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International Administrative Law for the Internet: Mechanisms of Accountability

Henry H. Perritt Jr.
IIT Chicago-Kent College of Law, hperritt@kentlaw.iit.edu

INTERNATIONAL ADMINISTRATIVE LAW FOR THE INTERNET: MECHANISMS OF ACCOUNTABILITY

HENRY H. PERRITT, JR.*

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INTRODUCTION

The number and sophistication of international regulatory institutions have been increasing significantly since the Second World War.[1] Multilateral rulemaking, adjudication, and enforcement institutions regulate or guide important aspects of telecommunications,[2] the environment,[3] bank-

* Dean and Professor of Law; Chicago-Kent College of Law, Illinois Institute of Technology. Comments are welcomed at <hperritt@kentlaw.edu>.

1. *See* Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI. KENT L. REV. (forthcoming 1999) (manuscript at 1011-53, on file with author) (describing post-war international governmental organizations).

2. The International Telecommunications Union (ITU) manages electromagnetic spectra and allocates geostationery orbital slots. *See World Radiocommunication Conferences* (last modified May 7, 1999) <http://www.itu.int/bredh/brochure/3.wrc/index.html> (describing spectrum management); *see also Mobile Satellite & Radionavigation-Satellite Services* (visited Aug. 31, 1998) <http://www.itu.int/mss-rnss/description.html> (discussing satellite orbital management).

3. The United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS) enforces prohibitions on certain types of fishing. *See Oceans and Law of the Sea* (visited Aug. 31, 1998) <http://www.un.org/Depts/los/index.htm> (outlining Convention on Law of

ing,[4] intellectual property,[5] proliferation of weapons of mass destruction, and, in specific cases, details of macro economic policy and structure of financial industries.[6] As the Internet becomes a political arena and a new marketplace, it is unlikely to escape international regulation. To be sure, most Internet service providers and major governments express a preference for self-regulation rather than traditional state-based regulation, or regulation through traditional intergovernmental organizations such as the International Telecommunications Union (ITU). However, it is difficult to make self-regulation work, and early experiences in the United States with respect to Internet privacy, and internationally with respect to Internet domain name administration, are not encouraging. Self-regulation may not prove sufficiently robust to meet political pressures to address Internet gambling, pornography, organization of terrorist activities, consumer fraud, defamation, and intellectual property infringement.

Even if self-regulation takes root in certain areas, it will probably need an explicit legal framework providing for limited immunity from antitrust and tort law.[7] Such a framework is itself a form of regulation, just as the domestic United States framework for self-regulation of securities exchanges[8] and collective bargaining[9] are forms of regulation.

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the Sea); *see also Oceans and Law of the Sea: Marine Resources* (last modified May 13, 1997) <http://www.un.org/Depts/los/los_mr1.htm> (setting forth rules relating to fishing resources).

4. *See generally Compendium of Documents Produced by the Basle Committee on Banking Supervision* (visited July 30, 1998) <http://www.bis.org/publ/bcbsc002.htm> (noting industry guidelines expressed in Basle agreements relating to banking reserves and loan policies).

5. A number of treaties, including the Madrid Agreement Concerning the International Registration of Marks (trademarks), the Paris Convention for the Protection of Industrial Property (patents), the Berne Convention for the Protection of Literary and Artistic Works (copyright), and more recently the TRIPS addendum to the WTO agreement, set a floor for intellectual property protection and additionally require signatories not to discriminate against foreign works. *See General Information About WIPO and Intellectual Property* <http://www.wipo.org/eng/general/index3.htm> (visited Aug. 31, 1998) (describing texts of intellectual property treaties). The TRIPS Agreement is the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organization.

6. *See International Monetary Fund* <http://www.imf.org> (last modified Aug. 31, 1998) (summarizing IMF requirements in Asian financial crisis, Russia, and Romania).

7. *See* Henry H. Perritt, Jr., *Cyberspace Self-Government: Town-Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 448 (1997) (explaining relationship between self-government and antitrust immunity).

8. *See* 15 U.S.C. § 78(f) (1994 & Supp. II 1996) (describing registration of exchanges).

9. *See* 29 U.S.C. §§ 153-160 (1994 & Supp. II 1996) (setting forth provisions of National Labor Relations Act).

Almost everyone who has thought seriously about Internet regulation recognizes that it presents strong jurisdictional challenges for territorially-based regulatory schemes. A state attorney general may be able to score political points by prosecuting off shore Internet casinos, but his practical ability to impose criminal sanctions beyond the limits of his state's territory are limited at best. A number of efforts are underway to address the jurisdictional issues, including the ABA Internet Jurisdiction project,[10] facets of the Hague Conference Initiative on International Recognition of Judgments, and the National Academy of Science/National Research Council Committee on International Networks and National Values.[11] These jurisdictional problems stimulate increased interest in international regulatory approaches.

Design of international regulatory agencies for the Internet will, however, omit some of the mechanisms of political accountability that students of American Administrative Law have come to assume are statutorily, and perhaps constitutionally, required. Even if international Internet regulation is provided for by treaty, the treaty is invalid insofar as it violates the United States Constitution.[12]

These accountability mechanisms are associated with each of the first three Articles of the United States Constitution. Article I vests "all legislative powers" in the Congress of the United States.[13] This is understood to preclude the "delegation" of legislative power to any other institution except when the delegation is narrow, when it must be exercised according to ascertainable statutory standards or self-imposed agency regulatory standards, and when compliance with these limitations is judicially enforceable.[14] Article II vests the "appointments power" in the President of the United States.[15] This provision is thought to foreclose giving anyone not

10. The ABA Internet Jurisdiction project is a project of the ABA Business Law Section, co-sponsored by the ABA Sections on International Law and Science and Technology. Its activities are coordinated from the Chicago-Kent College of Law at the Illinois Institute of Technology, where Professor Margaret G. Stuart is the reporter.

11. The author is a member of this committee.

12. *See* Reid v. Covert, 354 U.S. 1 (1957) (releasing prisoner, pursuant to writ of habeas corpus, because executive agreement subjecting civilians to court martial violated United States Constitution). The case involved an executive agreement, a capital murder prosecution, and violation of procedural protections under the Constitution. It is questionable whether the case should be extended to a situation involving structural provisions of the constitutions in a civil context under a treaty ratified by the Senate. *See id.*

13. U.S. CONST. art. I, § 1 (granting exclusive lawmaking authority to Congress).

14. *See* Loving v. United States, 517 U.S. 748, 757 (1996) (restating Delegation Doctrine in military context); *see also* Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558 (1976) (finding standards to guide Presidential exercise of delegated power sufficient).

15. U.S. CONST. art. II, § 2, cl. 2.

appointed by the President the powers of "an officer of the United States," or giving someone not appointed by the President, the heads of departments, or the courts the powers of a "subordinate officer of the United States."[16] Article III vests the judicial power in courts with defined attributes, the most important of which is life tenured judges. Article III is understood to foreclose giving the essential attributes of judicial power to any other institution in cases involving "private rights."[17] These constitutional requirements are not as inflexible as one might suppose in prohibiting the exercise of regulatory power by international institutions. In particular, the Delegation Doctrine can be satisfied by mechanisms of political accountability and judicial review not necessarily involving Article III courts; appointment power problems can be avoided by treating officers of international bodies as state officers when they exercise important legal power; and the exercise of the essential attributes of judicial power by United States courts, when enforcement is sought within United States territory, may be enough to satisfy the requirements of Article III. Some of these questions were explored in the context of the United States-Canada Free Trade Agreement in the early 1990s.[18] That agreement provided for arbitration of certain trade disputes. International administrative machinery for regulating the Internet raises a broader set of issues than the United States-Canada Free Trade Agreement, however, because the Internet regulatory apparatus would not necessarily be limited to arbitration, and unlike the United States-Canadian Free-Trade Agreement, it would not involve customs issues, as to which there is a substantial body of law, which originated in the earliest days of the Republic.

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16. Edmond v. United States, 520 U.S. 651, 666 (1997) (finding judge of Coast Guard Court of Criminal Appeals was "inferior officer" and could be appointed by Secretary of Transportation).

17. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (holding that administrative agency may be given power over common law counterclaims without violating Article III because "essential attributes of judicial power" remain with Article III court).

18. *See* Harold H. Bruff, *Can* Buckley *Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992) (concluding that Article III does not bar international arbitrators from reviewing determinations of American Administrators under United States-Canada Free Trade Agreement and North American Free Trade Agreement); *see also* William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315 (1992) (arguing that Appointments Clause is no justification for interference with United States' trade policy); Patricia Kelmar, Note, *Bi-national Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173 (1993) (discussing constitutionality of bi-national panel dispute settlement system and impact on Article III).

I. THE INTERNATIONAL MACHINERY

The following is a question I asked on the final examination for my Administrative Law course in the Spring semester of 1998.[19] The facts of the question are plausible representations of the features of an international system for regulating the Internet. Obviously, the subject matter of the regulation or the details of the institutional structures could vary.

Question I

The World's Internet service providers have agreed upon a new system for Internet governance. The institutional core of this system is an International Council of Participants (ICOP), located in Prague, Czech Republic. The ICOP has ultimate authority for deciding whether an applicant for an Internet domain name may receive one. An Internet domain name is the mnemonic address, such as www.kentlaw.edu or www.microsoft.com. Under the agreement setting up ICOP, applicants will be refused domain names if they have not agreed to be bound by rules adopted from time to time by ICOP and/or if they "traffic in" content, or Web sites handling content, that is "indecent, scandalous, fraudulent, or infringing of intellectual property rights."

The agreement setting up ICOP is a contract among the participating Internet service providers, most of whom are individuals or private corporations.

The authority of ICOP is exercised by a five member council elected for staggered three year terms through an e-mail balloting process in which each holder of an Internet domain name is entitled to one vote. Any revisions to the basic ICOP contract and bylaws are valid only after they are adopted by the Council and approved by a "review board," made up of the CEO's of all Internet service providers.

Any disagreement over the application or validity of any ICOP rule or decision is subjected to final and binding arbitration under the rules of the International Chamber of Commerce — a private arbitration body.

A. The President of the United States has issued an executive order obligating Internet service providers and all Internet users in the United States to comply fully with the ICOP system. Your client, Wannabee ISP (WISP), has applied for the Internet domain name www.wannabee.com. Its application has been rejected by ICOP on the grounds that it refuses to be bound by ICOP rules and decisions. (Your client has assured you that it does indeed refuse to agree to be bound by the ICOP rules and decisions because it refuses to recognize ICOP.) What arguments would you make to

19. This Administrative Law course was taught at Chicago-Kent College of Law at the Illinois Institute of Technology.

invalidate the decision to deny a domain name to your client? What remedies would you seek? In developing your argument and analysis, be sure to explain which arguments are strong and which are weak and why.

B. The Congress of the United States has enacted a statute designating ICOP as the "governing body" of the Internet for all United States users. How does this change your answer to sub-question "A"?

C. What changes should be made in this regulatory scheme to protect it from legal challenges? In describing the necessary changes, do not recommend changes that are not absolutely necessary, because most Internet service providers from other countries and other governments are extremely reluctant to agree on a scheme for Internet regulation that seems to be dominated by American institutions.

This question required the students to consider the questions posed in the introduction to this Article — questions that must be resolved by actual designers of international regulatory institutions for the Internet. The ICOP proposed in the examination question presents several constitutional arguments, those posited in the introduction relating to Articles I, II, and III, and arguments relating to presidential power and justiciability. While the ICOP mechanism could be considered private, and while it certainly deviates from the traditional intergovernmental institution, it can also be analyzed as a treaty-based governmental body. The details of the examination question are considered as appropriate in the following analysis.[20]

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20. There are other issues to be considered in a good answer to the examination question that are beyond the scope of this Article. If one assumes that the statute and/or the executive order confer governmental power on the ICOP system, thus making its decisions those of the government and more particularly making it an agency, its decisions are subject to the requirements of the Administrative Procedure Act (APA).

The rules adopted by ICOP are invalid because ICOP did not follow the required rulemaking procedures. *See* 5 U.S.C. § 553 (1994 & Supp. II 1996) (setting fourth guidelines for rulemaking procedure). It did not issue the proposed rule for comment, or publish the final rules in the Federal Register. Thus, the rules are invalid for failure to observe procedures required by law. *See* 5 U.S.C. § 706(2)(D) (declaring that reviewing court shall hold unlawful agency actions that do not observe required procedure).

Since the rules are invalid they can provide no support for the adjudicatory decision denying the hypothetical client his requested domain name. The adjudicatory decision is invalid because it was reached without observance of the procedures required by the constitution for adjudication, since there was no "magic language" "on the record after opportunity for agency hearing" in the statute to support an argument that sections 554-558 of the APA apply. Constitutional requirements of procedural due process require that the hypothetical client should have been entitled to a live hearing to voice his claim that the rules were invalid. However, this is a relatively weak argument because arbitration was available to the hypothetical client, and arbitration almost certainly meets all of the requirements of procedural due process.

II. WHAT IS THE SOURCE OF AUTHORITY FOR THE INTERNATIONAL REGULATORY REGIME?

An international regulatory arrangement could result from an "executive agreement" under the President's authority. The executive agreement could be, but would not necessarily be, authorized by statute. Alternatively, the arrangement might result from a treaty signed under the authority of the President and ratified by the Senate. The international regulatory regime could also be authorized by statute, or it could result from private agreement.

In Part A of the examination question, the President acts unilaterally. The principal objection to this procedure for establishing international regulation would be that the President has acted *ultra vires*. Under *Youngstown Sheet & Tube Co. v. Sawyer*,[21] the President of the United States lacks the authority to legislate. To allow the executive order to have effect would violate separation of powers principles because it would intrude upon the exclusive prerogative of Congress under Article I to exercise legislative power. *Youngstown* leaves the door open slightly for presidential authority exercised through executive order in the foreign affairs arena and in the housekeeping or purely executive arena. Unless the domain names are government property, neither of these possibilities for presidential power helps save this executive order. While the regulatory scheme is foreign, the President is not really doing anything with respect to traditional foreign affairs by issuing the order, and thus, can arguably derive no power under his foreign affairs functions under Article II.

Alternatively, Internet domain names might be a form of United States Government property,[22] and, therefore, fall within the scope of the President's inherent constitutional powers under Article II. According to this characterization, the President might be able to designate ICOP as a private entity responsible for administering this unusual form of government con-

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There may be some difficulty getting judicial resolution of these arguments unless a challenger exhausts all administrative remedies, including arbitration. On the other hand, most of the arguments go to pure legal issues and not factual issues. *Webster v. Doe*, 486 U.S. 592 (1988), suggests a judicial forum for arguments like these even if there were an express preclusion of judicial review, which there is not.

Another constitutional argument is that the legislation, combined with the decision of ICOP, violates the hypothetical client's First Amendment rights because it impermissibly denies him the opportunity to engage in expressive conduct. The language used in the ICOP rules is similar to language declared unconstitutional in *Reno v. ACLU*, which invalidated the Communications Decency Act on First Amendment grounds. 521 U.S. 844 (1997).

21. 343 U.S. 579 (1952) (invalidating executive order authorizing seizure of steel mills in labor dispute).

22. Internet domain names, and the Internet itself, originated from a government subsidized and supervised research effort.

tract right. Then, however, the actions of ICOP would be the actions of the government — "state action" — and there would be stronger procedural due process arguments in defense of property interests in the domain name.[23]

If Congress authorizes international regulation, either through ordinary legislation, as in Part B of the examination question, or by ratifying a treaty, the *ultra vires* question focused on Article II foreign affairs or contract powers disappears. However, basic questions relating to delegation, appointments power, and exercise of judicial power remain.

Another possibility, less likely to invoke constitutional issues, is simply to allow international regulation of the Internet by privatization: the regulatory agencies would be creatures of contract, not treaty or legislation. This was contemplated by the United States government in late 1998 with the establishment of ICANN[24], and the arrangement described in the examination question basically involves a private arrangement with a veneer of legislation.

If there were no statute or presidential decision, there would be no concrete governmental action for a challenger to attack under the Delegation Doctrine, Appointments Clause, or Article III. If the private international regulatory power simply issues rules and purports to enforce them, a challenger can simply refuse to follow the rules and flout enforcement decisions, safe in the knowledge that a contract-based enforcement action will allow adjudication of a variety of challenges.[25] If the international regulatory agency controls access to valuable resources, such as domain names, simple defiance will not work, because a self-awarded domain name is of no use unless others in the Internet, especially the root servers,[26] recognize it.

Consequently, the challenger must fall back on antitrust arguments, essentially claiming that the private international regulator exercises impermissible monopoly power over the valuable resources, and that any agreement among competing suppliers of Internet service providers to set up the

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23. *See infra* Part III.

24. The Internet Assigned Names Corporation, formed in response to a Department of Commerce notice of inquiry. *See, e.g., Internet Assigned Numbers Authority* (last modified May 21, 1999) <http://www.iana.org/> (describing California non-profit corporation exercising authority over existing domain name system).

25. The challenger might argue that she was not party to the contract, and therefore has no obligations under it. She also might argue that the contract, as elaborated through particular rules and decisions, violates public policy and therefore is unenforceable.

26. The domain name system requires that a domain, in order to be accessible throughout the Internet, be linked to a "top level domain" entered in databases located on the root servers. The Internet Assigned Names Corporation controls the root servers, as does the hypothetical ICOP.

regulatory regime constitutes an impermissible agreement in restraint of trade. The root server is a classic essential facility, and antitrust law prohibits denial of access by competitors to an essential facility.[27] *United States v. Terminal Railroad Association of St. Louis*,[28] sets the basic standards for access by nonparticipating competitors when competitors control an essential facility.[29]

An entity that controls essential facilities and denies equal access to competitors, may be in violation of Section 2 of the Sherman Act.[30] The essential facilities represent a bottleneck in the market, and the person controlling the bottleneck violates Section 2 unless he lets competitors through. There are four elements for essential facilities liability: (1) control of an essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; [31] (3) denial of the use of the facility to a competitor; [32] and (4) the feasibility of providing access to the facility.[33] Unless the owner of the essential facility is a competitor of those it excludes, essential facilities liability can not exist.[34]

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27. *See* United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912) (holding that monopoly on essential facility is restraint on interstate commerce and is forbidden by law); *see also* HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY § 2.20 (1996 & Supp. 1999).

28. 224 U.S. 383 (1912).

29. *See generally* John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571 (1993) (discussing antitrust issues in context of Internet service providers).

30. 15 U.S.C. §§ 1-7 (1994 & Supp. II 1996); *see* United States v. AT&T, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (stating applicable legal standard); *see also* Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139, 150-51 (4th Cir. 1990) (setting forth requirements for essential facilities doctrine; reversing dismissal of complaint alleging Sherman sections 1 and 2, and Clayton section 3 violations by hospital system that steered durable medical equipment purchases to its own affiliate). A separate inquiry into market power is unnecessary in these circumstances because an "essential" facility by definition represents market power for the services or goods realized through the facility.

31. *See Advanced Health Care Servs., Inc.*, 910 F.2d at 150 (discussing essential facilities doctrine); *see also* Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381, 392-93 (D. Md. 1990) (rejecting claim under essential facilities doctrine by vending machine seller challenging territorial restrictions because particular brand names within particular market are not appropriate for essential facilities analysis).

32. *See* Illinois Bell Tel. Co. v. Haines & Co., 744 F. Supp. 815, 823 (N.D. Ill. 1989) (rejecting essential facilities claim by publisher of street address directory; no showing of pricing discrimination in affording access to allegedly essential street address information).

33. *See* MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (restating elements necessary to establish liability under essential facilities doctrine); *see also Advanced Health Care Servs., Inc.*, 910 F.2d at 150; Southern Pacific Communications Co. v. AT&T, 740 F.2d 980, 1008-10 (D.C. Cir. 1984) (summarizing essential facilities arguments relating to denial of interconnections and concluding that public interest regulation by FCC helps justify types of interconnections offered; test requires both objective and

If the root server is not an essential facility, because it is feasible to have more than one, then the private regulatory regime breaks down because it cannot exercise meaningful control. Regulators, to be effective, must enjoy some kind of monopoly over benefits or over coercive measures.

A. Legislative Power Under Article I

Article I of the United States Constitution provides that "all legislative powers granted herein shall be vested in the Congress of the United States . . . ."[35] In *A.L.A. Schechter Poultry Corp. v. United States*[36] and *Panama Refining Co. v. Ryan*,[37] the United States Supreme Court invalidated the National Industrial Recovery Act because it delegated legislative power to private citizens and instrumentalities of the Executive Branch without sufficient limitations to assure the political accountability of the delegates. Subsequent Supreme Court cases have held delegations of legislative power permissible, but only because they included mechanisms assuring accountability. Such mechanisms include narrowing the subject matter of the delegation,[38] limiting the time during which the delegated power can be exercised,[39] delegating a subject matter as to which there is a context of past regulation so that deviations from past practice are evident,[40] author-

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subjective reasonableness; affirming district court finding of good faith and rejection of essential facilities claim). *Compare* Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990) (reversing summary judgment for defendant under four-factor essential facilities test), *with* Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-45 (4th Cir. 1991) (rejecting essential facilities claim under four-factor test), *and* Paddock Publications v. Chicago Tribune Co., 103 F.3d 42, 44 (7th Cir. 1996) (finding no essential facility claim because alternatives existed to news service).

34. *See Advanced Health Care Servs., Inc.*, 910 F.2d at 151 (evaluating allegation on whether hospital allegedly constituting an essential facility competed with suppliers of durable medical equipment).

35. U.S. CONST. art. I, § 1.

36. 295 U.S. 495 (1935).

37. 293 U.S. 388, 412-13 (1935).

38. *See* Yakus v. United States, 321 U.S. 414, 427 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be "fair" and "equitable").

39. *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 752 (D.D.C. 1971) (discussing Delegation Doctrine).

40. *See id.* at 748 ("We think this contention is sound."):

> The context of the 1970 stabilization law includes the stabilization statutes passed in 1942, and the stabilization provisions in Title IV of the Defense Production Act of 1950, and the 'common lore' of anti-inflationary controls established by the agency approaches and court decisions, including the probing analyses of the Emergency Court of Appeals. We do not suggest that the 1970 law was intended as or constitutes a duplicate of the earlier laws. But those laws and their implementation do provide a validating context as against the charge that the later statute stands without any indication to the agencies and officials of legislative contours and contemplation.

izing the delegate to impose on itself enforceable limitations through its own rules,[41] and providing for judicial review to make sure the delegate stays within the limitations.[42]

The Delegation Doctrine does not prohibit delegation of legislative power to private citizens,[43] although it weakens the accountability existing when power is delegated to officers or subordinate officers of the United States. Furthermore, it is difficult to find an explicit holding stating that judicial review in an Article III court is an absolute requirement.[44] Instead, it may be that all that is required is review by some neutral third party using some adjudicatory process. More broadly, it may be that all that is required is review by some external agent, including Congress. For example, the Arms Export Control Act does not allow for judicial review of presidential determinations to prohibit exports, but does contain mechanisms through which presidential decisions must be reported to Congress, presumably enabling legislative action to overturn inappropriate presidential decisions.[45]

The threshold question for Article I delegation analysis is whether an international agreement providing for Internet regulation involves the legislative power under Article I at all. If it does not, then the Delegation

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Id.

41. *See id.* at 758 ("Another feature that blunts the 'blank check' rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.").

42. *But see* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (criticizing loose enforcement of Delegation Doctrine standards).

43. *See* A.L.A Schecter Poultry Corp. v. United States, 295 U.S. 495;

> We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Id. at 530.

44. *See* United States v. Garfinkel, 29 F.3d 451, 459 (8th Cir. 1994) (finding that judicial review is a factor in weighing a Delegation Doctrine challenge). *But see* Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (arguing that judicial review is constitutionally required when criminal sanctions are imposed in connection with delegated rulemaking power).

45. 22 U.S.C. §§ 2751-2796d (1994).

Doctrine is irrelevant. One can argue that the Article I legislative power is not involved because the source of right and duty in any international Internet regulatory arrangement would be a treaty or contract and not ordinary congressional legislation. Arguably, treaty making is outside the scope of "legislative power" described in the introduction to Article I.

INS v. Chadha[46] teaches that the legislative power may be involved when new rights or duties are created, but congressional legislation is not the only source of rights and duties under the United States Constitutional scheme. State law, both statutory and common law, creates rights and duties enforceable by federal institutions. Significantly, the "law of nations" has been thought to be an independent source of right and obligation since the earliest days of the republic. Recognizing independent sources of legislative power, not rooted in explicit constitutional grants, is arguably inconsistent with the positivist view of *Erie Railroad Co. v. Tomkins*,[47] but so much authority exists embracing an independent law of nations that the absence of explicit Supreme Court repudiation in *Erie* or elsewhere should leave the possibility alive.

Accordingly, one way to avoid the Article I delegation problem is to conclude that the rights and duties in an international Internet regulatory scheme arise not from the exercise of legislative power under Article I, but as a part of the Law of Nations.[48] Even without any explicit United States action to subject such a regime to international law, an international regulatory regime can have at least the effect of shaping the interpretation of federal statutes and, arguably, as part of customary international law or *jus cogens* directly obligating persons covered by American law.[49] Moreover, there is an explicit mechanism for linking the United States to international law — the treaty power — and it is not found in Article I.

Before probing the treaty power, it is important to understand that three kinds of treaties exist: traditional treaties negotiated by the President and

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46. 462 U.S. 919, 956 (1983) ("These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-house acts provided for in the Constitution.").

47. 304 U.S. 64, 78 (1938).

48. The argument in the exam question would not be part of the Law of Nations, as traditionally understood, because it does not involve agreement among nation states. Its terms easily could be incorporated into an intergovernmental agreement, in which case it would be a type of treaty.

49. When international law is directly enforceable against domestic persons and entities, without implementing legislation, it is said to have "direct effect." *See generally* Ronald A. Brand, *Direct Effect Of International Economic Law In The United States And The European Union*, 17 NW. J. INT'L L. & BUS. 556, 561-2 (1996-97) (explaining monism and dualism).

ratified by the Senate, executive agreements negotiated by the President with no congressional involvement, and Congressional/Executive Agreements negotiated by the President under explicit legislative authorization.

Congressional/Executive Agreements provide the strongest case for the exercise of legislative power under Article I because ordinary legislation is the foundation for the power to enter into the international commitment.[50]

The existence of an executive agreement or traditional treaty provides strong indications that Article I legislative power is not involved. Article II is understood to give broad foreign affairs powers to the President. The high watermark of this interpretation was *United States v. Curtiss-Wright Export Corp.*,[51] which linked the President's foreign affairs power under Article II to the crown prerogative,[52] and was, therefore, entirely independent of any power that might have been possessed by the state legislatures when the Constitution was written. Thus, the foreign affairs power is not subject to the same limitations in the Constitution that apply to domestic legislation or presidential conduct.[53] Even when Senate ratification of a traditional treaty is involved, the Senate is exercising an Article II power,[54] and not an Article I power. Therefore, the limitations on delegation derived from Article I are inapplicable.

If the President has inherent constitutional power to make Executive Agreements without any congressional involvement at all, no Article I delegation problem is involved in the administration of those Executive Agreements, although a Texas magistrate judge recently suggested major

50. *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936) (assuming, without deciding, that legislative delegation would be unconstitutional if it pertained to domestic affairs; it is not unconstitutional as applied to foreign affairs).

51. *Id.* at 304.

52. *See id.* at 316 (explaining that powers of external sovereign were possessed by crown and not by individual colonies; upon declaration of independence, those powers passed to United States of America as collective entity, not to individual states); *see also* THE FEDERALIST NO. 47, at 140 (James Madison) (Roy P. Fairfield, ed., 1981) ("He [the British executive] alone has the prerogative of making treaties with foreign sovereigns which, when made, have under certain limitations, the force of legislative acts."); THE FEDERALIST NO. 64, at 188 (John Jay) (countering arguments that treaty power must be subjugated to the legislative branch). *But see* THE FEDERALIST NO. 75, at 222 (Alexander Hamilton) ("[Treaties] are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign," which have the force of law by operation of good faith).

53. *See Curtiss-Wright*, 299 U.S. at 315-16 (delineating difference between foreign affairs and international affairs).

54. Article II, section 2, paragraph 2 gives the President "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2. The treaty power is not mentioned in Article I.

limits on the effect of international agreements not subject to Senate advice and consent.[55]

To be sure, one could infer a prohibition on delegating the powers conferred by Article II, but the Senate is not delegating the power to ratify; it is exercising the power to ratify a treaty that is the source of right and duty.

However, suppose Article I legislative power *is* involved.[56] Can it be delegated to an international body? In other words, can American actors be bound by rules made by an international administrative agency? The answer depends on the structure of the international regulatory agency, but it should be possible to craft a structure that will survive a Delegation Doctrine challenge. The first requirement is that the rulemaking powers given to the international agency be circumscribed by "ascertainable standards." These ascertainable standards may be found in a Congressional Act committing the United States to the international regime, but they also might be found in an international agreement setting up the regime. The logic of the Delegation Doctrine simply requires enforceable limitations on the exercise of delegated power. The source of the limitations should not matter. This is the lesson of *Amalgamated Meat Cutters v. Connally*, allowing Constitutionally mandated limitations to arise from self-imposed agency regulations as well as from the organic statute.[57] The permissibility of the delegation would be strengthened by a time limitation, which would permit reassessment of administration of the regulatory regime through the regular political processes in the United States.

The traditional power of a treaty signatory to "denounce" the treaty by unilaterally withdrawing from it, also strengthens the conclusion that an international regulatory regime is permissible. Just as Congress can amend or appeal a federal statute delegating power to an administrative agency,[58]

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55. *See In re* Ntakirutimana, 988 F. Supp. 1038, 1042 (S.D. Tex. 1997) (placing major limitation on effect of international agreements not subject to Senate advice and consent).

56. Legislation authorizing the President to act in foreign affairs is common. "Fast track" negotiating authority is a recent example, authorizing the President to enter into an international agreement, and waiving congressional authority to amend the agreement subsequently. In *Curtiss-Wright*, the embargo on arms trading that led to the prosecution in the lower courts was declared by the President under legislative authority. *Curtiss-Wright*, 299 U.S. at 312 (describing joint resolution and subsequent presidential proclamation).

57. 337 F. Supp. 737, 758 (D.D.C. 1971) ("[W]e cannot accept the contention of the Government that the court must pass on the Constitutionality of the Act without any conception of its content.").

58. *See* Guaranty Trust Co. v. Henwood, 307 U.S. 247, 258-59 (1939) (finding contracts between private parties cannot create vested rights which serve to restrict and limit exercise of constitutional power of Congress to legislate); *see also* McCulloch v. Glendening, 701 A.2d 99, 108-09 (Md. 1997) (finding labor arbitration and mediation system does not divest constitutional bodies of their powers; implying it would be impermissible if it did); Municipality of Anchorage v. Anchorage Police Dep't Employees Ass'n, 839 P.2d

so also does unilateral power by the United States to denounce a treaty setting up a regulatory regime impose an ultimate limit on the exercise of delegated power.

As noted in the introduction to this section, some Delegation Doctrine cases can be read to suggest that the availability of judicial review in an Article III court is an absolute requirement of delegation. However, none of the controlling cases say that explicitly, and a more reasonable interpretation of the doctrine is that the functional equivalent of judicial review in an Article III court is required. Thus, as long as someone objecting to a rule adopted by the agency can present the objections to an institution that uses adjudicatory procedure and allows a fair opportunity to consider the challenged rule in light of the limitations imposed on the agency by its organic instrument, and as long as the adjudicatory review and decisionmakers are reasonably independent of the same political influences that control the agency, the judicial review requirement should be satisfied.

In evaluating Delegation Doctrine arguments, it is important to realize that Article I provides for two different legislative processes — domestic legislation through bicamerialism and presentment and treaty based legislation through Executive negotiation and Senate ratification. There is no reason that the Delegation Doctrine should be more demanding for the latter than the former, and there is some basis for arguing that it should be more flexible in the latter because the latter derives from crown prerogative.[59]

A more sophisticated Delegation Doctrine argument is that self-executing treaties may not divest Congress of certain powers reserved to it by Article I. It is widely accepted, for example, that a self-executing treaty could not constitutionally result in a declaration of war, because that power is reserved exclusively for Congress.[60] Nor can a self-executing treaty directly result in the appropriation of money because the appropriations power is reserved specifically for Congress and, more specifically, appropriations bills must originate in the House of Representatives.[61] On the

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1080, 1090 (Alaska 1992) (finding labor arbitration constitutional because legislature retains power over whether arbitration award should be implemented, and implying that surrender of that power would be unconstitutional); City of Rocky River v. State Employment Relations Bd., 530 N.E.2d 1, 7 (Ohio 1989) (finding delegation of legislative power to arbitrator to be unconstitutional because constitutional institutions did not retain power to override).

59. *See Curtis-Wright*, 299 U.S. at 316-17 (recognizing foreign affairs power, never possessed by colonies, passed directly from crown to President).

60. *See* Edwards v. Carter, 580 F.2d 1055, 1058 n.7 (D.C. Cir. 1978). *But see* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 778 (1988) (questioning assumption that treaties could not cause appropriation of money or declaration of war).

61. *See Edwards*, 580 F.2d at 1058 ("'[A]ll Bills for raising revenue shall originate in the House of Representatives.'" (quoting U.S. CONST. art. I, § 7, cl. 1)).

other hand, it is not the case that the treaty power stops when another power of Congress begins. In *Edwards v. Carter*,[62] a split panel of the Court of Appeals held that self-executing treaties can dispose of federal property, even though Congress possesses a parallel authority to legislate with respect to property disposal.

The ICOP arrangement in the examination question presents a major problem with delegation of legislative power — the power to make rules, which ICOP obviously does — under *Meat Cutters*.[63] There is no apparent judicial review mechanism. Moreover, there are no clear standards to guide the exercise of delegated power. The only thing that might save this delegation of legislative power is the narrow subject matter (Internet domain names) and the implicit availability of judicial review of arbitration awards. The implicit judicial review would help save the statute under the Delegation Doctrine only if the arbitrator, and then the reviewing court, would have power to consider claims of *ultra vires* action by any of the ICOP decision-makers.

B. Article II Appointment Power

Article II vests the "appointments power" in the President of the United States.[64] This provision forecloses giving anyone not appointed by the President the powers of "an officer of the United States," or giving someone not appointed by the President, the heads of departments, or the courts the powers of an "inferior officer of the United States."[65]

By giving regulatory power to ICOP, the arrangement presented in the examination question apparently violates separation of powers, because it interferes with the President's appointment power under Article II. Whether or not the ICOP decision-makers are principal officers or "other officers," the ICOP arrangement does not provide for the appropriate appointing authority consistent with Article II and *Morrison v. Olsen*.[66]

Alan Morrison argued, in the context of the Canada-United States Free-Trade Agreement, that decision-makers deriving their authority from international agreements may not decide questions involving rights belonging to American citizens or other constitutionally protected persons because they

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62. 580 F.2d 1055 (D.C. Cir. 1978).

63. 337 F. Supp. 737 (D.D.C. 1971) (holding as constitutional delegation of legislative power in contravention of constitutional provision on grounds that all legislative power vests in Congress).

64. U.S. CONST. art. II, § 2, cl. 2.

65. Edmond v. United States, 520 U.S. 651 (1997) (judge of Coast Guard Court of Criminal Appeals was "inferior officer" and could be appointed by Secretary of Transportation).

66. 487 U.S. 654 (1988).

are not appointed by the President of the United States or other appointing authorities identified in Article II of the United States Constitution.[67] This, he says, is the lesson of *Buckley v. Valeo*.[68]

However, there are compelling arguments that Mr. Morrison is wrong, that the appointments power does not apply to international decision-makers at all, and that a regime such as that posed in the examination question does not present insuperable appointments power problems. The reason is that such decision-makers are neither principal officers nor subordinate officers under Article II. *Morrison*,[69] in the context of the special prosecutor law, demonstrates that appointments power challenges to legislation are to be treated with some flexibility.[70] As Professor Bruff pointed out in response to Mr. Morrison, examples of legal decision making by persons not treated constitutionally as officers of the United States abound. State judges decide federal questions of federal law.[71] Private arbitrators decide questions of statutory right and federal regulatory programs.[72] Private and occasionally self-interested decision-makers set quotas for production and sale of agricultural commodities.[73] And, most significantly, international arbitrators long have decided transnational claims.[74]

More broadly, decision-makers in an international regulatory regime are not exercising power under United States law,[75] and, therefore, the decision-makers exercising the power are not officers of the United States.[76]

The *House Report on the United States-Canada Free-Trade Agreement Implementation Act of 1998* (House Report)[77] gives extensive consideration

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67. *See* Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299 (1992) (noting Appointments Clause problems with alternatives to judicial review provided in Canada-United States Free-Trade Agreement).

68. 424 U.S. 1, 143 (1976) (holding most of Federal Elections Commission's powers violated appointments clause).

69. 487 U.S. 654 (1988).

70. *See id.* at 671-72 (holding that one exercising federal prosecutorial function was not principal officer of United States notwithstanding long tradition in United States that those functions were important executive functions controlled by Chief Executive).

71. *See* Bruff, *supra* note 18, at 1311 (noting that significant portions of administration of federal law has always rested in hands of people not employed by federal government).

72. *Id.* at 1311.

73. *Id.* at 1312.

74. *See id.* at 1313 (citing *Dames & Moore v. Regan*, 453 U.S. 654 (1981), upholding constitutionality of Iran-United States claims arbitration).

75. *See supra* Part II.A (explaining why no legislative power under Article I is involved in international regulation).

76. Davey, *supra* note 18, at 1317 (citing *Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986)).

77. H.R. REP. NO. 100-816, pt. 4, at 4 (1988) (considering constitutionality of bi-

to the possibility that the bi-national dispute resolution machinery might be unconstitutional. It concluded that the careful deliberation by legislative and executive branches, coupled with the shared responsibility in those branches for regulating foreign commerce and foreign affairs, would induce the federal courts to conclude that the bi-national dispute resolution machinery was on strong constitutional grounds.[78]

The House Report rejected appointments clause challenges. While acknowledging that international law is a part of the law of the United States,[79] it nevertheless concluded that the bi-national dispute panels were not charged with the enforcement or execution of United States law, but rather with applying international law. Thus, the dispute panel arbitrators were not officers of the United States.[80] Moreover, exempting dispute panel members from the appointments clause was a pragmatic necessity. "If the Appointments Clause were read to preclude the United States from entering into international arbitration decisions, such a view would be unreasonable because no foreign government would ever agree with the imposition of the condition that all arbitrators be appointed by the United States."[81] In support of their constitutionality, the committee referred to the pattern of use of international tribunals throughout American history.[82]

The strongest precedent for the conclusion that Article II officers of the United States are not involved in deciding cases arising under multilateral agreements is the Supreme Court's conclusion that decision making under an interstate compact is outside the scope of the Article II appointments power, discussed in the following section. An interstate compact is like a treaty in that it is an agreement among two or more entities possessing sovereign power (American states) and it cannot become effective until approved by the Congress. Therefore, if a decision-maker whose powers are derived from an interstate compact can exercise them without being appointed by the President under Article II, then so should decision-makers whose powers are derived from an international treaty be able to exercise legal powers without being appointed by the President of the United States.

If the Article II appointments power is to be interpreted pragmatically as all of the experience with state authority, interstate compacts, arbitration,

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national dispute resolution mechanism).

78. *See id.* at 4 (concluding that bi-national panel is constitutional).

79. *See id.* at 16 (noting that international law is part of law of United States).

80. *See id.* at 14 ("[A]lthough the FTA incorporates United States trade law, the bi-national panels are set up to implement the FTA and are, thus, not charged with the enforcement or execution of United States law.").

81. *Id.*

82. *See id.* at 15 (citing examples including: Jay Treaty of 1794; Boundary Waters Treaty with Canada in 1909; resolution of the Gulf of Maine dispute; and settlement of claims with Iran in 1981).

and private decision making suggest, then there are compelling pragmatic reasons not to subject an otherwise appropriate international Internet regulatory scheme to the Article II appointments power. It would be preposterous for the executive authority of each signatory to insist upon appointing decision-makers under an international regime. Imposing such a requirement would entirely negate the possibility of meaningful international treaty-based regulation, driving a stake into the heart of the international legal system. There is no indication whatsoever that the Framers of Article II meant to do that. Quite the contrary, every indication is that by giving the foreign affairs power to the President in Article II, they meant to facilitate the evolution of the international legal system.

C. Article III Essential Attributes of Judicial Power

Article III of the United States Constitution vests the judicial power in federal courts. It violates separation of power for Congress to vest any other institution with the essential attributes of judicial power. This doctrine is not as broad as it might seem, however.[83]

For one thing, the judicial power involves the adjudication of private rights, those rights whose source is the common law or statutes which create rights closely resembling those existing at common law. Adjudication of "public rights" does not involve the judicial power because the Doctrine of Sovereign Immunity, as it existed when Article III was written, would have prevented adjudication in the regular courts for claims of right against the sovereign. Moreover, the distinction between rights and gratuities as it existed in 1789 might have prevented adjudication in the regular courts of claims based on statutes that could have been modified or repealed at the unlimited discretion of the Parliament. Unless private rights are involved, persons protected by the Constitution may be required to submit any claims of right they may have to non-Article III institutions satisfying due process requirements. These include domestic administrative agencies, arbitration bodies, and "legislative courts" such as the tax court and the customs court.[84] By logical extension, international adjudicatory bodies meeting the requirements of due process should be permissible.

The House Report's rejection of the argument that the bi-national review process under the United States-Canada Free-Trade Agreement violated the exclusive prerogative of Article III courts to review administrative agency

83. *See* Peretz v. United States, 501 U.S. 923 (1991) (permitting magistrate judge to conduct *voir dire* in felony trial when defendant raises no objection, and is faithful to purpose of Federal Magistrate Act).

84. *Ex parte* Bakelite Corp., 279 U.S. 438 (1929) (rejecting writ of prohibition; court of customs appeals was permissible legislative court).

action rested on the conclusion that the decisions of the dispute resolution panels would involve tariff duties — traditionally a public right.[85] Trade-related disputes involve rights that are government created, and therefore within the scope of the public rights doctrine.[86]

In two interrelated cases, the Supreme Court of the United States spoke approvingly of international arbitration, noting that virtually all nations accept it as a feature of international law[87] and that international arbitration should be free from technical pleading requirements.[88]

Two lower court cases have recognized that state officials and officials of interstate compacts can exercise power significantly affecting private rights without data by becoming officers of the United States subject to the appointments power. In *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council*,[89] the majority rejected an appointments clause challenge to decisions of an interstate compact whose members were appointed by state governors. The majority concluded that the compact officers exercised power under state law and not under federal law, even though their decisions had a significant impact on federal law.[90] The dissent focused on the unusual nature of the particular compact at issue. It distinguished state officials who spend federal funds because they are largely dependent upon decisions by constitutional branches of the federal government;[91] state judges because they derive their authority from state law;[92] state legislators because their authority also involves only state law;[93] and officers of ordinary interstate compact agencies because their decisions relate mainly to state law.[94]

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85. H.R. REP. NO. 100-816, pt. 4, at 9 (1988).

86. *See id.* at 10 (noting that most commentators agree with this view).

87. *See* La Abra Silver Mining Co. v. United States, 175 U.S. 423, 462-63 (1899) (approving reexamination for fraud of decisions of Mexican-U.S. international commission).

88. *See* Frelinghuysen v. Key, 110 U.S. 63, 73 (1884) (approving settlement of claim by commission, one member of which was appointed by President of United States and other was appointed by President of Mexico).

89. 786 F.2d 1359 (9th Cir. 1986).

90. *See id.* at 1364-65 (finding the Council's authority to develop a conservation and electricity usage plan affected the federal agency where the Council could request agency compliance and review agency actions). The Ninth Circuit held, however, that despite some involvement in federal law, the Council primarily represented state interests and that state law governed the "appointment, salaries, and administrative operations" of Council members. *Id.* at 1365.

91. *See id.* at 1376 (Beezer, J., dissenting) (comparing school boards that have limited power under federal law to distribute federal funds with Council members who exercise considerable control over federal funds under federal law).

92. *See id.* at 1376-77 (Beezer, J., dissenting) (recognizing that state judges, although they may decide federal issues, have no authority to disregard or change federal law).

93. *See id.* (Beezer, J., dissenting) (holding that although federal agencies may be sub-

In *United States v. Piqua Engineering, Inc.*,[95] the court rejected an appointments clause challenge to the standing of private plaintiffs under the False Claims Act because such plaintiffs act only on their own behalf and do not exercise governmental power, and because they are subject to significant control by constitutional federal officers.[96]

The kinds of rights most likely to be subjected to an international regulatory regime for the Internet resemble public rights more than they resemble private rights. Internet domain names are a good example. They have value only in the context of an international technological system and are quite different from anything that existed between two private citizens at common law. Congress may substitute public rights for private rights.[97]

The Direct Effect/Self Executing Doctrine says that it is up to the treaty to define individual rights. By definition, such rights did not exist at common law, and, therefore, legislative courts are permissible under *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[98] Little question exists whether Congress can extinguish private right and substitute public rights.

However, an international Internet regulatory regime might be extended beyond Internet domain names to rights involving intellectual property infringement, defamation, or consumer fraud.[99] Such rights involve disputes between private citizens and are much more analogous to common law rights. Accordingly, one can not dismiss confidently the possibility that rights subject to adjudication under an international regulatory regime would most appropriately be classified as private rights. What role, then, must be reserved for Article III courts? Not much. *Crowell v. Benson*[100] makes it clear that initial decision making, even when private rights are involved, may be the province of an institution other than an Article III court — an administrative agency as in *Crowell* itself or a private arbitrator as in

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ject to state laws, states do not have power to initiate regulation of federal agencies).

94. *See id.* at 1375-76 (Beezer, J., dissenting) (comparing ordinary compacts serving state's interest with Council, whose decisions impact federal agency).

95. 803 F. Supp. 115 (S.D. Ohio 1992).

96. *See id.* at 119-20 (pointing out federal government retains primary responsibility to enforce False Claims Act and can restrict plaintiff's rights where there is showing of good cause).

97. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (holding Congress may substitute public rights for private rights and provide for adjudication without juries, consistent with Seventh Amendment and Separation of Powers).

98. 458 U.S. 50 (1982).

99. *See* Perritt, *supra* note 7, at 413 (considering relationship between Internet and regulation).

100. 285 U.S. 22, 50 (1932) (emphasizing legislature's power to create "legislative courts" and procedures distinct from Article III courts).

the case of *Thomas v. Union Carbide Agricultural Products*.[101] The requirements of Article III are satisfied as long as there is review in an Article III court. That review can be quite limited. *Thomas* suggests that the extremely deferential standard traditionally afforded review of arbitration awards may be constitutionally sufficient.[102] Under this standard, arbitration awards may be displaced only if they are procured by fraud[103] or are outside the scope of power delegated to the arbitrator by the instrument providing for arbitration.

Of equal or greater significance is the Doctrine of Comity, which shields decisions of foreign courts from scrutiny on the merits in an Article III tribunal. This suggests that the most Article III requires is an opportunity to present an argument to an Article III court that an adjudicatory decision made under the international regulatory regime is wholly irregular. Allowing that kind of review in a United States enforcement proceeding, preliminary to taking property within the jurisdiction of a United States court, should be sufficient.

The legislation described in the examination question could be challenged as unconstitutional because it delegates judicial power without preserving the essential attributes of judicial power in an Article III court. This is the weakest constitutional argument against the ICOP arrangement because under *CFTC v. Schor*,[104] and *Thomas*,[105] an arbitration mechanism can meet the separation of powers requirements of *Crowell*[106] as long as a court reviewing the arbitration award has the power to decide questions of law *de novo* and to review factual decisions for evidentiary support — only a slight deviation from traditional standards for judicial review of private

101. 473 U.S. 568 (1985) (holding that FIFRA arbitration did not violate separation of powers).

102. *See id.* at 583 ("Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article II courts.").

103. *See id.* at 592 (providing Article III review of arbitration decisions in cases of "fraud, misconduct, or misrepresentation"); *see also Crowell*, 285 U.S. at 46 (holding administrative officer's findings were final where "supported by evidence and within the scope of his authority").

104. 478 U.S. 833 (1986) (finding adjudication of state common law claims before administrative agency did not violate Article III).

105. 473 U.S. at 586-87 (stating under *Crowell*, "the appropriate exercise of the judicial function" is met by Article III review of matters of law in administrative cases where findings are confirmed by evidence).

106. 285 U.S. at 27 (holding Article III was not violated where district court had "authority to determine whether the [administrative] order is based upon error of law, is wholly unsupported by evidence, or is arbitrary or capricious").

arbitration awards.[107] Due process requirements are independent, and they are discussed in Part III.

III. DUE PROCESS

If aspects of an international regulatory regime constitute state action depriving a constitutional "person" of life, liberty, or property, the actions of the international regulatory regime must satisfy the requirements of due process. This requirement is relatively easily satisfied. As discussed in Part II of this Article, it may be difficult to sustain the proposition that a private international regulatory regime involves state action.[108]

Even if state action is involved, only life, liberty, or property interests are protected against depravation. Analysis of property rights under *Perry v. Sindermann*[109] and *Board of Regents v. Roth*[110] might produce the conclusion that the matter at issue in a dispute presented to the international regulatory body does not involve a constitutionally protected interest.[111]

Even if state action is involved and protected interests are implicated, it should not be difficult to set up an international institutional arrangement that satisfies due process. The House Report concluded that due process was not violated by the bi-national dispute resolution process in the Canada-United States Free-Trade Agreement. Since private litigants have the right to invoke the use of the bi-national dispute panels; are given an opportunity to be heard in a meaningful time and in the meaningful manner, including appearances, oral argument, and written submissions; and be-

107. *See Thomas*, 473 U.S. at 586 (emphasizing courts, in analyzing Article III requirements in administrative cases, must follow common practice in other cases of privileging matters of substance over form); *see also Crowell*, 285 U.S. at 51-52 ("[I]t has not been the practice to disturb the findings [of masters and commissioners] when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.").

108. *See* Josh A. Goldfoot, *Antitrust Implications of Internet Administration*, 84 VA. L. REV. 909, 927-29 (1998) (private domain name regulation does not constitute state action, but must be evaluated under antitrust laws as horizontal contractual restraint). Antitrust law may impose due process requirements similar to those operative when state action is involved. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (regarding consortium of steel conduit manufactures agreed to exclude the polyvinyl conduit of respondent from the 1981 National Electric Code, promulgated by the National Fire Protection Association, a private standard-setting organization).

109. 408 U.S. 593, 601 (1972) (requiring procedural due process protections for government deprivation of property interests only upon a showing that particular benefit was based on "rules or mutually explicit understandings" of entitlement).

110. 408 U.S. 564, 577 (1972) (defining interests in property as "legitimate claim of entitlement" that is more than "an abstract need or desire" or "unilateral expectation").

111. *See, e.g., In re* Atlantic Bus. & Community Dev. Corp., 994 F.2d 1069, 1074 (3d Cir. 1993) (recognizing broadcast license is not owned asset or vested property interest).

cause the selection of the panelists is carefully controlled to avoid bias, the essential elements of due process are satisfied. Moreover, extraordinary challenge committees are available to cure aberrant behavior by panelists. Significantly, while the legislation precluded review of the merits, it allowed access to Article III courts for constitutional challenges. That, according to the House Report, satisfied the remaining attribute of due process.[112]

Any international regulatory regime for the Internet is likely to meet United States due process requirements, which are flexible enough to accommodate a wide range of procedural possibilities. Little due process is required when legislative decisions are made.[113] Even when adjudicatory decision making is involved, functional requirements may be satisfied without necessarily producing a carbon copy of a jury trial in federal court.[114]

All of these arguments are strong. Once again the examination question crystallizes the issues. As the analysis in Part II of this Article suggests, Internet domain names may be a form of United States government property, and the regulatory arrangement is merely a designation of ICOP as a private entity responsible for administering this unusual form of government contract right. In this case, however, the actions of ICOP almost certainly would be the actions of the government — "state action" — and reasonably good procedural due process arguments would shield the client's property interest in the domain name, represented by the entitlement system setup by the executive order and the ICOP organizational agreements. *Perry* and *Roth* would be helpful in this regard, as would *Goldberg v. Kelly*,[115] although the client's position in the examination question context would be somewhat weaker than the position of the claimants in those actual cases because the client does not already have the domain name, but merely seeks one. Thus, the client must establish the proposition that the regulatory arrangement gives a property interest in receiving a domain name to those satisfying legally acceptable criteria.

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112. H.R. REP. NO. 100-816, pt. 4, at 12 (1988).

113. *See* Londoner v. Denver, 210 U.S. 373 (1908) (holding proceedings of municipality in accordance with charter provisions and without hearings authorizing improvement do not deny due process rights to land owners who are afforded hearing on assessment).

114. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))); Henry J. Friendly, *Some Kind of Hearing*, U. PA. L. REV. 1267, 1315-17 (1975) (concluding adversarial system is not only appropriate model for hearings).

115. 397 U.S. 254 (1970) (holding procedural due process is applicable to termination of Welfare benefits).

IV. GETTING RELIEF

Merely having arguments against an international regulatory arrangement may not be very useful, unless a forum is available with the power to consider those arguments and to grant meaningful relief.

The examination question presents this dilemma. There are several constitutional arguments against the invalidity of the executive order and the statute. The problem is getting into court and getting meaningful relief. The client wants a domain name, which the ICOP refuses to give him. Invalidating the executive order, without more, does not give him the domain name he wants.

The validity of the executive order under the constitution presents a federal question, so the United States district courts would have jurisdiction under Title 28, Section 1331 of the United States Code to hear an action seeking invalidation of the executive order. The President, no doubt, would assert sovereign immunity, and the challenger would argue that the federal courts have inherent equitable power to enjoin *ultra vires* acts by federal officers, and that an *ultra vires* act is personal and not official and, therefore, outside sovereign immunity. The strongest authority in this regard would be *American School of Magnetic Healing v. McAnulty*,[116] which supports the proposition that federal courts have inherent equitable jurisdiction to enjoin *ultra vires* acts by federal officers.

But enjoining the executive order does not get the client a domain name. The client would need to assert some other legal claim, based on private law, probably antitrust,[117] to force the ICOP to give the requested domain name, or at least to follow some further procedures before denying the requested domain name.

A better strategy might be to argue that, if the executive order is valid, it has given ICOP the status of a federal agency. That permits a challenger to make a number of arguments under the Administrative Procedure Act, including those that invalidate the rules of ICOP and its decision in the client's particular case. That alternative argument would justify a judicial order forcing ICOP to give the client the domain name. Or, at the very least, those arguments should justify a judicial order requiring ICOP to follow appropriate procedures in promulgating its rules and in adjudicating the client's request.

The constitutional claims give rise to federal question jurisdiction under Title 28, Section 1331 of the United States Code. The cause of action is an implied private right of action under *Bivens v. Six Unknown Agents*[118] and

116. 187 U.S. 94 (1902).

117. *See supra* Part II.

118. 403 U.S. 388 (1971) (recognizing implied right of action for Fourth Amendment

McAnnulty[119] and, assuming that the statute/executive order combination is sufficiently valid to confer some power on the ICOP system, then on sections 702 and 704 of the Administrative Procedure Act, because ICOP functions as an agency.

V. NECESSARY STRUCTURE OF INTERNATIONAL INTERNET AGENCY

Sub-question C of the examination asked what changes could be made in the hypothetical regulatory scheme to preserve its constitutionality.

This regulatory scheme presented in Part A of the examination question is hard to save, because of the major constitutional flaws identified in the preceding sections. It could be made constitutional by ensuring that it is established by statute, that at least a majority of its decision-makers are appointed by the President or by department heads of the United States government, and by subjecting its rulemaking and adjudicatory decisions to review by Article III courts. However, that would make it an American administrative agency, and it is hard to imagine foreign entities and governments accepting that. Therefore, more creative approaches are worth considering.

One possibility is simply to let this proceed as a private arrangement and have no United States government involvement at all, except possibly for granting some sort of antitrust immunity. Then, there would be no due process problems because there would be no state action, and there would be no separation of powers or delegation problems because there would be no delegation of governmental power. But, it is not clear that this is responsive to the question, which asks for modifications to the legislation.

An alternative approach would be to focus the legislation on an existing or new federal administrative agency, which would be required by the legislation to look to the activities of ICOP and to use ICOP decisions as the basis for its own rules and orders. Thus, ICOP rules could be subjected to notice and comment rulemaking by the United States agency, and ICOP orders could be deferred to through doctrines analogous to *res judicata* and *stare decisis* by the agency in making its own decisions. Close conformity between the agency decisions, reached under the Administrative Procedure Act, and ICOP decisions could be ensured by statutory language obligating the agency to adopt ICOP decisions unless someone with an interest objecting to them could show that the decisions violate clear constitutional rights of the objector. Agency decisions accepting or modifying ICOP decisions could be subject to judicial review under the usual standards of the

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violations).

119. 187 U.S. at 108 (recognizing inherent equitable jurisdiction over claims of *ultra vires* action).

Administrative Procedure Act. A sufficiently clear mandate to the agency to follow ICOP decisions, absent some kind of extraordinary showing, should reduce to a minimum the likelihood of a judicial decision overturning agency acceptance of an ICOP decision.

In order to avoid Delegation Doctrine problems, any agency authorized to make rules affecting rights of private entities must act pursuant to standards set forth in a treaty setting up such an agency. Its compliance with those standards must be reviewable by a tribunal possessing the traditional attributes of adjudicatory process.

The core value embedded in the Delegation Doctrine is political accountability. Rules should be made only by those who are accountable to the people, and, equally important, rules that engender sufficient public opposition should be amenable to change. The treaty process, along with the other features suggested in Part III of this Article, assure political accountability in the rulemaking process. The ultimate protection of the people is that rules made by an international regulatory agency, like those made by a domestic administrative agency, are subject to legislative nullification. Just as Congress can enact legislation amending or repealing earlier legislation, and through that process, can abolish an administrative agency outright, so also may Congress through the ordinary legislative process nullify a treaty.[120] If rules promulgated by an international Internet regulatory agency are sufficiently controversial, Congress can hold hearings on them, just as it can hold hearings on controversial domestic administrative agency rules. If there is sufficient opposition, Congress could enact a statute causing the United States to withdraw from the treaty setting up the international Internet regulatory arrangement, or it could make certain rules unenforceable in the United States.[121] Thus, post-hoc political control over the regulatory process is not diminished when the regulatory process is international, as opposed to domestic.

Its adjudicatory procedures must meet the requirements of procedural due process. That would safely be done by following carefully the traditional design features of international arbitration bodies — with respect to presentation of arguments and evidence, and with respect to selection of decision-makers to avoid bias.[122]

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120. *See generally* Reid v. Covert, 354 U.S. 1, 18 (1957) ("This Court has . . . repeatedly taken the position that . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.").

121. The provisions of the treaty might make it impossible for a signatory to pick and choose among rules promulgated by the international agency, and require a signatory either to remain completely subject to the agencies authority or to withdraw from the treaty arrangement altogether.

122. *See generally* 19 U.S.C. § 3435 (1994 & Supp. III 1997) (providing rules of proce-

It would be prudent, when implementing legislation in the United States, to provide a clear channel — however limited — for review of the constitutionality of the mechanism in an Article III court, following the practice of the United States-Canada Free-Trade Agreement and NAFTA. The language of NAFTA could be used, and this would be sufficient to limit intrusion into review of the merits by an Article III tribunal.[123]

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dure for bi-national dispute panels and extraordinary challenge committees).

123. Not all the statutory language is so deferential to the bi-national dispute panels, however. *See* 19 U.S.C. § 1516a(b)(3) (1994) ("In making a decision in any action brought under subsection (a) of this section, a court of the United States is not bound by, but may take into consideration, a final decision of a bi-national panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the [United States-Canada Free Trade] Agreement.").

> If bi-national panel review of a determination is requested pursuant to article 1904 of the NAFTA or of the Agreement, then, except as provided in paragraphs (3) and (4)—
>
> (A) the determination is not reviewable under subsection (a) of this section, and
>
> (B) no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise.

19 U.S.C. § 1516a(g)(2). *See* Mitsubishi Elec. Indus. Can., Inc. v. Brown, 917 F. Supp. 836 (Ct. Int'l Trade 1996) (dismissing action because subject to bi-national panel review under NAFTA).

> (4) Exception to exclusive bi-national panel review for constitutional issues
>
> (A) Constitutionality of bi-national panel review system
>
> An action for declaratory judgment or injunctive relief, or both, regarding a det-ermination on the grounds that any provision of, or amendment made by, the North American Free Trade Agreement Implementation Act implementing the bi-national dispute settlement system under chapter 19 of the NAFTA, or the United States-Canada Free-Trade Implementation Agreement [sic] Act of 1988 implementing the bi-national panel dispute settlement system under chapter 19 of the Agreement, violates the Constitution may be brought only in the United States Court of Appeals for the District of Columbia Circuit, which shall have jurisdiction of such action.
>
> (B) Other constitutional review
>
> Review is available under subsection (a) of this section with respect to a determi-nation solely concerning a constitutional issue (other than an issue to which subparagraph (A) applies) arising under any law of the United States as enacted or applied. An action for review under this subparagraph shall be assigned to a 3-judge panel of the United States Court of International Trade.
>
> (C) Commencement of review
>
> Notwithstanding the time limits in subsection (a) of this section, within 30 days after the date of publication in the Federal Register of notice that bi-national 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 under subparagraph (A) or (B) by filing an action in accordance with the rules of the court.
>
> (D) Transfer of actions to appropriate court

In *American Coalition for Competitive Trade v. Clinton*,[124] the District of Columbia Circuit held that the requirement of exhausting bi-national panel procedures before seeking judicial review of constitutionality is constitutional. The court, however, noted that "a statute that totally precluded judicial review for constitutional claims would clearly raise serious due process concerns."[125]

The most difficult problem is the possibility that rights that would be affected by an international Internet regulatory agency would be deemed private rights instead of public rights. As the analysis in this article suggests, there is an argument that Internet domain names are public rights because they originally were received by the government. However, that has not been the case for at least five years. Now, Internet domain names are received from a private registrar, and the same thing would be true under any international regulatory regime. Accordingly, disputes over Internet domain names would seem to involve private rights. Likewise, disputes that an Internet domain name infringes a trademark would appear to involve private rights.

Thus, arguably the cases that allowed international arbitration are inapplicable because they involved public rights, as did the mechanism established under the United States-Canada Free-Trade Agreement and NAFTA.

The best defense against that argument is *Dames & Moore v. Regan*.[126] There, the Supreme Court emphasized the practice of executive agreements providing for settlement of claims by nationals of one country against the government of another country.[127] However, the claims subjected to international arbitration in *Regan* were by private persons and entities against the government of Iran. Such claims surely would not have been justici-

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> Whenever an action is filed in a court under subparagraph (A) or (B) and that court finds that the action should have been filed in the other court, the court in which the action was filed shall transfer the action to the other court and the action shall proceed as if it had been filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it is transferred.
>
> (E) Frivolous claims
>
> Frivolous claims brought under subparagraph (A) or (B) are subject to dismissal and sanctions as provided under section 1927 of Title 28 and the Federal Rules of Civil Procedure.

19 U.S.C. § 1516a(g)(4).

124. 128 F.3d 761 (D.C. Cir. 1997).

125. *Id.* at 765.

126. 453 U.S. 654 (1981) (upholding presidential authority to require that claims against Iran and Iranian entities be submitted to binding arbitration rather than litigated in Article III courts).

127. *See id.* at 679 (noting President can settle claims between United States citizens and foreign countries without consent of Senate or citizen).

able by a common law court in 1789, and thus they cannot be said to involve private rights. Accordingly, *Regan* may not be applicable either.

CONCLUSION

Ultimately, the permissibility of an Internet regulatory scheme will depend upon the pragmatic necessity of international regulatory mechanisms as a long-standing part of the law of nations, which is embraced by the Constitution and reinforced by the strong deference to foreign commerce and foreign affairs powers of Congress and the President. What might be impermissible when purely domestic rights are involved, nevertheless is permissible in the international arena, as long as the structural protections suggested in Part III of this Article are present.

Nevertheless, designers of new international systems for regulating the Internet must pay attention to requirements for accountability rooted in the constitutional underpinnings of American Administrative Law.[128]

128. *See* Goldfoot, *supra* note 108, at 951-52 (arguing that antitrust oversight of private domain name regulatory regime will ensure due process).