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R. Chris Van Landingham

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# Do We Have an Agreement? Examining the Constitutionality and Legality of the Security and Prosperity Partnership of North America, and the Legal Ramifications of its Informality

R. Chris Van Landingham\*

## I. INTRODUCTION

The Security and Prosperity Partnership of North America (“SPP”) is a tri-lateral partnership formed in 2005 between the United States, Canada, and Mexico.<sup>1</sup> The three countries previously took numerous steps such as the creation of the North American Free Trade Agreement (“NAFTA”)<sup>2</sup> to increase the economic prosperity of the continent, and following the terrorist attacks of September 11, 2001, the countries began working more closely to ensure continental security.<sup>3</sup> However, U.S. President George W. Bush, Canadian Prime Minister Paul Martin and

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\* Juris Doctorate Candidate, The Dickinson School of Law of the Pennsylvania State University, 2009; Bachelor of Arts, in History, Florida State University, 2005. I would like to give a special thanks to my wife Elena for all the help and support she has given me over the years.

1. See Press Release, White House, Joint Statement by President Bush, President Fox, and Prime Minister Martin (Mar. 23, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/03/20050323-2.html> [hereinafter Joint Statement].

2. Implementation of the North American Free Trade Agreement (NAFTA) began on January 1, 1994. This agreement will remove most barriers to trade and investment among the United States, Canada, and Mexico. Under the NAFTA, all non-tariff barriers to agricultural trade between the United States and Mexico were eliminated. In addition, many tariffs were eliminated immediately, with others being phased out over periods of 5 to 15 years. This allowed for an orderly adjustment to free trade with Mexico, with full implementation beginning January 1, 2008.

U.S. Department of Agriculture, Foreign Agriculture Service, North American Free Trade Agreement, <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.asp> (last visited Feb. 9, 2008).

3. See Joint Statement, *supra* note 1.

Mexican President Vicente Fox felt that additional steps needed to be taken.<sup>4</sup> This desire to increase continental cooperation in these areas resulted in the establishment of the SPP.<sup>5</sup>

This Comment is divided into seven parts. Part I introduces the SPP and explains its background, origins, and purpose. Part II of the Comment provides a detailed overview of the two primary agendas of the SPP: security and prosperity. Part III explains how the SPP's agenda is being implemented throughout North America. Part IV explains the executive branch's constitutional authority in the areas of foreign policy and treaty making, and defines the SPP as an agreement. Part V of the Comment describes the role and purpose of the North American Competitiveness Council within the SPP. Part VI parses the Federal Advisory Committee Act and argues that the North American Competitiveness Council violates provisions of the Act. Finally, Part VII of the Comment concludes that although the SPP is constitutional, its informal legal origins and structure may lead to future confrontations between the three branches of U.S. federal government.

The SPP is premised on the idea that the security and prosperity of each of the three member nations is mutually dependent on the other nations.<sup>6</sup> The security goals include establishing a common approach to

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4. *See id.*

5. *See id.*

6. *See id.*

The SPP is a White House-led initiative among the United States and the two nations it borders—Canada and Mexico—to increase security and to enhance prosperity among the three countries through greater cooperation. The SPP is based on the principle that our prosperity is dependent on our security and recognizes that our three great nations share a belief in freedom, economic opportunity, and strong democratic institutions. The SPP outlines a comprehensive agenda for cooperation among our three countries while respecting the sovereignty and unique cultural heritage of each nation. The SPP provides a vehicle by which the United States, Canada, and Mexico can identify and resolve unnecessary obstacles to trade and it provides a means to improve our response to emergencies and increase security, thus benefiting and protecting Americans.

*See* SPP.gov, Myths vs. Facts, [http://spp.gov/myths\\_vs\\_facts.asp](http://spp.gov/myths_vs_facts.asp) (last visited Jan. 5, 2007) [hereinafter *Myths vs. Facts*]. The SPP lists the following benefits to North American citizens:

To save lives, prevent injuries, and make consumer goods safer, the United States, Canada and Mexico signed separate agreements for advance notifications when consumer goods violate one country's safety standards or pose a danger to consumers. To strengthen border security, Mexican and U.S. agencies are exchanging information and establishing protocols to detect fraud and smuggling, and address border violence. To speed up response times when managing infectious disease outbreaks, the United States and Canada signed an agreement to enable simultaneous exchange of information between virtual national laboratory networks. To speed cargo shipping, the three countries are developing uniform in-advance electronic exchange of cargo manifest data for

security and making the movement of traffic across the borders more efficient.<sup>7</sup> The prosperity goals include improving the quality of life for citizens of the three member states and enhancing the competitiveness of North America in the global marketplace.<sup>8</sup>

## II. AGENDAS

### A. *Security Agenda*

The security agenda has three goals: secure North America from external threats, prevent and respond to threats from within North America, and streamline the secure movement of low-risk traffic across shared borders.<sup>9</sup>

To secure North America from external threats the SPP is creating a North American traveler security strategy.<sup>10</sup> The SPP is also implementing a cargo security strategy for the purpose of screening cargo before it leaves foreign ports in conjunction with inspection at the first entry point into North America.<sup>11</sup> The SPP member states are currently creating a joint bioprotection strategy for prevention and response to natural as well as intentional threats to public health, food, and agriculture.<sup>12</sup>

The SPP's second security goal provides a system of joint prevention and response to threats from within North America. To accomplish this, the SPP is currently enhancing the North American maritime transportation and port security and establishing equivalent approaches to aviation security.<sup>13</sup> The member states are also working

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maritime, railroad and motor carriers. To develop a coordinated strategy aimed at combating counterfeiting and piracy, a task force of senior officials from the three North American countries has been established. To reduce the cost of trade, the United States and Canada decreased transit times at the Detroit/Windsor gateway, our largest border crossing point, by [fifty] percent. To reduce market distortions, facilitate trade, and promote overall competitiveness, the North American Steel Trade Committee developed a new strategy that focuses on improving innovation and market development.

*Id.*

7. See Press Release, White House, Security and Prosperity Partnership of North America Security Agenda (Mar. 23, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/03/20050323-3.html> [hereinafter Security Agenda].

8. See Press Release, White House, Security and Prosperity Partnership of North America Prosperity Agenda (Mar. 23, 2005) *available at* <http://www.whitehouse.gov/news/releases/2005/03/20050323-1.html> [hereinafter Prosperity Agenda].

9. See Security Agenda, *supra* note 7.

10. See *id.*

11. See *id.*

12. See Security Agenda, *supra* note 7.

13. See *id.*

toward a comprehensive plan for combating transnational threats to the respective countries including threats from terrorism, drug trafficking, smuggling and organized crime.<sup>14</sup> The SPP is also increasing intelligence sharing between the member states regarding North American security, implementing common approaches to protect critical infrastructure and also to respond to cross-border terrorist incidents and natural disasters.<sup>15</sup>

The third security goal focuses on streamlining the secure movement of low-risk traffic across shared borders. To accomplish this, member states are working towards implementing a border strategy that improves the legitimate flow of people and cargo at ports of entry within North America.<sup>16</sup> New technologies are being developed<sup>17</sup> and deployed by the SPP to accomplish these security goals.<sup>18</sup>

### *B. Prosperity Agenda*

The stated goal of the prosperity agenda is “to enhance the competitive position of North American industries in the global marketplace and to provide greater economic opportunity for all [North American] societies, while maintaining high standards of health and safety for [the North American] people.”<sup>19</sup> To accomplish its prosperity goals, the SPP is working to improve productivity, reduce the costs of trade, and enhance the quality of life.<sup>20</sup>

The SPP outlined three steps to improve productivity. First the SPP regulates cooperation, generating growth by lowering costs for North American business producers and consumers, maximizing cross-border trade, and minimizing barriers.<sup>21</sup> Second, the SPP uses sectoral collaboration to facilitate business.<sup>22</sup> To enhance the competitiveness of North American industries the SPP requires increased cooperation among the member states in key industry sectors such as automobiles,

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14. *See id.*

15. *See id.*

16. *See id.*

17. The government of Mexico has begun to use biochips (microchips that are implanted under the skin) to curb illegal immigration from Guatemala and Belize across the southern border of Mexico. This implant will replace the “local pass” that is currently used to enter Mexico. *See Lou Dobbs Tonight* (CNN television broadcast Dec. 28, 2007), available at <http://www.youtube.com/watch?v=0XScXum6vjM>. It seems plausible that a similar biochip eventually might be used throughout the continent.

18. *See Security Agenda, supra* note 7.

19. *See Prosperity Agenda, supra* note 8.

20. *See id.*

21. *See id.*

22. *See id.*

and steel.<sup>23</sup> Further, the member states also cooperate in promoting energy efficiency, increasing energy supplies and promoting new technologies to strengthen the continent's energy markets.<sup>24</sup> The SPP is improving the safety and efficiency of the continent's transportation systems while working toward a freer flow of capital and providing financial services throughout North America.<sup>25</sup> Finally, the member states work together, expanding partnerships in higher education, science and technology to "invest in our people."<sup>26</sup>

Reducing the costs of trade is the second prosperity goal. To accomplish this, the SPP lowered trade transaction costs and made duty free treatment under NAFTA easier in order to move goods more efficiently.<sup>27</sup> The SPP is also working toward more efficient movement of people by facilitating the movement of businesspersons within the continent while reducing taxes and other charges residents face when relocating to different North American countries.<sup>28</sup>

The final prosperity goal is to enhance the quality of life. To achieve this goal the member states act as joint stewards of the environment; improving air quality, enhancing water quality, combating the spread of invasive marine species, protecting biodiversity, and protecting the oceans' ecosystems.<sup>29</sup>

The member states are also creating a safer and more reliable food supply while facilitating agricultural trade by enhancing food safety, laboratory coordination and work through the North American Biotechnology Initiative ("NABI") to develop a regulatory policy related to the agricultural biotechnology sectors in the individual countries.<sup>30</sup> Finally they will enhance public health coordination in disease prevention, improve the health of indigenous people, and adopt the best practices for registering medical products.<sup>31</sup>

### III. IMPLEMENTATION OF AGENDA

#### A. *Working Groups*

In order to improve productivity, reduce the costs of trade, and enhance the quality of life, the SPP established working groups "to fulfill

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23. *See id.*

24. *See Prosperity Agenda, supra* note 8.

25. *See id.*

26. *Id.*

27. *See id.*

28. *See id.*

29. *See Prosperity Agenda, supra* note 8.

30. *See id.*

31. *See id.*

the vision of the North American Heads of state.”<sup>32</sup> These groups are charged with consulting with stakeholders, setting specific, achievable, and measurable goals and implementation dates, and identifying steps the member governments can take to achieve these goals.<sup>33</sup> These groups are divided into 10 areas: manufactured goods and sectoral and regional competitiveness; movement of goods; energy; environment; e-commerce and information communications technologies; financial services; business facilitation; food and agriculture; transportation; and health.<sup>34</sup>

### *B. Current Projects and Accomplishments*

There are several security projects already underway.<sup>35</sup> In the area of traveler and cargo security, the member states agreed to develop biometric standards, such as digital fingerprints, for passports, visas, driver’s licenses and other traveler and border documents.<sup>36</sup> Member states are also developing ways to control the import and export of radioactive substances within North America.<sup>37</sup>

In order to coordinate bioprotection, the three member states are performing joint exercises within the public health and food systems to react to potentially vulnerable areas.<sup>38</sup> The member states have also developed a continental plan to respond to pandemic influenza.<sup>39</sup>

The SPP is coordinating the law enforcement and intelligence networks of the three states.<sup>40</sup> Prosecutors and investigators from all three countries are increasing cooperation with their North American counterparts to address coordination of security in areas such as organized crime, counterfeiting, drug and alcohol trafficking, and arms smuggling.<sup>41</sup> Trilateral law enforcement also coordinates antiterrorism efforts including sharing terrorist watch lists and other intelligence.<sup>42</sup>

The member states are also increasing border security by implementing hi-tech equipment along the borders<sup>43</sup> to increase the

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32. SPP.gov, Prosperity Working Groups, [http://spp.gov/prosperity\\_working/index.asp?dName=prosperity\\_working](http://spp.gov/prosperity_working/index.asp?dName=prosperity_working) (last visited Oct. 2, 2007).

33. *See id.*

34. *See id.*

35. *See* SPP.gov, Security Annex, at 49, available at [http://spp.gov/2006\\_report\\_to\\_leaders/security\\_annex.pdf?dName=2006\\_report\\_to\\_leaders](http://spp.gov/2006_report_to_leaders/security_annex.pdf?dName=2006_report_to_leaders).

36. *See id.*

37. *See id.* at 53.

38. *See id.* at 55.

39. *See id.* at 57.

40. *See* Security Annex, *supra* note 35, at 65-68.

41. *See id.*

42. *See id.*

43. The U.S. Department of Homeland Security is building a wireless border network between the United States and Mexico to be used to watch for illegal

efficiency of the secure flow of people and goods.<sup>44</sup> They also exchange research and information concerning cross-border infectious animal diseases.<sup>45</sup>

Several prosperity projects are underway.<sup>46</sup> In the area of manufactured goods, the SPP is working to make more compatible regulations for automobiles and automobile parts.<sup>47</sup> The three states are coordinating environmental regulations as they relate to automobiles and the automobile industry.<sup>48</sup> The SPP is giving Canadian and Mexican companies access to the U.S. Food and Drug Administration's medical devices "small business discount" to facilitate the trade of medical devices.<sup>49</sup>

The SPP reduced the "rules of origin" costs for goods traded within North America to facilitate movement of the goods across the borders.<sup>50</sup> The SPP also created common principles for e-commerce within the three member states.<sup>51</sup>

The Bush Administration pushed a project which, though not the official name, many call the "NAFTA Superhighway."<sup>52</sup> If realized, this superhighway will include lanes for trucks, trains, and utility lines that go from the Mexican border at Laredo, Texas to the Canadian border north of Duluth, Minnesota.<sup>53</sup> The long stretch of highway will enable foreign companies, such as those from China, to send cargo to seaports in

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immigrants. See Government Executive.com, [http://www.govexec.com/story\\_page.cfm?articleid=37393](http://www.govexec.com/story_page.cfm?articleid=37393) (last visited Feb. 7, 2007).

44. See Security Annex, *supra* note 35, at 77.

45. See *id.*

46. See SPP.gov, Prosperity Annex, at 6, available at [http://spp.gov/2006\\_report\\_to\\_leaders/prosperity\\_annex.pdf?dName=2006\\_report\\_to\\_leaders](http://spp.gov/2006_report_to_leaders/prosperity_annex.pdf?dName=2006_report_to_leaders) (last visited Oct. 6, 2007).

47. See *id.* Fifty-three percent of automobile parts imported into the United States comes from Canada and Mexico. See WILBUR L. ROSS, FED. RES. BANK OF CHI., PROSPECTS FOR AUTOMOTIVE SUPPLIERS (Apr. 18, 2006), available at [http://www.chicagofed.org/news\\_and\\_conferences/conferences\\_and\\_events/files/2006\\_uto\\_ross.pdf](http://www.chicagofed.org/news_and_conferences/conferences_and_events/files/2006_uto_ross.pdf).

48. See Prosperity Annex, *supra* note 46, at 6.

49. See *id.* at 8.

50. See *id.* at 12.

51. See *id.* at 14.

52. JEROME R. CORSI, THE LATE GREAT U.S.A.: THE COMING MERGER WITH MEXICO AND CANADA 91-92 (WND Books 2007). Corsi believes that the SPP, like NAFTA, is just a stepping stone to an ultimate plan to form a North American Union. He wrote in the foreword of the book that

More than a declaration of friendship by neighboring countries, the agreements made at the Waco summit were perhaps the reason our borders with Mexico and Canada have remained so porous . . . policy makers in the three nations and multinational corporations have placed the United States, Mexico and Canada on a fast track to merge together economically and politically.

*Id.*

53. See *id.*



Mexico and then ship the cargo to the United States and Canada.<sup>54</sup> Transport trucks and trains will not have to stop for U.S. customs until they reach the Kansas City “SmartPort.”<sup>55</sup> Though this “port” is located within the United States, it will most likely be considered Mexican soil.<sup>56</sup>

The first portion of this proposed “superhighway” is the Trans-Texas Corridor and is currently under construction.<sup>57</sup> The website of the Trans-Texas Corridor describes the project as “a proposed multi-use, statewide network of transportation routes in Texas that will incorporate existing and new highways, railways and utility right-of-ways.”<sup>58</sup> The proposed route for the corridor is 600 miles along Interstate-35 from the Mexican border to north of Dallas, Texas.<sup>59</sup>

There are also plans to develop four other transportation corridors: the Pacific, Atlantic, East and West corridors.<sup>60</sup>

#### IV. CONSTITUTIONAL AUTHORITY FOR FOREIGN POLICY AND TREATIES

##### A. *Executive Powers and Treaty Ratification*

Article II Section 1 of the United States Constitution states, “The executive Power shall be vested in a President of the United States of America.”<sup>61</sup> However, the Constitution fails to define “executive power.”<sup>62</sup> In his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*,<sup>63</sup> Justice Jackson opines that if the aforementioned clause constituted a grant of all executive powers of which the Federal government was capable, “it is difficult to see why the forefathers bothered to add several specific items, including trifling ones.”<sup>64</sup>

Justice Jackson laid out three categories in which executive power would fall, stating that first, when the President acts with Congressional authorization he “would be supported by the strongest of presumptions

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54. *See id.* at 92.

55. *Id.*

56. *See* CORSI, *supra* note 52, at 92.

57. *See id.* In January 2009, the Texas Department of Transportation announced that plans for the Trans-Texas corridor had been halted. *See* Michael A. Lindenberger, *Trans Texas Corridor is Dead, TxDOT Says*, THE DALLAS MORNING NEWS, Jan. 6, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/010609dnmetttc.43c00ac6.html>.

58. Trans-Texas Corridor Overview, <http://ttc.keeptexasmoving.org/projects/> (last visited Oct. 2, 2007).

59. *See id.*

60. *See* CORSI, *supra* note 52, at 120.

61. U.S. CONST. art. II, § 1.

62. *See id.*

63. 343 U.S. 579 (1952).

64. *Id.* at 579.

and the widest latitude of judicial interpretation. . . .”<sup>65</sup> Second, when the President does not act with Congressional authorization he may enter “a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>66</sup> Finally, when the President acts against Congressional will, “his power is at its lowest ebb.”<sup>67</sup> In *Dames & Moore v. Regan*,<sup>68</sup> the Supreme Court clarified this, stating that the President’s power does not fit neatly into Justice Jackson’s three categories “but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”<sup>69</sup>

Article II Section 2 of the U.S. Constitution states, the President “shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators concur. . . .”<sup>70</sup> The U.S. differs from most other states because here the term “treaty” has a particular meaning: it is an agreement made and signed by the President with the advice and consent of the Senate.<sup>71</sup>

Therefore, any agreement not signed by the President and not ratified by the Senate is not a treaty. However, the President has authority in conducting foreign affairs to enter into binding agreements without conforming to the rigid constitutional requirements of a treaty.<sup>72</sup> As with all executive powers, the authority to enter into binding agreements is stronger when acting pursuant to specific Congressional enactments and weaker when acting without Congressional consent.<sup>73</sup>

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65. *Id.* at 637.

66. *Id.*

67. *Id.* at 637-38.

68. 453 U.S. 654 (1981).

69. *Id.* at 669.

70. U.S. CONST. art. II, at § 2.

71. See DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 158 (Foundation Press 2001).

72. See *Robinson v. Harbert Int’l*, 743 F. Supp. 797, 801 (N.D. Ala. 1990). *Robinson* concerned the Compact of Free Association, which was not a treaty because it had not been ratified by the Senate. However, the Court found that,

the President’s authority in conducting foreign affairs includes the power to enter into certain binding agreements, such as the Compact of Free Association, with foreign nations without complying with the formal requisites of a treaty. The President’s authority to act is especially strong when the President acts pursuant to a specific congressional enactment. In this case, the President acted on the authority of 48 U.S.C. § 1681(a) (1954), and the results of his action, the Compact, received explicit congressional approval in the Act of 1985.

*Id.*

73. See *id.*

*B. Is the SPP a Treaty, Dialogue, or Executive Agreement?*

The SPP website claims it is not an agreement, nor was it signed by the President and ratified by the Senate.<sup>74</sup> Therefore, the SPP is not a “treaty” as defined by the Constitution.<sup>75</sup> Further, the SPP website claims that it is simply a dialogue between the three member states.<sup>76</sup> This seems to be a semantic maneuver to avoid legal responsibilities and is akin to calling a war a “conflict” in order to avoid the constitutionally necessary Congressional declaration of war. Dr. Jerome Corsi explains that the SPP is claiming to be a dialogue because,

constraints upon the Executive Branch demand such a labeling . . . [i]f written agreements resulted from the SPP, they would need to be submitted to Congress as legislation, or to the Senate as treaties for ratification, or published in the Federal Register as proposed rules changes.<sup>77</sup>

Is the SPP just a dialogue? A “dialogue” is defined as “1. a talking together, conversation[;] 2. interchange and discussion of ideas, esp[ecially] when open and frank, as in seeking mutual understanding or harmony.”<sup>78</sup> A literal interpretation of the word “dialogue” describes much of the work of the SPP. However, the SPP is moving beyond this definition and into something else. After all, the United States, Canada, and Mexico have had open dialogues for many years without ever forming anything so encompassing as the SPP before. As such, the SPP appears to represent something new and more than a simple dialogue. Does the SPP rise to the level of executive agreement?

The very name of the Security and Prosperity Partnership of North America implies an agreement. A partnership implies that the member states will work together accomplishing certain goals, not simply engaging in a dialogue. An “executive agreement” in the context of U.S. law is defined as “[a]n international agreement entered into by the President, without approval by the Senate, and usu[ally] involving

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74. See Myths vs. Facts, *supra* note 6.

75. *Id.*

76. *Id.* The SPP website’s list of myths and facts includes the following:

Myth: The SPP was an agreement signed by Presidents Bush and his Mexican and Canadian counterparts in Waco, TX, on March 23, 2005. . . . FACT: The SPP is a dialogue to increase security and enhance prosperity among the three countries. The SPP is not an agreement nor is it a treaty. In fact, no agreement was ever signed.

*Id.*

77. CORSI, *supra* note 52, at 78.

78. WEBSTER’S NEW WORLD COLLEGIATE DICTIONARY 380 (3d ed. 1997).

routine diplomatic or military matters.”<sup>79</sup> The President entered into the SPP without approval by the Senate, fitting the definition of executive agreement if it is in fact an agreement. “Agreement” is defined as:

1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons . . . [;] 2. The parties’ actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance.”<sup>80</sup>

Does the SPP fit the legal definition of agreement?

The member states already have certain goals and plans.<sup>81</sup> For example the SPP’s “2005 Report to Leaders” asserted that the three countries of the SPP signed a “Framework of Common Principles for Electronic Commerce” in order to develop trans-border online business within North America.<sup>82</sup> They have also reached an “arrangement on the Use of Care symbols on Textile and Apparel Goods Labels” to make uniform acceptance of care symbols in North America.<sup>83</sup> The leaders of the member states also signed a Declaration of Intent for the Conservation of North American birds and their habitats.<sup>84</sup> The SPP was used as a vehicle to modify agreements already in existence such as changing NAFTA to provide mechanisms giving temporary entry to professional workers within North America.<sup>85</sup> The member states also agreed to trilaterally support the World Customs Organization’s (“WCO”) Framework of Standards to Secure and Facilitate Global Trade.<sup>86</sup>

The “partnership” of the SPP acts much more as an agreement to implement various policies than a simple dialogue. However, it is important to determine whether the SPP operates with Congressional consent. According to the SPP’s website, “U.S. agencies involved with [the] SPP regularly update and consult with members of Congress on

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79. BLACK’S LAW DICTIONARY 610 (8th ed. 2004). If the executive makes an executive agreement with the consent of Congress the agreement will be a congressional-executive agreement and it will be more binding than a sole executive agreement. See JEFFERY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 281 (2006).

80. *Id.* at 74.

81. See CORSI, *supra* note 52, at 78.

82. SPP.gov, 2005 Report to Leaders, [http://spp.gov/report\\_to\\_leaders/index.asp?dName=report\\_to\\_leaders](http://spp.gov/report_to_leaders/index.asp?dName=report_to_leaders) (last visited Jan. 6, 2008).

83. *Id.*

84. See *id.*

85. See *id.*

86. See *id.*

[the SPP's] efforts and plans."<sup>87</sup> That statement is not completely accurate.

The best example of a lack of Congressional consent is the so-called "NAFTA Superhighway," discussed above. In early 2007, the Subcommittee on Highways and Transit of the Congressional Committee on Transportation and Infrastructure met with Jeffery Shane, the Undersecretary of Transportation for Policy at the U.S. Department of Transportation.<sup>88</sup> Undersecretary Shane was asked by the subcommittee specifically about the "NAFTA Superhighways."<sup>89</sup> He claimed that the "superhighways" were nothing more than an "urban legend."<sup>90</sup> However, following this meeting U.S. House Representative, Ted Poe<sup>91</sup> of Texas, stated that, "Mr. Shane was either blissfully ignorant or he may have been less than candid with the committee."<sup>92</sup> Apparently, Undersecretary Shane is not alone in his denial.

At the November 28, 2008 CNN/Youtube Republican Presidential debates, Presidential candidate and U.S. Congressman from Texas, Ron Paul<sup>93</sup> mentioned the "NAFTA Superhighway."<sup>94</sup> Following the debate,

87. Myths vs. Facts, *supra* note 6.

88. See World Net Daily.com, [hereinafter WND Urban Legend], plan for superhighway ripped as "urban legend," [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=53950](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=53950) (last viewed Jan. 6, 2007).

89. NAFTA superhighways are also known as "NAFTA Corridors."

90. WND Urban Legend, *supra* note 88. After Shane denied the existence of the NAFTA Superhighway, Congressman Virgil Goode said,

let's take Mr. Shane at his word. Let Mr. Shane come over here from the Department of Transportation and endorse House Concurrent Resolution 40 [opposing the NAFTA Superhighway]. . . . If, in his mind he's not doing anything to promote a NAFTA superhighway and he's not doing anything to promote the Security and Prosperity Partnership of North America, then he won't mind joining his voice with ours to be in opposition to any such "urban legend," as he so calls it.

*Id.*

91. *Id.* Congressman Poe also told World Net Daily that,

I don't understand why the federal government isn't getting public input on this. . . . We get comments like Mr. Shane's instead of our own government asking the people of the United States what they think about all of this. This big business coming through Mexico may not be good business for the United States . . . the public ought to make this decision, especially the states that are affected, such as Texas, Oklahoma, Kansas, and all the way through up to Canada. The public needs to make input on this. So, I don't understand, unless there's some other motive, why the public isn't being told about these plans and why the public is not invited to make input.

*Id.*

92. *Id.*

93. During the debate Congressman Paul stated,

And there is a move on toward a North American Union, just like early on there was a move on for a European Union, and eventually ended up. So we had NAFTA and moving toward a NAFTA highway. These are real things. It's not somebody made these up. It's not a conspiracy. They don't talk about it, and

the LA Times sought to determine whether there were plans for such a superhighway.<sup>95</sup> Ian Grossman, a spokesman with the Federal Highway Administration informed the Times “[t]here is no such superhighway like the one [Paul is] talking about. . . . It doesn’t exist, in plans or anywhere else.”<sup>96</sup> This statement is incorrect.

The government of Alberta, Canada has a map of four “NAFTA Trade Corridors” including one labeled “NAFTA Superhighway” on its Infrastructure and Transportation website.<sup>97</sup> The map shows the “NAFTA Superhighway” starting at the Mexico-Texas border and traveling up through the United States into Alberta.<sup>98</sup> The Texas route mapped on the Alberta website appears to follow the proposed route of the Trans-Texas Corridor number 35 (“TTC-35”).<sup>99</sup> Interestingly, forty-two U.S. Congressmen signed a resolution introduced by House Representative Virgil Goode of Virginia, opposing the “NAFTA Superhighway” the executive branch claims does not exist.<sup>100</sup>

Besides the obvious threats to separation of powers that are involved when the executive branch misleads Congress and the American people, there are other legal problems that arise. While describing the SPP as simply a dialogue lacking any formal agreement, the SPP essentially lacks the legal standing that would be afforded by a formal treaty or executive agreement. This presents international problems for the United States. Without Congressional consent, the

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they might not admit about it, but there’s been money spent on it. There was legislation passed in the Texas legislature unanimously to put a halt on it. They’re planning on millions of acres taken by eminent domain for an international highway from Mexico to Canada, which is going to make the immigration problem that much worse.

CNN.COM, CNN/YouTube Republican Debate Transcript, Nov. 28, 2007, *available at* <http://www.cnn.com/2007/POLITICS/11/28/debate.transcript/index.html>.

94. Stephen Braun, *Paul Believes in Threat of North American Superhighway*, L.A. TIMES, Nov. 30, 2007, *available at* <http://www.latimes.com/news/nationworld/politics/la-na-highway30nov30,1,4646522.story?coll=la-news-politics-national&ctrack=2&cset=true>.

95. *See id.*

96. *Id.*

97. *See* Infratrans.gov, NAFTA Trade Corridors & State Truck Standards, <http://www.infratrans.gov.ab.ca/2760.htm> (last visited Nov. 30, 2007).

98. *See id.*

99. *See id.*; *see also* Texas Department of Transportation, Strategic Plan 2007-2011, [http://www.keeptexasmoving.com/var/files/File/strategic\\_plan2007.pdf](http://www.keeptexasmoving.com/var/files/File/strategic_plan2007.pdf) (last visited Jan. 4, 2008). Even though the map of the NAFTA Superhighway is good evidence that there are at the very least plans to build the highway, some proponents continue to deny such plans. Some even suggest that talk of the superhighway is the work of conspiracy theorists. For example, Tiffany Melvin, executive director of NASCO, a consortium of transportation agencies and business interests, told the *LA Times*, “this is the work of fringe groups that have wrapped a couple of separate projects together into one big paranoid fantasy.” Braun, *supra* note 94.

100. *See* Braun, *supra* note 94.

President's authority to act is diminished,<sup>101</sup> and therefore, any plans he or she might make with his or her counterparts in Mexico and Canada through the framework of the SPP could be voided by the Congress or declared unconstitutional by the courts. This could be detrimental to the SPP's goals of increasing North American security and prosperity. However, if the President acts through Congressional consent, then any plans and agreements he or she makes through the SPP would be legally binding. Signing a formal treaty with the advice and consent of the Senate would guarantee U.S. compliance with the SPP's agenda. If a formal treaty is politically unattainable, the President should sign an executive agreement based on congressional authorization if he or she wishes to legally bind the United States to the tri-lateral partnership.

## V. NORTH AMERICAN COMPETITIVENESS COUNCIL

### A. *History and Purpose*

A year after founding the SPP, the leaders of the member states realized that to accelerate progress under the SPP it would be beneficial to receive direct advice from the private sector.<sup>102</sup> At the 2006 SPP summit Presidents Bush, Fox, and Prime Minister Harper called for business leaders from their respective countries to form the North American Competitiveness Council ("NACC").<sup>103</sup>

The U.S. Chamber of Commerce and the Council of the Americas jointly serve as the Secretariat for the NACC in the United States.<sup>104</sup> The Canadian Council of Chief Executives ("CCCE") serves as the Secretariat for the NACC in Canada<sup>105</sup> and in Mexico, the Instituto Mexicano para la Competitividad ("IMCO") serves as the Secretariat.<sup>106</sup>

The three heads of state charged the NACC with making recommendations and determining ways the private sector could itself contribute to North American prosperity.<sup>107</sup> In August 2007, the NACC submitted its initial report to the SPP, based on the consultations and deliberations of hundreds of North American companies, sectoral associations, and chambers of commerce.<sup>108</sup>

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101. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

102. See U.S. Chamber of Commerce, North American Competitiveness Council, <http://www.uschamber.com/issues/index/international/nacc.htm> (last visited Nov. 3, 2007) [hereinafter Chamber of Commerce].

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

107. See Chamber of Commerce, *supra* note 102.

108. See *id.*

### *B. Recommendations and Implementation*

The NACC's initial report included fifty-one recommendations divided into three sections: border-crossing facilitation, standards and regulatory cooperation, and energy integration.<sup>109</sup> The recommendations on border-crossing facilitation focus on measures for improving the efficiency of North American commercial exchange.<sup>110</sup> This section made recommendations for emergency management, post-incident resumption of commerce, expansion and improvements to border infrastructure, the movement of goods and the movement of people.<sup>111</sup>

Since trilateral regulatory cooperation is an essential tool for ensuring compatibility of new regulations, and eliminating or reducing differences in existing rules, the NACC supports working toward a framework for trilateral regulation within the section of standards and regulatory cooperation.<sup>112</sup> The section also emphasized the need for regulators and businesses to actively engage in developing global technical standards, especially in the areas of food and agriculture, financial services, transportation, and intellectual property rights.<sup>113</sup>

The NACC report also set forth integrations in the energy sector. The NACC recommended measures to heighten security of energy supplies by improving cross-border distribution systems, increasing supply of skilled labor in the energy field and joint development of clean and efficient energy technologies.<sup>114</sup> The report also focused on Mexico's need to accelerate the development of energy resources.<sup>115</sup>

Much of the NACC's recommendations have been implemented.<sup>116</sup> For example, on the recommendations of the NACC, border infrastructure improvement has taken place and all three member states have regularly conducted emergency management exercises and disaster planning simulations.<sup>117</sup> These exercises have included private sector participation.<sup>118</sup> The U.S. and Canada are working toward implementation of a new crossing at Detroit-Windsor, with the NACC

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109. *See id.*

110. North American Competitiveness Council, Building a Secure and Competitive North America, available at <http://www.uschamber.com/issues/index/international/nacc.htm> (follow "August 21, 2007 Building a Secure and Competitive North America" hyperlink) [hereinafter NACC].

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See* NACC, *supra* note 110.

116. *See id.*

117. *See id.*

118. *See id.*



participating in the planning of this crossing.<sup>119</sup> The SPP is also implementing the “trusted traveler” program which the NACC claims is an important step toward their long term goal—a single North American identification card or passport.<sup>120</sup>

The SPP is implementing the NACC’s recommendations concerning standards and regulatory cooperation.<sup>121</sup> For example, the SPP created a “Regulatory Cooperation Framework.”<sup>122</sup> The SPP also developed a trilateral Intellectual Property Rights (“IPR”) strategy.<sup>123</sup> The IPR strategy focuses primarily on ways to deter and detect trade in pirated and counterfeit goods, public awareness of the business community, and measurements to access progress in specific sectors.<sup>124</sup>

*C. Does the NACC Violate the U.S. Federal Advisory Committee Act?*

Judicial Watch, Inc., a not-for-profit, conservative, nonpartisan, education foundation filed a suit in U.S. District Court for the District of Columbia against The U.S. Department of Commerce in August of 2007, claiming that the NACC violated the Federal Advisory Committee Act (“FACA”).<sup>125</sup> The suit sought a judgment declaring the NACC to be an advisory committee, thus subject to control by the FACA.<sup>126</sup> Judicial Watch also sought to enjoin Defendants from continuing failure to comply with the FACA.<sup>127</sup>

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119. *See id.*

120. *See* NACC, *supra* note 110.

121. *See id.*

122. *Id.*

123. *See id.*

124. *See id.*

125. *See* Complaint, *Judicial Watch v. Dep’t of Commerce*, 501 F. Supp. 2d 83 (D.D.C. 2007) (No. 1:07CV01446), *available at* <http://www.judicialwatch.org/archive/2007/SPP.complaint.pdf>.

126. *See id.*

127. *See id.*

## VI. FEDERAL ADVISORY COMMITTEE ACT

### A. *The Act*

The FACA<sup>128</sup> states that “each advisory committee meeting shall be open to the public . . .”<sup>129</sup> and unless the President determines that national security purposes should prevent it, “timely notice of each meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.”<sup>130</sup> Furthermore, FACA states that “interested persons shall be permitted to attend, appear before, or file statements, with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.”<sup>131</sup> FACA also specifies that:

records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.<sup>132</sup>

The FACA defines an advisory committee as any “committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or subgroup thereof . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”<sup>133</sup>

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128. The Federal Advisory Committee Act was enacted in 1972 to ensure that advice by the various advisory committees formed over the years is objective and accessible to the public. The Act formalized a process for establishing, operating, overseeing, and terminating these advisory bodies and created the Committee Management Secretariat to monitor compliance with the Act. In 1976, Executive Order 12024 delegated to the administrator of GSA all responsibilities of the president for implementing the Federal Advisory Committee Act (FACA). Secretariat operations are directed at reporting to the president and Congress on the activities of at least 1000 federal advisory committees.

U.S. General Services Administration, Federal Advisory Committee Act Management Overview, <http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13170> (last viewed Feb. 9, 2008).

129. Federal Advisory Committee Act, 5 U.S.C. app. § 10 (2007).

130. *Id.*

131. *Id.*

132. *Id.*

133. Federal Advisory Committee Act, 5 U.S.C. app. 2 § 3 (2007).

*B. Specifics of the Judicial Watch Lawsuit*

The NACC facilitates actions between the SPP and the private sector.<sup>134</sup> According to Judicial Watch's complaint, the NACC and the U.S. Chamber of Commerce, as well as the governments of Mexico and Canada have committed to annual "ministerial-level" meetings with the NACC, as well as meeting with senior government officials two or three times a year to "engage on an ongoing basis to deliver concrete results."<sup>135</sup>

The NACC Executive Committee is comprised of fifteen large corporations and each member is charged with representing the sector in which its business operates.<sup>136</sup> The Executive Committee meets at least once a year with the Secretary of Commerce and working groups are scheduled throughout the year as needed.<sup>137</sup> The NACC Advisory Committee, made up of 200 large businesses, provides advice for the Executive Committee.<sup>138</sup>

On March 32, 2007, Judicial Watch sent a request to the U.S. Chamber of Commerce, asking to be allowed to "participate in all future meetings of the NACC, to include ministerial, Executive Committee and Advisory Committee meetings."<sup>139</sup> The U.S. Chamber of Commerce replied, stating that only invited officials and members of the Executive Committee could attend ministerial meetings, and membership on the Executive Committee was "only open to companies, sectoral associations, and chambers of commerce."<sup>140</sup>

Judicial Watch then contacted the Commerce Department and requested that they acknowledge that the NACC was an advisory committee and bring the NACC within compliance of the FACA.<sup>141</sup> After the Commerce Department failed to respond to this request, Judicial Watch filed suit in order to force compliance with the FACA.<sup>142</sup> As of this writing the suit is still pending.

*C. NACC and Compliance with the FACA*

To ascertain whether or not the NACC is violating the FACA, it must first be determined whether the NACC is an advisory committee

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134. See Complaint, *supra* note 125.

135. *Id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See Complaint, *supra* note 125.

140. See *id.*

141. See *id.*

142. See *id.*

within the meaning of the FACA. To be an advisory committee within the meaning of FACA, the NACC must satisfy two criteria.<sup>143</sup> First, the NACC must be a “committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or subgroup thereof.”<sup>144</sup> The NACC was created for the purpose of acting as a council to advise the governments of the SPP.<sup>145</sup> As such, the NACC satisfies part one of the definition.

Second, in order to be an advisory committee under the FACA, the NACC must have been “established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.”<sup>146</sup> The NACC was established for the purpose of advising and giving recommendations to the Commerce Department and the President of the United States as well as leaders and agents of Canada and Mexico.<sup>147</sup>

Having established that the NACC is an advisory committee within the meaning of the FACA, the next step is to determine whether or not the NACC has violated the provisions of the Act. To determine a violation there are four primary elements.<sup>148</sup>

First, the FACA mandates that meetings of advisory committees must be open to the public.<sup>149</sup> The NACC meetings are not open to the public.<sup>150</sup> According to Judicial Watch’s complaint, the U.S. Commerce Department sent Judicial Watch a letter stating that NACC meetings were only open to invited officials and members of the NACC committees.<sup>151</sup> Therefore the NACC violated the first provision.

Second, the FACA states that there shall be timely public notice of such advisory committee meetings so that interested persons may attend.<sup>152</sup> As the NACC considers itself to have closed meetings, the organization has no need to publish its meeting times.<sup>153</sup> However, this is a violation of the second element of FACA.

Third the FACA requires that “interested persons shall be permitted to attend, appear before, or file statements, with any advisory committee. . . .”<sup>154</sup> According to the complaint, Judicial Watch was

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143. See Federal Advisory Committee Act, 5 U.S.C. app. 2 § 3.

144. *Id.*

145. See Chamber of Commerce, *supra* note 102.

146. Federal Advisory Committee Act, 5 U.S.C. app. 2 § 3.

147. See Chamber of Commerce, *supra* note 102.

148. See Federal Advisory Committee Act, 5 U.S.C. § 10.

149. See *id.*

150. See Complaint, *supra* note 125.

151. See *id.*

152. See Federal Advisory Committee Act, 5 U.S.C. § 10.

153. See Complaint, *supra* note 125.

154. Federal Advisory Committee Act, 5 U.S.C. § 10.

denied permission by the U.S. Commerce Department the right to attend or appear before the NACC.<sup>155</sup> By denying permission the department violated this provision of FACA.

Finally, the Act specifies that "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying. . . ."<sup>156</sup> Judicial Watch's request for certain minutes from NACC meetings was denied.<sup>157</sup>

The NACC clearly violated the FACA by closing the meetings, not publishing the meeting times and places for interested persons, not allowing interested persons to appear before the committee, and not making their records and other information available to the public. This is important because the NACC is made up of private companies, meeting in secret, working for an international purpose, to set policy that could greatly change North America as a whole and the United States specifically.<sup>158</sup> The FACA was enacted for the very purpose of preventing influential private organizations from being able to influence government policy while hidden from the public eye. To allow continued violation of this by an organization that is working on greater integration within the North American continent would greatly undermine the entire purpose of the Act.

## VII. CONCLUSION

The Security and Prosperity Partnership of North America is constitutional, as the President has the authority to act in foreign affairs. The SPP is not a formal treaty and thus the President is not required to seek the advice and consent of the Senate. However, by acting without any Congressional consent, the President's power is in "a zone of twilight"<sup>159</sup> in whose authority it is uncertain.<sup>160</sup> Congress or the courts could undo everything the President is working toward with the SPP. If Congress prohibits all or part of the plans of the SPP, such as opposing the "NAFTA Superhighway," the President's authority is at its "lowest ebb."<sup>161</sup> This would make it unlikely for the courts to uphold the President's agreements, if the SPP is challenged by a plaintiff with standing. Furthermore, the NACC's possible violation of the FACA

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155. See Complaint, *supra* note 125.

156. Federal Advisory Committee Act, 5 U.S.C. § 10.

157. See Complaint, *supra* note 125.

158. See CORSI, *supra* note 52, at 64-65; NACC, *supra* note 106.

159. See *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952).

160. See *id.*

161. *Id.*

leaves the council open to lawsuits that could undo the work it did on the SPP's behalf.

Another issue that is currently taking shape is a new state sovereignty movement.<sup>162</sup> At least fourteen U.S. states have introduced bills into their legislatures to reclaim constitutional powers under the Tenth Amendment to the Constitution that supporters claim have been abrogated by the federal government of the United States.<sup>163</sup> The Texas legislature has already derailed the Trans-Texas Corridor, essentially burying plans for a NAFTA Superhighway.<sup>164</sup> Further assertions of state power may harm the SPP even more. If the SPP were a treaty, however, it would supersede state law.<sup>165</sup>

The final, and possibly largest legal issue with the continuation of the SPP, is that since it is not a treaty or even an agreement, the member states themselves are not bound. Newly elected national leaders could decide not to live up to the goals outlined by the SPP. Recently, for example, Mexican President Felipe Calderon stated that Mexico will not be participating in joint border patrols.<sup>166</sup> He also claimed that United States and Mexican cooperation does not imply joint participation of law enforcement agents.<sup>167</sup>

These problems should be rectified before the SPP's plans go forward to avoid having everything done thus far undone. Newly elected U.S. President Barack Obama has pledged to continue the trilateral partnership that President Bush began, and to further improve U.S. relations with Mexico.<sup>168</sup> To stave off potential future problems, it would behoove President Obama's administration to consider more binding agreements.

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162. See Larry Greenley, *Tenth Amendment Movement Taking Off*, THE NEW AM., Feb. 25, 2009, <http://www.thenewamerican.com/usnews/constitution/829>.

163. See *id.*

164. See Lindenberger, *supra* note 57.

165. *Missouri v. Holland*, 252 U.S. 416 (1920).

166. See Rosalba O'Brien, *Mexico Rules Out Joint Border Patrols with U.S.*, REUTERS, Mar. 30, 2009, available at <http://www.reuters.com/article/topNews/idUSTRE52T5YY20090330?feedType=RSS&feedName=topNews&rpc=22&sp=true>.

167. See *id.*

168. See Barack Obama: *I will repair our relationship with Mexico*, Op-Ed., THE DALLAS MORNING NEWS, Feb. 20, 2008, [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-obama\\_20edi.ART.State.Edition1.464da8e.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-obama_20edi.ART.State.Edition1.464da8e.html).

