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Can the United States Be a Party to Binding Arbitration - The Constitutional Issues Re-Evaluated - Tenaska Washington Partners II v. The United States

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Catherine: Catherine: Can the United States Be a Party to Binding Arbitration

Can the United States be a Party to Binding Arbitration? The Constitutional Issues Re-evaluated

*Tenaska Washington Partners II v. The United States*¹

I. INTRODUCTION

It has long been assumed that the Constitution prohibited the United States government from entering binding arbitration as a party. The Department of Justice recently re-examined the issue and concluded that there is no absolute constitutional bar to government participation in binding arbitration.² *Tenaska* is the first reported court decision to adopt the Department of Justice's new reasoning. The court in *Tenaska Washington Partners II v. The United States* held that a dispute between a private party and a governmental agency must be submitted to binding arbitration when the parties' voluntary agreement contains an arbitration clause.³

II. FACTS AND HOLDING

The underlying dispute between *Tenaska Washington Partners II, L.P.* (Partnership) and the Bonneville Power Administration (BPA), an agency within the United States Department of Energy, centers on a contract.⁴ On April 1, 1994, the parties entered into a Power Purchase Agreement (Agreement).⁵ In that agreement, the parties agreed that the Partnership would sell all the net electrical output of its proposed Frederickson Generation Project to BPA for twenty years.⁶ According to the Agreement's arbitration clause, any dispute that could not be resolved by the parties' representatives would be settled by arbitration under the Commercial Arbitration Rules of the American Arbitration Association.⁷

1. 34 Fed. Cl. 434 (1995).

2. Memorandum from Walter Dellinger, Assistant Attorney General, to John Schmidt, Associate Attorney General (Sept. 7, 1995) (on file with the Dept. of Justice).

3. *Tenaska*, 34 Fed. Cl. at 440.

4. *Id.* at 436.

5. *Id.*

6. *Id.* This agreement ensued from a letter of intent signed by the parties on July 16, 1992, following a competitive bidding process. *Id.*

7. *Id.* at 437. The arbitration clause read as follows:

Pending resolution of a disputed matter, the Parties shall continue performance of their respective obligations pursuant to this Agreement. Disputes regarding any matter relating to this Agreement shall be discussed by the Authorized Representatives who shall use

Following the Agreement, the Partnership arranged financing and contracted with various other parties for the construction and operation of the project.⁸ Construction began in 1994.⁹

On April 17, 1995, a BPA vice-president notified the Partnership that BPA did not intend to perform its obligations under the Agreement.¹⁰ BPA took the position that it was excused from honoring its obligations because supervening events had frustrated its purpose of agreeing to purchase electricity from the Partnership.¹¹ On June 23, 1995, the Partnership brought suit against the BPA in the United States Court of Federal Claims alleging that BPA had breached the Agreement.¹² On August 22, 1995, BPA filed motion to dismiss the Partnership's claim or in the alternative to stay the court proceeding and to compel arbitration.¹³

In opposition to this motion,¹⁴ the Partnership argued that the Constitution, particularly the Appointments Clause,¹⁵ prohibits the United States from entering binding arbitration conducted by an independent arbitrator.¹⁶ In its brief, BPA argued that the Department of Justice has now taken the position that the Constitution does not bar the United States from submitting to binding arbitration conducted by an independent arbitrator.¹⁷ To support this argument, BPA relied on a recent memorandum prepared by the Office of Legal Counsel (OLC) and entitled "Constitutional Limitations on Federal Government Participation in Binding Arbitration" (OLC memo).¹⁸

Recognizing that it was changing its position, the Federal Court of Claims was persuaded by the reasoning of the OLC memo.¹⁹ The court held that the Constitution did not prevent the BPA from entering binding arbitration, granted

their best efforts to amicably and promptly resolve the dispute. Should the Authorized Representatives be unable to resolve any controversy or claim arising out of or relating to this Agreement, or the breach thereof, the Parties agree that the controversy or claim shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. *Id.*

8. *Id.* at 436.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 436-37.

13. *Id.* at 437.

14. *Id.* The Partnership also cross-moved for an order providing that in the event arbitration was compelled any arbitration award would be binding on both parties and that BPA must continue to perform its obligations under the Agreement until the dispute was resolved. *Id.*

15. U.S. CONST. art. II, § 1, cl. 2.

16. *Tenaska*, 34 Fed. Cl. at 437, 439. The partnership also argued that statutory authority was lacking and that the arbitration clause was inapplicable to the dispute. *Id.* at 437.

17. *Id.* at 437.

18. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2.

19. *Tenaska*, 34 Fed. Cl. at 440.

BPA's motion to stay the court proceedings "pending arbitration," and compelled the parties into arbitration.²⁰

III. LEGAL HISTORY

To compel arbitration, BPA had to show that: 1) There was no constitutional impediment to BPA entering binding arbitration; 2) There was statutory authority for BPA to enter binding arbitration; and 3) There was a contractual basis for arbitration.²¹ This Note is concerned with the threshold issue of constitutionality.

For 150 years prior to the OLC memo and to this decision, the Department of Justice took the position that the Constitution prohibited the United States from submitting to binding arbitration.²² While the most significant source of concern was the Appointments Clause;²³ the Take Care Clause²⁴, Non-Delegation Doctrine, Article III concerns, and the Due Process Clause of the Fifth Amendment²⁵ were also implicated to a lesser degree.²⁶

A. The Appointments Clause

The Appointments Clause states:

[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 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.²⁷

Whether or not the Appointments Clause affects government participation in binding arbitration turns in part on whether the arbitrator in such a situation is an "officer."²⁸ If the arbitrator is an "officer", he/she must be appointed in

20. *Id.* at 440, 446. The court expressly made the grant of the motion to stay conditional on BPA's and the Department of Justice's commitment to uphold binding arbitration in the case, leaving the BPA administrator no approval power and only limited judicial review. *Id.* at 446.

21. *Id.* at 438.

22. *Id.*

23. U.S. CONST. art. II, § 1, cl. 2.

24. U.S. CONST. art. II, § 1, cl. 1.

25. U.S. CONST. amend. V.

26. *Tenaska*, 34 Fed. Cl. at 439.

27. U.S. CONST. art. II, § 2, cl. 2.

28. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 3.

accordance with the Appointments Clause.²⁹ Because arbitrators are generally not appointed in this way,³⁰ it is necessary to trace the definition of an "officer" as it has developed in the case law to determine if an arbitrator qualifies as an "officer" in this situation.

In *United States v. Hartwell*, the Court established the classic definition of an "officer" in the constitutional sense.³¹ In *Hartwell*, this Court defined an "officer" as "a public station or employment conferred by the appointment of government. The term embraces ideas of tenure, duration, emolument, and duties."³² This definition has been cited and further interpreted in subsequent Supreme Court decisions.³³

In *Hartwell*, the court decided that the defendant was an officer subject to the Appointments Clause.³⁴ When making this decision, the Court noted that he was in public service; his salary was statutorily fixed; his duties were defined by a superior, rather than by contract; and his employment was "continuing and permanent, not occasional or temporary."³⁵

In *Buckley v. Valeo*, the Court further defined an "officer" of the United States as one who exercises "significant authority pursuant to the laws of the United States."³⁶ The Court found that the Federal Election Commission's investigative and information gathering duties were not the exercise of significant authority pursuant to the laws of the United States.³⁷ The Court did, however, find that the members of the commission were officers since they exercised significant authority when they enforced compliance with the Federal Election Campaign Act.³⁸ Because members of the commission were officers, the Court found that their appointment by Congress without being nominated by the President violated the Appointments Clause.³⁹

In *Freytag v. Commissioner*, the Court relied on two factors in determining that a special trial judge appointed by the Chief Judge of the United States Tax

29. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

30. *Tenaska*, 34 Fed. Cl. at 439. In the instant case, the Commercial Arbitration Rules of the American Arbitration Association were to apply. *Id.* at 437. Those rules provide that the Association will compose lists of possible arbitrators from which the parties may strike names with the Association then making the final selection. G. Richard Shell, *Arbitration and Corporate Governance*, 67 N. C. L. REV. 517, 522 (1989).

31. 73 U.S. (6 Wall.) 385, 393 (1868).

32. *Id.*, 73 U.S. at 393.

33. *See, e.g.*, *United States v. Germaine*, 99 U.S. 508, 511-12 (1878); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890).

34. *Hartwell*, 73 U.S. at 393.

35. *Id.*

36. *Buckley*, 424 U.S. at 126.

37. *Id.* at 137.

38. *Id.* at 138.

39. *Id.* at 126-27.

Court was an officer.⁴⁰ First, the office of special trial judge, along with its duties, salary, and appointment procedures was statutory.⁴¹ Second, the special trial judge exercised significant discretion in conducting trials.⁴² Although special trial judges did not make final decisions, they did rule on the admissibility of evidence and enforced compliance with discovery orders.⁴³

In sum, factors that the Court has weighed in determining whether a party or an individual is an officer subject to the Appointments Clause include: whether the salary and office were set out in a statute;⁴⁴ whether the duties were continuing or temporary in nature;⁴⁵ and whether the party exercised significant authority and discretion.⁴⁶

If independent arbitrators conducting binding arbitration with the federal government as a party fit within the definition of an officer, then clearly the Appointments Clause applies. If they do not, the question remains: *Must* the exercise of significant authority, particularly that which binds the federal government to an action or payment, be performed by an officer of the United States? *Buckley* has been read to stand for the proposition that only officers can exercise significant authority pursuant to the laws of the United States.⁴⁷ The court in *Tenaska Washington Partners II v. United States* acknowledged that this position had long been inferred from the Appointments Clause and was one of the obstacles to the federal government's participation in binding arbitration.⁴⁸

The Department of Justice took the same position as the U.S. Supreme Court in *Buckley* and *Tenaska* until shortly before the publication of the Office of Legal Counsel memo ("OLC memo") in September 1995.⁴⁹ The legislative history of the Administrative Dispute Resolution Act ("ADRA")⁵⁰ is representative of the effect of the position that only officers can exercise significant authority.⁵¹ The ADRA was enacted to authorize and encourage the use of alternative dispute

40. 501 U.S. 868, 881-82 (1991). The Court also held that the Tax Court was a "court of law" within the meaning of the Appointments Clause, and, therefore, had the power to appoint an inferior officer. *Id.* at 890-92.

41. *Id.* at 881.

42. *Id.* at 881-82.

43. *Id.*

44. *Hartwell*, 73 U.S. at 393.

45. *Id.*

46. *Buckley*, 424 U.S. at 126.

47. *See, e.g., United States v. Miss. Vocational Rehab. for the Blind*, 794 F. Supp. 1344, 1354 (S.D. Miss. 1992); 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, 1302 (1992).

48. *Tenaska*, 34 Fed. Cl. at 439.

49. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 16.

50. Pub. L. No. 101-552, § 11, 104 Stat. 2736 (1990). By its terms, the ADRA expired on October 1, 1995. *Tenaska*, 34 Fed. Cl. at 438 n.2 (citing Pub. L. No. 101-552, § 11, 104 Stat. 2747). The proposed re-authorization of the ADRA is discussed *infra*.

51. *Tenaska*, 34 Fed. Cl. at 438.

resolution techniques by federal agencies.⁵² At subcommittee hearings, the Department of Justice supported the general thrust of the ADRA and the use of most alternative dispute resolution techniques, but argued against the use of binding arbitration based on constitutional concerns.⁵³ Therefore, the bill was changed to unambiguously place the ultimate decision-making authority with the agency head, an officer of the United States.⁵⁴

United States v. Mississippi Vocational Rehabilitation for the Blind provides another example of the United States government adopting the position that because arbitrators exercise significant authority in cases where the federal government is a party, the arbitrators must be officers appointed in accordance with the Appointments Clause.⁵⁵ *Mississippi Vocational* involved the Randolph-Sheppard Act.⁵⁶ This act sought to facilitate opportunities for the blind by establishing a program of vending machine and cafeteria operation on federal property.⁵⁷ It also provided for arbitration to resolve disputes arising under it.⁵⁸

In this case, the dispute arose between Mississippi Vocational Rehabilitation for the Blind (MVRB) and the National Aeronautics and Space Administration (NASA) after NASA denied MVRB's application for a vending permit.⁵⁹ The Government argued that binding arbitration between a federal agency and a state licensing agency violated the Appointments Clause.⁶⁰ The Government reasoned that such arbitrators exercise significant authority as contemplated by *Buckley* when they have the power to bind the Government to their decisions.⁶¹ Further, the Government maintained that only officers subject to the Appointments Clause can have that type of authority.⁶² The district court did not disagree with this reasoning, but held that the arbitrators came within the definition of "inferior officers;" therefore, their appointment by the Secretary of Education, as head of the department, satisfied the Appointments Clause.⁶³

Other decisions, however, have accepted the exercise of significant authority by parties who are not officers of the United States. *Auffmordt v. Hedden* involved a merchant appraiser who had the authority to re-appraise imported goods for the purpose of determining the correct duty to be paid on them.⁶⁴ It is especially significant that this appraisal might require the government to reimburse

52. S. REP. No. 543, 101st Cong., 2nd Sess., at 2 (1990).

53. *Id.* at 5.

54. *Id.* at 6-7.

55. *Mississippi Vocational Rehab.*, 794 F. Supp. at 1354.

56. *Id.* at 1346.

57. *Id.*

58. *Id.* at 1347.

59. *Id.* at 1348-49.

60. *Id.* at 1353.

61. *Id.* at 1354.

62. *Id.*

63. *Id.* at 1354-55.

64. *Auffmordt*, 137 U.S. at 312.

the importer for duties paid since the merchant appraiser's decision was final as far as the importer and the federal government were concerned.⁶⁵

Applying the definition in *Hartwell*, the Court also held that the merchant appraiser failed to qualify as an officer because the merchant appraiser was without tenure, duration, continuing emolument, or continuous duties and he acted only occasionally and temporarily.⁶⁶ The Court held that the merchant appraiser's duties did include the exercise of significant authority, as he rendered final decisions in disputes between the government and individuals.⁶⁷ Even though the Court held that the merchant appraiser exercised significant authority but was not an officer, the Court found no violation of the Appointments Clause.⁶⁸ The Court ended its discussion of the applicability of the Appointments Clause with the determination that the merchant appraiser was not an officer, and the Court made no inference that the Appointments Clause required the merchant appraiser to be an officer in order to exercise authority under federal law, even when the government would be bound by the decision.⁶⁹

The United States Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.*⁷⁰ upheld binding arbitration conducted by independent arbitrators for resolving conflicts among the parties who registered pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (Act).⁷¹ Arguably, these arbitrators exercised significant authority pursuant to federal law. Their determination of rights and compensation under the Act was only subject to judicial review for fraud, misconduct, or misrepresentation.⁷² In upholding the Act's arbitration provision,⁷³ however, the Court did not discuss the Appointments Clause. Rather, the Court addressed the challenge of the arbitration provision as a violation of Article III.⁷⁴

Finally, the Federal Court of Claims compelled arbitration of a contract claim on facts very similar to the instant case. In *George J. Grant Constr. Co. v. United States*,⁷⁵ the dispute involved a contract between private parties and a federal governmental agency.⁷⁶ Without discussing any constitutional issues, the court compelled arbitration based on the contract's arbitration clause.⁷⁷

65. *Id.*

66. *Id.* at 327.

67. *Id.* at 329.

68. *Id.* at 327.

69. *Id.* at 327-29.

70. 473 U.S. 568 (1985).

71. *Id.* at 571, 594.

72. *Id.* at 592.

73. *Id.* at 571.

74. *Id.*

75. 109 F. Supp. 245, 245 (Ct. Cl. 1953).

76. *Id.*

77. *Id.* at 247.

B. Other Constitutional Issues

The argument that independent arbitrators should not exercise significant authority pursuant to federal law has also been made on a non-delegation doctrine theory.⁷⁸ This theory provides that there are limits on the authority that the government may delegate to private actors.⁷⁹

The Supreme Court in *Auffmordt* and *Thomas* upheld the federal government's delegation of authority to private actors.⁸⁰ In those cases, however, the Court did not discuss the issues in terms of delegation of authority. The Court's failure to discuss it in those terms implicitly suggests that the non-delegation doctrine in the context of government participation in binding arbitration is more of a theoretical argument which has not been developed in case law, than a practical argument.⁸¹ One commentator, however, argues that the Supreme Court's language in *Buckley* supports an objection on non-delegation grounds.⁸² In *Buckley*, the court stated that members of the Federal Elections Commission, not being officers, should not be involved in the administration and enforcement of the law because that is the province of the executive branch.⁸³

Another argument contends that Article III of the Constitution may restrict the federal government from submitting to binding arbitration in some cases. Article III provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁸⁴

Nearly a century and a half ago, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁸⁵ the Supreme Court made it clear that Congress may assign the resolution of some matters to forums outside of the Article III courts.⁸⁶ The Court distinguished between suits at common law, in equity, or in admiralty and determined that these must remain in Article III courts.⁸⁷ For other matters, such as those involving "public rights," Congress can choose to adjudicate in either Article III courts or another forum.⁸⁸

For some time, the language in *Murray's Lessee* which identified public rights as an example of a determination that might be made outside of an Article

78. S. REP. NO. 543. 101st Cong., 2nd Sess., at 5 (1990); Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 13.

79. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 13.

80. *Auffmordt*, 137 U.S. at 328; *Thomas*, 473 U.S. at 571.

81. Jim C. Chen, *Appointments With Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1490 (1992).

82. Chen, *supra* note 79, at 1491 (citing *Buckley*, 424 U.S. at 139).

83. *Buckley*, 424 U.S. at 139.

84. U.S. CONST. art. III, § 1.

85. 59 U.S. (18 How.) 272, 284 (1855).

86. *Id.*

87. *Id.*

88. *Id.*

III court was interpreted to mean that all federal adjudications not involving a public right must take place in an Article III court.⁸⁹ The Court later explained that public rights were involved when the dispute was between the government and citizens about the constitutional functions of the executive or the legislative branch.⁹⁰

The Court's current approach, however, is less dependent on characterizing a dispute as a private or public matter.⁹¹ Rather, the constitutionality of adjudication in a non-Article III forum will be determined in light of the underlying purposes of Article III.⁹² Those purposes entail preserving the individual's right to have her claim adjudicated by an impartial and independent tribunal and aiding the maintenance of a checks and balances system.⁹³

In *Commodity Futures Trading Comm'n v. Schor*, the Court established a number of factors to consider in deciding whether adjudication outside Article III courts might undermine the purposes of Article III.⁹⁴ First, the Court must look at whether the "essential attributes of judicial power are reserved to Article III courts."⁹⁵ In *Thomas v. Union Carbide Agricultural Products Co.*, it was sufficient that Article III review was preserved for possible arbitrator fraud, misconduct, or misrepresentation.⁹⁶ Second, the Court must consider the scope of the jurisdiction and power assigned to the alternative forum which are "normally vested only in Article III courts."⁹⁷ Where the forum deals with a "particularized area of law," rather than operating with broad authority, this factor is unlikely to present a barrier to non-Article III adjudication.⁹⁸ The source and importance of the rights at stake comprise the third factor.⁹⁹ For example, the Court has indicated that Article III review of constitutional error should be preserved for Article III adjudication.¹⁰⁰ Also, the "public rights" distinction retains some vitality.¹⁰¹ When Congress vests the adjudication of private common law rights in an alternative forum, the Court will examine that statutory scheme carefully because private common law rights have been traditionally resolved in Article III courts.¹⁰² Thus, the risk that Congress is invading the role

89. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982).

90. *Id.* at 67-70.

91. See, e.g., *Thomas*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

92. *Schor*, 478 U.S. at 847.

93. *Id.* at 850.

94. *Id.* at 851.

95. *Id.* (citing *Thomas*, 473 U.S. at 587, 589-93; *Northern Pipeline*, 458 U.S. at 84-86).

96. *Thomas*, 473 U.S. at 592.

97. *Schor*, 478 U.S. at 851.

98. *Id.* at 852.

99. *Id.* at 851.

100. *Thomas*, 473 U.S. at 592.

101. *Schor*, 478 U.S. at 853-54.

102. *Id.* at 854.

of the judicial branch by adjudicating these rights in alternative forums is greater.¹⁰³ The last factor is Congress' interest in providing adjudication outside Article III courts.¹⁰⁴ The court is unlikely to find Congress' purpose unsuitable where Congress is attempting to provide an expeditious method of determining a particular type of dispute, and there is no evident attempt to undermine the judicial branch.¹⁰⁵

The above factors are particularly suitable for analyzing statutory schemes that provide for adjudication outside Article III courts.¹⁰⁶ Where, as in the instant case, the parties voluntarily agree to an arrangement such as binding arbitration, the Court is still concerned that the arrangement serves the underlying purposes of Article III.¹⁰⁷ Where the parties consent to arbitration, however, the danger of Congress or the executive branch encroaching on the judicial branch is minimal.¹⁰⁸

Finally, when determining whether arbitration or another type of hearing comports with due process, courts consider the factors set out in *Matthews v. Eldridge*.¹⁰⁹ These are: 1) the private interest at stake; 2) the "risk of an erroneous deprivation" of the private interest and the value of additional or alternate procedures; and 3) the Government's interest in conserving financial and administrative resources.¹¹⁰ In *Matthews*, the Court stated that due process is flexible and that the procedure may vary with the situation.¹¹¹ Furthermore, in *Schweiker v. McClure*, the Court found that vesting decision-making authority in a private actor may comport with due process.¹¹²

IV. INSTANT DECISION

The court began its discussion of the constitutional issues in *Tenaska* by recognizing that the Department of Justice, through Congressional testimony and internal writings, had always maintained that the United States could not enter into binding arbitration.¹¹³ The court noted that this was such an established assumption that there was little precedent on point.¹¹⁴

103. *Id.*

104. *Id.* at 851.

105. *Thomas*, 473 U.S. at 590.

106. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 23.

107. *Schor*, 478 U.S. at 850-51.

108. *Thomas*, 473 U.S. at 591.

109. 424 U.S. 319, 335 (1976).

110. *Id.*

111. *Id.* at 334.

112. 456 U.S. 188, 198-200 (1981).

113. *Tenaska*, 34 Fed. Cl. at 438-39.

114. *Id.* at 440.

In holding that the Constitution does not preclude the federal government from submitting to binding arbitration, the court relied heavily on the OLC memo.¹¹⁵ The court found the OLC memo to be a well-researched, persuasive analysis and adopted its reasoning without much discussion.¹¹⁶

Because the OLC memo serves, in effect, as the court's discussion on the constitutional issue, a brief survey is necessary to explain how the OLC reversed the Department of Justice's position that the federal government could not enter binding arbitration.

First, the OLC determined that arbitrators are not officers within the meaning of the Appointments Clause.¹¹⁷ The OLC read the cases to define an "officer" as one who meets the following three conditions: (1) employed with continuing duties, (2) employed within the federal government, and (3) vested with significant authority pursuant to the laws of the United States.¹¹⁸ While acknowledging that arbitrators fulfill the last condition, the OLC memo stated that arbitrators do not fulfill the other necessary conditions because they are appointed to resolve a single matter and because they are private actors rather than employees of the federal government.¹¹⁹

The OLC also repudiated the "negative inference" that only officers subject to the Appointments Clause may exercise significant federal authority.¹²⁰ It rejected the broad reading of *Buckley* which had been used to support the negative inference for two reasons.¹²¹ First, *Buckley* cited *United States v. Germaine* and *Auffmordt* with approval.¹²² Significantly, these cases involved private actors exercising significant federal authority.¹²³ Second, the *Buckley* language concerning the exercise of significant authority assumed that the individuals were federal employees, not private actors.¹²⁴ The OLC concluded that the Appointments Clause is simply silent on the exercise of federal authority vested in private actors.¹²⁵

With respect to the non-delegation doctrine, the OLC found no "pro se proscription" on the delegation to independent arbitrators of decision-making authority pursuant to federal law.¹²⁶ The OLC noted that the Supreme Court in *Auffmordt* and *Kendall v. United States ex rel. Stokes* implicitly upheld such

115. *Id.* at 439-40.

116. *Id.* The court noted that the OLC memo is binding on the Department of Justice and other executive branch agencies, but not on the courts. *Id.* at 440.

117. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 10.

118. *Id.*

119. *Id.*

120. *Id.* at 13.

121. *Id.* at 15-16.

122. *Id.* at 15 (citing *Buckley*, 424 U.S. at 125-26 n. 162).

123. *Germaine*, 99 U.S. at 508-09; *Auffmordt*, 137 U.S. at 312.

124. *Id.*

125. *Id.* at 13.

126. *Id.* at 26 (citing *Auffmordt*, 137 U.S. 310); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609-13 (1838).

delegation.¹²⁷ Thus, the OLC concluded that the non-delegation doctrine presents no difficulty as long as impartial and discernable standards exist in the arbitration.¹²⁸

The OLC, however, recognized that Article III concerns place some restrictions on federal government's participation in binding arbitration.¹²⁹ For example, the final adjudication of constitutional rights must remain in Article III courts.¹³⁰ The purposes underlying Article III, however, are unlikely to be undermined where Congress creates rights by statute or regulatory scheme or where the government participates in consensual binding arbitration.¹³¹ Therefore, Article III is not a complete bar to government participation in binding arbitration as long as Article III review of constitutional issues and arbitrator fraud, misconduct, and misrepresentation is reserved.¹³²

The OLC noted that in some circumstances the *Matthews* test requires a binding decision to be made by a government official.¹³³ It concluded, however, that due process generally does not prohibit the determination of claims through binding arbitration.¹³⁴

The court in *Tenaska* adopted the reasoning of the OLC and concluded that there is no broad constitutional prohibition on government participation in binding arbitration as long as there is no statutory prohibition on government participation and as long as Article III review of constitutional issues and possible fraud, misconduct, or misrepresentation by arbitrators is preserved.¹³⁵

V. COMMENT

The decision in *Tenaska* turned on the reversal of the Department of Justice's long held stance that there were broad constitutional prohibitions on the federal government entering binding arbitration as a party.¹³⁶ The constitutional challenge posed by the Partnership in *Tenaska* was squarely and thoroughly addressed by the OLC memo that underlies the new position of the Department of Justice.¹³⁷ To have rejected the OLC's conclusion would have been to reject the official position of the Department of Justice. Given the existence of the OLC

127. *Id.* at 26-27.

128. *Id.* at 27.

129. *Id.* at 20.

130. *Id.* at 23.

131. *Id.* at 24-26.

132. *Id.* at 26.

133. *Id.* at 27.

134. *Id.*

135. *Tenaska*, 34 Fed. Cl. at 439-40 (citing Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 26).

136. *Tenaska*, 34 Fed. Cl. at 440.

137. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 1.

memo with its thorough research, sound reasoning, and prominent contributors¹³⁸ and given the current federal policy favoring arbitration,¹³⁹ the *Tenaska* court's holding is an idea whose time has come.

The adjustments to the proposed re-authorization of the Administrative Dispute Resolution Act (ADRA) demonstrate one immediate consequence of the change in the Department of Justice's position.¹⁴⁰ The ADRA of 1990 contained a thirty day "escape" provision for arbitral awards when the government was a party.¹⁴¹ This permitted the agency head, a United States officer, to retain the final decision making authority.¹⁴² The provision was a response to the Department of Justice's concerns about constitutional implications.¹⁴³ In effect, it meant that arbitration was never binding on the government. On March 27, 1996, the Senate Committee on Governmental Affairs recommended a bill permanently re-authorizing the ADRA without the "escape" provision.¹⁴⁴ The committee, citing the OLC memo, reported that there are no longer any constitutional objections to government participation in binding arbitration.¹⁴⁵ Under the 1990 Act, private parties simply have not participated in arbitration with a government agency.¹⁴⁶ It appeared that private parties were unwilling to be bound to arbitration that the other party could unilaterally repudiate.¹⁴⁷ The Senate Committee suggested that the federal government should have the flexibility to fully take advantage of the benefits of all forms of alternative dispute resolution, particularly when a governmental agency functions as a commercial entity.¹⁴⁸ The Senate Committee also anticipated accelerating the use of alternative dispute resolution in contract disputes, employment claims, and regulatory enforcement more than was seen under the 1991 Act.¹⁴⁹

The constitutional issue, however, was not the end of the inquiry for the *Tenaska* court. Having found no constitutional prohibition, it was still necessary

138. *Tenaska*, 34 Fed. Cl. at 439. The OLC memo was prepared by Assistant Attorney General Walter Dellinger. See e.g., Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983). Several assistant attorneys general contributed. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2 (memorandum at 1 n. 1).

139. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982).

140. S. REP. No. 245, 104th Cong., 2d Sess. (1996).

141. 5 U.S.C. § 580(b) (1994). The ADRA authorized and promoted the use of a variety of alternative dispute resolution techniques in federal administrative agencies. S. REP. 543, 101st Cong., 2d Sess. (1990). Enacted in 1990, it expired by its terms on October 1, 1995. 5 U.S.C. § 571 (1994).

137 S. REP. No. 543, 101st Cong., 2d Sess., at 7 (1990).

143. *Id.* at 5, 7.

144. S. REP. No. 245, 104th Cong., 2d Sess., at 6 (1996). As of this writing, Senate bill 1224 has not been voted on.

145. *Id.* at 5.

146. 1995 WL 701360 (F.D.C.H.) (testimony of Hon. Marshall J. Breger).

147. *Id.*

148. S. REP. No. 245, 104th Cong., 2d Sess., at 5 (1996). Saving money, preserving working relationships, crafting lasting solutions, and conserving judicial resources were among the advantages noted. *Id.* at 2, 5.

149. *Id.*

to establish statutory authority and a contractual basis for BPA to enter binding arbitration.¹⁵⁰ This analysis by the *Tenaska* court suggests the form and shape of the analysis that other courts may undertake in scrutinizing binding arbitration which involves a federal governmental entity as a party.

The first step is likely to be statutory interpretation. In determining whether the statutory authority existed for BPA to enter binding arbitration, the court examined the statute that addressed the administrative authority of the BPA administrator.¹⁵¹ While the statute did not expressly authorize binding arbitration, it did empower the administrator to enter and cancel contracts, and to compromise or settle claims arising under a contract.¹⁵² The court found that authority to enter arbitration could be inferred from the express power to settle claims.¹⁵³ The court also noted that BPA was intended to function as much as possible like a private business enterprise.¹⁵⁴ Because the utilization of arbitration is now a widely accepted business practice, the statute was interpreted to give the BPA administrator this power.¹⁵⁵

Having found no constitutional prohibition and having established statutory authority, the court next analyzed the contractual basis for compelling arbitration.¹⁵⁶ In future cases, as in *Tenaska*, the analysis of the contractual arbitration clause will be essentially the same as that used for private parties. Courts will continue to recognize that arbitration clauses should be construed in favor of arbitration due to a strong federal policy encouraging arbitration.¹⁵⁷

The court cautioned that although the arbitration clause provided for arbitration of all disputes or claims arising out of the contract, the remedies available were restricted in this situation in a way that would not apply to two private parties.¹⁵⁸ For example, the Partnership requested continued performance of the contract pending resolution of the dispute.¹⁵⁹ The court said that although this would comport with the agreement, specific performance was not to be had against the United States where it had not been waived.¹⁶⁰ Because this would be true in litigation as well, arbitration would not put the Partnership at a disadvantage as far as remedies were concerned.¹⁶¹

Private and government parties contemplating arbitration agreements and policies and Congress in mandating arbitration in statutes must bear in mind that some restrictions remain even though the Department of Justice has acknowledged

150. *Tenaska*, 34 Fed. Cl. at 438.

151. *Id.* at 441. The statute in question can be found at 16 U.S.C. §832a(f) (1988).

152. *Tenaska*, 34 Fed. Cl. at 441.

153. *Id.* at 442-43.

154. *Id.* at 442.

155. *Id.* at 442-43.

156. *Id.* at 443.

157. *Id.* at 446 (citing *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24).

158. *Id.* at 443-44.

159. *Id.* at 443.

160. *Id.* at 443-44.

161. *Id.* at 444.

that there is no broad constitutional prohibition to government participation in binding arbitration.¹⁶²

The OLC memo indicates that Article III problems may best be avoided by limiting the scope of rights determined in the arbitral forum to a particularized area of the law and by preserving judicial review for constitutional issues and claims of arbitrator fraud, misconduct, and misrepresentation.¹⁶³ Arbitration is most clearly appropriate for rights created by statute, regulatory schemes, and voluntary agreements containing arbitration clauses (as opposed to statutorily mandated arbitration).¹⁶⁴

The OLC recommended that the parties delineate in their voluntary agreement what remedies are encompassed and that they be certain that there is statutory authority for those remedies.¹⁶⁵ The OLC also recommended that arbitrators be clearly impartial and "free from political influence" and that the arbitrators have clear standards to follow in decision-making.¹⁶⁶ This would prevent challenges based on non-delegation grounds.¹⁶⁷

Finally, it is necessary to remember that, according to the OLC memo, the *Mathews* test demonstrates whether due process has been satisfied.¹⁶⁸ The OLC predicted that results from applying the *Mathews* test would vary with the circumstances, but speculated that sometimes a final decision would be required by a government official rather than a private actor in order to satisfy due process.¹⁶⁹

162. Memorandum from Walter Dellinger to John Schmidt, *supra* note 2, at 28.

163. *Id.* at 26.

164. *Id.*

165. *Id.*

166. *Id.* at 27.

167. *Id.*

168. *Id.* (citing *Schweiker v. McClure*, 456 U.S. 188, 198-200; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

169. *Id.*

VI. CONCLUSION

The *Tenaska* court stated, "A new era of federal arbitration may be dawning, the extent of which remains to be seen."¹⁷⁰ What remains to be seen is whether the ADRA will be re-authorized in its proposed form permitting government participation in binding arbitration and whether other courts, as the *Tenaska* court was, are persuaded by the authority and reasoning of the new Department of Justice's position accepting federal government participation in binding arbitration. If so, the private sector is likely to be as confident entering arbitration agreements with federal governmental entities as they are with other private parties, and the use of alternative dispute resolution techniques within the federal government will continue to increase.

CATHERINE CHATMAN

170. *Tenaska*, 34 Fed. Cl. at 440.