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TRADE ON TRIAL: NAFTA IN THE DOCK

(Updating *Backgrounder* No. 939, "The NAFTA Debate, Part I: A Primer on Labor, Environmental, and Legal Issues," April 9, 1993.)

Judge Charles Richey of the United States District Court for the District of Columbia on June 30 hurled a judicial thunderbolt against the NAFTA, the North American Free Trade Agreement between the U.S., Canada, and Mexico.

Agreeing with the complaint of three special interest groups—Ralph Nader's Public Citizen, the Sierra Club, and the Friends of the Earth—Judge Richey in *Public Citizen v. Office of the United States Trade Representative,* found that the United States Trade Representative (USTR) had failed to comply with the National Environmental Policy Act (NEPA) by not preparing an environmental impact statement on the NAFTA. He then ordered the Clinton Administration to write such a statement as soon as possible.

An environmental impact statement, or EIS, is an evaluation of the environmental impact of a U.S. government agency action or legislative proposal. The agency must canvass affected state and local governments, prepare an assessment of environmental vulnerabilities, and propose alternate options. The EIS was mandated to ensure that administrative agencies take environmental factors into account in their decision-making processes.

By statute, the EIS requirement applies in terms not only to agency decisions such as rule-making but to such informal action as to where to place a dam. Indeed, it goes so far as to apply to "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Congress, however, has always known how to get information it wants from the executive branch. Thus, students of environmental law have never understood the point of the requirement of an EIS for legislative proposals. Judge Richey seemingly wants to instruct them.

The Posture of the NAFTA

George Bush signed the NAFTA agreement with Mexico and Canada on December 17, 1992. Bill Clinton had stated during the presidential campaign that he would not send NAFTA implementing legislation to Congress unless he successfully negotiated side agreements on labor and environmental issues with Mexico and Canada. Among his requirements were the creation of two tri-national commissions, one on labor and one on environmental issues. The Clinton Administration currently is negotiating these side agreements and hopes to reach a successful resolution this summer in order to simultaneously submit implementing legislation for both the NAFTA and the side agreements to Congress this fall.

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deed it may yet lead those within the Clinton Administration who are ambiguous about the NAFTA to put the whole thing off until next year. Such a delay would likely doom the NAFTA.

What To Do?

The Clinton Administration has sought an expedited review of Judge Richey's decision. Already the parties have agreed to a compressed briefing schedule with final briefs due on August l0. At that time the Court of Appeals will set a hearing date. The Justice Department has requested that the Court hear the case in late August. It is important that the Court do so. A decision would then be possible sometime in September, and this would still allow the NAFTA to be voted on this fall.

The pendency of the Court decision ought not preclude the Administration from moving quickly to conclude its negotiations over the NAFTA side agreements. The Court case has absolutely no impact on the side agreements. Indeed, concluding the side agreements should clarify significantly the environmental impact of the NAFTA and how the U.S. is seeking to protect the environment of the U.S. and Mexico.

In the unlikely event that the Court of Appeals affirms Judge Richey's decision, the Administration should immediately seek expedited review in the Supreme Court. In light of the NAFTA's importance, the Administration also should be ready to submit an EIS forthwith if the Supreme Court so requires. While some have suggested that preparation of an EIS would take six months to a year, this need not be the case. The Administration has already done extensive work on the environmental impact of the NAFTA. It has prepared a 250-page *Review of U.S.-Mexico Environmental Issues* assessing its various environmental ramifications. Thus, much of the "scoping" of issues has already been done. Furthermore, many of the environmental consequences of the NAFTA are speculative at best. Thus, the amount of further empirical work that must be done is limited. While in no way preferable, it should be possible, if legally required, to provide Congress with an EIS while it debates the NAFTA.

In any event, U.S. Trade Representative Mickey Kantor has pointed out that the Clinton Administration is free to submit the NAFTA to Congress at the earliest possible moment—regardless of whether the environmental impact statement is finished. Judge Richey did not forbid this. Indeed, as Public Citizen itself has admitted, "the Administration remains fully free to send the NAFTA to Congress for approval whenever it wishes, whether or not the office of USTR has completed its EIS by that time." And obviously the Congress, in Public Citizen's words, has "the right...to consider the NAFTA with or without an EIS." In the final exigency, the Administration must be prepared to act.

On its own, Judge Richey's decision cannot derail the NAFTA. It can only slow down the train. Any delay in bringing the NAFTA to the Hill, however, provides oxygen to NAFTA opponents. It is up to the Clinton Administration to prevent the battle over the NAFTA from being bogged down in a dispute over the reach of the National Environmental Policy Act.

Marshall J. Breger
Senior Fellow

Judge Richey's Opinion

Richey's opinion is vulnerable for a number of reasons. First, it remains doubtful whether the "public interest" plaintiffs have standing to sue. Do they have a sufficient interest in the controversy that justifies their bringing the case? Can they show some concrete injury-in-fact? Under recent Supreme Court precedents, Judge Richey's grant of standing, based on the mere conjecture that the NAFTA will constrain U.S. environmental regulation in a manner that increases environmental degradation, is problematic at best. Similarly, Public Citizen's assertion that organization members living in border states will be affected adversely by the trade agreement is no more than an "academic exercise in the conceivable." Ultimately, plaintiffs are reduced to relying on a bizarre form of injury. They argue that the failure of the government to prepare an EIS deprives them of needed information about the environmental effects of NAFTA.

Even if the plaintiffs do have standing to bring this case to court, it is unlikely that the environmental impact requirement for legislative proposals is judicially enforceable. The NEPA does not create an independent private right of action. If someone wants to sue for a violation of NEPA—such as a failure to prepare an EIS—it must be done through the Administrative Procedures Act (APA), which permits judicial review of "final agency action" only. Judge Richey tried to get around this hurdle by finding that final agency action was taken by the United States Trade Representative. He is simply incorrect. It is the President who submits the NAFTA implementing legislation to Congress. It is settled law that the President is not an agency for purposes of the Administrative Procedures Act. Thus, as the Supreme Court has underscored in the 1992 census case (*Massachusetts v. Franklin*), where it is the President, not an agency, who specifically must take final action under a statute, APA review is not available. The Administration's decision not to draft an EIS, therefore, is simply not a reviewable agency action.

Far more important, however, is that the Richey decision raises significant constitutional issues. It places constitutionally problematic strictures on the President's power to propose legislation. And more broadly, it intrudes the courts into the President's authority to effectively enter into international agreements.

Indeed it is hard to imagine that Congress, in passing the NEPA, actually contemplated that the President must prepare an environmental impact statement for international agreements and treaties negotiated with foreign countries. While it may be unsurprising that the State Department, for many years, has prepared EIS's for numerous international treaties and agreements, these precedents in no way vitiate the constitutional issues presented since the State Department's past voluntary actions in no way impairs the scope of the President's executive authority.

Legal Effect

The immediate legal effect of the Richey decision on the NAFTA is unclear. Judge Richey did not enjoin the USTR to stop negotiating the side agreements with Mexico and Canada until an EIS is completed. Nor did he forbid the Clinton Administration from submitting the NAFTA to Congress without an EIS, stating only that USTR "shall propose such an Environmental Impact Statement forthwith."

Under traditional NEPA jurisprudence, an agency action based on a defective EIS is open to judicial review. However, where a legislative EIS is required, as in the NAFTA implementing legislation, no court can prevent Congress from voting on that legislation because the court believes that an environmental impact statement is defective. In that sense, this *Public Citizen* litigation should be regarded as a "nuisance" suit, brought less to accomplish legal purposes than to wreak political havoc with the NAFTA.

Political Effects

Here it may succeed. The political effect of the district court decision is potentially devastating to the fate of the NAFTA. It provides succor to those who oppose the NAFTA for any and all reasons and raises the "price" the Administration will have to pay in the NAFTA side agreements to secure "Green" support. It provides an excuse for those who want to delay the NAFTA to demand that Congress wait upon the judicial branch. And in-