Winter 1994

International Trade Agreements and Domestic Environmental Policy: The NAFTA Example

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Cover Page Footnote
International Law; Commercial Law; Law
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I. Introduction

The National Environmental Policy Act (NEPA), implemented for the express purpose of encouraging harmony between man and his environment, reflects the spirit of activism typifying the late 1960s. The activist spirit of that period arguably has diminished over the years, and many policy makers may question the effectiveness of NEPA after the recent D.C. Circuit Court of Appeals decision in Public Citizen v. United States Trade Representative. The Public Citizen court limits the international impact of NEPA by refusing to apply its requirement of an environmental impact statement (EIS) to the North American Free Trade Agreement (NAFTA). This refusal represents a defeat for environmentalists, as Public Citizen demonstrates how NEPA completely failed to provide the courts with any vehicle to impose NEPA mandates on international trade agreements submitted to the President. Although environmental issues raised in the negotiations of international trade agreements such as NAFTA continue to be scrutinized, Public Citizen unveiled an obvious weakness in federal legislation concerning the environment—leaving the question of NEPA's effective-

2 5 F.3d 549 (D.C. Cir. 1993) [hereinafter Public Citizen IV].
3 Judge Richey of the district court noted that most government agencies, such as the State Department, adhered to NEPA requirements when preparing international treaties. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21, 30 (D.D.C. 1993), rev'd, 5 F.3d 549 (D.C. Cir. 1993) [hereinafter Public Citizen III] (citing 22 C.F.R. §§ 161.5(d), 161.7(d)(2) (1992)). In contrast to other government agencies, however, the Office of the United States Trade Representative (OTR) did not apply NEPA requirements to international trade agreements, so the judicial limitations placed on NEPA merely reflect the practices of the OTR. See Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139, 140 (D.D.C. 1992), aff'd, 970 F.2d 916 (D.C. Cir. 1992) [hereinafter Public Citizen I and II, respectively].
4 The environmental organizations involved in Public Citizen are planning to appeal to the United States Supreme Court, however, so the judiciary may not yet be removed from the controversy surrounding NEPA's application to NAFTA, notwithstanding its adoption. See International Affairs: Environmental Impact Statement Not Required On Trade Agreement, Federal Appeals Court Says, Env'tl. Rep. (BNA) No. 24, at 998 (Oct. 1, 1993). But see Public Citizen IV, 5 F.3d at 550, in which the majority stated, "NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play."
5 For example, President Clinton expressly conditioned NAFTA's submission to Congress upon collateral environmental agreements. Public Citizen IV, 5 F.3d 550.
ness to legislative remedy. This Note begins by examining the environmentalists' various attacks on NAFTA, including the most recent dispute raised in *Public Citizen*, in Part II. A survey of relevant background law is provided in Part III, followed by an analysis of the *Public Citizen* opinion in Part IV. Finally, in Part V, this Note concludes that the court's holding in *Public Citizen* will not significantly cripple NEPA's long-term impact on international trade agreements.

II. Statement of the Case

A. Origins of the Dispute

The adversaries in *Public Citizen* initially clashed during the negotiation process of NAFTA. The plaintiffs were several organizations interested in the environment, who maintained that NEPA required the Office of the United States Trade Representative (OTR) to prepare an EIS during its negotiation of NAFTA. The district court dismissed the action for lack of subject matter jurisdiction, ruling that the environmentalists failed to establish standing because the process of negotiating NAFTA was not a particular agency action that injured the plaintiffs.

The plaintiffs appealed the district court's dismissal only to see their claim rejected. The appellate court did not address the issue of the plaintiffs' standing, but based its decision on the failure of the plaintiffs to identify a "final agency action" that would subject the OTR to judicial review. The court declared that the OTR's refusal to provide an EIS did not itself constitute final agency action. Insisting that the NAFTA negotiations must result in an actual agreement before being considered final agency action, the appellate court affirmed the district court's dismissal.

B. Round One—District Court

The ongoing battle between the environmental organizations and the OTR culminated in a 1993 courtroom clash when the district court...
received the opportunity to re-examine the dispute in light of the completed NAFTA.\textsuperscript{16} The negotiations with Canada and Mexico had been settled, and the trade representatives had signed the resulting agreement.\textsuperscript{17} The President was expected to submit NAFTA to Congress later in the year,\textsuperscript{18} although he was under no obligation to do so.\textsuperscript{19} The plaintiffs, still concerned about NAFTA's environmental effects, filed suit against the OTR, again based upon the failure of the OTR to include an EIS in the completed NAFTA.\textsuperscript{20} The OTR countered plaintiffs in a four-pronged attack, asserting that (1) the district court did not have jurisdiction over the dispute; (2) exercising jurisdiction would be a violation of the constitutional separation of powers; (3) the plaintiffs had no standing in the action; and (4) NEPA's EIS requirement did not pertain to NAFTA.\textsuperscript{21} The third courtroom battle provided a brief victory for the environmentalists, however, as the district court resoundingly rejected the OTR's arguments and held that an EIS must be prepared regarding the completed NAFTA.\textsuperscript{22}

1. The APA Jurisdictional Challenge

The district court systematically expounded upon its rejection of each of the OTR's four contentions, considering the APA jurisdictional question first.\textsuperscript{23} The court noted, after an initial examination of NEPA, that the Administrative Procedure Act (APA) grants federal courts judicial review of final agency actions.\textsuperscript{24} The OTR claimed that the APA did not apply to NAFTA, however, for several reasons.\textsuperscript{25} First, the OTR declared that the President was ultimately responsible for NAFTA, and the APA granted no jurisdiction over the President.\textsuperscript{26} In response to the OTR's contention, the district court attributed the bulk of NAFTA's drafting and negotiation to the OTR, a fact conceded by the defendant.\textsuperscript{27} The district court concluded that due to the

\textsuperscript{17} Id. at 22. The United States Trade Representative is appointed by the President and acts as the representative of the United States when negotiating international trade agreements. 19 U.S.C. § 2171(b), (c)(1)(C) (1988).
\textsuperscript{18} In fact, the President submitted NAFTA to Congress in November 1993. The House of Representatives passed the agreement on November 17, and the Senate passed NAFTA on November 20.
\textsuperscript{19} Once submitted to Congress, NAFTA would be subject to the legislative "fast track" procedure. See infra text accompanying notes 126-30 (discussing the fast track procedure generally).
\textsuperscript{20} See Public Citizen III, 822 F. Supp. at 22.
\textsuperscript{21} Id. at 23.
\textsuperscript{22} Id. at 30.
\textsuperscript{23} See id. at 24.
\textsuperscript{24} See id. (referring to 5 U.S.C. § 704 (1988)). See also infra note 91 and accompanying text.
\textsuperscript{25} Public Citizen III, 822 F. Supp. at 24.
\textsuperscript{26} Id. Courts are in agreement that the President is not an agency governed by the APA. See infra notes 115-16 and accompanying text.
\textsuperscript{27} Public Citizen III, 822 F. Supp. at 25.
OTR's substantial contribution to the drafting of NAFTA, the APA authorization of judicial review of agency actions applied.\textsuperscript{28} The OTR's second jurisdictional challenge involved the determination of whether the completed negotiations of NAFTA constituted final agency action reviewable under the APA.\textsuperscript{29} The OTR contended that completed negotiations of NAFTA did not constitute finality; instead, the final action was the submission of NAFTA by the President to Congress for ratification.\textsuperscript{30}

The district court looked to NEPA when analyzing the finality question.\textsuperscript{31} Citing several cases which addressed NEPA, the court held that "a federal agency is still required to prepare an EIS even if a project or proposal is not exclusively a federal agency endeavor."\textsuperscript{32} Judge Richey also gave substantial deference to the regulation promulgated by the Council for Environmental Quality (CEQ), an entity established by NEPA.\textsuperscript{33} A strong body of case law supports the idea that courts must give substantial deference to the CEQ regulations' interpretation of NEPA.\textsuperscript{34} The regulation examined by the district court stated that NEPA's EIS requirement applied to requests for ratification of treaties predominantly developed by a federal agency.\textsuperscript{35} The district court provided examples of legislative, judicial, and administrative authority classifying the OTR's status as a federal agency subject to CEQ regulations.\textsuperscript{36} In support of its argument that there was no final agency action, the OTR cited Franklin v. Massachusetts,\textsuperscript{37} a Supreme Court decision holding that the submission of census information to the President by the Secretary of Commerce did not constitute final agency action subject to the APA.\textsuperscript{38} The district court distinguished the Franklin census from NAFTA by classifying the census as a "tentative recommendation" that did not bind the President to the results.\textsuperscript{39} In contrast, the President could not change the NAFTA signed by Mex-
The last prong of the OTR's attack on jurisdiction was based on the argument that the President had no obligation to submit NAFTA to Congress. The district court quickly disposed of this point by declaring that once Congress rejected or adopted a submitted proposal, the right for judicial review of the procedure introducing the proposal could be lost permanently. The court also declared that NEPA clearly mandated preparation of an EIS on legislative proposals regardless of the President's role in the submission process.

2. Separation of Powers

The OTR made a further argument that the application of APA rules would infringe upon the President's power to "conduct foreign policy" and therefore violate the separation of powers doctrine. The district court quickly rejected the OTR's contention by reminding the OTR that Congress had the power to regulate commerce. According to the court, the actual conduct of foreign policy was completed with the signatures of the United States, Canada, and Mexico, and the EIS requirement was a domestic issue that did not significantly affect the President's power to such an extent that it violated the separation of powers doctrine.

3. The Plaintiffs' Standing

After the district court rejected the OTR's first two jurisdictional challenges, it addressed the OTR's next major argument that plaintiffs had no standing in this action. The environmentalists argued that NAFTA would bind federal and state agencies and preempt state laws protecting the environment, causing injury to members of the plaintiff organizations. The district court agreed—NAFTA's preemption of state environmental laws such as those in Wisconsin and California would affect individual members of the environmental organizations. Judge Richey also noted that the plaintiffs provided sufficient evidence of a negative impact on the environment in the United States-Mexico.

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40 Id. See also 19 U.S.C. § 2191(d) (1988) (prohibiting amendment to trade agreements submitted under the fast track procedure).
42 Id. at 26 (citing Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986)).
43 Id.
44 Id. The court of appeals did not address the separation of powers issue. See infra note 80.
46 Id. at 27.
47 Id. For further discussion of standing see infra notes 92-93 and accompanying text.
49 Id.
border region where members of plaintiff organizations lived. This
evidence, the court concluded, was substantial enough to establish
plaintiffs' standing because the "allegation of environmental harms to
particular members of the Plaintiff organizations are sufficiently
concrete." The court also briefly referred to other standing issues.
According to the plaintiffs, standing was established on the basis of injury to
organizational interests, because without an EIS the plaintiffs could
not adequately inform their members of NAFTA's environmental ef-
facts. The court found it unnecessary to make a holding on this issue
because the environmental organizations established standing through
the interests of their individual members.

4. Applying NEPA to NAFTA

The final major argument offered by the OTR involved the applic-
cability of the NEPA EIS requirement to NAFTA. The court held
that NEPA clearly required the preparation of an EIS on legislative
proposals. The court, quoting a Ninth Circuit case, argued that
when interpreting "the policies, regulations and public laws of the
United States" courts should adhere to NEPA to the fullest extent pos-
sible. The court then held that the CEQ regulations mandated an
EIS when "federal actions 'establish a precedent for future actions with
significant effects or represent a decision in principle about a future
consideration,' or 'threaten a violation of Federal, State, or local law or
requirements imposed for the protection of the environment.'" The
court also noted that even though the fast track rules were applicable
to NAFTA, legislative relief by way of an extension could provide the
OTR with ample time to prepare an EIS; therefore, imposing the re-
quirement of an EIS on the OTR was not unduly burdensome or in-
consistent with procedural requirements. The court entered
summary judgment for plaintiff and ordered the OTR to prepare an
EIS on NAFTA, as it was essential for Congress to consider NAFTA's
environmental effects.

50 Id. at 29.
51 Id.
52 See id. at 27.
53 Id. at 29 n.12. For further discussion of this informational injury, see infra text ac-
companying note 92.
54 See Public Citizen III, 822 F. Supp. at 29. The circuit court did not address this issue.
55 Id. at 23.
56 Id. at 29.
57 Id. (quoting Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986)).
58 Id. at 29 n.14 (quoting 40 C.F.R. §§ 1508.27(b)(6), (b)(10)).
59 For further discussion of the fast track rules see infra notes 126-30 and accompanying
text.
60 Public Citizen III, 822 F. Supp. at 30 n.15.
61 Id. at 30.
C. Round Two—On Appeal

1. Issue and Holding

The success of the environmentalists in the district court was a short-lived one, as the Court of Appeals for the D.C. Circuit reversed the district court’s decision in September 1993.\(^\text{62}\) Based on the same facts as those recounted in the district court case, the court of appeals held that submission of the proposed trade agreement to the President did not constitute final agency action conferring jurisdiction on the court, and therefore the court could not enforce the NEPA requirements.\(^\text{63}\) The court began its analysis by examining NEPA’s requirement that an EIS must be included “in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . .”\(^\text{64}\) The court noted that NEPA created no private right of action, leaving the APA as the primary means by which parties might seek to enforce NEPA.\(^\text{65}\) Because “final” agency action was necessary before the APA could be invoked, the court reasoned that the crux of the dispute focused on whether the environmentalists could identify a final agency action.\(^\text{66}\)

2. Majority Reasoning

The court of appeals held that an earlier decision, Franklin v. Massachusetts,\(^\text{67}\) was controlling. The court cited the test used in Franklin to determine whether an agency action is final: “[T]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.”\(^\text{68}\) The court, applying the Franklin test, stated that the actions of the President (submitting NAFTA to Congress), not the actions of agency, would directly affect the parties.\(^\text{69}\) The President’s submission of the agreement to Congress was final, according to the court, and the President was not subject to the regulations of the APA.\(^\text{70}\)

The court of appeals rejected the distinction made by the district court between Franklin and the present case.\(^\text{71}\) According to the district court, the proposal in Franklin could be altered while in the hands

\(\text{\(^{62}\) Public Citizen IV, 5 F.3d 549 (D.C. Cir. 1993).}\)
\(\text{\(^{63}\) Id. at 550.}\)
\(\text{\(^{64}\) Id. at 551 (quoting 42 U.S.C. \S 4332(2)(C) (1988)).}\)
\(\text{\(^{65}\) Id. For a discussion of how the APA works in relation to the NEPA, see infra note 91 and accompanying text.}\)
\(\text{\(^{66}\) Public Citizen IV, at 551.}\)
\(\text{\(^{67}\) 112 S. Ct. 2767 (1992). For a full discussion of this case, see infra notes 110-21 and accompanying text.}\)
\(\text{\(^{68}\) Public Citizen IV, 5 F.3d at 551 (quoting Franklin, 112 S. Ct. at 2773).}\)
\(\text{\(^{69}\) Id. at 551-52.}\)
\(\text{\(^{70}\) Id.}\)
\(\text{\(^{71}\) Id. at 552. For discussion of the district court’s distinction, see supra text accompanying notes 37-40.}\)
of the President, but under the procedure governing the submission of NAFTA, the President could not amend international trade agreements. The court of appeals dismissed this distinction by asserting that the President had the power to renegotiate or even completely refuse to submit NAFTA to Congress. The court of appeals also refused to uphold the environmentalists' argument that the failure to prepare an EIS directly affected their ability to educate members of Congress about NAFTA's environmental effects. The court's only response to this argument merely reasserted that APA review would only be triggered in the case of identifiable substantive agency action affecting the parties. The plaintiffs further challenged the application of Franklin as effectively emasculating the NEPA requirements due to the frequency of "intervening steps," such as the submission of NAFTA to the President, which prevent the actual agency action from being considered "final." The court of appeals noted that the Franklin requirements proved to be difficult hurdles, but then stressed the limited applicability of Franklin. According to the Public Citizen court, Franklin applies only to cases where "the President has final constitutional or statutory responsibility in the final step necessary for the agency action directly to affect the parties." The court implied that this Presidential responsibility must be essential to the integrity of the process in order to qualify as the "final" action thereby removing the proposal from the jurisdiction of the APA.

The court of appeals treated Franklin as a dispositive case and, in applying Franklin's analysis to Public Citizen, reasserted that only the act of the President submitting NAFTA to Congress could affect the parties directly, and because the President does not perform an agency action, his submission would not be reviewable under the APA.

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72 Public Citizen IV, 5 F.3d at 552.
73 Id.
74 Id.
75 Id. (citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)).
76 Id.
77 Id. Franklin requires that (1) the agency complete its decision-making process and (2) the result of this process directly affect the parties. Franklin v. Massachusetts, 112 S. Ct. 2767, 2773 (1992). It appears that the Franklin Court's interpretation of "direct effects" really equates with "immediate effects" as there is no question that the submission of the census to the President would affect the parties because no action would be taken by the President without the submission. It is the intervening act of the President, however, that immediately affects the parties. The Franklin Court did not address the issue as one of contributing causation, but rather focused on the "intervening step" of submission to the President. This proves a difficult hurdle to overcome in the case of any agency proposal that must first pass through the President before adoption.
78 Public Citizen IV, 5 F.3d at 552.
79 Id.
80 Id. at 553. The government offered further reasons to overturn the district court's decision. Id. at 552. Alternative arguments offered by the government included a constitutional challenge based on the separation of powers; standing; a request for the court to use equitable discretion granted by § 702 of the APA; and NEPA's inapplicability to trade agree-
3. Concurrence of Judge Randolph

Judge Randolph filed a concurring opinion in which he agreed that the President’s submission of NAFTA to Congress constituted the only identifiable final agency action, and the President was not subject to the requirements of NEPA in an action instituted under the APA. The concurring opinion exposed a supposed logical fallacy in any relation between the Franklin “direct effects” test and the nature of a legislative proposal. According to Judge Randolph, a mere legislative proposal of any nature could not “directly affect” any party. The direct effect could not occur until the submitted bill passed and became law. Judge Randolph implied that under the direct effects test of Franklin, judicial review of NEPA violations in regard to legislative proposals, at least through the vehicle of the APA, is simply an impossibility. Although raising the issue of notable contradictions in prior case law regarding the NEPA EIS requirement, Judge Randolph ultimately expressed content that the sole issue in Public Citizen, the identified “final action” of the President’s submission of NAFTA to Congress, was easily resolved as the President was not subject to the APA.

III. Background Law

Public Citizen began its analysis by examining NEPA, which provides a logical starting point for any presentation of background law relevant to Public Citizen’s holding. The specific provision of NEPA allegedly violated in the Public Citizen conflict mandates that federal agencies include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible

ments. Id. at 552-53. The court expressly refused to address any of these alternative arguments, finding the sole ground for its holding sufficient. Id. at 553; see supra text accompanying notes 44-46 for discussion of separation of powers; see supra text accompanying notes 47-54 for a discussion of standing.

81 Public Citizen IV, 5 F.3d at 553 (Randolph, J., concurring).
82 Id. (Randolph, J., concurring). See supra notes 39-40 and accompanying text.
83 Public Citizen IV, 5 F.3d at 553 (Randolph, J., concurring).
84 Id. (Randolph, J., concurring).
85 Id. at 553-54 (Randolph, J., concurring).
86 Id. at 554 (Randolph, J., concurring).
87 The contradiction stems from the statement that a court may preside over a NEPA violation “when the report or recommendation on the proposal is made, and someone tests either the absence or the adequacy of the final impact statement.” Id. at 554 (Randolph, J., concurring) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 406 n.15 (1976)). Compare this statement to Franklin’s “direct effects” test, and the contradiction is obvious. Certainly Kleppe allows a broader jurisdictional base for NEPA violations.
88 Id. (Randolph, J., concurring).
89 See id. at 551.
Judicial review of NEPA violations is not directly authorized by the statute; however, the general provisions of the APA authorizing judicial review may be applied. Several requirements are imposed on a party invoking the APA's general provisions to confer jurisdiction over NEPA violations. Fulfillment of these requirements establishes a plaintiff's standing.

The United States Supreme Court faced the issue of judicial review of alleged NEPA violations in *Lujan v. National Wildlife Federation*. The plaintiffs in *National Wildlife Federation* challenged the land withdrawal review program administered by the Bureau of Land Management (BLM) through which some public land would be opened for private uses, such as mining. The plaintiffs contended that the BLM program violated NEPA's EIS requirement. The *National Wildlife Federation* Court asserted that because NEPA's provisions did not directly provide for judicial review, the general agency review provisions of the APA must be met. In order to meet the APA requirements, the *National Wildlife Federation* Court claimed, the person must suffer a legal wrong or be adversely affected or aggrieved in a manner contemplated by the statute allegedly violated, and the agency action causing such injury must be a final agency action.

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91 The relevant APA section provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1988).

92 *Public Citizen I*, 782 F. Supp. 139, 141-42 (D.D.C. 1992), aff'd, 970 F.2d 916 (D.C. Cir. 1992). In order to establish standing, a plaintiff must first fulfill requirements imposed by Article III of the United States Constitution. The constitutional requirements are that (1) a plaintiff demonstrate an injury in fact; (2) the injury be traceable fairly to the challenged action; and (3) the injury be likely to be redressed by a favorable decision. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). If suit is brought under the APA the plaintiff must meet additional requirements imposed by section 702: (1) there must be an identifiable agency action, and (2) the plaintiff must be aggrieved within the meaning of the relevant statute. See infra text accompanying notes 97-99.

93 See, e.g., *Public Citizen I*, 782 F. Supp. at 141-42.


95 *Id.* at 876.

96 *Id.* at 879.

97 *Id.* at 882. See also 5 U.S.C. § 702 (1988) (discussed supra note 91).

According to the National Wildlife Federation Court, an organization may also sue on its own behalf if its objective is to publish information and such objective is impeded by a final agency action, creating what is known as an "informational injury." The plaintiffs in National Wildlife Federation failed, however, to establish the existence of a final agency action, because the court concluded that the continuous nature of BLM programs precluded "final action."

The Court of Appeals for the District of Columbia Circuit continued the National Wildlife Federation Court's scrutiny of the APA's applicability to NEPA violations in City of Los Angeles v. National Highway Traffic Safety Administration. The plaintiffs sued because the defendant failed to prepare an EIS when lowering fuel emission requirements. The National Highway court set forth the constitutional elements necessary to maintain "standing" in the federal court. The Court further noted that the plaintiffs' action under NEPA satisfied these elements by showing that the defendant's failure to prepare an EIS caused actual injury to an interest within the zone of interests protected by NEPA. According to the court's analysis, the risk that serious environmental effects affecting the plaintiffs would be overlooked without the preparation of an EIS established an injury sufficient for "standing."

Another case relevant to Public Citizen is Kleppe v. Sierra Club. Kleppe, a precursor to National Wildlife Federation, rejected the idea that the judiciary was empowered by NEPA to require the preparation of an environmental impact statement before an agency's formal recommendation or report of a proposal. In a partial dissent, however, Justice Marshall voiced his belief that the policy of NEPA requires fair consideration of environmental factors throughout the agency process. To permit delay of the preparation of an EIS until an actual proposal is completely drafted, opined Justice Marshall, is to violate NEPA's policy of early consideration of environmental factors and to encourage a procedure of preparing a biased EIS that has had no practical effect on

99 Id. at 898-99.
100 Id. at 899. The National Wildlife Federation Court's rationale here was that an ongoing program, due to its continuous nature, could not be attacked as a "final" agency action. This implies that a party potentially affected by an agency program would not have standing under NEPA once the program was implemented.
102 Id. at 483.
103 Id. For a listing of the requirements, see supra note 92.
104 National Highway, 912 F.2d at 483 (quoting Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 997 (D.C. Cir. 1979)).
105 Id. The plaintiff satisfied the constitutional standing requirements as well as the additional APA standing requirements. See supra note 92 for a discussion of standing requirements.
107 Id. at 405-06.
108 Id. at 415 (Marshall, J., concurring in part and dissenting in part).
the previously drafted proposal. Public Citizen, however, focused on another Supreme Court decision that further illuminated the issue of the APA’s applicability to submissions of legislative proposals to the President. In Franklin v. Massachusetts, the Secretary of Commerce submitted a census report to the President, and Massachusetts challenged the results. The Franklin majority held that Massachusetts’ claim could not be subject to judicial review under the APA because the Secretary’s submission did not constitute a final agency action.

According to the Franklin Court, the role of the APA was to set forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts. The Franklin Court further stipulated that the President was not an agency within the meaning of the APA. Although the President was not expressly excluded from the bounds of the APA, he was not expressly included either, and the Franklin Court invited Congress to subject the President to the APA by statute. Otherwise, the Court concluded, the President would continue to be presumed exempt from the mandates of the APA. As the President was not bound by the census information, the Franklin Court held, his submission of the information to Congress is what truly constituted the final action, so no “final agency action” brought the information into the dominion of the APA.

Justice Stevens, concurring in part, and concurring in the judgment, opined that the submission of the census report to the President did constitute “final agency action” subjecting it to judicial review under the APA. Justice Stevens supported his conclusion by asserting that prior legislation completely excluded the President from the census report process, and that even after his inclusion, his function was purely ministerial. Justice Stevens further claimed that the statute allowing Presidential review of the census report before submission to Congress did not grant the President authority to modify the census figures produced by the Secretary of Commerce. In a final observation by Justice Stevens, he noted that his “conclusion that the Secretary’s action was reviewable makes it unnecessary for me to consider whether the President is an ‘agency’ within the meaning of the

109 Id. at 415-17.
110 Some might argue that this case further obscured the issue.
112 Id. at 2770.
113 Id. at 2773.
114 Id.
115 Id. The conclusion that the President was not subject to the APA had previously been reached in the Court of Appeals for the D.C. Circuit. See Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991).
116 Franklin, 112 S. Ct. at 2775-76.
117 Id. at 2774.
118 Id. at 2779 (Stevens, J., concurring).
119 Id. at 2780-81 (Stevens, J., concurring).
120 Id. at 2782 (Stevens, J., concurring).
APA."121

Franklin was decided after other jurisdictions had grappled with similar finality questions relating to NEPA’s applicability to various legislative proposals and the policy considerations behind NEPA’s EIS requirement.122 In Trustees for Alaska v. Hodel, the Ninth Circuit held that failure to allow public comment on an EIS before submission to Congress was a violation of NEPA.123 The defendant in Trustees for Alaska contended that no proposal had been submitted to Congress; therefore, no final action had been taken.124 The Ninth Circuit disagreed, claiming that the failure to allow public comment on the EIS constituted a final agency action, and once the proposal did pass to Congress, the public would lose its right to comment on the proposal at an administrative level.125

A final bit of background law worthy of exploration is the procedure for ratification of an international trade agreement known as the “fast track” process.126 According to provisions governing the fast track procedure, after completion of negotiations by the OTR, the President submits the trade agreement, along with accompanying legislation to implement the agreement, to Congress.127 Congress must vote on whether to implement the agreement within sixty legislative days after submission by the President.128 The fast track procedure denies Congress any power to amend the agreement.129 Trade agreements submitted through the fast track procedure will only be effective upon adoption of implementing legislation by both Houses of Congress.130

IV. Significance of the Case

The district court and the Court of Appeals for the D.C. Circuit began their respective analyses of Public Citizen in a similar manner.131 Each court examined the provisions of NEPA and found that the APA supplied the only vehicle for jurisdiction since NEPA itself provided no

121 Id. at 2783 n.15. Justice Stevens claimed that although the census report prepared by the Secretary of Commerce did constitute final agency action subject to judicial review under the APA, deference must be given to overriding constitutional and Census Act considerations (these overriding considerations are not relevant to Public Citizen), which explains his final concurrence in the judgment. Id. at 2778.

122 See, e.g., Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986). Actual preparation of the EIS was not at issue in this case.

123 Id.

124 Id. at 1381.

125 Id.


128 Id. § 2191(e).

129 Id. § 2191(d).

130 Id. § 2903(a)(1).

131 See supra text accompanying notes 24, 62-63.
private cause of action.\textsuperscript{132} It was after this initial reference to NEPA that the courts diverged dramatically. The district court, though stating that its jurisdiction was based on the APA, gave substantial deference to NEPA regulations.\textsuperscript{133} These regulations clearly presented the idea that NEPA should be applied to international trade agreements.\textsuperscript{134}

In contrast, once the Court of Appeals for the D.C. Circuit asserted that the APA was its basis for jurisdiction, it cast aside all of the NEPA provisions as well as the CEQ regulations accompanying NEPA.\textsuperscript{135} The CEQ regulations attempted to define the APA's role regarding treaty proposals,\textsuperscript{136} and the court's decision to ignore the regulations demonstrated that any attempts to apply NEPA to international trade proposals would be futile,\textsuperscript{137} regardless of the agency's interpretation of NEPA's applicability. The court's decision effectively overrode the Supreme Court's substantial deference standard\textsuperscript{138} by implying that if NEPA provides no jurisdiction, its regulations are completely irrelevant. This implication of "cutting things off at the pass" allowed the court to avoid major issues debated in preceding cases,\textsuperscript{139} and presented inconsistencies between Public Citizen and precedent.\textsuperscript{140}

\begin{footnotes}
\item[132] See supra note 91 and accompanying text.
\item[133] See supra note 33 and accompanying text. In the actual determination of whether the APA applied to the OTR's submission of NAFTA to the President, the district court drew upon language and case law under NEPA. Public Citizen III, 822 F. Supp. 21, 24 (D.D.C. 1993).
\item[134] See supra notes 89-90.
\item[135] The Court of Appeals for the D.C. Circuit drew its analysis from the Franklin case, with no reference to the CEQ regulations.
\item[136] See supra notes 89-90.
\item[137] The foundation of Public Citizen's holding, the Franklin "direct effects" test, effectively eliminates any imposition of NEPA requirements on legislative proposals such as international trade agreements. Public Citizen IV, 5 F.3d 549, 554 (D.C. Cir. 1993) (Randolph, J., concurring).
\item[138] The Supreme Court held that the CEQ's regulations interpreting NEPA should be given substantial deference by the courts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
\item[139] Because the court treated Franklin as dispositive, it specifically chose not to address other arguments offered by the OTR and discussed by the district court, such as the separation of powers and standing issues. See supra note 80. Although the district court's own address of the separation of powers issue was brief, see supra text accompanying notes 44-46, and unnecessary to the decision in Public Citizen IV, see supra note 80, the issue of standing was arguably relevant to the Franklin direct effects test. See Public Citizen IV, 5 F.3d at 551-52. The majority in Public Citizen stated, "To determine whether an agency action is final, 'the core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" Id. at 551 (quoting Franklin v. Massachusetts, 112 S. Ct. 2767, 2773 (1992)). The plaintiffs claimed that the OTR had completed its decisionmaking process, and the OTR's exclusion of an EIS directly affected the plaintiffs as environmental organizations because it deprived them of the ability to lobby and educate Congress about NAFTA's impact on the environment. Id. at 552. The Public Citizen court simply responded that the inability of the plaintiffs to inform and lobby Congress due to the absence of an EIS did not "directly affect" the parties since no final agency action was identified. Id. The circularity of the court's arguments is obvious. See also supra text accompanying note 99 for discussion of "informational injury."
\item[140] A sigh of relief was echoed in Public Citizen's concurrence, as the majority's treatment
\end{footnotes}
Though specifically addressing international trade agreements, by issuing an opinion in disregard of the CEQ regulations, the Public Citizen court renders NEPA impotent in many other international arenas where it previously had been influential.\textsuperscript{141} Other government agencies have adhered to NEPA's EIS requirement in negotiating international treaties.\textsuperscript{142} Because the submission of a trade agreement proposal is not considered final agency action, agencies formerly adhering to NEPA may decide to emulate the court's disregard for the CEQ regulations when their treaty proposals are to be submitted to the President.

The environmentalists echoed this concern when they argued that the frequency of "intervening steps," such as the submission of the NAFTA proposal to the President, will render NEPA ineffective.\textsuperscript{143} In a conciliatory tone, the Public Citizen court limited Franklin's applicability to cases where the role of the President is essential.\textsuperscript{144} In attempting to place limitations on the application of Franklin, however, the Public Citizen decision may spawn a great deal of controversy over the enigmatic standard of whether the President's role is considered essential.\textsuperscript{145} The court stressed that the APA may still apply if the President's role in the agency process is nonessential.\textsuperscript{146} The ambiguity and indecisiveness of this statement foreshadows more litigation since the court provided little criteria for deciding the nature of the President's role as essential.\textsuperscript{147}

Additional analysis of the case law decided prior to Public Citizen reveals attempts to allow a broader time period for judicial review of agency action in light of the time constraint issue raised in Trustees for Alaska.\textsuperscript{148} Public Citizen's presumption at the district court level that the President is not an agency, which is consistent with Franklin, provided relief from the fast track time constraints as a practical matter.\textsuperscript{149}

\begin{flushright}of Franklin as a dispositive case saved judicial effort in reconciling inconsistencies arising from prior case law. For example, see supra notes 86-88 and accompanying text.\end{flushright}
\begin{itemize}
\item \textsuperscript{141} See supra note 3.
\item \textsuperscript{142} Public Citizen III, 822 F. Supp. 21, 30 (D.D.C. 1993).
\item \textsuperscript{143} See Public Citizen IV, 5 F.3d at 552.
\item \textsuperscript{144} For discussion of the limited applicability of Franklin, see supra notes 77-79 and accompanying text.
\item \textsuperscript{145} See Public Citizen IV, 5 F.3d at 552.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} See id.
\item \textsuperscript{148} See, e.g., Trustees of Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986). For discussion of time constraint issue, see supra text accompanying notes 122-25. Although Trustees of Alaska is a Ninth Circuit decision, and thus not controlling, it raises valid policy issues and was quoted by the district court. See Public Citizen III, 822 F. Supp. 21, 27 (D.D.C. 1993).
\item \textsuperscript{149} See Public Citizen III, 822 F. Supp. at 26. Because the President is not an agency, his submission of a trade agreement or other legislative proposal to Congress is not final agency action; therefore, if there is any final agency action found, it would be the submission of the proposal to the President. Then, the period of judicial review would be extended throughout the sojourn of the proposal with the President. If the President himself was found to be an agency, there would be no time in which a court may review a legislative proposal because
\end{itemize}
No statutory language bars the President from being considered as an agency. Perhaps, then, the courts earlier adopted the position that the President is not an agency to provide an easy solution for widening the window of time available for review of legislative proposals. A potential legislative reaction to the court of appeals’ decision in Public Citizen, however, would be to accept the judicial invitation issued in Franklin to expressly codify the President’s status as an agency and effectively bar the courts from any review of international treaty proposals under which jurisdiction is conferred through the APA.

The Public Citizen case displayed the palpitating weakness of NEPA. Without a private cause of action under the NEPA, judicial review of EIS violations will be subject to the APA and its procedural requirements, limiting NEPA’s applicability to international treaties.

V. Conclusion

The majority in Public Citizen based its holding on the Franklin case, possibly to the neglect of other sound interpretations of statutory and case law employed by the district court. However, the court betrayed its unease with its holding both in the majority and concurring opinions by acknowledging the sometimes harsh result from applying Franklin and mentioning alternative routes that may be pursued in order to protect the environment. The unease expressed by the court, as well as the commitment of the environmental organizations to seek certiorari, demonstrate that some of the activist spirit of the 1960s that gave birth to NEPA has survived into the

the President’s submission to the legislature would be a final agency action, transferring the proposal from judicial to legislative review immediately.

Franklin v. Massachusetts, 112 S. Ct. 2767, 2774 (1992). One draws the logic from Kleppe that a specific point in time marks reviewable agency action. If the President were considered an agency, his submission to Congress might plausibly be considered a final agency action, and the opportunity for judicial review before legislative implementation would be severely limited as explained in note 149, supra.

Franklin, 112 S. Ct. at 2775.

Indeed, the Public Citizen court’s failure to consider CEQ regulations in light of Franklin’s interpretation of the APA demonstrates that NEPA was never consulted as an authority by the court at all. However, even if the legislature amends NEPA to include a cause of action, the OTR still has a strong basket of alternative arguments to explore. See supra note 80.

See, e.g., supra note 33 and accompanying text.

Public Citizen IV, 5 F.3d 549, 552 (D.C. Cir. 1993).

The majority seemed almost consoling in its tone when expressing a “fear not—Franklin does have its limits” rationale. Id. The majority further took pains to point out that the President has made his submission of NAFTA to Congress expressly contingent on collateral agreements regarding, among other things, environmental laws. Id. at 550. The concurring opinion adopts the same conciliatory style when mentioning that congressional initiative is one option which may bar legislative proposals with adverse effects of the environment—through either hearings on NAFTA’s environmental effects or congressional refusal to consider legislative proposals. Id. at 554 (Randolph, J., concurring).

See supra note 4.
1990s as another generation pursues the goal of giving NEPA some teeth.

If nothing else, the debate over environmental concerns regarding NAFTA and other international trade agreements will continue to rage. Environmental organizations, realizing that their legislative weapon is ineffective, will pressure Congress to provide them with ammunition in the form of an amendment to NEPA.

WENDY LEIGH LOVE