Winter 1993

Dodging the Bullet: Judicial Review, Presidential Policy and International Labor Rights Education and Research Fund v. Bush

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Cover Page Footnote
International Law; Commercial Law; Law
NOTES

Dodging the Bullet: Judicial Review, Presidential Policy and *International Labor Rights Education and Research Fund v. Bush*

I. Introduction

The extent to which the judiciary should review executive policy decisions has often been the subject of contentious debate because of the effort to maintain proper separation of powers. In *International Labor Rights Education and Research Fund v. Bush*, the Court of Appeals for the District of Columbia Circuit was asked to review the President's enforcement of the Generalized System of Preferences (GSP). The concurring opinions of the court did not reach the enforcement issue, however, and focused instead on two other issues. The first was whether the Court of International Trade (CIT) had exclusive jurisdiction to hear the complaint. The second point of contention was whether the complaint was nonjusticiable for want of Article III standing.

The Court issued a two-to-one decision in favor of the defendants, affirming the second of two lower court opinions (*Bush I* and *Bush II*). In her concurrence, Judge Henderson concludes that the complaint falls within the exclusive jurisdiction of the Court of International Trade, and thus, the plaintiffs' initial forum selection mandates dismissal. Similarly, Judge Sentelle determines that the case is nonjusticiable because plaintiffs lack Article III standing. In the dissenting opinion, Chief Judge Mikva's argues that plaintiffs have Article III standing, and suggests that judicial review should not be precluded by any incidental impact on foreign policy.

This Note will analyze the means by which Judge Henderson

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3 954 F.2d at 746 (Henderson, J., concurring).
4 *Id.* at 749 (Sentelle, J., concurring).
5 *Id.* at 746 (Henderson, J., concurring).
6 *Id.* (Henderson, J., concurring).
7 *Id.* at 749-52. (Sentelle, J., concurring).
8 *Id.* at 754-57 (Mikva, J., dissenting).
and Judge Sentelle arrive at their concurring opinions, as well as Chief Judge Mikva's dissent. Consideration will be given to the strengths of their various arguments and the weight of precedents cited. This Note will also consider the place of *Bush* in the developing jurisprudence concerning the jurisdiction of the Court of International Trade and the nonjusticiability doctrines. Finally, because the complaint in *Bush* sought judicial review of a highly political foreign policy decision, this Note will explore some of the legal issues involved in such a request.

II. The Facts of *Bush* and the D.C. Circuit's Decision

In *Bush I*, a group of prominent labor unions and human rights groups alleged that the President failed to conduct a meaningful review of the worker rights practices of the beneficiary developing countries, as required by the GSP. Plaintiffs sought a court order forcing the President to conduct a review of the relevant nations' practices, in the hope that he would deny beneficiary developing country status to those countries not complying with the worker rights provisions of the GSP.

Before the District Court, defendants moved to dismiss for lack of jurisdiction, maintaining that a successful complaint would have the potential to "provide for" tariffs, and therefore should fall within the exclusive jurisdiction of the Court of International Trade. The court denied the motion to dismiss for lack of jurisdiction, concluding that Congress intended the CIT to have jurisdiction only over those cases which "arise directly out of an import transaction." The District Court admitted that the GSP would control some of the conditions under which existing duties would be lifted or imposed, but concluded that it does not "provide for" tariffs in and of itself.

In *Bush II*, defendants also moved that the claims were nonjusticiable on the grounds that plaintiffs lacked Article III standing. In its examination of the statute establishing the GSP, the court decided that there were no guidelines along which to review the President's determinations as to which countries should benefit under the

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11 Id. at 491.
12 Id. at 491-92.
14 Id. at 491.
GSP scheme. In such a situation, the court concluded that there was no law to apply and consequently decided the claim was nonjusticiable. The court noted:

Congress has enunciated general policy guidelines and has left it to the Chief Executive's discretion to carry out policy within those guidelines. Congress has provided no defined standard for reviewing his discretionary determinations or determining whether existing GSP regulations violate the vague statutory requirements, and any effort such as this to obtain judicial review is misplaced.

Therefore, the complaint was dismissed with prejudice.

The dismissal was affirmed on different grounds in concurring opinions by the District of Columbia Court of Appeals. In her concur-

ence, Judge Henderson affirms the district court's dismissal on the grounds that the action falls within the exclusive jurisdiction of the Court of International Trade. She determines that the rescission of beneficiary developing country status would amount to an imposition of import duties on the subject country. Believing this would "provide for" a tariff, Judge Henderson concludes that this action rightfully falls within the exclusive jurisdiction of the CIT.

Circuit Judge Henderson explains that there are two primary reasons for this decision. First, she adopts a broad interpretation of "providing for," as it is used in the grant of exclusive jurisdiction to the CIT. She cites the Supreme Court's decision in *K Mart Corp. v. Cartier, Inc.* as authority for interpreting the phrase "relating to" as equivalent to "provide for." Judge Henderson goes on to assert that, under this formulation, the complaint "falls squarely within the exclusive jurisdiction of the Court of International Trade, under subsection 1581(i)(2), because the claims raised here 'relate to' duties." Next, Judge Henderson cites legislative history as an indication that Congress intended complaints of this nature to fall within the exclusive jurisdiction of the Court of International Trade.

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17 *Bush II*, 752 F. Supp. at 497.
18 Id. at 499.
19 Id. at 496.
21 Id. at 748 (Henderson, J., concurring).
22 Id. at 747 (Henderson, J., concurring).
23 The CIT has "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(2) (1988).
24 *Bush*, 954 F.2d at 747-48 (Henderson, J., concurring).
25 Id. at 747 (Henderson, J., concurring).
26 *Bush*, 954 F.2d at 747 (Henderson, J., concurring).
27 Id. (Henderson, J., concurring).
28 Id. at 747-48 (Henderson, J., concurring).
29 Id. at 747-48 (Henderson, J., concurring).
Judge Sentelle specifically rejects Judge Henderson’s rationale, yet affirms the dismissal on the grounds that the complaint is nonjusticiable because the plaintiffs lack Article III standing. Citing Allen v. Wright, Judge Sentelle maintains that none of the plaintiffs meet all three necessary constitutional requirements to have standing to bring the suit. In particular, Judge Sentelle argues that the human rights organizations lack any tangible injury upon which to base their claim, and that the labor unions fail the tests of causality and redressability. Consequently, he rules that the plaintiffs lack Article III standing.

Chief Judge Mikva, author of the dissenting opinion, argues that the labor unions have standing to bring the complaint, although he admits that human rights organizations’ “abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.” Nevertheless, he introduces an argument that the human rights organizations’ expenditure of resources could reach such a level as to satisfy the “injury” requirement. Chief Judge Mikva then concedes, however, that “the drain on organizational resources is not obvious, and because the human rights organizations are less directly within the zone of interests that Congress intended to protect,” the human rights organizations lack standing.

He develops his argument that the labor unions have standing in two stages. First, Chief Judge Mikva works to demonstrate that the unions have been injured by the failure to enforce the GSP provisions, namely the job losses and wage concessions suffered by their members. He believes that, due to the failure to enforce the worker rights provisions of the GSP, beneficiary countries have not had to enact progressive labor legislation which would make the cost of their labor less inexpensive relative to U.S. labor costs. It is his contention that this has resulted in job loss and forced wage concessions.

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30 Judge Sentelle does not share Judge Henderson’s interpretation of K Mart, stating that “the Supreme Court, in the quoted dicta [equivocating ‘providing for’ and ‘relating to’], does not appear to have been setting limitations on the meaning of the phrase ‘providing for,’ nor furnishing synonyms.” Id. at 749 (Sentelle, J., concurring).
31 Id. at 748 (Sentelle, J., concurring).
32 468 U.S. 737, 758 (1984) (stating that to have standing, a plaintiff must allege “(1) personal injury; (2) fairly traceable to the defendant’s allegedly unlawful conduct; and (3) likely to be redressed by the requested relief”).
33 Bush, 954 F.2d at 749-50 (Sentelle, J., concurring) (citing Allen, 468 U.S. at 751).
34 Id. at 750-52.
35 Id. at 751 (Sentelle, J., concurring).
36 Id. at 754 (Mikva, J., dissenting) (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976)).
37 Id. (Mikva, J., dissenting) (citing Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C. Cir.), cert. denied, 111 S.Ct. 508 (1990)).
38 Id. (Mikva, J., dissenting).
39 Id. at 755 (Mikva, J., dissenting).
sions in the United States.\textsuperscript{40}

Second, Chief Judge Mikva cites the legislative history of the GSP as evidence that Congress established a presumption of causation and redressability when it passed the GSP.\textsuperscript{41} He suggests deference to this presumption and indicates that any adverse influence on foreign policy decisionmaking would be incidental and permissible.\textsuperscript{42} "'[W]hereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs . . . . ' [T]his case presents a conventional statutory question, not a political one, and is clearly justiciable."\textsuperscript{43} Consequently, Chief Judge Mikva would allow the plaintiffs in \textit{Bush} to continue their suit to enforce the worker rights clause in the GSP.\textsuperscript{44}

III. Background Law

\textit{A. Generalized System of Preferences}

The Generalized System of Preferences is a statutory scheme designed to allow the President to confer preferential tax status on certain designated developing nations.\textsuperscript{45} The worker rights provision of the GSP, the statutory origin of \textit{Bush}, suggests that worker rights should be one of several criteria for the award of beneficiary developing country status.\textsuperscript{46} To give efficacy to this provision, Congress empowered the President to rescind a nation's preferential status upon a determination that a country does not satisfy the worker rights standards.\textsuperscript{47} Plaintiffs in \textit{Bush} sought a review of the President's enforcement of this provision of the GSP, alleging that he allowed nations to receive the benefits of the GSP without satisfying the worker rights criteria.\textsuperscript{48}

Plaintiffs' complaint is assisted by the legislative history of the GSP. Specifically, certain statements in the legislative history suggest a congressional finding which substantiates the injuries and causation which the labor union plaintiffs must show to establish Article III standing. For example, the legislative history indicates Congress' concern that "the tremendous disparity in labor rights between many American workers and the absence of those rights for workers in

\textsuperscript{40} Id. (Mikva, J., dissenting).
\textsuperscript{41} Id. at 756 (Mikva, J., dissenting).
\textsuperscript{42} Id. at 757 (Mikva, J., dissenting).
\textsuperscript{43} Id. (Mikva, J., dissenting) (citing DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987)).
\textsuperscript{44} Id. at 755-56 (Mikva, J., dissenting).
\textsuperscript{46} Id. § 2462(b).
\textsuperscript{47} Id. § 2464(a)(1).
many developing countries is a growing factor in the competitive de-
cline of many of our basic industries."

Similarly, the legislative history memorializes the concern of some persons in Congress that
the threat, whether explicit or implicit, by American-based multina-
tional corporations to transfer domestic production from the United
States to other countries in which there are no labor rights serves as
a powerful inducement to force American workers to relinquish le-
gitimate rights won through several decades of personal hardship
and struggle.

Taken together, these statements in the legislative history of the GSP
indicate a Congressional presumption in favor plaintiffs' alleged in-
juries and causation.

B. Jurisdiction of the Court of International Trade

Circuit Judge Henderson believes the CIT should have jurisdiction
over Bush. Congress established that the CIT has exclusive
jurisdiction over any action against a United States agency or officer
"that arises out of any law of the United States providing for . . .
tariffs, duties, fees, or other taxes." There has been considerable
debate, however, concerning what interpretation should be given to
this language. K Mart Corp. v. Cartier, Inc. most thoroughly confronts
this issue.

Plaintiffs in K Mart sought enforcement of the Tariff Act of 1930,
which forbids a foreign manufacturer from importing into the United
States goods bearing a trademark owned by a United States citizen,
unless the trademark holder gives permission to the importer. Re-
pondents in K Mart maintained that the Trade Act of 1930 consti-
tuted an embargo, for the purposes of the jurisdictional grant to the
Court of International Trade, and as such, could only be adjudi-
cated in that forum.

The crux of K Mart thus involved an effort to interpret Con-
gress' language relegating cases involving embargoes to the exclu-
sive jurisdiction of the CIT. Plaintiffs advocated a definition of
"embargo" which would include any policy decision resulting in
"import prohibitions." The Supreme Court rejected this expan-
sive redefinition of "embargo," however, and adopted what it typi-
fied as the "ordinary meaning of 'embargo.'"58 In doing so, the Supreme Court noted the specificity of the terminology used in other areas of the statute granting jurisdiction to the CIT. Consequently, the Court concluded that, if Congress had meant "embargo" to imply anything other than its normal meaning, it would have used a broader term.59

In dicta, the Supreme Court revealed that its motivation for this strict construction of the language granting jurisdiction to the CIT was a concern that anything else would not give effect to Congress' intention to avoid "jurisdictional confusion."

Given that much of the holding and the dicta in K Mart emphasizes that Congress' language was chosen specifically and should be followed exactly, K Mart seems to mandate a "plain meaning" construction of 28 U.S.C. § 1581 (1988). The Court's method of statutory construction, emphasizing Congress' intentions when it granted jurisdiction to the CIT, is highly relevant to an understanding of Judge Henderson's concurrence.

The remaining background law implicated in Judge Henderson's concurrence involves her contention that, in reviewing CIT decisions in previous cases involving the GSP, the court recognized implicitly the exclusive jurisdiction of the CIT over those cases. Judge Henderson refers to several examples in support of this proposition, and each case she cites involves plaintiffs opposing tariffs levied on their goods exported to the United States. For example, plaintiff in Azteca Milling Co. v. United States61 contested taxation of imported flour goods. In Madison Galleries, Ltd. v. United States,62 plaintiff litigated tariffs imposed on vases imported from Hong Kong. Finally, North American Foreign Trading Corp. v. United States63 reviewed a determination by the CIT that watches imported from a beneficiary nation were not tax exempt items.

The similarity between these cases is that the original causes of action directly contested the actual imposition of import duties, and the GSP became involved only as grounds for asserting that the goods should be tax exempt. Thus, the cases cited by Judge Henderson show only that the court recognized the jurisdiction of the CIT in cases involving contested import duties. These complaints properly fell within the exclusive jurisdiction of the CIT because they litigated tariffs, and the GSP became involved as a secondary issue.

58 Id. at 187.
59 "By choosing the word 'embargoes' over the phrase 'import prohibitions,' Congress likewise declined to grant the Court of International Trade exclusive jurisdiction over importation prohibitions that are not embargoes." Id. at 189.
60 Id. at 187, 188-89.
61 890 F.2d 1150 (Fed. Cir. 1989).
62 870 F.2d 627 (Fed. Cir. 1989).
63 783 F.2d 1031 (Fed. Cir. 1986).
C. Justiciability Under Article III

Judge Sentelle bases his opinion upon a determination that plaintiffs lack Article III standing. Article III, section 2 states that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and ... to Controversies." Thus, plaintiffs must allege an actual controversy, if they are to have standing to litigate their complaint. The requirements for Article III standing are explained in Allen v. Wright. In Allen, the Supreme Court determined that plaintiffs lacked standing under Article III of the Constitution to bring their claim. The Supreme Court declared that, to have Article III standing, "a plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief."

The Court further refined each component of this test, stating that the alleged injury must be "distinct and palpable, 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." The Court required that inquiry satisfy these points if Article III jurisdiction is to be available. The objective of its stringent Article III test is to weed out those claims asserting government misbehavior which are nonjusticiable. These firm guidelines are the principle legal background for Circuit Judge Sentelle's concurrence in Bush.

There are additional grounds for a ruling of nonjusticiability in Bush which must be examined, if Judge Sentelle's concurrence is to be understood within the broader context of the general jurisprudence of nonjusticiability. First, the "political question" doctrine

\[\text{\textsuperscript{64} Int'l Labor Rights Educ. \\& Research Fund v. Bush, 954 F.2d 745, 749 (D.C. Cir. 1992).}\]
\[\text{\textsuperscript{65} U.S. Const. art. III, § 2, cl. 1.}\]
\[\text{\textsuperscript{66} Baker v. Carr, 369 U.S. 186, 204 (1962).}\]
\[\text{\textsuperscript{67} 468 U.S. 737 (1984).}\]
\[\text{\textsuperscript{68} Plaintiffs claimed that their children would not receive an integrated education as a result of the Internal Revenue Service's failure to adopt adequate policies to screen giving tax exemptions to segregated private schools. Id. at 739-40.}\]
\[\text{\textsuperscript{69} Id. at 751. See also Valley Forge Christian College v. Americans United for Separation of Church \\& State, Inc., 454 U.S. 464, 472 (1982) (stating that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show [the three elements]").}\]
\[\text{\textsuperscript{70} Bush, 954 F.2d at 750 (Sentelle, J., concurring) (citing Gladstone v. Village of Bellwood, 441 U.S. 91, 100 (1979)).}\]
\[\text{\textsuperscript{71} "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" Id. at 752. (Sentelle, J., concurring).}\]
\[\text{\textsuperscript{72} Id. at 754 (Mikva, J., dissenting) (citing Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); Laird v. Tatum, 408 U.S. 1 (1972)).}\]
generally shields political executive decisions from judicial inquiry.\textsuperscript{75} The "political question" doctrine, as outlined in \textit{Baker v. Carr},\textsuperscript{74} is essentially an outgrowth of the general separation of powers, and asks whether a given governmental function is assigned by the Constitution to a specific branch of the federal government.\textsuperscript{75} To the extent that certain issues fall within the exclusive purview of the political branches of the government, they may be nonjusticiable.\textsuperscript{76}

The Administrative Procedure Act (APA)\textsuperscript{77} pierced the shield of the "political question" doctrine, but subsequent interpretation of the APA has indicated others bases for a ruling of nonjusticiability. For example, in \textit{Citizens to Preserve Overton Park v. Volpe},\textsuperscript{78} the Supreme Court decided that section 701 of the APA allows judicial review of all agency decisions unless there is an affirmative showing that the decision was committed to agency discretion by law.\textsuperscript{79} Even under the \textit{Overton Park} analysis, however, the Court determined that review is inappropriate when Congress uses language so broad that there are no standards by which to review the agency action.\textsuperscript{80} Therefore, if Congress did not articulate clear standards against which to judge agency action, the Supreme Court has indicated that the enforcement of a statute is committed to the absolute discretion of the agency.\textsuperscript{81}

The Court refined further its analysis of the APA in \textit{Heckler v. Chaney}.\textsuperscript{82} In \textit{Chaney}, the Court retreated somewhat from the \textit{Overton Park} holding and stated that agency decisions \textit{not to act} would be presumptively unreviewable.\textsuperscript{83} Thus, a combination of the relevant holdings in \textit{Overton Park} and \textit{Chaney} reveals that agency action is reviewable, unless committed by law to the agency's discretion, but agency inaction is presumptively nonreviewable. In \textit{Bush}, one obvious difficulty is in determining whether the President decided not to enforce the worker rights provisions of the GSP, thus raising a presumption of nonreviewability, or whether he did act and therefore

\begin{footnotes}
\footnote{\textsuperscript{75} See generally Baker v. Carr, 369 U.S. 186 (1962); Coleman v. Miller, 307 U.S. 433 (1939) (noting that certain "political questions" may be beyond the scope of review).}
\footnote{\textsuperscript{74} 369 U.S. 186 (1962).}
\footnote{\textsuperscript{75} Id. at 706.}
\footnote{\textsuperscript{76} Id.}
\footnote{\textsuperscript{78} 401 U.S. 402 (1971).}
\footnote{\textsuperscript{79} Id. at 410.}
\footnote{\textsuperscript{80} Id.}
\footnote{\textsuperscript{81} "Review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." \textit{Heckler v. Chaney}, 470 U.S. 821, 830 (1984).}
\footnote{\textsuperscript{82} Id. at 821.}
\footnote{\textsuperscript{83} Noting that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing," and that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," "an agency's decision not to take enforcement should be presumed immune from the judicial review under § 701(a)(2)." \textit{Id.} at 831-32.}
\end{footnotes}
should be subject to judicial review. Due to the dichotomy in the Supreme Court's analysis of the presumptions inherent in the Administrative Procedure Act, there are arguments both for and against judicial review in Bush.

Finally, an important subissue in the "political question" line of analysis concerns the separation of powers as it applies to the President's foreign policy discretion in particular. Although courts have not always explicitly separated the standard of review applied to general agency action from that which should be considered for foreign policy issues, there has been a consistent emphasis on the special status of the President's foreign policy discretion. For example, the Supreme Court has stated that

the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Although it is clear that all courts will not defer entirely to Presidential decisions in the area of foreign policy, there is a fairly consistent pattern of granting the President a level of discretion which extends beyond that given to executive actions in general. Thus, when there is a foreign policy issue involved, the presumption of nonreviewability inherent in the "political question" doctrine is heightened. Because the foreign policy decisionmaking power is constitutionally given to the President, the political question doctrine may be applied to avoid reviewing Presidential policy choices. To the extent that Bush involves foreign policy, the "political question" doctrine may be implicated.

IV. Significance of the Case

A. The CIT does not have Exclusive Jurisdiction

Circuit Judge Henderson, in affirming dismissal, argues ineffec-

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85 Chicago & Southern Air Lines v. Waterman, 333 U.S. 103, 111 (1948) (citing Coleman v. Miller, 307 U.S. 433, 454 (1939)). See also Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1917) (determining that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative 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").
86 "It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 210 (1962).
tively that the CIT has exclusive jurisdiction. Judge Henderson rests her decision on three arguments. The first is her contention that if plaintiffs are successful in prosecuting their claim, the result could be the revocation of beneficiary developing country status and a subsequent resumption of normal tariffs. Consequently, she concludes that the revocation of beneficiary developing country status under the GSP would "provide for" a tariff and thus falls within the exclusive jurisdiction of the CIT.

There are several weaknesses in this argument. One is that the GSP sets forth circumstances under which a developing country may qualify for or lose preferential trade allowances, but clearly does not "provide for" any tariffs. It is only after beneficiary developing country status has been withdrawn that the tariffs provided by other statutes resume. As such, the revocation of the beneficiary developing country status does not, in and of itself, "provide for" tariffs. For this reason, Bush should not fall within the grant of jurisdiction to the CIT.

A related criticism is that the causal link used to establish plaintiffs' claim to an imposition of new import tariffs is too thin to be convincing. It relies on a chain of assumptions that, if the suit were brought before the Court of International Trade, a judgment in favor of plaintiffs' claim might be rendered and the CIT might then require the President to review the worker rights policies of those countries receiving beneficiary developing country status under the GSP. But it is only if the President then decides to rescind some nations' benefits under the GSP that one can conclude that this action has "provided for" tariffs in any meaningful sense.

Perhaps aware of the tenuousness of this position, Circuit Judge Henderson makes her second unconvincing argument by attempting to redefine the required relationship between the claim and a resumption of tariffs. She cites *K Mart Corp. v. Cartier, Inc.*, in which the Supreme Court replaced "providing for" with "relating to tariffs," to support her belief that the CIT should have jurisdiction over Bush. Her reliance on the language in *K Mart*, however, may be misplaced. In *K Mart*, the Supreme Court did substitute "relating to" for "providing for" to suit the grammatical needs of a passage, but it is far from certain that the Court intended to suggest a more

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89 Id. (Henderson, J., concurring) (citing 28 U.S.C. § 1581(i)(2) (1988)).
expansive definition of the CIT's exclusive jurisdiction.94

On the contrary, the Court points out the importance of following Congress' exact language in the very passage from which the fateful "switch" is extracted. For example, the Court emphasizes that Congress specifically chose the word "embargo," as opposed to "importation prohibitions," in its efforts to be precise.95 In its discussion, the Supreme Court notes that Congress carefully chose its language to convey a precise meaning and the Court dedicates itself to interpreting that meaning accurately.96 Given that Judge Henderson extracts her ersatz redefinition of "providing for" from a passage in which the Court is so focused, the suggestion that the Supreme Court seriously intended to replace Congress' "provide for" with "relating to" is somewhat ironic. Though the Court technically did replace "provide for" with "relating to," extracting this as an explanation of Congress' language violates the spirit of the Court's dicta. Circuit Judge Henderson is therefore unconvincing in her attempt to suggest a different construction of "providing for."

The third illogical reason Judge Henderson gives to support her proposition that Bush should be decided by the CIT is that, in reviewing previous CIT cases involving the GSP, the Court of Appeals implicitly acknowledged the CIT's jurisdiction over all GSP complaints and therefore, the CIT should have jurisdiction over Bush.97 The cases Judge Henderson cites, however, uniformly involve importers seeking to have their imports reclassified with different duties.98 Thus, the causes of action in these complaints clearly fall within the exclusive jurisdiction of the CIT because they directly contest tariffs. The GSP becomes involved only as an affirmative defense to the

94 Judge Henderson also cites In re Gregory, 705 F.2d 1118 (9th Cir. 1983), which does construe "provide for" as an equivalent of "refer to." Bush, 954 F.2d at 747 (Henderson, J., concurring) (citing Gregory, 705 F.2d at 1122). The relevant passage discusses the availability of discharge for debts under a bankruptcy statute. The court concludes that, for the debts to be dischargeable, the statute must "refer to" them. Gregory, 705 F.2d at 1122.
96 In the same paragraph, the Court goes on note that "to depart from the words Congress chose would infect the courts with the same jurisdictional confusion that Congress intended to cure." Id.
97 Int'l Labor Rights Educ. & Research Fund v. Bush, 954 F.2d 745, 748 (D.C. Cir. 1992) (Henderson, J., concurring) (citing Asteica Milling Co. v. United States, 890 F.2d 1150 (Fed. Cir. 1989); Madison Galleries, Ltd. v. United States, 870 F.2d 627 (Fed. Cir. 1989); North American Foreign Trading Corp. v. United States, 783 F.2d 1031 (Fed. Cir. 1986); Torrington Co. v. United States, 764 F.2d 1563 (Fed. Cir. 1985)).
98 In Asteica Milling, 890 F.2d at 1150, plaintiff contested the taxation of imported flour goods. Madison Galleries, 870 F.2d at 627, involved the proper level of taxes on vases imported from Hong Kong. Finally, North American Foreign Trading, 783 F.2d at 1031, reviewed a determination by the CIT that watches imported from a beneficiary nation were not tax exempt items. In all these cases, the causes of action were based on contested import duties; the GSP became involved only as grounds for asserting that the goods should be tax exempt. Thus it is clear that the CIT had jurisdiction because the cases involved import duties, not because of GSP considerations.
PRESIDENTIAL DISCRETION

The goods should not be taxed because they either originated from or were "substantially transformed" in a beneficiary country. The cases Judge Henderson cites involved legitimate tariff questions as their causes of action, and it was for this reason that the CIT had exclusive jurisdiction. The General System of Preferences was involved only as an affirmative defense raised after the claims were before the proper jurisdiction of the CIT.

Even if the Court of Appeals' review of these CIT decisions may be fairly read as an implicit recognition of the CIT's jurisdiction in those cases, since they involved different sections of the GSP than those at issue in Bush, they are not relevant to the jurisdictional issues at hand. Thus, this line of cases cannot fairly be read to mandate jurisdiction in a case like Bush unless they stand for the proposition that all GSP-related claims must be heard by the CIT. Not even Judge Henderson advances such a proposition. Given these logical difficulties, Judge Henderson is fairly unconvincing in her argument that, because the court has reviewed CIT decisions on tariff disputes, it should have exclusive jurisdiction of a case involving a nontariff provision of the GSP.

Consequently, Judge Henderson is unconvincing in her arguments that the CIT has exclusive jurisdiction over the complaint in Bush. Her assertion that a decision in favor of defendants in Bush would provide for a tariff is unconvincing because of a highly attenuated causal link. Similarly, Judge Henderson's redefinition of the statutory language granting jurisdiction to the CIT is unsuccessful because it relies on an unfortunate rephrasing given in the Supreme Court's dicta in K Mart Corp. v. Cartier, Inc. Finally, Judge Henderson's argument that past judicial review of CIT decisions confirms CIT jurisdiction in Bush is ineffective because the cases cited were before the CIT for reasons other than their involvement with the GSP.

B. Lack of Article III Standing

Circuit Judge Sentelle's concurrence is addressed primarily to whether plaintiffs have Article III standing to bring the suit. Judge Sentelle addresses the standing of the two different categories of plaintiffs in turn. The first group are the "human rights" organizations who, as Judge Sentelle persuasively contends, are unable to establish Article III standing. Judge Sentelle focuses on the

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99 Azteca Milling, 890 F.2d at 1150; Madison Galleries, 870 F.2d at 627; North American Foreign Trading, 783 F.2d at 1031.
101 Bush, 954 F.2d at 749-51 (Sentelle, J., concurring).
102 Id. at 750 (Sentelle, J., concurring).
human rights organizations' failure to "allege an injury that is distinct, palpable and personal to the plaintiff." The alleged failure of the President to enforce the worker rights provision of the GSP probably only represented an ideological setback to these organizations. He notes that a "sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if the party's interest is purely ideological, uncoupled with any injury in fact." In such circumstances, there is insufficient showing of an actual injury to sustain the requirements for Article III standing explained in Allen v. Wright. Circuit Judge Sentelle correctly dismisses the human rights organizations for their failure to satisfy the injury requirements for standing under Article III.

Circuit Judge Sentelle then relies on Article III, as interpreted in Allen v. Wright and argues that the labor organizations also lack the necessary standing to bring their complaint. Instead of attacking their inability to show a "palpable injury," however, Circuit Judge Sentelle asserts that the labor unions are unable to satisfy the requirement of causation. In his determination that the labor unions are unable to demonstrate causation, his reliance on Allen is particularly well placed, though his contention that the causation issues in Allen and Bush are "closely analogous" is somewhat overstated.

The alleged injury in Allen was in conferring a benefit on possibly discriminatory schools, thus presumably having a negative impact upon the plaintiffs' chances for an integrated education. The situation in Bush is more straightforward, however, because the alleged job loss is more plausibly a direct result of defendants' actions. In this respect, it would be misleading to assert that, for purposes of showing causation, the situation in Bush is identical to that in Allen.

103 Id. (Sentelle, J., concurring) (citing Gladstone v. Village of Bellwood, 441 U.S. 91, 100 (1979)). See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 498-99 (1975) ("The standing question in its Art. III aspect is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf") (emphasis in original).

104 Bush, 954 F.2d at 750 (Sentelle, J., concurring) (quoting Capital Legal Found. v. Commodity Credit Corp., 711 F.2d 253, 258 (D.C. Cir. 1983)).


106 Chief Judge Mikva agrees with Judge Sentelle that the human rights organizations fail the injury requirement for Article III jurisdiction. Bush, 954 F.2d at 754 (Mikva, J., dissenting).

107 468 U.S. at 797.

108 Bush, 954 F.2d at 751-52 (Sentelle, J., concurring).

109 Id. at 750-51 (Sentelle, J., concurring).

110 Id. at 751 (Sentelle, J., concurring).

111 Allen, 468 U.S. at 740.

112 It is often proposed that one of the many factors in the loss of American jobs is labor's inability to compete with inexpensive foreign workers. The President's choice not to enforce that legislation which might make foreign labor less inexpensive could have an impact on jobs and wages in the United States.
Nevertheless, Circuit Judge Sentelle recognizes that Bush is highly analogous to Allen because, in both cases, the causal relations between the defendants and the injured persons are interrupted by third parties. For example, in Allen, the schools which allegedly were the instrumentalities of injury were independent third parties. The Allen decision suggests that it is the intervening presence of the private schools that most damages the causal chain between defendants’ inaction and the alleged injury in Allen. This intervening third party substantially inhibits the necessary showing of causation for Article III standing.

In a similar manner, an intervening third party in the form of the allegedly recalcitrant nations devastates the chain of causation in Bush. It is difficult to accept that the President’s alleged inaction caused job loss in America, when there is an intervening nation which follows its own policies and acts largely without regard for grants or denials of special tariffs from the United States. For this reason, Circuit Judge Sentelle correctly draws the parallel between the two cases to show that under the Allen guidelines, plaintiffs in Bush cannot satisfy the causation required for Article III standing. Consequently, he gives credence to his argument that the causation of the injury alleged in Bush is too attenuated.

Judge Sentelle does not devote as much effort to demonstrating that plaintiffs’ claim is not redressable, the other requirement for Article III standing which is potentially troublesome for plaintiffs. Having already satisfied himself that there were grounds for dismissal of all the plaintiffs, Judge Sentelle did not need to fully analyze whether or not plaintiffs’ injuries were redressable. Nevertheless, it might be supposed that since the Court in Allen decided that it was “entirely speculative” that withdrawal of the private schools’ tax ex-

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113 Bush, 954 F.2d at 751 (Sentelle, J., concurring).
114 Allen, 468 U.S. at 740.
115 “From the perspective of [defendants], the injury to respondents is highly indirect and results from the independent action of some third party not before the court.” Id. at 757 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).
116 “The Supreme Court has emphasized that ‘Art. III still requires that a federal court act only to redress the injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party.’” Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991) (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)).
117 The influence of other, unmentioned economic factors could also account for the job loss.
118 “As we noted in Fulani v. Brady, 935 F.2d 1324 (D.C.Cir. 1991), Article III standing is absent where ‘the presence of intervening factors’ interrupts the chain of traceability and redressability.” Bush, 954 F.2d at 751. See also Warth v. Seldin, 422 U.S. 490 (1975) (the Court rejected petitioners’ claim that enforcement of a zoning ordinance precluded the construction of low-cost housing, noting that plaintiffs failed to demonstrate that a removal of the ordinance would necessarily result in the creation of low-cost housing by third-party construction companies).
emptions would remove the discrimination, it would be equally conjectural to conclude that rescinding the beneficial tax status under the GSP would stop the loss of jobs in the United States.

It is somewhat surprising that Judge Sentelle does not make this argument, given that his discussion about lack of causation can be assailed. For example, Chief Judge Mikva correctly points out that Judge Sentelle fails to address the possibility that Congress indicated a presumption about causation and redressability to which the court should defer. Chief Judge Mikva cites statements from the Congressional Record which indicate that at least certain members of Congress believed that the lack of worker rights in developing countries directly injures the interests of the American worker. He then points out that an indication of a congressional presumption should be considered, noting out that “even judges who are inclined to give less deference rather than more have repudiated the suggestion that courts should pay no attention to Congress’ predictions of the effect of law.”

Judge Sentelle concedes the point that the judiciary may owe deference to Congress’ intentions, but denies that Congress has expressed any such presumption as to causation and redressability. He seems to casually ignore the evidence in the legislative history of the GSP and reasserts plaintiffs’ failure to satisfy the causation requirements for Article III standing. Given that the legislative history reveals that some members of Congress found a causal relation to exist, it seems unusual that Judge Sentelle summarily dismisses the issue of possible deference to congressional intent.

Judge Sentelle also disdains the suggestion that wage concessions by the labor unions might constitute an injury for Article III purposes. In fact, he does not even discuss or rebut this possibility. After devoting so much attention to his argument that there is

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119 Allen, 468 U.S. at 758.
120 Bush, 954 F.2d at 756 (Mikva, J., dissenting).
123 Bush, 954 F.2d at 751 (Sentelle, J., concurring).
124 Circuit Judge Sentelle summarily concludes that “Congress has expressed no such intention about causation and redressability relevant to the question before us.” Id. (Sentelle, J., concurring).
126 All that Circuit Judge Sentelle says about this possibility is that “any connection between the actions of appellees in this case and wage concessions, real or potential, by
weak causation for the alleged loss of jobs, it seems unusual that Judge Sentelle does not similarly address the allegation that threats of plant relocations by U.S. companies were used as a means to extract wage concessions from labor unions. Instead, he only asserts that there is no evidence that Congress determined the causation of this alleged injury.127 Once again, his statement on this issue does not match the Congressional record which indicates that Congress did recognize a possible causal connection.128

It is difficult to find any explicit justification for these gaps in Judge Sentelle's concurrence. It is possible that he was aware of Congress' statements but independently concluded that the causation was too tenuous to be considered, even if there was a Congressional presumption. But if such were the case, he should not have stated categorically that he read no evidence of congressional findings concerning the two alleged injuries.129 Furthermore, it is difficult to accept that Judge Sentelle was completely unaware of the Congressional Record, since it is cited prominently in Chief Judge Mikva's dissent.130

Unfortunately, such a paradox reduces one to the level of mere supposition. It is possible that Judge Sentelle does not bother to rebut Congress' position, though he clearly acknowledges its existence,131 because he believed that his arguments showing plaintiffs' inability to demonstrate causation were insurmountable.132 Another possibility is that Judge Sentelle's decision was motivated by other underlying concerns. For example, had Circuit Judge Sentelle decided as a matter of course, that judicial review of the President's GSP policy would be undesirable, then he would only need to find a point upon which to base that decision. If this were true, then anal-

127 Id. at 751 (Sentelle, J., concurring).
129 Bush, 954 F.2d at 751 (Sentelle, J., concurring).
130 An unsatisfying explanation could be that, when Circuit Judge Sentelle expresses his belief that "Congress has expressed no such intention about causation and redressability" to which the court might defer, he means that he finds no evidence of that intention in the statute itself and disregards the Congressional Record. Id. (Sentelle, J., concurring). The fact that Circuit Judge Sentelle makes reference on two separate occasions to Chief Judge Mikva's dissent, however, undercuts this explanation because Chief Judge Mikva directly cited the passages in the Congressional Record that evidenced Congress' intent. Id. at 758 (Mikva, J., dissenting).
131 Id. at 751 (Sentelle, J., concurring).
132 In a subsequent decision, Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992), the Supreme Court affirmed that, to have Article III standing, plaintiffs must show that they have suffered in fact an actual injury of a protected interest. Lujan also reemphasized that the presence of intervening third-parties will disrupt the chain of causation necessary to demonstrate that the injury resulted from the subject of the complaint. Id. Consequently, it would seem that Judge Sentelle correctly decided not to devote more attention to the possibility that forced wage concessions might be an injury.
ses of other possibilities would become less essential, thus explaining Judge Sentelle's curious inattention to the Congressional Record.

C. Alternative Nonjusticiability Analyses

By framing his nonjusticiability analysis in terms of plaintiffs' inability to satisfy the respective prongs of the *Allen* test, Judge Sentelle may have missed an opportunity to contribute to the development of positive law. For example, Judge Sentelle could have used *Bush* to clarify a difficulty which has emerged in understanding presumptions of reviewability under the Administrative Procedure Act. The difficulty results from a tension between the Supreme Court's decisions in *Chaney* and *Overton Park*.

*Chaney* states that agency non-action is presumptively nonreviewable.\(^{133}\) The corollary rule from *Overton Park*, however, indicates that agency action is presumptively reviewable unless the relevant statute fails to provide meaningful guidelines for judicial review.\(^{134}\) Consequently, a meaningful examination of *Bush* in light of the Administrative Procedure Act, as understood by the Supreme Court in *Overton Park* and *Chaney*, would necessarily have to consider both of these rules which have grown out of the Court's analysis of the proper role of judicial review of agency action. Though Judge Sentelle selected alternate grounds for his determination that the complaint was nonjusticiable, a dissection addressed to separation of powers would have been more revealing and would likely have rendered the same result.

If he were to undertake such an analysis, the threshold question would be whether review is sought of agency action or non-action. In *Bush*, this issue has the potential to lead one into a factual quandary: did the President "act" by affirmatively determining that the worker rights standards in the beneficiary nations were satisfactory, or was there merely a failure to enforce the worker rights standards of the GSP, thus constituting agency "non-action." If the latter were the case, *Bush* would be nonreviewable under the APA, as interpreted in *Chaney*. Clearly, this is a factual determination, but it seems relevant that plaintiffs brought suit alleging that defendants *failed* to enforce the worker rights provisions of the GSP.\(^{135}\) This indicates that the complaint rests on an instance of agency non-action, thus rendering the case nonjusticiable under the *Chaney* presumption of nonreviewability.

Even if it were determined that plaintiffs sought a review of agency action, thus passing the *Chaney* test, the complaint still might

\(^{134}\) 401 U.S. 402, 410 (1971).
be nonjusticiable. According to *Overton Park*, if the statute fails to provide sufficient guidelines for judicial review, a presumption of nonreviewability is raised on the grounds that Congress must have intended it to be committed to the discretion of the executive branch. Thus, one must examine the language of the GSP in an effort to determine whether there are sufficient standards by which a court could review the action. Under such an analysis, *Bush* would probably be nonjusticiable because, in the relevant provisions of the GSP, Congress provides no explicit methodology by which the President is to undertake his review of worker rights. Quite the contrary, all the statute requires is that "the President shall take into account worker rights. The only specific directive given elsewhere is a definition of the term "internationally recognized worker rights."  

On first reading, this definition might appear to provide a workable guideline for judicial review, but a closer examination reveals that it does not provide a meaningful standard for review. It fails to do so because the "rights" it attempts to define are enumerated generally, but without a level of specificity necessary for an objective review of the President's decisions. For example, the definition requires that the relevant beneficiary nation establish a "minimum age for employment," but does not say what that age is. Similarly, the statute requires a finding of "acceptable" work conditions but provides no criteria by which to evaluate said conditions. The vagueness of the requirements renders them almost inherently discretionary. In none of these provisions did Congress establish a specific baseline by which beneficiary nations' worker rights practices are to be evaluated. Instead, Congress requires the President to make general determinations that there are "acceptable conditions of work" and "a minimum age for the employment of children," but Congress neither specifies what those "acceptable conditions" might be, nor does it state what a "minimum working age" should be.

As such, there are no actual standards by which the judiciary can objectively measure the President's alleged failure to enforce the worker rights provisions of the GSP. *Overton Park* reveals that, in such a situation, courts must defer to the construction of the statute applied by the President or the agency involved. The rationale

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136 *Overton Park*, 401 U.S. at 410-11.
138 Id. § 2462(b)(7).
139 These rights include "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." Id. § 2462(a)(4).
for this deference is that, by choosing not to provide objective criteria by which to evaluate the President's actions, Congress demonstrates its intent that those actions be left to the President's discretion. For this reason, the claim would be nonjusticiable on the grounds that there are insufficient statutory standards to overcome the presumption of nonreviewability.

There is another point for consideration which Judge Sentelle chooses not to explicitly address in Bush. As the case strongly implicates the President's foreign policy decisions, the court must have noted that at least a certain level of discretion is due under the traditional understanding of separation of powers. Though it is clear that the court would not have to defer completely to the President on all issues involving foreign policy, it seems rather unusual that Judge Sentelle does not at least mention this concern as an additional rationale for his position, especially since the District Court prominently discusses it. As the presence of foreign policy concerns does not necessarily render the complaint nonjusticiable, this seeming oversight on the part of Judge Sentelle probably should be regarded as merely a component of the larger "political question" doctrine which he ignores completely.

For the foregoing reasons, it is possible that the complaint in Bush could have been held to be nonjusticiable for reasons other than the one Judge Sentelle gives. Although his concurrence is certainly capable of standing on his determination that plaintiffs lack standing, a discussion of the reviewability of Bush according to the guidelines set in the Supreme Court's recent APA jurisprudence would have been valuable. A possible explanation for Judge Sentelle's decision to base his concurrence exclusively on plaintiffs' lack of standing could be that he recognizes that nonjusticiability was the basis of the District Court's decision and tenders his analysis as addi-

cil, Inc., 467 U.S. 837, 844 (1984) for the proposition that, if a statute is ambiguous and the legislative history does not indicate otherwise, the usual practice is to defer to the agency's construction of the statutory scheme); United States v. Curtiss-Wright Corp., 290 U.S. 504, 519 (1936) (emphasizing the singular role of the President in foreign policy determinations).

141 "In determining whether a question is [nonjusticiable], the appropriateness under our system of government of attributing finality to the action of the political department and also the lack of criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-55 (1938) (citations omitted).

142 Review of agency decisionmaking has also been declined on the grounds that it would have "disruptive" practical effects. Southern R. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 457 (1978). In the present context, it seems particularly likely that courts would wish to avoid disruption of the President's foreign policy plans.


tional grounds for dismissal. Unfortunately, Judge Sentelle's failure to take a clear position on the District Court's decision that the claim is nonjusticiable leaves some question as to the relative value of the District Court's analysis.

V. Conclusion

Bush could be typified as the right decision for the wrong reasons. Judge Henderson's justification for affirming the dismissal, though couched in an almost plausible argument, fails due to its reliance on an overbroad interpretation of Congress' language, a less-than-logical argument about the complaint's potential to "provide for" tariffs, and citations to cases which do not really support her contention that the CIT has jurisdiction over GSP-related cases.

Judge Sentelle's concurrence and his analysis of the plaintiffs' lack of Article III standing is considerably less troubled, and his application of Allen to Bush is well chosen and effective. Furthermore, by basing his decision on plaintiffs' inability to satisfy the requirements of Article III, Judge Sentelle avoids embroiling the court in what should rightly be considered nonjusticiable. Nevertheless, Judge Sentelle's failure to address arguments potentially damaging to his position does nothing to enhance his efforts.

Considering this mixed balance, it is unclear for what Bush legitimately stands. Given the enormous problems with Judge Henderson's concurrence, it probably should not be interpreted as a legitimate, expansive statement of the CIT's jurisdiction. Judge Sentelle, on the other hand, commits a sin of omission by failing to clarify important aspects of the development of separation of powers jurisprudence. Finally, both judges essentially disregard a substantial subissue in Bush—the "political question" doctrine. Thus, the ultimate conclusion to be drawn from the case may be that court has casually avoided the most important issues inherent in Bush.

BRYAN GREGORY

146 Judge Sentelle neither explicitly affirms the basis of the District Court's nonjusticiability holding nor does he overrule it.