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293 (1988) [hereinafter FTA].

2. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) [hereinafter Implementation Act] (codified in scattered sections of 19 U.S.C.).

3. H.R. REP. No. 816, 100th Cong., 2d Sess. 8-13 (1988) [hereinafter H.R. REP. 100-816].

4. The United States, Canada, and Mexico have recently reached agreement on a wide-ranging trade agreement, known as the North American Free Trade Agreement. *See* North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., *available in* WL, NAFTA Database (awaiting submission to Congress as this article went to press) [hereinafter NAFTA]. Chapter 19 of NAFTA contains dispute resolution provisions that, with the exception of differences based on the presence of three parties instead of two, are the same as those discussed in this essay. Since NAFTA has not yet been approved by the United States Congress, it will not be referred to further herein.

the decisions of federal officers. Not only does that scheme violate principles of representative government and democracy, but it also violates the Appointments Clause.

In order to understand what the United States-Canadian dispute resolution does, it is necessary to explain briefly the two statutes that it affects—the antidumping and countervailing duty laws.[5] Stated simply, both statutes are international fair trade laws, designed to prevent foreign businesses and their United States associates from competing unfairly with United States concerns. Under the antidumping laws, the unfair competition arises in the form of sales by foreign companies at prices in the United States below the prices charged at home[6] (*i.e.*, the companies are "dumping" goods in the United States) either to get rid of surplus or to drive out United States competitors, or both. The antidumping laws are intended to remedy unfair competition by making importers pay penalties[7] to offset the cut-rate pricing. The money goes into the United States Treasury, but the effect is to alter the pricing decisions of importers by forcing them to increase their prices in order to avoid paying the penalties. Then, because of the higher prices, United States companies can compete with foreign producers.

Countervailing duties operate in a similar way except that they attack government subsidies provided to foreign companies that give them unfair advantages when competing with United States producers.[8] Again, the United States competitor will normally trigger the complaint[9] and the competitor pays money to the United States Treasury, but the real benefit accrues to United States competitors in the form of altered (and presumptively more fair) pricing mechanisms.

Proceedings under both statutes are quite formal. A hearing on the record is held before an administrative law judge,[10] and the decision is made by the six members of the United States International Trade Commission who are appointed by the President with the advice and the consent of the Senate.[11] Under both laws, except as modified by the United States-Canadian trade treaty, losing parties have the right to seek judicial review.[12] This review ultimately reaches the United States Court of Appeals for the Federal Circuit which is composed of Article III judges whom the President appoints and the Senate confirms in accordance with the Appointments Clause. It is the right to judicial review, or more precisely the right to have a favorable decision by an administrative agency reviewed only by an Article III court, that is eliminated in United States-Canadian disputes.

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5. 19 U.S.C. §§ 1671-1677 (1988 & Supp. II 1990).
6. 19 U.S.C. § 1673 (1988).
7. *Id.*
8. 19 U.S.C. § 1671(a) (1988).
9. 19 U.S.C. § 1671a(b) (1988).
10. 19 U.S.C. § 1677c (1988); 19 C.F.R. § 207 (1992).
11. 19 U.S.C. § 1330 (1988 & Supp. I 1989).
12. 19 U.S.C. § 1516a(a) (1988); 28 U.S.C. § 1295(a)(5) (1988).

Instead of having to go to a United States court, the losing party has the right to opt for review[13] by a panel of five arbitrators. Two arbitrators must come from the United States, two from Canada, and the fifth rotates between the countries.[14] Those panels review the substance of the administrative decisions, just as a court would do for countries other than Canada, and render judgments which are then the final decision in the case, with the possible exception of extraordinary challenges,[15] which are like actions to overturn arbitration awards, *i.e.*, they are very limited and of very little practical significance. It is important to note that the panels, like the administrative agencies whose decisions they are reviewing, are applying United States law[16] (or in the case of comparable Canadian proceedings, Canadian law), not international law or substantive law contained in the United States-Canadian trade agreement. In that regard, they act just like the Article III judges whom they replace, except that they are not federal officers in either the Executive or Judicial branches of government.[17]

Instead, the United States panel members are private citizens, chosen from a group of fifty selected each year. These citizens' names are sent to Congress for its views before the panel is actually chosen. The United States Trade Representative, who heads an office within the Executive Office of the President with a staff of approximately one hundred and eighty members, appoints the panel members.[18] The panel members are not presidential appointees, and there is no Senate confirmation. The Canadian members are chosen entirely by the Canadian Government, with no United States involvement, just as there is no Canadian involvement for the United States appointees. As a result of this scheme, these five member mixed panels are reviewing government decisions made by Executive Branch officers even though panel members (except arguably the United States designees) are not government officials of any kind.

APPOINTMENTS CLAUSE PROBLEMS

Article 2, Section 2, Clause 2 of the Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and

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13. FTA, *supra* note 1, art. 1904, at 387.

14. *Id.* annex 1901.2, at 393.

15. *Id.* annex 1904.13, at 395.

16. *Id.* art. 1904 para. 2, at 387.

17. *Id.* annex 1901.2 para. 1, at 393. In theory, if the United States company that was complaining about the foreign activity lost before the federal agency, that party could appeal to our court system. However, the trade treaty and enabling legislation specifically give the right to the Canadian party to, in effect, overrule that choice by filing a request for panel review which supersedes any court review if done within the time provided by the law. *Id.* art. 1904, at 387-90.

18. Implementation Act, *supra* note 2, § 405(a)(2)(A), 102 Stat. at 1888.

> Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[19]

Under *Buckley v. Valeo*,[20] all persons who are officers of the United States must be appointed in accordance with the provisions of the Appointments Clause. Moreover, under *Buckley*, all persons "exercising significant authority pursuant to the laws of the United States" are officers of the United States.[21] Thus, the first inquiry must be to ascertain whether the power being exercised by the panel members is "pursuant to the laws of the United States."

In this case the inquiry is quite simple and the outcome quite clear. The panel members do essentially the same job as either the administrative officers, whose decisions they are reviewing, in which case they are like other Executive Branch officials acting in a supervisory capacity, or the panel members are substituting for the judges of the Federal Circuit, in which case they are performing Article III functions. In either case, the panel members are officers of the United States and must therefore be appointed in accordance with the Appointments Clause.

Since the President does not appoint the members of the panel, the Appointments Clause can be satisfied only if the panel members are (1) inferior officers and (2) the method of appointment applicable to inferior officers has been satisfied. As to the first requirement, the Supreme Court in *Morrison v. Olson*[22] set forth some of the criteria for determining whether an officer is an inferior officer. These criteria include whether the officer has limited duties, limited jurisdiction, is limited in time, and whether a superior may remove the officer. Leaving aside the first three, the panel members clearly do not satisfy the fourth criterion. While it is true that the United States Trade Representative can refuse to reappoint panel members, the Representative has no power to remove them, let alone to reverse the decision that the panel makes. Most important of all, the panel itself is reviewing decisions of persons who are, without a doubt, principal officers of the United States. It is unthinkable that these inferior officers could be overruling their superiors, which the panel does when it reverses administrative decisions made in these cases.

Assuming that the inferior officer hurdle can be surmounted, and assuming that the United States Trade Representative, who heads a small White House office, is the head of a department within the meaning of the

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19. U.S. CONST. art. II, § 2, cl. 2.
20. 424 U.S. 1, 126 (1976).
21. Buckley v. Valeo, 424 U.S. 1, 126 (1976).
22. 487 U.S. 654, 671-73 (1988).

Appointments Clause, there is another equally large constitutional impediment. In half of the cases, United States panel members will occupy only two of the five places, and in no case will they occupy more than three. If all three Canadians vote to overturn the administrative decision, it is plain that the decision would not be made by anyone who is an officer of the United States, since none of the three is even arguably appointed under the Appointments Clause. Even if the majority of the panel were United States citizens appointed by the United States Trade Representative, the problem still persists. While the Supreme Court has never ruled on the legitimacy of mixed bodies composed of both officers of the United States and non-officers, the Court would surely not sustain a law in which, for example, Congress provided that one-third of the members of the Federal Circuit do not need Senate approval, as long as only one of the non-Senate approved members appeared on any given panel. After all, it is not the votes alone, but the power to persuade, debate, and discuss that is at the heart of collegial decisionmaking.[23]

Therefore, if a panel is required to have officers of the United States serving on it, then all, and not merely a majority, must meet the tests of the Appointments Clause. For all of these reasons, the standards of the Appointments Clause have not been met. In all probability, the panel members are superior and not inferior officers, but even if they are inferior officers, at least forty percent and perhaps sixty percent of a given panel are appointed by a method completely outside the Appointments Clause. Under *Buckley*, therefore, the panelists cannot serve in positions in which they are exercising power pursuant to the laws of the United States.

There are three responses that have been raised when this and similar issues have been debated in the past. First, relying on *Dames & Moore v. Regan*[24] and *Thomas v. Union Carbide*,[25] supporters have argued that the Supreme Court has blessed the use of arbitral panels to resolve disputes, particularly in the international arena, and they contend that the Court would also uphold this plan for similar reasons. Two problems arise under this approach. First, the substantive law being applied in this situation is United States law, not international law.[26] Indeed, United States law,

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23. *But see* Melcher v. Federal Open Mkt Comm., 644 F. Supp. 510 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) (rejecting challenge to mixed composition of Federal Open Market Committee merits).

24. 453 U.S. 654 (1981).

25. 473 U.S. 568 (1985).

26. *See* INTERNATIONAL TRADE COMMUNICATIONS GROUP, DEPARTMENT OF EXTERNAL AFFAIRS OF CANADA, CANADA-U.S. FREE TRADE AGREEMENT—TRADE: SECURING CANADA'S FUTURE 268 (Preamble to Chapter 19 of Free Trade Agreement) (on file with author). The Preamble to Chapter 19 of the FTA makes it clear that the parties did not create new laws in the fields of antidumping and countervailing duties, but instead imposed a new mechanism for review of initial determinations by the administrative agencies of both countries. *Id.* at 268. The FTA provides that "the two governments have agreed to a unique dispute settlement

including the right to judicial and not panel review, still applies to every foreign competitor accused of unfair practices under the antidumping or countervailing duty laws, except those who are Canadians. Thus, the international law argument is of no help.

Another problem with this approach is that it both assumes that there is no constitutional right to judicial review in these circumstances—a proposition which I do not dispute, given the nature of the public rights at stake[27]—and that the arbitral panel decides the matter in the first instance, as was true in *Thomas* and *Dames & Moore*. But the latter is not correct here because a federal administrative agency makes the original decision, not the arbitration panel, and the panels act as reviewers (either administrative or judicial) of the prior administrative decision. I am aware of no case which involves a non-federal officer reviewing decisions of federal officers under the laws of the United States in a panel format or otherwise.

The second argument made by supporters is that the Supreme Court's decision in *Currin v. Wallace*,[28] supports the proposition that private parties can override decisions made by officials of the federal government. In *Currin*, the Secretary of Agriculture was given the power to promulgate uniform standards for tobacco sales, but the growers in each marketing area who would be subject to those rules and for whose benefit the rules were intended, had to approve their application by a two-thirds vote.[29] Such a vote took place and the growers overwhelmingly approved the plan. The question then became whether the Secretary's order was nonetheless invalid. The Court held that allowing a vote by the private parties to determine whether the plan went into effect was not unconstitutional.[30] Thus, *Currin* is claimed to support the proposition that the Supreme Court has upheld a general principle that private parties can override federal officials.

There are several problems with this proposition. To begin with, *Currin* has been regularly cited and regularly disregarded or rejected in virtually

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mechanism that guarantees the impartial application of their respective antidumping and countervailing duty laws," *id.*, and that the "binational panel . . . will determine whether existing laws were applied correctly and fairly," *id.*, and further provides that determinations by panel will be "on the basis of the same standards as would be applied by a domestic court," *Id.*; *accord* H.R. REP. No. 100-816, *supra* (stating that "[t]he binational panels would be required to apply to [sic] the law of the country whose agency decision is being reviewed"). The Preamble to Chapter 19 also makes it clear that the parties (especially Canada) sought to change the outcome by use of the panel review, and not simply to provide for greater advantages of speed and reduced formality that the panels might have over courts. The Preamble stated that "Canadian producers who have in the past complained that political pressures in the United States have disposed U.S. officials to side with complainants will now be able to appeal to a bilateral tribunal." *Id.*

27. *See* Thomas v. Union Carbide, 473 U.S. 568, 589 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 (1982).

28. 306 U.S. 1 (1939).

29. Currin v. Wallace, 306 U.S. 1, 6 (1939).

30. *Id.* at 15-16.

all separation of powers cases starting with *INS v. Chadha*.[31] While that does not establish that it is a dead letter, its force is surely diminished. Second, *Currin* did not discuss the Appointments Clause, nor was it argued to the Court, and because *Currin* predates *Buckley* by thirty-seven years, it can hardly be seen as having much bearing on Appointments Clause issues today. Third, the inclusion on the panel of persons appointed by the United States Trade Representative would distinguish this case from *Currin* and would highlight the absence of compliance with the Appointments Clause. Fourth, as described by the Supreme Court, *Currin* principally involved the ability of the principal intended beneficiaries of a federal program to decide that they did not want those benefits, and it held simply that nothing in the Constitution forbids Congress from giving the beneficiaries an opportunity to vote against such a program.[32] But even if such a program would be upheld today, that does not mean that the Court would allow, for example, farmers to veto a program that was intended to benefit consumers or wholesalers, which is the analogy applicable to this situation.[33]

The final and perhaps most troubling argument is based on *Seattle Master Builders v. Pacific Northwest Electric Power & Conservation Planning Council*.[34] In that case, by a vote of two to one, the Court of Appeals for the Ninth Circuit upheld a statute that allowed a compact agency, created among states in the northwest and composed of state officials, to propose a plan that dealt with conservation and usage of electric power in the northwest, including power generated by the Bonneville Power Association, a federal entity. The principal challenge was based on the fact that the members of the Planning Council were carrying out federal laws and were admittedly not appointed under the Appointments Clause.

In rejecting the challenge, the majority made a number of determinations which distinguish that case from this one. First, the court said that there was no difficulty with federal officers being required to follow state law.[35] That argument cannot apply here since the laws which are being relied on—the substantive United States antidumping and countervailing duty laws and the procedural statute substituting panel review for judicial review where the importing country is Canada—are plainly federal and not state or international.[36] Second, the court concluded that the members of the Council were not serving pursuant to federal law[37] because the Council was a creature of state law, which Congress had simply approved as a compact agency as

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31. 462 U.S. 919, 987 (1983).

32. *Currin*, 306 U.S. at 6.

33. *See id.* at 15 (stating that "[t]his is not a case where a group of producers may make the law and force it upon a minority").

34. 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

35. *Id.* at 1364.

36. *See* sources cited *supra* note 26.

37. Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

the Constitution requires. Once again, that claim cannot be made in the instant situation because the panels are entirely creatures of the enabling act passed to implement the United States-Canada Free Trade Agreement, both of which are federal law.

The court also relied on the fact that Congress was not arrogating the appointments power to itself, as it had done in *Buckley*,[38] but that reason cannot suffice. At least since *Morrison v. Olson*,[39] in which there was no aggrandizement of the appointment power by Congress, the Court has made it clear that its Appointments Clause analysis does not end with a finding of lack of congressional aggrandizement. The most troubling aspect of the opinion is that, despite the court's assertion that the Council was carrying out state and not federal law, it is undisputed that federal substantive and procedural requirements guided the plan, and thus, the plan was likely a product of federal law, as the dissent pointed out.[40]

Two other features of *Seattle Master Builders* that are not present here are worth noting. First, there is nothing in the Constitution that forbids Congress from directing that federal officials comply with state law without making state enforcement officials into officers of the United States. For example, it would surely not be unconstitutional for Congress to tell federal officials that they must comply with local speed limits when they are driving on federal business, nor that state officers who arrest federal officials who exceed those speed limits would not thereby be converted into officers of the United States. Arguably, compliance with state law was all that was at stake in *Seattle Master Builders*, at least insofar as the Bonneville Power Administration was concerned.

Second, the only action being challenged in *Seattle Master Builders* was the issuance of the plan. The plan itself did not in any way overrule or coerce any federal official into acting differently than the official would otherwise have done. The plan was, at least at that stage, advisory only. To be sure, there were other provisions of the federal law under which the federal agencies would be required to comply with the plan, if the Council so determined, but those were not at issue in the case. Moreover, as the Solicitor General made clear in his opposition to *certiorari*, the approval of the authority to issue the plan would not necessarily be dispositive in the later situations.[41] Since decisions by panel members overruling decisions of administrative agencies under antidumping and countervailing duty laws can hardly be considered to be advisory, that aspect of *Seattle Master Builders* does not save the present scheme. Moreover, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[42]

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38. *Id.*

39. 487 U.S. 654 (1988).

40. *Id.* at 1375 (Beezer, J., dissenting).

41. Brief for the United States in Opposition, Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 479 U.S. 1059 (1987) (No. 86-629).

42. 111 S. Ct. 2298 (1991).

the Supreme Court took an expansive view of what constitutes a federal power, as opposed to what constitutes a state power. This expansive view undercuts much of *Seattle Master Builders* and strongly supports the argument that the powers of the panels are federal, making panel members subject to the requirements of the Appointments Clause. For all of these reasons, it is not at all clear that the majority opinion in *Seattle Master Builders* is valid now, if it ever was. And even if it is valid, it is distinguishable on a number of very significant grounds.

In assessing the Appointments Clause argument, it is useful to consider not only the technical compliance with the Constitution, but also the fundamental violation of principles of representative democracy that would be established by allowing the panel decisions to go forward. In essence, what Congress has agreed to do is to allow private persons, at least forty percent of whom must be citizens of another country, to conclude that decisions by federal officials, appointed by the President with the advice and consent of the Senate are contrary to laws passed by Congress and approved by the President. One must also remember that once those panel determinations are made, they are subject to no further review of any kind by any official of the United States Government. Whatever the reach of the Appointments Clause may be, it surely requires that panel decisions of the kind at issue here must be made by officers of the United States, not private citizens of the United States and a foreign country. Since that requirement has plainly not been met, the panels are unconstitutional.

There is one other factor to keep in mind in assessing the validity of the panel review procedures. This is not a case where the elimination of judicial review was primarily intended to benefit the parties by speeding up the process. To be sure, the House Report attempts to sell the scheme by reference to its shortened timetables, its creation of some review of heretofore unreviewable Canadian administrative decisions, and the availability of government attorneys in the panel process to reduce costs to private parties.[43] Aside from the fact that the first and third of those benefits have nothing to do with the panel mechanism, there is little doubt that the driving force behind the change was the Canadian dissatisfaction with the outcome of the proceedings in the United States, even after judicial review was completed.[44] In other words, when the parties were unwilling or unable to negotiate substantive changes in United States law, they created the bilateral panels to do indirectly that which they could not, or would not, do directly. Indeed, to the extent that the panels are amending United States law by their interpretations of such law, they are unconstitutional for the same reason that the legislative veto was struck down: They do not comply

43. H.R. REP. No. 100-816, *supra* note 3, at 3-4.

44. *See* sources cited *supra* note 26; *see also* H.R. REP. No. 100-816, *supra* note 3, at 4 (discussing Canadian desires for substantive changes in U.S. laws, but accepting bilateral panels as compromise).

with the mechanism set forth in the Constitution by which laws are made.[45]

If the meaning and applicability of the laws of the United States dealing with antidumping and countervailing duties are enunciated and given legally binding effect in decisions directly affecting the rights of private parties, as well as the government, the Appointments Clause requires that such decisions be made by officers of the United States for whom the President and the Senate are accountable. Moreover, it surely forbids final administrative decisions that are made by officers of the United States, appointed by the President with the advice and consent of the Senate, especially when the purpose behind the creation of the panels was to alter the result under the very laws that the members of the panel are supposed to be upholding. The use of these bilateral panels is dangerous to our system of democracy, even in this limited context, but their potential application in other international agreements requires that the courts promptly step in and hold the panel review scheme unconstitutional before it spreads to many other areas of law.[46]

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45. INS v. Chadha, 462 U.S. 919, 956-59 (1983).

46. On August 19, 1992, an action was filed in the United States District Court for the District of Columbia challenging the constitutionality of the panel scheme. National Council for Indus. Defense, Inc. v. United States, No. 92-1898 (D.D.C. filed Aug. 18, 1992). Because the challenge is a general one, not tied to any particular panel determination, and because there is a specific and exclusive judicial review provision governing such challenges, which has not been met but is also being challenged, the plaintiffs are likely to have substantial difficulties in convincing a court to reach the merits of the case. *See* 19 U.S.C. § 1516a(g)(4)(A) (1988).