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The Death Knell of the Legislative Environmental Impact Statement: A Critique of Public Citizen v. U.S. Trade Representative

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I. INTRODUCTION

The North American Free Trade Agreement ("NAFTA") is an agreement between Canada, the United States, and Mexico that dramatically reduces trade barriers between the three countries. Since its inception in 1991, environmental organizations have been concerned about NAFTA’s potential impact upon the United States’ environment. The Agreement, and supplemental accords, contained little to placate the concerns of organizations such as the Sierra Club, Public Citizen, and Friends of the Earth, who feared that U.S. laws protecting public health and safety would be adversely affected by NAFTA. Ever since the early stages of

1. Public Citizen v. U.S. Trade Representative, 822 F. Supp. 21 (D.D.C.), rev’d, 5 F.3d 549 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 685 (1994). In the district and circuit courts, the Sierra Club and Friends of the Earth were also parties to the suit. Friends of the Earth did not join in the Supreme Court appeal.


4. See, e.g., Brief for Appellees, Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-560) [hereinafter Brief for the Appellees]; Sierra Club, Analysis of the North American Free Trade Agreement and the North American Agreement on Environmental Cooperation (1993). The organizations’ concerns about NAFTA included the potential preemption of state and federal health and safety laws, the lack of public access to dispute resolution procedures, and poorly-enforced environmental standards in Mexico. Id.
NAFTA negotiations, these organizations sought to attain an environmental assessment of NAFTA in accordance with the National Environmental Policy Act ("NEPA"). NEPA requires administrative agencies to prepare environmental impact statements for all proposals of legislation that might adversely affect the health of the public. Because the Office of the U.S. Trade Representative ("USTR") refused to prepare such an impact statement on NAFTA, the groups sought redress in the courts. In June of 1993, Public Citizen, Sierra Club, and Friends of the Earth won their case before Judge Ritchey in the U.S. District Court. In Public Citizen v. U.S. Trade Representative ("Public Citizen 2"), Judge Ritchey held that the Office of the USTR, the agency that negotiated the agreement, must prepare an environmental impact statement for NAFTA.9

On appeal, the district court decision was reversed. In Public Citizen v. U.S. Trade Representative ("Public Citizen 3"), the D.C. Court of Appeals held that the environmental impact statement requirement applies only if there is a final agency action. The court of appeals found that NAFTA was not a final agency action under the Administrative Procedure Act ("APA"), but would only become final when the President submitted the proposal to Congress. The court reasoned further that because presidential action is not subject to the APA, the APA did not apply to NAFTA and its implementing legislation. Consequently, the court found that the USTR need not fulfill the NEPA mandate that an environmental impact statement ("EIS") be prepared for any "recommendation or report on

7. Id. § 4332(2)(C).
9. Id.
13. Public Citizen, 5 F.3d at 551.
proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment."\textsuperscript{15}

The implications of this decision merit careful consideration because the net effect of the holding is to exclude the Office of the USTR from agency status under the APA and NEPA. As the USTR is granted primary responsibility for negotiating foreign trade agreements, no international agreement negotiated by this office will be subject to the EIS requirement of NEPA in the future. In fact, this decision casts doubt upon the role of the EIS in many administrative agency-related proposals for legislation because no agency-prepared materials are truly final until they are implemented or enacted by Congress.

This Note briefly explains the significance of the legislative EIS in order to illustrate what is at stake in the Public Citizen cases. This Note then compares the court of appeals' decision in Public Citizen v. U.S. Trade Representative with the decision of the district court. Next, this Note argues that the district court was correct in holding that NAFTA was a "final agency action" as defined by the APA, NEPA, and case law and, thus, that NAFTA should have gone through the EIS process. This Note then explores the potential impact of the court of appeals' decision on future trade agreements and other administrative agency actions. This Note concludes that NEPA's environmental impact statement, to fulfill its intended role, must be applied to foreign trade agreements.

II. THE PURPOSE OF THE LEGISLATIVE EIS

Public Citizen brought a series of cases to compel the USTR to prepare an EIS on NAFTA.\textsuperscript{16} Clearly, Public Citizen believed there was an important right at stake—the right to know how NAFTA would impact the U.S. environment. When Congress passed the National Environmental Policy Act of 1969, it provided a mechanism by which agencies must document and review the

\textsuperscript{15} Id. § 4332(2)(C).

potential impact of their actions. The purpose of NEPA is "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . ."

The EIS plays a primary role in achieving NEPA's goals. The Code of Federal Regulations explains:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the [National Environmental Policy] Act are infused into the ongoing programs and actions of the Federal Government. [The EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. It shall be used by Federal officials in conjunction with other relevant material to plan action and make decisions.

EISs are required for a variety of governmental actions. Specifically, they are required in all "recommendation[s] or report[s] on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." There are several different kinds of EISs: programmatic

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17. Congressional policy reasons for implementing the National Environmental Policy Act are explained in 42 U.S.C. § 4331:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . . Id.

The EIS is explained as the mechanism of choice to enforce the policies of NEPA in 42 U.S.C. § 4332:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . (C) include in every recommendation or report on proposals for legislation and other major Federal Actions . . . a detailed statement by the responsible official on the environmental impact of the proposed action. Id.


EISs are prepared for major federal actions, programs, plans, and policies, while site-specific EISs address changes in proposals later in an agency’s decision-making process. At issue in the Public Citizen cases is the legislative EIS, which exists to provide Congress and the public with information on the environmental effects of legislative proposals.

Public Citizen sought an EIS on NAFTA to force the USTR to contemplate the potential environmental risks that NAFTA could pose and to ensure that Congress could consider the EIS when voting on the North American Free Trade Implementation Act. Although the USTR had not prepared EISs for past trade agreements, nothing in the Trade Act of 1974, the APA, or NEPA exempted the Office of the USTR from NEPA requirements. Thus, Public Citizen brought suit to compel the USTR to comply with federal law and prepare an EIS.

III. PROCEDURAL HISTORY OF THE PUBLIC CITIZEN CASES

The controversy decided by the court of appeals on September 24, 1993 was clearly laid out in Public Citizen 2. In Public Citizen 2, the Government contended that NAFTA was not a final agency action—thus, no EIS was required. Public Citizen, on the other hand, asserted that because the USTR had completed preparation of NAFTA, it was required to prepare an EIS. Accordingly, Judge Ritchey held that NEPA requires the USTR to prepare an EIS for NAFTA and its implementing legislation. In granting Public Citizen’s motion for summary judgement, Judge Ritchey ordered the USTR to prepare an EIS immediately.

22. Bear, supra note 20, at 7-8.
23. 42 U.S.C. § 4332(2)(C). For an explanation of the purposes of the legislative EIS, see Izaak Walton League of America v. Callaway, 480 F. Supp. 972 (D.D.C. 1979), aff’d sub nom. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981). In Izaak Walton League, the court stated: “a legislative EIS is primarily prepared for the benefit of Congress.” Id. at 974. The court also stated that the legislative EIS exists “to provide detailed environmental information to the public to permit them to participate in a meaningful way in further decisionmaking both at the administrative and legislative levels.” Id. at 976.
26. Id. at 23.
27. Id. at 24.
28. Id. at 30.
29. Id. at 30-31.
The court of appeals reversed Judge Ritchey’s decision and decided the case on the narrower issue of whether the USTR action of negotiating NAFTA was final—that is, whether the President or the USTR was primarily responsible for the drafting of NAFTA.30

Public Citizen petitioned the Supreme Court for a writ of certiorari; however, the Supreme Court declined to review the appellate court’s decision on January 10, 1994.31

IV. ANALYSIS OF THE ARGUMENTS PRESENTED IN THE PUBLIC CITIZEN CASES

The Government put forth several arguments to support its position that an EIS was unnecessary for NAFTA.32 First, the Government asserted that NAFTA was an action of the President, and therefore was not, under the APA, subject to NEPA.33 The Government relied heavily on Franklin v. Massachusetts34 to support this contention. Second, the Government argued that NEPA’s application to NAFTA would conflict with the Trade Act of 1974.35 Finally, the Government asserted that NAFTA’s potential effect on the environment was too indirect and remote to be analyzed in an EIS.36

Public Citizen, on the other hand, argued that the USTR, and not the President, was primarily responsible for NAFTA.37 Public Citizen contended that the USTR was a federal agency and subject to the APA. Because it is subject to the APA, the USTR—like all other federal agencies—is subject to the require-

33. Id. at 19.
34. Franklin v. Massachusetts, 112 S. Ct. 2767 (1992). In this case, the Supreme Court held that the Secretary of Commerce’s compilation of 1990 census figures was not a final agency action under the APA. The census tally was only final once the President had reviewed the figures and made his recommendations for reapportionment to Congress. The President, not the Secretary of Commerce, was responsible for taking final action regarding the allocation of seats in the House of Representatives. Because executive actions are not reviewable under the APA, jurisdiction for review was denied.
35. Brief for the Appellants, supra note 32, at 19.
36. Id.
ments of NEPA. Public Citizen argued that the Trade Act of 1974 supported, rather than diminished, the proposition that NAFTA was a product of the USTR, and not of the President. Finally, Public Citizen argued that the environmental threat presented by NAFTA was sufficiently foreseeable and concrete to document in an EIS.

A. Subject Matter Jurisdiction under the APA

Central to the inquiry in Public Citizen 2 was whether the USTR qualified as an agency under the APA. This was important for two reasons. First, the judiciary's jurisdiction to review agency action comes from the APA. In Public Citizen 2, the plaintiffs gained standing to question the USTR's failure to prepare an impact statement under APA jurisdiction. Second, the USTR is only subject to NEPA if it is considered an administrative agency under the APA.

Because NEPA does not provide for a private cause of action if an agency fails to prepare an EIS, Public Citizen rested its cause of action upon the APA, which provides for subject matter jurisdiction of "final agency actions by a party adversely affected or aggrieved by agency action within the meaning of a relevant statute." Public Citizen alleged that its membership would be adversely affected by the USTR's failure to comply with NEPA. NEPA qualifies as a relevant statute under the language of the APA.

This raises two questions: (1) whether the USTR is an agency under the APA, and (2) what constitutes a final agency action sufficient to trigger review under the APA.

See also 5 U.S.C. §§ 551, 701.
1. The USTR is an Agency Under the APA

The USTR must qualify as an agency under the APA in order for NEPA's EIS requirement to apply. Under the APA, an agency is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." In Public Citizen, Judge Ritchey held that the USTR was an agency under the APA and that its action was final upon completing the negotiation of NAFTA. Congressional intent and case law demonstrate that the USTR is considered an agency for the purposes of the APA.

The following factors show that Congress intended the USTR to be considered an administrative agency for APA purposes. First, the Trade Act of 1974 is the legislative act that created the USTR and gave it agency status. The Trade Act supports the USTR's status as a federal agency by placing it in the Executive Branch. Further, the USTR's top officials are subject to the advice and consent of the Senate. Additionally, the USTR is responsible for making reports to Congress with respect to trade agreements and international trade negotiations. The USTR is also bound by the APA's Freedom of Information requirements.

Case law also supports that the USTR should be considered an administrative agency. Judge Ritchey pointed to the test set out in Soucie v. David for a common law definition of what

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47. 42 U.S.C. § 4332(2)(C).
52. 19 U.S.C. § 2171(a). In general, administrative agencies are part of the Executive Branch. This does not, however, relieve agencies of their APA obligations. GEOFFREY R. STONE, CONSTITUTIONAL LAW 413-33 (2d ed. 1991).
54. Id. § 2171(e)(1)(H).
56. 448 F.2d 1067 (D.C. Cir. 1971).
should be considered a Federal agency. In Soucie, the court of appeals held that "the APA . . . confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." In Public Citizen 2, the court held that because "[t]he Office of the United States Trade Representative has a separate statutory basis for its authority and has many separate responsibilities aside from assisting and advising the President . . . the [USTR] is an agency subject to the APA." Further, the Council on Environmental Quality, when explaining who must prepare an EIS, defines "Federal Agency" as "all agencies of the Federal government."

On appeal, the Government did not dispute that the USTR was an agency under the APA. Instead, the court of appeals directly addressed the finality requirement, found that the agency's action was not final, and thus was not reviewable by the judiciary.

2. NAFTA as Drafted by the USTR is a Final Agency Action Under the APA

The most critical point of the Ritchey holding, and the point upon which the case was overturned on appeal, was whether the USTR's role in drafting NAFTA constituted a final agency action. The facts support an affirmative answer to this question.

The USTR had a significant involvement in the preparation, negotiation, and drafting of NAFTA. Ambassador Carla Hills, the U.S. Trade Representative under President Bush, guided the negotiations. When Public Citizen challenged the USTR in 1993 for not preparing an EIS on NAFTA, there were many indicators of NAFTA's finality. For example, NAFTA as drafted by the USTR was accepted by representatives of the United States.

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57. Public Citizen, 822 F.2d at 25 n.4.
58. Soucie, 448 F.2d at 1073.
62. See Stuart Auerbach, U.S., Canada, Mexico Near Accord on Trade; Pact Would Remove Tariffs Over 15 Years, WASH. POST, Aug. 12, 1992, at F1; see also Brief for Appellees, supra note 4, at 4-6.
63. See Auerbach, supra note 62, at F1.
Canada, and Mexico on August 12, 1992. That same version of NAFTA was signed by President Bush on December 17, 1992. Finally, the language of NAFTA was not changed before it was submitted to and approved by Congress in the fall of 1993. In pointing to NAFTA as conceived of by the USTR, the plaintiffs were pointing to a specific proposal for legislation or other identifiable action or event which "at least arguably trigger[ed] the agency's obligation to prepare an impact statement." Public Citizen brought its suit seeking an EIS for NAFTA in 1993—after the USTR and President Bush signed the completed draft of the Agreement in 1992 without having prepared an EIS. Judge Ritchey found that NAFTA, at that point, constituted a specific proposal for legislation. He contrasted Public Citizen 2 with the 1992 case, Public Citizen v. U.S. Trade Representative ("Public Citizen 1"), in which Public Citizen brought a similar suit to require the USTR to prepare an EIS for NAFTA. In the earlier case, the court did not find final agency action because NAFTA was then still under negotiation.

For purposes of the APA, a proposal for legislation is final when it is specific and concrete. NAFTA as drafted and signed by Ambassador Hills was specific and concrete. By the time Public Citizen brought its suit, President Clinton had stated that he intended to submit the same version of NAFTA to Congress. Thus, even the President acted as if NAFTA was final once signed by the USTR.
Yet, the Government argued not only that NAFTA was not final at the time Public Citizen brought its suit, but also that the USTR was not the party responsible for it.\textsuperscript{75} The district court found that the USTR was the party substantially responsible for drafting NAFTA, as the Trade Act vests the USTR with responsibility “for conducting international trade negotiations, developing and coordinating United States trade policy and imposing any retaliatory trade sanctions on other countries.”\textsuperscript{76} The Trade Act itself sheds some insight on the responsibilities of the USTR in relation to final agency action.

\textit{i. The Trade Act of 1974}

A strong argument asserted by the Government to defeat the applicability of an EIS to NAFTA was the doctrine of separation of powers. The Government contended that the Trade Act of 1974 inextricably bound up the role of the President with the role of the USTR; therefore, any demand on the USTR to comply with APA procedures impermissibly intruded on the President’s domain.\textsuperscript{77} This argument is problematic. According to the Trade Act of 1974, the USTR “shall serve as the President’s chief negotiator in trade matters.”\textsuperscript{78}

Thus, Congress clearly delegated the power to negotiate foreign trade rules to the USTR. The President oversees the USTR’s actions, but the USTR is the one Congress vested with the power to negotiate foreign trade rules. The Government claimed that the USTR should be exempt from APA jurisdiction because it is an agency located “within the Executive Office of the President.”\textsuperscript{79} This language is non-conclusive. According to the general constitutional doctrine of separation of powers, Congress is the branch vested with the power to make law. Over time, however, Congress has developed a policy of delegating its power to make law to administrative agencies.\textsuperscript{80} Congress also realized

\textsuperscript{75} Brief for the Appellants, supra note 32, at 22-24.
\textsuperscript{77} Brief for the Appellants, supra note 32, at 13.
\textsuperscript{78} 19 U.S.C. § 2171(c).
\textsuperscript{79} Brief for the Appellants, supra note 32, at 13.
\textsuperscript{80} STONE, supra note 52, at 413-33. Stone explains that “the conventional understanding that the legislature is the exclusive lawmaker—no longer reflects reality. . . . [A]dministrative agencies, which are generally part of the executive branch, have been
that this delegation of power could potentially impact the public. Thus, Congress passed the APA to provide judicial review of administrative agency actions.81

Conceptually, administrative agencies are located within the executive branch.82 Thus, the assertion that the USTR is located in the executive office contradicts the contention that it is exempt from the mandates of the APA. Congress delegated the power to make laws concerning foreign trade to the USTR, and Congress defined the USTR as being located within the executive branch.83 The USTR, like any other agency, was created by Congress and is governed by the APA. The USTR even considers itself an administrative agency for the purposes of complying with the Freedom of Information policies and procedures of the APA.84

ii. Supplemental Agreements Are Not Relevant to NAFTA’s Finality

The Government also implied that President Clinton’s negotiation of side agreements before submitting NAFTA to Congress was further evidence that NAFTA was not final.85 Yet, the side agreements to NAFTA were not a part of NAFTA and were not subject to the bicameralism and presentment requirements that all legislation must undergo.86 They did not require congressional approval to be effectuated. Rather, the side agreements were executive agreements between President Clinton, the President of Mexico, and the Prime Minister of Canada. Nothing in NAFTA acknowledges the existence of the supplemental agreements, nor does anything bind Mexico, Canada, and the United States to follow them. The supplemental agreements are

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81. Id. See also 5 U.S.C. § 702, which provides for judicial review of administrative agency actions.
82. See Stone, supra note 52, at 415.
83. See 19 U.S.C. § 2171(a) (stating that "there is established within the Executive Office of the President the Office of the United States Trade Representative."). See also § 2171(c)(1)(A) (stating that "The United States Trade Representative shall have primary responsibility for developing, and for coordinating the implementation of, United States international trade policy . . . ").
85. Brief for the Appellants, supra note 32, at 16.
86. See U.S. Const. art. I, § 7, cl. 2. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it . . . ." Id.
"gentlemen's agreements," which did not implicate NAFTA's finality in any way.

NAFTA itself could only be changed by reopening negotiations with Mexico and Canada, which the President did not do. NAFTA became final during the Bush Administration.87 The fact that President Clinton drafted supplemental agreements to try to correct the portions of NAFTA he found unsatisfactory, rather than reopen negotiations, supports NAFTA's finality. Accordingly, in Public Citizen 2, Judge Ritchey found that the negotiation of side agreements did not affect the finality of NAFTA itself.88

iii. The Effect of Fast Track Legislation

NAFTA was not just a treaty; it was a composition of implementing legislation that needed to be signed by both Houses of Congress to take effect.89 As NAFTA was "fast track" legislation, it was submitted to Congress exactly as drafted by the USTR and could not be amended.90 Once NAFTA was submitted for consideration, Congress had ninety days to debate and vote on the Agreement.91 To prove that the President, and not the USTR, had primary responsibility for NAFTA, the Government argued in Public Citizen 2 that the purpose of "fast track" procedures is to bolster the President's accountability and negotiating power with foreign nations.92 "Fast track" gives the President "the ability to assure his negotiating partners that the agreement reached internationally would be the agreement voted on at home."93 Further, the President has stated that fast track "means that we will not

87. President's Remarks on Signing the North American Free Trade Agreement, supra note 65, at 2362.
90. See 19 U.S.C. §§ 2191-2194, 2902-2903 for requirements of fast track approval process.
91. Id.
92. Brief for the Appellants, supra note 32, at 14 n.2.
93. President's Remarks at the Presentation Ceremony for the Small Business Person of the Year Award and an Exchange with Reporters, 27 WEEKLY COMP. PRES. DOC. 574 (May 7, 1991).
tinker with trade agreements worked out by our negotiators and their foreign counterparts.'

This statement directly contradicts the Government's contention that NAFTA was not final once the trade representatives of Canada, Mexico, and the United States concurred that it was.

The prevailing argument in Public Citizen 3 was that NAFTA was not final until the President submitted it to Congress because the President reserved the right to amend the Agreement until that time. Yet, the President himself stated that the term "'fast track' promises that we will not attach amendments or make changes, since to do so could force negotiators to call off talks or start again from square one." The purpose of the "fast track" procedure is to assure that agreements negotiated and finalized abroad will be the ones approved at home and to specifically discourage the President from altering agreements once the USTR completes them.

Although in theory the President reserved the right to amend or alter NAFTA, he did not. The version of NAFTA submitted to Congress was the same draft approved by representatives of Mexico, Canada, and the United States. In order to alter NAFTA, the President would have had to reopen negotiations with Mexico and Canada and undercut his own explanation of the purpose of "fast track." That NAFTA was negotiated and passed according to "fast track" procedures greatly supports the contention that it was complete when it left the USTR's hands. The President's role in finalizing NAFTA was largely procedural. The substantive portion of the Agreement was drafted by the USTR, and the "fast track" procedure ensured that the USTR's substantive draft was offered for Congressional approval. Consequently, Judge Ritchey had ample evidence to support the proposition that

94. See President's Remarks and a Question-and-Answer Session at a Meeting of the Society of Business Editors and Writers, 27 WEEKLY COMP. PRES. DOC. 537 (May 1, 1991) (emphasis added).

95. Public Citizen v. U.S. Trade Representative, 3 F.3d 549 (D.C. Cir. 1993).

96. See President's Remarks and a Question-and-Answer Session at a Meeting of the Society of Business Editors and Writers, supra note 94.


98. Trade Representatives from Mexico, Canada, and the United States signed NAFTA on August 12, 1992. Auerbach, supra note 62, at F1. Although implementation of the Agreement depended upon approval by the legislatures of the three countries, NAFTA was in its final form—the form it was in when considered by those bodies—at the time Public Citizen brought suit seeking an EIS.
NAFTA was final upon the USTR’s signing, and not at a later date.

iv. The Council on Environmental Quality’s Interpretation of Final Agency Action under NEPA

An agency is only required to prepare an EIS for legislative proposals that might adversely affect the public’s health.99 At issue in the Public Citizen cases is what constitutes a proposal for legislation sufficient to trigger the EIS requirement. One explanation comes from the Council on Environmental Quality (“CEQ”).100 The Supreme Court has stated that the CEQ’s “interpretation of NEPA is entitled to substantial deference.”101 In Public Citizen 2, the district court yielded to this deference.102 The CEQ provides specifically that, for purposes of NEPA:

[L]egislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . . The test for significant cooperation is whether the proposal is in fact predominately that of the agency rather than another source . . . . Proposals for legislation include requests for ratification of treaties.103

Case law supports the contention that a federal agency is still required to prepare an EIS even if a project is not exclusively that agency’s endeavor.104 Courts consider whether the proposal is predominantly that of the agency to be persuasive.105 Thus, even if the President had some input, the USTR was the entity predominantly in charge of NAFTA. Although the Government contended in the Public Citizen cases that Presidents Clinton and Bush

104. See Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D.Cal. 1985) (holding that various federal agencies violated NEPA when they failed to prepare an EIS before issuing construction permits on federally-owned land); Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (holding that when the U.S. Corps of Engineers granted a permit for part of a construction project, an EIS was required for the entire project).
105. Id. See Council on Environmental Quality, NEPA and Agency Planning, 40 C.F.R. § 1501.5. See also Bear, supra note 20, at 5 (“When there is more than one federal agency either proposing an action or involved in the same action or group of actions, a ‘lead’ agency supervises the preparation of the EIS.”).
played "a direct personal role at every stage of NAFTA pro-
cess," the USTR is vested by law with the "primary responsi-
bility for developing, and for coordinating the implementation of, United States international trade policy . . . ." Furthermore, the USTR has "lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations . . . ." Although the President plays a role in guiding the agency's policies, the Office of the USTR, and not the President, crafted the proposal for NAFTA and its implement-
ing legislation.

If the court of appeals in Public Citizen had heeded the CEQ's determination that "proposals for legislation [must be] predominantly that of the agency . . . [and] include requests for ratification of treaties," then it would have considered NAFTA a proposal for legislation sufficient to trigger the EIS requirement. NAFTA was primarily the action of a federal agency (the USTR), and it is a proposal that will have a significant effect on the human environment. These facts make it difficult to understand how the guidelines of the CEQ, which define what is considered an agency action sufficient to trigger the EIS requirement, can be interpreted to mean anything other than that the USTR is required by law to prepare an EIS on its proposal for legislation—NAFTA.

Still, the court of appeals found there was no basis on which to compel the USTR to prepare an EIS. Although the court did not determine whether the USTR was an agency, it did find that the USTR's action in preparing NAFTA was not final. As the court can only review final agency actions, it found there was no mechanism for review under the APA.

B. The Purpose of the Legislative EIS is Thwarted if It Does Not Apply to NAFTA

The goal of the legislative EIS is to spur administrative agencies to consider potential environmental consequences while

106. Brief for the Appellants, supra note 32, at 22.
108. Id. § 2171(c)(1)(C).
111. Id.
112. Id.
preparing proposals for legislation, as well as to ensure that Congress and the public are informed of the environmental impact of legislative proposals.113 The Supreme Court has noted that "the thrust of [the EIS] is ... that environmental concerns be integrated into the very process of agency decisionmaking. The 'detailed statement' it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions."114

The court of appeals, in making the threshold for final agency action so high, may have thwarted the purpose of the EIS altogether. In Public Citizen 3, the court of appeals effectively held that an agency's proposal for legislation can be prepared and presented to Congress without environmental review, and that no one has standing to challenge it. This clearly does not fulfill the above-articulated intentions of the EIS as defined by the Supreme Court.

In Weinberger v. Catholic Action of Hawaii/Peace Education Project,115 the Supreme Court held that the EIS:

[T]hus serves twin aims. The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process. Through the disclosure of an EIS, the public is made aware that the agency has taken environmental considerations into account.116

With respect to NAFTA, the EIS would have forced the USTR to contemplate the potential environmental concerns NAFTA might generate. In turn, the USTR would have had the opportunity to address those concerns within the Agreement, rather than omitting considerations of environmental consequences or leaving them to be dealt with in non-binding supplemental accords.117

113. Bear, supra note 20, at 3.
116. Weinberger, 454 U.S. at 143.
117. If the USTR had been required to prepare an EIS on NAFTA, it would have identified environmental hazards such as the pollution at the United States-Mexico border and consequently, might have included a provision within NAFTA to address the condition. Instead, President Clinton attempted to address border clean-up in non-binding supplemental agreements to NAFTA. The disadvantage of having environmental concerns dealt with only in side agreements is that side agreements are not legislation; rather, they are executive agreements. Consequently, they are not ratified by Congress and are not
EIS jurisprudence is somewhat conflicting. Following the enactment of NEPA, courts have "repeatedly held that an agency's failure to prepare a legislative EIS on the proposal is subject to judicial review."

When an agency issues a license to build a power plant, or leases federal lands for mining, the courts have not waited until the private company begins operating the plant or mining the land to review EIS claims. According to established NEPA jurisprudence, the time for judicial intervention is "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." Conflicts typically arise regarding the time when an agency action is sufficiently complete to be open to challenge for lack of an EIS.

Public Citizen's first challenge to the USTR's failure to prepare an EIS in 1992 illustrates this friction. At that time, the district court held that there was no agency action in place to trigger NEPA's EIS requirement because NAFTA was still in the negotiation stage. When Public Citizen brought its second suit in 1993, however, the USTR had finalized NAFTA. According to the holding in Public Citizen 1, then, the court should have found that NAFTA was a sufficiently complete agency action. Yet, in Public Citizen 3, the court of appeals ruled that the USTR's version of NAFTA was not a final agency action sufficient to trigger the EIS requirement. Thus, there remained no judicially appropriate time to question the lack of an EIS on NAFTA.

This obstacle to enforcement contradicts the essential purpose of the EIS. The EIS exists in order to provoke contemplation of enforceable against the United States, Canada, or Mexico.

118. Brief for the Appellees, supra note 4, at 40.
122. Id.
123. The court of appeals found that NAFTA was not a final action of the USTR because the President had final responsibility for submitting NAFTA to Congress. Public Citizen v. U.S. Trade Representative, 5 F.3d 549, 553 (D.C. Cir. 1993). The Court did not find that NAFTA itself was incomplete. Id. For further discussion, see supra parts IV(A)(1) and (2).
124. If this holding is followed to its reasonable conclusion, no foreign trade agreement negotiated under the Trade Act of 1974—such as the General Agreement on Tariffs and Trade—will be challengeable under the APA.
the potential environmental impact of agency proposals while the actions are being developed, as well as to provide information and insight to Congress. Yet, under the court of appeals' reasoning, courts can only recognize a challenge for the failure to prepare an EIS when an agency presents a final proposal without one, and the challengers can prove that the agency action will directly affect them.

V. THE PRESIDENT'S ROLE IN NEGOTIATING NAFTA

In Public Citizen 3, the Government argued that the President, and not the USTR, was primarily responsible for NAFTA because the President was required to submit NAFTA to Congress for approval. The Government argued that the judiciary does not have jurisdiction to order an EIS in compliance with NEPA because the President's actions are not subject to judicial review under the APA. The court of appeals agreed. A panel of three judges accepted Franklin v. Massachusetts as controlling and found that the USTR's action was not final. Consequently, the action was not subject to such review because such review is limited to agency action and not to Presidential action.

A. Franklin v. Massachusetts is Distinguishable from Public Citizen v. U.S. Trade Representative

In Franklin, the Supreme Court found that there was no final agency action when the Secretary of Commerce submitted the

126. In Public Citizen, the circuit court followed the holding of Kleppe v. Sierra Club: "[T]he moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a proposal for federal action.'" Kleppe v. Sierra Club, 427 U.S. 390, 405-06 (1976) (citing Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 283, 320 (1975)). Thus, no cause of action can arise for failure to prepare an EIS until the proposal is made without one. Public Citizen, 5 F.3d at 554.
127. Public Citizen, 5 F.3d at 551.
129. Public Citizen v. U.S. Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993). See also Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (holding that the President is not an agency within the meaning of the APA).
130. 112 S. Ct. 2767 (1992). See supra note 34 for a concise description of the Franklin case holding and infra part V(A) for a discussion of the Franklin case.
131. Public Citizen, 5 F.3d at 550.
132. Id. at 549.
The Court believed that the Secretary of Commerce's proposals for congressional redistricting were only recommendations to the President, not final proposals subject to rubber-stamp approval. The final action occurred only when the President submitted his proposal to Congress for reapportionment of congressional districts. Relying on Franklin, the Government argued in Public Citizen 2 that the need for the President to submit NAFTA to Congress meant that the USTR's version of NAFTA was not yet final. Because there was no final agency action, there was no APA jurisdiction. Additionally, the Government emphasized that NAFTA was really presidential action, and such actions are not subject to review under the APA.

The Government analogized the situation in Franklin to that of Public Citizen 2, although Franklin addresses neither NEPA nor the EIS requirement. The Government asserted that like the census data, NAFTA must be submitted to Congress by the President to become "final." Thus, there was no final agency action under the APA to be reviewed by the court.

Public Citizen, in contrast, argued that the census data provided by the Secretary of Commerce to the President was preliminary, and it was left to the President to use the data to make recommendations for reapportionment of congressional districts. These circumstances differ from those surrounding NAFTA. NAFTA was not a preliminary recommendation subject to the President's alteration. The President did not change the USTR's version of NAFTA before submitting it to Congress.

In order to avoid jurisdiction under the APA, the Government also argued that NAFTA was not final because the President was not obligated to submit NAFTA to Congress. Public Citizen rebutted this argument by pointing out that even though

133. Franklin, 112 S. Ct. at 2767.
134. Id. at 2770.
135. Id.
137. Id.
139. Brief for the Appellants, supra note 32, at 19.
140. Id.
141. Id.
142. Brief for the Appellees, supra note 4, at 38.
the President had the power to submit NAFTA to Congress, the USTR's obligation to prepare an EIS was an independent statutory duty and, thus, was reviewable as soon as the negotiation process was completed without complying with NEPA. The district court, accepting Public Citizen's argument, found that according to case law, "NEPA requires that an EIS must be prepared for legislative proposals." Thus, "case law is clear that an EIS must be prepared once such a proposal is completed . . . its submission to Congress is not required." On appeal, however, the panel relied on Franklin and found that "the core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." In Public Citizen 2, the court of appeals found that unless NAFTA was submitted to Congress, NAFTA would not directly affect the plaintiffs. Additionally, the court held that NAFTA was not a final agency action unless and until the President submitted the Agreement to Congress.

This reasoning is inherently contradictory. When the USTR completed its negotiation process, NAFTA was final. Yet, the court of appeals ruled that NAFTA could not be considered final until the President took further action, even though the Agreement itself would not change. According to this ruling, a product of the USTR will never be deemed final, although the USTR is considered a federal agency, and thus should be subject to NEPA and the APA. Surely, the court did not intend this problematic result.

A decision based on the President's foreign policy powers or on the Trade Act of 1974 would have been more consistent with

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144. Id. at 552.
149. Public Citizen, 5 F.3d at 550.
150. Id.
151. See President's Statement on the Completion of Negotiations on the North American Free Trade Agreement, supra note 64; President's Remarks on Signing the North American Free Trade Agreement, supra note 65.
prior APA jurisprudence. In Public Citizen 3, however, the court's holding effectively nullifies the legislative EIS by requiring that a federal agency action be final enough to directly affect the parties seeking resolution.

B. The "Direct Effects" Test

The "direct effects" requirement arising from Public Citizen 3 makes it very difficult for an agency action to be considered "final" under the APA, and contradicts prior APA jurisprudence. The court of appeals explained the "direct effects" test in the following manner: "[t]o determine whether an agency action is final, 'the core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'"\(^{152}\) The role of many federal agencies is to formulate proposals for legislation that will only become final after revision and approval by Congress. Under the "direct effects" test, the only point at which an agency's proposal will become final is if Congress implements the proposal. This test defeats the purpose of the legislative EIS, which is meant to provide information to Congress and the public on the potential environmental impact that legislation will have if it is in fact implemented.\(^{153}\)

To justify this result, the Government argued that Franklin should only apply when the President is responsible for taking final action on an agency proposal and has not delegated that power.\(^{154}\) The court of appeals explained that Franklin applied to "those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."\(^{155}\) The problem with expanding Franklin's "direct effects" test beyond instances where the President has final, if symbolic, responsibility for implementing administrative agency actions can be explained as follows:

To the extent that Franklin stands for the proposition that the APA provides no basis for obtaining substantive review of

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152. Public Citizen, 5 F.3d at 550-51 (citing Franklin v. Massachusetts, 112 S. Ct. at 2773 (1993)).
153. See supra part II for a discussion of the purpose of the legislative EIS.
advice given by agencies to the President, it hardly revolutionizes the legal landscape.

The Office seeks to expand Franklin greatly to preclude challenges to agencies' violations of their independent statutory obligations, whenever the violations relate to matters on which the President has final decisional authority. Thus, the "direct effects" test implicates many actions in which the executive branch plays a nominal role in the "final" submission of agency proposals to Congress. Public Citizen identified the problems inherent in the "direct effects" test:

If judicial review is unavailable simply because some other entity in the Executive Branch . . . must do something else before the action will be final, in all senses of the word, and its harm can be felt by the plaintiffs, the legislative EIS requirement can be written out of NEPA. Indeed, if a legislative proposal is not final for APA purposes until Congress enacts it, then a NEPA legislative EIS challenge would become moot at the same moment it became ripe.

Public Citizen argued that Franklin should apply only in instances when the President must take some discretionary action to make the agency proposal final, as in Franklin itself, where the President was statutorily obligated to decide how to use the census figures in the reapportionment of congressional districts. NAFTA, like many other agency actions that flow through the executive branch, was finalized by the USTR and did not require a Presidential discretionary act for its completion.

In the concurring opinion to Public Citizen 3, Judge Randolph expressed concern that the holding effectively nullifies the "legislative EIS" requirement. He stated that holding administrative agency proposals for legislation to a "direct effect" test before the action is subject to judicial review could end the requirement:

[It] is difficult to see how the act of proposing legislation could generate direct effects on parties, or anyone else for that matter. . . . [O]nly a Member of Congress may introduce a bill embodying the proposal, and even then no one will be affected, directly

156. Brief for the Appellees, supra note 4, at 37.
157. Id. at 45.
158. Public Citizen, 5 F.3d at 553.
159. Id. Judge Randolph explained only that he concurred in the result but did not offer a separate rationale. His concurrence seemed skeptical of the majority's attempt to limit Franklin's holding in a way that would preserve the legislative EIS. Id.
or otherwise, unless and until Congress passes the bill and the President signs it into law. If one takes Franklin at its word, a legislative proposal’s lack of any direct effects would seem to mean that there can be no final action sufficient to permit judicial review under the APA.  

In attempting to protect the USTR from having to comply with NEPA’s environmental impact statement requirement, the court of appeals may have initiated a trend that prohibits anyone from compelling an agency to fulfill the EIS obligation. The language used in Public Citizen 3 makes it unlikely that this holding can be limited to foreign trade agreements.

VI. THE IMPLICATIONS OF THE PUBLIC CITIZEN CASES ON FOREIGN POLICY AND ADMINISTRATIVE AGENCY ACTIONS

Another argument the Government asserted in the Public Citizen cases against application of the EIS requirement to NAFTA was that if APA jurisdiction was granted over the USTR, it would violate the separation of powers doctrine. The Government alleged that subjecting NAFTA to the APA would infringe upon the President’s power to conduct foreign affairs. The district court, however, found that an exercise of APA jurisdiction in this case did not infringe upon the President’s power to conduct foreign policy, because the Agreement was final and the only remaining action was the domestic one of submitting the legislation to Congress. Judge Ritchey also noted that Article I, Section 8, Clause 3 of the Constitution gives Congress the power to regulate foreign commerce. The notion that Congress has a broad plenary power to regulate foreign commerce is well established. Both Houses of Congress needed to approve NAFTA, as it is composed of legislation that affects local, state, and national

160. Id. at 553-54.
162. Brief for the Appellants, supra note 32, at 26-27.
163. Public Citizen, 822 F. Supp. at 27. “The EIS requirement is, therefore, a domestic issue, where an agency must inform the relevant decision makers, in this case the Congress, of the environmental consequences of a proposal for legislation.” Id. See also 42 U.S.C. § 4332(2)(C).
laws. This principle counters the Government's argument that preparing an EIS for NAFTA would interfere with the President's power to conduct foreign policy.

The court of appeals does not adequately consider the foreign policy implications of its decision. Although the Government raised these considerations, the court felt that they were outside the scope of the case.

A. Ramifications on Future Trade Agreements

Public Citizen appealed the circuit court's decision to the Supreme Court, with the hope of clarifying the role of the legislative EIS in trade agreements, legislative proposals, and other agency actions that require presidential involvement. The Supreme Court denied certiorari, so the ruling in Public Citizen stands. Thus, the USTR is not obligated to prepare an EIS for trade agreements.

This outcome is troublesome. Recent trends indicate that the globalization of trade will continue. Other countries that were parties to past trade agreements have challenged domestic health and safety laws as barriers to trade, in the name of international harmonization of health and safety standards. For instance, under the General Agreement on Tariffs and Trade ("GATT"), Mexico successfully challenged a provision of the U.S. Marine Mammal Protection Act as a non-tariff trade barrier.

166. See supra note 89 for an explanation of why NAFTA is not a treaty, but a nonself-executing congressional-executive agreement. NAFTA requires approval of both houses of Congress before it can be effective, in contrast to a foreign treaty, which constitutionally requires ratification only by the Senate. U.S. CONST. art. II, § 2, cl. 2.

167. Public Citizen v. U.S. Trade Representative, 5 F.3d 549, 552-53 (D.C. Cir. 1993). Not considering foreign policy considerations is consistent with standing judicial policy to refuse to decide issues of law on constitutional grounds when they can be addressed otherwise. For a discussion of judicial restraint, see generally GERALD GUNThER, CONSTITUTIONAL LAW 51-64 (12th ed. 1991).


The Marine Mammal Protection Act bans the import of tuna that is caught using methods deadly to dolphins. The GATT dispute resolution panel found that U.S. restrictions on the method of production, rather than on the quality of the product, were insupportable barriers to trade under GATT. Many other health and safety laws have been challenged under GATT, such as restrictions on tobacco advertising, a ban on hormone-treated beef, and fuel economy standards.

By requesting an EIS, Public Citizen sought to ensure that Congress would foresee and contemplate international preemption of environmental, health, and safety laws before it votes on trade agreements. The purpose of the EIS is to provide insight into the environmental implications of legislative proposals. By excluding the Office of the USTR from this requirement, the court of appeals has disabled the EIS from fulfilling its function.

To defend its position that the USTR need not prepare an EIS, the Government explained that “[t]he effects of broad, complex changes in economic relationships, such as those set in motion by trade agreements, are too attenuated to be cognizable under NEPA.” Nevertheless, the fact that the environmental impact of a governmental action may be far reaching and affect a broad area does not warrant the abandonment of NEPA and its required EIS. The Supreme Court has noted that, “the absence of a geographical nexus does not defeat a claim of standing because that would mean that the most injurious and widespread Gover-


178. For instance, the current renegotiation of GATT, the Uruguay Round, has been introduced to Congress without an EIS. Like NAFTA, GATT poses substantial threats to the environment. Because the USTR cannot be compelled to prepare an EIS on GATT, Congress will consider and vote on GATT implementing legislation without an EIS for guidance.

ment actions could be questioned by nobody.\textsuperscript{180} Furthermore, EISs are regularly prepared on proposals for legislation that may by nature be hypothetical:

The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. . . . [T]he basic thrust of NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."\textsuperscript{181}

NEPA requires all agencies of the Federal Government to prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."\textsuperscript{182} It is difficult to understand how an agreement that even the Government concedes\textsuperscript{183} will potentially have broad effects on many aspects of America's environment can fall outside of "major Federal actions significantly affecting the quality of the human environment."\textsuperscript{184}

\textbf{B. Impact of Decision on APA Jurisprudence}

Several cases have cited the Public Citizen cases as dispositive of what constitutes final agency action. In Sabella v. United States,\textsuperscript{185} plaintiff fishermen sought an injunction against the National Marine Fisheries Service ("NMFS") because the NMFS allegedly planned to enforce the encirclement provision of the International Dolphin Conservation Act of 1992\textsuperscript{186} against plaintiffs.\textsuperscript{187} The court found, however, that there was no final agency action to review because the NMFS had issued only an advisory

\textsuperscript{180} United States v. SCRAP, 412 U.S. 669 (1973).
\textsuperscript{182} 42 U.S.C. § 4332(2)(C).
\textsuperscript{183} Brief for the Appellants, supra note 32, at 41-42.
\textsuperscript{184} 42 U.S.C. § 4332(2)(C).
\textsuperscript{187} Sabella, 863 F. Supp at 2.
opinion stating how it planned to enforce the encirclement provisions but had not yet issued definitive enforcement rules.\footnote{188} The court cited the Public Citizen cases as standing for the proposition that "final agency action is an independent jurisdictional requirement [that] must be met first before moving on to the question of ripeness."\footnote{189}

More specifically, Public Citizen brought a similar suit against the USTR seeking an EIS for the GATT.\footnote{190} In Public Citizen \textit{v. Kantor}, three causes of action were asserted. First, Public Citizen sought to compel the USTR to prepare an EIS for the GATT.\footnote{191} Second, it sought to require the USTR to promulgate general procedures to ensure compliance with NEPA during the negotiation of future trade agreements.\footnote{192} Finally, Public Citizen asked the court to exercise its authority to grant mandamus relief compelling federal officials to perform their non-discretionary statutory duties.\footnote{193}

The district court ruled against Public Citizen and held that it did not have power under the APA to review the actions of the USTR.\footnote{194} This case reaffirms that trade agreements, although primarily the products of the USTR, are not agency actions within the meaning of the APA. The court stated that "the APA claim is barred by the principle . . . that APA review requires final agency action . . . . This requirement cannot be met where Congress provides that only the President may take final action."\footnote{195} Yet, nowhere in this case, nor in the earlier Public Citizen cases, did the Government prove that Congress intended USTR actions to be considered final only if introduced to Congress by the President. These holdings place a presidential contingency not apparent in law on agency proposals for legislation. If this reasoning is carried to its logical conclusion, there will be no APA jurisdiction over an agency's action any time it crafts a proposal that Congress or the President must approve. This

\footnotesize{\begin{enumerate}
\item[188] Id. at 2-3.
\item[189] Id. at 3. \textit{See infra} text accompanying note 211 for a criticism of the policy of requiring final agency action before the question of ripeness can be addressed. This rule, in effect, merges the justiciability doctrines of standing and ripeness.
\item[191] Id. at 210.
\item[192] Id.
\item[193] Id.
\item[194] Id. at 211.
\end{enumerate}}
reasoning directly contradicts the APA, which states only that the agency’s action must be final before a party can challenge its deficiency, not that it must actually be implemented.196

VII. STANDING ISSUES

A. The “Direct Effects” Test Merges the Doctrines of Standing and Ripeness

In Public Citizen I, the plaintiffs were denied standing because the negotiation of NAFTA was incomplete.197 The court held, therefore, that Public Citizen could not point to a sufficiently cognizable injury.198 In the second round of Public Citizen v. U.S. Trade Representative, however, NAFTA negotiations were final, and Public Citizen sufficiently alleged a cognizable injury at risk under NAFTA.199

To satisfy standing requirements, Public Citizen had to show that the lack of an EIS on NAFTA posed a substantial risk of harm.200 Thus, Public Citizen pointed to several sections of NAFTA that could preempt both state and local laws as non-tariff trade barriers.201 Additionally, members of Public Citizen, particularly those in California and Texas, would be placed at risk of specific harm if NAFTA passed and such laws were chal-
The district court recognized that state and local environmental laws are at risk of preemption under NAFTA:

NAFTA, by its very terms, sets forth criteria that may form a basis for challenging various domestic health and environmental laws . . . . Those laws that are found to be contrary to the NAFTA's free trade provisions either cannot be applied or can become the basis of trade sanctions . . . . In addition, by virtue of the Supremacy Clause, a state law that conflicts with the NAFTA is preempted by the NAFTA. 203

A cognizable injury is recognized for standing purposes if there is a "reasonable risk that environmental harm may occur." 204

The district court also recognized that "the allegations of possible environmental harm as a result of NAFTA to members of the Plaintiff organizations who live on the United States-Mexico border region are sufficiently concrete as to establish standing." 205 Members of Public Citizen, Sierra Club, and Friends of the Earth live near the Maquiladora region in Mexico, where U.S. companies have established factories in a small-scale free trade zone. In the region, "[s]urface and ground water contamination from raw sewage, industrial wastewater, pesticides, and solvents have, according to an American Medical Association study, made the border area 'a virtual cesspool and breeding ground for

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202. Brief for the Appellees, supra note 4, at 12-14. Public Citizen, Sierra Club and Friend of the Earth have thousands of members who reside in California and Texas. Id. at 46. Because of the Maquiladora program, U.S. industrial development along the border in Northern Mexico has been extensive. Id. at 13. Air and water quality has greatly diminished in these regions due to this development, with pollution crossing the border and specifically afflicting the cities of San Diego and El Paso. Id. at 46. Under NAFTA, there are incentives to continue to develop this region, but there are few provisions to fund corrective measures. Id. at 48. A full explanation of the potential environmental harm posed by NAFTA is beyond the scope of this paper. For further detail, see SIERRA CLUB, ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (1993); Robert W. Benson, Free Trade As an Extremist Ideology: The Case of NAFTA, 17 U. PUGET SOUND L. REV. 555 (1994); U.S. GEN. ACCOUNTING OFFICE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT (1991); U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS WASTE: MANAGEMENT OF MAQUILADORAS' WASTE HAMPERED BY LACK OF INFORMATION (1992).


205. Brief for the Appellees, supra note 4, at 43-44.
The area also suffers from overcrowding, increased air pollution, and heightened percentages of birth defects traceable to the pollution problems. Judge Ritchey rejected the Government’s argument that "many of the alleged environmental effects of the NAFTA are too widespread to be confined to a particular geographical location." Instead, the district court found that "the absence of a geographical nexus does not defeat a claim of standing because that ‘would mean that the most injurious and widespread Government actions could be questioned by nobody.’” The issue of redressability in cases of potentially widespread environmental harm is implicated in the appellate decision. If the EIS requirement does not apply to the USTR, then NAFTA and any future trade agreements are exempt from NEPA’s environmental safeguards.

The court of appeals ruled that no “direct effect” could result from an agency-created proposal for legislation that requires further action by the President. Therefore, a future plaintiff will not have standing to bring a case such as Public Citizen v. U.S. Trade Representative. Any case challenging USTR actions will follow the 1992 decision in which the Court’s holding was based on standing grounds; i.e., because the USTR’s action was not final, it was not subject to judicial review. According to the Franklin decision, finality only arises when the President submits a proposal to Congress. Under this test, future USTR actions will never be sufficiently final for APA purposes. Thus, as the court of appeals concluded, “NAFTA’s fate now rests in the hands of the

209. Id. (citing United States v. SCRAP, 412 U.S. 669, 687-88 (1973)).
211. This point illustrates a problematic barrier to review in EIS cases—the merging of the doctrines of standing and ripeness. See Bridget A. Hust, Ripeness Doctrine in NEPA Cases: A Rotten Jurisdictional Barrier, 11 LAW & INEQ. J. 505 (1993).
political branches. The judiciary has no role to play.”212

B. Informational Standing

Public Citizen also raised the question of informational standing. Public Citizen argued that because of the failure of the USTR to prepare an EIS, they were unable to keep their membership adequately informed.213

Case law provides some support for this contention, notably in Scientists’ Institute for Public Information, Inc. (“SIPI”) v. Atomic Energy Commission,214 and Competitive Enterprises Institute v. National Highway Traffic Safety Administration (“NHTSA”).215 In SIPI v. Atomic Energy Commission, the court stated in dicta that an organization might have standing because it distributed scientific information to the public, an activity that would be adversely affected if the agency failed to prepare an EIS.216 In Competitive Enterprises Institute v. NHTSA, the court held that “[a]llegations of injury to an organization’s ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization’s activities.”217

In Foundation on Economic Trends v. Lyng,218 however, the court found that although “the Foundation has adequately alleged injury through the deprivation of information,”219 it still did not have standing.220 There, as in the Public Citizen cases, the court found that the Foundation had not pointed to an agency action that triggered the EIS requirement; thus, their informational claim was not ripe.221 The Lyng court also noted the dilemma present in the Public Citizen cases, “[w]e recognize that this tends to

213. Brief for the Appellees, supra note 4, at 49. Recall that a purpose of the legislative EIS is to provide information to the public as well as to Congress on agency proposals for legislation. 40 C.F.R. § 1502.1 (1994). See supra part II for a discussion of the purpose of the legislative EIS.
219. Id. at 85.
220. Id.
221. Id.
merge standing under the APA with the merits of a plaintiff's NEPA claim."\textsuperscript{222} If an organization cannot obtain standing when an agency has failed to prepare an EIS, then jurisdiction under the APA becomes impossible to obtain, as APA jurisdiction is contingent upon pointing to a final agency action.\textsuperscript{223}

Judge Ritchey, although granting Public Citizen standing on other grounds, noted that "the Supreme Court has stated that such [informational] injury is within the zone of interest that NEPA was designed to protect."\textsuperscript{224} The court of appeals did not address the issue of informational standing.

VIII. CONCLUSION

In Public Citizen 2, the district court decided that because NEPA and the APA apply to the USTR, the USTR failed to fulfill its NEPA obligation by not providing an EIS for NAFTA. Part of the underlying rationale was that Congress clearly created NEPA to provide a method of environmental review for proposed legislation. By reversing Public Citizen 2, the D.C. Circuit has removed the EIS process of environmental review from international trade agreements, and potentially from all agency actions requiring some "final" action or approval by the President. The EIS provides an essential safeguard on agency action by ensuring that agencies consider the environmental impact of their proposals and by informing both the public and Congress about the impact. Without the EIS, the environmental costs of such agency actions will be overlooked.

Trade agreements such as NAFTA and GATT have a profound impact on many aspects of life in the United States. Many U.S. laws are at risk of preemption under the agreements, the U.S. and Mexican environment faces grave threats of damage from polluting factories at the border, and U.S. health and safety standards can be undermined as non-tariff trade barriers. The kinds of environmental risks posed by foreign trade agreements should be catalogued in an EIS, in order to provide Congress and

\textsuperscript{222} Id. at 85-86.
\textsuperscript{223} 5 U.S.C. §§ 551, 552.
the public with trustworthy information about the environmental consequences of such agreements. This would be more in accord with the CEQ guidelines, and more in line with congressional intent for NEPA.

It would have been less harmful to NEPA jurisprudence for the D.C. Circuit to rest its decision in Public Citizen 3 on foreign policy considerations or on the political question doctrine, rather than on the "direct effects" test of Franklin.225 Of course, there are dual motives to electing the "direct effects" route. First, federal courts generally abide by the prudential mandate to abstain from deciding legal issues on constitutional principles if there is an alternative method to resolve the issue.226 Second, there were strong political mandates to keep NAFTA exempt from the EIS requirements and, had the court found final agency action, it would have been difficult to ignore the strong precedents requiring EISs on final agency actions.227 In order to protect NAFTA, the EIS had to be neutralized. The court achieved its goal by restricting the ability to protest an agency's failure to prepare an EIS to when that agency's action would "directly affect" the parties. This decision will be costly, however. Any administrative agency proposal for legislation, by definition, cannot directly affect anyone unless and until it is approved by both houses of Congress and signed by the President. As a primary purpose of the EIS is to provide information to Congress while it is considering agency proposals for legislation, the holding of the Public Citizen cases defeats the purpose of the EIS.

The Government argued that preparing an EIS for a trade agreement like NAFTA would be close to impossible, and therefore, might foreclose or seriously burden the President's ability to negotiate foreign trade treaties. U.S. Solicitor General Drew S. Days III, stated on behalf of the Government that "[Judge] Ritchey had ordered a study of 'the world with NAFTA, as opposed to the world without NAFTA' and 'we seriously do not believe that can be done.'"228

226. See GUNTHER, supra note 167, for details on judicial restraint.
227. See, e.g., the strong mandate from the CEQ requiring EISs on treaties, supra note 103 and accompanying text, and the language of NEPA itself, supra note 21 and accompanying text.
Public Citizen, however, explained that the real fight is "about how environmental and health impacts of trade pacts will be assessed and accounted for in the future." Public Citizen attorney Patty Goldman explained that "the environmental groups plan to press their case even if the legal route proves much slower than the political one. We want to set these principles in place forever. Even if we don't get an EIS for NAFTA, we want the ruling in place for the next trade treaty."  

The Supreme Court did not grant certiorari in the Public Citizen cases, thus finalizing the holding in Public Citizen 3, at least for the D.C. Circuit. Public Citizen has continued to seek EISs for foreign trade agreements, most notably the GATT. The goal is to ascertain a mandate that the federal government will be required to fulfill its NEPA obligations in all legislation, including future trade agreements.

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229. President's NAFTA Role is at Issue, CHI. TRIB., Aug. 25, 1993, Business Section, at 1.

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