9/13/93

Dear C-SPAN:

This letter concerns the North American Free Trade Agreement and questions its constitutionality. I oppose NAFTA. I have sent this letter to many Congresspeople with the hope of causing an inquiry into this aspect of the agreement. C-SPAN has greatly educated me and the public on the job-related consequences of NAFTA. I am sending you this letter for what it's worth to you. It presents a different question on NAFTA, one of which the public is barely aware. Thank you for all you have done for this country. Among my reasons for opposition to NAFTA, citing vol. 1, follow.

(1) NAFTA provides new incentives for businesses to move to Mexico through provisions not now available that protect foreign investments;

(2) NAFTA requires the "harmonization," "conformity," and "equivalence" of standards, a development which will certainly not result in an elevation of Mexico's low standards to our level but will cause ours to fall to a lower level (714, 908);

(3) NAFTA requires the United States to accept various Mexican professional licensing standards and permits these professionals, such as nurses, to enter the United States and compete for jobs in their fields at much lower wages (1603 (1));

(4) NAFTA lifts all trucking restrictions over time so that the lower Mexican trucking license standards for drivers who drive trucks subject to lax safety regulations and are permitted to exceed United States restrictions on the number of trailers etc, will be driving throughout the roads around our country (Annex 915.5.1-a (2));

(5) The claim that we now enjoy an export surplus with Mexico that will increase when the tariffs of 10% are removed is based mostly upon American companies exporting to themselves in Mexico and not to the Mexican consumer;

(6) Most of our health and saftey standards will be claimed to create an impediment to trade because Mexican goods are below those we have set for what is sold in this country and will thus be subject to NAFTA. NAFTA provides that standards may upheld only if they are based upon scientific evidence, and a fact question will arise as to whether science supports the standard (712.3 (b)). The fact question as to whether we have passed such a law for a good reason, a bad reason, any reason or no reason will be ignored. This provision abrogates the ability of this country to choose its own laws;

(7) NAFTA directs the United States to amend and to repeal various laws (Annex 1904.15), prohibits the use of our courts (Annex 1904.11), specifies what causes of action this country may or may not provide (2021), and confers standing on Mexico and Canada to intervene in our internal legal processes (1804, 1805), which must then take the intervenors' position into account in its decision;

(8) The manner in which disputes about our laws claimed to impinge on Mexican businesses' ability to "trade" – *e.g.*, its ability to sell goods and services which do not conform to our standards – is undesirable and possibly unconstitutional.

The subject of this letter is the last, the dispute-resolution mechanism of NAFTA. I believe that the procedure specified in Chapter 20 in particular violates the United States Constitution. I may be wrong. I have not heard this issue discussed. A related problem with NAFTA, that it affects our sovereignty, has been mentioned but, for some unknown reason, dismissed as frivolous. The transfer of power from our own institutions to those in NAFTA is one of the most far-reaching effects of this agreement. The envisioned diminution of our sovereignty is a policy choice which should be thoroughly discussed and understood. This discussion, however, presupposes that the diminution of our sovereignty inherent in NAFTA is legal. I think it is not legal, and that is the subject of this letter. I have heard no question raised as to whether the proposed transfer of power from the United States to the NAFTA panels may constitutionally occur. Due to the monumental seriousness of this question, I feel compelled to write you and raise it. Since you possess greater expertise and resources than I do, and because I have not thoroughly researched this issue, I ask that you use your capacities to ascertain the validity of my concerns. As the above indicates, however, my opposition to NAFTA goes well beyond its constitutionality and this letter is intended to express my opposition to NAFTA generally.

DISPUTE RESOLUTION PANELS

Passage of NAFTA will cause Congress to create the panels specified in chapters 19 and 20 of volume I. The dispute-mechansim in NAFTA will apply not only to disputes in interpreting the agreement but also to any of our laws that are claimed to interfere with the ability of business to enter our market Any law that results in an impairment, which means loss of a benefit which would accrue absent the law (2004), is subject to NAFTA jurisdiction. Our health and safety laws fall into this category. These laws restrict the ability to sell noncomplying products in the United States and can be described as barriers to trade that violate NAFTA.

Chapter 20 specifies the procedure for a NAFTA country complaining about the operation of a law on the ability of business to sell. After attempts to resolve the dispute by consultation and cooperation have failed, a NAFTA panel will be formed. (2008). Members are to be chosen from a roster whose members are supposed to be qualified in certain ways. These panelists are to be independent of, not affiliated with, nor receiving instructions from a NAFTA country (2009(2)(b)). They are expressly not government employees.

The panel will conduct at least one hearing. The panel's work – hearings, deliberations, initial report, and written material – are to be "confidential" which means secret (2012.) The panel then issues its initial report (2016). The only question before the panel is whether the law at issue is contrary to NAFTA and its effect is to prevent a benefit that would occur without the law. (2016 (2) (b)). No inquiry into the purpose of the law, the right of a country to pass it, the degree of protection it provides, the effect of its removal on anyone other than the complaining trader, the desirability, or any other aspect of the law is to be undertaken by the panel.

If a country disagrees with the panel's initial report, it may take various steps for a reconsideration. (2016 (4)) before the panel, which then issues its final report. The final report is the last consideration of the matter. The "appeal" therefore takes place before the same panel which issued the report appealed from.

The positions of the panelists are to be kept secret. (2017 (2)). The final report is then transmitted to the Free Trade Commission which can decide to keep the final report secret as well (2017 (4)). The Free Trade Commission is composed of cabinet-level appointees of the NAFTA governments (2001(1)). The final report is the resolution of the dispute and its orders are to be followed. In a case in which the panel decides that the law at issue violates NAFTA and causes impairment, the order may be carried out by the offending country causing the impeding law, or one that is proposed, to be removed or not implemented. If removal or nonimplementation of the law does not occur, the country refusing to do so will be required to pay compensation for the claimed harm (2018). If compliance with either of these does not occur within 30 days of the final report, trade sanctions are to be imposed against the recalcitrant country (2019).

Slightly different rules apply in antidumping and countervailing duty disputes. I don't know anything at all about this subject. It appears that a similar panel procedure occurs. There are two interesting provisions in this Chapter, 19. Article 1904.1 replaces judicial review of antidumping and countervailing duty disputes with the panels. 1904.11 prohibits a country from having domestic legislation which allows for judicial review of a final determination by the NAFTA panel. NAFTA thus

dictates the course of legislative and judicial activity in this country.

It is clear by this scheme, in which this country will be directed to change the law which prevents Mexico or Canada from receiving benefits or to pay damages otherwise, that trade and only trade can be dispositive as to the validity of our laws. Trade can override any other consideration in our society. NAFTA imposes a new reordering of our priorities and places the ability of foreign businesses to trade without restriction above all others. Laws which the NAFTA panels decree restrict trade unnecesssarily will be declared invalid. It is interesting to note that the NAFTA panels occupy a place parallel to our Supreme Court. Our laws must be approved by both. A finding by the Supreme Court that a law is constitutional is a necessary but not a sufficient condition for the survival of a law. The law must also satisfy NAFTA to be legally enacted or retained.

CONSTITUTIONALITY

It seems to me that these panels do not conform to any judicial body which has been found to be constitutionally permissible. Their existence and personnel violate the separation of powers doctrine, Article III, Article I, and the nondelegation doctrine. Their operation appears to violate the Fifth Amendment.

In a nutshell: I cannot see that the Constitution authorizes Congress to create panels of the type described in NAFTA. Conversely, although the Constitution does authorize Congress to create adjudicative bodies with jurisdiction over the subject matter of NAFTA, the bodies described in NAFTA violate the Constitution in their composition and operation.

Article III vests the judicial power of the United States in the federal courts. Congress determines the parameters of jurisdiction and confers subject matter by statute. Congress is free to allocate or not allocate any particular matter to the federal courts. There seems little question that Congress may, through NAFTA, chose to confer jurisdiction over it to a federal court as constituted per Article III.

But, of course, NAFTA does not comply with Article III. Instead of the compulsory lifetime tenure and the political check of Senate confirmation required for federal judges, NAFTA panels are to consist of persons, some of whom are not even citizens of this country, who are not subject to advise and consent and who lack lifetime tenure. These provisions exist to protect the independence of the federal judiciary, which is value in our form of government. The panels envisioned by NAFTA violate Article III. The structure of the Constitution expresses the importance of

separation of power, which itself is another value in our government. The NAFTA panels violate the letter of Article III and are not legitimate Article III courts. If they are legal, then they must flow from some other constitutional provision.

Article I permits Congress to delegate its legislative authority to administrative executive agencies. This delegation has been held not to violate Article III because these "Article I" courts do not have enforcement power. Agencies rely legally upon Article III courts to issue orders, judgments, affirmances on appeal, etc. The Article I courts are constitutional *only* because they under under the control of courts created under Article III.

NAFTA panels, however, do have enforcement power. And not only that, but the panels are expressly not subject to our domestic (Article III) courts. (Annex 1904.15 (8), (10)). This enforcement power and independence from our judiciary mean that these panels are not legitimate recipients of Congress' legislative delegation. They violate both Articles I and III, and both the separation of powers and nondelegation doctrines. And again, even if found to be creatable as administrative entities under Article I, their personnel procedures fail to conform to the safeguards of advice and consent which to which other agency personnel heads are subject. Even the most independent agency of the Federal Reserve, not amenable to political orders and not exercising any power of adjudication, must be confirmed by the Senate. The same is true for members of the International Trade Commission, an entity perhaps analogous to the NAFTA panels with jurisdiction over trade. Although the fact that the roster of panelists is dervied from the Commission, on which sits an executive appointee who has been subject to advise and consent, this confirmation process has not been undertaken for the Commission's Mexican and Canadian members. I can locate no adjucative entity in this country in which two-thirds of the adjudicators escape advise and consent as these panels do.

It is to be noted furthermore that the under NAFTA the Congress will attempt to confer some kind of judicial or congressional power to persons who are not cititzens of this country. I don't know the legal status of such an action, but the idea that foreigners not subject to advise and consent and operating in secret will possess the power to pass on the validity of the laws of the United States is intuitively aversive. Our Congress should think long and hard before authorizing unaccountable bodies whose decisions that we change our law or pay a fine are made by foreigners.

It appears then that the NAFTA panels may not be created under Article III or Article I, as illustrated above. If they are legal, then the Constitution must provide some other means for their creation. I discern no such means. One with which I am

unfamiliar may indeed exist, and this precise constitutional source under which Congress creates these NAFTA panels should be demonstrated. It must be shown as well that this precise constitutional source grants to these panels the scope of their power to issue final binding judgments, demand changes of our laws, and levy fines against the United States. Lacking this precise constitutional authority, the panels specified in NAFTA may not legally be created.

And the nationalities and selection process of the members of these panels must be scrutinized. The panels' gross deviation from the usual standards applicable to persons exercising adjudicative authority – noncitizens and private Americans not subject to Senate confirmation – must be justified. As noted above, advise and consent and lifetime tenures exist for a reasons which have been elevated to constitutional status and may therefore not lightly be avoided. The same is true of compliance with the very structure of our government, the separation of powers. It is not to be merely presumed that these NAFTA panels do not violate the Constitution. It is rather to be precisely demonstrated that a specific constitutional authority for their creation and the scope of their powers exists.

The same conclusion can be reached from starting at another angle. The constitutional function of these bodies is derived by looking at the NAFTA panels first and then defining their power. It seems to me that a body which says what the law is, which interprets that law, which decides cases by applying the law to the facts, which determines what parties' rights are under the law, which, pursuant to the law, issues binding judgments, and which is the sole arbiter of that law is exercising judicial power. If passed, NAFTA will be a law of the United States and will be enforced here. It seems to me that the NAFTA panels will be exercising the judicial power of the United States, which, of course, is reserved to those who comply with Article III. I think it cannot be said that orders directing the United States to pay fines and change laws can be described as anything other than the exercise of this country's judicial power. But if not the United States' judicial power, then whose? The Constitution recognizes no other judicial authority. The conspicuous absence of a NAFTA power in a document which contains a complete list of the powers of the federal government and a complete description of its constitution seems to me to be conclusive proof that the NAFTA panels may not legally be created.

But even if there is no constitutional problem in creation of the panels, the extent of their power, and their memberships, it seems to me that these panels will operate in a manner that violates the due process clause of the Fifth Amendment.

The due process clause protects the integrity and legitimacy of all adjudicative procedures. The operations of the NAFTA panels, however, fail to conform to the fundamental strictures which apply to every other such entity in this country. Due

process requires an open proceeding. In the NAFTA panels, by contrast, all hearings, deliberations, and the initial report, and all submissions to and communications with the panel are secret. (2012). Due process would also require that those participating on the panel be known to the public. NAFTA, on the other hand, provides that neither the identity of the panelists nor their position on the issue be disclosed. (2017). All participants on the NAFTA panels are subject to protective orders, the violation of which results in sanctions. (1901.12). Such an operation in the courts of this country would be intolerable.

It would seem additionally that due process should guarantee a right to appeal, lacking in NAFTA (1904.11). And to have the individuals sitting on the entity hearing the matter be of the same nationality of the complainant or defendant, not the case in NAFTA panels. Similarly, it would seem that those exercising jurisdiction over NAFTA matters should be employees of the government, not private individuals whose accountability is nil, whose allegience is elsewhere, who operate in secret and whose opinion and position may not be disclosed. Can any reader imagine the federal district court being made up of such people operating in that way? What about, for example, the FCC? Or how about a secret Supreme Court, a more apt comparison? It's unheard of and mind-boggling. I can find only one aspect of the panels' operation, the ability for one hearing, which complies with due process. The other many violations should prohibit the operation of the panels as envisioned. Because, as I understand it, Congress may not amend NAFTA to replace the unconstitutional operations of the panels, Congress should not authorize their creation to begin with.

APPLICATION

Beyond the ins and outs of the NAFTA panels will be their real-world operation. If the reader of this letter finds that they pose no constitutional problem, an example of their effect will illustrate the unacceptability of this NAFTA scheme. What will happen when a NAFTA panel finds that one of our health or safety laws creates an impediment to trade? Either the law must be removed or compensation paid. This country will have a rude awakening.

How likely are the citizens of this country to merely acquiese to the idea that a law we have passed for our own protection must be removed because it prevents foreign business from placing goods in our market which do not meet standards we have chosen to enact? Do you think the American people find that foreign business profits are more important than our ability to chose our own laws which reflect the level of safety we think is proper for our protection? Is it likely that we will respect

such an order emanating from a secret tribunal?

And can the taxpayers of this country reasonably be expected to fork over their money from the United States treasury to pay continuing damages to foreign businesses because of a law we have chosen for our own safety and protection? Since when are the taxpayers liable to foreign businesses and governments for exercising our right to protect our own health and safety? This is a ludicrous proposition. It amounts to penalizing the people of this country for having and using our own government. It prohibits us from establishing as a priority anything other than foreign business profits. Since when does this country allow foreign business to dictate our priorities? I for one find the idea that I must pay foreign businesses to be able to use my own government to pass the laws I chose to be outrageous and inconceivable.

Finally, there is the issue of the "side agreements," which I have not read but have only heard about. My understanding is that these labor and environmental agreements require the NAFTA countries to enforce their own laws or be subject to fines (after, of course, protracted and endless panel proceedings). Well, since when have the taxpayers of this country agreed to pay fines to other governments for labor or environmental violations by private U.S. businesses? We never have and never should. If I am right, then I challenge anyone with access to publicity to disclose to the public that this NAFTA will impose financial liability on them for labor and environmental misconduct by private business. And that use of their own government to enact laws for their own protection is no longer available free of charge but may require us to pay foreign businesses for the privilege of preventing them from placing products in our market with health and safety standards we reject. I cannot believe that Congress will allow this kind of thing to occur.

The NAFTA panels present many other problems. For instance, what is their legal status? What kind of entities are they? When these panels order us to remove a law and a citizen is then injured by the harm the law would have prevented, what is the injured citizen's recourse? NAFTA panels are granted immunity from suit or legal process (Annex 1901.2.(11)). And no other structure appears to exist within NAFTA which would be legally responsible for the harm caused, providing therefore no incentive whatsoever to prevent it. NAFTA purports to allow us to retain safety or other laws based on scientific evidence, but specificially prohibits us from establishing a legal cause of action that would challenge the panels' actions on the basis that they are inconsistent with our ability to keep such laws. In other words, this country may not provide for private rights or remedies under the agreement (2021).

Who has jurisdiction over NAFTA panels? What if Mexico wished to import a product which failed to meet a safety standard at a level which truly endangered the

public and then convened a panel which decided that the standard was a trade barrier and must be changed. To prevent this change, imagine that interested American citizens sought an injunction in a federal court, which agreed that the product posed an imminent danger and that it was likely that the litigants would succeed on the merits of the question at trial. The court issued a preliminary injunction against implemenation of the panel's order. Would this order have any force whatsoever against these NAFTA entities? Are we prepared to place ourselves in the position in which our federal courts have no power and need not be obeyed? These and other problems abound.

This is my analysis. And it may be right or wrong. I have to think it is the latter because the constitutionality of the NAFTA adjudication scheme is so basic that it should have been the first consideration in its conceptualization. But I can't see how the Constitution authorizes or permits this kind of adjudicative entity. This question is so important that I feel I must raise it, taking the risk that I am making huge errors which should and will embarrass me in a letter I am sending to important people. Please look into the constitutionality and ramifications of these NAFTA panels and then disclose your findings to the American people.

Thank you for reading and taking any action on this letter. You can see that this agreement contains many elements that are not in the best interest of this country. Please help defeat this NAFTA !

Very truly yours,

[redacted]

Lutherville, Md. 21093-5421

[redacted]