Regional Fishery Management Councils: A Governance Framework on Unstable Constitutional Grounds

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I. Introduction

In the spring of 2008, the Pacific Fishery Management Council took emergency action to close the West Coast salmon fishery for the first time in the history of the country. The California State Department of Fish and Game predicted the closure would cost the state's commercial fishing industry $255 million and 2,263 jobs in 2008 alone.[2] The more than two million recreational fishermen in California who spend approximately $2.38 billion on fishing each year also would be negatively impacted.[3]

Managing America's offshore fisheries presents a challenge because the resource is regionally segmented with each fishery possessing geographically unique attributes. To accommodate this intricacy, § 302 of the Magnuson-Stevens Fishery and Conservation Act (Magnuson Act) established eight Regional Fishery Management Councils (FMCs): New England, North Pacific, Mid-Atlantic, Pacific, South Atlantic, Western Pacific, Gulf of Mexico, and the Caribbean. The FMCs prepare fishery management plans, subject to approval and implementation by the National Marine Fisheries Service (NMFS), for fisheries found within the area three to 200 miles offshore, known as the Exclusive Economic Zone (EEZ).

Individuals are appointed to serve on the FMCs in two different ways. Approximately 75% of all FMC members are appointed by the Secretary of Commerce from a limited list of individuals nominated by the Governor of each applicable constituent state.[4] The members appointed by the Secretary "must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned."[5] The remaining voting members of the FMC

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[2] Matt Weiser, *Salmon Fishing Closure Prompts Schwarzenegger to Declare Emergency*, THE SACRAMENTO BEE, Apr. 11, 2008, *available at* http://www.klamathbasincrisis.org/fishermen/closure/schwarzennegarEM041108.htm (last visited Feb. 2, 2009).
[3] Press Release, American Sportfishing Association, *California Bans Recreational Fishing in the Channel Islands*, *available at* http://www.asafishing.org/asa/newsroom/newspr_102402.html (last visited Feb. 2, 2009).
[4] 16 U.S.C. § 1852(2)(C).
[5] *Id.* § 1852(b)(2)(A).

include state officials, nominated by their respective Governors, with fishery management expertise and the "regional director of the NMFS for the geographic area concerned."[6]

As twenty-five percent of the members are neither appointed by the President, the courts, or department heads, this article examines whether the FMC structure is unconstitutional in abrogation of the Appointments Clause of the U.S. Constitution. The Presidential power of appointment originates in the Appointments Clause of the United States Constitution.

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[7]

Pursuant to the Appointments Clause, the President recommends individuals for Cabinet-level positions to the Senate for confirmation. Deputy undersecretaries, however, are generally appointed by the President without Senatorial consent. Congressional approval of Presidential appointments creates a balance of power which assures that no single branch receives too much control.

Buckley v. Valeo[8] stands as the keystone case for the constitutional analysis of Presidential appointments.[9] In *Buckley*, the U.S. Supreme Court examined the constitutionality of an eight-member commission established by the Federal Election Campaign Act of 1971 (FECA). The commission had certain recordkeeping, disclosure, investigatory, rulemaking, and enforcement powers with respect to federal campaign expenditures. The members of the Commission were appointed as follows: two members by the *pro tempore* of the Senate, two by the Speaker of the House, and two by the President.[10] The Secretary of the Senate and the Clerk of the House served as *ex officio* nonvoting members.[11]

The Supreme Court held that "powers given to Congress under the Twelfth Amendment to regulate practices in connection with Presidential elections do not permit it to create a federal commission to regulate such elections in a manner violative of the [A]ppointments [C]lause."[12] The FECA violated the Constitution by vesting appointment powers in the Speaker of the House and the President pro tempore of the Senate. Under the Appointments Clause, Congress may only vest the appointment of inferior officers in the President, in the courts, or in department heads. According to the Supreme Court, "neither

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[6] *Id.* § 1852(b)(1).
[7] U.S. CONST. art. II, §2, cl. 2.
[8] 96 S. Ct. 612 (1976).
[9] *Id.* at 688 ("All Officers of the United States are to be appointed in accordance with the [Appointments] Clause.")
[10] *Id.* at 679.
[11] *Id.* at 626.
[12] *Id.* at 647.

the Speaker of the House, nor the President pro tempore of the Senate, come within the terms 'Courts of Law' or 'Heads of Departments.'"[13]

In *Buckley*, the U.S. Supreme Court created a three-prong test to determine whether an individual must be appointed in accordance with the Appointments Clause. The Appointments Clause applies to (1) all executive or administrative officers, (2) who serve pursuant to federal law, and (3) who exercise significant authority over federal government actions.[14] If an individual meets all three prongs, he or she must be appointed by the President, the courts, or a department head.

Concerns over the constitutionality of the FMC appointment process arose immediately upon its implementation. In 1984, the Department of Justice advised President Ronald Reagan that the promulgation of regulations by the Councils would violate the Appointments Clause.[15] Based on that warning, President Reagan signed a bill amending provisions of the Magnuson Act based on his "understanding that Councils will only make recommendations with respect to proposed regulations. It is the Secretary, not the Councils who must make final decisions on the appropriate final action to be taken in response to recommendations transmitted by the Councils."[16]

In the early 1990s, environmental groups challenged the constitutionality of the Pacific Fishery Management Council.[17] While the court ultimately ruled that the plaintiffs lacked standing to raise their claim,[18] the case should serve as a warning that future challenges are possible. Concerns over the constitutionality of the Council system remain.

In fact, in January 2007, upon the signing of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, President Bush stated that "provisions of the Act . . . purport to give significant governmental authority of the United States to individuals who are not appointed in accordance with the Appointments Clause of the Constitution. The executive branch shall construe these provisions in a manner consistent with the Appointments Clause."[19]

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[13] *Id.* at 645.
[14] *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council,* 786 F.2d 1359 (9th Cir. 1985).
[15] Press Release, White House, *Statement by Ronald Reagan on Signing a Bill Concerning Marine Sanctuaries and Maritime Safety* (Oct. 19, 1984), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=39281 (last visited Feb. 2, 2009).
[16] *Id.*
[17] *Northwest Environmental Defense Center v. Brennen*, 958 F.2d 930 (9th Cir. 1992).
[18] *Id.* at 937.
[19] Press Release, White House, *Statement by President George W. Bush Upon Signing [H.R. 5946]*, 2007 U.S.C.C.A.N. S83 (Jan. 27, 2007). Presidential signing statements do not necessarily have the force of law, but can serve legitimate legal purposes. Signing statements can provide an explanation of the bill's likely effects upon constituencies; provide direction to the President's subordinates within the executive branch regarding implementation; and inform Congress that certain applications may result in an unconstitutional exercise of executive power. *See*, U.S. Department of Justice, *Memorandum for Bernard N. Nussbaum, Counsel to the President*, Nov. 3, 1993 *available at* http://www.usdoj.gov/olc/signing.htm . It is generally recognized that the president may use a signing statement to "announce that, although the legislation is constitutional on its face, it would be unconstitutional in various applications, and that in such applications he will refuse to execute it."

II. Assessment of the Constitutionality of Fishery Management Councils

A. Council Members as "Officers"

The Supreme Court in *Buckley* held that "officers of the United States" include "all persons who can be said to hold an office under the government" including "any appointee exercising significant authority pursuant to the laws of the United States."[20] Upon first glance, this definition of officer converts the *Buckley* test into a two-prong, rather than a three-prong, test. The first prong is met anytime the second and third prongs are met. Some courts, however, have treated the first prong as a formal requirement and granted "officer" status only "when the delegee has formal duties, holds an established office, has a prescribed tenure and receives federal emoluments."[21]

The U.S. Supreme Court held in *U.S. v. Hartwell*[22] that

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.[23]

In a memorandum analyzing whether an executive order applied to all executive branch employees of FMCs, the Department of Justice's Office of Legal Counsel (OLC) concluded that Council members are not executive branch "employees" (or officers) subject to the Order.[24] The OLC contended that the first prong of the *Buckley* test is met only when a

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Id. at 2. Although federal law does not prohibit such signing statements, such statements may obstruct Congressional intent. Signing statements could be used by a President to subvert the intended effect of certain legislation. *See*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1247 (2006) ("The use of avoidance style reasoning in signing statements has a fairly established history although recent scholarship suggests that the Bush Administration has taken the practices to new level.") For example, President Bush's statement on signing the 2006 Defense Appropriations bill significantly expanded the executive branch's discretion in implementing Senator John McCain's anti-torture amendment. *Id.*

[20] Gordon C. Wilson, Note, *Limitations on Congressional Power to Establish Interstate Mechanisms of Governance: The Unconstitutionality of the Ozone Transport Region Created Under Section 184 of the Clean Air Act*, 11 J. L. & POL. 381, 387-88 (1995) (*referencing Buckley*, 424 U.S. at 125-26).

[21] *U.S. v. Hartwell,* 73 U.S. 389, 393 (1867).

[22] 73 U.S. 385 (1867).

[23] *Id.* at 393.

[24] Office of Legal Counsel, U.S. Department of Justice, *Memorandum to Ginger Lew, General Counsel, Department of Commerce, Applicability of Executive Order N. 12674 to Personnel of*

person is "(1) [appointed] to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States."[25]

Despite the OLC's advisory opinions, Council members arguably meet all three of these sub-elements and the first prong of the *Buckley* test. Council members are in a position of employment within the federal government. According to federal law, federal employees are those (1) appointed by an appropriate official, (2) engaged in the performance of a Federal function, and (3) subject to the supervision of an appropriate Federal officer or employee.[26]

75% of the Council members easily meet the first element since they are appointed by the Secretary of Commerce. As for the second element, all Council members are clearly engaged in the performance of a federal function, the management of U.S. fisheries. The Councils were created to provide assistance and support to NMFS and the Secretary of Commerce with respect to fisheries management. Council members receive compensation from the federal government for travel and other expenses. The Office of General Counsel for the Department of Commerce has declared that the Councils are "subordinate parts of the Department of Commerce" and "an integral part of the Department."[27]

However, it is not as clear whether Council members are "subject to the supervision" of the Secretary of Commerce. The OLC, under President Clinton, concluded that Council members do not qualify as employees because they are subject only to limited supervision of the Secretary of Commerce.[28] First, the OLC found that the Secretary's power to remove officers is quite limited. The Secretary may only remove a Council member upon the prior recommendation of two-thirds of a Council.[29] Second, the OLC referred to the Councils' veto power. Councils are empowered by the Magnuson Act to prevent the Secretary from taking certain regulatory actions, such as limiting access to a fishery.[30]

The DOJ has previously stated, "However independent the Councils may be in their day-to-day operations, ultimate authority over a majority of their membership, budgets, and their major area of concern – the fishery management plans – remains with the Secretary or other federal agencies."[31] The Secretary of Commerce reviews all plans and proposals submitted by the Councils and only the Secretary can publish regulations to implement those plans and proposals.

Limited supervision, however, is not the same as the absence of supervision. As discussed in more detail below, a position on a FMC carries significant authority to determine how

Regional Fishery Management Councils (Dec. 3, 1993), *available at* http://www.usdoj.gov/olc/fishery.htm .

[25] Office of Legal Counsel, U.S. Dept. of Justice, *Memorandum for the General Counsels of the Federal Government on the Constitutional Separation of Powers between the President and Congress* (May 7, 1996), *available at* http://www.usdoj.gov/olc/delly.htm .

[26] 5 U.S.C. § 2105(a).

[27] General Counsel, U.S. Dept. of Commerce, *Memorandum for William Hogarth, Council Members and Staff Eligibility for Voluntary Participation in Federal Employees Health Benefits Program* (July 12, 2007).

[28] OLC, *supra* note 24.

[29] 16 U.S.C. § 1852(b)(6).

[30] *Id.* § 1864(c)(3).

[31] OLC, *supra* note 24.

fisheries will be managed. Council members develop the fishery management plans which are approved by the Secretary unless inconsistent with the Magnuson Act or other relevant laws.[32] Councils conduct public hearings, develop annual catch limits for each managed fishery, and establish multi-year research priorities.[33]

B. Council Members Serve Pursuant to Federal Law

The second prong of the *Buckley* test is that the officer must serve pursuant to federal law. The Council members clearly serve pursuant to federal law. The eight regional fishery management councils are creatures of federal law. The Magnuson Act established the Councils in 1976, delineated the appointment and removal process, and set the parameters for their activities and duties.[34]

The Councils' situation is distinguishable from a recent challenge to the Pacific Northwest Electric Power Conservation Planning Council (Planning Council).[35] The Planning Council develops and maintains a regional power plan and a fish and wildlife program to balance the Northwest's environmental and energy needs.

Like the FMCs, the Planning Council seeks to manage regional issues that occur within state boundaries but have national implications. A group of industry leaders and home builders challenged the constitutionality of the Planning Council in 1985 in *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council*.[36] The plaintiffs brought suit against the Planning Council over allegations that the Planning Council structure violated the Appointments Clause of the Constitution.

The court acknowledged that even though the Planning Council exercised significant authority and discretion, the court ruled that it was constitutional. According to the court, the Planning Council failed to meet the second prong of the *Buckley* analysis because "the Council members do not perform their duties "pursuant to the laws of the United States."[37] The court concluded that the Planning Council failed to qualify as "officers" of the United States because their appointment, salaries, administrative operations, and direction of the Councils are all state-derived.[38] The FMCs, however, were created by federal law, are administered by federal entities, and are supervised by the Secretary of Commerce.

C. Council Members Exercise Significant Authority

The third prong in the *Buckley* analysis requires an officer to exercise significant authority before his appointment will trigger the Appointments Clause. A position with "significant authority" possesses enforcement authority to bind the federal Government.[39] For example,

[32] 16 U.S.C § 1854(a)(1)(A).
[33] *Id.* § 1852.
[34] *Id.*
[35] *Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council*, 786 F. 2d. 1359 (1985).
[36] *Id.*
[37] *Id.* at 1364.
[38] *Id.*
[39] OLC, *supra* note 25.

the creation of a Presidential advisory committee composed entirely of congressional appointees would not implicate the Appointments Clause because such committees exercise no power to bind the President and are purely advisory in nature.[40] Because Councils have the power to bind the federal government, their members exercise significant authority.

The definition of "significant authority" played a major role in the Supreme Court's decision in *Freytag v. Commissioner*.[41] In *Freytag*, the appointment of special trial judges, referred to as commissioners, by the Chief Judge of the U.S. Tax Court was questioned. Justice Blackmun, writing for the majority, rejected the Commissioners' argument that they were simply federal employees lacking authority to render a final decision and that their role merely was "assisting" the tax court judges in decision-making.

Justice Blackmun declared that this argument ignored the significance of the duties and discretion that commissioners exercised. The commissioners' office was established by law and their duties, salary, and means of appointment were specified by statute.[42] The Court concluded that the commissioners exercised significant authority because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion."[43]

III. Conclusion

The Constitutionality of the Councils has been questioned since their creation. Strong arguments exist that could potentially declare the entire Council system unconstitutional under the Appointments Clause of the Constitution. However, in the only reported decision addressing the constitutionality of FMCs, *Northwest Environmental Defense Center v. Evans*,[44] the U.S. District Court for the District of Oregon held that the Pacific Fishery Management Council did not violate the Appointments Clause. This decision may serve as persuasive, but non-binding authority, in other jurisdictions.

16 U.S.C. §1854(b)(1)(A) permits a proposed FMP plan to automatically take effect if the Secretary of Commerce failed to notify the Council of his disapproval within 95 days. The Northwest Environmental Defense Center (NEDC) contended that this provision, among others, granted Council members significant authority and required the members be appointed pursuant to the Appointments Clause.

The Department of Justice countered by arguing that a fishery management plan "has no force or effect" until the Secretary of Commerce issues regulations to implement it.[45] Significant authority therefore, according to the DOJ, lies with the Secretary of Commerce.

The District Court construed the phrase "significant authority" narrowly, holding that it arises "from the ability to promulgate, not propose, implementing regulations for a fishery

[40] *Id.*
[41] *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2645 (1991).
[42] *Id.* at 2645.
[43] *Id.*
[44] 1988 U.S. Dist. Lexis 8977 (1988).
[45] *Id.* at *17.

management plan or plan amendments."[46] Under the district court's definition, only administrative agencies would have significant authority within the federal government because only they have the authority to promulgate regulations.

In reaching its conclusion, however, the court failed to take into account the numerous other significant powers granted to FMC members by the Magnuson Act. Councils are more than advisory panels. In fact, Councils have the authority to create their own advisory panels and appoint members to assist in "the development, collection, evaluation, and peer review of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of fishery management plan."[47] Further, Councils formulate fishery management plans, conduct public hearings, prepare comments on foreign fishing applications, review optimum yield stock assessments, develop annual catch limits for each managed fishery, and create multi-year research priorities for fisheries.[48]

At times, the Councils' authority even seems to exceed that of the Secretary. Section 304(h) of the Magnuson Act limits the Secretary of Commerce's power to repeal a fishery management plan. "The secretary may repeal or revoke a fishery management plan for a fishery under the authority of the Council only if the Council approves the repeal or revocation by a three-quarters majority of the voting members of the Council."[49] Without the consent of three-quarters of the Council, the Secretary has no other choice but to enforce the management plan given to him by the Councils. The Secretary's power to promulgate regulations becomes less significant when the Council is empowered to authorize any repeal or revocation.

Section 304(c)(3) of the MSA states that for a fishery *under the authority* of the Council, "the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system, including any limited access privilege program unless such system is first approved by a majority of the voting members, present and voting, of each appropriate council."[50] By employing the language, "under the *authority* of the council" an assumption is created which suggests Congress intended the Councils to manage fisheries somewhat autonomously. The Secretary cannot establish a limited access program without the consent of the Councils. The Magnuson Act "empowers the Councils to prevent certain regulatory actions by the Secretary and in effect puts the Councils on a footing with the Secretary in regulating access to regional fisheries."[51]

In addition, the Councils exercise significant authority over the Secretary's removal powers. Section 302(b)(6) of the MSA severely limits the Secretary's power to remove Council appointees. "The Secretary may remove for cause any member of a Council required to be appointed by the Secretary . . . if the Council concerned first recommends removal by not

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[46] *Id.* at *18.
[47] 16 U.S.C. § 1852(g).
[48] *Id.* § 1852(h).
[49] *Id.*
[50] *Id.* §1852(c)(3).
[51] General Counsel, *supra* note 27.

less than two-thirds of the members who are voting members and submits such removal recommendation to the Secretary in writing."[52]

Coupled with the power to appoint officers is the essential authority to remove officers. This vital safeguard ensures adequate political accountability of appointees. Section 302(b)(6) bestows upon Council members the ability to significantly shape national fisheries policy and management.[53] As such, they are officers who must be appointed pursuant to the Appointments Clause.

[52] 16 U.S.C. § 1852.

[53] A secondary, but important, analysis must be undertaken to determine whether Council members are principal or inferior officers. Principal officers may be appointed only by the President. Inferior officers may be appointed by either the President, the courts, or department heads. If Council members are principal officers, the Council structure is unconstitutional because no member is appointed by the President. The Supreme Court in *Morrison v. Olson* acknowledged that "the line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided very little guidance into where it should be drawn." *Morrison v. Olson*, 108 S. Ct. 2597, 2603 (1988). *Morrison* was brought by three government officials questioning the authority of counsels appointed by the judiciary under the authority of the Ethics and Government Act (EGA). The court eventually held that the EGA did not violate the Appointments Clause, the counsel members were inferior officers, and there was no violation of the separation of powers doctrine.