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The Quick Solution to Complex Problems: The Article III Judge

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THE QUICK SOLUTION TO COMPLEX PROBLEMS: THE ARTICLE III JUDGE*

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Congress and the executive branch have shown an extraordinary tendency in recent years to entrust numerous thorny problems to the members of their sister branch of government, the federal judiciary. From the federalizing of crimes traditionally viewed as the province of the state criminal justice systems, to the appointment of special prosecutors and the creation of the U.S. Sentencing Guidelines, judges appointed pursuant to Article III of the Constitution are increasingly called upon to perform functions beyond decision-making in federal cases and controversies.[1] International affairs are not immune from this approach to problem-solving employed by the first two branches of our tri-partite government. Indeed, international trade has been, and probably will be into the next century, a prominent area for non-traditional, perhaps extra-constitutional, uses of Article III judges.

Utilization of Article III judges for other than the exercise of the judicial power of the United States is not new. In *In re*

* H.L. Mencken is reputed to have once observed: "Every complex problem has a simple solution and it's usually wrong." *See, e.g.*, United States v. Michael, 645 F.2d 252, 264 n.6 (5th Cir.), *cert. denied*, 454 U.S. 950 (1981); Andrew R. Simmonds et al., *Dealing with Anomalies, Confusion and Contradiction in Fraud on the Market Securities Class Actions*, 81 Ky. L.J. 123 (1993).

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1. Article III, Section 2, Clause 1 of the U.S. Constitution reads as follows:

> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

President's Commission on Organized Crime,[2] the court highlighted the policy concerns caused by judicial membership on the President's Commission, and reviewed some of the notable instances of similar service. In an early example, President Grant appointed Justice Samuel Nelson to represent the United States in arbitration of Great Britain's claims in 1871.[3] Justice Robert Jackson served as chief prosecutor at the Nuremburg trials, and Chief Justice Earl Warren headed the commission investigating the assassination of President Kennedy.[4] The list is a good deal longer, but Chief Justice Warren himself, in explaining his original declination, pointed out some of the obvious concerns:

> I told [Deputy Attorney General] Katzenbach and [Solicitor General] Cox that I had more than once expressed myself to that effect for several reasons. First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy docket; and, third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases. I then told them that, historically, the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth, had not contributed to the welfare of the Court, that the service of five Justices on the Hayes-Tilden Commission had demeaned it, that the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and that the action of Justice Robert Jackson in leaving Court for a year to become chief prosecutor at Nürnburg after World War II had resulted in divisiveness and internal bitterness on the Court.[5]

Interestingly, this passage was quoted by the court in *Mistretta v. United States*,[6] which upheld perhaps the most controversial use of Article III judges in recent history, that is, as members of the United States Sentencing Commission. The issue of nonjudicial activity was also taken up by the Senate in a 1947 report by the Senate Judiciary Committee:

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2. 783 F.2d 370 (3d Cir. 1986) (finding Judge Irving Kaufman's participation thereon constitutional).
3. *Id.* at 377 n.4.
4. *Id.* at 377.
5. EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 356 (1977).
6. 488 U.S. 361, 401 n.26 (1989).

> When historical precedent is examined, it appears that the practice of using Federal judges in nonjudicial capacities has been defended in some quarters and strongly disapproved in others. A dearth of capable men in the early public life of the Nation gave rise to the frequent use of judges in nonjudicial activities, but objections to the practice were voiced by many, including Jefferson, Madison, and Pinckney. It was said that the choice of Federal judges for nonjudicial duties made the bench an 'annex' of a political party and an 'auxiliary' to the Executive. The situation was criticized as 'unwise and degrading.'[7]

As further historical examples of extrajudicial service demonstrate, the international arena is a prime target for the "Article III solution." Justice Owen Roberts served on the Commission to investigate the bombing of Pearl Harbor.[8] Chief Justice Melville Fuller and Justice David Brewer arbitrated a boundary dispute between Venezuela and British Guiana.[9] Justice Charles Evans Hughes settled a border dispute between Guatemala and Honduras, and Justice Willis Van Devanter arbitrated a dispute with Great Britain over a vessel seizure.[10]

Moving forward to recent times, the conscription of Article III judges to resolve international trade disputes appears to be on the upswing. Binational and regional free trade agreements are becoming a popular device to resolve international trade woes.[11] A feature of the most well-known of the regional agreements, the North American Free Trade Agreement[12] ("NAFTA"), and its predecessor, the Canada-United States Free Trade Agreement,[13] is the creation of the binational dispute settlement panels to resolve antidumping and countervailing duty disputes. NAFTA, however, contains a new provision. The panels that are normally composed of lawyers in the international trade field, often the very lawyers who litigate against each

7. S. REP. No. 7, 80th Cong., 1st Sess. 2 (1947) (footnote omitted).

8. In re President's Comm'n, 783 F.2d at 377.

9. *Id.* at n.4.

10. *Id.*

11. These types of agreements are to be distinguished from the broad-based multilateral agreements such as the General Agreement on Tariffs and Trade ("GATT") and its successor, the Agreement Establishing the World Trade Organization ("WTO").

12. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296, 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

13. Jan. 2, 1988, Ch. 19, 27 I.L.M. 281, 286.

other and who appear before the panels,[14] are to be joined by judges within the federal judicial circuits.[15] The selection process for the particular panels is not unlike that utilized under the rules of the American Arbitration Association.[16]

The drafters of the NAFTA Implementation Act did perceive some of the special problems caused by the utilization of such odd creatures as Article III judges. The statute thus establishes procedures for selection of judges and placement on a list of candidates eligible for service, which differ from those applicable to other candidates. These procedures are set forth in Section 402 of the implementing legislation.[17]

First, the U.S. Trade Representative must consult with the chief judges of the federal judicial circuits to determine who is interested and who is available for service on the binational panels, extraordinary challenge committees (appeals panels for narrow governmental challenges),[18] and special committees.[19] If a chief judge of the circuit unearths (or unbenches) a likely candidate, the name of the candidate is presented to the Chief Justice of the United States, who may submit the name or names to the Trade Representative, who, in turn, "shall" include the names submitted on the roster of judges.[20] The roster is then submitted for consultation to the House and Senate Committees on the Judiciary, the House Ways and Means Committee, and the Senate Finance Committee.[21] A final list is then submitted

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14. This may be one of the reasons why participation by members of the judiciary is desired. The involved attorneys are not always comfortable with the judgments, and the process of being judged, by their colleagues. *See* Robert E. Burke & Brian F. Walsh, *NAFTA Binational Panel Review: Should It Be Continued, Eliminated or Substantially Changed?*, 20 BROOK. J. INT'L L. 529, 560-61 (1995). Ethical issues also have arisen. *See id.* at 556-58 (discussing conflicts of interest raised in *In re Certain Softwood Lumber Prods. from Canada*, No. ECC-94-1904-01USA (Extraordinary Challenge Comm. Proceeding, Aug. 3, 1994)).

15. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, tit. IV, § 402, 107 Stat. 2057, 2130 (codified at 19 U.S.C. § 3432(b)(2) (Supp. V 1993)).

16. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL ARBITRATION RULES arts. 5-6 (1993); AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES rules 4, 13 (1993).

17. *Compare* 19 U.S.C. § 3432(b) (1988 & Supp. V 1994) *with* 19 U.S.C. § 3432(c) (1988 & Supp. V 1994).

18. *See* NAFTA, *supra* note 13, art. 1904(13), 32 I.L.M. at 683.

19. 19 U.S.C. § 3432(b)(2).

20. *Id.*

21. *Id.* § 3432(b)(3).

by the Trade Representative to the House Ways and Means Committee and the Senate Finance Committee.[22]

Second, pursuant to Annex 1901.2 of NAFTA, Canada, Mexico, and the United States consult and draw up a roster of 75 candidates for binational panels from their respective lists.[23] Each party to a dispute selects two candidates from the roster.[24] Four peremptory challenges are allowed, and the fifth candidate is chosen by agreement of the parties.[25] Failing agreement, the fifth panelist is chosen by lot from the roster.[26] NAFTA specifically provides that judges and former judges shall be used to the fullest extent possible.[27] Further, for purposes of an appeal, an extraordinary challenge committee is to be selected from a roster comprised only of judges and former judges of the federal benches of the three countries.[28] The committee would consist of three members.[29]

Third, issues regarding the integrity of the dispute settlement system are to be resolved by special committees, appointed from the same roster and in the same manner as the extraordinary challenge committee. To date, however, the Chief Justice has approved no names for the Trade Representative's lists of candidates for any of the NAFTA dispute resolution functions.

The World Trade Organization ("WTO") has occasioned another proposal for the use of Article III judges in international trade dispute resolution, outside the sphere of "Cases" or "Controversies." Debate regarding passage of the Uruguay Round Implementation Act included discussion of concerns as to loss of sovereignty, because, in general, domestic law prior to 1947[30] is not shielded from WTO violation, as was the case formerly with the General Agreement on Tariffs and Trade ("GATT").[31] Fur-

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22. *Id.* § 3432(b)(3), (c)(4).
23. NAFTA, *supra* note 12, annex 1901.2(1), 32 I.L.M. at 687.
24. *Id.* annex 1901.2(2), 32 I.L.M. at 687.
25. *Id.* annex 1901.2(2)-(3), 32 I.L.M. at 687.
26. *Id.* annex 1901.2(2), 32 I.L.M. at 687.
27. *Id.* annex 1901.2(1), 32 I.L.M. at 687.
28. *Id.* annex 1904.13(1), 32 I.L.M. at 688.
29. *Id.* art. 1905(2), (4)-(5), 32 I.L.M. at 684.
30. GATT was signed on October 30, 1947. GATT, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194.
31. Under the WTO system, GATT will be applied definitively and the exception for "grandfathered" legislation will be eliminated, subject to a limited exemption in the 1994 GATT text. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, annex 1A, ¶ 3, 33 I.L.M. 1140, 1155.

thermore, WTO panel decisions are to be more binding than past GATT decisions.[32] To assuage such concerns, Senate Majority Leader Robert Dole has introduced Senate Bill 16, the WTO Dispute Settlement Review Commission Act (the "Dole Legislation").[33] The review commission to be established is to be composed of five active circuit judges who are to be appointed by the President, after consultation with the Congressional leadership, for terms of two to five years.[34] The purpose of the commission is to review the decisions of the WTO resolving disputes between member nations, for both substantive and procedural fairness, and to report to Congress regarding the effects of the decisions on the rights of the United States.[35] The reports may lead to a joint resolution of Congress calling for negotiation by the President to improve the WTO dispute settlement procedures or a joint resolution of Congress to withdraw from the WTO.[36]

One of the interesting features of this proposed legislation is that it provides no role for any segment of the Article III governance structure in the selection of the judges who would be appointed. Thus, despite workloads or the press of the responsibility of exercising the judicial power of the United States, individual judges would be selected directly by the President for this duty. Presumably, a judge may decline. The provision for direct presidential selection would seem to be an unusual and unwise interference with the self-governance of a coordinate branch of government. Contrast the NAFTA procedures discussed above and the selection procedures for the judicial members of the United States Sentencing Commission[37] with Senate Bill 16. The need for the judiciary to be involved in the assignment of its own judges is an inherent aspect of its independence. James Madison wrote that "neither of [the Branches] ought to possess directly or *indirectly*, an overruling influence over the others in the administration of their respective powers."[38] The constitu-

32. *See id.* annex 2, arts. 3, 17, 21, 33 I.L.M. at 1227, 1236, 1238.

33. S. 16, 104th Cong., 1st Sess. (1995).

34. *Id.* § 3.

35. *Id.* § 4.

36. *Id.* § 6.

37. Pursuant to 28 U.S.C. § 991(a), at least three of the eight members of the Sentencing Commission must be judges, chosen from a list of six judges recommended by the Judicial Conference to the President. 28 U.S.C. § 991(a) (1988).

38. THE FEDERALIST No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added).

tionality of the NAFTA legislation and of Senate Bill 16, if it is enacted, will no doubt be the subject of legal decision,[39] as NAFTA is now of law review articles.[40]

Here, rather, we address the policy considerations of involving the federal judiciary in the extrajudicial resolution and review of international trade disputes. First, having "no influence over either the sword or the purse,"[41] the judicial branch depends upon its perceived legitimacy for the acceptance of and adherence to its decisions.[42] Acceptance and adherence by the coordinate branches, the states, the lower federal courts, and the public, in turn, enables the judiciary to fulfill its role in the constitutional structure. Indeed, as the *Mistretta* opinion forthrightly declares, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."[43]

The court in *Mistretta* noted that:

> According to express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies' . . . . These doctrines help to ensure the independence of the Judicial Branch by precluding *debilitating entanglements* between the Judiciary and the two political Branches.[44]

Also, as Judge J. Skelly Wright, in part quoting Chief Judge Cardozo, observed:

> Most critically, public confidence in the judiciary is indispensable to the operation of the law; yet this quality is placed in risk whenever judges step outside the courtroom into the vor-

39. Such an action was brought in the Court of Appeals for the District of Columbia challenging the decision in *Certain Softwood Lumber Prods. from Canada*, ECC 94-1904-01USA (Aug. 3, 1994). Coalition For Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (appeal voluntarily dismissed Jan. 6, 1995).

40. *See, e.g.*, Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141 (likening binational panel decision-making to unconstitutional exercise of judicial power of United States by Article I court); *see also* Burke & Walsh, *supra* note 14.

41. *See* THE FEDERALIST No. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

42. *Cf.* Planned Parenthood v. Casey, — U.S. —, 112 S. Ct. 2791, 2814-16 (1992) (holding that overruling of prior precedent would not only reach unjustifiable result under *stare decisis* principles, but would seriously weaken Court capacity to exercise judicial power and function as Court of nation dedicated to rule of law).

43. Mistretta v. United States, 488 U.S. 361, 407 (1989).

44. *Id.* at 385 (emphasis added) (citations omitted).

> tex of political activity. Judges should be saved 'from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.'[45]

The Dole Legislation particularly threatens to involve the judiciary in debate among the Congress, the President, and the public as to whether membership in the WTO invades the sovereignty of the United States, a subject that arouses great passions and that surely will not keep the judiciary above the fray of political issues. It also leaves open the possibility that the President's selection for the WTO review commission could be attacked as partisan or politically-motivated, thus drawing the nominated judges into political controversies. Moreover, the breadth of the review may lead the five judges into making political rather than judicial judgements.[46]

Second, Chief Justice Rehnquist, in discussing the federalization of crimes in his ninth annual year-end report, stated:

> Congress, of course, is subject to the limits imposed by the Constitution in enacting legislation. And in *Hayburn's Case*, decided in the first decade of the Nation's existence, the Supreme Court held that Congress could not require federal courts to decide cases which were then subject to revision by some agency outside the judiciary. But subject to these limitations, the law which Congress declares is the law which the federal courts apply.[47]

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45. Hobson v. Hansen, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting) (quoting In re Richardson, 247 N.Y. 401, 420 (1928)).

46. A similar situation was presented in *Morrison v. Olson*, 487 U.S. 654 (1988). There the court upheld the independent counsel provisions of the Ethics in Government Act of 1978, permitting the appointment of independent counsel by a "Special Division" court of Article III judges (also created by the Act). 487 U.S. at 696-97. Yet, a recent appointment has engendered questions about the impartiality and nonpartisanship of three Article III judges acting in such a capacity. *See* In re Charge of Judicial Misconduct or Disability, Judicial Council Complaint Nos. 94-8, 94-9, 94-10, 1994 U.S. App. LEXIS 30631 (D.C. Cir. Nov. 1, 1994) (dismissing complaint).

Judge Edwards discussed the effect of involvement in non-judicial functions upon the perceived integrity and nonpartisanship of the judiciary. *Id.* at *18-*24. He found that the Special Division was not exercising Article III judicial power and that "[i]t makes little sense to think that an authority acting pursuant to the Appointment Clause of Article II might be forbidden from consulting with others" [allegedly including U.S. Senators]. *Id.* at *21. Yet "[e]ven when acting in his capacity as a member of the Special Division, the judge . . . may still be subject to disciplinary process in this circuit by virtue of his service as judge of the Court of Appeals for the D.C. Circuit." *Id.* at *13. Upon what criteria then are non-judicial or political actions of a judge to be weighed?

47. Chief Justice William Rehnquist, *Chief Justice Rehnquist Reflects on 1994 in Year-End Report*, THIRD BRANCH, Jan. 1995, at 2.

Certainly, whatever the application of *Hayburn's Case*[48] to such extra-judicial decision-making, NAFTA panel decisions are arbitral,[49] and opinions under Senate Bill 16 are advisory and possess no finality. Participation in the issuance of such opinions does not contribute to traditional notions of the role of Article III adjudication. Arguably, the participating judges would not be exercising judicial power in these capacities and thus, under the doctrine of *United States v. Ferreira*,[50] would be acting as "commissioners" rather than as judges. The proposed creation in Senate Bill 16 of a commission composed *only* of five active circuit judges and of the extraordinary challenge committee in NAFTA, composed *only* of judges and former judges, however, are deliberately designed to look remarkably like U.S. federal courts. Structures that effectively mimic Article III courts may not fall within the *Ferreira* exception to the principles set forth by the justices deciding *Hayburn's Case.*

Third, the Code of Conduct for United States Judges,[51] promulgated by the Judicial Conference,[52] might be read to require federal judges to decline service on these bodies. Canon 5 states: "A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Subsection G of Canon 5 reads as follows:

> A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. *A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, im-*

48. 2 U.S. (2 Dall.) 409 (1792) (finding power of Congress to assign duties to Federal Judiciary limited to judicial duties only).

49. Under an unusual provision of the United States Code, 19 U.S.C. § 1516a(g)(7) (Supp. V 1993), the President may accept a NAFTA panel decision, whether or not it is found to be constitutional.

50. 40 U.S. (13 How.) 40, 48 (1851) (finding power conferred upon district court judge by statute similar to that of commissioner appointed to adjust claims to land or money under treaty).

51. 2 GUIDE TO JUDICIAL POLICIES AND PROCEDURES, CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES (Oct. 1994).

52. 28 U.S.C. § 331 (1988). The Judicial Conference is to serve as the principal policy-making body concerned with the administration of U.S. Courts. *Id.*

partiality, or independence of the judiciary.[53]

The commentary to Canon 5G, which offers significant observations, states:

> Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial resources created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary. The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation. Such assignments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary. . . . A code of conduct ought not compel judges to refuse, without regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment *provided that the judge's services would not interfere with the performance of the judge's judicial responsibilities or tend to undermine public confidence in the judiciary.*[54]

The individual judges selected, or those in the judiciary responsible for approving their selection, will have to decide if service on the bodies at issue will unduly interfere with the responsibilities of the particular judge to exercise the judicial power of the United States, will involve the judiciary in matters which will not enhance the public's view of judges as impartial and appropriately uninvolved decision-makers, or will violate the constitutional principles underlying *Hayburn's Case.*

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53. CODES OF CONDUCT FOR JUDGES, *supra* note 51, Canon 5G (emphasis added).

54. *Id.* Canon 5G commentary (emphasis added). Also established by Congress, the Judicial Conference can be characterized as the paramount commission within the judicial branch. As the principal policy-making body concerned with the administration of the U.S. Courts, its "Commentary," with its constitutional separation of powers base, should be given great weight. *Id.*

The writers hereof, speaking only for themselves, do not applaud continuation of this trend in international trade law into the "twenty-first century." We look forward to its reconsideration.