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THE NORTH AMERICAN FREE TRADE AGREEMENT: LOOKING AT THE BINATIONAL PANEL SYSTEM THROUGH THE LENS OF *FREE ENTERPRISE FUND*

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INTRODUCTION

This paper examines the constitutionality of the binational panels of the North American Free Trade Agreement ("NAFTA") under the United States Constitution. Part I provides an overview of the binational panel process. Part II outlines the process for challenging the constitutionality of binational panels and the obstacles that must be overcome. Part III discusses possible violations of the Due Process Clause. Part IV analyzes the constitutionality of binational panels under Article II of the United States Constitution. Part V examines the constitutional implications of Article III with respect to the absence of judicial review. Part VI is a case-by-case analysis of previous attempts to challenge the constitutionality of binational panels. The conclusion illustrates how binational panels may violate Article II, Article III, and the Due Process Clause of the 5th Amendment.

Chapter 19 of the NAFTA allows each party to reserve "the right to apply its antidumping . . . and countervailing duty law to goods imported from the territory of the other Party."[3] Antidumping laws prevent companies from selling products in other countries at unreasonably low prices. Countervailing duty laws are a means to the same end, but are in place to offset government subsidies. In the United States, a domestic firm can ask the Commerce Department to investigate a potential violation of either antidumping or countervailing duty actions.[4] The Commerce Department and the Interna-

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[3] North American Free Trade Agreement, U.S.-Can.-Mex., art. 1902(1), Dec. 17, 1992. 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[4] 19 U.S.C. § 1673(1) (1930).

tional Trade Commission then make a preliminary determination.[5] If both agencies make affirmative findings, they then make final determinations.[6] Prior to the NAFTA, these determinations were appealable to the Court of International Trade,[7] and then the United States Court of Appeals for the Federal Circuit.[8] Mexico and Canada were both dissatisfied with this process due to fear of domestic political bias. Participating countries originally reached a compromise in the U.S.-Canada Free Trade Agreement of 1988,[9] which was later implemented nearly verbatim into the NAFTA. This compromise stripped the Court of International Trade and the Federal Circuit's review power, and placed jurisdiction exclusively in a binational panel.[10]

The case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*[11] looms large while analyzing the Appointments and Removal Clause of Article II of the Constitution. In that case, the Supreme Court provided further guidance on how officers are classified and, in addition, struck down the manner in which officers were removed. As this case plays a pivotal role in comparing the Appointments and Removal Clause to the binational panels of the NAFTA, a full review is necessary.

Appellants,[12] Free Enterprise Fund ("the Fund"), received a critical report by Appellees, Public Company Accounting Oversight Board ("the Board"), regarding the Fund's auditing practices.[13] The critical report triggered a deeper investigation by the Board into the Fund's practices.[14] With the investigation and looming possibility of severe penalties, the Fund brought a declaratory judgment action claiming that the Board is unconstitutional, and sought an injunction

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[5] 19 U.S.C. § 1673(2).

[6] 19 U.S.C. § 1673(e).

[7] 19 U.S.C. § 1516(a)(1)(D) (1988) ("[A]n interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint . . . contesting any factual findings or legal conclusion upon which the determination is based.").

[8] 28 U.S.C. § 1295(a)(5) (1988) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of International Trade.").

[9] MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 6 (2000).

[10] NAFTA ch.19 (1993).

[11] Free Enter. Fund v. Pub. Co. Accounting Oversight Bo., 130 S.Ct. 3138 (2010).

[12] "The Fund" is actually a mix of two different groups: Beckstead and Watts, LLP (an accounting firm that received the critical report from the Board) and the Free Enterprise Fund, an organization of which Beckstead and Watts is a member. *Id.* at 3149.

[13] *Id.*

[14] *Id*.

to prevent the Board from exercising its investigative powers.[15] A look into how the Board operates is necessary to understand the Fund's argument.

The Sarbanes-Oxley Act created the Board to help reign in the wildly volatile financial sector in the aftermath of Enron and other questionable financial practices.[16] The reach of the Board is broad: all accounting firms, domestic and foreign, that wanted to be a part of the American financial industry were required to register with the Board.[17] In doing so, those that were registered were subject to the Board's rules.[18] Additionally, all firms paid a fee directly to the Board.[19]

The five individual board members[20] serve five-year staggered terms[21] and are appointed by commissioners of the Securities and Exchange Commission ("SEC").[22] Together, the commissioners enforce the rules in the Sarbanes-Oxley Act, the rules the SEC promulgates, the rules the Board itself imposes, and professional accounting and auditing standards.[23] In addition to enforcing the above rules, the Board promulgates its own auditing and ethical standards and performs routine inspections of the registered firms.[24] If one of the registered firms fails to abide by any of the rules, the Board can hand down a steep penalty. A willful violation of a Board rule is considered a willful violation of an SEC rule, and is therefore a felony punishable by 20 years in prison or $25 million dollars in fines.[25] Lastly, and arguably most importantly, only the SEC can remove Board members, and only for good cause.[26]

The heart of the case, and the Fund's key argument, rested with the way the Board members and the SEC commissioners were appointed and removed. Ultimately, the Court latched onto the way the Board members were removed.[27] Because the Board members are only removable by SEC commissioners for good cause, and SEC commissioners are removable by the President only under a *Humphrey's*

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[15] *Id*.
[16] 15 U.S.C. § 7211(a) (2010).
[17] *Free Enter. Fund*, 130 S. Ct. at 3147
[18] *Id*. at 3147-48.
[19] *Id*. at 3147.
[20] 15 U.S.C. § 7211(e)(1).
[21] *Id*. § 7211(e)(5).
[22] *Id*. § 7211(e)(4).
[23] *Id*. §§ 7215(b)(1), (c)(4).
[24] *Id*. §§ 7213–14.
[25] *Free Enter. Fund*, 130 S. Ct. at 3148.
[26] 15 U.S.C. § 7211(e)(6).
[27] *Free Enter. Fund*, 130 S. Ct. at 3148–49.

Executor[28] standard, a dual-level removal cloud exists.[29] The existence of both standards means neither the President nor the SEC commissioners have direct control over the Board members.[30] Because the SEC cannot remove a Board member at will, the President cannot hold the Commission accountable for the Board's behavior.[31] The President can only act when he so disagrees with the Commissioners' determination of good cause that its unreasonableness reaches the *Humphrey's* standard.[32]

Therefore the Court concluded that the Board operates under a dual-level of good cause removal, which directly conflicts with the constitution's separation of powers.[33] Although in dicta, the Court stated, "While we need not decide the question here, a removal standard appropriate for limiting government control over private bodies may be inappropriate for officers wielding the executive power of the United States."[34]

Although the Fund raised an additional challenge to the Board using the Appointments clause, the Court found it without merit.[35] The main challenge under the Appointments clause was that the Board members were principal officers and therefore the President was required to seek the advice and consent of the Senate prior to appointing the members.[36] While the Court rejected the Fund's argument and determined that the Board Members were not principal officers, they did so only after stating that the SEC Commissioners, because of the opinion, possessed the ability to remove Board Members at will in order to avoid violating the Constitution.[37] Therefore, the Court left open the possibility that had there existed only a single level of removal for Board Members - a higher one than an at-will standard - the Board Members would be considered principal officers. As such they would have been subject to Presidential appointment with the advice and consent of the Senate.[38] Nevertheless, the holding of the case was limited to the removal procedures only.[39]

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[28] Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935) (citing 15 U.S.C. § 1) (finding that a Commissioner may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office).
[29] *Free Enter. Fund*, 130 S. Ct. at 3151.
[30] *Id*. at 3154.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 3151.
[34] *Id.* at 3158.
[35] U.S. CONST. art. II, § 2, cl. 2; *id*. at 3162.
[36] U.S. CONST. art. II. § 2, cl. 2; *id.* at 3162.
[37] *Free Enter. Fund*, 130 S. Ct. at 3162.
[38] U.S. CONST. art. II, § 2, cl. 2.
[39] *Free Enter. Fund*, 130 S. Ct. at 3164.

The impact of this decision has the potential to reach the binational panels of NAFTA. As discussed below, the way panel members are selected and removed may follow the Court's reasoning in *Free Enterprise Fund* and therefore could be unconstitutional.

I. BINATIONAL PANEL SYSTEM

Binational panels decide whether an administrative determination was correct under the laws of the country that rendered it.[40] The panel may remand for further proceedings consistent with its decision.[41] The panel's decision is generally binding and non-reviewable, with one exception for an "extraordinary challenge."[42] These qualities are judicial in nature, and the non-reviewability factor essentially makes the binational panel the court of last resort.[43]

Binational panels are made up of five members selected from a 75-person roster.[44] Similar to arbitration, the parties themselves develop the roster with each selecting two panelists subject to challenge by the opposing party. The parties then agree on a fifth panelist together, or, if an agreement is not possible, they select the fifth panelist by lot.[45] The chairperson and a majority of the panel must be lawyers, but there is no requirement that all panelists be lawyers.[46] The NAFTA encourages the use of judges, or former judges, to the extent practicable.[47] It should be noted that panel review is not mandatory.[48] In fact, if a party does not request a panel review, the determination may proceed through the judicial review procedures that apply. Due to the generally high dollar amounts at stake and perceived bias in domestic judicial review processes, failure to request a review panel is unlikely. When review panels are requested, they should apply the same substantive law that the agency has applied.

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[40] *See* NAFTA arts. 1902(1), 1904, 1911.

[41] 19 U.S.C. § 1516a(g)(7)(A) (1994).

[42] *Id.*

[43] *Id*.

[44] NAFTA Annex 1901.2(1-3).

[45] NAFTA Annex 1901.2(3).

[46] NAFTA Annex 1901.2(2).

[47] NAFTA Annex 1901.2(1).

[48] NAFTA art. 1903(3); *see generally* Ontario Forest Industries Assoc. v. United States, 444 F. Supp.2d 1309, 1313 (Ct. Int'l Trade 2006).

II. CHALLENGING BINATIONAL PANELS

No court in the U.S. will review any decision made by either a binational panel or an extraordinary panel.[49] The only challenge that is justifiable is a constitutional challenge to the binational panel itself. Such a challenge must be filed in the United States Court of Appeals for the District of Columbia within thirty days of the panel's decision.[50] A decision by the D.C. Circuit may be appealed to the United States Supreme Court within ten days of issuance.[51] This procedure has only been used twice since the implementation of binational panels under the U.S.-Canada Free Trade Agreement of 1988.[52] The lack of challenges to the binational panel, and the fact that the two aforementioned cases never reached a decision on the merits, are likely due to the multiple hurdles that have been placed in the path of a potential challenger. Numerous obstacles negate any motivation for a party seeking to challenge the constitutionality of this quasi-judicial procedure.

The first obstacle is a financial one. Constitutional disputes are pricey in general, but prospective challengers might hesitate before requesting review of a binational panel's decision when faced with the possibility of paying the opposing party's fees as well as their own. The NAFTA requires the petitioning party to pay their opponent's litigation costs if the challenge fails.[53] While the court has discretion as to whether to utilize this provision, the very existence of such a possibility is likely to discourage many companies from pursuing a challenge. The second obstacle is a dual-threat hurdle from the executive and legislative branches. In 1989, President Ronald Reagan

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[49] *Ontario Forest Industries Assoc.*, 444 F. Supp.2d at 1313 (Ct. Int'l Trade 2006) (citing NAFTA arts. 1904(11), (13); 19 U.S.C. § 1516a(g)(2)); *see also* NAFTA annex 1904.13.

[50] 19 U.S.C. § 1516a(g)(4)(C) ("[W]ithin 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action . . . by filing an action in accordance with the rules of the [District of Columbia Circuit] court.").

[51] 19 U.S.C. § 1516a(g)(4)(H) ("[A]ny final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the United States . . . within 10 days after such order is entered.").

[52] United States-Canada Free-Trade Agreement, Jan. 21, 1988, Can.-U.S., 27 I.L.M. 281.

[53] 19 U.S.C. § 1516a(g)(4)(F)(ii) (1994) ("[i]f a court upholds the constitutionality of the determination in question in such action, the court shall award to a prevailing party fees and expenses, in addition to any costs incurred by that party, unless the court finds that the position of the other party was substantially justified or that special circumstances make an award unjust.").

issued an executive order providing that the President accepts "as a whole, all decisions of binational panels and extraordinary challenge committees."[54] The President may also direct the Commerce Department to take action consistent with the panel decision, even if the binational panels are held unconstitutional.[55]

This combination of congressional and executive action essentially make a constitutional challenge, even if successful, useless to the parties involved in the case. The only reason for such a challenge would be to put an end to or to amend the binational panel process in future disputes because the result in the underlying case would not change. When the financial and practical obstacles are combined, it becomes apparent that constitutional challenges will be rare. These factors were likely central considerations to the settlements that prevented the only two challenges thus far from reaching a decision on the merits. Regardless of the practicality of a constitutional challenge, there are many questions that should be answered regarding binational panels. The next three sections will discuss possible constitutional violations in detail.

III. DUE PROCESS

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."[56] As interpreted, this phrase forbids the deprivation of a property interest by government action without the opportunity to be heard by a neutral and detached decisionmaker.[57] In 1970, the Supreme Court of the United States outlined a four-prong analysis for due process challenges.[58] First, the challenger must establish that the action was performed under the direction or control of the government. Second, the challenger must prove that a life, liberty, or property interest is affected. Third, the challenger must establish what process is due. Finally, the challenger must prove that the government, or its instrumentality, has not provided such process.[59] Under this test, it is likely that the NAFTA's binational panel system violates due process.

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[54] Exec. Order No. 12,662, 54 Fed. Reg. 785 (Jan. 9, 1989).

[55] 19 U.S.C. § 1516a(g)(7)(B). Prior to Executive Order, Congress implemented the NAFTA which provided for the President to accept binational decisions, even if they are held unconstitutional.

[56] U.S. CONST. amend. V.

[57] Matthews v. Eldridge, 424 U.S. 319, 332-33 (1976) (regarding termination of Social Security benefits).

[58] *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (involving the question of whether welfare recipient's interest in continued receipt of welfare was a property interest requiring due process before termination).

[59] *Id.*

Binational panels perform a judicial function typically reserved for the federal judiciary under Article III.[60] Binational panels "are endowed by the State" through 19 U.S.C. § 1516a(g), thus their "functions [are] governmental in nature, they [have] become [an] agenc[y] or instrumentalit[y] of the State and subject to its constitutional limitations."[61] Likewise, a "sufficiently close nexus" exists between the United States Government and the binational panel system, such that the actions of binational panels are government actions for due process purposes.[62] The nexus is the finality and binding nature that panel decisions have on the executive branch of the U.S. Government. In essence, binational panels are interpreting law, a judicial function, and enforcing law, an executive function. For these reasons, the first prong of the due process analysis is met, and an action by a binational panel should be considered government action. Next, it must be determined whether a property interest is affected.

"Property interests . . . are not created by the Constitution, [but] are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . that secure certain benefits and that support claims of entitlement to those benefits."[63] The independent source of law in this situation is the statutes for the antidumping and countervailing duties laws. Where a statute creates a property interest, the Due Process clause requires that constitutionally adequate procedures must be followed to alter or end that property interest.[64] In fact, on multiple occasions, the Court of International Trade has recognized that domestic companies threatened with material injury from dumped or subsidized imports have a property interest in the enforcement of laws and are, therefore, entitled to procedural due process.[65] Because the government has created a property right, Congress lacks the constitutional authority to mandate the use of a process that strips a company of that right without complying with due process. This analysis must determine what process a challenger is entitled to and whether the binational panel system affords such a process.

The process that is due to a challenger is an opportunity to be heard by impartial and unbiased decision-makers. In certain instances, the possibility of bias may render adjudication unconstitu-

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[60] *See* 19 U.S.C. § 1516a(g)(2).

[61] Evans v. Newton, 382 U.S. 296, 299 (1966).

[62] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[63] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

[64] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

[65] *See, e.g.*, Koyo Seiko Co. v. United States, 796 F. Supp. 517 (Ct. Int'l Trade 1992); PPG Indus., Inc. v. United States, 708 F. Supp. 1327 (Ct. Int'l Trade 1989).

tional as a denial of due process.[66] The test for bias rendering adjudication violating due process is a situation "which would offer a *possible* temptation to the average man as judge . . . which might lead him not to hold the balance nice, clear, and true between the [parties]."[67] The Supreme Court has emphasized the need for impartial and unbiased review, even if that means that a judge with no actual bias will be barred from hearing a case.[68] The Court derives its position from the maxim that "justice must satisfy the appearance of justice."[69] In *Matthews v. Eldridge*, the Supreme Court laid out balance to this stringent rule.[70] In *Matthews*, the Court applied a balancing test weighing the affected private interest with the government's interest.[71] The apparent government interest at play in instituting the binational panel system is a political interest to satisfy the governments of Canada and Mexico. The Supreme Court has rarely found a governmental interest sufficient to outweigh private due process rights. In 2004, the Court held that even national security interests cannot outweigh the right to an impartial adjudicator.[72] If national security does not weigh enough to tip the scales, then it is doubtful that political and pecuniary interests would weigh more. Now that the initial three elements have been satisfied, it must be determined whether the binational panel system provides the process due.

Binational panels do not provide due process because the process itself creates the possibility of bias. Many argue that if binational panels are unconstitutional for this reason, then all arbitrations would suffer the same fate. However, the compulsory nature of binational panels noticeably distinguishes them from private arbitrations. In private arbitrations, both sides agree to submit to such a system in exchange for cost savings and to promote efficiency. However, in the binational panel arena, if either party demands a binational panel review then both parties are required to submit to this process.[73] The possibility of bias and lack of mutual assent renders the binational panel system unconstitutional.

In 1993, the Supreme Court heard a case that had similar concerns to the binational panel system. In *Concrete Pipe and Products of California, Inc. v. Construction Laborers*, the Court noted disfavor for any process by which the adjudicators chosen, even by private parties,

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[66] *In re* Murchison, 349 U.S. 133, 136 (1955) (citing Tumey v. Ohio, 273 U.S. 510, 532 (1927)).
[67] *Tumey*, 273 U.S. at 532 (emphasis added).
[68] *Murchison*, 349 U.S. at 136.
[69] *Id.* (citing Offutt v. United States, 348 U.S. 11, 14 (1954)).
[70] *Matthews*, 424 U.S. at 319 (1976).
[71] *Id.* at 335.
[72] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[73] NAFTA § 1904.

had an incentive to be biased.[74] The Court stressed that justice must appear just, and that this requirement is not relaxed when a private party has adjudicative authority by statute.[75] Binational panelists have a dual role that cannot be separated sufficiently to satisfy due process. On one hand, they may be biased towards the party that appointed and pays them. Likewise, the panelists are also usually from the country of the appointing party. On the other hand, they have been asked to serve in a quasi-judicial, unbiased role with little to no training in U.S. law or administrative procedure. This inherent conflict of interest creates at least a possibility of bias. Therefore, some argue that this probability of bias makes binational panels in violation of the Constitution's Due Process Clause.

In addition to the generalized bias of nationality and affinity for the appointing party, binational panelists can have both a professional and pecuniary interest in the outcome of the cases. Professional bias may arise because many of the panelists are trade lawyers and consultants who currently practice before the Commerce Department and International Trade Commission. Thus, panelists are placed in a position to review decisions of the agencies before which they practice. Panelists may feel inclined to take one position because of the possible assistance the decision could lend to their own cases or controversies. In addition, panelists also have a personal financial interest in ensuring repetitive selection by ruling in favor of the party who appointed them in order to continue collecting fees. If a party perceives that one panelist seems to side with them on a regular basis, they are more likely to choose that panelist for future disputes. While panels are unlikely to be filled with biased members, the Supreme Court held that a single biased member taints the entire panel, and thus denies the party's due process rights.[76]

A sufficient process to remove potentially biased members and guard against bias would cure this deficiency. Unfortunately, no such process exists under the NAFTA. A panel member may only be removed if both party-countries consent.[77] The possibility that one party could present evidence of bias and be unable to effectuate removal unilaterally deprives the aggrieved party of their due process right to a neutral and detached decision-maker. Even if the panel is completely unbiased, the process may still violate due process by failing to provide

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[74] Concrete Pipe & Products of California, Inc. v. Construction Laborers, 508 U.S. 602, 617 (1993).

[75] *Id.* at 618.

[76] Amos Treat & Co. v. S.E.C., 306 F.2d 260, 264 (D.C. Cir. 1962) (quoting Berkshire Employees Ass'n v. N.L.R.B., 121 F.2d 235, 238-39 (3d Cir. 1941)).

[77] *See* NAFTA Annex 1901.2(6).

a panel that is competent to interpret and apply the United States laws and standards of review.[78]

In considering the use of untrained adjudicators, the Supreme Court upheld a Medicare review system that allowed non-lawyers to serve as decision-makers because the Act specifically required hearing officers to have a *thorough* knowledge of the Medicare program.[79] No such requirement exists under chapter 19 of the NAFTA. In addition, the binational panel system suffers from some other serious practical complications. Under the current system, Canadian lawyers are expected to interpret and apply U.S. law, and Mexican lawyers, who come from a civil law background, are expected to act in a common law system that is foreign to their training. As is human nature, a panelist who is not trained in U.S. law or its standards may focus on the outcome and work backwards from there. This concern has played out before.

In at least two panel opinions, a dissenting member noted that the majority of the panel ignored the standard of review or applicable case law. In *In re Grey Portland Cement & Clinker From Mexico*, panelist Endsley noted that he feared the other panel members ignored the standard of review and utilized a "wholesale dismissal of the applicable case law."[80] In *In re Certain Softwood Lumber Products from Canada,* panelist Wilkey noted that the Canadian members did not have a familiarity with the standards of judicial review and instead proceeded to "reevaluate the evidence, [and] re-determine the technical issues" that were before the agency.[81] The possibility of ignorance of applicable law creates a process that is diametrically opposed to the concept of due process. The most elementary expectations for an adjudicator are that they have knowledge and understanding of the law or rules to be applied. For these reasons, the binational panel system violates due process.

IV. ARTICLE II

Article II of the United States Constitution provides, in relevant part, that the President "shall nominate . . . with the Advice and Consent of the Senate . . . Officers of the United States, whose Appointments are not herein otherwise provided for."[82] It also provides that the Congress may "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or

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[78] *See* Gordon v. Justice Court for Yuba Judicial Dist., 525 P.2d 72, 75 (Cal. 1974) (striking practice of non-law-trained judges presiding over criminal trials).
[79] Schweiker v. McClure, 456 U.S. 188, 199-200 (1982).
[80] No. US-97-1904-1, 1999 FTAPD Lexis 4 at *325 (June 18, 1999).
[81] 1994 WL 405928 at *63-64 (August 3, 1994).
[82] U.S. CONST. art. II.

in the Heads of Departments."[83] The Supreme Court has defined "Officer of the United States" as an appointee exercising significant authority pursuant to the law of the United States.[84] The following paragraphs demonstrate that binational panelists exercise such authority, and that whether regarded as an "Officer" or an "inferior Officer," their appointments contravene Article II of the United States Constitution.

Binational panelists exercise significant authority pursuant to the law of the United States. They review antidumping and countervailing duty determinations of other principal Officers of the United States. The President, with advice and consent of the Senate, appoints the Secretary of Commerce and Commissioner of the International Trade Commission. The panelists, however, derive their power directly from the implementing legislation of the NAFTA.[85] The Supreme Court has never determined whether such panelists are "Officers."[86] But, in an analogous situation, the Court determined that the Election Commission, created to enforce compliance with certain laws, were Officers for the purpose of Article II appointments.[87] The Court noted that the commissioners' powers encroached upon the President's ability to faithfully execute the law.[88] Also, the Court has become highly skeptical of officers, whether principal or inferior, who are insulated from the President.[89] When such officers are handling some form of executive business without presidential oversight, their authority and actions contravene constitutional authority.[90] Similarly, binational a panelist's authority to review the determinations of administrative agencies encroaches upon the executive authority to make such determinations, and possibly the judiciary's authority to review such determinations. It is unreasonable that an officer should be subject to the binding review of a non-officer. Another major problem is the lack of control or direction by any of the three constitutional branches.[91] As discussed, this problem was at issue in *Free Enterprise Fund*, where Board Members, only controllable by the President through a dual-layer of good-cause removal, had the ability to dole out fines, force registration with the payment of a fee, and enforce specific procedures and protocol for an entire sector.[92] The Court held that the

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[83] *Id.*
[84] Buckley v. Valeo, 424 U.S. 1, 126 (1976).
[85] *See* 19 U.S.C. § 1516a(g)(7)(A).
[86] *Buckley*, 424 U.S. at 141.
[87] *Id.*
[88] *Id.*
[89] *See Free Enter. Fund,* 130 S. Ct. at 3151.
[90] *Id*.
[91] *Buckley*, 424 U.S. at 126.
[92] *See Free Enter. Fund,* 130 S. Ct. at 3151.

amount of power the Board Members wielded coupled with the level of insulation they enjoyed was unconstitutional.[93]

Binational panelists are required to apply the laws of the United States, utilizing standards of review developed by the American judiciary whose decisions have binding authority over administrative agencies. Because the panelists exercise their authority pursuant to United States law, they are "Officers" of the United States. The fact that panelists are only selected for a single case at a time does not remove them from the purview of the Appointments Clause. While duration is a factor to be considered, no single factor is determinative.[94] Authority exists for "Officers" who are only appointed for a single case. The Supreme Court has held that Independent Counsels, appointed for a single case, are subject to the requirements of the Appointments Clause.[95] While Independent Counsels were determined to be inferior officers, the following paragraphs explain why the current process for the selection of binational panelists violates the Appointments Clause, regardless of whether they are considered principal or inferior Officers.

The President selects Principal Officers with the advice and consent of the Senate; while inferior Officers, if Congress allows, may be appointed by the President alone, by the head of a department, or by the Judiciary.[96] Recently, the Supreme Court expanded the scope of those that may appoint inferior officers.[97] Now, the term, "head of a department" can be considered to include an entire commission of people, so long as they generally share responsibilities with each other.[98] Specifically, the Court stated, "As a constitutional matter, we see no reason why a multi-member body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs."[99] Here, however, a single entity does not select binational panelists. In fact, the governments of Canada or Mexico select some of the panelists, while the United States Trade Representative appoints the rest.[100] Obviously, the panelists are not appointed by the President and confirmed by the Senate. If panelists are determined to be principal Officers, then this deficiency would make their appointment unconstitutional. If it is assumed that panelists are more accurately characterized as inferior Officers, then they

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[93] *Id*.
[94] *See* United States v. Germaine, 99 U.S. 508 (1878).
[95] *See* Morrison v. Olson, 487 U.S. 654, 672 (1988).
[96] *Id.* at 670.
[97] Even recently, the Supreme Court has expanded the scope of those who may appoint officers. *See* Freytag v. Comm'r, 501 U.S. 868, 918 (1991).
[98] *Free Enter. Fund*, 130 S. Ct. at 3162.
[99] *Id*. at 3163.
[100] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

still fail to pass constitutional muster. The United States Trade Representative is not the President, a head of a department, or the Judiciary.[101] The appointment of panelists by foreign governments is in no way reconcilable with the mandates of the Appointments Clause. As Justice Scalia noted in a 1994 case, "violations of the Appointments Clause occurs . . . when Congress . . . effectively lodges appointment power in any person other than those whom the Constitution specifies."[102]

Congress granted panelists the authority to make binding decisions regarding administrative determinations. The Founding Fathers established the Appointments Clause to prevent this type of delegation.[103] If panelists are principal Officers, the President, with the advice and consent of the Senate, should have the sole power to appoint.[104] If panelists are inferior Officers, the President, the head of a department, or the Judiciary should appoint them.[105] The Constitution, in no way, gives foreign powers the authority to appoint panelists. For these reasons, the current selection process for binational panelists violates the Appointments Clause.

In addition, should it be determined that panelists exercise executive rather than judicial powers, the panels violate the requirement of a unitary executive branch. Article II requires that the President personally, and through officers accountable to him, ensure that the laws be faithfully executed.[106] Executive authority may be delegated, but must ultimately be delegated to Officers or agencies that are still subject to the President's control.[107] In *Printz v. United States*, the Court held that the President was not allowed to force local law enforcement officers to perform background checks on handgun purchasers because the act unconstitutionally delegated executive power beyond the President's control.[108] Under the binational panel system, private citizens are selected to exercise, arguably, executive powers outside the control of the President. Similarly, the Supreme Court

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[101] *See* 5 U.S.C. § 101 (2000) (stipulating that departments of the United States are identified by statute, and the applicable statute does not include the Office of the U.S. Trade Representative).

[102] Weiss v. United States, 510 U.S. 163, 196 (1994) (Scalia, J., concurring).

[103] U.S CONST. art. II, § 2, cl. 2.

[104] If panelists are determined to be principal Officers, this deficiency would make their appointment unconstitutional. If it is assumed that panelists are more accurately characterized as inferior Officers, they still fail to pass constitutional muster. *See Freytag*, 501 U.S. at 919.

[105] If it is assumed that panelists are more accurately characterized as inferior Officers, they still fail to pass constitutional muster. *Id.*

[106] U.S. CONST. art. II, §§ 1, 3.

[107] *See* Printz v. United States, 521 U.S. 898, 922 (1997).

[108] *Id.* at 922-23.

struck down legislation giving the force of law to regulatory codes developed by industry associations.[109] The Court noted that the delegation to industry associations "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be, and often are, adverse to the interest of others in the same business."[110] As previously noted, the panelists' private interests may be adverse to the parties involved in the case before them. Thus, the inability of the executive branch to control or review binational panel decisions violates the mandate for a unitary executive.[111] In *Free Enterprise Fund*, it was the President's inability to directly control the Board Members that led to its unconstitutionality.[112] The court stated, "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[113] Executive control over officers is unquestionably inherent in the Constitution.

The NAFTA implementing legislation delegates power to decide matters pursuant to United States law to panels unaccountable to the executive branch and the American people. This delegation is inconsistent with both the Constitution and American democracy.[114] While the binational panel system does not include accountability to the United States government as required by the Constitution, it does include accountability to foreign countries at some level.[115] If the decisions are not attributable to the United States government because of the constitutional shortcomings, then they are analogous to a foreign judgment. The Supreme Court has determined that foreign judgments are not controlling in United States with respect to the Supreme Court's interpretation and application of the 8th Amendment.[116] It appears that the binational panel system violates both the Appointments Clause and the requirement of a unitary executive under Article II of the United States Constitution.

In addition to the Appointments Clause, the NAFTA binational panels violate the Removal Clause as illustrated by *Free Enterprise*

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[109] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[110] *Id.* at 311.
[111] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (holding that the President's retention of the power to decide whether to give binding legal effect to trade, state, or council determinations was not enough to validate the delegation of such power under the National Industrial Recovery Act).
[112] *Free Enter. Fund*, 130 S. Ct. at 3164.
[113] *Id*.
[114] *Schechter Poultry*, 295 U.S. at 537.
[115] NAFTA arts. 1902.1, 1904, 1911.
[116] Roper v. Simmons, 543 U.S. 551, 575 (2005).

Fund.[117] The Constitution has charged the President with the duty to "Take care that the laws be faithfully executed."[118] To do so, the President is vested with the power to remove the officers that help him carry out the duties he has been charged with.[119] And, while there have been limits placed on this presidential power,[120] these limits, with respect to the binational panels of the NAFTA, contravene the Constitution.

As noted above, the panelists serving on binational panels are appointed from different countries. The analysis above demonstrates that the appointment of those panelists is unconstitutional. However, just as the President lacks the power to appoint, he also lacks the power to remove the panelists, making their existence unconstitutional, again. Well-stated constitutional law affirms that the President holds the authority to remove officers working for the executive department.[121] And, while the Court stated in *Humphrey's Executor* that Congress may restrict the President's removal power by requiring him to show "for-cause", it only mattered when the officer was considered a hybrid, meaning he possessed some form of multiple branch characteristics, rather than purely executive.[122]

When it comes to the binational panels of the NAFTA, the President lacks the constitutionally protected power of removing officers. If the panelists are considered purely executive officers, the President should have the ability to remove for whatever reason. Even if the panelists are considered quasi-branch officers, as those illustrated in *Humphrey's Executor*, the President may be restricted to a for-cause standard.[123] The panelists, however, irrespective of status (quasi or pure) or nationality (American, Canadian, or Mexican), are not removable by the President.[124] This means that the President has no authority – whether for-cause or not – to fulfill his constitutional duty and ensure the laws of the United States are followed and executed. In essence, a panelist from a different nation may contribute to a ruling that binds a party from the United States without that panelist being accountable to any government agent in the United States of America.

In *Free Enterprise Fund*, an analogous situation regarding the President's removal powers of inferior officers was at issue.[125] The of-

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[117] *Free Enter. Fund*, 130 S.Ct. at 3151.
[118] U.S. CONST. art. II, § 3.
[119] Myers v. United States, 272 U.S. 57 (1926).
[120] *See Humphrey's Ex'r*, 295 U.S. at 602; Morrison v. Olson, 487 U.S. 654 (1988).
[121] *Id*.
[122] *Humphrey's Ex'r*, 295 U.S. at 602.
[123] *Id*.
[124] NAFTA arts. 1901.2, 2011.
[125] *Free Enter. Fund*, 130 S. Ct. at 3151.

ficers in *Free Enterprise Fund* were protected by a dual for-cause removal standard, meaning they could only be removed for-cause by their superiors, SEC Commissioners, who, in turn, were also only removable by the President for-cause.[126] While Congress has been able to insulate officers to a degree, the Court held, creating a dual for-cause protection crossed the constitutionally allowed threshold.[127] The double level of insulation took control away from the President, even in the decision of whether good cause existed or not.[128] The Court noted that one level of for-cause protection has been upheld in the past, but that double protection constructed a denial of the ability to hold any of the SEC Commissioners accountable. Even the SEC lacked the ability to remove the Board Members at-will.[129] Therefore, nobody, including the President, could be held accountable for the actions of the Board Members.[130] The lack of accountability, a constitutional staple for the Executive Branch, was being contravened.

The same lack of accountability in *Free Enterprise Fund* is present in the NAFTA binational panels. As outlined above, the President is charged with the duty of executing the laws of the United States.[131] Because of this, he is accountable and responsible to the people he governs. Therefore, the President needs the ability to run the Executive Branch as he sees fit and this includes removing officers if he desires. However, the NAFTA binational panels eviscerate the President's ability to execute this responsibility. If the President disagrees with a panelist's ruling, he lacks the requisite power to remove the panelist, even if the panelist hails from a foreign nation.

Furthermore, the people affected by a decision handed down from the binational panels have no one to hold accountable for the positioning of the panelists. They cannot blame a member of Congress, a department head, or the President. Instead, the panelists enjoy an independent source of protection because no superior officer can remove them, either at will or for cause.[132] Therefore, the binational panelists lack any removal procedure typical for officers of the United States. In *Free Enterprise Fund* the Court struck down a dual-level of protection.[133] When it comes to the binational panels of the NAFTA, multiple levels of protection exist, leading to an utter lack of accountability. The President's inability to remove these officers directly conflicts with the Constitution.

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[126] *Id*.
[127] *Id*. at 3151.
[128] *Id*. at 3153.
[129] *Id*.
[130] *Id*.
[131] U.S. CONST. art. II, § 3.
[132] NAFTA art. 1902(1).
[133] *See Free Enter. Fund,* 130 S. Ct. at 3151.

V. ARTICLE III

The total divestiture and preclusion of review by Article III courts makes the binational panel system inherently unconstitutional. Prior to the invention of the binational panel system, antidumping and countervailing duty determinations of the Commerce Department were subject to review by the Court of International Trade, the Court of Appeals for the Federal Circuit, and possibly the Supreme Court of the United States.[134] After the implementation of the binational panel system, however, the panels have the authority to interpret United States law and direct the actions of administrative agencies without any meaningful oversight.[135] This lack of oversight, or even a modicum of judicial review, should render the process unconstitutional. Whatever power Congress has to parse out adjudicatory duties, allowing possibly biased non-governmental panels to interpret and apply United States law, without any judicial oversight, falls outside the province of its authority.

The Supreme Court has recognized that the decisions of binational panels are "binding, and domestic judicial review of panel determinations is prohibited."[136] A jurisprudential examination of the history of Congressional delegations of adjudicatory powers reveals that while review may be limited, it may not be wholly abandoned. For example, in a 1982 plurality opinion, the Supreme Court allowed Congress to delegate authority over bankruptcy litigation from Article III district courts to the newly formed bankruptcy courts.[137] It is noteworthy that the Court reached this decision partially because the litigant has an appeal as of right to an Article III court.[138] The *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* decision created an exception for matters considered functions of the executive or legislative departments.[139] While this appeared to be a bright line rule, it was short lived.

In 1985, the Supreme Court refused to follow any bright line rules and instead, upheld Congress's attempt to transfer adjudicatory power from the Environmental Protection Agency to a body of arbitrators.[140] The Court approved use of a balancing test to comply with the mandates of Article III.[141] When applying the balancing test, the

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[134] *Id.*
[135] 19 U.S.C. § 1516a(g)(7).
[136] American Coal. for Competitive Trade v. Clinton, 128 F.3d 761, 763 (D.C. Cir. 1997).
[137] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
[138] *Id.* at 55.
[139] *Id.* at 63-68.
[140] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 571 (1985).
[141] *See id*. at 587.

Court pointed out the significance of some judicial review, to review arbitrators' decisions for fraud, misconduct or misrepresentation.[142] Specifically, the Court noted that such review protects against "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."[143] The binational panel system's failure to provide even this modicum of protection for litigants possibly renders the system unconstitutional.

The Supreme Court further refined the balancing test in 1986 when the Court upheld Congress's delegation of adjudicatory power to the Commodity Futures Trading Commission ("CFTC").[144] In *Commodity Futures Trading Commission v. Schor*, the Court noted that the plaintiff waived his right to Article III review by *voluntarily* submitting his claim to the CFTC.[145] In contrast, the NAFTA binational panel system is not voluntary.[146] If either party wishes to remove the claim from traditional Article III review, the case is transferred to the binational panel.[147] Thus, an opposing party's request for binational review overrides the plaintiff's choice to submit his claim to a court.

The Supreme Court noted in dicta that removing all review would be unconstitutional.[148] In addition, several circuit courts have acknowledged some form of judicial review is fundamental to an Article III analysis.[149] By contrast, the binational panel system provides no judicial review.[150] Neither the international concerns at play, nor the nature of the law in dispute, should allow Congress to summarily preclude all judicial review because such preclusion violates Article III.[151] It is also worth noting that *Union Carbide* involved the transfer of power from one non-Article III institution to another, while still preserving judicial review by an Article III court.[152] However, the implementation of the binational panel system transferred authority from

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[142] *Id.* at 592.
[143] *Id.*
[144] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986).
[145] *Id.* at 849.
[146] NAFTA § 1904(1).
[147] NAFTA § 1904(5).
[148] *Northern Pipeline*, 458 U.S. at 70 n.23 (citing Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455 n.13 (1977)).
[149] *See* Chemical Bank v. Togut (*In re* Axona Int'l Credit), 924 F.2d 31, 35 (2d Cir. 1991); Parklane Hosiery Co. v. Parklane/Atlanta Venture (*In re* Parklane/Atlanta Joint Venture), 927 F.2d 532, 538 (11th Cir. 1991); Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989); Marozsan v. United States, 852 F.2d 1469, 1472 (7th Cir. 1988).
[150] 19 U.S.C. § 1516a(g)(7)(A).
[151] *See* U.S. Dep't of Treasury v. Fed. Labor Relations Auth., 43 F.3d 682, 689-90 (D.C. Cir. 1994).
[152] *Union Carbide*, 473 U.S. at 571.

an Article III court, the Court of International Trade, to arbitrators in a non-Article III institution without any oversight by the government whose laws they are to interpret and apply.[153] Because *Schor* is still the applicable law in an Article III analysis, it is necessary to examine the factors the Court considered in their balancing test.

> The factors for consideration are:
>
> (1) the extent to which the essential attributes of judicial power are reserved to Article III courts; (2) the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in the Article III courts; (3) the origins and importance of the right to be adjudicated; and (4) the concerns that drove Congress to depart from the requirements of Article III.[154]

Although no individual factor is determinative, many courts view the first factor as dominant in their analysis.[155] This dominant factor, however, is non-existent in the binational panel system, further tilting the balancing scales toward unconstitutionality.

The second factor, the extent to which the non-Article III forum exercises traditional Article III functions, likewise contributes to the constitutional demise of the binational panel system. As Chief Justice John Marshall noted, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[156] Congress did not adhere to this precedent when it gave binational panels' unfettered authority to interpret, apply, and render decisions regarding the laws of the United States without the possibility of judicial oversight. Panel members also engage in judicial activities, such as entertaining motions, reviewing legal memoranda, and hearing oral arguments.[157] It appears that binational panelists are serving in a judicial role that is clearly within the province of Article III, and thus, the second factor also weighs against the constitutionality of the binational panel system.

Third, the process does not invoke the public rights exception. Antidumping and countervailing duty questions do not involve the government as a party, but two private companies.[158] While govern-

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[153] 19 U.S.C. § 1516a(g)(7)(A).

[154] *Schor*, 478 U.S. at 851.

[155] *See* Spierer v. Federated Dep't Stores, Inc. (*In re* Federated Dep't Stores), 328 F.3d 829, 835-36 (6th Cir. 2003); Public Citizen v. Burke, 843 F.2d 1473, 1479 n.8 (D.C. Cir. 1988); United States v. Garcia, 848 F.2d 1324, 1331 (2d Cir. 1988).

[156] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[157] *See* NAFTA arts. 1904(7), (14).

[158] Leon E. Trakman, Address before the 25th Australian International Trade Law Conference 2003 Resolving Trade Disputes: Learning from the NAFTA 4–5 n.15 (1997), http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1DSD1A3

mental presence is not mandatory, it is a nearly dispositive factor.[159] Even if the right were somehow styled as a 'public right', the nature of the right is not dispositive in an Article III analysis.[160] Even if it is conceded that this factor weighs in favor of the binational panel system, the other factors still substantially outweigh it.

Finally, Congress has historically departed from the mandates of Article III to reduce the burdens on their dockets, and created Article I courts with specialized areas of expertise.[161] Prior to the implementation of the binational panel system, the reverse had occurred because the cases were decided by a specialized Article III court that was well versed in United States trade law, and was one of the most efficient Federal courts in the country.[162] After a consideration of the factors, it is clear that the binational panel system not only fails the balancing test, but also struggles to provide any constitutional weight in favor of the system. Therefore, the binational panel system violates Article III of the Constitution of the United States. As discussed in the next section, there are only two instances in which this procedure has been formally challenged on a constitutional basis. Although neither case reached a decision on the merits, their presentation and posture are instructive in our consideration of this subject.

VI. CASES

The first case to challenge the constitutionality of the binational panel system of the NAFTA was filed in 1997.[163] The American Coalition of Competitive Trade ("ACCT"), a non-profit organization, brought suit claiming injury through its respective members who lost their jobs due to adverse binational panel decisions.[164] ACCT contended that the binational panel system infringed upon United States sovereignty by violating the Appointments Clause, Article III, and the Due Process Clause of the United States Constitution.[165] Unfortunately, the court refused to address the merits of the case and dismissed the action due to lack of Article III standing.[166] The ACCT's

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[159] *See Union Carbide*, 473 U.S. at 586.

[160] *Schor*, 478 U.S. at 853.

[161] *See* Peretz v. United States, 501 U.S. 923, 936–37 (1991); Palmore v. United States, 411 U.S. 389, 398 (1973).

[162] Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX & BUS. LAW. 101, 113–14 (1996).

[163] *See American Coal. for Competitive Trade*, 128 F. 3d at 761.

[164] *Id.* at 763.

[165] *Id.*

[166] *Id.* at 765–67.

failure to exhaust administrative remedies as required by the NAFTA also served as the basis for the adverse finding.[167]

It took nearly ten years for the next constitutional challenge to occur. In 2006, the Coalition for Fair Lumber Imports challenged the constitutionality of the binational panel systems contained in both the U.S.-Canada Free Trade Agreement and the NAFTA.[168] Once again, the system was challenged for violation of Article II, Article III, and the Due Process Clause of the United States Constitution.[169] The parties settled their dispute, however, after oral argument and deprived the court of jurisdiction the opportunity to decide the case.[170] The exact reasons for the settlement have never been disclosed, although it may have been to avoid unraveling the NAFTA, to avoid further litigation costs if the decision was later appealed to the Supreme Court of the United States, or because the Coalition received favorable terms for settlement. What is clear is that the settlement has once again raised constitutional suspicion of the binational panel system without the satisfaction of a definitive answer.

CONCLUSION

Binational panels, comprised of members untrained in United States law, are ill equipped to interpret and enforce the laws of the United States. While similar to private arbitration, the process is flawed because it requires private companies to waive their right to judicial determination without due process. The financial and practical hurdles that potential challengers face clearly exist to discourage opposition to an institution that direly needs exactly that. At the very least, every adjudicator should be expected to know and understand the applicable laws and rules. The possibility, or probability, that members cannot adequately apply United States law demonstrates the reality that the binational panel system violates the Due Process Clause of the United States Constitution. Regardless of whether the panel members are determined to be principal or inferior officers, the current process violates the Appointments and Removal Clause. If panel members wield executive powers, then the current process violates the requirement of a unitary executive. Considering the *Schor* factors, it is apparent that the binational panel system not only fails the balancing test, but also struggles to provide any constitutional weight in favor of the system, violating Article III as well. For these

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[167] *Id.* at 766–67.
[168] *See* Coal. for Fair Labor Imps. Exec. Comm. v. United States, 471 F. 3d 1329, 1330 (D.C. Cir. 2006).
[169] Brief of Petitioner at 46, 53, Coal. for Fair Lumber Imps. Exec. Comm. v. United States, No. 05-1366 (D.C. Cir. Jan. 17, 2006).
[170] *Id.* at 1332-33.

reasons, the next challenger of the binational system should possess the required standing, the perseverance to attain a decision on the merits, and the financial resources to promote the greater good, because he will not receive any immediate benefit.