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## CAN *BUCKLEY* CLEAR CUSTOMS?

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The United States-Canada Free Trade Agreement (FTA)<sup>1</sup> and the North American Free Trade Agreement (NAFTA)<sup>2</sup> provide for panels of international arbitrators to review countervailing duty and antidumping determinations made by American administrators. Because the panels displace judicial review by American federal courts, their use presents two kinds of separation of powers issues. First, must judicial review by Article III judges be retained?<sup>3</sup> Second, must review be performed by "Officers of the United States" who are appointed in conformity with Article II of the Constitution?<sup>4</sup> Alan Morrison's article,<sup>5</sup> focusing only on the second question, concludes that the answer is "yes," because under *Buckley v. Valeo*,<sup>6</sup> the FTA arbitrators exercise "significant authority pursuant to the laws of the United States," and must therefore be officers of the United States, which they are not. I believe that the two questions cannot be separated in this instance, and that a negative answer to the first also compels a negative answer to the second. Therefore, I conclude that the dispute resolution provisions of the FTA, or the NAFTA, are constitutional.

### A. THE PURPOSES OF *BUCKLEY*

The holding of *Buckley* is that Congress may not grant itself the appointments power for officers engaged in regulation of domestic political campaigns.<sup>7</sup> As the Court pointed out, the Constitution allows the President,

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1. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293.

2. North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., available in LEXIS, GENFED-EXTRA Database, WL, NAFTA Database (awaiting ratification as this article went to press).

3. For my views on this and other issues concerning the constitutionality of the dispute resolution mechanism of the FTA, see *United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 101-18 (1988) (statement of Prof. Harold H. Bruff).

4. U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause provides: [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and 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 Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

*Id.*

5. Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299 (1992).

6. 424 U.S. 1, 126 (1976).

7. *Buckley v. Valeo*, 424 U.S. 1, 135 (1976).

the Heads of Departments, and the Courts of Law to appoint officers, but leaves out Congress.<sup>8</sup> That the omission was not accidental is confirmed by the Incompatibility and Ineligibility Clauses of Article I, Section 6, which forbid members of Congress to serve simultaneously as executive officers, or to create new or embellished offices and then serve in them.<sup>9</sup> If Congress and the Executive were to be kept in the hands of separate personnel, as the Framers surely intended, it would be almost as important to forbid Congress to appoint executive officers as to forbid it to execute the laws directly.<sup>10</sup>

Hence *Buckley* is that rarity in separation of powers jurisprudence, an easy case. Here, if anywhere, the Court's recent focus on the presence or absence of "aggrandizement"<sup>11</sup>—or "encroachment" or "disruption" or whatever pejorative we wish to apply to action that impairs the balance of power among the branches—justifies the conclusion that Congress was trying to usurp one of the President's chief means of controlling the executive branch.<sup>12</sup> The force of the Court's reasoning surely justifies a general principle that Congress may never seize the appointments power itself for domestic administration of the laws.

Yet difficulties in assessing *Buckley*'s reach speedily appear. Both executive officers and federal judges are "Officers of the United States" for Appointments Clause purposes. Is there any difference between them for these purposes? If not, administration of the laws could be allocated to either federal judges or executive officers, but not to anyone else, such as international arbitrators. The President, however, has a fundamentally different relationship to the two kinds of "Officers." He enjoys varying degrees of supervisory authority over executives, and none over judges. *Buckley* was decided in the context of "independent" executive officers, who occupy a twilight zone between maximum presidential authority over the Cabinet, and minimum authority over the judiciary.<sup>13</sup> The members of the Federal Election Commission, like many administrators, performed not only adjudicative functions that presumably could have been assigned to federal judges, but rulemaking and enforcement functions that could not have been assigned to the judiciary. The Court, avoiding the swamp of discussing the extent of permissible presidential supervision over independent agencies, did not say whether its preservation of the President's appointment

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8. *Id.* at 125-27.

9. U.S. CONST. art. I, § 6, cl. 2.

10. See *Bowsher v. Synar*, 478 U.S. 714, 741-50 (1986) (Stevens, J., concurring) (emphasizing that congressional agents must not make binding policy decisions).

11. *Buckley*, 424 U.S. at 122 (discussing "aggrandizement" of one branch at expense of another branch).

12. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381-83 (1989); *Morrison v. Olson*, 487 U.S. 654, 693-95 (1988); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-57 (1986).

13. See generally Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987).

opportunity was meant to protect his supervisory role over execution as well. For administration in the hands of ordinary executive agencies, the power to appoint officers does carry an implied power to supervise execution.<sup>14</sup>

Nevertheless, it is generally understood that principles of due process forbid political supervision of adjudication, whether it be placed in a court or an agency.<sup>15</sup> If appointment of adjudicators is not linked to the President's needs to supervise execution of the law, the interest of the Executive in retaining appointment authority is markedly reduced. It is not eliminated, however—there remains an interest in selecting adjudicative personnel, even if their later activity cannot be supervised. This interest is present for both executive adjudicators and federal judges, of course. As the nation has seen in recent clashes over Supreme Court nominees, the President hopes to obtain appointment of persons who share his general political philosophy. Hence, although the degree of presidential need to select executive officers is greater than to select judges, it is difficult or impossible to identify a point where Congress may permissibly disregard it. Perhaps, then, we should read *Buckley* to state a sound and universal principle that all statutory administration must be in the hands of constitutional officers, and no one else. If so, some existing law will have to change, as I next discuss.

#### B. ADMINISTRATION OF FEDERAL LAW BY NON-OFFICERS (OR, DOES BUCKLEY CROSS THE BELTWAY?)

Notwithstanding *Buckley*, significant portions of the administration of federal law have always rested in the hands of persons not employed by the federal government. The most prominent example, the litigation of federal questions in state courts, may be a special exception stemming from Our Federalism. So I lay it to one side, although it does embarrass any literal reading of *Buckley*. The Court's approval of placing governmental power in the hands of arbitrators and other private individuals does need reconciliation with the Appointments Clause.

In two cases decided since *Buckley*, the Court has upheld the use of arbitration in federal programs.<sup>16</sup> The Court's focus was not on *Buckley* in either case. In *Schweiker v. McClure*,<sup>17</sup> the Court allowed private arbitrators to apply federal law in a portion of the Medicare program. The Court inquired whether arbitration was consistent with due process, and concluded that the informality of arbitration is offset by its increased neutrality, so that fairness is adequately ensured.<sup>18</sup> Thus arbitral schemes, by focusing on

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14. See *Myers v. United States*, 272 U.S. 52, 135 (1926) (President "may properly supervise and guide their construction of the statutes").

15. See *Wiener v. United States*, 357 U.S. 349 (1958); *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966).

16. See generally Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989).

17. 456 U.S. 188 (1982).

18. *Schweiker v. McClure*, 456 U.S. 188, 196-200 (1982).

practical means to ensure neutral deciders, promote a value that has long been central to adjudication. This value competes with the President's interest in selecting adjudicators who are sympathetic to the goals of the executive. In the arbitration cases, the Court seems quietly to have decided that neutrality can trump responsiveness. In *Thomas v. Union Carbide Agricultural Products Co.*,<sup>19</sup> the Court asked whether the arbitration of disputes between manufacturers in the regulation of pesticides was consistent with Article III. It concluded that relieving the overloaded courts of some potential business could promote rather than undermine the purposes of Article III.<sup>20</sup> The Court's judgments in both of these cases seem acceptable.

There is also a long—and very conflicted—line of cases concerning delegations of power to private individuals to administer federal statutes.<sup>21</sup> These schemes lack the institutional controls to ensure neutrality that typify arbitration. The Supreme Court has sometimes condemned the placement of governmental power in the hands of interested private persons, and has sometimes upheld it. For an example of the Court's toleration of the practice, consider *Block v. Community Nutrition Institute*,<sup>22</sup> in which the Court held that consumers may not obtain judicial review of federal milk marketing orders. To support its nonreviewability holding, the Court argued that statutory provisions conditioning government orders on the consent of milk producers showed that the scheme was designed to advantage the producers.<sup>23</sup> The Court did not pause to ask whether private interests should be allowed to commandeer federal agencies—indeed, its holding facilitated private control. Perhaps all the cases that uphold these delegations are wrong under the *Buckley* principle. If so, the Court will have to survey a better border between public and private power in America than anyone has done to date.

### C. INTERNATIONAL ARBITRATION OF AMERICAN CLAIMS

From the earliest days of our Republic, international agreements have subjected claims of Americans to international arbitration, with binding effect on those claims.<sup>24</sup> The practice extends back to the controversial Jay Treaty of 1794.<sup>25</sup> Although there was much to dislike in the Treaty, whose terms were more or less imposed by the British, no one suggested that its claims settlement feature was unconstitutional.<sup>26</sup> From the standpoint of historical pedigree for a constitutional practice, it is hard to do much better

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19. 473 U.S. 568 (1985).

20. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590-91 (1985).

21. See Bruff, *supra* note 16, at 455-62; George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

22. 467 U.S. 340 (1984).

23. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346-47 (1984).

24. See *Hearing, supra* note 3, at 124, 142-58 (statement of Prof. Andreas F. Lowenfeld).

25. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat.

26. See generally JOHN C. MILLER, *THE FEDERALIST ERA 1789-1801* 164-71 (1960).

than an agreement that was "negotiated" by a moonlighting Chief Justice, swallowed by a reluctant President Washington, and accepted by one of the earliest Senates. Claims settlement by international arbitration has been a regular feature of our foreign policy ever since. The Supreme Court has repeatedly upheld it, most recently in *Dames & Moore v. Regan*,<sup>27</sup> which approved the transfer of claims pending in federal courts to an international arbitral tribunal as part of the Iranian hostage settlement.

It is easy to see why the Court has allowed international arbitration, without requiring that the arbitrators be officers of the United States. The power to settle claims by arbitration is one needed by any nation, to remove controversies that hamper foreign relations. For example, no resolution of the Iranian crisis was likely to occur until a mechanism for settling outstanding claims was devised. The claims settlement power is thus a component of the foreign policy powers of the United States Government under Articles I and II of the Constitution.

The Appointments Clause must be interpreted in a way that does not impair the operation of other provisions of the Constitution. To extend the operation of the Clause to international arbitration is fundamentally inconsistent with the purposes of this settlement device. It may be that the American members of international panels regard themselves as our officers, when they are selected by means arguably in compliance with the Appointments Clause, although that would be quite inconsistent with a neutral adjudicative role.<sup>28</sup> In any event, the foreign members of the panels are not our officers in any sense, and cannot be transmogrified into them. If all members of a mixed panel of Iranians and Americans must be our officers before arbitration may commence, there is little likelihood that any initial agreement to use arbitration will occur, or that the process will remain the truly international and balanced one that it must be to achieve success.

<sup>4</sup> D. DOES BUCKLEY CROSS NIAGARA FALLS (AND THE RIO GRANDE)?

The FTA and the NAFTA fit comfortably within the traditions of international arbitration. First, the subject matter of antidumping and countervailing duty determinations is truly international. The facts of these controversies concern the activities of foreign governments and firms within their own borders: is a feature of the tax code a subsidy; is a pricing practice explained by a protected environment? Second, the law of dispute settlement is also international. Today, a panel applies our federal law; tomorrow, another applies Canadian law; under NAFTA, another will apply Mexican law. All are equally part of the scheme, and it is artificial to focus only on the portion of the disputes that apply our own law. Third, the

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27. 453 U.S. 654 (1981).

28. But see William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315, 1320 (1992) (stating that Professor Davey did not feel that his panel position was so "august" as to require Senate confirmation).

aggrandizement concern that lies at the heart of *Buckley* is not present here. No international agreement containing an arbitral mechanism can be imposed on an unwilling executive. If the executive is not wholeheartedly in favor of any international agreement, it is most unlikely to be reached at all. This contrasts sharply with the frequency with which Congress has forced a President to swallow a domestic statute containing a provision the executive believes to be unconstitutional, for example a legislative veto.<sup>29</sup> Finally, within its appropriate sphere, *Buckley* is about administrative responsiveness to the President; international arbitration is about neutrality. The twain should not be joined. Correctly understood, *Buckley* does not clear customs.

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29. See *INS v. Chadha*, 462 U.S. 919, 968-74 (1983) (White, J., dissenting).