

## The Applicability of NEPA to NAFTA: Law, Politics, or Economics?

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# THE APPLICABILITY OF NEPA TO NAFTA: LAW, POLITICS, OR ECONOMICS?\*

## I. INTRODUCTION

The National Environmental Policy Act (NEPA),<sup>1</sup> is the environmental Bill of Rights for individuals who want to ensure that federal agencies consider the environmental consequences of their actions.<sup>2</sup> The general purpose of NEPA is to harmonize man's production with nature's sustenance and to preserve this harmony for future generations.<sup>3</sup> To accomplish that purpose, NEPA requires federal agencies to prepare an environmental impact statement (EIS) on proposed legislation and on major federal actions that will significantly affect the environment.<sup>4</sup> The EIS can then be used by the decisionmaker to weigh the environmental consequences of the proposed agency action against its overall benefits.<sup>5</sup>

Under the Administrative Procedures Act (APA),<sup>6</sup> NEPA claims are subject to judicial review when the applicable statute so provides; however, NEPA does not provide judicial review. In the absence of such a provision, the APA provides review of "*final agency action*" for which there is no other adequate remedy.<sup>7</sup>

In *Public Citizen v. United States Trade Representative*,<sup>8</sup> the

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\* The author wishes to thank Professor John Harbison for his comments on earlier drafts of this article.

1. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(2)(C), 42 U.S.C. § 4331 (1993).

2. See Council on Environmental Quality, 40 C.F.R. § 1500.1(a) (1993) (stating that NEPA is "our basic national charter.").

3. 42 U.S.C. § 4331(a) (1993).

4. 42 U.S.C. § 4332(2)(C) (1993).

5. *Public Citizen v. United States Trade Representative* (USTR), 782 F. Supp. 139, 141 (1992) (citing *Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 491 (D.C. Cir. 1990)); 40 C.F.R. § 1502.1 (stating that an EIS is to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts. . ."); 40 C.F.R. § 1500.1 (stating that the purpose of NEPA is "to help public officials make decisions that are based on understanding of environmental consequences. . .").

6. Administrative Procedures Act, 5 U.S.C. § 704 (1993).

7. 5 U.S.C. § 704 (1993) (emphasis added).

8. 782 F. Supp. 139 (D.D.C. 1992). There was the original suit and three appeals. For simplicity, the original suit is referred to as *Public Citizen I* (*Public Citizen v. United States Trade Representative*, 782 F.Supp. 139 (D.C. Cir. 1992)), and the subsequent appeals are consecutively numbered as *Public Citizen II* (*Public Citizen v. United States Trade Representative*, 970 F.2d 916 (D.C. Cir. 1992)), *Public Citizen III* (*Public Citizen v. United States Trade Representative*, 822 F. Supp. 21 (D.D.C.

plaintiffs<sup>9</sup> claimed judicial review was required under the APA and urged the District Court for the District of Columbia to declare that NEPA was applicable to the North American Free Trade Agreement (NAFTA).<sup>10</sup> *Public Citizen v. United States Trade Representative*<sup>11</sup> gives a definitive answer regarding NAFTA<sup>12</sup> and has been used as precedent for the 1994 General Agreement on Tariffs and Trade (GATT) negotiations.<sup>13</sup>

NAFTA had been in negotiation since 1991 and was passed by Congress, without an EIS, on November 18, 1993.<sup>14</sup> The plaintiffs<sup>15</sup>

1993)), and *Public Citizen IV* (*Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993)).

9. There were actually three plaintiffs (Public Citizen, Friends of the Earth and Sierra Club) suing the USTR. Hereafter, the plaintiffs will be collectively referenced as one, under the name Public Citizen.

10. The NAFTA will eliminate investment and trade barriers in agriculture, manufacturing, and services, and will increase protection of intellectual property rights. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA].

11. 5 F.3d 549 (D.C. Cir. 1993).

12. The court noted that it could not determine whether NEPA substantively would apply to NAFTA because it found that there was no basis for judicial review. 5 F.3d at 551.

In *Public Citizen I*, the District Court for the District of Columbia dismissed for lack of standing. 782 F. Supp. at 142-43. In *Public Citizen II*, the Appeals Court dismissed for lack of judicial review under the APA which, requires "final agency action." 970 F.2d at 916 (quoting 5 U.S.C. § 704 (1993)).

In *Public Citizen III*, the District Court held that there was APA judicial review because the USTR completed a final draft of NAFTA, and on the merits ordered the USTR to prepare an EIS on NAFTA. 822 F. Supp. at 29.

In *Public Citizen IV*, the Appeals Court reversed, holding that there was no basis for judicial review. 5 F.3d at 551. Public Citizen appealed, but the Supreme Court denied certiorari. *Public Citizen v. United States Trade Representative*, *cert. denied*, 114 S.Ct. 685 (1994).

13. The United States District Court for the District of Columbia in *Public Citizen v. Kantor*, 1994 WL 549498 (D.D.C. 1994) relied on *Public Citizen IV*, 5 F.3d 549 (D.C. Cir. 1993), in holding that NEPA does not apply to the Uruguay Round of Multilateral Trade Negotiations, which subsequently replaced the General Agreements on Tariffs and Trade (GATT), 61 Stat., Pts. 5 and 6, TIAS No. 1700, 55 U.N.T.S. 187, 194 (1947), with GATT 1994 and established the World Trade Organization (WTO). In *Public Citizen v. Kantor*, the District Court, which is the same court that applied NEPA to NAFTA in *Public Citizen III*, 822 F. Supp. 21 (D.D.C. 1993), held that it is "clear that the Uruguay Round falls outside the reach of the APA . . ." based on the Appeals Court decision in *Public Citizen IV* and *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). *Public Citizen v. Kantor*, 1994 WL 549498, 2. The Supreme Court in *Franklin* determined that the APA was inapplicable to the reapportionment statute.

14. See generally *Feature Quotations, Showdown Over NAFTA*, OREGONIAN,

argued that NAFTA was an action of the Office of the United States Trade Representative (OTR) that would have significant impact on the quality of the human environment,<sup>16</sup> and therefore, an EIS should have been prepared. The case was finally resolved by the United States Court of Appeals for the District of Columbia. The Court of Appeals concluded that because the APA requires a "final agency action," there can be no review of the trade agreement-making process.<sup>17</sup> The court concluded that even though the OTR and the President worked together on NAFTA, as individual entities, the OTR took no final action and President Clinton took no agency action.<sup>18</sup> In denying judicial review, the Court of Appeals never considered whether NAFTA would have a significant impact on the environment.

Although Public Citizen stated that the decision of the Appeals Court "would render NEPA's legislative EIS requirement judicially unenforceable, effectively overruling two decades of NEPA jurisprudence and practice,"<sup>19</sup> there is no jurisprudence directly on the issues raised in the case. Cases applying NEPA to international actions are sparse, and there are no cases applying NEPA to trade agreements. However, because the court denied jurisdiction on a narrow interpretation of the APA, the decision redefines precedent already set for application of NEPA to federal actions having only local or national significance, and it prohibits the future application of NEPA to agency actions that have Presidential involvement.

## II. HISTORICAL DEVELOPMENT

NAFTA's implementation was statutorily authorized by the Trade Acts.<sup>20</sup> The Acts outline roles for the President, the OTR and Congress in trade agreements.

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Nov. 18, 1993, at A17; J. Craig Crawford, *Its's a Deal: House votes for NAFTA*, ORLANDO SENTINEL, Nov. 18, 1993, at A1.

15. *See supra* note 9.

16. 42 U.S.C. § 4332(2)(C) (1993).

17. *Public Citizen IV*, 5 F.3d 549, *cert. denied*, 114 S.Ct. 685 (1994).

18. *Public Citizen IV*, 5 F.3d at 551.

19. Appellant's Brief at 1, *Public Citizen IV* (No. 93-5212).

20. Trade Act of 1974, 19 U.S.C. §§ 2101-91, 2901-09 (1993). In Article I, Section 8, of the United States Constitution, Congress is given the power to regulate foreign commerce. It is by this authority that it enacted the Trade Acts which enable the President and the Office of the Trade Representative to negotiate trade agreements, subject to congressional approval.

### A. *The President's Role*

President Bush and President Salinas, on June 11, 1990, endorsed the goal of a comprehensive Free Trade Agreement (FTA) between the United States and Mexico and directed their trade representatives to begin the necessary consultations and preparatory work for a round of negotiations.<sup>21</sup> President Bush notified Congress on September 25 of his intent to negotiate with Mexico.<sup>22</sup> After subsequent consultations with Canada, the three governments decided to negotiate a three-way FTA among the United States, Mexico and Canada.<sup>23</sup> In May 1991, Congress delegated to President Bush the authority to negotiate such an agreement,<sup>24</sup> and the trilateral NAFTA negotiations began in June of 1991.<sup>25</sup> The primary objectives of NAFTA are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the Parties; [and] (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory. . . .<sup>26</sup>

### B. *The Office of the Trade Representative's Role*

The OTR,<sup>27</sup> which is in the Executive Office of the President,<sup>28</sup> has had a substantial role in negotiating NAFTA. The United States Trade Representative (USTR) has the authority to set international trade policy, lead negotiations on and draft text for trade agreements, and implement unilateral trade sanctions under presidential direction.<sup>29</sup>

21. TRADE POLICY REVIEW, GATT PUBLICATIONS, April 1992, at 30.

22. Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement, May 1, 1991, *available in* NAFTA, 1991 WL 434200.

23. TRADE POLICY REVIEW, GATT PUBLICATIONS, April 1992, at 30.

24. *Id.*

25. 56 Fed. Reg. 32454-455 (1991).

26. NAFTA, Art. 101.

27. The OTR originated as the Office of the Special Representative for Trade Negotiations, established by President Kennedy. Exec. Order No. 11,075, 28 Fed. Reg. 473 (1963) (Note that Executive Order 11,075 has been repealed, but the OTR still operates under the Trade Acts of 1974, 19 U.S.C. §§ 2101-91, 2901-09 (1993)).

28. 19 U.S.C. § 2171.

29. 19 U.S.C. §§ 2171, 2411-17 (1993).

In addition to participating in the foreign aspects of trade relations, the USTR plays a significant role in the domestic enactment of trade policy.<sup>30</sup>

### C. *The Role of Congress*

The Trade Acts incorporate the "fast track procedure" for passage of trade agreements.<sup>31</sup> The fast track procedure gives the President the ability to negotiate an agreement and have it voted on quickly without Congressional detainment or amendment. The President can invoke the fast track process by consulting with Congress prior to negotiations,<sup>32</sup> notifying Congress and the public ninety days prior to negotiations,<sup>33</sup> and submitting the final text of the agreement to Congress along with implementing legislation.<sup>34</sup> Congress then has sixty days<sup>35</sup> to reject or pass the agreement in its submitted form.<sup>36</sup> Congress retains the authority to amend the fast track procedure<sup>37</sup> or extend its application.<sup>38</sup>

NAFTA was approved through the fast track procedure.<sup>39</sup> Because the time for congressional research and debate on environmental issues was reduced,<sup>40</sup> Public Citizen argued that the need for an EIS

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30. For example, United States Trade Representative Mickey Kantor reports directly to Congressional Committees. See *NAFTA and Side Agreements*, United States Trade Representative Mickey Kantor, Sept. 14, 1993, available in LEXIS, Nexis Library.

31. 19 U.S.C. § 2901 (1993).

32. 19 U.S.C. § 2902(c) (1993).

33. 19 U.S.C. § 2903(a)(1) (1993).

34. 19 U.S.C. § 2903(a)(1)(B) (1993). See 19 U.S.C. § 2903(a)(2) (1993) (giving a description of necessary supporting information to accompany the agreement and implementing legislation).

35. 19 U.S.C. §§ 2191(c), (e) (1993).

36. 19 U.S.C. § 2191(d) (1993).

37. 19 U.S.C. § 2191(a)(2) (1993). The fast track process was made "as an exercise of the rulemaking power of the House of Representatives and the Senate . . . with full recognition of the constitutional right of either House to change the rules. . . at any time." *Id.*

38. This statute was limited to agreements entered into before June 1, 1991. However, Congress granted a two-year extension to President Bush for GATT and NAFTA. *Public Citizen II*, 970 F.2d at 917 (citing 19 U.S.C. § 2903(b)(1) (1993)).

39. See generally J. Craig Crawford, *Its's a Deal: House votes for NAFTA*, ORLANDO SENTINEL, Nov. 18, 1993, at A1.

40. No amendments to the proposed treaty are allowed, and there is a limit of twenty hours for debate in each chamber. 19 U.S.C. §§ 2192-2, 2902-3 (1993). However, this limited time for debate is on the final text of NAFTA. Congress had prior copies sent to it and had been holding committee hearings. See generally *NAFTA and Side Agreements Before the House Ways and Means Committee* (1993) (chaired by Dan Rostenkowski) available in LEXIS, Nexis Library.

was compelling.<sup>41</sup> The OTR negotiated an environmental side agreement to accompany NAFTA; however, the text of NAFTA was never renegotiated. In summarizing his administration's hope for NAFTA, President Clinton stated that the agreement "will permit us to create an economic order in the world that will create more growth, more equality, better preservation of the environment and the greater possibility of world peace."<sup>42</sup> The final version of NAFTA will:

bring together 370 million people and a gross domestic product of \$6.8 trillion — making it by far the world's largest free-trade zone . . . [by] 1. [e]liminat[ing] trade barriers between the three countries over 15 years . . . 2. [p]romot[ing] fair competition 3. [i]ncreas[ing] cross-border investment opportunities 4. [p]rotect[ing] copyrights 5. [establishing] a mechanism to resolve disputes [and] 6. [e]stablish[ing] a framework for future cooperation.<sup>43</sup>

### III. ANALYSIS

NEPA<sup>44</sup> does not create a private cause of action for plaintiffs to challenge agency compliance with EIS requirements. The Appeals Court in *Public Citizen v. United States Trade Representative* (hereinafter *Public Citizen IV*)<sup>45</sup> interpreted the APA to deny judicial review under NEPA; therefore, its holding extends to many statutes using the APA as a basis for jurisdiction.

#### A. Final Agency Action in the Context of the APA

The making of an executive agreement is not reviewable by statute

41. See generally Appellee's Brief, *Public Citizen IV* (No. 93-5212).

42. *President's Signature Puts NAFTA in Motion*, DETROIT FREE PRESS, Dec. 9, 1993, at A4.

43. Pros and Cons of the NAFTA Accord, USA TODAY, Nov. 9, 1993, at A6 (stating: "[b]y linking Canada, the United States and Mexico, NAFTA will create the world's largest regional free-trade market.") See James G. Treybig, *The Pros and Cons of the NAFTA*, SAN JOSE MERCURY NEWS, Nov. 14, 1993, P1 (stating that "[i]t will represent 7 percent of the world's population (the European Community represents 6 percent) and produce about 29 percent of the world's gross domestic product (the EC produces 28 percent).") See also *President's Signature Puts NAFTA in Motion*, DETROIT FREE PRESS, Dec. 9, 1993, at A4 (stating that NAFTA "creates the world's largest and richest trading bloc, covering 360 million people.")

44. 42 U.S.C. § 4331 (1993).

45. 5 F.3d 549.

because NEPA does not create a private cause of action.<sup>46</sup> Therefore, there is only review if the submission of NAFTA by the OTR to the President was “final agency action for which there is no adequate remedy in a court. . . .”<sup>47</sup> On the issue of finality, “[t]he core question[s] [are] whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.”<sup>48</sup>

### 1. Completion of the Decisionmaking Process

To determine whether the decisionmaking process was complete, the court in *Public Citizen IV*<sup>49</sup> bifurcated the phrase “final agency action” into two requirements — “final action” and “agency action.”<sup>50</sup> It incorrectly focused not on the finality of the agency action that the APA refers to, but rather on the President’s involvement in the decisionmaking process and the finality of the NAFTA document.<sup>51</sup> The Appeals Court’s bifurcation of final agency action disregards the independence of the OTR as an agency, dilutes the integrity of the process by which trade agreements are negotiated, and presents plaintiffs who wish to challenge the OTR with an unavoidable dilemma.

Generally, there is reluctance to review an agency’s action before it has had an opportunity to correct its mistakes;<sup>52</sup> however, when the agency refuses to act or correct its mistakes, there should be review. The OTR had two final actions: action with respect to NEPA, which was final when it refused to do an EIS, and action with respect to the Trade Acts, which was final upon submission of NAFTA to President Clinton. Thus, any mistakes the OTR might have made regarding NAFTA would not be corrected absent judicial intervention.

The integrity of the decisionmaking process is best preserved when the President’s action is based on valid agency action because this “protects the President as well as the litigants and the public interest against unlawful [agency] action.”<sup>53</sup> Thus, the OTR’s compliance with all relevant statutes should have been reviewable.

The Supreme Court has recognized that when the agency action,

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46. *Id.* at 551.

47. 5 U.S.C. § 704 (1993).

48. *Public Citizen IV*, 5 F.3d at 551 (citing *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2773 (1992)).

49. 5 F.3d 549.

50. *Id.* at 552.

51. *Id.* at 553.

52. *Federal Trade Comm. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980).

53. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).



“[i]nstead of being handed down to the parties as the conclusion of the administrative process, [is] . . . submitted to the President [and] . . . the terms, conditions and limitations . . . are subject to his approval, . . . denial, transfer, amendment, cancellation or suspension,”<sup>54</sup> the plaintiffs face a dilemma. The dilemma is that “before Presidential approval, [the agency order] is not a final determination . . . and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion.”<sup>55</sup> When the ultimate discretion rests with the President, there can be no review because “Congress did not intend to subject the President to the APA.”<sup>56</sup> This was the crux of the dilemma that Public Citizen faced. When the agreement was submitted to Congress by the President, the Appeals Court said there was finality;<sup>57</sup> however, there was no agency action.<sup>58</sup>

Recognizing the difficulties that plaintiffs face when the phrase “final agency action” is severed, some courts have interpreted “final” as modifying the words it precedes — “agency action.” The “finality” of agency action is to be interpreted in a “pragmatic way.”<sup>59</sup> Judicial review should not be unavailable simply because some other entity in the Executive Branch, Congress, or a private entity must act before the action will be “final.” Because “final” modifies “agency action,” it is “the agency’s ‘final’ position” that is at issue;<sup>60</sup> “[t]he term ‘agency action’ . . . embraces an agency’s . . . [decision], and it is the finality of that action that we must consider.”<sup>61</sup>

## 2. Direct Affect to Parties

Besides being complete, final agency action must impose “an obli-

54. *Id.* at 109.

55. *Id.* at 113.

56. *Armstrong v. Bush*, 924 F.2d 282, 289 (1991). *See also Chicago & S. Air Lines*, 333 U.S. 103; *Franklin*, 112 S.Ct. at 2775.

57. *Public Citizen IV*.

58. *Id.*

59. *Standard Oil*, 449 U.S. at 239 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967)).

60. *International Union v. Brock*, 783 F.2d 237, 249 (D.C. Cir. 1986) (citing *Abbot Labs.*, 387 U.S. at 149 (1967)). *See also Eagle-Picher Indus. v. United States E.P.A.*, 759 F.2d 905, 917 (D.C. Cir. 1985) (stating that a lack of uncertain or tentative language signifies that the determination is the agency’s “final position”).

61. *International Union v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986) (quoting *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971)).

gation, deny a right or fix some legal relationship."<sup>62</sup> To determine whether the decision is one that will affect the parties, the majority in *Public Citizen IV*<sup>63</sup> focused on the procedural track of the NAFTA document and mechanically applied a test set forth in *Franklin v. Massachusetts*<sup>64</sup> without considering sharp distinctions between Public Citizen's case and the *Franklin* line of cases. The Court in *Franklin*,<sup>65</sup> addressing a reapportionment challenge, did not just summarily conclude that the agency action was not final because it did not "directly affect the parties."<sup>66</sup> Rather, it considered several factors that distinguish it from *Public Citizen IV*: (a) the roles of and the relationships between the agency, the President and Congress, (b) the product of the agency, and (c) the remedy sought by the plaintiffs.<sup>67</sup>

(a) *Roles and Relationships*

In *Franklin*,<sup>68</sup> the court questioned the constitutional reapportionment procedure. In the reapportionment process, the agency has little discretion about making a report because the Constitution mandates certain procedural requirements. The agency acts as "a subordinate official,"<sup>69</sup> because the President can direct the Secretary on policy judgments<sup>70</sup> and instruct the Secretary to reform or redo the census.<sup>71</sup> The results of the Secretary's reapportionment report are not seen by Congress or the public until the President releases his statement. The action by the agency is "not promulgated to the public in the Federal Register,"<sup>72</sup> and "no official administrative record is generated."<sup>73</sup> In essence, the President is the communication link between the Secretary on one hand and Congress and the public on the other. Ultimately, no "effect on reapportionment is felt"<sup>74</sup> until the President makes that link.

However, in the process of formulating NAFTA, communication

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62. *Chicago & Southern Air Lines*, 333 U.S. at 113.

63. 5 F.3d 549.

64. 112 S.Ct. 2767 (1992).

65. *Id.*

66. *Id.* at 2773.

67. *See generally* *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992).

68. 112 S.Ct. 2767 (1992).

69. *Id.* at 2773 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)).

70. *Franklin*, 112 S.Ct. at 2775.

71. *Id.* at 2774.

72. *Id.* at 2773.

73. *Id.*

74. *Id.*

was effected among the agency, Congress, and the public without sole reliance on the President as a link. The signed version of NAFTA was not the first version Congress and the public had seen of the agreement.<sup>75</sup> Indeed, Congress continually held hearings on NAFTA<sup>76</sup> and the USTR and other members of the OTR reported directly to Congressional committees.<sup>77</sup>

(b) *Products*

In the reapportionment process, the report the Secretary submits to the President is not the product that Congress votes on. The President, upon receipt of the Secretary's report, "shall transmit to the Congress a statement . . . as ascertained under the . . . decennial census;"<sup>78</sup> therefore, the President is merely using the "data from the 'decennial census' in making his statement."<sup>79</sup> The statute does not prohibit "amendment of the 'decennial census' itself after the Secretary submits the report to the President,"<sup>80</sup> nor does it "expressly require the President to [even] use the data in the Secretary's report."<sup>81</sup> In the apportionment process, the report of the agency is tentative and, most certainly, a "moving target."<sup>82</sup>

NAFTA's uncertain future did not stem primarily from the OTR or the President. The product released by the agency was that which Congress voted on; it was not merely a report that the President used to make his own statement, as in *Franklin*.<sup>83</sup> The President would not

75. Charles E. Roh Jr., *Testimony Before the Committee on Science, Space and Technology*, Sept. 30, 1992, available in 1992 WL 360148 (NAFTA).

76. *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). See generally *NAFTA and Side Agreements Before the House Ways and Means Committee* (1993) (chaired by Dan Rostenkowski) available in LEXIS, Nexis Library; *NAFTA Before the Senate Finance Committee* (1993) (chaired by Daniel P. Moynihan) available in LEXIS, Nexis Library.

77. See *NAFTA and Side Agreements*, United States Trade Representative Mickey Kantor, Sept. 14, 1993, available in LEXIS, Nexis Library; *Hills Dispels NAFTA Myths*, United States Trade Representative Carla A. Hills, Sept. 21, 1992, available in NAFTA, 1992 WL 360151. See also Charles E. Roh Jr., *Testimony Before the Committee on Science, Space and Technology*, Sept. 30, 1992, available in 1992 WL 360148 (NAFTA).

78. *Franklin*, 112 S.Ct. at 2771 (quoting 2 U.S.C. § 2(a) (1993)).

79. *Franklin*, 112 S.Ct. at 2769.

80. *Id.* at 2774.

81. *Id.*

82. *Id.* at 2774.

83. The product (the draft text of NAFTA) that was released by the USTR was the same product that was voted on by Congress because under the fast-track procedures, it is not subject to amendment. 19 U.S.C. § 2191(d). Whereas, the product (the

have unilaterally altered its terms, because he had already signed the agreement with Canadian and Mexican leaders.<sup>84</sup> Although the President could have simply not delivered NAFTA to Congress, it is unlikely that President Clinton would have set aside an agreement that had been in negotiation for years by the OTR, Canada and Mexico.

(c) *Remedies*

To complete reapportionment, Congress used the President's statement; to make the statement, the President used the Secretary's report. Therefore, if the Secretary's report was procedurally flawed, the validity of the President's statement and Congress' reapportionment would be questionable. Thus, as a remedy, it was necessary that the plaintiffs in *Franklin*<sup>85</sup> enjoin every party in the process — the Secretary of the agency, the President and Congress. The district court's decision, later overturned, "directed the Secretary to eliminate the overseas federal employees from the apportionment counts, directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress, and directed the Clerk of the House of Representatives to inform the States of the change."<sup>86</sup>

Public Citizen neither attempted to inhibit the President's discretion concerning NAFTA negotiations nor endeavored to prevent the President's transmittal of NAFTA to Congress.<sup>87</sup> The USTR claimed that requiring an EIS would have prevented the executive power "from exercising his accustomed supervisory powers over his executive officers."<sup>88</sup> However, while Congress' procedural reapportionment requirements are directed at the agency for the use of the President, NEPA's EIS requirement from Congress is directed at the agency for the use of Congress. Congress would have used the EIS to evaluate the probable environmental effects of NAFTA, as enacted. An injunction requiring an EIS would not have substantively affected NAFTA be-

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census report) that was released by the Secretary was only used by the President to make the product that was voted on by Congress. *Franklin*, 112 S.Ct. at 2769.

84. *The North American Free Trade Agreement: Official Notification of Congress*, Sept. 18, 1992, available in 1992 WL 360153 (NAFTA).

85. 112 S.Ct. 2767 (1992).

86. *Id.* at 2770 (referring to *Franklin v. Massachusetts*, 785 F. Supp. 230 (Mass. Dist. Ct. 1992)).

87. *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993) (Plaintiffs sought to set aside the President's decision to close a base because the agency, in making a recommendation to the President, had violated procedural requirements). See also *Specter v. Garrett*, 995 F.2d 404 (3d Cir. 1993) cert. granted, 114 S.Ct. 342 (1993).

88. *Franklin*, 112 S.Ct. at 2775.

cause it could still have proceeded to Congress in the same form, but accompanied by an EIS.

### *B. Final Agency Action in the Context of NEPA*

The APA grants injunctive relief to those "adversely affected or aggrieved by agency action within the meaning of a relevant statute."<sup>89</sup> Had the court considered NEPA, it would have granted judicial review because the obligations NEPA imposes are intended to arise before plaintiffs are legally affected — an EIS should be done on "*proposals* for legislation."<sup>90</sup>

The EIS is a requirement enacted to serve a legislative function: link the fact finder (the agency) to the final decisionmaker (Congress).<sup>91</sup> It was not intended to inhibit the negotiator (the President). This legislative function of NEPA is strongly supported by the Council on Environmental Quality (CEQ) regulations,<sup>92</sup> internal agency regulations, and courts' past extensions of review.

#### 1. CEQ Regulations

The legislative function of linking the factfinder to the decisionmaker is most explicitly expressed in the CEQ regulations, which interpret the procedural provisions of NEPA<sup>93</sup> and are "entitled to substantial deference."<sup>94</sup> Although regulations allow flexibility in agency implementation of its procedures,<sup>95</sup> all agencies of the Federal Government must comply with the CEQ regulations<sup>96</sup> when compliance is not inconsistent with an agency's statutory requirements.<sup>97</sup> It was the position of the CEQ that an EIS on NAFTA was mandated but not per-

89. 5 U.S.C. § 702 (1993).

90. NEPA, 42 U.S.C. § 4332 (1993) (emphasis added).

91. 40 C.F.R. § 1502.1 (stating that an EIS is to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts. . ."); 40 C.F.R. § 1500.1 (stating that the purpose of NEPA is "to help public officials make decisions that are based on understanding of environmental consequences . . .").

92. 40 C.F.R. § 1500 (1993).

93. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977).

94. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

95. 40 C.F.R. § 1507.1 (1993) (stating that each agency retains "flexibility in adapting its implementing procedures").

96. 40 C.F.R. § 1507.1 (1993) (stating that "[a]ll agencies of the Federal Government shall comply with these [CEQ] regulations").

97. 40 C.F.R. § 1500.3 (1993). *See also* Exec. Order No. 11,991, § 2(q), 42 Fed. Reg. 26,967 (1977).

formed. The former CEQ General Counsel, Nicholas C. Yost, specifically concluded that the plain language of NEPA requires an EIS on NAFTA.<sup>98</sup>

According to the CEQ regulations, treaties<sup>99</sup> are both "proposals for legislation" and "federal actions." There is a "proposal" when an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."<sup>100</sup> The proposal must be for "legislation developed by or with the significant cooperation and support of a Federal agency."<sup>101</sup> Even though "[d]rafting does not by itself constitute significant cooperation,"<sup>102</sup> the acts surrounding the creation of treaties, as opposed to simple submission to Congress, do constitute significant cooperation.<sup>103</sup> Moreover, the final draft of NAFTA was per se legislation because the regulation specifically states that "[p]roposals for legislation include requests for ratification of treaties."<sup>104</sup>

The CEQ has identified four categories<sup>105</sup> of federal actions that

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98. See Appellant's Brief at 23 n.15, 24, *Public Citizen IV* (No. 93-5212).

99. Although the language applies specifically to treaties, it has been interpreted to apply to international agreements as well. *Public Citizen III*.

100. 40 C.F.R. § 1508.23 (1993).

101. 40 C.F.R. § 1508.17 (1993).

102. *Id.*

103. *Public Citizen III*, 822 F. Supp at 25.

104. 40 C.F.R. § 1508.17 (1993). Although the language applies specifically to treaties, it has been interpreted to apply to international agreements as well. *Public Citizen III*.

105. 40 C.F.R. §§ 1508.18(b)(1)-(4) (1993).

(b) Federal actions [requiring an EIS] tend to fall within one of the following four categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

require an EIS. NAFTA arguably falls within three of these categories: (1) "treaties and international conventions or agreements,"<sup>106</sup> (2) "[a]doption of formal plans . . . upon which future agency actions will be based,"<sup>107</sup> and (3) "systematic and connected agency decisions . . . implement[ing] a specific statutory program."<sup>108</sup>

## 2. Agency Internal Regulations

Some agencies and departments have explicitly mandated EISs on certain treaties and international agreements. They have done so to comply with CEQ requirements that mandate supplementary CEQ regulations<sup>109</sup> and to ensure strict compliance with the letter and spirit of NEPA.<sup>110</sup> For example, the State Department has prepared EISs<sup>111</sup> on numerous treaties and agreements including: the Panama Canal Treaty,<sup>112</sup> the Ocean Dumping Convention,<sup>113</sup> and the Strategic Arms Reduction Treaty.<sup>114</sup> Various agencies have also prepared EISs on treaties and international agreements that they negotiated: the EPA on the 1988 Montreal Protocol on Substances that Deplete the Ozone Layer, and the Federal Maritime Commission on the 1979 Intercontinental Transport Agreements.<sup>115</sup>

## 3. Courts' Extension of Review

In some cases, the courts have extended their jurisdiction to decide the issue of NEPA compliance on agency action taken prior to the pro-

*Id.*

106. 40 C.F.R. § 1508.18 (b)(1) (1993).

107. 40 C.F.R. § 1508.18(b)(2) (1993).

108. 40 C.F.R. § 1508.18(b)(3) (1993).

109. 40 C.F.R. § 1507.3(a) (1993).

110. 40 C.F.R. § 1500.1(a) (1993).

111. 22 C.F.R. §§ 161.5(c),(d) (1993).

112. Panama Canal Treaty, Pls. Exs. 58-59 (1977).

113. Ocean Dumping Convention, Pls. Exs. 61-70 (1972). *See also* NORML v. United States Dep't of State, 452 F. Supp. 1226, 1232-33 (D.D.C. 1978) (Concluding NEPA is applicable to effects of U.S. herbicide spraying program in Mexico.).

114. NEPA and Trade Agreements: Hearings Before Senate Comm. on Env't and Pub. Works (1993) (Statement of Nicholas Yost, Former CEQ General Counsel) *available in* NAFTA.

115. Appellee's Brief at 23 n.16, *Public Citizen IV* (No. 93-5212). Also, an EIS was prepared by the Department of Interior on the 1973 World Heritage Convention, by the Department of Commerce on the 1975 and 1976 Interim Convention on Conservation of North Pacific Fur Seals, and by the Office of the Micronesian Status Negotiations on the 1984 Compact of Free Association. *Id.* (citing Pls. Exs. 60, 71-72, 74-76, 82 (Office of Micronesian Status Negotiations, Compact of Free Ass'n 1984)).

posal stage and on ordinary legislative proposals,<sup>116</sup> even though it was the President who ultimately submitted the request or proposal to Congress.<sup>117</sup> The final action of the agency, which was subject to judicial review under APA, was the completion of the proposal or report. It was not the actual submission to Congress because that was an act of the President.<sup>118</sup> Some courts have recognized the reviewability of this agency action under the APA, even though they may have found on the merits of the case that there was no need to do an EIS. In some of the following instances, there has been judicial review of: an executive agreement,<sup>119</sup> deployment of MX missiles pursuant to a Presidential recommendation for alternative basing requirements approved by Congress,<sup>120</sup> and a submarine communications system that the President requested.<sup>121</sup>

Under the majority's holding in *Public Citizen IV*,<sup>122</sup> there can be no judicial review of a request for an EIS under the APA until there is "final agency action," which does not include Presidential action.<sup>123</sup> The concurring opinion in *Public Citizen IV*<sup>124</sup> recognized an inherent contradiction in the majority's reading of "final agency action" when it stated: "[t]he nub of the problem is that judicial review under the APA demands 'final agency action' whereas the duty to prepare an impact statement arises earlier. The main objective of an impact statement is to ensure that the decisionmaker considers environmental effects prior to taking action."<sup>125</sup>

116. *Izaak Walton League of America v. Marsh*, 655 F.2d 346 (D.C. Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981); *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991).

117. *Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972) (holding that an EIS is required whenever agency intends to take steps that will result in a significant environmental impact, even if these steps were planned before the passing of NEPA).

118. *Kleppe*, 427 U.S. at 406.

119. *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 758 (D.Haw. 1990) *vacated as moot*, 924 F.2d 175 (9th Cir. 1991) (holding EIS not required for Presidential agreement between the United States and West Germany regarding removal of chemical weapons).

120. *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) (considering the necessity for an EIS).

121. *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (considering the agency's failure to supplement its EIS).

122. 5 F.3d 549.

123. *Id.* at 553.

124. *Id.* (Randolph, J., concurring).

125. *Id.* at 554.



C. *Ramifications of Public Citizen IV*<sup>126</sup>

In its attempt to avoid mandating an EIS requirement on a trilateral trade agreement, the Appeals Court may have frustrated the intent of Congress in three ways. First, Congress had to enact NAFTA without considering an EIS. Thus, the Appeals Court stripped NEPA of its basic objective with regard to NAFTA: to inform Congress about the environmental effects of the agreement before it was passed.<sup>127</sup> Congress certainly did not receive the “[r]easonable forecasting and speculation . . . implicit in NEPA.”<sup>128</sup> However, it is possible that many of the consequences of NAFTA that would have been forecasted by an EIS were in fact forecasted by the numerous hearings held by Congress and were addressed by the environmental protection afforded in NAFTA and the accompanying environmental side agreement.<sup>129</sup>

Second, the court practically annihilated the “proposals for legislation” element of NEPA.<sup>130</sup> *Public Citizen IV*<sup>131</sup> sets the stage to deny review of all future international agreements, whether they have congressional hearings and side agreements, as well as all proposals for legislation that are routed from an agency through another entity before finally reaching Congress. These results, if intended by Congress, should have been specified more clearly as the EIS requirement seeks to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”<sup>132</sup>

Finally, because the APA applies to every statute that does not independently create a cause of action, the Appeals Court’s interpretation of final agency action is now precedent. The court did not limit its decision to cases that involve NEPA. Rather, it denied judicial review for a case, having national, international, economic, social, and environmental significance, on basically one word in the APA — “final.” Because the court narrowly interpreted the word “final,” *Public Citizen IV*<sup>133</sup> may be used as precedent to generally deny APA review of many

126. 5 F.3d 549.

127. *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). *See also* *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985).

128. *Scientists’ Inst. for Pub. Info.*, 481 F.2d at 1092 (D.C. Cir. 1973). *See also*, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985).

129. *See infra* notes 292-294 and accompanying text.

130. 42 U.S.C. § 4332(2)(C) (1994).

131. 5 F.3d 549.

132. 40 C.F.R. § 1500.1(b) (1994).

133. 5 F.3d 549.

topics.

#### IV. ALTERNATIVE HOLDINGS IN *PUBLIC CITIZEN IV*

There are three viable alternatives to the court's holding in *Public Citizen IV*.<sup>134</sup> First, the Appeals Court could have applied NEPA. This, of course, is what the District Court did. It granted the plaintiffs judicial review and held on the merits that an EIS was required for NAFTA. The District Court issued an injunction to make the USTR comply "forthwith."<sup>135</sup> Second, the Appeals Court could have denied judicial review altogether under the political question doctrine. Finally, the Appeals Court could have applied equitable market considerations. It could have granted judicial review and considered NEPA, but concluded that NAFTA's economic purpose prevented it from issuing an injunction.

##### A. Apply NEPA

The District Court in *Public Citizen IV*<sup>136</sup> did not inhibit the President's authority or timing to deliver NAFTA to Congress;<sup>137</sup> it "simply directed the Office to take another, albeit related action."<sup>138</sup> Congress, as part of its authority to create and delegate power to federal agencies, may "require agencies to submit information to Congress, especially where, as here, the information is vital to Congress in carrying out its constitutional authority."<sup>139</sup> Public Citizen argued that Congress, pursuant to its authority "to regulate commerce with foreign nations,"<sup>140</sup> established the OTR, under the Trade Acts, as "the chief representative of the United States for, international trade negotiations, . . . in which the United States participates,"<sup>141</sup> and requires the OTR, under NEPA, to submit an EIS concurrent with NAFTA and its implementing legislation.<sup>142</sup>

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134. *Id.*

135. *Public Citizen III* at 35.

136. 5 F.3d 549.

137. See *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). This is unlike those cases that prevent the President from taking action, such as seeking advice from his advisors. *Association of American Physicians & Surgeons, Inc. v. Clinton*, No. 93-5086 (D.C. Cir. 1993).

138. Appellant's Brief at 31, *Public Citizen IV* (No. 93-5212).

139. *Id.*

140. *Id.* (quoting U.S. CONST. art. I, § 8).

141. 19 U.S.C. § 2171(c)(1)(C) (1993).

142. Appellee's Brief at 31, *Public Citizen IV* (No. 93-5212).

### 1. Judicial Review of NEPA Compliance

Because it is the duty of the courts to construe congressional legislation,<sup>143</sup> they “cannot shirk this responsibility merely because [the] decision may have significant political overtones.”<sup>144</sup> The Supreme Court, in *Tennessee Valley Authority v. Hill*,<sup>145</sup> did not shirk its judicial authority to interpret the Endangered Species Act of 1973 (“ESA” or the “Act”)<sup>146</sup> and to issue an injunction against further agency action. Environmental groups had sought to enjoin the construction of the Tellico Dam until after an EIS was done.<sup>147</sup> The injunction was issued, and the EIS revealed that in the waters below the dam there was a small population of fish having protection under the ESA.<sup>148</sup>

The ESA mandates that the Secretary take “such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species. . . .”<sup>149</sup> The agency argued that “closure of the Tellico Dam, as the last stage of a ten-year project, falls outside the legitimate purview of the Act if it is rationally construed.”<sup>150</sup> However, the Court, concluding that “once the meaning of an enactment is discerned . . . the judicial process comes to an end,” announced that the statute mandates a perplexing result but, nevertheless, one that it would not usurp.<sup>151</sup> Similarly, in *Public Citizen III*,<sup>152</sup> the District Court granted judicial review and determined that all of the requirements of section 102(C) of NEPA were met.<sup>153</sup>

### 2. NEPA Requirements

At the time of *Public Citizen III*,<sup>154</sup> the OTR had released the

143. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

144. *Id.*

145. 437 U.S. 153 (1978).

146. 16 U.S.C. § 1531 (1994).

147. *Environmental Defense Fund v. Tennessee Valley Auth.*, 339 F. Supp. 806 (E.D. Tenn. 1972) *aff'd*, 468 F.2d 1164 (6th Cir. 1972). The NEPA injunction halted the construction of the dam for 21 months, even though it already had \$29 million invested in it. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 158 n.5.

148. *Endangered Species Act of 1973*, 16 U.S.C. § 1536 (1994).

149. *Id.*

150. *Hill v. Tennessee Valley Auth.*, 549 F.2d 1064, 1070 (1977).

151. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 195.

152. 822 F. Supp. 21.

153. *Public Citizen III* at 21 (citing 42 U.S.C. § 4332(2)(c) (1993)).

154. 822 F. Supp. 21.

final draft of NAFTA for the President's signature and submittal to Congress. These actions, at a minimum, constituted a proposal that Congress pass NAFTA and its implementing legislation.<sup>155</sup> However, even if President Clinton had not submitted NAFTA to Congress, it is not necessary that a proposal actually be submitted to Congress in order for an EIS to be required.<sup>156</sup> NAFTA is also a major governmental action.<sup>157</sup> The negotiation of NAFTA was undoubtedly a "necessary part"<sup>158</sup> of free trade which allegedly will produce the adverse environmental effects. Additionally, negotiating and implementing NAFTA, with its side agreements, required and will continue to require "substantial planning, time and expense."<sup>159</sup>

The Proposals for legislation or major governmental action often "significantly affect[] the quality of the human environment."<sup>160</sup> To determine if there is significance, courts will consider: short and long term,<sup>161</sup> national and regional,<sup>162</sup> direct and indirect<sup>163</sup> and cumulative effects.<sup>164</sup> The "human environment" includes the relationship between people, animals, nature, places, things, policy and the economy.<sup>165</sup>

Public Citizen produced substantial proof that NAFTA would aggravate the relationship between these environmental factors.<sup>166</sup> The evidence primarily addressed the most controversial issues surrounding NAFTA: Mexico's lax enforcement of its environmental laws, the pol-

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155. Appellant's Brief at 42-43, *Public Citizen IV* (No. 93-5212).

156. *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986).

157. The circuits have split on the interpretation of the term "major." Some circuits "require substantial planning, time, resources, or expenditure" to go into the federal action. *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356, 366 (E.D.N.C. 1972) (emphasis added). Other circuits require the federal action to be a "necessary part" of the environmental damage. *Sierra Club v. Marsh*, 769 F.2d at 877. See also *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1431 (C.D. Cal. 1985) (citing 40 C.F.R. § 1508.27 (1993)).

158. *Supra* note 157.

159. *Id.*

160. 42 U.S.C. § 4332(2)(C) (1993).

161. 40 C.F.R. § 1508.27(a) (1993).

162. *Id.*

163. Direct effects "occur at the same time and place." 40 C.F.R. § 1808.8(a) (1993). Indirect effects "are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (1993). In fact, they "may be more significant than the . . . primary effect." *Colorado River Indian Tribes*, 605 F. Supp. at 1434.

164. 40 C.F.R. § 1508.7 (1993) (Cumulative effects result when past actions are added to present actions and reasonably foreseeable future actions to create adverse impact).

165. 40 C.F.R. §§ 1508.14, 1508.27(b)(1)-(10) (1993).

166. See *Public Citizen III*, 822 F. Supp. 21 (citing Plaintiff *Public Citizen Aff.*).

lution density of the U.S.- Mexico border region, and the probability that American environmental laws would be weakened.<sup>167</sup>

It was the position of the Executive Office that NAFTA would improve the environment by "maintain[ing] U.S. environmental, safety, and health standards; allow[ing] us to enact even tougher standards; and encourag[ing] our partners to strengthen their standards."<sup>168</sup> NAFTA supports the Executive Office's position with its environmental side agreement. This side agreement explicitly recognizes the right of each country to prohibit the importation of goods which fall below domestic environmental standards.<sup>169</sup>

In February 1992, the USTR and the EPA released a comprehensive Environmental Review which also supported the Executive Office's position in various ways.<sup>170</sup> First, the review concluded that NAFTA would provide Mexico with resources to enforce its laws.<sup>171</sup> In 1988, Mexico enacted the General Law for Ecological Equilibrium and Environmental Protection<sup>172</sup> and, since then, has been enforcing it with rigor.<sup>173</sup> Second, the review refuted the "pollution haven" myth.<sup>174</sup>

167. See generally "Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement," May 1, 1991, available in 1991 WL 434200 (NAFTA); "NAFTA Before the Comm. on Science, Space and Technology," (1992) (Testimony of Charles E. Roh Jr., Assistant United States Trade Representative for North American Affairs) available in NAFTA, 1992 WL 360148; "Hills Dispels NAFTA Myths," United States Trade Representative Carla A. Hills, Sept. 21, 1992, available in NAFTA, 1992 WL 360151.

168. "San Antonio Meeting and Initialing of the North American Free Trade Agreement, The White House Office of the Press Secretary," 1992, available in 1992 WL 360158 (NAFTA).

169. NAFTA: Office of the U.S. Trade Representative Before the Committee on Science, Space and Technology, (1992) (Testimony of Charles E. Roh Jr., Assistant United States Trade Representative for North American Affairs) available in 1992 WL 360148 (NAFTA).

170. "Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement," May 1, 1991, available in 1991 WL 434200 (NAFTA).

171. *Id.*

172. *Id.*

173. "Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement," May 1, 1991, available in 1991 WL 434196 (NAFTA).

Between 1989 and the beginning of 1991, the Mexican government ordered some 980 temporary and 82 permanent closures of industrial facilities for failing to comply with environmental laws. In 1990, Mexico made the multi-billion dollar decision to phase out leaded gasoline and to order that all new cars, including over 40,000 Mexico city taxis, be equipped with catalytic converters. The government also shut down all 24 military-industrial installations

President Salinas articulated "that Mexico has no interest in becoming a pollution haven for North America."<sup>176</sup> Finally, the review concluded that NAFTA would not encourage United States firms to relocate to Mexico because: (1) Mexican environmental law was comparable to United States law,<sup>176</sup> (2) enforcement in Mexico was improving dramatically,<sup>177</sup> and (3) the cost of complying with domestic standards was generally too small a percentage of total costs to induce firms to relocate.<sup>178</sup>

Nevertheless, even if the United States Executive office, the USTR, and the EPA were correct in their assessment that the benefits of NAFTA outweigh the costs, an argument of resulting benefits from the action "is not relevant to the question of the existence of significant environmental effects . . . ."<sup>179</sup> Courts are unlikely to weigh beneficial and detrimental effects, especially when the action is one that normally requires an EIS, because an EIS requires disclosure of (1) "actions which may lead to significant change in land use,"<sup>180</sup> even if they do

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in the Mexico City area because of potential environmental risks.

Most dramatically, President Salinas announced last month the permanent closure of Mexico's largest oil refinery for environmental reasons. The refinery had been responsible for an estimated 15 percent of Mexico City's industrial air pollutants. The estimated cost of that shut-down is some \$500 million and up to 5,000 jobs . . . . [In addition the] budget of the Mexican environmental agency, SEDUE, has been increased almost eight-fold between 1989 and 1991 (from \$5 million to \$39 million).

*Id.* at 7-8.

174. "Hills Dispels NAFTA Myths," United States Trade Representative Carla A. Hills, Sept. 21, 1992, *available in* 1992 WL 360151 (NAFTA).

175. "Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement," May 1, 1991, *available in* 1991 WL 434200 (NAFTA).

176. *Id.* These laws were patterned after United States domestic environmental laws. *Id.*

177. Before operating, new businesses in Mexico must file an environmental compliance program detailing how they will conform to the 1988 standards. "Hills Dispels NAFTA Myths," United States Trade Representative Carla A. Hills, Sept. 21, 1992, *available in* 1992 WL 360151 (NAFTA).

178. "Report of the Administration on the NAFTA and Actions Taken in Fulfillment of the May 1, 1991 Commitments," Sept. 18, 1992, *available in* 1992 WL 360154 (NAFTA) (noting that compliance costs are less than two percent for most industries).

179. *Sierra Club v. Marsh*, 769 F.2d at 880 (quoting 40 C.F.R. § 1508.27(b)(1) (1993)).

180. *Sierra Club v. Marsh*, 769 F.2d at 881 (citing 23 C.F.R. § 771.115(a)(3) (1984)).

not result in a "complete devastation" of the land;<sup>181</sup> (2) actions that cause "unique or unknown impacts,"<sup>182</sup> (3) actions that damage ecologically critical areas,<sup>183</sup> such as the U.S.-Mexico border; (4) actions of a controversial nature,<sup>184</sup> especially if they are purely economical,<sup>185</sup> which is the essence of NAFTA;<sup>186</sup> (5) actions that set a significant precedent;<sup>187</sup> or (6) actions that may violate "any local, state or federal law that protects the environment."<sup>188</sup>

If the OTR had been required to do an EIS, it would have included a succinct description of the environments or areas to be affected by NAFTA,<sup>189</sup> a list of all reasonable alternatives to NAFTA,<sup>190</sup> a "scientific and analytic" evaluation of all the environmental consequences<sup>191</sup> of each alternative,<sup>192</sup> and finally, a plan or "[m]eans to mitigate" such consequences.<sup>193</sup>

### B. Apply the Political Question Doctrine

The political question doctrine recognizes that "certain issues, because of their purely political character or because their determination would involve encroachment upon the powers of the Executive or Legislative Branches, should not be decided by the courts."<sup>194</sup> *Baker v. Carr*,<sup>195</sup> the seminal case for the political question doctrine, set forth the six ways in which a court can find that the doctrine applies.<sup>196</sup>

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181. *Sierra Club v. Marsh*, 769 F.2d at 880-81.

182. 40 C.F.R. § 1508.27(b) (1993).

183. *Id.*

184. *Id.*

185. See generally, *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991).

186. NAFTA is primarily an economic document. See generally *supra* notes 323 and accompanying text.

187. 40 C.F.R. § 1508.27(b) (1993).

188. *Id.*

189. 40 C.F.R. § 1502.15 (1993).

190. 42 U.S.C. §§ 4332(2)(C), (E) (1993).

191. 42 U.S.C. § 4332(2)(C) (1993).

192. 40 C.F.R. § 1502.16 (1993).

193. 40 C.F.R. § 1502.16(h) (1993).

194. BLACK'S LAW DICTIONARY 1158 (6th ed. 1990).

195. 369 U.S. 186 (1962)(holding that a Fourteenth Amendment challenge to Tennessee's apportionment statute was not a nonjusticiable political question).

196. *Id.* at 217. The six ways are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the

### 1. Committed To Other Branches

The Court has stated that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — ‘the political’ — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”<sup>197</sup> Even if foreign policy is involved, the case will be justiciable<sup>198</sup> if it challenges the interpretation of policy rather than the setting of policy. *United States v. Yoshida*<sup>199</sup> illustrates the distinction between the two challenges, stating that “[alt]hough courts will not normally review the essential political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon.”<sup>200</sup> The former is simply unallowable; the latter is expected.<sup>201</sup>

In the context of NAFTA, Public Citizen was not simply calling for an interpretation of NAFTA but was making a challenge intimately related to the government’s foreign trade policy, which is constitutionally committed to Congress<sup>202</sup> and statutorily delegated to the President and the OTR.<sup>203</sup> There was a commitment by the leaders of Canada, Mexico and the United States to make NAFTA effective by

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impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*

197. *Baker*, 369 U.S. at 211-12 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)). See also *United States v. Belmont*, 301 U.S. 324, 328 (1937).

198. *Baker*, 369 U.S. at 211.

199. 526 F.2d 560 (C.C.P.A. 1975). *Yoshida* challenged the validity of a presidential proclamation that levied an import duty surcharge on its products. Presidential Proclamation 4074 was authorized by the Trading with the Enemy Act, which allows regulation of trade during times of war or national emergency. *Yoshida*, 526 F.2d at 566.

200. *Yoshida*, 526 F.2d at 578-579.

201. *Id.* at 579.

202. U.S. CONST., Art. I, § 8.

203. The Trade Acts, 19 U.S.C. §§ 2101-91, 2901-09 (1993). The Trade Acts make a broad delegation of power to the President and the OTR, and in *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 110 (1947), the Court stated that it will scrutinize any statute that authorizes review in those instances that Congress has exercised its authority to delegate “very large grants of its power over foreign commerce to the President . . . as the Nation’s organ in foreign affairs.” *Id.* at 110.



January 1, 1994. Mandating an EIS in September 1993,<sup>204</sup> would have undermined the "viability of the fast-track approval process."<sup>205</sup>

## 2. Insufficient Standard

In *Sanchez-Espinoza v. Reagan*,<sup>206</sup> the court stated that the lawsuit was "another cog in the wheel of controversy currently surrounding U.S. government involvement in Central America."<sup>207</sup> The court concluded that it did "not have the resources and expertise required to oversee U.S. military affairs in Central America . . . which is the current debate . . . by both the Executive and Congress."<sup>208</sup> In a similar vein, controversy surrounded the NAFTA negotiations. Labor, unfair trade, and environmental issues all elicited considerable political and public debate.

## 3. Beyond Judicial Discretion

In *Concerned v. Schlesinger*,<sup>209</sup> a nuclear site was the subject of controversy.<sup>210</sup> Ultimately, "[a] question that might be answered in different ways for different amendments must surely be controlled by political standards rather than standards easily characterized as judicially manageable"<sup>211</sup> because such policy "is not within the ambit of the court's expertise or discretion."<sup>212</sup> Likewise, the environmental policy commitments of NAFTA, a trilateral trade agreement stretching from the "Arctic to Acapulco,"<sup>213</sup> needed to be established by all the negotiators — the United States, Canada, and Mexico.<sup>214</sup>

204. *Public Citizen IV* was decided on September 24, 1993.

205. Appellant's Brief at 30-31, *Public Citizen IV* (No. 93-5212) (quoting Katz Aff. para. 4).

206. 568 F. Supp. 596 (1983).

207. *Id.* at 602. Nicaraguan plaintiffs were seeking damages for alleged U.S.-sponsored terrorist attacks on them, and Congressional plaintiffs were seeking an injunction against further military involvement in Nicaragua. *Id.* at 598. It was alleged that the United States' involvement constituted a war unauthorized by Congress. *Id.*

208. *Sanchez*, 568 F. Supp. at 599, 602.

209. 400 F. Supp. 454 (D.D.C. 1975).

210. *Id.* There were "ongoing international arms limitation negotiations" that related to the project. *Id.*

211. *Goldwater*, 444 U.S. at 1003 (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

212. *Concerned*, 400 F. Supp. at 482.

213. J. Craig Crawford, It's a Deal: House votes for NAFTA, *ORLANDO SENTINEL*, Nov. 18, 1993, at A1.

214. The three countries were in the process of negotiating an environmental side agreement that incorporated trilateral standards.

#### 4. Respect For Coordinate Branches

The consistency of two United States bilateral nuclear agreements with the policy of United States non-proliferation statutes was the issue in *Cranston v. Reagan*.<sup>215</sup> The court concluded that it would not, in a post hoc fashion, “disturb the ‘single-voiced’ statement of the Government’s views on this issue”<sup>216</sup> because Congress had a statutorily-created opportunity to protest.<sup>217</sup>

The political process worked for NAFTA. To avoid adopting the lowest common denominator environmental standard, United States and Mexican officials negotiated options for resolving differences in the environmental standards of the two countries.<sup>218</sup> The environmental provisions of NAFTA, in short, state “that the toughest standards on the books are the floor to which others should adjust, not a ceiling to be lowered by compromise.”<sup>219</sup>

#### 5. Adherence To A Final Decision

In the legislative enacting process, absence of finality in a statute “contribute[s] to judicial reluctance to inquire whether . . . it complied with all requisite formalities.”<sup>220</sup> Considerations of finality will arise when the complaint of the plaintiff is central to an issue of political power.<sup>221</sup> Trade policy formulation, as opposed to interpretation, is central to executive power — both statutorily<sup>222</sup> and symbolically.<sup>223</sup> When

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215. *Cranston*, 611 F. Supp. 253 (citing Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2282, as amended by the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978)).

216. *Cranston*, 611 F. Supp. at 253-54 (quoting *Baker*, 369 U.S. at 211).

217. When the conflict is between the legislative and executive branches, it must be resolved in the political process because “[s]uch matters are the archetype of those best resolved through bargaining and accommodation . . . .” *National Wildlife Federation v. United States*, 626 F.2d 917, 924-26 (D.C. Cir. 1980); see also *Wilderness Society v. House of Representatives*, 733 F.2d 946, 955 (D.C. Cir. 1984).

218. GENERAL ACCOUNTING OFFICE, GAO REPORT T-RCED-93-9 (1993). Within NAFTA, there is an intricate procedure for dispute resolutions: the initial consultations, NAFTA, Art. 2006, a Free Trade Commission, NAFTA, Art. 2007, an arbitral panel, NAFTA, Art. 2008, and a panel of experts, NAFTA, Art. 2015.

219. John S. Rainey, *What would NAFTA change?*, COLUMBIA STATE, Nov. 14, 1993, at D3.

220. *Baker*, 369 U.S. at 214 (quoting *Field v. Clark*, 143 U.S. 649, 672, 676-677). See also *Leser v. Garnett*, 258 U.S. 130, 137 (1992).

221. See, e.g., *Baker*, 369 U.S. at 213-14 (stating that a public rent control program, although important during a declaration of emergency, is not central to the emergency effort).

222. Trade Act of 1974, 19 U.S.C. §§ 2101-91, 2901-09 (1993).

President Clinton exercised his statutory authority to sign NAFTA into law, he stated: “[w]e are on the verge of a global economic expansion that is sparked by the fact that the United States, at this critical moment, decided that we would compete, not retreat.”<sup>224</sup>

#### 6. Avoidance Of Embarrassment From Conflicting Pronouncements

The Supreme Court will not grant jurisdiction if the United States would “risk embarrassment of our government abroad”<sup>225</sup> as a result of “multifarious pronouncements by various departments on one question.”<sup>226</sup> In *Cranston*,<sup>227</sup> the plaintiffs claimed that during the multilateral nuclear negotiations, the defendants were to forecast and scrutinize proliferation risks of the initial agreements.<sup>228</sup> The challenged agreements were the product of five years of negotiation between Sweden, Norway, and the United States<sup>229</sup> and had been approved by the Swedish Government and the Norwegian Parliament.<sup>230</sup> The *Cranston* court stated:

[t]he challenged Agreements . . . have progressed through the political processes of three nations and taken effect. Were this Court to adopt a new stance, ‘ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President, the ‘symbolic impact’ would be grave indeed.<sup>231</sup>

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223. A ceremony was held at the White House, two months prior to NAFTA being voted on in Congress, at which President Clinton and former Presidents Bush, Carter, and Ford all gave speeches in support of the agreement. NAFTA and Side Agreements Before the House Ways and Means Committee (1993) (testimony of Sam M. Gibbons) available in LEXIS, Nexis Library.

224. Ronald A. Taylor, *Clinton Signs NAFTA*, WASH. TIMES, Dec. 9, 1993, at A4.

225. *Baker*, 369 U.S. at 226.

226. *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

227. 611 F. Supp. at 253.

228. *Cranston*, 611 F. Supp. at 250 (citing 42 U.S.C. §§ 2153, 2160 (1993)).

229. *Cranston*, 611 F. Supp. at 251.

230. *Id.* Pursuant to the procedures set forth in the authorizing statute, the Secretary of State, with the aid of the Director of the Arms Control and Disarmament Agency and the Secretary of Energy, negotiated the agreements and submitted them to the President. *Id.* at 249 (citing the Atomic Energy Act § 123, 42 U.S.C. § 2153 (1993)). The President then approved the agreements and submitted them to Congress along with a statement that the agreements “will not constitute an unreasonable risk[] to the common defense and security.” *Cranston*, 611 F. Supp. at 249 (citing 42 U.S.C. § 2153(b) (1993)).

231. *Cranston*, 611 F. Supp. at 253 (quoting *Mitchell v. Laird*, 488 F.2d 611, 616

With regard to NAFTA, "once the President undertakes trade negotiations . . . he could be severely embarrassed by a judicial recall."<sup>232</sup> Ultimately, "in foreign policy terms, NAFTA is a test of our leadership."<sup>233</sup>

### C. Apply Equitable Market Considerations

Actions taken between the Department of State and "foreign officials . . . [to] facilitat[e] trade opportunities abroad and U.S. business expansion in foreign markets" are categorically excluded from the EIS requirement.<sup>234</sup> Although these regulations were established by the Department of State and not by the OTR, they address the types of interests that the Appeals Court in *Public Citizen IV*<sup>235</sup> could have been tacitly protecting.

Justices are beginning to consider economic issues more frequently.<sup>236</sup> Today Supreme Court Justices are "more sophisticated in economic reasoning, and they apply it in a more thoroughgoing way than at any other time in our history."<sup>237</sup> They are beginning to consider, with increasing sophistication, the effect of their decisions on economic incentives on the margin.<sup>238</sup> Economic analysis in judicial holdings may not always be overt, but there increasingly seems to be an application by implication. Some cases that the Supreme Court has dismissed on issues of standing or separation of powers are "not explicitly economic, but the principles lay just beneath the surface."<sup>239</sup> Whether judges will incorporate economic considerations into a decision depends on how they frame the issue, interpret the statute, and apply principles of equity.

#### 1. Issue Framing

The relationship between personal liberties and economic or governmental interests greatly influence how the court frames the issue at

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(D.C. Cir. 1973)). See also *Adams v. Vance*, 570 F.2d 950, 956 (D.C. Cir. 1978).

232. Erwin P. Eichmann & Gary N. Horlich, *Political Questions in International Trade: Judicial Review of Section 301?*, 10 MICH. J. INT'L L. 735 (1989).

233. *Id.*

234. 22 C.F.R. § 161.7(b)(1)(1993).

235. 5 F.3d 549.

236. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

237. Easterbrook, *supra* note 236 at 5.

238. See generally *id.* at 33-42.

239. *Id.* at 42.

hand.<sup>240</sup> Incorporating market interests would marginally alleviate the problem of dualism — the paradox of passionately defending personal interests while often overlooking economic interests.<sup>241</sup>

In *Community for Creative Non-Violence (CCNV) v. Watt*,<sup>242</sup> the CCNV brought suit against the Secretary of the Interior to challenge the U.S. Park Service's denial of its members' requests to sleep in temporary structures on government-owned land in downtown Washington, D.C. The demonstrators wanted to bring attention to the plight of the homeless.<sup>243</sup> The Interior Department, in exercising its authority to maintain the national park system,<sup>244</sup> had previously issued a National Park Service regulation prohibiting "camping" in the area where the demonstrations took place.<sup>245</sup> Judge Mikva, who also wrote the opinion in *Public Citizen IV*,<sup>246</sup> recognized that the demonstrators were exercising a free speech right and framed the issue narrowly.<sup>247</sup> The Park Service's "interests must be weighed against only that activity which CCNV seeks to do: sleep within tents that they have been given permission to erect and at which they have been allowed to maintain a twenty-four hour presence."<sup>248</sup> The court concluded, "Why not allow sleep? The effect [was] small, [and] the demonstrators few . . ."<sup>249</sup>

The Supreme Court reversed this decision in *Clark v. CCNV*.<sup>250</sup> The Court recognized that the demonstrators had a free speech interest in sleeping in the park;<sup>251</sup> however, it pointed out that "it is evident

240. *Id.* at 19-20 (noting that in *Community for Creative Non-Violence v. Watt*, 104 S.Ct. 3065 (1984), the Supreme Court framed the issue narrowly, avoiding intrusion on personal liberty while preserving a statutory governmental interest).

241. Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 5 (1987).

242. 703 F.2d 586 (D.C. Cir. 1983).

243. *Id.* at 586.

244. 16 U.S.C. §§ 1, 3 (1993).

245. 36 C.F.R. § 50.27(a) (1993). The regulation prohibits "the use of park land for living accommodation purposes such as sleeping activities." *Id.* An individual will be in violation of the regulation "regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." 36 C.F.R. 7.96(g)(5)(vii).

246. 5 F.3d 549.

247. 703 F.2d at 596 (limiting the result of the decision to the acts of CCNV and failing to extend the slippery slope to others who may want to sleep in the park).

248. *Id.*

249. Easterbrook, *supra* note 236 at 20.

250. 468 U.S. 288 (1984).

251. 468 U.S. at 293 (stating that "overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment").

from our cases that the validity of this regulation need not be judged solely by reference to the demonstration at hand."<sup>252</sup> The Court, "[i]nstead of asking, 'What is the effect of allowing these few people to close their eyes?' . . . asked, in essence, 'What is the effect of camping in the national parks near the White House?'"<sup>253</sup>

In *Public Citizen IV*,<sup>254</sup> the same approach could have been used to support an economic-based analysis of the effects of applying NEPA to NAFTA. Even after determining that NEPA could mandate an EIS, the court could have avoided issuing an injunction by simply broadening the perspective. Instead of asking, "What is the effect of mandating an EIS for NEPA?" it could have asked, "What is the effect of opening up NAFTA to the application of all U.S. environmental laws?"

## 2. Statutory Interpretation

Judges should not "set about rearranging economic relations on the basis of an ambiguous statute without first resolving a question about the nature of legislation."<sup>255</sup> Judges' philosophies on whether the political process or the "invisible hand"<sup>256</sup> moves markets influences how they will interpret statutes.<sup>257</sup> The judges "who see market failures, and conceive statutes as means to correct these defects, will read the statutes broadly and extend them to cover new cases."<sup>258</sup> The judges "who conclude that statutes generally displace markets . . . will take a more beady-eyed view."<sup>259</sup>

In *Block v. Community Nutrition Institute*,<sup>260</sup> the Supreme Court granted review under the APA for milk consumers who were discontented about how the Secretary of Agriculture, milk buyers, and milk producers used the Agricultural Marketing Agreement Act of 1937<sup>261</sup> to negotiate marketing agreements.<sup>262</sup> The consumers had commanded

252. *Id.* at 296-97 (citing *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 652-53 (1981)). The dissent in the district court stated that it had to evaluate the "government's interest in preventing camping generally." 703 F.2d at 618.

253. Easterbrook, *supra* note 236 at 20.

254. 5 F.3d 549.

255. Easterbrook, *supra* note 236 at 15.

256. *See generally* ADAM SMITH, *THE EARLY WRITINGS OF ADAM SMITH* (J. Ralph Lindgren ed. 1967).

257. Easterbrook, *supra* note 236 at 14-18, 42.

258. *Id.* at 42.

259. *Id.*

260. 104 S.Ct 2450 (1984).

261. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608 (1982).

262. *Community Nutrition Inst.*, 104 S.Ct. at 2455.

no leverage in the agreement-making process.<sup>263</sup> The Court, noting that the objective of the act was served, upheld the agreement as "a cooperative venture among the Secretary, handlers, and producers[,] the principle purposes of which [were] to raise the price of agricultural products and to establish an orderly system for marketing them."<sup>264</sup>

The general purpose of NEPA is to ensure that decisionmakers are informed about the environmental consequences of their proposals.<sup>265</sup> Although the statute seems clear on its face, it has naturally been the source of much litigation because agencies do not want regulatory wrenches thrown into their decisionmaking process. Most of this litigation indicates that NEPA applies generally to bridge-building and tree-cutting type operations.<sup>266</sup> Since these actions are essentially local in nature, local benefit is to be weighed against local environmental detriment.<sup>267</sup>

It is apparent that this narrow interpretation would make NEPA's EIS mandate inapplicable to NAFTA, a trilateral trade agreement that will have international economic ramifications.<sup>268</sup> The OTR, in carrying out its duties under the Trade Acts,<sup>269</sup> has never been subjected to NEPA or the CEQ regulations; moreover, it has never adopted internal agency implementing procedures as directed by the CEQ regulations.<sup>270</sup> NEPA recognizes that agency action must be

263. *Id.*

264. *Id.* at 346. *See also* Easterbrook, *supra* note 236.

265. *See supra* note 5 and accompanying text.

266. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) (noting that "decisionmaking processes of federal agencies . . . are uniquely domestic").

267. *Public Citizen v. United States Trade Representative (USTR)*, 782 F. Supp. 139, 141 (1992) (citing *Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 491 (D.C. Cir. 1990)); 40 C.F.R. § 1502.1 (stating that an EIS is to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts. . ."); 40 C.F.R. § 1500.1 (stating that the purpose of NEPA is "to help public officials make decisions that are based on understanding of environmental consequences. . .").

268. While NAFTA is trilateral, its effects are multilateral. The General Agreement on Tariffs and Trade, a multilateral agreement, has a general requirement that all signatories treat all other signatories equally. GATT, Oct. 30, 1947, 61 Stat. Pt. 5, 55 U.N.T.S. 187, Art. I. Under NAFTA, the United States, Canada, and Mexico, apply special trade rules to each other that they do not apply internationally. Thus, an exception to GATT's Article I regime of equality had to be given to the three countries. GATT, Art. XXIV; *See also* NAFTA, Art. 101 (stating that the agreement is consistent with Article XXIV of GATT).

269. 19 U.S.C. §§ 2101-91, 2901-09 (1993).

270. 40 C.F.R. § 1507.3(a) (1993).

“consistent with the foreign policy of the United States.”<sup>271</sup> Furthermore, the regulations provide “limited exceptions” for “proposed actions . . . specifically authorized under criteria established by an Executive Order. . . .”<sup>272</sup>

In 1979, President Carter issued Executive Order 12,114<sup>273</sup> to “further[] the purpose of the National Environmental Policy Act . . . consistent with the foreign policy . . . of the United States”<sup>274</sup> and to avoid the possibility of coercion in negotiations where “the United States . . . hold[s] the cards.”<sup>275</sup> The executive order covers agency actions that are “outside the United States . . . which significantly affect natural or ecological resources of global importance”<sup>276</sup> and agency actions that provide “a product or physical project. . . which is. . . strictly regulated by Federal law[s].”<sup>277</sup>

In *Greenpeace USA v. Stone*,<sup>278</sup> plaintiffs asserted that the U.S. Army and the Department of State were required to conduct an EIS on an executive agreement between the United States and West Germany designed to accelerate the destruction of weapons.<sup>279</sup> The executive agreement “undoubtedly stemmed from diplomatic concerns . . . clearly beyond the purview of this court’s review.”<sup>280</sup> The court held that Executive Order 12,114<sup>281</sup> was applicable because it addresses the issue of environmental protection “in a way sensitive both to environmental and foreign policy concerns.”<sup>282</sup>

When applicable, the executive order mandates one of three proce-

271. 42 U.S.C. § 4332(F) (1993).

272. 40 C.F.R. § 1507.3(c) (1993).

273. 3 C.F.R. § 356 (1980).

274. Exec. Order No. 12,114, §1-1, 3 C.F.R. 356 (1980), 42 U.S.C.A. § 432.

275. *Greenpeace USA v. Stone*, 748 F. Supp. 749, 760 (D. Haw. 1990) (quoting *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 647 F.2d 1345, 1357 (D.C. Cir. 1981)).

276. Exec. Order No. 12,114, § 2-3(d), 3 C.F.R. § 356 (1980).

277. Exec. Order No. 12,114, § 2-3(c)(1), 3 C.F.R. § 356 (1980).

278. 748 F. Supp. 749 (D.D.C. 1990) *appeal dismissed by*, 924 F.2d 175 (9th Cir. 1991).

279. *Greenpeace USA*, 748 F. Supp. at 749. In 1986, President Reagan entered into an agreement with Chancellor Kohl to dispose of munitions in West Germany by transporting them to Johnston Atoll, an unincorporated United States territory in the vicinity of Hawaii. In 1989, President Bush and Chancellor Kohl made a further agreement to accelerate the disposal. *Id.* at 752.

280. *Greenpeace USA*, 758 F. Supp. at 760.

281. 3 C.F.R. § 356 (1980).

282. *Greenpeace USA*, 748 F. Supp. at 763 (quoting ENVIRONMENTAL QUALITY—1979, THE TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, Dec. 1979, at 582).



dures: (1) an EIS, (2) a bilateral or multilateral environmental study, or (3) concise reviews of the environmental issues involved.<sup>283</sup> An agency may completely exempt itself from all three procedures if the action was "taken by or pursuant to the direction of the President . . . when the national . . . interest is involved[,]""<sup>284</sup> such as an intricate treaty agreement.<sup>285</sup> The OTR drafted NAFTA, which affects a trilateral market, only because President Bush initiated the trade negotiations.<sup>286</sup> The OTR had no authority to act independently of the President's direction;<sup>287</sup> therefore, it possibly could have exempted itself.

If it does not elect this exemption, an agency can modify the "contents, timing and availability of documents"<sup>288</sup> when there is a necessity to protect foreign relations, diplomatic factors, international economic competition or commercial confidentiality.<sup>289</sup> The Appeals Court in *Public Citizen IV*<sup>290</sup> could have declined to issue an injunction, recognizing the limited scope of NEPA and the broad discretion of the President and agencies in foreign economic relations.<sup>291</sup>

Rather than choosing an exemption or modification, the OTR complied with two of the three procedures.<sup>292</sup> First, the OTR and the EPA compiled and released an Environmental Review.<sup>293</sup> Second, the

283. Exec. Order No. 12,114, §§ 2-4(a)(i)-(iii), 3 C.F.R. § 356 (1980).

284. Exec. Order No. 12,114, § 2-5(a)(iii), 3 C.F.R. § 356 (1980).

285. *PEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.C. Cir. 1993) (stating that "in situations where there is a substantial likelihood that treaty relations will be affected . . . [or] that EIS preparation would [have an] impact upon the foreign policy of the United States . . . NEPA requirements [will] necessarily yield").

286. President Bush, June 11, 1990, endorsed the goal of a Free Trade Agreement and directed USTR to begin the necessary consultations and preparatory work for a round of negotiations. *TRADE POLICY REVIEW*, GATT PUBLICATIONS, April 1992, at 30. Once the negotiations have been authorized diplomatically with another country, the USTR then has the authority to lead the negotiations. 19 U.S.C. §§ 2171, 2411-17 (1993).

287. 19 U.S.C. §§ 2101-91 (1993).

288. Exec. Order No. 12,114, § 2-5(b), 3 C.F.R. § 356 (1980).

289. Exec. Order No. 12,114, §§ 2.5(b)(iii)(1)-(3), 3 C.F.R. § 356 (1980).

290. 5 F.3d 549.

291. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (holding President's degree of discretion in foreign affairs is greater than that in domestic affairs); *See also* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255; William P. Hovell, Brian M. Mueller, & Kirk S. Schumacher, *Separation of Powers — Congressional Acquiescence to Executive Discretion in Foreign Affairs*, 57 *NOTRE DAME LAW.* 868.

292. *See supra* note 283 and accompanying text.

293. Report of the Administration on the NAFTA and Actions Taken in Fulfillment of the May 1, 1991 Commitments, Sept. 18, 1992, Exec. Summ, 1992 WL 360154.

OTR held trilateral negotiations on an environmental side agreement. It is undeniable that "repairing the environmental damage to our planet is not just the job of . . . wealthy countries. It is the task of every nation, and hence, solutions acceptable to all must be found. [A trade agreement] is the logical forum to do this."<sup>294</sup>

### 3. Equitable Application

Public Citizen sought an injunction which is "an equitable remedy and does not issue as a matter of course."<sup>295</sup> In *Tennessee Valley Authority v. Hill*,<sup>296</sup> the Court decided whether to balance economic benefit with environmental detriment. It was faced with the following portion of the Endangered Species Act: "[a]ll persons, including federal agencies, are specifically instructed not to 'take' endangered species, meaning that no one is 'to harass, harm [or] wound . . . ' such life forms."<sup>297</sup> The Court refused "to balance the loss of a sum certain — even \$100 million — against a congressionally declared 'incalculable' value."<sup>298</sup> However, the Court did concede that "this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds."<sup>299</sup>

The dissent emphatically contended that the Court did have discretion to weigh equitable factors when issuing injunctions.<sup>300</sup> The dissent noted that the Supreme Court had "specifically held that a federal court can refuse to order a federal official to take specific action, even though the action might be required by law, if such an order 'would work a public injury or embarrassment' or otherwise 'be prejudicial to the public interest.'"<sup>301</sup>

The dissent also viewed equity broadly, as "more far reaching than the adverse effect on the people of this economically depressed area is the continuing threat to the operation of every federal project, no matter how important to the Nation."<sup>302</sup> Equitable considerations are instruments "for nice adjustment and reconciliation between the public

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294. Michael B. Smith, *GATT, Trade, and the Environment*, 23 ENVTL. L. 533 (1993).

295. *Greenpeace USA*, 748 F. Supp. at 755 (citing *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987)).

296. 437 U.S. 153 (1978).

297. *Id.* at 184-85 (quoting 16 U.S.C. §§ 1532(14), 1538(a)(1)(B) (1976)).

298. *Id.* at 188.

299. *Id.* at 174.

300. *Id.* at 213 (J. Rehnquist, dissenting).

301. *Id.*

302. *Id.* at 210 (J. Powell, dissenting).

interest and private needs."<sup>303</sup> Federal judges are to use their sound discretion by applying flexibility and practicality rather than rigidity.<sup>304</sup>

In *Tennessee Valley Authority v. Hill*,<sup>305</sup> the Court did not incorporate economic considerations into its analysis because the Endangered Species Act (ESA)<sup>306</sup> protects endangered species "whatever the cost;"<sup>307</sup> conversely, NEPA requests agency compliance only "to the fullest extent possible."<sup>308</sup> The CEQ explains that this phrase "means that each agency of the Federal Government shall comply with [section 102] unless existing law applicable to the agency's operations . . . makes compliance impossible."<sup>309</sup>

In *Public Citizen IV*,<sup>310</sup> the court might have foreseen that the application of NEPA, which simply imposes a costly procedural requirement, would be a stepping-stone for the application of environmental statutes like the ESA<sup>311</sup> which "covers every animal and plant species, subspecies, and population in the world needing protection."<sup>312</sup> The court may have been reluctant, at such an early stage in the life of NAFTA, to use NEPA to open the door to such far-reaching substantive environmental statutes like the ESA.<sup>313</sup>

In *Greenpeace USA v. Stone*,<sup>314</sup> the court had to decide whether to balance the foreign policy issues involved against the environmental objectives of NEPA.<sup>315</sup> The court determined that an agency will not have to do an EIS "where U.S. foreign policy interests outweigh the benefits derived from preparing an EIS . . . or where the foreign policy interests at stake are particularly unique or delicate."<sup>316</sup> The President,

303. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 212 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)).

304. *Id.* (J. Powell, dissenting) (quoting *Hecht*, 321 U.S. at 329-30, which speaks of "flexibility rather than rigidity" in the federal courts).

305. 437 U.S. 153.

306. 16 U.S.C. § 1531 *et seq.*

307. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 174.

308. 42 U.S.C. § 4332 (1993).

309. 40 C.F.R. § 1500.6 (1993).

310. 5 F.3d 549.

311. 16 U.S.C. § 1531 (1993).

312. *Tennessee Valley Auth. v. Hill*, 437 U.S. at 159, n.8 (quoting Keith Shreiner).

313. ESA, 16 U.S.C. § 1531 (1993).

314. 748 F. Supp. 749.

315. *Id.* at 760.

316. *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d at 535 (citing *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 647 F.2d 1345 (D.C. Cir. 1981); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 796 (D.C. Cir. 1971)).

in exercising his fundamental foreign policy powers,<sup>317</sup> had reached an agreement, and the Department of Defense had already completed a Global Commons Environmental Assessment.<sup>318</sup> The Court concluded that mandating an EIS would be contrary to foreign policy interests because of the inevitable postponement of the date of completion in the agreement.<sup>319</sup> Time would be wasted while the EIS was being done and while the adequacy of the EIS was being litigated.<sup>320</sup> Issuing an injunction and requiring an EIS would have interrupted the President's carefully timed operation and would have forced a rescheduling of the detailed plans.<sup>321</sup>

The court in *Public Citizen IV*<sup>322</sup> could have denied an injunction based on an economic protectionist theory, similar to the dissent in *Tennessee Valley Authority v. Hill*, or on a foreign relations protectionist theory, like the majority in *Greenpeace USA v. Stone*, or even on an environmental protectionist theory.

The economic protectionist premise of applying NEPA to NAFTA would undeniably defeat the agreement's objective. The purpose of NAFTA is to create trade incentives by decreasing export and import barriers and opening up a trilateral free market.<sup>323</sup> However, applica-

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317. *Greenpeace USA*, 748 F. Supp. at 758.

318. *Id.* at 754. The Department of Defense was responsible to complete the environmental assessment, although the Army actually did it. *Id.*

319. *Id.* at 760 (noting that the timing of the removal of the munitions was specifically ordered in the agreement between President Bush and Chancellor Kohl).

320. *Id.* at 760.

321. *Id.* at 768.

322. 5 F.3d 549.

323. North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., Preamble, available in WESTLAW, IEL database. The Preamble states:

The Government of the United States of America, the Government of Canada and the Government of the United Mexican States, resolved to:

STRENGTHEN the special bonds of friendship and cooperation among their nations;

CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;

CREATE an expanded and secure market for the goods and services produced in their territories;

REDUCE distortions to trade;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable commercial framework for business planning and investment;

BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;

tion of substantive environmental laws to NAFTA would defeat that purpose by creating trade barriers through the imposition of United States environmental standards.<sup>324</sup> "Trade is the lifeblood of many nations; it cannot be crucified on an environmental cross. Too many jobs are at stake, and the politics are too large."<sup>325</sup>

The foreign relations protectionist premise might suggest that NAFTA had already been negotiated and signed by the three participating countries. The OTR and the EPA had completed an Environmental Review, and an environmental side agreement was near conclusion. There was a commitment to have NAFTA and the side agreements in effect by January 1, 1994, and the completion of an EIS and the litigation that might ensue would postpone the agreed-upon date. Therefore, "[a]lthough NEPA is clearly a procedural statute, its application to the . . . action would interfere with the substance of the President's commitment."<sup>326</sup>

The environmental protectionist premise of applying NEPA to NAFTA would potentially open to question many other state and federal environmental statutes of the United States. That is, application of substantive environmental laws to NAFTA would potentially result in a leveling of standards or a weakening of domestic substantive laws.

## V. CONCLUSION

Difficult cases make bad law; *Public Citizen IV* is no exception. To avoid deciding the merits of this case, the Appeals Court in *Public Citizen IV* bifurcated the APA's "final agency action" requirement, in essence, holding that the OTR could take no final action.

The immediate consequence of this holding was that NAFTA was submitted to Congress without an EIS, evading the purpose of NEPA.

ENHANCE the competitiveness of their firms in global markets;  
 FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;  
 CREATE new employment opportunities and improve working conditions and living standards in their respective territories; . . . [and]  
 STRENGTHEN the development and enforcement of environmental laws and regulations.

*Id.* (emphasis in the original).

324. See *Tennessee Valley Auth. v. Hill*, 437 U.S. at 188 n.34.

325. Smith at 544, *supra* note 294. "NAFTA will give us the tools to deal with the economic issues and the environmental issues important to [the] United States, Mexico, and Canada." *NAFTA and Side Agreements Before the House Ways and Means Committee* (1993) (Testimony of Carol Browner, Administrator of the EPA) available in LEXIS, Nexis Library.

326. *Greenpeace USA*, 748 F. Supp. at 761.

However, Congress, in holding hearings on NAFTA, and President Clinton, in negotiating an environmental side agreement, may have remedied the OTR's failure to comply with NEPA.

The long-range effect of the bifurcation is that *Public Citizen IV*<sup>327</sup> has precedential value for all agency action that must take a path through the Presidential office. In light of the fact that the Court of Appeals for the District of Columbia is the nucleus of APA and NEPA litigation, this case may be used repeatedly to narrowly interpret the word "final," to disregard the APA and NEPA framework, and to overlook the intrinsic emergence of political conditions and economic theories with equitable remedies. Indeed, it has already been used as precedent for another trade negotiation.<sup>328</sup>

It is apparent that the court foresaw problems with halting a tri-lateral agreement midway between the other two branches of government; therefore, it should have fashioned a holding more in line with this insight. The court conceded that

[t]he ultimate destiny of NAFTA has yet to be determined. Recently negotiated side agreements may well change the dimensions of the conflict that Public Citizen sought to have resolved by the courts. More importantly, the political debate over NAFTA in Congress has yet to play out. Whatever the ultimate result, however, NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play.<sup>329</sup>

This concession should have been the basis for application of either the political question doctrine or equitable principles. Although the political question doctrine may not apply where the court is called to simply interpret a statute, such as NEPA, the ramifications of an interpretation that would halt the negotiation or implementation of a trade agreement could be politically severe. The Appeals Court should have concluded that it would not issue such an injunction after considering the interplay of sovereign environmental laws, delicate foreign relations, and international markets.

*Taunya L. McLarty*

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327. 5 F.3d 549.

328. It was used as a basis to deny review of NEPA's applicability to GATT 1944. *Public Citizen v. Kantor*, 1994 WL 549498 (D.D.C. 1994). See *supra*, note 13.

329. *Public Citizen IV*, 5 F.3d at 553.

