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The WTO Dispute Settlement Review Commission: An Unwise Extension of Extrajudicial Roles

by

ANDREW D. HERMAN*

Introduction

In the past decade, Congress has enlisted the federal judiciary to deal with issues ranging from the appointment of special prosecutors to the development of standardized sentencing guidelines. Although the role of federal judges has never been confined strictly to the adjudication of cases, "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."† Thus, in 1994, when speculation about the effects of the proposed World Trade Organization (WTO) Agreement elicited sovereignty concerns from Congress, it was not surprising that Congress looked to federal judges for assistance.

In November 1995, former Senator Robert Dole (R-Kan.) introduced Senate Bill 1438 (S. 1438).‡ The bill calls for a five-member panel, comprised of active federal circuit judges, to review all WTO dispute resolution decisions adverse to the United States' economic interests.§ The proposed "WTO Dispute Settlement Review Commission" would examine all decisions for both "substantive and proce-

* J.D., 1996; B.A., University of Michigan, 1991. The author wishes to thank his parents for everything.
1. Ira Bloom & Jane A. Restani, The Role of International Law in the Twenty-First Century: The Quick Solution to Complex Problems, 18 FORDHAM INT'L L.J. 1668, 1668 (1995). Professor Bloom is a Political Science Professor at Lehman College of The City University of New York, and Judge Restani sits on the Court of International Trade.
3. Id.
dural fairness, and ... report to Congress regarding the effects of the decisions on the rights of the United States." This proposal raises both constitutional separation of powers issues and broad policy concerns.

Recently, Congress has utilized extrajudicial bodies to address a number of domestic issues. Legal challenges have enabled courts to analyze the concerns regarding extrajudicial service by federal judges. The Supreme Court has examined two recent, notable examples: the creation of a Special Division composed of federal judges to appoint and terminate independent counsel and the appointment of federal judges to sit on the United States Sentencing Commission.

In *Morrison v. Olson*, the Court upheld Congress' creation of a Special Division composed of federal judges. Congress empowered the Special Division to appoint and terminate independent counsel under the Ethics in Government Act. The Supreme Court found no violation of the Appointments Clause, the provisions of Article III, or the separation of powers doctrine. Only Justice Scalia dissented.

Less than a year later the Court decided *Mistretta v. United States*. By an 8-1 margin the Court affirmed another congressional creation, the United States Sentencing Commission. Membership on the eight-person Commission includes three federal judges. The body promulgates binding sentencing guidelines which establish a range of determinate sentences for all federal offenses. The Court held that Congress neither delegated excessive legislative power to the Commission, nor violated separation of powers principles. Justice Scalia was again the lone dissenter.

Perhaps emboldened by Supreme Court approval of its extrajudicial use of federal judges, Congress has turned to international trade

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5. In April 1995, a similar version of the Senate bill, also titled the “WTO Dispute Settlement Review Commission Act,” was introduced in the United States House of Representatives and is presently before the House Ways and Means Committee. H.R. 1434, 104th Cong., 1st Sess. (1995).
7. *Id.* at 662-64.
8. *Id.* at 696-97.
10. *Id.*
11. *Id.* at 368.
12. *See id.* at 365.
13. *Id.* at 412.
14. *See, e.g., World Trade Organization (WTO) Dispute Settlement Review Commission Act, 1995: Hearings on S. 16 Before the Senate Committee on Finance, 104th Cong., 1st Sess. 9 (1995) [hereinafter *Hearings on S. 16*]. In a dialogue between Senator Charles E. Grassley (R-Iowa) and Judge Stanley S. Harris, chairman of the Committee on Inter circuit Assignments of the Judicial Conference, Senator Grassley stated, "I am sure that you are even more familiar than I am with the Mistretta case, but the Supreme Court there indi-
issues. As part of the North American Free Trade Agreement (NAFTA), Congress approved the use of federal judges on binational review panels.\textsuperscript{15} Although the plan has not been implemented, these bodies are slated to review NAFTA trade disputes.\textsuperscript{16}

The WTO Commission is the most recent congressional proposal to make extrajudicial use of federal judges, and although passage of S. 1438 is not assured,\textsuperscript{17} the bill is unlikely to be the last of its kind. One article stated, “[I]nternational trade has been, and probably will be into the next century, a prominent area for non-traditional, perhaps extra-constitutional, use of Article III judges.”\textsuperscript{18} For this reason, S. 1438 presents a paradigm with which to assess both the constitutionality and the wisdom of using federal judges in this type of role.

This Note presents an in-depth examination of Senate Bill 1438 and concludes that the WTO Dispute Settlement Review Commission is an unwise extension of the role of the federal judiciary. Part I summarizes the composition and duties of the proposed Commission. It also provides a brief overview of the WTO and the concerns which its dispute settlement provisions present. Part II examines the longstanding tradition of extrajudicial service and the Supreme Court’s modern-day acceptance of congressional creations like the Sentencing Commission and the Special Division. It concludes that the Court would likely hold that the WTO Commission does not violate the constitutional separation of powers doctrine. Part III discusses the policy implications of the proposal upon the integrity of the judiciary and concludes that the judicial branch would be detrimentally affected by the creation of the Commission.

I. Summary of the WTO and S. 1438

In November 1994, the Clinton Administration launched “an elaborate White House courtship” of Senator Dole in an attempt to win his influential support for the WTO implementation bill pending


\textsuperscript{16} Id.

\textsuperscript{17} Although S. 1438 has made little progress since its introduction, Senator Dole continued to press for its passage up to the date of his resignation from Congress. See 142 CONG. REC. S5985 (daily ed. June 10, 1996). Referring to S. 1438 on the eve of his departure, Senator Dole stated, “I hope we might be able to clear this without amendment today and send it to the House, so the President will have it on his desk for signature—which he is perfectly willing to do.” Id.

\textsuperscript{18} Bloom & Restani, supra note 1, at 1668.
in Congress.\textsuperscript{19} The WTO's goal is to improve current international trade regimes in goods and services.\textsuperscript{20} The body functions to implement existing international trade agreements, primarily the General Agreement on Trade and Tariffs (GATT).\textsuperscript{21} Approval of the Uruguay Round multinational trade agreement in 1994 committed the United States to all WTO provisions, including its controversial international dispute settlement panels.\textsuperscript{22}

These panels would possess "extensive powers to resolve trade disputes among . . . [GATT] signatories."\textsuperscript{23} While GATT had little binding effect, under the new provisions the United States can neither unilaterally block panel decisions nor grandfather laws passed prior to 1947.\textsuperscript{24} However, the panels cannot alter U.S. law to conform to their decisions.\textsuperscript{25} "Thus, even in those instances where a panel finds the United States has violated its GATT obligations, specific congressional or presidential action would be required to bring U.S. law into conformity with the GATT, and the United States would be free to decline to take such action."\textsuperscript{26}

Despite the non-binding nature of these provisions, trade activists unleashed a torrent of complaints regarding the WTO dispute panels.\textsuperscript{27} Critics as diverse as Phyllis Schlafly and Ralph Nader lambasted the dispute resolution mechanisms.\textsuperscript{28} Nader called the panels "a system of penetrating international governance which grants international tribunals unprecedented authority over the democratic laws."

\begin{itemize}
  \item \textsuperscript{19} Bob Davis & David Rogers, \textit{Clinton, Dole are Close to Deal Seeking to Assure Critics of World-Trade Pact}, \textit{Wall St. J.}, Nov. 22, 1994, at A26.
  \item \textsuperscript{22} Uruguay Round, Pub. L. No. 103-0465, 108 Stat. 4809.
  \item \textsuperscript{24} Bloom & Restani, \textit{supra} note 1, at 1676 n.31.
  \item \textsuperscript{25} Whitener, \textit{supra} note 23.
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} Davis & Rogers, \textit{supra} note 19, at A26.
  \item \textsuperscript{28} David Shribman, \textit{GATT: Vilifying the Inscrutable}, \textit{Boston Globe}, July 22, 1994, at 3; see also Whitener, \textit{supra} note 23.
\end{itemize}
of the United States. Commentator, and then-Republican presidential candidate, Pat Buchanan proclaimed it the “supreme court of trade.” Concern that the WTO would dictate U.S. trade policies, violating American sovereignty, apparently motivated Senator Dole to propose S. 1438’s “Three Strikes and You’re Out” plan.

Comprised of five federal appellate judges, the Review Commission would examine all WTO dispute resolution decisions adverse to the United States. The Commission would determine if the WTO panel exceeded its authority or acted outside the scope of the Uruguay Round trade agreement. If the Commission determines that the WTO panel violated either procedural or substantive fairness under the terms of the Uruguay Round agreement, it would issue an “affirmative determination.” After three such determinations in any five-year period, any member of the House or Senate could introduce a joint resolution to withdraw approval for U.S. participation in the WTO.

The Commission would act under two circumstances: (1) automatically, when an adverse report from any WTO dispute panel or Appellate Body is adopted by the WTO’s Dispute Settlement Body

29. Whitener, supra note 23.
30. Id.
31. See S. 1438, 104th Cong., 1st Sess. Sources speculated that the measure would be approved easily. However, the smooth passage forecast for this provision did not materialize. Despite broad-based support from the private sector, the federal judiciary opposed the measure, ostensibly on efficiency grounds. Finance Committee Chairman Robert Packwood (R-Or.) called S. 16 a “good piece of legislation” but allowed it might need fine tuning to survive a likely constitutional challenge. General Developments, 12 Int’l Trade Rep. (BNA) No. 20, at D-14 (May 17, 1995). In August 1995, Senator Robert Byrd (D-WVa.) blocked consideration of S. 16, saying that he needed more time to examine the legislation before clearing it for floor action. On November 30, 1995, Senator Dole reintroduced the bill in nearly identical form as Senate Bill 1438. Id.

32. Commissioners are appointed by the President, in consultation with the majority and minority leaders of both houses, the chairman and ranking member of the Committee on Ways and Means in the House, and the chairman and ranking member of the Committee on Finance in the Senate. S. 1438 § 3(b)(1). Commissioners will serve five year terms, although the initial terms would be staggered to prevent wholesale replacements every five years. Id. § 3(e)(1).
33. Id. § 4(a)(1)(A). S. 16 was originally interpreted to require that retired judges serve on the Commission. Hearings on S. 16, supra note 14, at 2. Overall, the bill’s express aim of calming trade activists’ fears did not change. The Findings and Purpose Section stated: “The American People must receive assurances that United States Sovereignty will be protected, and United States interests will be advanced, within the global trading system which the WTO will oversee.” S. 16 § 2(a)(2).
34. S. 16 § 4(a)(2)(C).
35. Id. § 4(a)(2)(A)-(D).
36. Id. § 4(a)(3).
37. See id. § 6(a)(2).
(DSB)\textsuperscript{38} and is the result of proceedings initiated against the United States by a WTO member;\textsuperscript{39} or (2) upon the request of the United States Trade Representative, when the DSB adopts an adverse report in which the United States is the complainant.\textsuperscript{40}

In reaching its decision, the Commission may hold public hearings,\textsuperscript{41} solicit information from federal agencies or departments,\textsuperscript{42} and examine the documents used in the WTO decision.\textsuperscript{43} The Commission is entitled to administrative assistance from any agency or department designated by the President.\textsuperscript{44} It must report “affirmative determinations” to the House Ways and Means Committee, the Senate Finance Committee, and the Trade Representative within 120 days of the WTO Dispute Settlement Body’s report.\textsuperscript{45}

The Commission’s decisions are not binding upon Congress; instead, they serve an advisory function. In response to a single “affirmative determination,” Congress may pass a joint resolution calling upon the President to modify the subject of that determination.\textsuperscript{46} Following three such determinations within five years, Congress may pass a “withdrawal resolution,” effectively revoking its approval for U.S. participation in the WTO.\textsuperscript{47}

This proposal places no real check on Congress because, under the WTO implementing agreements, the legislature may pass a joint resolution suspending U.S. membership in the WTO for any reason, with six months notice. Also, Congress must be advised of the result of every WTO dispute resolution.\textsuperscript{48} Thus, the Commission, which is

\begin{itemize}
\item \textsuperscript{38} Id. § 4(a)(1)(A)(i).
\item \textsuperscript{39} Id. § 4(a)(1)(A)(ii).
\item \textsuperscript{40} Id. § 4(a)(1)(B).
\item \textsuperscript{41} Id. § 5(a).
\item \textsuperscript{42} Id. § 5(b)(2)(B).
\item \textsuperscript{43} Id. § 5(b)(3)(A) (including “any information contained in such submissions identified by the provider of the information as proprietary information or information designated as confidential by a foreign government”).
\item \textsuperscript{44} Id. § 5(c)(1) (stating that agencies or departments must provide “administrative services, funds, facilities, staff, or other support services to the Commission”).
\item \textsuperscript{45} Id. § 4(b)(1)-(2).
\item \textsuperscript{46} Id. § 6(b)(1).
\item \textsuperscript{47} Id. § 6(b)(2). S. 1438 does not provide actual authority for withdrawal from the WTO. Congress actually withdraws its approval under section 101(A) of the Uruguay Round Agreements Act. Id. § 6(a)(2). S. 1438 supplies language for a withdrawal resolution: “That, in light of the 3 affirmative reports submitted to the Congress by the WTO Dispute Settlement Review Commission during the preceding 5-year period, and the failure to remedy the problems identified in the reports through negotiations, it is no longer in the overall national interest of the United States to be a member of the WTO and accordingly, the Congress withdraws its approval.” Id. § 6(b)(2). If the President vetoes the joint resolution, Congress may vote to override the veto within 90 days. Id. § 6(c)(1)(B).
\item \textsuperscript{48} Kendall W. Stiles, The New WTO Regime: The Victory of Pragmatism, 4 J. Int’l L. & Prac. 3, 38, 39 (1995). Numerous other built-in safeguards ensure congressional involvement in all amendments or reinterpretations of WTO agreements. In addition, a
powerless to compel legislative action, merely assumes an advisory role. However, its decisions may be influential in prompting Congress to condemn WTO dispute resolution decisions. The political ramifications created by Commission decisions could exert enormous pressure on Congress to act consistently with the judges' decisions. Thus, while the Commission lacks power to compel action, its political influence could be substantial.

On January 17, 1996, in its first major ruling, a WTO dispute resolution panel decided "that a key section of the [United States] Clean Air Act discriminated against foreign oil refiners." In response to the ruling, the Clinton Administration agreed to "change the way it applied environmental regulations to imported gasoline." A review of the WTO's decision could be the Commission's first task under S. 1438's provisions. Numerous other disputes involving the United States are presently pending before the WTO dispute resolution panels.

II. Constitutional Separation of Powers Analysis

Although not expressly delineated by the Constitution, the separation of powers is an established doctrine. It derives from the textual division of constitutional power among the legislative, executive, and judicial branches laid out in three separate Articles. Commenting on this doctrine, James Madison wrote that it "d[oes] not mean that these [three] departments ought to have no partial agency in, or no control over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." Consequently, constitutional separation of powers does not mandate complete independence between the branches. As Justice Blackmun wrote in Mistretta, "[the] greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in the hermetic divi-

systematic accounting of the costs and benefits of the WTO must be delivered to Congress every five years. Id. at 38.


51. The United States has 13 complaints pending before the WTO and "is itself the target of complaints filed by Costa Rica, India and the European Union, among others, which accuse Washington of failing to play by the rules it champions." Id.; see also Frances Williams, WTO Completes Legal Framework—The Body Providing Teeth to the Complaints Procedure, Fin. Times, Nov. 29, 1995, at 5 (listing currently pending disputes).

52. Springer v. Government of the Philippine Islands, 277 U.S. 189, 201 (1928).

sion among the Branches, but in a carefully crafted system of checked and balanced power within each Branch."

Although the Constitution bars members of Congress from holding other government positions or offices, no parallel prohibition exists for federal judges. A long history of extrajudicial service by federal judges illustrates that no "hermetic division" has ever been placed on the judiciary. This established tradition provides a guide for a constitutional analysis of S. 1438.

A. Historical Precedent for S. 1438

In his testimony before the Senate Finance Committee, Judge Stanley Harris stated, "We are not aware of any law which served as precedent for the appointment process found in [S. 1438] and therefore, these appear to be questions of first impression." While S. 1438 does elicit unique constitutional concerns, the extrajudicial use of federal judges in either domestic or international disputes is not an original proposition. Judges have assumed these roles since Article III authorized Congress to establish the judiciary.

The general acceptance of these roles as a legitimate judicial function stems, at least in part, from Great Britain’s extrajudicial use of judges and the continuation of this practice in the American colonies.

Framers at the Constitutional Convention debated the wisdom of extrajudicial service. Delegates unsuccessfully advanced two measures prohibiting all extrajudicial service by federal judges. Conversely, James Madison proposed creating a Council of Revision, comprised of the President "and a convenient number of the National Judiciary, ... with authority to examine every act of the National Legislature before it shall operate." Another proposal would have created a council of federal judges which would have issued advisory opinions on request from the President or Congress "upon important questions of law, and upon solemn occasions." The framers rejected

54. Mistretta, 488 U.S. at 381.
55. The Incompatibility Clause states that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States ... and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2.
58. Id. at 127.
59. Id. at 128-29 (omission in original). The proposal was "decisively rejected." Id.
60. Id. at 129.
these proposals, and others on both sides of the debate at the Constitutional Convention.\(^6\)

The impact of these actions is ambiguous, as the framers neither banned nor mandated extrajudicial service. Thus, it is difficult to derive any intent from these actions. Commentators have argued both sides; some maintain that rejection of judicial councils set the tone for a strict constitutional limitation that "judges should do—and only do—what they are trained for;"\(^6\) while other scholars claim "that even staunch opponents of judicial membership on the Council of Revision thought that judges should perform some extrajudicial tasks."\(^6\)

In *Mistretta*, the Supreme Court addressed the question of the historical basis for extrajudicial service. "We do not pretend to discern a clear intent on the part of the Framers with respect to this issue, but glean from the Constitution and the events at the Convention simply an inference that the Framers did not intend to forbid judges to hold extrajudicial positions."\(^6\) Commentator Russell Wheeler framed the historical inquiry: "It is at bottom a question of discretion whether the judge can maintain judicial independence while serving the nation off the bench. That discretion belongs in some degree to those seeking the judges' services. But it belongs primarily to the judges."\(^6\)

(I) Extrajudicial Service by Supreme Court Justices

Historically, judges have exercised this discretion by performing a wide array of extrajudicial functions. Supreme Court Justices have served extrajudicial roles from the time President Washington sent Chief Justice Jay abroad to negotiate with foreign nations.\(^6\) Similarly, President Adams employed Justice Oliver Ellsworth to resolve disagreements between the United States and France; Justice Harlan arbitrated a Bering Sea controversy; Chief Justice Fuller and Justice Brewer served on a tribunal arbitrating a boundary disagreement be-

\(^{61}\) See id. at 125-31 (discussing the various proposals for extrajudicial service).


\(^{63}\) Wheeler, *supra* note 57, at 129.

\(^{64}\) *Mistretta*, 488 U.S. at 668 n.21.


tween Venezuela and British Guiana in 1897; Chief Justice White arbitrated a boundary dispute between Panama and Costa Rica; Chief Justice Hughes presided over a 1930 tribunal arbitrating the Guatemala-Honduras boundary dispute; Justice Van Devanter arbitrated a controversy between the United States and Great Britain resulting from the seizure of the "I'm Alone;" President Wilson assigned Justice Joseph Lamar to a commission concerning relations between the United States and Mexico in 1914; and Justice Owen Roberts served on the fact-finding body that investigated the attack on Pearl Harbor.67 After World War II, Justice Jackson served as chief prosecutor at the Nuremberg Trials.68 Perhaps most notably, Chief Justice Earl Warren led the commission investigating President Kennedy's assassination.69 This abridged history of Supreme Court extrajudicial service provides some guidance for an analysis of S. 1438. Most of the Supreme Court Justices' extrajudicial roles involved discrete events and had limited durations. In addition, the vast majority of tasks involved international trade affairs, with the Warren Commission serving as a notable exception.

Consequently, these examples inform at least a broad analysis of the separation of powers concerns underlying the WTO Commission.

68. Id. at 34.
69. McKay, supra note 66, at 25. McKay criticizes both Jackson's and Warren's decisions:

Justice Jackson's year-and-a-half absence from the Court when he was the principal prosecutor at Nuremberg was an embarrassment to the Court. Chief Justice Warren's solution in connection with the investigation of the Kennedy assassination was scarcely better when he sought to perform two crucial tasks concurrently. That Warren succeeded as well as he did is a testimonial to his capacity, not to the merit of the idea.

Id.

In explaining why he originally declined to serve, Chief Justice Warren stated: 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 the Court for a year to become chief prosecutor at Nuremberg after World War II had resulted in divisiveness and internal bitterness on the Court.

Most importantly, Supreme Court Justices have not balked at fulfilling extrajudicial roles. This rather obvious observation weighs against a strict separation of powers argument for the extrajudicial use of judges. If Supreme Court Justices who were contemporaries of the constitutional framers did not hesitate to accept extrajudicial assignments from the executive or legislature, it is hard to justify a strict latter-day prohibition on extrajudicial action.

However, the Supreme Court's experience is not entirely apposite. First, Supreme Court Justices serve a vastly different function from Circuit Court appellate judges. The Supreme Court does not sit year-round, as the courts of appeals do. In addition, Supreme Court nominations have traditionally generated more political controversy than seats on the lower courts. Although Supreme Court Justices adjudicate cases, they also serve as tangible representatives of our federal judiciary. Thus, it seems less overreaching to involve Supreme Court Justices in politicized international issues than it would to impose similar functions upon appellate judges.

Procedurally, the WTO Commission is distinct because it would not merely examine a unique, one-time event. Instead, it would be more institutionalized, analyzing periodic decisions from the WTO dispute settlement bodies. Even when commissions are assigned to perform complicated and protracted tasks, like the Warren Commission's investigation of President Kennedy's assassination, their purpose has been confined to a single event. The conclusion of the investigation ends the extrajudicial service. The WTO Commission would assume a more permanent and institutionalized role providing judges with a different full-time job for five years.

(2) Extrajudicial Service by Lower Court Judges

Consequently, while the service of Supreme Court Justices provides a historical perspective, examination of lower court judges' extrajudicial activities provides a more valuable and instructive comparison. While usually limited to matters with lower profiles than the Supreme Court's ventures, there has been no dearth of opportuni-

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70. The controversy surrounding Justice Clarence Thomas' nomination is a notable example of the attention paid to Supreme Court nominees. See, e.g., William G. Ross, The Supreme Court Appointment Process: A Search for a Synthesis, 57 ALB. L. REV. 993, 993 (1994) ("The perennial controversy over the Supreme Court Appointment process reached a new pitch of intensity during the Reagan-Bush era.").

71. Supreme Court Justices serve on numerous cultural commissions. See Mistretta, 488 U.S. at 400 n.24. By statute, the Chief Justice is a member of the Board of Regents of the Smithsonian Institution and a trustee of the National Gallery of Art. Four Justices have served as the judiciary member of the National Historical Publications and Records Commission. In addition, Chief Justice Burger began serving as Chairman of the Commission on the Bicentennial of the United States Constitution before he retired. Id.
ties, often at the request of Congress, for lower court judges to fulfill extrajudicial roles.

Historically, federal circuit judges have executed a "substantial number of tasks about which there appears to have been little controversy. Congress assigned, and judges evidently willingly performed, many duties in which they employed judicial skills in the service of the executive and legislative branches." While performed from the bench, these tasks did not involve adjudicating legal cases. Many examples resemble the proposed Commission's duties. Examples include: a 1790 law allowing judges to receive applications from ships' crews alleging their vessels were unsafe; a 1792 law directing federal district judges to attend the salvaging of French ships shipwrecked or stranded on the American coast; and a 1798 statute providing for an investigation of contested congressional elections by lower court judges, who were required to examine witnesses and forward findings to Congress.

Two examples illustrate the historical parameters of the lower courts' extrajudicial service. A 1790 law authorized the Treasury to "remit fines or forfeitures paid by individuals guilty of unintentional customs law violations." Claimants filed their petitions with a district judge who would investigate the facts of the violation in a "summary manner." Although the Treasury Secretary examined the results of the inquiry and decided if the fine should be remitted, the court at least acted in a judicial manner. "The judge did not merely state the evidence, but instead drew a 'legal conclusion' from the evidence 'as to the existence of those facts.'" While the opinion was neither binding nor the ultimate decision, the judges analyzed evidence using a legally cognizable standard. Evidently, this format satisfied judicial concerns, because the judges duly executed the statute and mounted no challenge to its validity.

The second statute, a 1795 law, gave judges the responsibility to naturalize aliens. This provision required that "it shall further appear to [the judge's] satisfaction that during that time [of a residency requirement], he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." This law also went unchallenged by the judiciary.

73. Id. at 132-33.
74. Id. at 133 (footnote omitted).
75. Id. (internal quotation omitted).
76. Id. (quoting Justice Story) (footnotes omitted).
77. Id. at 132.
78. Id. at 134 (footnotes omitted) (insertion in original).
79. Id.
While these laws seemed to straddle the division between traditional adjudicatory functions and extrajudicial advisory opinions, they do provide insight into the legality of the proposed WTO Commission. As with the proposed Commission, lower federal judges have, on occasion, examined evidence using established standards and reported their findings to another branch. Apparently, this action did not violate the separation of powers doctrine.

Whether this would still be true today would depend largely on how "court-like" the judge's actions appeared. The Supreme Court recently held that congressional interference with judicial decisions through retroactive reopening of final dispositions violates separation of powers.80 This implies that executive or legislative review and reversal of a court's final opinion would tread upon judicial independence. If, however, the previous judicial entities and the proposed WTO Commission do not act as courts, there would be no constitutional violation. Instead, they would sit as commissions whose membership is comprised of judges and review by another branch would not tread upon judicial autonomy.81

These examples, however, differ from the WTO Commission in the same manner that traditional Supreme Court extrajudicial service does; they all assumed discrete, limited tasks. Neither statute created a new full-time task. Instead, they essentially conferred new, but limited jurisdiction upon federal judges. This is not equivalent to removing judges from the bench for a five-year period. Thus, the proposed Commission is a much greater incursion on the judiciary.

More recently, lower court judges have served extrajudicially on numerous commissions. For example, Judges A. Leon Higginbotham, Jr., James B. Parsons, Luther W. Youngdahl, George C. Edwards, Jr., James M. Carter, and others have served on various presidential and national commissions.82 Morrison's Special Division examined in Morrison and Mistretta's U.S. Sentencing Commission are the latest examples of extrajudicial service by lower court judges. The Supreme Court overwhelmingly (7-1 and 8-1, respectively) approved these activities.83

(3) Comparison with the NAFTA Dispute Resolution Proposal

Like the proposed WTO Commission, another controversial trade agreement, the North American Free Trade Agreement (NAFTA), contains a dispute resolution mechanism utilizing federal

81. This will be discussed in detail later. See infra Part III.B.2.
82. See Mistretta, 488 U.S. at 670 n.25.
83. See Morrison, 487 U.S. at 654; Mistretta, 488 U.S. at 361.
judges. The proposed WTO Commission and NAFTA's dispute resolution procedures differ substantially. In addition, NAFTA's provisions have yet to be applied, further decreasing their precedential value. NAFTA's panels, however, do further illustrate the diverse roles in which Congress has tried to employ the judiciary.

NAFTA establishes "binational panels" to examine member disputes and "extraordinary challenge committees" to review these decisions. The binational panel provisions favor judicial participation, and the extraordinary challenge committee mandates a panel of five sitting or retired judges. These panels will function as NAFTA's trial and appellate courts, resolving disputes between the three member nations. While decisions are non-binding in domestic courts, any member found to violate a decision could be penalized or removed from the agreement.

An elaborate selection process for the panels removes most control from the judiciary, placing selection responsibility with the United States Trade Representative and the House Ways and Means Committee. However, the chief judges of the circuits are involved early in the selection process and the Chief Justice of the Supreme Court assists in assessing final eligibility of candidates.

The NAFTA agreement, like the WTO proposal, employs judges outside of a strict Article III situation. Few other similarities exist. The NAFTA panels mimic a court hierarchy, with lower and appellate levels. Their decisions lack precedential value in U.S. courts, but may be considered by the federal judiciary in its deliberations. The NAFTA panels (like the WTO's own dispute resolution body) can review and overrule domestic international trade decisions, an action the WTO Commission would be unable to take. The panels issue written opinions, including concurrences and dissents. In short, the NAFTA panels function like transnational courts, unlike the WTO Commission's strictly advisory role. While the two agreements present some similar policy issues (the utilization of scarce judicial re-

84. NAFTA, supra note 15, at 687.
85. To date, the Chief Justice has approved no names for the list of candidates for any NAFTA dispute resolution functions. Bloom & Restani, supra note 1, at 1672.
86. NAFTA, supra note 15, at 687.
87. Id. at 688.
88. See id. (stating that panels may also include international trade lawyers).
89. Id. at 687.
90. Id. at 688.
92. See Bloom & Restani, supra note 1, at 1671. For a discussion of the importance of judicial participation in the selection process, see infra Part III.A.
95. NAFTA, supra note 15, at 687.
sources and the use of federal judges to analyze international trade
matters), NAFTA's panels are too dissimilar to provide legal guidance
to analyze the WTO proposal.96

However, the NAFTA dispute resolution panels do exemplify the
increased extrajudicial use of federal judges. As with the WTO, Con-
geress has selected federal judges to perform a nontraditional role. The
virulent reaction to the NAFTA provision may provide a caution for
proponents of the WTO Commission. Legal scholars have criticized
the NAFTA panels on both constitutional and prudential grounds.97
Upon passage of S. 1438, constitutional analysts would almost cer-
tainly fix their aim on the S. 1438's Review Commission.

B. Legal Analysis of S. 1438 Under the Separation of Powers Doctrine

Professor Martin Redish has identified two separation of powers
dangers inherent in congressionally mandated extrajudicial duties.
First, as the "enforcer of counter-majoritarian constitutional norms
and as a check against the representative branches,"98 the judicial
branch must maintain its integrity and independence from the political
entities. Second, the unrepresentative judiciary must not encroach on
the authority of the democratically elected branches.99 When judges
perform legislative, executive, or administrative tasks, their actions
evoke both concerns. As Redish notes, this danger is rarely evident in
any one judicial incursion.100 Instead, it arises from a subtle erosion in
judicial integrity, or conversely, an increase in authority.101 This con-
cern forms the basis for all separation of powers analysis of extrajudi-
cial activity.102

A court could assess the proposed WTO Commission using three
different analyses. A formalistic approach would invalidate almost

96. Interestingly, in August 1995, Senator Dole and other influential U.S.
senators criticized the dispute settlement provisions of NAFTA in a public letter which "called this
system 'fundamentally flawed' and expressed support for its elimination." John W. Head,
International Business and Kansas Lawyers: An Update on International Trade Rules and
How They Affect Kansas, 65 J. KAN. B. Ass'n 26, 30 (Jan. 1996).

97. See generally Bloom & Restani, supra note 1, at 1673-77; Robert E. Burke &
Brian F. Walsh, NAFTA Binational Review: Should it be Continued, Eliminated or Sub-
stantially Changed?, 20 BROOK. J. INT'L L. 529, 562 (1995) (recommending the elimination
of panels).

98. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION

99. Id. The Supreme Court echoes this position in the test used in Mistretta, although
its conclusions are diametrically opposed to those expressed by Professor Redish.

100. Id.

101. Id.

102. Id.
any incursion. This separationist model erects strict barriers between the judiciary and the political branches, condemning any judicial action beyond live cases and controversies. Courts usually employ this approach when Congress creates an agency exercising non-legislative powers and retains control over that agency. Any court applying this theory would disapprove of the WTO Commission on an essentially per se basis.

At the opposite end of the spectrum, Dean Jesse Choper has proposed a “total deferential” model. This “every branch for itself approach” assumes that “institutional capital” spent by the Supreme Court on separation of powers issues will detract from the good-will needed to protect minority rights. Although never adopted by any court, this approach would likely result in blanket approval for the WTO proposal.

Finally, the Supreme Court employed a “flexible” functional approach in both Morrison and Mistretta. This allows overlap among the three branches, while placing limits on intermingling of functions or powers. It is also described as the “checks-and-balances understanding of the separation of powers.” In Morrison and Mistretta, Congress retained no power, and thus made no attempt to “agrandize” itself at the expense of another branch.

Given the Supreme Court’s recent actions as well as the factual similarities between Morrison, Mistretta, and the WTO proposal, the Court would likely apply a functional approach to assess S. 1438. Although an act of Congress would create the proposed WTO Commission, the bulk of the legislature’s control would cease with enact-

104. See, e.g., Bowsher, 478 U.S. at 726. In Bowsher, the Court employed a strict constitutional analysis to invalidate congressional assignment of executive functions to a Comptroller General; see also Chadha, 462 U.S. at 974-76.
105. Professor Redish asserts that the “formal separationist” approach most effectively serves separation of powers principles, and he would apply it to Morrison, Mistretta, and almost certainly to the proposed WTO Commission as well. Redish, supra note 98, at 20.
106. Id. at 14 (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 169 (1980)).
107. Id.
108. Id. Redish uses the word “flexible” to modify his description of the functional approach.
109. See, e.g., Morrison, 487 U.S. at 693; Mistretta, 488 U.S. at 381.
110. Mark Nielsen, Comment, Mistretta v. United States and The Eroding Separation of Powers, 12 HARV. J.L. & PUB. POL’Y 1049, 1065 (1989) (internal quotations omitted); see also Mistretta, 488 U.S. at 381 (“In adopting this flexible understanding of the separation of powers, we simply have recognized . . . that the greatest security against tyranny . . . lies not in the hermetic division between the Branches, but in a careful system of checked and balanced power within each Branch.”).
ment.111 The President is required to consult with members of both houses, but has sole appointment power over the commissioners.112 While the Commission would communicate with the U.S. Trade Representative (a presidential appointee),113 and potentially receive administrative assistance from executive bodies,114 this would not seem to "aggrandize" Congress at any other branch's expense. Although the bill specifies no removal procedures, they would likely resemble Mistretta's executive "for-cause" provision,115 completely removing congressional control. Finally, from a constitutional perspective, Congress would gain no power from this proposal.116 Consequently, in assessing the constitutionality of S. 1438, the Court would likely employ a functional analysis.

One caveat to any constitutional analysis of the proposed Commission is its apparent insulation from a court challenge. In Mistretta and Morrison, individuals affected by either the Sentencing Commission or the Special Division had standing to sue.117 However, the WTO Commission would create no substantive effects on any potential litigant, as it would merely advise Congress. No cause of action seems to be available for any party against anyone involved with the Commission.118

While the Commission may be insulated from legal attack, this certainly does not render a legal analysis moot. Any congressional incursion on judicial autonomy should be subjected to stringent analysis. As Professor Redish notes:

[T]he danger is an incremental one: eventually, the judicial branch will either have acquired an excess of authority or will have lost much of its requisite integrity, but to no single branch could be attributed responsibility for the overall harm. But it is presumably for that very reason that separation-of-powers protections are largely prophylactic in nature: they are designed to prevent damage to the

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111. The Court's decision to use a formal approach in Bowsher and Chadha rested on congressional retention of control. See, e.g., Bowsher, 478 U.S. at 726-27. Disturbingly, despite the presence of partial congressional control over the independent counsel in Morrison, the Court elected to apply a functional analysis. Morrison, 487 U.S. at 693-95. Justice Scalia notes this inconsistency. Id. at 700-03 (Scalia, J., dissenting).

112. S. 1438 § 3(b)(1).

113. Id. § 5(b)(3)(A).

114. Id. § 5(c)(1).

115. Mistretta, 488 U.S. at 409 (explaining that the President has the sole power to remove judges from the Commission, and may only do so "for-cause").

116. However, Congress could gain a great deal politically from this proposal.

117. See Mistretta, 488 U.S. at 370-71 (petitioner pled guilty in federal court and was sentenced under the guidelines); Morrison, 487 U.S. at 667-69 (appellees indicted by independent counsel appointed by Special Division).

118. Hypothetically, one could file a suit against the Comptroller General to withhold the paychecks of WTO Commissioners.
The important role of the separation of powers doctrine mandates that any incursion into judicial autonomy, regardless of the magnitude of the infringement or the justiciability of the action, creates constitutional dangers. This Note now turns to these dangers.

C. Supreme Court Analysis of Extrajudicial Service: Hayburn to Mistretta

(1) The Supreme Court's Test

Although the WTO Commission is a new and unique creation, the Supreme Court has addressed the constitutionality of extrajudicial service in a number of cases. In *Mistretta*, the Supreme Court delineated a two-part inquiry for analyzing judicial separation of powers issues: (1) whether the task assigned to the judicial branch would be more properly placed within a different branch; and (2) whether that task "impermissibly [threatens] the institutional integrity of the Judicial Branch." The Court may not always address these questions explicitly, but the concerns consistently underlie the analysis.

(2) The Judge/Commissioners Distinction

When assessing extrajudicial activity, courts have distinguished between tasks creating additional judicial functions and those which compel judges to act as commissioners. While the parameters of this distinction remain somewhat ill-defined, the Supreme Court has used this distinction to uphold extrajudicial activity.

The Supreme Court first examined the issue in *Hayburn's Case* in 1792, when it considered a request for a writ of mandamus ordering a circuit court to execute a statute empowering courts to set pensions for disabled Revolutionary War veterans. Judges were utilized because Congress "wanted to make further use of the judges' honesty as well as their ability as intelligent and capable fact-finders." Judges on three circuit courts (including later Supreme Court Chief Justice John Jay and later Justices Cushing from New York and Iredell from

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119. Redish, supra note 98, at 12.
120. Mistretta, 488 U.S. at 383 (quoting Morrison, 487 U.S. at 679).
121. Id. (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).
122. 2 U.S. (2 Dall.) 409 (1792).
123. Id. at 409. Essentially, Congress requested that judges examine the wounds of veterans and, based on their severity, determine the pension the veteran deserved. Judges submitted their findings to the Secretary of War, who would allot that amount, unless he suspected an error, in which case he could report the matter to Congress and "recommend a reversal of the judge's recommendations." Wheeler, supra note 57, at 136.
North Carolina\textsuperscript{125} concluded that the task could not be performed by an Article III court.\textsuperscript{126}

Although Congress changed the law before the Supreme Court could decide the issue,\textsuperscript{127} the opinion noted in an extensive footnote that three circuit courts had held that the statute infringed on separation of powers by assigning a non-judicial function to the judiciary.\textsuperscript{128} The courts also held that Congress could not subject judicial decisions to administrative review.\textsuperscript{129} However, the New York district court agreed to enforce the law in an ex officio capacity.\textsuperscript{130} As Solomon Slonim notes, "[T]he case appears to establish a distinction between the exercise of nonjudicial powers by the court, as a body, or as an institution, which is proscribed, and the exercise of such powers by an individual judge, in his personal capacity, which is permitted."\textsuperscript{131}

The Supreme Court addressed this issue again in United States v. Ferreira,\textsuperscript{132} when it refused to hear appeals of district court decisions on claims from a treaty with Spain.\textsuperscript{133} Instead, the 1819 statute provided for review by the Secretary of the Treasury. The Court concluded that if the statute conferred the duties on the judges as commissioners, "there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decision."\textsuperscript{134} Thus, the Court explicitly accepted congressional delegation of powers to federal judges, so long as they acted as commissioners, not as federal judges. As in Hayburn's Case, the Court "found no difficulty, on the grounds of separation of powers, in the judge personally assuming a nonjudicial task."\textsuperscript{135}

The crux of these decisions is the judge/commissioner distinction. Although their basis is somewhat ambiguous,\textsuperscript{136} the decisions hinge not on the tasks assigned, but to whom they are assigned. In Mistretta, Justice Blackmun concluded, "Ferreira, like Hayburn's Case, suggests

\begin{itemize}
\item \textsuperscript{125} Slonim, supra note 66, at 405.
\item \textsuperscript{126} Id. at 404.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Hayburn's Case, 2 U.S. at 410, n.2.
\item \textsuperscript{129} Id.; see also Bloom & Restani, supra note 1, at 1675.
\item \textsuperscript{130} Slonim, supra note 66, at 405. "The members of the Court for the district of New York . . . were of the opinion that the Act could indeed be interpreted 'as appointing commissioners for the purposes mentioned in it, by official, instead of personal, descriptions.' These judges were prepared to 'regard themselves as being the commissioners designated by the act.'" Id.
\item \textsuperscript{131} Id. at 404.
\item \textsuperscript{132} 54 U.S. (13 How.) 40 (1851).
\item \textsuperscript{133} Id. at 52.
\item \textsuperscript{134} Id. at 50.
\item \textsuperscript{135} Slonim, supra note 66, at 407.
\item \textsuperscript{136} This was especially evident in Hayburn's Case where all the substantive law is contained in the reporter's note. See Hayburn's Case, 2 U.S. (2 Dall.) at 409.
\end{itemize}
that Congress may authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers."\textsuperscript{137} Mistretta cites Hayburn and Ferreira extensively in upholding the constitutionality of the Sentencing Commission. In large part, the Court bases its decision on the judges' nonjudicial commissioner status.\textsuperscript{138}

The judges selected for the WTO Commission could fall within the Hayburn/Ferreira commissioner designation. Although they would retain judicial status, they would not be performing Article III functions. As in Mistretta, the judges would serve, "not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs."\textsuperscript{139} Their authority "is not judicial power; it is administrative power derived from the enabling legislation."\textsuperscript{140} In short, proponents of S. 1438 would argue that Commission members may happen to be federal judges, but they are serving as nonjudicial individuals.

While this argument facially mirrors that employed in the Court's analysis of Mistretta, it is flawed on a number of facets. Conceding that the Commissioners do not actually sit as federal judges on a court, one can argue the panel resembles a federal tribunal so closely that it could be considered quasi-judicial. Indeed, the Commission is composed of five active circuit judges and is "designed to look remarkably like [a] U.S. federal [court]."\textsuperscript{141} No one would mistake a Commission decision for a federal opinion. However, how is an observer to effectively distinguish the five judges sitting as WTO Commissioners from an appellate panel? Why would Congress mold the Commission to resemble a federal panel so closely, if it did not wish to mimic a court structure?

The Court's analysis in Morrison would support the contention that the WTO Commission is a court, not merely a commission of individuals. Although the Special Division meets only to appoint special prosecutors, Morrison held that the Division constituted a court for purposes of the Article II Appointments Clause\textsuperscript{142} thereby enabling it to constitutionally appoint special prosecutors. As with the WTO Commission, the Special Division is not a regular federal

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  \item \textsuperscript{137} Mistretta, 488 U.S. at 403.
  \item \textsuperscript{138} Id. at 404.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Bloom & Restani, supra note 1, at 1676.
  \item \textsuperscript{142} Morrison, 487 U.S. at 678-79. The Appointments Clause states in part, "Congress may by Law, vest the Appointment of such inferior Officers, as they think proper in the President alone, in the Courts of Law .. . ." U.S. Const. art. II, § 2, cl. 2 (emphasis added). The Court never explicitly questions whether the Special Division is a court for constitutional purposes. Morrison, 487 U.S. at 669-70.
\end{itemize}
Instead, it is a congressionally created body comprised of judges functioning administratively. While the Special Division has a function vastly different from the WTO Commission, the structures are essentially identical. S. 1438's proposal could arguably fit within Morrison's implicit definition of a court.

Countering this classification would be disingenuous in light of the repeated assertions made by Senator Dole and other proposal supporters. Numerous proponents stressed that the Commission needed the credibility provided by the federal judiciary. At the Senate hearing, witnesses testified that this proposal was designed to employ the prestige, credibility, and impartiality of the federal judiciary. Consequently, there is little room for a claim that the Commissioners would be sitting as individuals and not as federal judges.

Thus, one could maintain that the proposed Commission is constituted to resemble a court. Neither Mistretta nor its predecessors provide guidance on what constitutes a court as opposed to a commission, or when judges sit as commissioners and not as judges. As Professor Redish notes, "[I]t is difficult to imagine that the Article III problem would disappear if the legislation were instead to create a non-judicial commission whose membership happened to consist of all of the judges of that Article III court." It is certainly arguable that Congress has commissioned a federal appellate court to provide advice on WTO dispute resolution decisions.

If the Commission does resemble a court too closely it could present separation of powers problems. Requiring an apparent federal court to report to, and be reviewed by, Congress would impugn the integrity of the judiciary. This would violate Mistretta's second factor. Congressional supervision of a quasi-judicial panel might also tread (at least at the margins) on the doctrine elucidated by Plaut v. Spendthrift Farms—that Congress may not subject judicial decisions to revision or review. Precedent originating with Hayburn's Case dic-

143. As described by the Morrison Court:
The court consists of three circuit court judges or justices appointed by the Chief Justice of the United States. One of the judges must be a judge of the United States Court of Appeals for the District of Columbia Circuit, and no two of the judges may be named to the Special Division from a particular court. The judges are appointed for 2-year terms.

Morrison, 487 U.S. at 661.

144. See Hearings on S. 16, supra note 14, at 2-4, 14, 31 (including statements on necessity of utilizing judges to establish Commission's credibility).

145. Id.

146. Redish, supra note 98, at 19.

147. The second prong states "that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.'" Mistretta, 488 U.S. at 383 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

148. Plaut, 115 S. Ct. at 1453.
tates that judges may only serve extrajudicially when they act as commissioners.

As Justice Blackmun stated in *Mistretta*, "the Constitution, at least as a per se matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." The structure and format of the proposed WTO Commission could violate this constitutional constraint.

(3) **WTO Commission Infringement on Another Branch's Power**

The WTO Commission may also run afoul of the separation of powers constraints articulated in *Morrison* and *Mistretta* if it interferes with another branch's functions. This would violate the first concern posed by the *Mistretta* opinion. An initial, facial examination reveals little infringement. Compared to *Mistretta*'s Sentencing Commission, which infringes on legislative rulemaking functions, the Commission has little effect on Congress. Here, the WTO Commission acts in an adjudicatory manner, albeit advisory. The Commission wields no legislative power and does not infringe upon congressional duties. Effectively, the legislature has given nothing away. The Commission's "affirmative reports" do not force Congress to enact a joint resolution, nor does Commission approval of WTO action preclude Congress from contravening the treaty. Invalidation of the Commission on this basis is unlikely.

As for infringement on executive powers, the same general argument applies. Nothing in S. 1438 prevents the President or Trade Representative from pressing his or her own views on WTO dispute resolution decisions. While S. 1438 may place the judiciary in an unorthodox position, it is unlikely the Court would find it comes at the expense of the executive branch. Commission decisions neither limit nor compel administrative action. The evaluation of WTO decisions is not a zero-sum game, where one branch's authority comes at the expense of another. Instead, Congress seems to be enlarging the universe of those who may examine the dispute resolution process.

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150. The first prong states "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches.'" *Id.* at 383 (quoting *Morrison*, 487 U.S. at 680-81).

151. S. 1438 § 6(b)(1) & (2).

152. That the Supreme Court has rarely invalidated congressional delegation of its power lends additional support for this argument. *See Mistretta*, 488 U.S. at 372-73.

153. The Sentencing Commission does not suffer from the same predicament because it addresses issues solely related to the judiciary. *See Mistretta*, 488 U.S. at 395.

154. This is true at least in the constitutional sense, although it may not be true in the more practical political sense.
While a cursory analysis of the proposal does not reveal constitutional infirmities, a closer look uncovers serious concerns. A criticism of Morrison that is equally applicable here is that initially, Morrison's two-pronged analysis ignores that Congress has instructed the judicial branch to perform a non-judicial function outside Article III's literal "cases and controversies" provision. Consequently, Congress must have some constitutional basis to delegate this responsibility to the judicial branch.

In prior cases, the Court identified constitutional authority for congressional delegation in unusual situations. In Morrison, the Court held that Article II's Appointments Clause provided a basis for the federal judges in the Special Division to appoint special prosecutors independent from Article III's constraints. The Mistretta Court, perhaps questionably, held that the "Necessary and Proper Clause" provided authority. The Court stated, "[b]ecause of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch."

The same cannot be said of the duties assigned to judges on the Commission. Unlike sentencing, international disputes are not part of the judiciary's traditional jurisdiction. The Commission is a radically different entity from either the Special Division or the Sentencing Commission, and presents unique issues. Given the nature of the WTO Commission, it is doubtful that a court could argue that reviewing international trade decisions is a traditional role for lower court judges acting either individually or as a panel.

In addition, no constitutional provision creates authority for Congress to delegate review of international treaties. Certainly, the decisions of an international tribunal are not "cases" or "controversies" as the Court has interpreted them. Mistretta's "necessary and proper" explanation would be equally inapplicable. Although an extensive

155. Redish, supra note 98, at 17 (criticizing the Morrison analysis).
156. Morrison, 487 U.S. at 696.
157. Id. at 678-80.
160. Mistretta, 488 U.S. at 389-90. The Mistretta opinion likened the promulgation of sentencing guidelines to other judicially-administered functions. The Court has recognized congressional power to create administrative entities such as the Judicial Conference and the Administrative Office. Mistretta treats the Sentencing Commission as an extension of this practice. Id. at 388-89.
161. A court could utilize Congress' power to "constitute Tribunals inferior to the supreme Court." U.S. Const. art. I, § 8, cl. 9. However, this argument fails for a myriad of
examination is beyond the scope of this paper, no constitutional au-
thorization for this delegation is readily apparent. 162

Without textual authorization, any congressional grant of power
violates the separation of powers principle. To allow Congress to em-
power courts to act without specific constitutional authorization vi-
lates all but the most lenient separation of powers interpretation.
Even utilizing a “flexible” functional analysis, 163 a court must impose
outer limits. Otherwise, constitutional overlaps would be so extensive
as to obliterate nearly all distinctions between the branches.

The counter argument is the initial, facial conclusion that the
Commission simply wields no power. This issue is ultimately a debate
over the definition of power as it fits within the issues enunciated in
Mistretta. If one believes the WTO Commission is powerless, it is
hard to oppose its function on separation of powers grounds; a power-
less judicial entity simply cannot infringe on another branch. Ulti-
mately, opponents of S. 1438 may have to concede this point. Aside
from the political pressure created by congressional rejection of Com-
mission decisions, the panel wields no real authority. Unless a court
found this political pressure created a substantial justification, it
would likely find that the Commission does not infringe on another
branch’s powers.

Similarly, Commission proponents would claim that a powerless
extrajudicial entity could not infringe on the institutional integrity of
the judiciary. This argument is more difficult to sustain. Integrity can
be infringed in many different ways. These range from reducing re-
sources so that the judiciary cannot efficiently function to embroiling
the branch in political affairs. The Commission’s perceived powerless-
ness would not preclude it from infringing on judicial integrity. Fur-
ther insight into this concern may be provided through an
examination of policy issues presented by S. 1438.

III. Policy Analysis of S. 1438

The policy implications of S. 1438 may violate the second concern
enunciated by the Court in Mistretta. If the Commission’s tasks “im-

162. To “check” its reasoning in Mistretta, the Court analyzed whether Congress could
have legitimately delegated the sentencing function to the executive branch without in-
fringing on the judiciary. Mistretta, 488 U.S. at 391 n.17. For a variety of reasons, the Court
decided this would have been improper. Id. Conversely, delegating non-binding review of
WTO dispute resolutions to an executive body, or certainly to a congressional sub-commit-
tee, would impose no harm upon the judicial branch. Id. (“If guidelines were to be
promulgated by an agency outside the judicial branch, it might be viewed as an encroach-
ment on a judicial function.”).

163. See id. at 382.
permissibly [threaten] the institutional integrity of the Judicial Branch," the proposal will violate the separation of powers doctrine.164 Judicial integrity is vital to the effective administration of justice. The Court in Mistretta noted that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."165

Although the Court has not explicitly defined an "impermissible" violation of judicial integrity, it is possible to balance the policy implications created by this proposal. If Congress impermissibly appropriates the judiciary's reputation for impartiality, places judges in an ethical dilemma, or overburdens judicial resources, S. 1438 would violate the separation of powers as enunciated by Mistretta.

A. Political Implications as a Threat to Judicial Integrity

(1) The British Experience with the Scott Commission

Great Britain's on-going experience with the Scott inquiry serves as a cautionary example and illustrates potential political repercussions of the WTO Commission. In 1993, British Prime Minister John Major appointed Sir Richard Scott to head an inquiry examining whether Cabinet ministers misled Parliament about the sale of military equipment to Iraq.166 Major was "widely applauded" for appointing the "High Court judge known for independent thinking... to shed light on Britain's version of the Iran-Contra scandal."167 At the time, supporters viewed Major's appointment as a wise action to enlist the aid of a respected member of the judiciary and insure an impartial, in-depth examination of a potentially major scandal.168 Critics averred that Major employed Sir Richard (as he is known) as a shield, appropriating the integrity of the judiciary to gain political cover.169

In either case, the investigation and subsequent report, which was released on February 15, 1996, has set off a storm of controversy. Delays pushed back the original release date of July, 1995.170 An unauthorized leak of a preliminary draft, containing criticism of ministers in Major's cabinet, touched off rancor within Parliament, including

164. See id. at 383.
165. Id. at 407.
167. Id.
168. Id.
169. Id.
strident criticism of Judge Scott.\textsuperscript{171} The delay led to additional speculation about the report’s timing, with political analysts speculating that a November release date might encourage a challenge to Prime Minister Major’s party leadership.\textsuperscript{172}

In the weeks leading up to the release of the report, the Judge became further embroiled in politics. One former government official attacked Judge Scott in an article in which he “accused Scott of being engaged in a ‘marathon contest with reality.’”\textsuperscript{173} Finally, the report’s release prompted calls for resignations or firings of ministers implicated in the scandal.\textsuperscript{174}

This imbroglio should give pause to proponents of the WTO Commission. That this event made headlines in England, where the judiciary does not have the strict American tradition of separation,\textsuperscript{175} illustrates the drawbacks of judicial involvement in overtly political matters. As with the proposed WTO Commission, the Scott inquiry was merely charged with reporting its findings. Devoid of a legal basis for the decision or the presumption of a court’s impartiality, the report was clearly attached to the political process. Consequently, Judge Scott exposed himself to the type of criticism normally reserved for the majoritarian elements of government. In addition, the delay and eventual timing of the report embroiled the Judge in political machinations usually avoided by the American judiciary.

In all likelihood, Americans would react similarly if Chief Justice Rehnquist investigated the Whitewater or Iran-Contra affairs. While the WTO Commission is not responsible for probing a governmental scandal, the political ramifications of reporting to Congress on a controversial issue of national concern could lead to similar criticism. In addition to the constitutional concerns, one must question whether Congress should subject the judiciary to the potential invective and opprobrium attached to the Scott inquiry. A reaction like the one which greeted the Scott Report would damage the integrity of the judiciary.

\textsuperscript{171} Id. at 15 ("'The whole thing is an absolute farce—a music hall joke,' said one senior Tory. 'Scott knows bugger-all about government. Governments in the rest of Europe must be laughing at us. We are the only country who would subject ourselves to this.'" One witness, Sir Richard Luce, said, "The Scott inquiry is unbuttressed by any experience of international affairs or parliamentary matters. This is not a personal comment on Sir Richard Scott, it's about the nature of the inquiry. It's a fundamental mistake.").

\textsuperscript{172} Id. at 14.


\textsuperscript{174} \textit{Inviting Defeat on Scott}, \textit{FIN. TIMES}, Feb. 26, 1996, at 19.

\textsuperscript{175} See Wheeler, supra note 57, at 125-26.
S. 1438's political implications present a distinct threat to judicial integrity. S. 1438 involves federal judges in the thorny sovereignty dispute surrounding the debate over international trade. This issue has aroused tremendous passion from opponents of the WTO, who fear U.S. laws will be preempted by foreign entities.\(^\text{176}\) Regardless of the validity of these concerns, the WTO is an extremely hot issue.\(^\text{177}\) Judicial review of WTO decisions would "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 . . . and that surely will not keep the judiciary above the fray of political issues."\(^\text{178}\) A ruling either approving or rejecting a WTO decision adverse to the United States would place the judiciary at the center of the debate.

The process for selecting Commissioners also raises policy concerns by excluding all judicial participation. Previous extrajudicial commissions gave the judiciary substantial control. For example, the President selects Sentencing Commissioners from a list of judges recommended by the Judicial Conference.\(^\text{179}\) Judges sitting on NAFTA dispute resolution panels are also selected only after consultation with the judiciary.\(^\text{180}\) However, the WTO proposal removes the judiciary from this process entirely. It merely requires that the President consult with certain members of Congress before appointing Commissioners.\(^\text{181}\) Without judicial involvement, "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."\(^\text{182}\)

In addition, this process removes any locus of control from the judicial branch. "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

\(^\text{176}\) One commentator states, "[GATT] will limit state sovereignty by federal preemption of state laws enforced by mechanisms in the agreement that create a duty of signatory nations to bring into compliance offending 'subfederal' laws. This will also oblige federal courts to interpret and defend the treaty and the implementing federal legislation." Thomas E. Baker, A View to the Future of Judicial Federalism: "Neither Out Far Nor In Deep", 45 CASE W. RES. L. REV. 705, 748 (1995).

\(^\text{177}\) See supra Part II.

\(^\text{178}\) Bloom & Restani, supra note 1, at 1675.


\(^\text{180}\) See NAFTA, supra note 15, at 687.

\(^\text{181}\) S. 1438 § 3(b)(1).

\(^\text{182}\) Bloom & Restani, supra note 1, at 1675.
directly or indirectly, an overruling influence over the others in the administration of their respective powers.’”

Finally, the aforementioned political controversy combined with S. 1438’s poorly defined standards of review may lead judges to make politically influenced decisions. Even assuming complete neutrality on the part of the Commissioners, it would be difficult to escape the intense political ramifications of these international trade issues. This is aggravated by the fact that judges receive little guidance from the bill itself as to what guidelines the WTO dispute resolution panels must follow. Even if the judges are able to avoid political pressure and apply a reasoned analysis, all decisions will be subjected to intense scrutiny and harsh criticism. Any suggestion of political influence would impugn the reputation of the judiciary.

(3) Presidential Control over the Commission

As discussed earlier, the executive would select the WTO Commissioners and likely have some form of removal power. Presidential control elicits concerns about the judiciary’s independence and integrity. However, the Supreme Court appears to have settled the debate over executive appointment and removal power.

In Mistretta, the Court held that the presidential powers of appointment and removal presented no greater danger of interference than that which usually exists under judicial appointment procedures. Without power to affect the salary or tenure of judges serving on the Sentencing Commission, the President lacks the “power to coerce the judges in the exercise of their judicial duties.” The Court conceded that removal from the Sentencing Commission could be damaging to a judge’s reputation, but countered that commissioners voluntarily assume that risk when they agree to take the position on a commission.

The differences in the proposed WTO Commission could affect the Supreme Court’s analysis. The proposal provides no specific removal provision. Anything less than the Sentencing Commission’s “for cause” standard would likely be rejected, as it could give the President coercive influence over the Commissioners.

The absence of judicial input in the selection process could also impact the proposal. Service on the WTO Commission could be considered less voluntary than similar work for the Sentencing Commission because of the absence of judicial input. The President could

183. Id. at 1673 (quoting The Federalist No. 48, at 332 (James Madison) (Jacob E. Cooke ed. 1961)).
185. Id. at 411.
186. Id. at 411 n.34.
request a specific judge without any comment from the judiciary. Although the judge could certainly refuse this request, a delicate or uncomfortable political situation could be created. This would be especially true if the President had appointed the judge, or if they were of the same political party. Even a slight increase in presidential influence over the judiciary would threaten the constitutionality of this proposal.\textsuperscript{187}

(4) Ethical Considerations of S. 1438

The proposed Commission may violate the Codes for Conduct for Judges and Judicial Employees.\textsuperscript{188} The Code could be interpreted as barring this type of service.\textsuperscript{189} Canon Five states: "A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties."\textsuperscript{190} In Mistretta, the Court quotes subsection G:

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, impartiality, or independence of the judiciary.\textsuperscript{191}

The commentary counsels caution in light of the "crowded dockets and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial."\textsuperscript{192}

As the commentary notes, a code of conduct "ought not to compel judges to refuse, without regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest."\textsuperscript{193} Individual judges selected will have to exercise the discretion which Wheeler discussed in determining whether their service would violate the Code.\textsuperscript{194} In either case, S. 1438 compels judges to make a difficult ethical decision.

\textsuperscript{187} See Hearings on S. 16, supra note 14, at 41. Judge Harris highlighted this concern in his appearance before the Senate Finance Committee.

\textsuperscript{188} 2 GUIDE TO JUDICIAL POLICIES AND PROCEDURES, CODES FOR CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES Canon 5 (1994) [hereinafter GUIDE TO JUDICIAL POLICIES].

\textsuperscript{189} Bloom & Restani, supra note 1, at 1676.

\textsuperscript{190} GUIDE TO JUDICIAL POLICIES, supra note 188, at Canon 5.

\textsuperscript{191} Id.

\textsuperscript{192} Id. (commentary to the Canon).

\textsuperscript{193} Id.

\textsuperscript{194} See supra Part III.A.
B. Practical Implications of S. 1438

The WTO Commission will also hamper the judiciary’s ability to effectively administer justice. Judge Harris, in both a prepared statement and testimony before the Senate Finance Committee, focused on the practical concerns presented by the proposed WTO Commission. Although in Mistretta the Supreme Court largely downplayed the Sentencing Commission’s effect on the judiciary, these concerns are legitimate and weighty.

The Mistretta opinion equated the Sentencing Commission with other administrative bodies like the Judicial Conference. The Court stressed the de minimis nature of this type of service. However, the WTO Commission does not address issues traditionally within the judiciary’s purview, a vital factor in Mistretta. Moreover, S. 1438 conscripts five additional members from the ranks of active judges. As Professor Redish has noted, each factor viewed in isolation may be de minimis, but over time the cumulative impact may become weighty.

Judge Harris delineated these practical concerns before the Senate Finance Committee. First, the federal judiciary is already short-handed due to increasing dockets and existing judicial vacancies. As Judge Harris stated, “The opposition of the conference is predicated on the drain of scarce judicial resources that this feature of [S. 1438] would cause during this time of increasing judicial workload . . . [and] exacerbated by significant existing judicial vacancies on the circuit courts of appeals . . . .” Removing federal judges at a time when additional ones are desperately needed runs counter to both concerns for judicial integrity and common sense.

This concern is supported when one examines the actual time demands of the WTO Commission. The number of referrals each year will depend on variable factors including number of complaints and appeals filed with the WTO and number of adverse decisions. The amount of time necessary to examine each referral is also unclear. Judge Harris estimated each would take the full 120 days allowed by the Dole Proposal. Review would involve examination of a voluminous record containing detailed trade and economic figures, pos-

196. Id.
197. See id. at 389-90.
198. Redish, supra note 98, at 12.
199. Hearings on S. 16, supra note 14, at 41.
200. Id. at 40-42 (citing overcrowding figures).
201. See id. at 41.
sible hearings, and a report-writing process. Judge Harris stated, "If you get even two cases a year, I have trouble seeing how they could do it within 120 days." Judge Harris also expressed concern over the "plenary scope of review" which the Commission would be forced to undertake. Commissioners would not only have to examine the specific record, but also be generally familiar with international trade practice and procedure. Achieving a working familiarity would be a time-consuming and cumbersome process. Finally, the "reporting requirement of the bill" implies the presentation of a formal written opinion to Congress, another time-consuming exercise. These concerns led Judge Harris to state "that it is therefore fair to conclude that Commission membership would become a full-time job for a judge, or at the very least, would require devotion of a substantial amount of time each year."

Although S. 1438 would temporarily remove only five judges from active service, it could affect the judiciary's ability to function. Judge Harris expressed legitimate concerns about the Commission's impact on efficient judicial functioning especially when viewed in light of the other responsibilities Congress has placed on judges. Any administrative harm which the Commission would inflict on the judiciary would infringe on the institutional integrity of the branch, and violate the separation of powers doctrine.

Conclusion

The proposed "WTO Dispute Settlement Review Commission" implicates both constitutional and policy concerns. The long tradition of extrajudicial service as well as the Court's support for recent extrajudicial creations warrant a legal analysis of S. 1438. Even if a party

204. Id.
205. Id. at 8.
206. Id. As Judge Harris stated:
   [I]t would appear that to conduct a meaningful 'complete review,' whether the WTO acted 'arbitrarily and capriciously,' whether the WTO deviated from any applicable international standards of review and caselaw, or whether its actions affected the outcome of the dispute in a material way, Commission members would have to develop expertise generally in the norms and construction of international treaty instruments, sources, and hierarchy of authority of international law, and global economics principles and effects. The time it takes to develop a thorough understanding of the general international trade law would be in addition to the time it takes for Commission members to master the underlying facts, applicable treaties, and specific standards of review relevant to the matter referred.
   Id. at 41.
207. S. 1438 § 4(b)(2).
208. Hearings on S. 16, supra note 14, at 41.
could contest the Commission in court (an unlikely prospect), the Supreme Court would likely be hesitant to strike it down on constitutional grounds. In discussing *Morrison* and *Mistretta*, Professor Redish commented, "Invalidation of either could have given rise to serious political repercussions. It is therefore not surprising—though perhaps less than commendable—that the Court strained to find both statutory schemes constitutionally legitimate."209 It is likely that the Court would do the same here.

However, the policy concerns presented by S. 1438 militate against acceptance of the bill. The danger of enmeshing the judicial branch in partisan politics is great. Great Britain’s experience with the Scott Report illustrates that:

> Whenever issues that are highly visible and sensitive are entrusted to a public commission for resolution or recommendation, the results are unlikely to satisfy all the critics, perhaps none. Participation in such a process by members of the judiciary is less likely to settle a troublesome public issue than to lend credence to the charge that the courts are part of the political process.210

Any judicial participation in the political process is unfortunate. However, involvement in an issue as contentious as international trade would be harmful to judicial integrity.

As for efficiency, S. 1438 comes at a time when judicial resources are already strained. Congress and the Supreme Court have largely ignored this issue. In *Mistretta*, Justice Blackmun wrote, "While in the abstract a proliferation of commissions with congressionally mandated judiciary participation might threaten judicial independence by exhausting the resources of the Judicial Branch, that danger is far too remote for consideration here."211

The short-sightedness of this trend is alarming. The last ten years have brought *Morrison*’s Special Division, *Mistretta*’s Sentencing Commission, NAFTA’s panels, and now Senator Dole’s proposed WTO Commission. These developments, each one further removed from the traditional roles of the judiciary, increasingly infringe on the federal bench. Straying from tradition, these commissions are not designed to respond to extraordinary events such as the prosecution of Nazi war criminals or the assassination of President Kennedy. Instead, they commit the judiciary to unprecedented roles.

The Supreme Court is undoubtedly correct; each new intrusion is minimal and the actual effects on the courts nearly undetectable. However, the combination of additional judicial burdens and increased political involvement raise grave separation of power con-

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cerns. The greatest danger comes from the congressional philosophy that the judiciary is a resource to be tapped, like a vein of coal. However, like natural resources, the integrity of the judiciary will soon be spent if it is not preserved.

In his dissent in *Mistretta*, Justice Scalia summarizes the argument against measures like S. 1438 which impose extrajudicial duties: "There are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."212