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Abstract

This Comment argues that the D.C. Circuit in Public Citizen II erred in finding that there was no "final agency action". Part I of this Comment explores the statutory requirements of NEPA and the APA as well as the law of the various justiciability doctrines. Part I also examines the impact of NAFTA and the Uruguay Round of GATT on the litigation. Part II details the historical background, procedural posture, facts and findings in the Public Citizen cases. Part III argues that the D.C. Circuit interpreted final agency action in Public Citizen II too narrowly. Finally, this Comment concludes that the issues raised in Public Citizen II are justiciable and that any exemption from NEPA's EIS requirement favoring the OTR should be expressed by Congress.

THE INJUSTICE OF ENVIRONMENTAL JUSTICIABILITY: *PUBLIC CITIZEN v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE*

INTRODUCTION

Federal courts in the United States, at one time receptive to environmental litigants in pursuit of policy change,[1] increasingly seek to limit such access to the courthouse.[2] The National Environmental Policy Act of 1969 ("NEPA"),[3] and its requirement that all U.S. federal agencies prepare an environmental impact statement ("EIS") prior to major decisions affecting the environment,[4] provides the statutory basis for much environmental litigation. However, because the U.S. Congress did not grant a private right of action under NEPA, environmentalists must rely on the Administrative Procedure Act (the "APA")[5] to provide for a right to judicial review.[6] By strictly construing the language of the APA, which calls for "final agency action" prior to judicial review, U.S. federal courts have limited the claims of environmentalists.[7]

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1. *See* Bill J. Hays, *Standing and Environmental Law: Judicial Policy and the Impact of Lujan v. National Wildlife Federation*, 39 KAN. L. REV. 997, 998 (1991). The author notes that " 'the judiciary's long love affair with environmental litigation' may be ending." *Id.* (quoting Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 884 (1983)). *See generally*, Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-5 (1982) (describing "public law litigation" as court effectuated governmental policy change through adjudication of individual rights).

2. Hays, *supra* note 1, at 998.

3. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70(a) (1988 & Supp. IV 1992). The NEPA established a policy to promote a lasting harmony between man and the environment. *Id.*

4. 42 U.S.C. § 4332(2)(C).

5. The Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1988 & Supp. IV 1992). The APA governs agency procedure and provides the mechanism for judicial review of agency action adversely affecting individuals. *Id.*

6. 5 U.S.C. §§ 702, 704. The APA allows an individual aggrieved by final agency action to seek redress in the federal courts. *Id.*

7. *See, e.g.*, Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (holding plaintiff failed to identify specific "final agency action" in Bureau of Land Management's "land withdrawal review program"). The Supreme Court declined jurisdiction in *Lujan* stating:

> [F]laws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.

In addition to their strict construction of "final agency action", the U.S. federal courts have invoked the separation of powers concept as a bar to environmental litigation, declaring the claims nonjusticiable.[8] Standing,[9] ripeness,[10] political question[11] and mootness[12] doctrines each provide the court with a means to dismiss environmental claims. With respect to environmental litigation, the federal courts narrowly construe their Article III jurisdiction under the U.S. Constitution.[13]

Recently, environmentalists encountered these obstacles in their action against the Office of the U.S. Trade Representative (the "OTR")[14] to compel preparation of an EIS in connection with the negotiation and drafting of the North American Free Trade Agreement ("NAFTA")[15] and the Uruguay Round of the

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Id. at 893; *see also* Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993) (rejecting environmentalists' claim due to failure to identify final agency action).

8. *See, e.g.*, Lujan v. Defenders of Wildlife, __ U.S. __, 112 S. Ct. 2130 (1992) (dismissing environmentalist's complaint for lack of standing).

9. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). Standing serves to ensure that a litigant has a sufficient stake in a controversy and is the proper party to obtain judicial relief. *Id.*

10. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). Ripeness requires that an actual, present controversy exist so as to prevent premature adjudication of an abstract disagreement. *Id.* Ripeness is closely related to the concepts of finality and exhaustion of remedies. *Id.* For purposes of this Comment, ripeness is considered only in terms of its statutory equivalent under the APA which requires final agency action prior to judicial review. 5 U.S.C. § 704.

11. *See* Baker v. Carr, 369 U.S. 186 (1962). A political question involves an issue committed to the executive or legislative branch of government, and therefore, the courts will refrain from making a judicial determination on the matter rather than encroach upon the powers of a coordinate branch. *Id.* at 208-10.

12. *See* Murphy v. Hunt, 455 U.S. 478 (1982). A moot case is one in which the controversy between the parties ceases to exist or is no longer "live" and judicial determination would have no practical effect. *Id.*

13. U.S. CONST. art. III, § 2.

14. The Trade Act of 1974, 19 U.S.C. § 2171(a) (1988). The OTR is an agency located within the Executive Office of the President. *Id.* The OTR serves as the United States' chief negotiator on trade matters reporting directly to the President and Congress and is responsible for the administration of trade agreements. *Id.* § (c)(1)(B). The OTR develops and coordinates United States trade policy, *id.*, and levies trade sanctions on other countries where necessary. *Id.* §§ 2411-17. The OTR also has other responsibilities aside from assisting and advising the President. *Id.* § 2171. The current issue stems from the OTR's involvement in negotiating and drafting the North American Free Trade Agreement ("NAFTA"). Public Citizen v. Office of the United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993).

15. North American Free Trade Agreement, Dec. 17, 1992, *reprinted in* 32 I.L.M. 296 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. *See Description of the Proposed North American Free Trade Agreement; Prepared by the Governments of Canada, the United Mexi-*

General Agreement on Tariffs and Trade ("GATT").[16] Many environmentalists in the United States feared that NAFTA and the Uruguay Round of GATT would have a detrimental effect on the U.S. environment.[17] With the incorporation of a supplemental agreement on the environment,[18] most U.S. environmentalists' fears regarding NAFTA were allayed.[19] However, some environmentalists in the United States remained concerned and acted to ensure that all decisions on NAFTA took into account the environmental impact of the agreement.[20]

In *Public Citizen v. Office of the United States Trade Representative* ("*Public Citizen I*"),[21] U.S. environmentalists brought suit against the OTR to compel production of an EIS on NAFTA and

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can States and the United States of America, Aug. 12, 1992, *available in* WESTLAW, NAFTA Database, PR Trade File [hereinafter *Description of NAFTA*]. NAFTA is a comprehensive plan to eliminate tariffs on trade among the member nations — the United States, Canada and Mexico. NAFTA, *supra*, art. 101, 32 I.L.M. at 297.

16. *Ministerial Declaration of Punta Del Este*, GATT DOC. MIN. DEC. No. 86-1572, Sept. 20, 1986 [hereinafter Uruguay Round].

17. *Response of the Administration to Issues Raised in Connection with the Negotiation of a North American Free Trade Agreement*, May 1, 1991, *available in* WESTLAW, NAFTA Database, PR Trade File [hereinafter *Response of the Administration*]. Some of the environmentalists' fears included: (1) Mexico's poor environmental track record of low or unenforced environmental quality standards; (2) the flight of United States companies to Mexico to avoid strict United States standards on environmental quality; and (3) the diminished vitality of existing United States environmental quality standards due to NAFTA itself. *Id.*; *see generally* Public Citizen v. Office of the United States Trade Representative, 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992) (discussing resulting litigation).

18. North American Agreement on Environmental Cooperation, *reprinted in* 32 I.L.M. 1482 [hereinafter Environmental Side Agreement]; *see NAFTA Supplemental Agreement: North American Agreement on Environmental Cooperation Between The Government of the United States of America, The Government of Canada and The Government of the United Mexican States*, Sept. 13, 1993 (Final Draft), *available in* LEXIS, Nexis Library, NAFTA File (detailing mechanism for environmental enforcement and expressing spirit of cooperation).

19. Keith Schneider, *Environmental Groups are Split on Support for Free Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1. Environmental groups supporting NAFTA include the Environmental Defense Fund, the Natural Resources Defense Council, the Conservation Institute, the Audubon Society, the World Wildlife Fund and the National Wildlife Federation. *Id.*; *Hearing of the Senate Environment and Public Works Committee: NAFTA and the Environment*, FED. NEWS SVC., Mar. 15, 1993, *available in*, LEXIS, Nexis Library ("NAFTA is the greenest trade agreement in history.").

20. *See* Schneider *supra* note 19 and accompanying text (discussing split on environmental support for NAFTA).

21. 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992) "*Public Citizen I.*"

the Uruguay Round of GATT.[22] The U.S. District Court for the District of Columbia held that plaintiff environmentalists lacked standing and dismissed the complaint.[23] The U.S. Court of Appeals for the District of Columbia affirmed the district court decision.[24] The D.C. Circuit held that since NAFTA and the Uruguay Round of GATT were then in the negotiation and drafting stage, the OTR's action was not final and thus, not reviewable.[25]

When the OTR submitted the final draft of NAFTA to the President, Public Citizen reinstated the lawsuit.[26] In *Public Citizen v. Office of the United States Trade Representative* ("*Public Citizen II*"),[27] the U.S. District Court for the District of Columbia found that Public Citizen had satisfied both the APA and justiciability requirements for jurisdiction.[28] On the merits, the district court ordered the OTR to produce an EIS.[29] On appeal, however, the D.C. Circuit again held that plaintiffs had failed to identify final agency action.[30]

This Comment argues that the D.C. Circuit in *Public Citizen II* erred in finding that there was no "final agency action". Part I of this Comment explores the statutory requirements of NEPA and the APA as well as the law of the various justiciability doctrines. Part I also examines the impact of NAFTA and the Uruguay Round of GATT on the litigation. Part II details the historical background, procedural posture, facts and findings in the *Public Citizen* cases. Part III argues that the D.C. Circuit interpreted final agency action in *Public Citizen II* too narrowly. Finally, this Comment concludes that the issues raised in *Public Citizen II* are justiciable and that any exemption from NEPA's

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22. *Id.* Plaintiff environmentalists include Public Citizen, the Sierra Club, and Friends of the Earth (collectively "Public Citizen"). *Public Citizen I*, 782 F. Supp. at 141.

23. *Id.* at 144. The district court also noted a finality problem in the environmentalists' claim. *Id.* at 142 n.2.

24. *Public Citizen I*, 970 F.2d at 917. The D.C. Circuit, without reaching the standing issue, held that the claim was not judicially reviewable in the absence of final agency action. *Id.*

25. *Id.* at 919.

26. Public Citizen v. Office of the United States Trade Representative, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

27. 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994) "*Public Citizen II*".

28. *Public Citizen II*, 822 F. Supp. at 30.

29. *Id.*

30. *Public Citizen II*, 5 F.3d at 550.

EIS requirement favoring the OTR should be expressed by Congress.

I. *STATUTORY AND JUDICIAL OBSTACLES ENCOUNTERED IN THE* PUBLIC CITIZEN *LITIGATION AND THE LINK BETWEEN TRADE AND THE ENVIRONMENT*

Although U.S. federal law requires agencies engaging in major activity with a significant effect on the environment to prepare an EIS,[31] a private litigant that asks a court to compel preparation of an EIS by a federal agency must overcome both statutory[32] and judicial[33] obstacles. The APA prevents private litigants from challenging any agency action that is not final.[34] In addition, the doctrines of justiciability require plaintiffs to show that an issue is properly before a U.S. federal court.[35] Recently, the U.S. federal courts addressed these jurisdictional matters in the context of litigation linking trade and the environment.[36]

A. *Statutes Implicated in the* Public Citizen *Litigation*

While NEPA provides a basis for environmental litigation in the United States,[37] the statute's use is limited by the absence of a private right of action.[38] A private environmental group challenging a proposal for legislation or major federal action must, therefore, be adversely affected by final agency action under the APA in order to pursue a cause of action.[39] In the absence of

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31. 42 U.S.C. § 4332(2)(C).

32. 5 U.S.C. §§ 701-06.

33. *See supra* notes 9-12 and accompanying text (discussing justiciability doctrines and cases applying).

34. 5 U.S.C. § 704. What constitutes finality for purposes of the APA has been the focus of recent litigation in the U.S. federal courts. *See, e.g.*, Franklin v. Massachusetts, __ U.S. __, 112 S. Ct. 2767 (1992) (interpreting "final agency action"); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (analyzing "final agency action"); *Public Citizen II*, 5 F.3d 549 (D.C. Cir. 1993) (applying *Franklin* standard).

35. *See* Lujan v. Defenders of Wildlife, __ U.S. __, 112 S. Ct. 2130 (1992) (analyzing plaintiff environmentalists' standing). *See supra* notes 9-12 and accompanying text (discussing justiciability doctrines and cases applying).

36. *Public Citizen I*, 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992); *Public Citizen II*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

37. 42 U.S.C. § 4332(2)(C).

38. *See Lujan v. National Wildlife Federation*, 497 U.S. at 882; *Public Citizen II*, 5 F.3d at 551 (discussing absence of private right of action under NEPA).

39. 5 U.S.C. §§ 701-06.

APA "finality", the U.S. federal courts are without jurisdiction.[40]

1. The National Environmental Policy Act

In 1969, the U.S. Congress passed a comprehensive set of environmental laws known as the National Environmental Policy Act ("NEPA").[41] The purpose of the enactment of NEPA was: (1) to encourage harmony between man and the environment; (2) to prevent or eliminate environmental damage and stimulate human health and welfare; (3) to improve the nation's understanding of ecological systems and natural resources; and (4) to create a Council on Environmental Quality.[42] As one commentator noted, NEPA marked a new era in environmental protection.[43]

To achieve NEPA's goals, the U.S. Congress declared that it was the federal government's continuing policy "to use all practicable means" to establish conditions that would foster harmony between man and nature for the benefit of present and future Americans.[44] Congress indicated that the laws of the United States were to be interpreted and administered according to the policies set out in the Act.[45] Congress also directed all agencies of the U.S. federal government to reform their decision making process and to include, with legislative proposals or other major federal action significantly affecting the quality of the environment, a detailed EIS.[46] Thus, NEPA allowed judicial review of

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40. *Id.*

41. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70(a) (1988 & Supp. IV).

42. 42 U.S.C. § 4321. NEPA was designed

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality.

Id.

43. Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 979 (1993). In criticizing some courts for refusing to consider evidence not previously submitted to an agency in NEPA actions, the author noted that "[b]eginning with the enactment of NEPA, Congress . . . began a new era of environmental regulation." *Id.*

44. 42 U.S.C. § 4331(a).

45. 42 U.S.C. § 4332(1).

46. 42 U.S.C. § 4332(2)(C). The Congress authorizes and directs that

> all agencies of the Federal Government shall . . . . [i]nclude in every recom-

U.S. agency action affecting the environment at least to the extent of ensuring that the Act's procedural requirements were met in the agency's decision making process.[47]

Because preparation of an EIS was a lengthy process, many U.S. agencies sought to avoid the delay in the decision making process by attacking the language of NEPA.[48] For instance, defendant agencies questioned the meaning of "significantly" affecting the environment[49] and "major" federal action.[50] Additionally, the timing of EIS preparation was a point of contention in litigation.[51] NEPA contemplates early preparation of an EIS to aid in the agency's decision making process[52] rather than serv-

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mendation 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 official on—

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between the local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

47. *See* Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971) (Judge Skelly Wright interpreting NEPA).

48. Keith Bradsher, *Court Ruling Lets Trade Agreement Move to Congress*, N.Y. TIMES, Sept. 25, 1993, § 1, at 1 (indicating preparation of environmental impact statement may be "yearlong" process).

49. *See, e.g.*, Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (describing secondary effects as falling within meaning of significantly); Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983) (discussing Forest Service's finding of no significant impact on oil and gas leases for National Forests); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (discussing significantly in urban context as having cumulative effect). A Finding of No Significant Impact (FONSI) relieves the agency of its EIS obligation. *See* 40 C.F.R. § 1500.3 (discussing NEPA procedure).

50. *See, e.g.*, Sylvester v. United States Army Corps of Engineers, 884 F.2d 394 (9th Cir. 1989) (deferring to Corps interpretation as to whether issuance of wetland water permit constitutes private action or federal action); Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039 (4th Cir. 1986) (declaring federally funded non-federal highway project to be federal action); *see also* 40 C.F.R. § 1508.18(b) ("actions" include rules, regulations, legislative proposals, treaties, etc.).

51. *See* Kleppe v. Sierra Club, 427 U.S. 390 (1976). "[T]he moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.' " *Id.* at 406 (quoting Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320 (1975)).

52. *Kleppe*, 427 U.S. at 406 n.15.

ing as a post hoc rationalization for choices already made.[53] The U.S. Supreme Court, however, has made it clear that a court is without authority to intervene and determine the point at which a potential proposal becomes a proposal requiring an EIS.[54] Otherwise, that court would be involved in the agency's day-to-day decision making process.[55]

In spite of its purely procedural requirements,[56] NEPA nonetheless provides environmental litigants with a powerful tool for influencing U.S. federal policy.[57] If those procedural re-

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53. *Id.* at 416 (dissenting opinion of Justice Marshall citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971)).

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

55. *Id.* The Court indicated that "[s]uch an assertion of judicial authority would . . . invite judicial involvement in the day-to-day decisionmaking process of the agencies." *Id.* However, the Court cautioned that

> [t]his is not to say that § 102(2)(C) imposes no duties upon an agency prior to its making a report or recommendation on a proposal for action . . . . [T]he section contemplates a consideration of environmental factors by agencies during the evolution of a report or recommendation on a proposal. But the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption.

Kleppe, 427 U.S. at 406 n.15.

56. *See supra* note 46 and accompanying text (discussing NEPA's requirements); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). The Court stated:

> NEPA itself does not mandate particular results, but simply prescribes the necessary process . . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs . . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action.

Robertson, 490 U.S. at 350 (citing Strycker's Bay Neighborhood Council, Inc. v. Karlan, 444 U.S. 223, 227-28 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 558 (1978)); *see also* Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1985). The court declared:

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.

Marsh, 872 F.2d at 500.

57. *See, e.g.*, Sierra Club v. Marsh, 769 F.2d 688 (1st Cir. 1985) (where environmentalists' in their action to stop highway project lacking an EIS).

quirements are not met, a qualified litigant may bring an action to enjoin implementation of an agency plan.[58] Not only does such an action delay any harmful environmental effects of a federal plan, it also subjects the plan to public scrutiny.[59]

2. The Administrative Procedure Act

NEPA requires U.S. federal agencies to include an EIS with each report or recommendation on proposed law and other major federal actions significantly affecting the environment.[60] Yet, in drafting NEPA, the U.S. Congress did not provide a private right of action.[61] Therefore, members of a private environmental citizens' group must look to the provisions of the Administrative Procedure Act (the "APA")[62] when seeking judicial review of agency action.[63]

Section 701 of the APA permits judicial review of action by a U.S. governmental authority except where a statute prohibits review or where the action is committed to agency discretion by law.[64] In the absence of such an exception, the APA provides any person, adversely affected by agency action, with the right to seek judicial review of that action.[65] "Agency action" may be in the form of a rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act on the part of the agency.[66] The APA limits judicial review, however, to agency ac-

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58. *Id.*

59. *See* 40 C.F.R. § 1506.10(c) (discussing public comment and review period required for draft EIS).

60. 42 U.S.C. 4332(2)(C). An EIS is to be included "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." *Id; see supra* notes 41-59 and accompanying text (discussing NEPA); *see also* Lujan v. National Wildlife Federation, 497 U.S. 871, 879 (1990)(discussing the requirements of NEPA).

61. *See Lujan v. National Wildlife Federation*, 497 U.S. at 882; *Public Citizen II*, 5 F.3d at 551 (discussing absence of private right of action under NEPA).

62. The Administrative Procedure Act, 5 U.S.C. § 701-706 (1988 & Supp. IV 1992).

63. *Lujan v. National Wildlife Federation*, 497 U.S. at 882-83.

64. 5 U.S.C. § 701. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (discussing judicial review under APA).

65. 5 U.S.C. § 702. "A person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

66. 5 U.S.C. § 551(13). Agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id; see* 5 U.S.C. § 701(b)(2).

tion that is "final."[67] Identifying and defining "final agency action" causes much confusion in the federal courts and remains the subject of considerable debate in recent cases.[68]

In *Lujan v. National Wildlife Federation*,[69] the U.S. Supreme Court analyzed the meaning of "final agency action" in the context of a challenge to the Bureau of Land Management's[70] "land withdrawal review program."[71] The National Wildlife Federation's[72] complaint, in *Lujan*, alleged that reclassification of certain lands by the Bureau of Land Management would open those lands to mining activities and destroy their natural beauty.[73] The Supreme Court held that the National Wildlife Federation failed to identify a single Bureau of Land Management order but instead focused on the agency's on-going operations.[74] The Court concluded that such operations could not be construed as agency action, much less a final agency action.[75] The Court explained that it was improper for the National Wildlife Federation to seek programmatic change through the court system, rather than through the legislative process, and declined to apply the APA.[76] To grant jurisdiction, the Court required a

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67. 5 U.S.C. § 704. Judicial review of agency action is limited to "final agency action for which there is no other adequate remedy in a court." *Id.*

68. *See, e.g.*, Franklin v. Massachusetts, __ U.S. __, 112 S. Ct. 2767 (1992) (interpreting "final agency action"); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (analyzing "final agency action"); *Public Citizen II*, 5 F.3d 549 (D.C. Cir. 1993) (applying *Franklin* standard).

69. 497 U.S. 871 (1990).

70. *See* 35 U.S.C. § 1731 *et seq.* The Bureau is located within the Department of the Interior and manages federal lands and their resources. *Id.*

71. *Lujan v. National Wildlife Federation*, 497 U.S. at 875.

72. *Id.* The National Wildlife Federation is the plaintiff environmental organization in *Lujan v. National Wildlife Federation.*

73. *Lujan v. National Wildlife Federation*, 497 U.S. at 886. The land at issue involved pristine federal lands "in the vicinity" of the Grand Canyon National Park, the Kaibab National Forest, the Kanab Plateau and the South Pass-Green Mountain, Wyoming — each known for its recreational use and aesthetic enjoyment and now threatened by mining claims and oil and gas leasing. *Id.*

74. *Id.* at 890. The NWF did not "refer to a single BLM order or regulation . . . . [but instead] referred to the continuing . . . operations of the BLM . . . . [which were] no more an identifiable 'agency action' — much less a 'final agency action.' " *Id.*

75. *Id.*

76. *Id.* at 891-93. The Court stated that:

> "respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made . . . . [and] that the flaws in the entire 'program' . . . cannot be laid before the courts for wholesale correction under the APA."

specific, final agency action that actually had or immediately threatened an adverse effect on the litigant prior to judicial intervention under the APA.[77]

The U.S. Supreme Court further refined its definition of "final agency action" in *Franklin v. Massachusetts*.[78] In *Franklin*, the state of Massachusetts challenged the U.S. Secretary of Commerce's decision to allocate overseas federal employees — in particular military personnel — to their "home of record"[79] in calculating the 1990 census and reapportionment.[80] As a result of the Secretary's method of allocating overseas federal employees, Massachusetts lost a seat in the U.S. House of Representatives.[81] Addressing the APA claim, the Court in *Franklin* reasoned that the central issue was whether the agency's decision making process was complete and if so, whether the result of that process would have a direct effect on the litigants.[82] The Court held that there was no final agency action reviewable under the APA since the final action complained of was that of the President of the United States, who was deemed not to be an agency for purposes of the statute.[83]

In *Franklin*, the Court noted that while the Secretary of Commerce is responsible for the tabulation of the census report, the President submits the document to Congress.[84] The Court declared that the action directly affecting reapportionment was the President's statement to Congress, not the Secretary's report

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Id.

77. *Id.* at 894.

78. ___ U.S. ___, 112 S. Ct. 2767 (1992).

79. *Id.* at 2771. " 'Home of record' is the State declared by the person upon entry into military service, and determines where he or she will be moved after military service is complete . . . . Legal residence was thought less accurate because the choice of legal residence may have been affected by state taxation." *Id.* at 2771-72.

80. *Id.* at 2770.

81. *Id.*

82. *Id.* at 2773. The Court stated that "[t]he 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.*

83. *Franklin*, 112 S. Ct. at 2773. The Court held that "the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards." *Id.* This part of the opinion represents a five-to-four majority of the Court. In a concurring opinion, Justice Stevens, joined by Justices Blackmun, Kennedy and Souter, found the President's actions ministerial and thus, "final agency action" was present for purposes of judicial review under the APA. *Id.* at 2779-83.

84. *Id.* at 2771.

to the President.[85] Thus, since the President of the United States had the discretion to amend the report, the Court viewed it as a "moving target" and equated the agency's action to that of a "subordinate official" ruling — "tentative," not final, and therefore, not subject to judicial review under the APA.[86]

In sum, "final agency action" under the APA requires a specific, final act[87] in the decision making process and a "direct effect" on the litigant by that act.[88] Moreover, the U.S. Supreme Court has held that the President of the United States is not an agency within the meaning of the APA, and thus, U.S. courts may not impute the acts of the President to an agency for purposes of finality.[89] A private litigant who fails to meet the requirements of the APA, therefore, is without a remedy due to the court's lack of jurisdiction.[90]

B. *Justiciability Doctrines Implicated in the* Public Citizen *Litigation*

Once APA jurisdiction is established, a litigant must also overcome the additional barrier to adjudication posed by the justiciability doctrines born of the "case" and "controversy" requirement of the U.S. Constitution.[91] Of the justiciability doctrines, the doctrine of standing is perhaps the most considerable impediment to environmental litigation.[92] The history of the U.S. Supreme Court's pronouncements on standing have been described as inconsistent.[93] For this reason, the standing doctrine

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85. *Id.* at 2773.

86. *Id.* at 2773-74. The Court proclaimed:

> An agency action is not final if it is only "the ruling of a subordinate official," or "tentative" . . . . For potential litigants, therefore, the "decennial census" still presents a moving target, even after the Secretary reports to the President . . . . It is not until the President submits the information to Congress that the target stops moving . . . . [T]he Secretary's report . . . is, like "the ruling of a subordinate official," . . . not final and therefore not subject to review.

Id. (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967)).

87. *Lujan v. National Wildlife Federation*, 497 U.S. at 894.

88. *Franklin*, 112 S. Ct. at 2773.

89. *See id.* at 2775 (interpreting APA's silence as to exclusion of President under APA definition of "agency" as insufficient to subject President to statute's provisions).

90. *See, e.g., Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (dismissing environmentalists' complaint for lack of final agency action).

91. U.S. CONST. art. III, § 2.

92. *See* Hays, *supra* note 1 (discussing history of environmental standing and future implications of decision in *Lujan*).

93. *Id.*

has generated considerable literature.[94]

1. Standing Doctrine

The concept of standing stems from the "case" or "controversy" jurisdictional requirements of the U.S. Constitution.[95] Article III of the U.S. Constitution confines the adjudicatory power of the federal courts to actual "cases" or "controversies."[96] The doctrine of standing defines the notion of separation of powers with respect to the judicial branch and protects the federal courts from addressing questions properly left to the executive and legislative branches of the U.S. government.[97]

Standing invokes both constitutional and prudential concerns in the U.S. federal courts.[98] The constitutional component of the standing doctrine serves to ensure that the plaintiff has a "direct stake" in the outcome of a case,[99] thereby preserving the requisite adversarial context to sharpen the issues before the court.[100] The constitutional minimum of standing requires a plaintiff to allege: (1) a legally cognizable injury; (2) caused by the defendant's conduct; and (3) capable of judicial redressability.[101]

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94. *See id.* (discussing history of environmental standing and future implications of *Lujan v. National Wildlife Federation* decision); Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," And Article III.* 91 MICH. L. REV. 163 (1992) (criticizing opinion in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) and advocating "bounty" as remedy); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's 'Hypothetical' Barriers*, 68 N.D. L. REV. 1 (1992) (discussing the Supreme Court's treatment of standing); Jonathan Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991) (criticizing *Lujan v. National Wildlife Federation* decision).

95. U.S. CONST. art. III, § 2.

96. Allen v. Wright, 468 U.S. 737, 750 (1984).

97. *See id.* The Court indicated:

> [T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper — and properly limited — role of the courts in a democratic society."

Id. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

98. *Id.* at 750-51.

99. Sierra Club v. Morton, 405 U.S. 727, 740 (1972).

100. Flast v. Cohen, 392 U.S. 83, 99 (1968).

101. Allen v. Wright, 468 U.S. 737, 751 (1984). "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.*; *see* Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992).

The second component of the standing doctrine, prudential considerations, is primarily a function of judicial self-governance.[102] Notwithstanding a plaintiff's having met the constitutional requirements, standing may be denied based on prudential concerns of the U.S. courts.[103] That is, a litigant may not: (1) raise the legal rights of another; (2) complain of a generalized grievance — common to all and better left to the coordinate branches of government; or (3) assert a claim not within the "zone of interests" protected by the law invoked.[104] This prudential aspect of the standing doctrine has raised the debate as to whether a congressional grant of "citizen suit" standing is constitutional.[105] Moreover, prudential principles have led to the application of the "zone of interests" test[106] in cases where judi-

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> First, the plaintiff must have suffered an "injury in fact" —an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Allen v. Wright 468 U.S. 737, 756 (1984); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16 (1972)).

102. *Lujan*, 112 S. Ct. at 2136.

103. Allen v. Wright, 468 U.S. 737, 751 (1984). The Court noted:

> Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id.

104. *Id.* However, with respect to representing the legal rights of another, an organization may assert a right of one of its members. Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (citing NAACP v. Button, 371 U.S. 415, 428 (1963)). "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Id.* To do so, the organization must meet certain criteria. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). The test requires that: (1) an individual member of the group have standing; (2) the interest involved is germane to the group; and (3) the claim does not require the individual's participation. *Id.*

105. *See* Sunstein, *supra* note 94 (discussing denial of standing in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) and advocating "bounty" to circumvent problems raised by doctrine).

106. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). The "zone of interests" test requires a plaintiff to allege injury-in-fact that is within the zone of interest protected by the relevant statute. *Id.*

cial review is predicated on the APA[107] and serves as a further limit on the court's capacity to adjudicate the case.[108]

The complexity of the standing doctrine and its frequent application in the environmental forum has made it a considerable barrier to litigation and subsequent relief.[109] Without having met each of the above requirements, federal courts in the United States will not hear the claims of environmental litigants.[110] The U.S. Supreme Court has been strict in applying the doctrine.[111]

In *Lujan v. Defenders of Wildlife*,[112] environmentalists challenged the U.S. Secretary of the Interior's promulgation of a rule[113] that indicated that section 7 of the Endangered Species Act of 1973[114] was inapplicable extraterritorially.[115] The Defenders of Wildlife claimed that the absence of consultation on activities abroad, which were funded by the United States, increased the extinction rate of endangered and threatened species.[116] The U.S. government defended on the grounds that plaintiffs lacked standing.[117]

In considering whether the environmentalists were directly affected, the U.S. Supreme Court focused on two affidavits from members of the Defenders of Wildlife.[118] One expressed an intent to return to Egypt to observe the habitat of the "endangered [N]ile crocodile."[119] The other stated an intent to revisit Sri Lanka to view the habitat of "endangered species such as the Asian elephant and the leopard."[120] Both indicated that ongoing U.S. involvement in projects abroad in those countries hin-

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107. 5 U.S.C. § 702; *see supra* notes 60-90 and accompanying text (discussing APA).

108. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

109. *See, e.g.*, Lujan v. Defenders of Wildlife, __ U.S. __, 112 S. Ct. 2130 (1992) (dismissing plaintiff's complaint for lack of standing).

110. *Id.*

111. *Id.*

112. __ U.S. __, 112 S. Ct. 2130 (1992).

113. *See* 50 C.F.R. § 402.01 (1991) (reinterpreting § 7(a)(2) to require consultation only for action taken in United States or on high seas) *amending* 43 Fed. Reg. 874 (1978) (obligations imposed by § 7(a)(2) extend to actions taken in foreign nations).

114. 16 U.S.C. § 1536 (1988).

115. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2135.

116. *Id.* at 2137.

117. *Id.* at 2135.

118. *Id.* at 2138.

119. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2138.

120. *Id.*

dered their opportunity to observe the habitat of those endangered species in the future.[121] While recognizing that the claims involved a cognizable interest,[122] the Court seized upon the fact that neither had "current plans" to visit these places — only future intentions — and as a result, both failed to identify "imminent" injury.[123]

Furthermore, the Court identified two factors that raised problems of redressability and causation.[124] First, the environmentalists failed to join the U.S. agencies responsible for funding the projects in their action against the U.S. Secretary of the Interior who promulgated the rule.[125] Because it was uncertain that the U.S. Secretary of the Interior had authority to bind the U.S. agencies, the Court questioned whether the agencies, as non-parties, would honor the legal determination.[126] Second, the Defenders of Wildlife neglected to prove that elimination of the U.S. funding, a small fraction of the total, would result in suspension of the projects abroad or reduced harm to listed species.[127] The alleged harms stemmed from the activities of non-U.S. nations, not from the Secretary's ruling, thus suggesting a lack of causation.[128] The U.S. Supreme Court concluded that the environmentalists were without standing.[129]

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121. *Id.*

122. *Id.* at 2137. The Court has declared injury to aesthetics and environmental well-being cognizable. *Id.* (citing Sierra Club v. Morton, 405 U.S. 727 (1972)).

123. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2138. The Court proclaimed:

> [T]he affiants' profession of an 'inten[t]' to return to the places they had visited before — where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species — is simply not enough. Such 'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require.

Id. The Court also rejected injury theories based on "ecosystem nexus," "animal nexus" and "vocational nexus." *Id.* at 2139-40.

124. *Id.* at 2140-41.

125. *Id.*

126. *Id.*

127. *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2142.

128. *Id.*

129. *Id.* The Court also rejected standing based on the "citizen-suit" provision of the ESA, 16 U.S.C. § 1540(g), calling into question the constitutionality of a congressional grant of standing and equating such actions with "generalized grievances." *Id.* at 2142-43; *see* Sunstein, *supra* note 94 (criticizing *Lujan* decision and equating some aspects of justiciability with the notion of substantive due process).

2. Political Question Doctrine

In the landmark case *Marbury v. Madison*,[130] the U.S. Supreme Court laid the foundation of the political question doctrine.[131] In analyzing whether the Court had jurisdiction to decide a mandamus claim directing the U.S. Secretary of State to deliver to William Marbury his commission as a justice of the peace, Chief Justice John Marshall stated that under the U.S. Constitution, the President was charged with exercising certain discretionary political powers that are unassailable outside the political arena.[132] At the same time, however, Justice Marshall declared that it was the responsibility of the judiciary to interpret the Constitution.[133] The President of the United States had signed William Marbury's commission and affixed the seal of the United States, making the failure to deliver the commission a violation of a right for which the law provided a remedy.[134] However, because the legislative act providing the Court with original jurisdiction in mandamus actions was unconstitutional, the Court did not have jurisdiction to effectuate a remedy.[135]

The political question doctrine emanates from the concept

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130. 5 U.S. (1 Cranch) 137 (1803).

131. *Id.* at 170 ("Questions in their nature *political*, or which are, by the Constitution and laws, submitted to the executive, can never be made in this Court.") (emphasis added). The Court also defined the role of the judiciary as that of interpreter of the Constitution. *Id.* at 177. That role has been viewed both narrowly and expansively at different times throughout history. *Compare* Goldwater v. Carter, 444 U.S. 996 (1979) (identifying the President's power to terminate treaty as matter involving political question) *with* Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."). Often, the availability of judicial review may rest on how the issue is framed. Baker v. Carr, 369 U.S. 186, 211 (1962).

132. *Marbury*, 5 U.S. at 165-66. Justice Marshall declared:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience . . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

Id.

133. *Id.* at 177. "It is emphatically the province and duty of the judicial department to say what the law is." *Id.*

134. *Id.* at 167-68.

135. *Id.* at 180.

of separation of powers.[136] The doctrine recognizes a limit on judicial adjudication of matters that arise in cases involving: (1) a commitment of the issue to a coordinate branch of government by the text of the Constitution; (2) a lack of judicial standards for resolving the issue; (3) the necessity for a nonjudicial policy determination on the issue; (4) the impossibility of a judicial determination without showing disrespect to a coordinate branch of government; (5) the need for finality of a past political decision; and (6) the need for unanimity among the coordinate branches of government on certain matters.[137] Commentators have synthesized this statement of the political question doctrine into two components, including the lack of judicial standards for resolving the issue and the need for finality with respect to a past political decision.[138]

However, not every matter touching on politics involves a political question.[139] International affairs, for example, is an area traditionally left to the executive and legislative departments of the U.S. government.[140] Nonetheless, the U.S.

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136. Baker v. Carr, 369 U.S. 186, 210 (1962) (Brennan, J.) ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' "). *Id.*

137. *Id.* at 217. Justice Brennan noted:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Id.

138. *See, e.g.*, Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215 (1985) (arguing that political question doctrine assumes constitutionality, is adjudication on merits, not justiciability, and that such an assumption is warranted only where there is need for finality).

139. *Baker*, 369 U.S. at 211. *Compare* C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) (holding Presidential approval of agency decision regarding foreign air routes equivalent of final order and not subject to review in courts by virtue of political question doctrine) *with* Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring) (challenge by few Members of Congress to President's action terminating treaty thereby depriving them of their Constitutional role not "ripe" without official action by Congress).

140. *See* Atlee v. Laird, 347 F. Supp. 689, 696 (E.D. Pa. 1972), *aff'd on appeal*, 411

Supreme Court has stated that a case or controversy that merely "touches" international relations may be justiciable.[141]

In *Japan Whaling Association v. American Cetacean Society*,[142] the Court considered whether the U.S. Secretary of Commerce was required to certify that Japan's whaling practices "diminish the effectiveness" of the International Convention for the Regulation of Whaling (the "ICRW").[143] Japan's annual harvest exceeded established quotas.[144] While the ICRW set harvest limits,[145] the implementing organization, the International Whaling Commission (the "IWC"), was without power to impose sanctions for quota violations.[146] As a result, the U.S. Congress passed the Pelly Amendment to the Fisherman's Protective Act of 1967.[147] The Pelly Amendment directed the U.S. Secretary of Commerce to certify to the President of the United States if foreign fishing operations "diminish the effectiveness" of an international fishery conservation program.[148] Upon certification, the President had the discretionary power to impose sanctions.[149] When the President failed to impose sanctions on five separate occasions of such certification,[150] Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act.[151] The Packwood Amendment made sanctions mandatory upon certification.[152]

In 1981, the IWC set a zero quota for sperm whales and Ja-

U.S. 911 (1973)(quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political' — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Atlee*, 347 F. Supp. at 696.

141. Japan Whaling Assn. v. American Cetacean Soc., 478 U.S. 221, 229-30 (1986). It is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* (quoting Baker v. Carr, 369 U.S. 186, 211 (1969)).

142. 478 U.S. 221 (1986).

143. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948) [hereinafter ICRW]. The United States was a founding member; Japan joined in 1951. *Id.*

144. Japan Whaling Assn. v. American Cetacean Soc., 478 U.S. 221, 223 (1986).

145. ICRW, *supra* note 143, art. I, 62 Stat. at 1717.

146. ICRW, *supra* note 143, art. IX, 62 Stat. at 1720.

147. 22 U.S.C. § 1978 (1988).

148. 22 U.S.C. § 1978(a)(1).

149. 22 U.S.C. § 1978(a)(4).

150. Japan Whaling Assn. v. American Cetacean Soc., 478 U.S. 221, 225 (1986).

151. 16 U.S.C. § 1801-82 (1988).

152. 16 U.S.C. § 1821(e)(2)(B).

pan objected.[153] After extensive negotiations, the United States and Japan reached an executive agreement limiting, but not eliminating harvests until 1988.[154] That agreement, the U.S. Secretary of Commerce deemed, would not "diminish the effectiveness" of ICRW.[155] Environmentalists filed suit seeking a writ of mandamus compelling the U.S. Secretary of Commerce to certify Japan.[156]

Japan Whaling Association, intervenors, claimed the issue was not justiciable by invoking the political question doctrine.[157] The Court disagreed quoting the language of *Baker v. Carr* which stated that not every case involving international affairs is beyond judicial determination.[158] Justice Byron White added that the Court need only interpret the statute in this instance.[159] The Court went on to decide the case on the merits.[160]

3. Mootness Doctrine

Similar to the doctrines of standing and political question, the doctrine of mootness is rooted in the "case or controversy" clause of the U.S. Constitution.[161] While standing requires adversity between the parties at the outset of the litigation, mootness necessitates that the adversity be maintained throughout the course of the action.[162] If the controversy between the litigants terminates prior to the court's decision, the case will be

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153. *Japan Whaling*, 478 U.S. at 227.

154. *Id.* at 227-28.

155. *Id.*

156. *Id.* at 228.

157. *Id.* at 229.

158. *Japan Whaling*, 478 U.S. at 229-30. The Court recognized that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.' [U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

159. *Id.*

160. *Id.* at 231-41. The Court held that the U.S. Secretary of Commerce's construction of the statute, vesting in him the discretion to determine the meaning of "diminish the effectiveness," neither contradicted legislative history nor frustrated congressional intent. *Id.* at 240.

161. U.S. CONST. art. III, § 2.

162. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)(Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

dismissed.[163]

Confusion in the mootness doctrine arises more often in the context of the doctrine's exceptions. The first exception is voluntary cessation of illegal activity.[164] Because the defendant may again commence the illegal activity at some time in the future, the dispute before the court is not moot.[165] In addition, the public has an interest in the outcome of a case which challenges the legality of an activity.[166] Such a dispute is justiciable because the public is entitled to have the legality of an activity determined by the court for purposes of notice and predictability of the criminal law.[167]

The second exception to the mootness doctrine involves controversies "capable of repetition, yet evading review."[168] Where mootness results from the passage of time, but the same issue is likely to arise in the future, the court will nevertheless decide the matter for purposes of efficiency.[169] The exception requires a "demonstrated probability" or a "reasonable expectation" that the same issue will recur.[170]

Mootness is important with respect to NEPA actions because the point at which a court may intervene to declare an agency deficient in meeting the procedural mandate of NEPA is usually after the decision is made.[171] At times, the court may still fashion a remedy by enjoining implementation of the action at issue in a case.[172] At other times, such a remedy is not enough to undo the harm that NEPA seeks to avoid.[173]

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163. Murphy v. Hunt, 455 U.S. 478, 481-82 (1982).

164. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

165. *Id.* at 632.

166. *Id.*

167. *Id.*

168. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911).

169. *Id.*

170. *Murphy*, 455 U.S. at 482.

171. *See supra* notes 51-55 and accompanying text (discussing timing of NEPA).

172. *See* Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (granting injunctive relief against proposed development).

173. *Id.* The court stated:

> NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obliga-

C. *Treaties Implicated in the* Public Citizen *Litigation*

Recently, these statutory and judicial jurisdictional obstacles were pivotal in U.S. environmental litigants' attempt to link trade and environmental concerns.[174] By invoking these doctrines, the U.S. federal courts averted the difficult question of judicial intrusion into the executive domain.[175] The North American Free Trade Agreement ("NAFTA") and the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT") were the targets of the environmentalists' challenge.[176]

1. The North American Free Trade Agreement

On September 25, 1990, President George Bush of the United States notified Congress of his decision to pursue free trade negotiations with Mexico.[177] Canada joined in the negotiations on February 5, 1991.[178] Over the ensuing two years, the three nations worked towards establishing a free trade zone under the North American Free Trade Agreement ("NAFTA").[179]

NAFTA is a comprehensive plan to eliminate trade tariffs[180] on goods originating[181] in the United States, Canada and Mexico over a transition period.[182] The agreement covers virtually every aspect of trade among the three countries, including trade in the automotive sector, textiles, energy, petrochemicals, and agriculture.[183] NAFTA also covers trade aspects of investment and trade in services such as telecommunications and financial

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tions attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. *Id.*

174. *Public Citizen I*, 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992); *Public Citizen II*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

175. *Id.*

176. *Id.*

177. *Response of the Administration*, *supra* note 17.

178. *Id.*

179. NAFTA, *supra* note 15, art. 101, 32 I.L.M. at 297.

180. NAFTA, *supra* note 15, art. 102(a), 32 I.L.M. at 297.

181. NAFTA, *supra* note 15, arts. 401-15, 32 I.L.M. at 349.

182. *Description of NAFTA*, *supra* note 15, at 5.

183. NAFTA, *supra* note 15, table of contents, 32 I.L.M. at 296 (listing items covered under agreement).

services.[184]

NAFTA aspires to expand world trade by building on the framework of the General Agreement on Tariffs and Trade ("GATT"),[185] to enhance the competitiveness of the member nations, to promote economic growth, to create new employment opportunities, to improve working conditions and to undertake each of the preceding in a manner consistent with environmental protection and conservation.[186] To accomplish this, NAFTA establishes a free trade area.[187] The Agreement aims to eliminate trade barriers, promote fair competition, increase investment opportunities, provide protection of intellectual property rights, establish procedures for implementation, administration and dispute resolution, and establish a framework for further trilateral cooperation within the free trade area.[188] In furtherance of these objectives, the three governments affirm their rights and obligations under GATT.[189] In addition, the United States, Canada and Mexico agree that NAFTA prevails over other agreements in the event of an inconsistency.[190] Finally, NAFTA's obligations extend to the state and provincial governments of the three nations.[191]

While NAFTA was publicized as an historic opportunity,[192] U.S. environmentalists were not convinced of NAFTA's benefits.[193] Mexico's environmental statutes, although current,[194] historically were not enforced by the Mexican government, leading U.S. environmentalists to question Mexico's commitment to the

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184. *Id.*

185. The General Agreement on Tariffs and Trade, 61 Stat. A3, 55 U.N.T.S. 187, *opened for signature* Oct. 30, 1947 [hereinafter GATT].

186. NAFTA, *supra* note 15, pmbl., 32 I.L.M. at 297.

187. NAFTA, *supra* note 15, art. 101, 32 I.L.M. at 297.

188. NAFTA, *supra* note 15, art. 102, 32 I.L.M. at 297.

189. NAFTA, *supra* note 15, art. 103(1), 32 I.L.M. at 297.

190. NAFTA, *supra* note 15, art. 103(2), 32 I.L.M. at 297. The Agreement excepts certain enumerated agreements. NAFTA, *supra* note 15, art. 104, 32 I.L.M. at 297.

191. NAFTA, *supra* note 15, art. 105, 32 I.L.M. at 298. "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments." *Id.*

192. *Response of the Administration*, *supra* note 17.

193. *Id.*

194. The Council on International Affairs, *Report on the North American Free Trade Agreement*, 49 REC. ASS'N BAR CITY OF N.Y. 143, 223 (1994) [hereinafter *Report on NAFTA*].

environment.[195] Unless enforcement improved, environmentalists argued, the pollution problems common to the Maquiladoras on the U.S.-Mexico border were likely to be visited upon other areas of Mexico with the implementation of NAFTA.[196] Furthermore, such a "pollution haven", environmentalists suggested, would dilute existing U.S. environmental standards because U.S. firms would act to eliminate any competitive disadvantage as against Mexican firms.[197] Finally, the language of NAFTA itself established the means for dilution of U.S. environmental standards.[198] Chapter Seven, for example, discussing sanitary and phytosanitary measures,[199] established each Party's right to protect human, animal or plant life.[200] That right, however, is limited to measures based on scientific principles that do not arbitrarily or unjustifiably discriminate between the Parties' goods.[201] Thus, since NAFTA disallowed such discrimination, the possibility of an influx of Mexican imports below U.S. standards existed.[202] By virtue of Article 105, NAFTA threatened

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195. *Id.* The U.S. environmentalists labeled the Mexican commitment to the environment "suspect". *Response of the Administration, supra* note 17.

196. *Report on NAFTA, supra* note 194, at 223. The Maquiladoras are firms operating just south of the U.S.-Mexico border that, under current law, receive favorable trade treatment on goods shipped to the United States. *Id.* at 214. In exchange for this favorable treatment, the Maquiladoras are to adhere to Mexican environmental laws and, in the case of U.S. based firms, to ship their hazardous waste back to the United States — obligations ignored in most instances. *Id.* The Maquiladora program has resulted in significant pollution problems for the region. *Id.*

197. *Id.* at 223.

198. NAFTA, *supra* note 15, arts. 711-12, 32 I.L.M. at 377-78.

199. *Report on NAFTA, supra* note 194, at 217. Sanitary and phytosanitary measures "include measures to protect the public from additives, toxins or other contaminants in foods and beverages, as well as measures to protect the public from pests and diseases carried by various products." *Id.*

200. NAFTA, *supra* note 15, art. 711, 32 I.L.M. at 377.

201. NAFTA, *supra* note 15, art. 712, 32 I.L.M. at 377-78. The relevant language states:

> Each Party may . . . adopt . . . any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life [provided that the measure is] based on scientific principles . . . . does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party [and is not] a disguised restriction on trade . . . .

Id.

202. *Hearing of the House Ways and Means Committee: North American Free Trade Agreement (NAFTA) and Side Agreements*, FED. NEWS SVC., Sept. 14, 1993. "U.S. quality standards should be met by any Mexican produce entering the country." *Id.*

state environmental standards in the United States as well.[203]

The Bush Administration countered these concerns by announcing that NAFTA would do nothing to weaken U.S. environmental laws or diminish the right of the United States to protect the environment.[204] The Bush Administration also emphasized the Mexican authorities' recent improvement in enforcement of environmental laws.[205] Cooperation between the United States and Mexico, the Bush Administration argued, would serve to build the necessary resources for further improvement in Mexico's enforcement of environmental laws.[206] Finally, in order to adequately address the environmentalists' concerns, the United States, Canada and Mexico agreed to adopt a supplemental agreement on the environment in connection with NAFTA.[207]

On August 12, 1992, negotiations on NAFTA were concluded.[208] President Bush officially notified the U.S. Congress of his intention to sign NAFTA on September 18, 1992.[209] NAFTA was signed by U.S. President George Bush, Mexican President Carlos Salinas de Gortari and Canadian Prime Minister Brian Mulroney on December 17, 1992.[210] On January 1, 1994, upon the approval of the U.S. Congress and an exchange of written notice between the United States, Canada and Mexico, NAFTA

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203. *See supra* note 191 and accompanying text (discussing state observance of NAFTA provisions).

204. *Response of the Administration, supra* note 17.

205. *Id.*

206. *Environment: The North American Free Trade Agreement*, August 1992, WESTLAW, NAFTA Database, PR Trade File, 1992 WL 239305. On February 25, 1992, President Bush released the findings of a nine-month study of the environmental effects of NAFTA. *Id.* The study concluded that NAFTA would:

> —Enhance environmental protection by providing Mexico with additional resources to address current environmental problems; and
>
> —Ease environmental pressures on the border as free trade encourages economic development to occur further south.

Id.

207. Environmental Side Agreement, *supra* note 18. The supplemental agreement on the environment establishes the Commission for Environmental Cooperation, provides a mechanism for review of environmental disputes and outlines remedies including a limited suspension of NAFTA tariff benefits. *Id.*

208. The White House Office of the Press Secretary, *The North American Free Trade Agreement: Official Notification of Congress*, Sept. 18, 1992, *available in* WESTLAW, NAFTA Database, PR Trade File, 1992 WL 360153.

209. *Id.*

210. NAFTA, *supra* note 15, 32 I.L.M. at 703.

entered into force.[211]

2. The Uruguay Round of GATT

Since 1947, GATT has defined international trade.[212] GATT was the seminal multilateral trade treaty.[213] The goal of GATT is to liberalize trade among its members or "Contracting Parties" by eliminating protectionist measures.[214] To achieve these goals, GATT employs most-favored-nation treatment, national treatment, progressive tariff reductions and limitations, or restrictions on, the use of trade distorting measures such as quotas.[215]

At present, the number of GATT members exceeds one hundred.[216] GATT is essentially composed of some 200 treaties amending the original agreement.[217] GATT's transformation is the result of a series of trade rounds.[218] Presently, GATT is in the eighth round, also known as the Uruguay Round.[219]

The Uruguay Round has been described as the most comprehensive and ambitious round of negotiations in the history of GATT.[220] The issues addressed in the Uruguay Round of GATT include agriculture, sanitary and phytosanitary measures, trade-related investment measures, trade in services and trade-related aspects of intellectual property, among others.[221] In addition, the Uruguay Round of GATT establishes the World Trade Or-

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211. NAFTA, *supra* note 15, art. 2203, 32 I.L.M. at 702. NAFTA passed in the House of Representatives by a margin of 234-200 votes, while the Senate voted 61-38 in favor of NAFTA. Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1.

212. GATT, *supra* note 185.

213. HARRY C. HAWKINS, G.A.T.T. AN ANALYSIS AND APPRAISAL OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 20 (1955). "Prior to GATT the method employed . . . was the bilateral rather than the multilateral approach." *Id.*

214. Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751 (1993) (analyzing intersection of trade and environment in context of U.S.-Mexico tuna-dolphin debate).

215. *Id.*

216. Matthew Schaefer, *What's Needed for the GATT after the Uruguay Round?*, 86 AM. SOC'Y INT'L L. PROC. 69 (1992).

217. *Id.*

218. *Id.*

219. Uruguay Round, *supra* note 16.

220. Sylvia Ostry, *Europe 1992 and the Evolution of the Multilateral Trading System*, 22 CASE W. RES. J. INT'L L. 311 (1990).

221. GATT SECRETARIAT, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS § II-A1A-3, A-4, A-7, A1B, A1C (1993) [hereinafter "FINAL ACT . . . URUGUAY ROUND"].

ganization.[222] In so doing, the Uruguay Round of GATT essentially replaces the existing GATT structure.[223]

As with NAFTA, U.S. environmentalists feared that the Uruguay Round of GATT would result in a diminution of existing U.S. environmental standards.[224] The Uruguay Round of GATT, like NAFTA, addresses, among other issues, sanitary and phytosanitary measures.[225] Again, the language concerning those matters suggests the possibility of a challenge to U.S. standards as barriers to trade.[226] Thus, U.S. environmentalists, having sought in the past to prevent any dilution of U.S. standards,[227] may again seek to prevent such harm from occurring under the terms of the Uruguay Round of GATT. Such litigation was made possible on December 15, 1993, when GATT members concluded the Uruguay Round negotiations and signed the Uruguay Round of GATT.[228]

II. *DISCUSSION OF THE* PUBLIC CITIZEN *CASES*

During the drafting and negotiation stage of NAFTA,[229] Public Citizen initiated suit to compel the OTR to prepare an EIS under NEPA for the proposed legislation.[230] In *Public Citizen v. Office of the United States Trade Representative* ("*Public Citizen*

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222. *Id.* § II.

223. *Id.*

224. *See supra* notes 177-211 and accompanying text (discussing NAFTA and related environmental concerns).

225. FINAL ACT . . . URUGUAY ROUND, *supra* note 221, § II-A1A-4.

226. *Id.* The pertinent language states:

> Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal and plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement [are] applied only to the extent necessary [are] based on scientific principles and . . . sufficient scientific evidence [and] do not arbitrarily or unjustifiably discriminate between Members . . . .

Id.

227. *Public Citizen I*, 970 F.2d at 917.

228. Peter Passell, *The World Trade Agreement: U.S. and Europe Clear the Way for a World Accord on Trade, Setting Aside Major Disputes; How Free Trade Prompts Growth: A Primer*, N.Y. TIMES, Dec. 15, 1993, at A1. Roger Cohen, *The World Trade Agreement: The Overview; GATT Talks End in Joy and Relief*, N.Y. TIMES, Dec. 16, 1993, at D1. There is nothing speculative about such a theory with GATT recently approved and heading for Congress as "fast track" legislation. Passell, *supra*.

229. *See supra* notes 177-211 and accompanying text (discussing chronological events of NAFTA).

230. *Public Citizen I*, 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992).

I"),[231] the environmentalists' complaint was dismissed for lack of final agency action as required under the APA.[232] Because the agreement was subject to change, agency action was not final.[233] Once a final draft of NAFTA was prepared, however, Public Citizen reinstated the claim in *Public Citizen v. Office of the United States Trade Representative* ("*Public Citizen II*").[234] Again, the action was dismissed for lack of APA finality.[235] This time, however, the absence of final agency action was based merely on causation.[236]

A. *The Decision in* Public Citizen I

Although the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia were in agreement as to the dismissal of the environmentalists' complaint in *Public Citizen I*, the two courts relied on different doctrines.[237] The district court found that Public Citizen lacked standing.[238] The D.C. Circuit, on the other hand, did not reach the standing issue.[239] Instead, the D.C. Circuit held that Public Citizen failed to identify final agency action reviewable by the court.[240]

1. The Facts in *Public Citizen I*

In 1991, the United States, Canada and Mexico entered into negotiations aimed at establishing a free trade zone within North America.[241] On August 1, 1991,[242] Public Citizen brought suit[243] seeking declaratory and injunctive relief[244] pursuant to

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231. *Id.*

232. *Public Citizen I*, 970 F.2d at 917.

233. *Id.* at 919.

234. 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 685 (1994).

235. *Public Citizen II*, 5 F.3d at 550.

236. *Id.* at 551-52.

237. *Public Citizen I*, 782 F. Supp. 139 (D.D.C. 1992), *aff'd on other grounds*, 970 F.2d 916 (D.C. Cir. 1992).

238. *Public Citizen I*, 782 F. Supp. at 140.

239. *Public Citizen I*, 970 F.2d at 917.

240. *Id.*

241. *See Public Citizen II*, 822 F. Supp. at 22 (citing 56 Fed. Reg. 32, 454-55 (July 16, 1991)); *see also supra* notes 177-211 and accompanying text (discussing NAFTA).

242. *Public Citizen II*, 5 F.3d 549, 551 (D.C. Cir. 1993).

243. *Public Citizen I*, 782 F. Supp. 139 (D.D.C. 1992).

244. *Id.* at 140.

NEPA[245] requiring the OTR to prepare an EIS on NAFTA.[246] Public Citizen claimed that the lack of information about the proposed trade agreement inhibited their efforts to educate the public and the U.S. Congress.[247] Public Citizen asserted that because NAFTA was subject to "fast track" treatment,[248] its claim was ripe.[249] Defendants argued that the environmental groups lacked standing and that their claim was not ripe.[250] On the merits, the U.S. government's defense suggested that the "fast track" statute preempted NEPA, that NEPA did not bind the Trade Representative or the President of the United States because they are not agencies and that NEPA's application here would violate the constitutional doctrine of separation of powers.[251] The plaintiffs moved for summary judgment while the defendants moved to dismiss or, in the alternative, for summary judgment.[252]

2. The District Court's Decision in *Public Citizen I*

The U.S. District Court for the District of Columbia, in an opinion by Judge June Green, held that plaintiffs did not have

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245. 42 U.S.C. § 4332(2)(C); *see supra* notes 41-59 and accompanying text (discussing NEPA).

246. *Public Citizen I*, 782 F. Supp at 140. Plaintiffs sought the same relief with respect to the Uruguay Round of GATT. *Id.* It is important to note that the remedy sought is against the OTR and not the President. *Id.* "Plaintiffs' [sic] later withdrew their request for an injunction against concluding the agreements, acknowledging that such relief might intrude into the Executive's function." *Id.*

247. *Id.* at 141.

248. 19 U.S.C. §§ 2191-94, 2902-03 (1988). The "fast track" legislation calls for the President and Congress to follow specific procedures to ensure the expedient consideration of trade agreements. *See Public Citizen II*, 822 F. Supp. at 23.

> Under the fast track process, the President submits the NAFTA to Congress along with implementing legislation and an explanation of the changes in the current law. 19 U.S.C. § 2903(a)(1)(B). The NAFTA must be approved by both Houses of Congress before it can become effective, and such approval occurs when the NAFTA's implementing legislation has been enacted by both the Senate and the House of Representatives. 19 U.S.C. § 2903(a)(1) . . . . [O]nce the NAFTA has been submitted to Congress, Congress has only sixty legislative days to approve or reject the agreement, *id.* § 2191(c) and (e); legislative debate is limited to 20 hours in each House, *id.* § 2191(f) and (g); and Congress may not change the implementing legislation or the Agreement. *Id.* § 2191(d).

Public Citizen II, 822 F. Supp. at 23.

249. *Public Citizen I*, 782 F. Supp. at 141.

250. *Id.*

251. *Public Citizen I*, 970 F.2d. at 918.

252. *Public Citizen I*, 782 F. Supp. at 141.

standing to bring the suit at that time and granted defendants' motion to dismiss.[253] The district court's decision noted that the APA governed judicial review,[254] and relied heavily on *Lujan v. National Wildlife Federation*.[255] In *Lujan*, plaintiffs challenged the "land withdrawal review program" of the U.S. Bureau of Land Management.[256] The U.S. Supreme Court held that plaintiffs' affiants, claiming that Bureau of Land Management decisions caused harm to land use "in the vicinity", were not in fact injured by specific "final agency action".[257]

Likewise, in *Public Citizen I*, the district court found inadequate the environmental organizations' injury, asserted derivatively through its members.[258] Public Citizen's affidavits suggested that possible challenges to U.S. environmental laws as barriers to trade in violation of NAFTA would diminish state laws protecting public health and the environment.[259] The court declared these averments imprecise and inadequate.[260] Moreover, Public Citizen's organizational interest in information failed to point to identifiable agency action as the source of their injury.[261] For these reasons, the district court held that the plaintiffs lacked standing.[262] The district court briefly mentioned a ripeness problem as well, but elected not to rely on the issue for its holding.[263]

3. The Court of Appeals Decision in *Public Citizen I*

On appeal, the U.S. Court of Appeals for the District of Columbia, in an opinion by Circuit Judge Stephan F. Williams, affirmed the district court decision.[264] Unlike the district court, however, the D.C. Circuit did not reach the issue of Public Citi-

253. *Id.* at 144.

254. *Id.* at 141.

255. 497 U.S. 871 (1990); *see supra* notes 69-77 and accompanying text (discussing *Lujan v. National Wildlife Federation*).

256. *Lujan*, 497 U.S. at 875.

257. *Id.* at 891-94.

258. *Public Citizen I*, 782 F. Supp. at 142.

259. *Id.*

260. *Id.*

261. *Id.* at 143 (quoting Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991)).

262. *Public Citizen I*, 782 F. Supp. at 144.

263. *Id.* at 142 n.2.

264. *Public Citizen I*, 970 F.2d at 917.

zen's standing.[265] Instead, the D.C. Circuit held that the plaintiffs failed to identify any "final agency action" judicially reviewable within the meaning of the APA.[266] The court's analysis emphasized that NAFTA was merely in the negotiation and drafting stage and thus, did not qualify as final agency action.[267] The court also noted that even though section 102(2)(C) of NEPA contemplates consideration of environmental factors by agencies prior to final report or recommendation on a proposal, the time for judicial intervention is after the agency makes a final report or recommendation on the proposal.[268] Accordingly, the OTR's statement of refusal to prepare an EIS alone was insufficient for purposes of finality.[269] Thus, the court held that intervention would be premature, would constitute judicial intrusion into the daily decisionmaking process of the agencies and would result in the preparation of numerous unnecessary EISs.[270]

B. *The Decision in* Public Citizen II

Unlike *Public Citizen I*, the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia in *Public Citizen II* differed as to the outcome of the

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265. *Id.*

266. *Id.*

267. *Id.* at 919.

268. *Id.* (quoting Kleppe v. Sierra Club, 427 U.S. 390, 406 n.15 (1976)); *see supra* notes 51-55 and accompanying text (discussing judicial interpretation of agency's NEPA duties).

269. *Public Citizen I*, 970 F.2d at 921.

270. *Id.* at 919-20 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976)). The Court of Appeals proceeded in *Public Citizen I* to distinguish two cases plaintiffs cited in support of ripeness. *Id.* at 920-24. In the first case, Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986), the court held ripe a suit to enjoin the Department of the Interior from submitting a report to Congress until it complied with NEPA since it was required to do so by statute — not true in the case of *Public Citizen I*. *Id.* at 920-21. In the second case, Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983), the Court reviewed an NRDC rule stating that the Commission would not prepare an EIS on permanent storage of nuclear wastes in individual licensing proceedings. *Id.* at 921-22. The Court of Appeals in *Public Citizen I* distinguished the formal final rule from the Trade Representative's statement of refusal. *Id.* In addition, Public Citizen's contentions in favor of ripeness, that (1) only purely legal issues need be addressed and (2) denial of immediate review would result in hardship on them on the theory that the NEPA claim might become moot before it ripens due to the courts' refusal to enjoin lawfully approved international agreements, were also rejected by the Court of Appeals. *Public Citizen I*, 970 F.2d at 922-24.

environmentalists' claim.[271] The district court found that the APA and justiciability jurisdictional requirements had been met in Public Citizen's complaint.[272] The district court ordered the OTR to produce an EIS on the merits.[273]

The D.C. Circuit disagreed and reversed the district court's order.[274] The D.C. Circuit held that the OTR's actions with respect to NAFTA did not directly affect Public Citizen.[275] Thus, the environmentalists were not aggrieved by final agency action.[276]

1. The Facts in *Public Citizen II*

On October 7, 1992, the trade representatives of the United States, Canada and Mexico signed NAFTA.[277] Public Citizen seized upon this event to bring a second action seeking declaratory and injunctive relief compelling the OTR to prepare an EIS on NAFTA prior to the agreement's submission to Congress.[278] The U.S. government again defended contending that the court lacked APA jurisdiction, that the plaintiffs were without standing and that NEPA was not applicable to NAFTA.[279] On cross motions for summary judgment,[280] the U.S. District Court for the District of Columbia, in an opinion by Judge Charles R. Richey, granted Public Citizen's motion for summary judgment[281] and ordered the OTR to produce an EIS "forthwith."[282]

2. The District Court Decision in *Public Citizen II*

The district court began its discussion with an analysis of APA jurisdiction.[283] Distinguishing *Public Citizen II* from the earlier action involving the same parties, the court found that

271. *Public Citizen II*, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993).
272. *Public Citizen II*, 822 F. Supp. at 30.
273. *Id.*
274. *Public Citizen II*, 5 F.3d at 550.
275. *Id.* at 553.
276. *Id.*
277. *Public Citizen II*, 822 F. Supp. 21, 22 (D.D.C. 1993).
278. *Id.* at 23.
279. *Id.*
280. *Id.* at 22.
281. *Id.*
282. *Public Citizen II*, 822 F. Supp. at 31.
283. *Id.* at 23-24.

NAFTA was no longer in "draft" form.[284] Instead, the agreement had been finalized and signed.[285] Moreover, Judge Richey noted that under the "fast track" procedure,[286] the agreement was not subject to change once submitted to Congress.[287]

The court reasoned that although the responsibility for submitting the agreement to Congress rested with the President of the United States, not the OTR,[288] and the President is not an "agency" within the meaning of the APA for purposes of jurisdiction,[289] the OTR's actions were nonetheless "final" within the meaning of section 102(2)(C) of NEPA.[290] First, the court noted the substantial role that the OTR played in negotiating and drafting NAFTA.[291] Pursuant to the U.S. Council for Environmental Quality's[292] own regulations, a federal agency's significant cooperation and support in the development of legislation is all that is required for a NEPA proposal on legislation — including treaties.[293]

Second, the district court distinguished the U.S. Supreme Court's recent decision in *Franklin v. Massachusetts*.[294] In *Franklin*, plaintiffs challenged, under the APA, the U.S. Secretary of Commerce's 1990 census report issued pursuant to a reappor-

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284. *Id.*

285. *Id.* at 24.

286. *See supra* note 248 and accompanying text (discussing "fast track" procedure).

287. *Public Citizen II*, 822 F. Supp. at 24.

288. *Id.*

289. *Id.* at 24 (citing Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991) (holding no APA jurisdiction to review actions by President)).

290. *Public Citizen II*, 822 F. Supp at 24. NEPA § 102(2)(C) requires that "all agencies of the Federal Government shall . . . . [i]nclude 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 official on [t]he environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). *See supra* note 46 and accompanying text (discussing NEPA requirements).

291. *Public Citizen II*, 822 F. Supp. at 25.

292. *See supra* note 42 and accompanying text (discussing formation of CEQ).

293. *Public Citizen II*, 822 F. Supp. at 25 (quoting 40 C.F.R. § 1508.17 (1992) ("[F]or purposes of the NEPA, legislation: includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency . . . . The test for significant cooperation is whether the proposal is in fact predominately that of the agency rather than another source . . . . Proposals for legislation include requests for ratification of treaties.") The court also noted that NEPA established the CEQ and thus, their regulations and interpretations of the statute were entitled to substantial deference. *Public Citizen II*, 822 F. Supp. at 25.

294. ___ U.S. ___, 112 S. Ct. 2767 (1992); *see supra* notes 78-86 and accompanying text (discussing *Franklin* decision).

tionment statute.[295] The Court held that since the President of the United States had the discretion to amend the census report before its submission to Congress, it was a "moving target" and thus, there was no "final agency action" reviewable under APA standards that would "directly affect" the parties.[296] By contrast, the district court noted NAFTA was a "final product".[297]

Third, the district court found that even though the President was not obligated to submit NAFTA to Congress, APA jurisdiction was not barred.[298] The court pointed out that NEPA unambiguously requires an EIS on "proposals for legislation".[299] Therefore, APA jurisdiction was appropriate and an EIS was required on NAFTA.[300]

The district court next considered the separation of powers question raised in defense by the U.S. government.[301] The court found that an exercise of jurisdiction in this case would not infringe upon the powers of the President to conduct international affairs for two reasons. First, the power to regulate commerce with other nations belongs to the U.S. Congress.[302] Second, since NAFTA had been signed, all that remained was the domestic issue of Congressional ratification.[303] Thus, the court felt the preparation of an EIS would not infringe on the President's international affairs power so as to violate the separation of powers doctrine.[304]

Addressing the issue of standing, the district court focused primarily on the injury aspect of that doctrine.[305] The court noted that denial of the procedural benefits of NEPA gave rise to cognizable injury provided there was a reasonable risk that environmental injury would occur.[306] The court found that various domestic health and environmental laws, including U.S. state

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295. *Franklin*, 112 S. Ct. at 2773.

296. *Id.* at 2773-74.

297. *Public Citizen II*, 822 F. Supp. at 26.

298. *Id.*

299. *Id.* (quoting 42 U.S.C. § 4332(2)(C)).

300. *Public Citizen II*, 822 F. Supp. at 26.

301. *Id.*

302. *Id.* (citing U.S. CONST. art I, § 8, cl.3).

303. *Public Citizen II*, 822 F. Supp. at 27.

304. *Id.*

305. *Id.* at 27-29; *see supra* notes 95-129 and accompanying text (discussing standing doctrine).

306. *Public Citizen II*, 822 F. Supp. at 27.

laws by virtue of the Supremacy Clause, contrary to NAFTA's free trade provisions would be rendered inapplicable or would form the basis of trade sanctions.[307] Moreover, harm to plaintiffs' members living on the U.S.-Mexico border was sufficiently concrete as evidenced by the environmental problems then existing in the limited free trade zone — the Maquiladora program.[308] The court rejected the U.S. government's contention that the environmental effects of NAFTA were "too widespread" and insufficiently particular as plaintiff had suggested.[309] Thus, the court found the plaintiffs' allegations of environmental harm sufficiently concrete and concluded that standing was proper.[310]

Finally, the district court determined that the "plain language" of NEPA called for the OTR to prepare an EIS.[311] A narrow exception to NEPA's requirement — a "clear and fundamental conflict of statutory authority" — did not apply in this case.[312] Thus, the district court ordered the OTR to prepare the EIS pursuant to NEPA "forthwith."[313]

3. The Court of Appeals Decision in *Public Citizen II*

The U.S. Court of Appeals for the District of Columbia, in an opinion by Chief Judge Mikva, reversed the district court's decision to grant Public Citizen summary judgment.[314] The D.C. Circuit found the district court's distinction that NAFTA was a

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307. *Id.* at 27-28 (quoting NAFTA Article 105 stating "countries must 'ensure that all necessary measures are taken' to comply with the NAFTA, including compliance by 'state and provincial governments' "); *see supra* notes 177-211 and accompanying text (discussing NAFTA).

308. *Public Citizen II*, 822 F. Supp. at 28; *see supra* note 196 and accompanying text (discussing environmental problems associated with Maquiladoras).

309. *Public Citizen II*, 822 F. Supp. at 28 (quoting United States v. SCRAP, 412 U.S. 669, 688 (1973) ("[T]hat 'would mean that the most injurious and widespread Government actions could be questioned by nobody.' ")).

310. *Id.* at 29.

311. *Id.* (quoting 42 U.S.C. § 4332(2)(C) (1988) ("The NEPA requires that all 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' an environmental impact statement.")); *see supra* note 46 and accompanying text (discussing NEPA's EIS requirement).

312. *Public Citizen II*, 822 F. Supp. at 29 (quoting Flint Ridge Dev. Co. v. Scenic Rivers Ass'n., 426 U.S. 776, 791 (1976)).

313. *Public Citizen II*, 822 F. Supp. at 31.

314. *Public Citizen II*, 5 F.3d 549, 553 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

"final product" rather than a "moving target" unpersuasive.[315] Relying on the U.S. Supreme Court's decision in *Franklin v. Massachusetts*,[316] the D.C. Circuit emphasized that the President of the United States had the discretionary power to alter NAFTA before submitting the agreement to Congress, or to withhold the agreement altogether, thereby rendering the document tentative until such time as it was submitted.[317] The D.C. Circuit also stressed that the President's discretionary power need not be exercised.[318] It was enough that such power existed to show that NAFTA was not "final" upon the OTR's submission to the President.[319] Thus, the D.C. Circuit found that in the absence of Presidential action, NAFTA did not "directly affect" the environmentalists.[320] Therefore, no "final" action by the OTR having an adverse effect on Public Citizen was identified so as to subject the OTR to judicial review under the APA.[321]

The D.C. Circuit also rejected arguments by Public Citizen that the EIS was an "independent statutory obligation" for the OTR and that application of *Franklin* in this case would effectively nullify NEPA's EIS requirement where additional steps are often necessary for environmental harm to result.[322] Responding to Public Citizen's first argument, the D.C. Circuit stated that absent identifiable substantive agency action, an agency's failure to prepare an EIS alone is insufficient to trigger APA review.[323] As for Public Citizen's second claim, Judge Mikva indicated that the stringent "direct effect" requirement of *Franklin* did not represent the "death knell of the legislative EIS" since it was limited

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315. *Id.* at 552; *see supra* notes 283-313 and accompanying text (discussing district court's decision in *Public Citizen II*).

316. __ U.S. __, 112 S. Ct. 2767 (1992); *see supra* notes 78-86 and accompanying text (discussing *Franklin* decision). In *Franklin*, the Supreme Court announced the standard for determining when agency action is final under the APA. *Franklin*, 112 S. Ct. at 2773. "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.*

317. *Public Citizen II*, 5 F.3d at 551-52.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Public Citizen II*, 5 F.3d at 551-52.

322. *Id.* at 552.

323. *Id.* (citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)). "[A]n agency's failure to prepare an EIS, by itself is not sufficient to trigger APA review in the absence of identifiable substantive agency action." *Public Citizen II*, 5 F.3d at 552.

to cases where the President had responsibility for the final step necessary for the agency action to directly affect the parties.[324] In sum, the D.C. Circuit found that the "final agency action" directly affecting plaintiffs, Public Citizen, was the U.S. President's discretionary act of submitting NAFTA to Congress.[325] Such an act did not involve the OTR and was not "agency action" reviewable under the APA.[326] Public Citizen appealed the decision of the D.C. Circuit and filed a petition for writ of certiorari.[327] On January 10, 1994, the U.S. Supreme Court denied certiorari of Public Citizen's claim.[328]

III. *THE COURT OF APPEALS' NARROW INTERPRETATION OF FINAL AGENCY ACTION IN* PUBLIC CITIZEN II *THWARTS CONGRESSIONAL INTENT WITH RESPECT TO NEPA AND ESTABLISHES THE WRONG PRECEDENT FOR FUTURE HARMONY BETWEEN TRADE AND THE ENVIRONMENT*

The U.S. Court of Appeals for the District of Columbia in *Public Citizen II* erred in its strict interpretation of "final agency action".[329] Dismissal for lack of "final agency action" was proper in *Public Citizen I*[330] because the OTR had prepared only a "draft" of NAFTA.[331] In *Public Citizen II*,[332] however, the OTR's involvement had terminated when the President "signed and released a final draft of NAFTA,"[333] leaving only Congressional rat-

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324. *Public Citizen II*, 5 F.3d at 552. In the concurring opinion (Randolph, J.), the court suggests that *Franklin* may in fact sound the death knell for the legislative EIS expressing concern over the majority opinion's attempt to limit *Franklin*. *Id.* at 553. "If one takes Franklin at its word, a legislative proposal's lack of any direct effects would seem to mean that there can be no final action sufficient to permit judicial review under the APA." *Id.* at 554.

325. *Id.* at 553.

326. *Id.*

327. *Public Citizen II*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

328. *Id.*

329. *See supra* notes 314-26 and accompanying text (discussing court of appeals interpretation of final agency action in *Public Citizen II*).

330. 970 F.2d 916 (D.C. Cir. 1992).

331. *Public Citizen I*, 970 F.2d at 919; *see supra* notes 264-70 and accompanying text (discussing court of appeals decision in *Public Citizen I*).

332. 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

333. *Public Citizen II*, 5 F.3d 549, 551 (D.C. Cir. 1993); *see supra* notes 271-326 and accompanying text (discussing decision in *Public Citizen II*).

ification for approval of the treaty.[334] Applying an unduly strict causation standard, the D.C. Circuit failed to recognize final agency action and thus, erred.[335] As a result, the issues pertaining to justiciability were not addressed by the court. Had the D.C. Circuit passed on the issues of standing, political question and mootness, Public Citizen's claim ought to have been ruled justiciable, thereby allowing a decision on the merits.

A. *The Court of Appeals Erred in Finding a Lack of Final Agency Action in* Public Citizen II

The OTR's "implied" ruling that NAFTA was finalized for the President, the equivalent of a recommendation on a proposal for legislation, represented "final agency action" from which environmental harm was likely to follow.[336] The act of proposing legislation sufficed to meet the final agency action requirement under section 704 of the APA.[337] The duty to prepare an EIS was thereby established,[338] the absence of which resulted in injury "directly affecting" Public Citizen.[339] The NEPA action was distinguishable from the decision in *Franklin v. Massachusetts*.[340] The D.C. Circuit erred in not recognizing final agency

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334. *See supra* note 211 and accompanying text (discussing Congressional approval requirement on NAFTA).

335. *See supra* notes 314-26 and accompanying text (discussing court of appeals decision in *Public Citizen II*).

336. *See supra* notes 60-90 and accompanying text (discussing APA "final agency action").

337. *Public Citizen II*, 5 F.3d at 554 (concurring opinion of Randolph, J., suggesting possibility of such an interpretation).

338. *See supra* note 46 and accompanying text (discussing NEPA's EIS requirement).

339. *See supra* notes 78-86 and accompanying text (discussing final agency action requirement under *Franklin*).

340. __ U.S. __, 112 S. Ct. 2767 (1992). Notwithstanding this reasoning, "Public Citizen argues that applying *Franklin* in this case would effectively nullify NEPA's EIS requirement because often 'some other step must be taken before' otherwise final agency actions will result in environmental harm." *Public Citizen II*, 5 F.3d 549, 552-54 (D.C. Cir. 1993). This suggests the "death knell" for the legislative EIS. *Id.* The majority disagreed limiting *Franklin* to subsequent action by the President. *Id.* The concurring opinion suggests, however, that the legislative EIS may well be dead. *Id.* Note that *Franklin* itself is limited by the doctrine of *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221 (1986), which renders agency action final where the President's subsequent action is mandated by statute. *Franklin*, 112 S. Ct. at 2774. Nonetheless, the suggestion that the legislative EIS is dead is an excellent rationale for accepting the above reasoning rather than thwarting Congress' intent under NEPA.

action in *Public Citizen II*.[341]

The first element necessary for APA review in the U.S. Court of Appeals is a specific final agency act.[342] Agency action is defined as a "rule, order, license, sanction, relief, or the equivalent or denial thereof, or the failure to act."[343] Thus, even though the OTR's involvement ended without formal agency action once the President signed the final draft of NAFTA,[344] by implication, the OTR had entered a final "rule" as to what document to submit to the President. This "implied" rule was the "equivalent" of a formal agency action "rule" and satisfied the definition of agency action.[345] Similarly, the agency's "failure to act" or "denial" of such a ruling constituted sufficient agency action as defined.[346]

More importantly, agency action under section 702 of the APA is qualified by the phrase "within the meaning of a relevant statute."[347] In *Public Citizen II*, the relevant statute, NEPA, mandates agency preparation of an EIS for a "recommendation or report on proposals for legislation."[348] A "recommendation" is not a specifically enumerated agency action, as that term is defined,[349] but is U.S. agency action within the meaning of NEPA.[350] Thus, when read together, the two statutes reduce the formal agency action requirement from a "rule, order . . . " to a mere "recommendation." Of course, the recommendation must be final, but the final draft of NAFTA met this requirement.[351]

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341. *See supra* notes 314-26 and accompanying text (discussing court of appeals interpretation of final agency action in *Public Citizen II*).

342. *See supra* notes 69-77 and accompanying text (discussing final agency action under *Lujan v. National Wildlife Federation*).

343. *See supra* note 66 and accompanying text (defining "agency action" under APA).

344. *See supra* notes 177-211 and accompanying text (describing chronological events of NAFTA).

345. *See supra* note 66 and accompanying text (defining "agency action" under APA).

346. *Id.*

347. *See supra* note 65 and accompanying text (quoting section 702 of APA).

348. *See supra* note 46 and accompanying text (discussing NEPA's EIS requirement).

349. *See supra* note 66 and accompanying text (defining "agency action" under APA).

350. *See supra* note 46 and accompanying text (discussing NEPA's EIS requirement).

351. *See Public Citizen II*, 822 F. Supp. at 26. "The NAFTA that was negotiated and

The first part of the "final agency action" test was satisfied under any of the above theories.

The second element necessary for APA review, having established specific identifiable final agency action, is the "direct effect" on the litigant requirement under *Franklin*.[352] This prong of the test was satisfied by the procedural injury resulting from the agency's failure to prepare an EIS.[353] While the D.C. Circuit in *Public Citizen II* refused to recognize such an injury without identifiable substantive agency action,[354] arguably, the "implied" ruling or the "recommendation" was identifiable agency action, and therefore, the injury was cognizable.

Here, the language of the court is instructive. A "refusal" to prepare an EIS suggests no present duty exists.[355] A "failure" to prepare an EIS in conjunction with a final agency act, on the other hand, indicates an obligation not met and thus, injury.[356] Once an identifiable final agency action exists and environmental harm is reasonably likely to follow, an EIS must be produced.[357] If not, procedural injury results having a "direct effect" on the litigant.[358]

In *Public Citizen II*, the OTR's final "recommendation" on a proposal for legislation, NAFTA, represented final agency action.[359] Because NAFTA was likely to significantly affect the quality of the environment,[360] the OTR was obligated to prepare

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signed by the Trade Representative is the same document that shall be submitted to Congress . . . ." *Id.*

352. *See supra* notes 78-86 and accompanying text (discussing APA "final agency action" requirement under *Franklin*).

353. *See supra* note 56 and accompanying text (discussing procedural aspects of NEPA); *see also Public Citizen II*, 822 F. Supp at 26 (acknowledging procedural injury).

354. *See Public Citizen II*, 5 F.3d at 552 (citing Foundation on Economic Trends v. Lyng, 943 F.2d 79, 85 (D.C. Cir. 1991)).

355. *See Public Citizen I*, 970 F.2d at 918 (discussing "final agency action" requirement under APA).

356. *See Public Citizen II*, 5 F.3d at 552 (discussing "final agency action" under APA).

357. *See Public Citizen II*, 822 F. Supp. at 24 (identifying final agency action with respect to OTR's activities).

358. *Id.*; *see supra* notes 78-86 and accompanying text (discussing "direct effect" requirement of APA under *Franklin*).

359. *See supra* notes 60-90 and accompanying text (discussing "final agency action" under APA).

360. *See supra* notes 177-211 and accompanying text (discussing environmental concern over NAFTA).

an EIS.[361] The OTR's failure to satisfy the procedural EIS requirement of NEPA resulted in injury to Public Citizen.[362] This procedural injury, a recommendation to the President and Congress without consideration of environmental impact and alternatives, directly affected Public Citizen.[363] Not only was Public Citizen's legal interest under NEPA unprotected and violated, but the organization's ability to lobby Congress and disseminate information to the public was severely hampered by the absence of the EIS.[364]

"Final agency action" is the statutory equivalent of the constitutional doctrine of ripeness.[365] Although the Court has interpreted APA "statutory ripeness" more narrowly than its constitutional counterpart,[366] the purpose of the doctrine is merely to prevent the courts from becoming involved in the day-to-day operations of agencies[367] and, in a NEPA case, to prevent the preparation of an unnecessary EIS.[368] However, where the U.S. agency's involvement has terminated, as the OTR's has with respect to NAFTA, and all that remains is Congressional ratification,[369] there is no such problem. The Council on Environmental Quality's interpretation of proposals for legislation includes treaties and is entitled to deference.[370] The D.C. Circuit's decision in *Public Citizen II* undermines the Council on Environmental Quality's authority and thwarts the intent of Congress by not requiring an EIS on NAFTA. In so doing, the D.C. Circuit sounds the "death knell" of the legislative EIS.[371] The court's approach in *Public Citizen II* is unduly strict.

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361. *See supra* notes 41-59 and accompanying text (discussing NEPA requirements).

362. *See supra* note 56 (discussing harm NEPA seeks to prevent).

363. *Id.*

364. *See Public Citizen II*, 5 F.3d at 552 (recognizing harm in Public Citizen's inability to lobby Congress and disseminate information to public).

365. *See* Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) (comparing APA finality with ripeness).

366. *See, e.g., id. Compare* 28 U.S.C. § 1331 (providing narrow jurisdiction) *with* U.S. CONST. art. III (providing broad jurisdiction).

367. Kleppe v. Sierra Club, 427 U.S. 390, 406 (1976).

368. *Id.*

369. *See supra* notes 177-211 and accompanying text (discussing chronological events of NAFTA).

370. *See supra* note 293 and accompanying text (identifying CEQ's interpretation of "treaty" as proposal for legislation).

371. *Public Citizen II*, 5 F.3d at 554 (concurring opinion of Randolph, J.).

B. *The Court of Appeals Ought to Have Ruled the Issue in* Public Citizen II *Justiciable*

Even if the D.C. Circuit had properly identified "final agency action" and asserted APA jurisdiction, the matter of justiciability remained undecided. However, Public Citizen met the constitutional and prudential requirements of standing.[372] Moreover, Public Citizen's claim raised no political question,[373] and Public Citizen's claim was not moot.[374] Therefore, the D.C. Circuit ought to have ruled the case justiciable and proceeded to the merits.

1. The Requirement of Standing was Satisfied

Public Citizen II satisfied the constitutional minimum of standing.[375] Public Citizen alleged injury, caused by the OTR's conduct and redressable in the courts.[376] In addition, *Public Citizen II* satisfied the prudential component of the standing doctrine.[377] Thus, had the D.C. Circuit reached the issue, standing ought not to have been denied.

First, as the district court correctly indicated, deprivation of the procedural and informational benefits of NEPA's EIS represented cognizable injury provided there was a reasonable risk of environmental harm.[378] Public Citizen averred, with supporting affidavits, that changes to U.S. federal and state laws due to NAFTA's preemption clause would result in a loss of the health and environmental protections those laws provide.[379] Among the standards affected were those for pesticides, chemicals, seafood imports and pollution controls.[380] Moreover, NAFTA posed a threat to environmental conditions along the U.S.-Mex-

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372. *See supra* notes 95-129 and accompanying text (discussing standing doctrine).

373. *See supra* notes 130-60 and accompanying text (discussing political question doctrine).

374. *See supra* notes 161-73 and accompanying text (discussing mootness doctrine).

375. *See supra* notes 95-129 and accompanying text (discussing standing doctrine).

376. *Id.*

377. *Id.*

378. *Public Citizen II*, 822 F. Supp. 21, 27 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 685 (1994).

379. *Id.*; *see supra* notes 283-313 and accompanying text (discussing district court opinion in *Public Citizen II*).

380. *Public Citizen II*, 822 F. Supp. at 28 n.7; *see supra* notes 177-211 and accompanying text (discussing NAFTA).

ico border.[381] The Maquiladora program, a limited free trade zone presently operating in that geographical area, demonstrated the severe environmental problems confronting the inhabitants there.[382] The present pollution problems were real and suggested similar problems arising out of NAFTA were not speculative.[383] Thus, Public Citizen's injury was "sufficiently concrete" for purposes of standing.[384]

Second, the D.C. Circuit was not confronted with a causation obstacle to the environmentalists' standing.[385] The procedural injury was directly "traceable" to the OTR's failure to provide an EIS on NAFTA.[386] Public Citizen should not have been denied standing on this basis.

Third, no lack of redressability existed to divest Public Citizen of standing.[387] Although the environmentalists' remedy required the D.C. Circuit to order preparation of an EIS on NAFTA by the OTR, such an order in no way interfered with the U.S. President's power to proceed with the proposed legislation.[388] Thus, the D.C. Circuit was not presented with a separation of powers conflict.[389] Furthermore, the fact that NAFTA was targeted as "fast-track" legislation,[390] rendering completion of an EIS prior to the U.S. Congress' vote on the legislation virtually impossible, did not preclude a meaningful decision. At that time, Congress had not put NAFTA to a vote.[391] Speculation as to when Congress would do so or as to the time required for the EIS's preparation was inappropriate for consideration by the

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381. *Public Citizen II*, 822 F. Supp. at 28.

382. *Id.*; *see supra* note 196 and accompanying text (discussing environmental problems associated with Maquiladoras).

383. *Public Citizen II*, 822 F. Supp. at 28. The government's own reports confirm these apprehensions. *Id.*

384. *Id.* at 29.

385. *See supra* notes 95-129 and accompanying text (discussing standing doctrine).

386. *Id.*

387. *Id.*

388. *See supra* note 246 and accompanying text (discussing scope of relief sought by Public Citizen).

389. *See supra* notes 130-60 and accompanying text (discussing political question doctrine and distinguishing matters "touching" on politics from those involving political question).

390. *See supra* note 248 and accompanying text (discussing "fast-track" procedure).

391. *See supra* notes 177-211 and accompanying text (discussing chronological events of NAFTA). Both houses of Congress have since voted and approved NAFTA which entered into force on January 1, 1994. *See* Dewar, *supra* note 211 and accompanying text (indicating Congressional approval of NAFTA).

D.C. Circuit at the time of their decision. The only issue before the court was whether the OTR had a duty to prepare an EIS on NAFTA.[392] In addition, the previous litigation,[393] brought with the intention of providing the OTR with ample time to complete an EIS, although dismissed, should have put the U.S. government on notice of the EIS requirement and fairness would preclude them from raising such a hardship claim.[394] Finally, the redressability concerns raised suggested a mootness problem in the case.[395] However, an exception to the mootness doctrine for controversies "capable of repetition, yet evading review"[396] was particularly appropriate in Public Citizen's case. The same issue was likely to arise with respect to the Uruguay Round of GATT.[397] Thus, under such an analysis, Public Citizen met the standing doctrine's constitutional requirements of injury, causation and redressability.[398]

As for the prudential considerations of the standing doctrine,[399] again *Public Citizen II* posed no problem for the D.C. Circuit. First, the environmentalists' alleged injury in fact within the "zone of interest" protected by the relevant U.S. statute.[400] Public Citizen's alleged injuries to aesthetics and environmental well-being were cognizable.[401] Second, no third party standing issue existed since Public Citizen met the test for organizational standing.[402] An organization whose members suffer injury is entitled to represent those members in an action for judicial review.[403] Finally, since the claims raised by Public Citizen's members were particularized and reflected direct injury, a "generalized grievance" assertion was improper.[404] Prudential

392. *Public Citizen II*, 5 F.3d at 550.

393. *See supra* notes 237-70 and accompanying text (discussing *Public Citizen I*).

394. *Public Citizen II*, 822 F. Supp. 21, 30 n.15 (D.D.C. 1993).

395. *See supra* notes 161-73 and accompanying text (discussing mootness doctrine).

396. *Id.*

397. *See supra* notes 212-28 and accompanying text (discussing Uruguay Round of GATT and possibility of new litigation).

398. *See supra* notes 95-129 and accompanying text (discussing standing doctrine).

399. *Id.*

400. *See supra* note 106 and accompanying text (discussing "zone of interests" test).

401. *See supra* note 122 and accompanying text (discussing cognizable injuries).

402. *See supra* note 104 and accompanying text (discussing organizational standing).

403. *Id.*

404. *Public Citizen II*, 822 F. Supp. at 28.

considerations, therefore, do not divest Public Citizen of standing.

In sum, Public Citizen established facts sufficient to surmount both the constitutional and prudential requirements for standing.[405] The D.C. Circuit never reached this issue.[406] Had the D.C. Circuit addressed the standing issue, the claim ought to have been ruled justiciable.

2. No Political Question was Raised by the Claim

Having determined that the OTR's submission of NAFTA to the President of the United States constituted "final agency action" and that Public Citizen had standing, the D.C. Circuit would then have been required to consider whether the transaction involved a political question.[407] A political question would have involved either a lack of judicial standards for resolving the issue or the need for finality with respect to a past political decision.[408] Because the OTR is located "within the Executive Office of the President,"[409] a judicial determination on the merits would represent a potential encroachment on a domain of U.S. government committed to a coordinate branch — international affairs.[410] However, even if judicial restraint was warranted as to the actions of the President or Congress, such restraint was not due the OTR. Furthermore, because *Public Citizen II*[411] merely "touched" international affairs, the question therein — whether the OTR's proposal for legislation (NAFTA) required an EIS under NEPA — was justiciable, not political.[412]

In *Public Citizen II*, although the issue "touched" international affairs,[413] the D.C. Circuit's decision merely required statutory interpretation of NEPA with respect to NAFTA — action

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405. *See supra* notes 95-129 and accompanying text (discussing standing doctrine).

406. *Public Citizen II*, 5 F.3d at 550.

407. *See supra* notes 130-60 and accompanying text (discussing political question doctrine).

408. *Id.*

409. *See supra* note 14 and accompanying text (discussing OTR).

410. *See supra* notes 130-60 and accompanying text (discussing political question doctrine).

411. 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

412. *See supra* note 158 and accompanying text (quoting *Japan Whaling* and *Baker* and discussing possibility of judicial determination of matter related to international affairs).

413. *Id.*

within the traditional capacity of the judiciary.[414] The question as to whether NEPA required the OTR to prepare an EIS for NAFTA, as a proposal for U.S. legislation, was purely a domestic issue.[415] The court neither lacked the requisite standards for adjudication on the merits nor intruded upon the domain of the U.S. executive.[416] Relief was sought only against the OTR.[417] Although the OTR was located "within the Executive Office of the President,"[418] the agency had responsibilities other than assisting and advising the President and thus, was an agency subject to the APA.[419] Furthermore, even though the President of the United States had approved the final draft of NAFTA, no formal statement had been made by the Executive as to whether the OTR was required to prepare an EIS under NEPA.[420] Thus, there was no concern regarding the "finality" of a Presidential pronouncement.[421] If the President had formally approved of the OTR's failure to prepare an EIS, then it would have been incumbent upon the U.S. Congress to defend against the challenge to NEPA.[422] In such a case, until Congress took such action, the issue would not be "ripe."[423] Instead, the OTR's responsibility was an "independent statutory obligation"[424] and did not involve the President.[425] Thus, no political question

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414. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (defining role of U.S. judicial branch).

415. *Baker*, 369 U.S. at 211; *Public Citizen II*, 822 F. Supp. at 27.

416. *See supra* note 137 and accompanying text (discussing requisite elements of political question doctrine).

417. *Public Citizen II*, 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

418. *Public Citizen II*, 5 F.3d 549, 550 (1993)(citing 19 U.S.C. § 2171(a) (1988)).

419. *Public Citizen II*, 822 F. Supp. 21, 25 n.4 (D.D.C. 1993)(citing Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)).

420. *Cf.* C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948)(holding Presidential approval of an agency decision regarding foreign air routes equivalent of final order and not subject to review in courts by virtue of political question doctrine).

421. *Id.*

422. *Cf.* Goldwater v. Carter, 444 U.S. 996, 997-98 (1979)(Powell, J., concurring)(challenge by few Members of Congress to President's action terminating treaty thereby depriving them of their Constitutional role not "ripe" without official action by Congress).

423. *Id.*

424. *Public Citizen II*, 5 F.3d 549, 552 (D.C. Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 685 (1994).

425. *See supra* note 246 and accompanying text (discussing scope of relief sought by Public Citizen). As noted earlier, Public Citizen was not seeking to prevent the President from submitting NAFTA to Congress. *Id.* Furthermore, the fact that the President

presented itself on the facts before the D.C. Circuit in *Public Citizen II.*

In sum, none of the factors outlined in the political question doctrine were applicable in *Public Citizen II.*[426] The D.C. Circuit need only have interpreted the NEPA statute.[427] There was no question as to which branch of the U.S. government was vested with that responsibility — it was the judiciary.[428] The D.C. Circuit was well equipped with the "standards" necessary for such a determination.[429] Moreover, the OTR's independence from the President removed any concern over the issue of "finality".[430] As U.S. Supreme Court Justice Brennan indicated in *Baker v. Carr*,[431] unless the issue before the court was "inextricable" from the factors of the political question doctrine, the court ought to proceed.[432] And, as Chief Justice John Marshall declared in *Marbury v. Madison*,[433] it is the duty of the court "to say what the law is."[434]

3. Mootness did not Prevent a Meaningful Decision

The mootness doctrine was the final area of justiciability the D.C. Circuit ought to have considered.[435] Mootness requires that the adversity between the parties continue throughout the litigation.[436] Because Public Citizen sought to compel production of an EIS on NAFTA by the OTR for the purpose of lobbying Congress[437] and because Congress had yet to decide the fate

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has done so, and that Congress has since approved NAFTA, is not a bar to this action since the doctrine of mootness excepts those claims "capable of repetition, yet evading review." *See supra* notes 161-73 and accompanying text (discussing mootness doctrine).

426. *See supra* note 137 and accompanying text (discussing requisite elements of political question doctrine).

427. *See supra* note 158 and accompanying text (discussing interpretation of statute "touching" on political matter).

428. *Marbury*, 5 U.S. (1 Cranch) at 177.

429. *See supra* note 137 and accompanying text (discussing requisite elements of political question doctrine).

430. *Id.*

431. 369 U.S. 186 (1962).

432. *Id.*

433. 5 U.S. (1 Cranch) 137 (1803).

434. *Id.* at 177.

435. *See supra* notes 161-73 and accompanying text (discussing mootness doctrine).

436. *Id.*

437. *Public Citizen II*, 5 F.3d at 552.

of NAFTA at the time of the D.C. Circuit's decision,[438] the controversy did not cease to exist but remained "live".[439] Speculation as to the OTR's ability to complete an EIS prior to a U.S. Congressional vote on NAFTA did not change this analysis. The D.C. Circuit needed only to decide the OTR's duty at the time of the court's decision.

However, the mootness doctrine was of greater import with respect to Public Citizen's petition for writ of certiorari.[440] At the time the U.S. Supreme Court denied certiorari on January 10, 1994, both the U.S. House of Representatives and the U.S. Senate had approved NAFTA and the agreement was in force as of January 1, 1994.[441] Thus, the OTR's production of an EIS after January 1, 1994, served no purpose in assisting the U.S. Congress in its decision on NAFTA.

Nevertheless, an exception to the mootness doctrine provided for the continuing vitality of the litigation.[442] The issue in *Public Citizen II*, whether the OTR was required to prepare an EIS on certain treaties, was "capable of repetition, yet evading review."[443] The "demonstrated probability" of repetition centered on the passage of the Uruguay Round of GATT and the likelihood of similar litigation.[444] Thus, even though the U.S. Supreme Court denied certiorari on *Public Citizen II*,[445] such action was not required under the mootness doctrine. The U.S. Supreme Court was not precluded from fulfilling its duty to "say what the law is."[446]

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438. *See supra* notes 177-211 and accompanying text (discussing chronological events of NAFTA).

439. *See supra* notes 161-73 and accompanying text (discussing mootness doctrine).

440. *See supra* notes 327-28 and accompanying text (noting Public Citizen's petition for certiorari).

441. *See supra* notes 177-211 and accompanying text (discussing chronological events of NAFTA).

442. *See supra* note 161-73 and accompanying text (discussing mootness doctrine and its exceptions).

443. *Id.*

444. *Id.*; *see supra* notes 212-28 and accompanying text (discussing Uruguay Round of GATT and possibility of new litigation).

445. *See supra* notes 327-28 and accompanying text (noting denial of certiorari in *Public Citizen II*).

446. *Marbury*, 5 U.S. (1 Cranch) at 177.

CONCLUSION

In *Public Citizen II*, the U.S. Court of Appeals for the District of Columbia erred in reading the APA meaning of "final agency action" so narrowly.[447] Congress intended the language to require "ripeness" not to provide a loophole for agencies to avoid responsibility through their inaction. The D.C. Circuit ought to have found "final agency action" in the OTR's completion of NAFTA negotiations, subsequently ruling the matter justiciable and proceeding to the merits of the case. If it is the intent of the U.S. Congress to exempt the OTR, acting in its advisory role to the President, from preparing an EIS pursuant to NEPA, then that intention should be explicitly stated by the U.S. Congress. It is not for the U.S. federal courts to do so artificially through the doctrines of justiciability.

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447. *See supra* notes 314-26 and accompanying text (discussing decision of court of appeals in *Public Citizen II*).

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