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REVIEWABILITY OF ENVIRONMENTAL IMPACT
STATEMENTS ON LEGISLATIVE PROPOSALS AFTER
FRANKLIN v. MASSACHUSETTS

INTRODUCTION

In order to comply with the National Environmental Policy Act (NEPA),¹ federal agencies must include a detailed environmental impact statement (EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."² Despite NEPA's broad provisions designed to safeguard the environment, it fails to provide citizens a private right of action that would allow them to challenge agency noncompliance and to enforce NEPA provisions. Thus, litigants can gain judicial review only if they comply with the Administrative Procedure Act (APA),³ which enables people who are adversely affected by agency action to obtain judicial recourse. Yet, in order to gain judicial review under the APA, litigants must demonstrate that the federal agency action they challenge is a "final agency action."⁴ The Supreme Court's recent construction of this finality requirement in *Franklin v. Massachusetts* states that the "final" agency action must "directly affect" the parties.⁵ Although *Franklin* was not a NEPA case, the lower courts' application of its direct effects finality requirement to NEPA cases will make access to courts all the more difficult for future environmental litigants to obtain.

In particular, *Public Citizen v. Office of the United States Trade Representative*,⁶ a recent D.C. Circuit decision, demonstrates that a court's application of the *Franklin* finality requirement to NEPA cases could effectively eliminate judicial review of an agency's failure to comply with NEPA's EIS requirement in an entire category of actions. Most litigation regarding NEPA's EIS provision has involved its second prong, which requires an EIS for "major Federal actions." Thus, NEPA's EIS requirement for legislative proposals, the first prong, remains somewhat of a "forgotten clause."⁷ In *Public Citizen*, however,

¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.) (1988).

² 42 U.S.C. § 4332(2)(C).

³ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.) (1988).

⁴ 5 U.S.C. § 704.

⁵ 112 S. Ct. 2767, 2773-76 (1992).

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

⁷ Ian M. Kirschner, Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U. L. REV. 560, 561 (1978). See also Comment, *Impact Statements on Legislative*

the clause came briefly into the national spotlight. In that case, several environmental groups brought an action against the Office of the United States Trade Representative (USTR) for failing to prepare an EIS on a proposal for legislation that would implement the North American Free Trade Agreement (NAFTA).⁸ Environmental groups achieved a short-lived success in a district court ruling requiring the USTR to prepare an EIS;⁹ the D.C. Circuit reversed the district court's opinion, however, and the Supreme Court denied certiorari.¹⁰

The D.C. Circuit, applying the *Franklin* standard of finality, found that the USTR's preparation of NAFTA without an EIS failed to constitute "final agency action" under the APA.¹¹ The court's reliance on the finality requirement proved a convenient way to avoid judicial review of an important question. This Note explores the need for clarification of the finality doctrine with respect to NEPA's EIS requirement. It argues that courts should be able to review an agency's failure to prepare an EIS on a legislative proposal, even if the President has the ultimate constitutional authority over the action, as was the case with NAFTA. An agency's failure to adhere to NEPA's EIS requirement should constitute a "final agency" action, thus al-

Proposals: Enforcing the Neglected Half of NEPA's Mandate, 7 ENVTL. L. REP. 10145 (1977) (commenting on how little judicial attention is given to the EIS requirement on proposals for legislation).

⁸ In June 1991, the United States, Mexico and Canada entered into trilateral negotiations to establish a North American free trade zone. See 56 Fed. Reg. 32,454-55 (July 16, 1991). On September 18, 1992, President Bush officially notified Congress of his intent to sign NAFTA. 57 Fed. Reg. 43,603 (Sept. 18, 1992). On October 7, 1992, the USTR initialed the final NAFTA text and President Bush signed the Agreement on December 17, 1992. At the time of *Public Citizen*, President Clinton had not yet submitted the NAFTA legislation to Congress. The Trade Acts require Congress to follow fast-track procedures during the NAFTA approval process. Thus, Congress had 90 days following the President's submission of the legislation in which to either adopt or reject NAFTA. See 19 U.S.C. §§ 2191-2903 (1988 & Supp. 1994).

Following widespread public concern during the trilateral negotiations that a free trade agreement might have harmful environmental effects in the U.S.-Mexico border area, the Office of the U.S. Trade Representative issued a report, *Review of U.S.-Mexico Environmental Issues*. This report characterized the general environmental concerns posed by a trade agreement, but did not specifically assess the impact of a final trade agreement on the environment. Thus, the USTR never contended that this report satisfied NEPA's EIS requirement. See Petition for a Writ of Certiorari at 5, *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (No. 93-560), cert. denied, 114 S. Ct. 685 (1994) [hereinafter *Public Citizen Cert. Petition*].

Congress passed NAFTA in November, 1993. It could have a significant impact on the environment, including increased air pollution in all three countries and further decreases in air and water quality as a result of increased trade development along the U.S.-Mexico border. *Id.*

⁹ *Public Citizen v. Office of the U.S. Trade Representative*, 822 F. Supp. 21 (D.D.C.), rev'd, 5 F.3d 549 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 685 (1994).

¹⁰ The Supreme Court denied certiorari without comment. 114 S. Ct. 685 (1994). The Court probably felt the issue was moot because Congress already had passed NAFTA by the time they acted on the certiorari petition.

¹¹ *Public Citizen*, 5 F.3d at 533.

lowing courts jurisdiction under the APA. Contrary holdings, which extend a strict *Franklin* articulation of “finality” to NEPA cases, as the D.C. Circuit did in *Public Citizen*, renders NEPA’s EIS requirement for legislative proposals unenforceable and moot.

In Part I, this Note provides background information regarding NEPA and the APA. In addition, it discusses the manner in which courts dealt with the finality issue prior to the Supreme Court’s decision in *Franklin v. Massachusetts*.¹² Finally, it fleshes out three current models courts use to either apply or distinguish *Franklin* in the NEPA context. Inconsistencies in the various courts’ applications of *Franklin* in both NEPA and non-NEPA cases demonstrate the need to identify an appropriate test for finality and clarify its application to cases regarding EISs on legislative proposals.

In Part II, this Note argues that courts should not apply *Franklin*’s APA finality requirement in the NEPA context, as the court did in *Public Citizen*. Part II.A discusses NEPA’s purposes, its legislative history, and the APA’s legislative history, each of which strongly supports a presumption of judicial review of an agency’s failure to comply with NEPA’s mandates. Part II.B argues that the APA’s “final agency action” requirement, if properly interpreted and applied, is not an obstacle to obtaining judicial review of an agency’s independent statutory obligations.

Furthermore, Part II.C disputes the proposition that the constitutional mandate of separation of powers necessitates the elimination of judicial review of *agency* action in situations where the President has the ultimate decisionmaking authority. Finally, Part II.D proposes an analytical model whereby courts define the challenged action under the APA as the combination of an agency’s completion of a recommendation on a proposal and its concomitant failure to include an EIS. This model best serves NEPA’s goals, as discussed in Part II.A, and maintains the appropriate balance of power between the three branches.

I

BACKGROUND

A. The National Environmental Policy Act (NEPA)

Congress enacted NEPA in 1969 as one of the first major pieces of federal environmental legislation. It evolved from a growing concern that agencies ignored the environmental effects of their decisions.¹³ The Act declared a national environmental policy to “encourage productive and enjoyable harmony between man and his

¹² 112 S. Ct. 2767 (1992).

¹³ DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* at ix (2d ed. 1994).

environment" and to "enrich the understanding of the ecological systems and natural resources important to the Nation."¹⁴ It created the Council on Environmental Quality (CEQ) to accomplish this goal.¹⁵ In addition, it mandated a number of "action-forcing provision[s],"¹⁶ requiring, for instance, that all federal agencies file an EIS on all legislative proposals and major federal actions that significantly affect the environment.¹⁷ These provisions guaranteed that environmental concerns would become a significant factor in the policy-making process.

The CEQ promulgated regulations to implement NEPA in 1978.¹⁸ In order to facilitate the Executive Branch's intent that these regulations simplify the EIS process and make it more useful to decisionmakers and the public by "reduc[ing] paperwork and the accumulation of extraneous background data,"¹⁹ the CEQ has defined "federal agency," "legislation," "major federal action" and "proposal."²⁰ In addition, the CEQ regulations give a detailed description of both the process an agency must follow in preparing an EIS and the actual content of an EIS.²¹ Courts have consistently deferred to the CEQ's interpretation of NEPA.²²

NEPA introduced several procedural devices, such as the EIS requirement in section 102(c) and the development of alternatives requirement in section 102(d), to effectuate its national environmental policies.²³ As a result, federal agencies must generate information regarding the environmental effects of their legislative proposals and

¹⁴ 42 U.S.C. § 4321.

¹⁵ *Id.*

¹⁶ M. Diane Barber, *Bridging the Environmental Gap: The Application of NEPA to the Mexico-United States Bilateral Trade Agreement*, 5 TUL. ENVTL. L.J. 429, 434-35 (1992).

¹⁷ See 42 U.S.C. § 4332(2)(c).

¹⁸ 40 C.F.R. §§ 1500-1508 (1994). Exec. Order No. 11,991 granted CEQ the authority to promulgate regulations, substituting its earlier authority to merely issue guidelines. See Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977). CEQ adopted interpretive regulations and other federal agencies must adopt their own NEPA regulations that comply with the CEQ regulations. See MANDELKER, *supra* note 13, § 2.06[1]. Although Congress deemed the CEQ's primary role to be advisory in nature, it has become the principal coordinating agency, policing federal agency compliance with NEPA and establishing some degree of uniformity. *Id.*

¹⁹ Exec. Order No. 11991, 42 Fed. Reg. 26,967 (1977).

²⁰ 40 C.F.R. §§ 1508.12, 1508.17-18, 1508-23 (1994). For example, with regard to whether the EIS provisions apply to trade agreements, 40 C.F.R. § 1508.18(b)(1) defines "major Federal action" to include "treaties and international conventions or agreements." In addition, 40 C.F.R. § 1508.17 defines "legislation" as "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 predominantly that of the agency rather than another source."

²¹ MANDELKER, *supra* note 13, § 10.06.

²² See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (noting that CEQ regulations deserve "substantial deference" by the courts). See also *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981).

²³ 42 U.S.C. §§ 4332(2)(C)-(E).

major actions and make this information available to the public.²⁴ This informational function facilitates the discussion of environmental concerns before a specific decision about the proposal is made.²⁵ In fact, to ensure public participation, the CEQ regulations divide the EIS process into two parts. First, the agency must prepare a draft environmental statement, which is circulated for comment.²⁶ Second, the agency must submit its final EIS to the EPA that, in turn, publishes the statement in the *Federal Register* and allows for further public comment.²⁷ After such discussion, however, the agency makes its own decision.²⁸ Thus, based on the EIS, courts cannot stop an agency from proceeding with its project.²⁹ In general, then, "NEPA merely prohibits uninformed—rather than unwise—agency action."³⁰

The decisionmaking process mandated by NEPA led to increased judicial review of federal agency decisions.³¹ Soon after NEPA's enactment, courts ruled that NEPA imposes on agencies certain mandatory

²⁴ See 42 U.S.C. § 4332 (2)(G).

²⁵ The Supreme Court recently described the two purposes of NEPA's EIS requirement as follows:

It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). See also *Izaak Walton League of Am.*, 655 F.2d at 365 (noting that the EIS requirement for legislative proposals "in part . . . ensure[s] that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels").

²⁶ 40 C.F.R. § 1503.1 (1994).

²⁷ *Id.* § 1506.10.

²⁸ See *Robertson*, 490 U.S. at 350 ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

²⁹ See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (noting that once an agency has made a decision, having complied with NEPA's procedural requirements, the court's role is limited to guaranteeing that the agency considered the environmental consequences, rather than judging the merits of the decision).

Courts can, however, review the agency's compliance with NEPA to determine whether it has amounted to a full-faith consideration of the environmental consequences of its actions. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (explaining that NEPA requires a "'systematic' balancing analysis" between options and that the court will scrutinize whether an agency has in good faith complied with the statute). Furthermore, courts can review an agency's compliance with NEPA under the "arbitrary, capricious, an abuse of discretion, not in accordance with law" standard. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In general, courts do not substitute their decision for an agency's. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

³⁰ See *Robertson*, 490 U.S. at 351.

³¹ Prior to NEPA, federal agencies were usually shielded from aggressive judicial review of their actions. See MANDELKER, *supra* note 13, at ix (noting that prior to NEPA "federal agencies were usually protected from aggressive judicial review by deferential judicial review standards enacted in the federal Administrative Procedure Act").

obligations that can be judicially enforced.³² Yet, because NEPA created no private right of action to enforce its provisions, litigants hoping to obtain judicial review of an agency's noncompliance with NEPA's provisions must rely on the Administrative Procedure Act as a vehicle to obtaining judicial review.³³

B. The Administrative Procedure Act (APA)

Section 702 of the APA enables persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain judicial recourse.³⁴ Courts have presumed a congressional intent in favor of judicial review under the APA where a statute does not expressly indicate APA review.³⁵ Indeed, courts presumed an intent to permit judicial review under the APA unless they were presented with "clear and convincing evidence" to the contrary.³⁶ Recently, however, courts have become more reluctant to allow judicial review under section 702 and have moved away from the Act's liberal standing requirements.³⁷

Three important factors limit the availability of judicial review under the APA. First, the APA sections governing judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."³⁸ Second, the APA applies only to actions by "federal agencies,"³⁹ a term

³² *Id.*

³³ The APA, however, is not an independent source of subject-matter jurisdiction. See *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977). Plaintiffs must also claim jurisdiction under one of the federal jurisdictional statutes, which for NEPA plaintiffs is typically the federal questions statute, 28 U.S.C. § 1331 (1988). MANDELKER, *supra* 13, § 4.03[1].

³⁴ 5 U.S.C. § 702.

³⁵ The Supreme Court has endorsed the presumption of judicial review under the APA for plaintiffs who fall within § 702. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967). See also *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981) (finding that NEPA's mandate that agencies comply with its provisions "to the fullest extent possible" means that implied congressional repeals of NEPA "should be found only in the rarest of circumstances"); *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1125 (D.C. Cir. 1971) (finding that § 104 "relieve[d] an agency of its NEPA duties only if other 'specific statutory obligations' clearly preclude[d] performance of those duties"). Cf. Stephen M. Macfarlane, Note, *Lujan v. National Wildlife Federation: Standing, the APA, and the Future of Environmental Litigation*, 54 ALB. L. REV. 863, 876-77 (1990) (noting that although the Supreme Court has recognized that the APA "embodies the basic presumption of judicial review" for plaintiffs within § 702, its interpretation of the scope of that provision "has varied over time").

³⁶ See Roger Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, C855 ALI-ABA 1, 28 (1993).

³⁷ *Id.* at 27-31.

³⁸ 5 U.S.C. § 701(a). Section 701 qualifies judicial review available under §§ 702-706. See WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 995 (8th ed. 1987).

³⁹ The statute defines federal agencies to include

the Supreme Court has held excludes review of Presidential actions.⁴⁰ Finally, the APA allows judicial review only of “final” agency action for which there are no other adequate legal remedies.⁴¹ Thus, agency actions that are “preliminary, procedural or intermediate” are not subject to judicial review.⁴²

C. The Time Line for Preparing an EIS

NEPA does not expressly mandate the timing of an agency’s preparation of an impact statement.⁴³ The Supreme Court attempted to resolve the timing problem, to some extent, by specifying that the agency’s report or recommendation on a proposal triggers the EIS requirement.⁴⁴ Courts then utilize one of the timing doctrines, such as ripeness or finality, to guide their decisions on whether to hear a case. Essentially, courts intervene only after an agency has completed its report or recommendation on a proposal. At this time, courts hear challenges to either the adequacy of the EIS or the agency’s failure to prepare an EIS.

1. *Proposal for Major Federal Action*

In *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*⁴⁵ (*SCRAP II*), the Supreme Court first imposed the proposal requirement as a trigger for NEPA application. After a hearing, the Interstate Commerce Commission (ICC) issued a report regarding a proposed rate increase by railroads. The Court held that the ICC should have prepared an impact statement after it had issued its report and not at the time of the hearing. The Court stated that “the time at which the agency must prepare the final ‘statement’ is the

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but . . . not . . . (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.

5 U.S.C. § 701(b)(1).

⁴⁰ The APA does not specifically exclude the President, although courts have read this exemption into the statute. The D.C. Circuit held that the APA’s definition of federal “agency” excluded the President. *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). The Supreme Court confirmed this exclusion in *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775-76 (1992). See also Carl Bretscher, *The President and Judicial Review under the Records Acts*, 60 GEO. WASH. L. REV. 1477, 1508 (1992) (critiquing *Armstrong v. Bush* and the “barriers to judicial review created by executive privilege, separation of powers, and ambiguous legislative intent”).

⁴¹ 5 U.S.C. § 704.

⁴² *Id.*

⁴³ NEPA requires an impact statement on all “proposals for legislation and other major Federal actions.” 42 U.S.C. § 4332(c).

⁴⁴ See *Aberdeen & Rockfish Ry. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 320 (1975) (*SCRAP II*).

⁴⁵ *Id.*

time at which it *makes a recommendation or report on a proposal* for federal action."⁴⁶

In attempting to define "proposal," the Supreme Court in *Andrus v. Sierra Club*⁴⁷ clarified that agency appropriation requests do not trigger the EIS requirement. In that case, the Office of Management and Budget (OMB) required an environmental agency to decrease its appropriation request. Because the OMB did not prepare an EIS to accompany the requirement, plaintiffs challenged the OMB's decision. The Court found, however, that requiring the OMB to prepare an EIS would be premature because one could not predict how the agency would respond to the budget cut and how its reaction, in turn, would affect the environment.⁴⁸ It held that "OMB's determination to cut the . . . budget is not a programmatic proposal, and therefore requiring OMB to include an . . . [impact statement] in its budgetary cuts would be premature."⁴⁹ The Court also relied on Congress' distinction between appropriations and legislation to hold that appropriation requests are not legislative proposals requiring an impact statement.⁵⁰

In *Kleppe v. Sierra Club*,⁵¹ the Supreme Court dealt with programmatic impact statements, whereby an agency prepares one EIS for an entire program consisting of multiple segments. The Court reviewed a challenge against the Department of the Interior for failure to prepare a *regional* EIS on its proposal to develop coal reserves on federal lands in the Northern Great Plains. The Department had prepared an impact statement on national coal development and it conceded that NEPA required site-specific impact statements. The Sierra Club argued that, in addition to these site-specific impact statements, the agency must provide a regional EIS to fully outline the foreseeable effects of the coal development project. The Supreme Court, however, ruled that the Department had not made any proposal for action at the regional level, but rather had only made proposals for actions at the national or local level.⁵² In attempting to define "proposal," the Court repudiated the district court's finding that a "contemplated" proposal satisfied the proposal requirement.⁵³ Thus, it held that a regionwide EIS was not necessary.⁵⁴

⁴⁶ *Id.* (emphasis added).

⁴⁷ 442 U.S. 347 (1979).

⁴⁸ *Id.* at 363.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 427 U.S. 390 (1976).

⁵² *Id.*

⁵³ *Id.* at 404.

⁵⁴ *Id.* at 398 ("Respondents can prevail only if there has been a report or recommendation on a proposal for major federal action with respect to the Northern Great Plains

In expanding on the timing of both the EIS process and its judicial review, the *Kleppe* Court attacked the appellate court's balancing approach. It found no basis for a balancing test in NEPA to determine the point at which an agency should begin an EIS when it formulates a plan for federal action. Instead, the Supreme Court reiterated its finding in *SCRAP II* that "the 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.'"⁵⁵ The Court disputed the notion that agencies need not comply with NEPA until the last minute and allayed concerns that the judiciary might involve itself prematurely in the NEPA process.⁵⁶ Indeed, the Court stressed that agencies should consider environmental factors during the process of drafting a recommendation or report on a proposal.⁵⁷ However, a court should not intervene until after the agency completes its recommendation: only at this point can a court fully assess the adequacy of the EIS or hear challenges to an agency's failure to comply with NEPA's mandates.⁵⁸

2. *Proposals for Legislation*

NEPA's EIS requirement also extends to proposals for legislation.⁵⁹ Defining "proposals for legislation" is a complicated task, frustrated by the paucity of decisions involving EISs on legislative proposals. In addition, the intricate nature of the legislative process makes identifying when an agency actually formulated a legislative

region. . . . [T]here has been none; instead, all proposals are for actions of either local or national scope.").

⁵⁵ *Id.* at 406 (quoting *SCRAP II*, 422 U.S. 289, 320 (1975)).

⁵⁶ In disputing the notion that agencies need not comply with NEPA until the last minute and in allaying concerns that the judiciary may involve itself prematurely in the NEPA process, the Court stated the following:

This 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. This section states that prior to preparing the impact statement the responsible official "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Thus, this 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.

Id. at 406 n.15 (emphasis added).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 42 U.S.C. § 4332(c).

proposal difficult.⁶⁰ Numerous agencies, as well as other bodies, participate in the legislative process, and a particular federal agency may play only a limited role.⁶¹ Courts thus face the question of whether an agency's participation in the development of legislation is a "proposal for legislation" requiring an impact statement. The CEQ regulations define "legislation" as a "bill or legislative proposal to Congress developed by or with the significant cooperation and support for a Federal agency."⁶² The test for "significant cooperation" is whether the proposal is "in fact predominantly that of the agency rather than another source."⁶³

Although *Kleppe* involved a proposal for major federal action, courts have extended its rule to cases concerning proposals for legislation. For example, in *Environmental Defense Fund, Inc. v. Alexander*,⁶⁴ the district court held that the Corps of Engineers' report to Congress, recommending continuation of a NEPA-approved waterway and preparation of a feasibility report, was not a proposal for legislation. An EIS was unnecessary because the "language of the report, as to future work, is tentative, preliminary, and of a general nature."⁶⁵ The report was merely a recommendation to investigate the feasibility of the project and, at most, it described plans contemplated by the Corps officials for additional work. The court based its ruling on *Kleppe's* holding that an EIS is unnecessary for merely contemplated plans.⁶⁶

In the past, most courts have enforced the requirement for impact statements on legislative proposals without waiting for the legislature to enact the proposal. For example, in *Atchison, Topeka & Santa Fe Railway Co. v. Callaway*,⁶⁷ the D.C. district court reviewed the Corps of Engineers' proposed legislation and final impact statement on a new lock and dam on the Mississippi River when plaintiffs challenged particular inadequacies in the final impact statement. The court rejected the Corps' argument that the issue was not justiciable because Congress had not yet enacted the proposed legislation.⁶⁸ The court noted NEPA precedent establishing judicial review of the adequacy of an EIS on proposals for major federal actions and stated that impact

⁶⁰ See MANDELKER, *supra* note 13, § 8.05[7], at 8-64 (noting that "[d]etermining when an agency has made a legislative proposal is difficult because congressional consideration of proposed legislation is not a neat process").

⁶¹ *Id.*

⁶² 40 C.F.R. § 1508.17 (1994).

⁶³ *Id.* See also *State v. Andrus*, 483 F. Supp. 255, 259 n.5 (D.N.D. 1980) (finding that the test for "significant cooperation" is satisfied by federal agency "leg work" for a legislative proposal).

⁶⁴ 501 F. Supp. 742 (N.D. Miss. 1980).

⁶⁵ *Id.* at 750.

⁶⁶ *Id.* at 750-51 (following *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)).

⁶⁷ 431 F. Supp. 722 (D.D.C. 1977).

⁶⁸ *Id.* at 726-27.

statements on legislative proposals were not distinguishable.⁶⁹ The court noted that the result would be the same for a challenge to an agency's failure to prepare an impact statement on a legislative proposal.⁷⁰

Thus, the operative language—that courts can review agency failure to comply with NEPA after the agency completes its recommendation or report on a proposal—also applies to legislative proposals. Furthermore, precedent establishes that courts need not wait for Congress to enact the proposal in order to review the agency's independent statutory obligations during the proposal process.

3. *The Statutory Requirement of Finality and the Timing Doctrines*

a. *Finality in Non-NEPA Cases*

In addition to focusing on the "proposal" requirement, a court must also determine whether the action before it is ripe for review. The ripeness doctrine serves the purpose of protecting agencies from unnecessary or premature judicial review⁷¹ and is related to the APA requirement of "final agency action."⁷²

The APA does not define "finality." In creating a finality doctrine, courts have followed a pragmatic approach introduced in the Supreme Court's leading ripeness case, *Abbott Laboratories v. Gardner*.⁷³ While determining the ripeness issue, the Court addressed the issue of finality. In reviewing a pre-enforcement challenge to a Food and

⁶⁹ *Id.* at 726.

⁷⁰ *Id.* at 728. *Cf.* *Wingfield v. Office of the Mgmt. and Budget*, 9 Env't Rep. Cas. 1961 (D.D.C. 1977) (relying on separation of powers problems to hold that NEPA did not confer a private right of action to enforce the legislative EIS requirement). *See also* discussion *infra* notes 221-28 and accompanying text.

⁷¹ *See* *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967) (describing the rationale of the ripeness doctrine).

⁷² *See* MANDELKER, *supra* note 13, § 4.08[2], at 4-47. The APA finality requirement is distinct, although related, to the timing doctrines, such as ripeness and exhaustion. Although this Note addresses mainly the issue of finality, it is difficult to separate the categories because the courts often confuse these issues in their decisions. *See, e.g.* *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987) (three separate opinions dismissing the action based on exhaustion, finality, and ripeness). *Cf.* *Beers, supra* note 36, at 35 (noting that "[a]lthough the requirement of 'finality' is at least akin to ripeness, it has recently been dealt with as a separate concept," and citing *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), as an example).

The finality determination precedes consideration of either ripeness or exhaustion, because it is a jurisdictional requirement that a litigant must meet in order to state a claim under the APA. *See* E. Gates Garrity-Rokous, Note, *Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action*, 101 YALE L.J. 643, 646 n.31 (1991). In addition, finality informs the ripeness inquiry since it is "an essential precondition to ripeness." *Id.* The ripeness inquiry involves a two-step test: whether the issue is fit for review and whether the denial of review would bring undue hardship to the litigant. The fitness of the issue test focuses on whether the agency action is final. *Id.*

⁷³ 387 U.S. 136 (1967).

Drug Administration regulation on drug labeling, the Court found that the challenge was sufficiently final because the regulation had a "direct effect on the day-to-day business" of the petitioning drug manufacturers.⁷⁴ Following this decision, courts have held that an agency decision must be a "definitive" determination of the rights or obligations of the complaining party in order for it to be final under the APA.⁷⁵

Franklin v. Massachusetts,⁷⁶ the most recent non-NEPA Supreme Court decision addressing the APA's finality requirement, expanded the *Abbott Laboratories* analysis. Residents of Massachusetts challenged the Secretary of Commerce's method of calculating the 1990 decennial census, which deprived them of a seat in Congress. The Secretary of Commerce altered the Massachusetts population count by deeming 922,819 overseas military personnel residents of the state of Washington because it was reported in their files as their "home of record." This action eliminated one Representative from Massachusetts.⁷⁷ Plaintiffs claimed that the Secretary of Commerce's method of computing the census was arbitrary and capricious under the APA.

The Supreme Court addressed the issue of whether the Secretary of Commerce's action satisfied the final agency action requirement of the APA.⁷⁸ It first identified the point at which the challenged action was final and then asked whether the final action was that of an agency, as defined by the APA. It concluded that the final agency action complained of was that of the President, and presidential actions are not reviewable under the APA.⁷⁹

The *Franklin* Court articulated the following test for finality: "[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties."⁸⁰ In determining whether the plaintiffs satisfied this direct effects finality test, the Court focused on the Presi-

⁷⁴ *Id.* at 152.

⁷⁵ See Garrity-Rokous, *supra* note 72, at 644. The leading case on final agency action is a non-NEPA Supreme Court case, *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232 (1980). The Supreme Court relied on its finality analysis in *Abbott Laboratories*, 387 U.S. 136 (1967), to hold that the FTC's issuance of a complaint was not final since it had no significant "legal force or practical effect upon Socal's daily business." *Id.* at 243. The Court articulated the test for finality as whether the agency's action was "definitive." *Id.* The courts use the "definitive" test to guarantee that the agency has completed its decision-making process, thereby avoiding unnecessary litigation over a tentative or informal ruling. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 151 (1967).

⁷⁶ 112 S. Ct. 2767 (1992).

⁷⁷ *Id.* at 2770.

⁷⁸ *Id.* at 2773.

⁷⁹ *Id.* The Supreme Court developed this test from its rule in *Abbott Laboratories*, 387 U.S. at 152 (looking at whether the agency impact has a "direct effect on . . . day-to-day business").

⁸⁰ 112 S. Ct. at 2773.

dent's ability to modify the census report. Because the President could change the report or instruct Congress to reform the census before submitting the proposal to Congress, the Court characterized the decennial report as "a moving target."⁸¹ Therefore, the Secretary of Commerce's census report to the President was similar to a tentative report or a report of a subordinate official.⁸² The Court concluded that "the action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President."⁸³

Under this reasoning, in order for the plaintiffs to satisfy the finality requirement, they would have to challenge the President's action of submitting the report to Congress, because this was the action that directly affected them. The plaintiffs were precluded from challenging this action, however, because the APA allows judicial review of agency but not presidential actions.⁸⁴ Hence, the Supreme Court dismissed the case, holding that the issue was not justiciable under the APA.⁸⁵

b. *Finality in NEPA Cases*

The finality doctrine in NEPA cases is less clearly defined than in non-NEPA cases. Courts rely on both the APA provision and the judicially created ripeness doctrine when determining the appropriate time to hear a NEPA claim.⁸⁶ In fact, justiciability depends on how the particular court defines the challenged action before them. Where the court defines the challenged action as an agency failure to comply with NEPA, then judicial review may be granted and the finality requirement is satisfied. However, where the court focuses on the underlying action, such as a mining project for which the agency has failed to prepare an EIS, then judicial review is much more problematic.

For example, in *Environmental Defense Fund, Inc. v. Johnson*,⁸⁷ the Corps of Engineers prepared a report on water needs in the northeastern states and recommended an "early action" water supply project that would draw water from the Hudson River. The Corps

⁸¹ *Id.* at 2774. The statute at issue did not require the President to transmit the Secretary of Commerce's report to Congress. *Id.*

⁸² The Supreme Court stated that agency action is not final if it is "the ruling of a subordinate official" or "tentative." *Id.* at 2773 (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 151 (1967)).

⁸³ *Id.*

⁸⁴ *Id.* at 2776. See *supra* notes 39, 40.

⁸⁵ 112 S. Ct. at 2776.

⁸⁶ See MANDELKER, *supra* note 13, §4.08[2], at 4-47.

⁸⁷ 629 F.2d 239 (2d Cir. 1980).

prepared a draft impact statement on the Hudson River project but did not intend to prepare a final statement until after completion of the study. The court applied the APA finality doctrine and the ripeness doctrine to hold that the report was not a final agency action requiring an EIS. Thus, in this case, the court focused on the actual report in determining finality rather than focusing on the agency's failure to comply with NEPA.

In another case, *Foundation on Economic Trends v. Lyng*,⁸⁸ the court also focused on the underlying action in determining whether the finality requirement was satisfied. The D.C. Circuit held that environmental organizations did not have standing to challenge the Department of Agriculture's failure to prepare an EIS on its germplasm preservation program.⁸⁹ The court found that the agency's program was not an "identifiable action or event" triggering the agency's obligation to prepare an EIS.⁹⁰ Stating that the plaintiffs had failed to identify any final agency action, the court held that "plaintiffs seeking judicial review under section 702 of the APA for an alleged violation of NEPA and claiming only an 'informational injury' must show the particular agency action—in addition to the agency's refusal to prepare an impact statement—that allegedly triggered the violation and thereby caused the injury."⁹¹

The courts in *Foundation on Economic Trends* and *Johnson* focused on whether the particular agency program or report satisfied the finality requirement. Other courts, however, focus on the finality of the agency's decision not to prepare an EIS. Courts focusing on the agency's decision are more likely to find the finality requirement satisfied. For example, in *Township of Parsippany-Troy Hills v. Costle*,⁹² the court found the plaintiff's challenge to the EPA's failure to prepare an EIS on the three-phased wastewater treatment project ripe for review. Although the project was being re-evaluated, the court noted that the agency's decision not to prepare an EIS was final.⁹³

Some courts have recognized the potential dangers of applying a strict finality analysis in the NEPA realm. Judicial review may be unnecessarily delayed if courts hold that an agency action is not final

⁸⁸ 943 F.2d 79 (D.C. Cir. 1991).

⁸⁹ *Id.*

⁹⁰ *Id.* at 85. The court based this conclusion on the Supreme Court's admonition in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), that courts should not review an agency's day-to-day operations. 943 F.2d at 86.

⁹¹ 943 F.2d at 87 (emphasis added).

⁹² 503 F. Supp. 314 (D.N.J. 1979), *aff'd*, 639 F.2d 776 (3d Cir. 1980).

⁹³ Noting that the action before it was not an APA action subject to limited review of final agency decisions, the court stated that "NEPA is, by its own terms, addressed to agency action which is non-final." *Id.* at 319.

until the permit decision is made or until the project is completed.⁹⁴ As a result, some courts have recognized the need for prompt judicial review and have held final an interim agency action if the agency is committed to a course of action that may have adverse environmental consequences.⁹⁵

The finality doctrine in NEPA cases needs clarification. Courts will continue to reach differing results if they do not agree on the appropriate action, either the agency decision not to prepare an EIS or the underlying proposal, by which to judge finality.

D. Application of *Franklin's* Direct Effects Finality Test in NEPA Cases

The application of the *Franklin* finality test in NEPA cases has significant consequences for the private enforcement of NEPA's procedural requirements. According to *Franklin*, unless plaintiffs establish that the agency actions directly affect them, they will not be able to gain judicial review of their complaint under the APA.⁹⁶ Unfortunately, the inconsistent applications of *Franklin* in the lower courts, in both NEPA and non-NEPA⁹⁷ cases, leaves litigants without guidance.

⁹⁴ See *Foundation of Economic Trends v. Lyng*, 943 F.2d 79, 89 (D.C. Cir. 1991) (Buckley, J., dissenting) (noting that the majority's approach of "withholding judicial review until there is final agency approval of the proposed action would effectively eliminate judicial oversight of NEPA's procedural requirements").

⁹⁵ See *MANDELKER*, *supra* note 13, §4.08[2], at 4-49. See, e.g., *Colorado Envtl. Coalition v. Lujan*, 803 F. Supp. 364 (D. Colo. 1992) (holding final the recommendation of the agency in the process of wilderness designation and requiring an EIS).

⁹⁶ 112 S. Ct. 2767, 2776 (1992).

⁹⁷ The lower courts' inconsistent application of *Franklin* in non-NEPA cases resulted in Supreme Court review of whether the Defense Base Closure and Realignment Commission's act in recommending bases for closure to the President is a final decision reviewable under the APA. In *Dalton v. Specter*, 114 S. Ct. 2771 (1994), the Supreme Court held that the Commission's action in recommending bases for closure was not final since the President had the ultimate decision on closure. This holding reversed the Third Circuit's ruling in *Specter v. Garrett*, 995 F.2d 404 (3d Cir. 1993). The Supreme Court's ruling in *Specter*, however, proved inconclusive with respect to *Franklin's* application in the NEPA realm, such as in the *Public Citizen* case. The *Specter* holding merely states that courts may not review the President's discretion in accepting or rejecting a recommended base-closing list, and an aggrieved party may not enjoin closure of a base due to an alleged error in the President's decisionmaking process. 114 S. Ct. at 2278. Justice Blackmun in his concurrence in *Specter* noted that the majority's decision would not foreclose judicial review of presidential action if there had been a claim that the President had not complied with his statutory duty. *Id.* (Blackmun, J., concurring). In addition, the majority decision in *Specter* would not foreclose judicial review of a procedural violation, such as a decision to close the Commission's hearing to the public, because such a decision affects the "rights of interested parties independent of any ultimate presidential review." *Id.* at 1279. This latter situation is analogous to an agency's failure to comply with NEPA's procedural mandates, which also affects the rights of interested parties regardless of the President's ultimate decision on the merits. To the extent that the Supreme Court in *Specter* did not address this situation, the majority decision fails to clarify the ambiguity resulting from *Franklin's* application in the NEPA realm.

This Note builds three competing models, each of which stems from an opinion in *Public Citizen*. These models detail a unique analytical approach for the method by which courts define the agency action and determine finality for purposes of providing APA review in NEPA cases after *Franklin*.

1. Model 1: Distinguish *Franklin*

According to Model 1, the court defines the agency action for purposes of APA review as the agency's decision not to prepare an EIS statement. Furthermore, the agency's action is final after it issues its report or recommendation. Litigants can seek judicial review at this time and need not wait for the recommendation to take effect. Judge Richey's district court opinion in *Public Citizen v. Office of the United States Trade Representative*⁹⁸ exemplifies the first model. In 1991, Public Citizen, Friends of the Earth, and Sierra Club voiced their concerns that the office of the United States Trade Representative (USTR) was not taking environmental consequences into consideration during negotiations of NAFTA and the General Agreement on Tariffs and Trade (GATT). The three public interest organizations filed suit against the USTR to enforce NEPA compliance after the USTR indicated its intent not to prepare an EIS on the proposal for NAFTA.⁹⁹ The district court dismissed the case on the ground that the dispute was not ripe because the agreements had not yet been concluded.¹⁰⁰ The D.C. Circuit affirmed the dismissal.¹⁰¹

Upon conclusion of the NAFTA negotiations, Public Citizen filed another suit to compel the USTR to produce an EIS on the final draft of the NAFTA agreement. District Court Judge Richey found in favor of the public interest organizations and ordered the USTR to prepare an EIS "with all deliberate speed."¹⁰² He concluded that "the plain language of the NEPA makes it a foregone conclusion that the [USTR] must prepare an EIS on the NAFTA."¹⁰³ In addressing the USTR's claims that the court lacked jurisdiction, Judge Richey examined the APA's requirement of final agency action. He noted that

⁹⁸ 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.2d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

⁹⁹ *Public Citizen v. Office of the U.S. Trade Representative*, 782 F. Supp. 139 (D.D.C.) (*Public Citizen I*), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

¹⁰⁰ *Id.* at 142-43.

¹⁰¹ 970 F.2d 916 (D.C. Cir. 1992). Note, however, that the court of appeals dismissed the case due to a lack of any identifiable final agency action at that point in the NAFTA negotiations. The court never gave any reason to believe that this finality requirement would not be met in the future or that the court could never review the USTR's failure to comply with NEPA when it prepared a legislative proposal regarding a trade agreement. See *Public Citizen Cert. Petition*, *supra* note 8, at 8.

¹⁰² 822 F. Supp. at 30.

¹⁰³ *Id.* at 29.

unlike the previous case brought in 1991, the NAFTA agreement had since been finalized.¹⁰⁴

In response to the USTR's claim that the court lacked jurisdiction because the President negotiated NAFTA, Judge Richey found that NAFTA was "in substantial part, a result of the work of the Defendant [USTR]" and described the USTR's role in conducting international trade negotiations.¹⁰⁵ Judge Richey also rejected the USTR's principal point that because the President submits the NAFTA proposal to Congress, review of the failure to prepare an EIS is barred by the APA.¹⁰⁶ In making this argument, the USTR relied principally on *Franklin v. Massachusetts*.¹⁰⁷ Judge Richey, however, distinguished *Franklin* from the NAFTA case:

[T]he NAFTA is in stark contrast to the census report in *Franklin* because the NAFTA is a complete and, most importantly, a final product that will not be changed before submission to Congress. The NAFTA that was negotiated and signed by the Trade Representative is the same document that shall be submitted to Congress and which is the subject of this suit.¹⁰⁸

Judge Richey concluded that the President's authority not to submit NAFTA to Congress does not bar APA jurisdiction.¹⁰⁹ In support of this contention, Judge Richey indicated that the clear statutory language of NEPA requires an EIS on all legislative proposals that significantly affect the environment.¹¹⁰ Furthermore, Judge Richey found that the agency should prepare an EIS when it has completed its legislative proposal.¹¹¹ He cited *Trustees for Alaska v. Hodel*¹¹² for the proposition that the submission of the legislative proposal is not a prerequisite to the preparation of an EIS; to hold otherwise would likely result in the aggrieved party losing its right to judicial review, because after Congress acts on a proposal the issue is moot.¹¹³ Finally, Judge Richey held both that judicial review pursuant to the APA in this case was not a violation of the separation of powers and that the plaintiffs had standing because they had made the requisite allegation of injury as a consequence of NAFTA.¹¹⁴

¹⁰⁴ *Id.* at 24. The United States, Canada, and Mexico had signed the agreement and, in light of the fast track procedure, the agreement could not be modified after it had been sent to Congress. See *supra* note 8.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Id.* at 25-26.

¹⁰⁷ 112 S. Ct. 2767 (1992).

¹⁰⁸ 822 F. Supp. at 26.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 806 F.2d 1378 (9th Cir. 1986).

¹¹³ 822 F. Supp. at 26.

¹¹⁴ *Id.* See separation of powers discussion, *id.* at 26-27; standing discussion, *id.* at 27-29. Since the appellate court did not reach the standing and separation of powers issues be-

A recent Colorado district court decision, *Colorado Environmental Coalition v. Lujan*,¹¹⁵ also applied this analytical model. In *Lujan*, environmental groups challenged the Secretary of the Interior's decision to remove five wilderness study areas from wilderness recommendation without preparing a supplemental EIS (or SEIS).¹¹⁶ The Secretary, relying on *Franklin*, argued that no final agency action exists until the President transmits his recommendation for wilderness designation to Congress. The Court disagreed, holding that the "Secretary's decision not to prepare a SEIS pursuant to NEPA is final agency action subject to review under the APA."¹¹⁷

Under Model 1, *Franklin* poses little concern for the review of an agency's failure to prepare an EIS on a legislative proposal. Courts can distinguish *Franklin* by defining the challenged action as the agency's decision not to prepare an EIS rather than focusing on the underlying action.

2. Model 2: *Franklin* Limits Reviewability of EISs on Legislative Proposals

According to Model 2, a court defines the agency action for purposes of APA review as the underlying action, or the specific action to which the proposal speaks. Furthermore, the agency's action is final only after the agency's recommendation on the proposal takes effect or the President submits it to Congress. Until then, litigants challenging an agency's failure to prepare an EIS on a legislative proposal will not gain judicial review under the APA. The D.C. Circuit court's analysis in *Public Citizen*¹¹⁸ epitomizes the second analytical model. Relying on *Franklin*, the D.C. Circuit adopted the government's position that "NAFTA does not constitute 'final agency action' within the

cause it concluded that the court lacked jurisdiction, and because this Note focuses on the finality issue, Judge Richey's disposal of these issues in favor of plaintiffs is not discussed in detail. However, see *infra* part II.C for a discussion of why the separation of powers concerns do not necessitate a total elimination of judicial review. Furthermore, see *infra* part II.D for a discussion of how the importation of *Franklin* in the NEPA realm upsets the balance of power in favor of the Executive.

¹¹⁵ 803 F. Supp. 364 (D. Colo. 1992).

¹¹⁶ After an agency has prepared an EIS, it must prepare a supplemental EIS if the agency makes substantial changes in the proposed action that affect the environment. 40 C.F.R. § 1502.9(c)(1) (1994).

¹¹⁷ 803 F. Supp. at 370. The court also rejected a separation of powers argument finding that a supplemental EIS prepared by the Secretary of the Interior would not interfere with the executive and legislative branches of government. See *id.* ("Just as Congress does not violate separation of powers by structuring the procedural manner in which the executive branch shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.").

¹¹⁸ 5 F.3d 549 (D.C. Cir. 1993).

meaning of the APA.”¹¹⁹ Refusing to address the merits of the case, and leaving the fate of NAFTA in the “hands of the political branches,” the court stated that the “judiciary has no role to play.”¹²⁰

In deciding whether the challenged action is reviewable under the APA, the D.C. Circuit adopted the *Franklin* Court’s finality test. The D.C. Circuit claimed that regardless of USTR’s role in negotiating and finalizing NAFTA, the agreement would have no effect on Public Citizen’s members “unless and until the President submits it to Congress.”¹²¹ The court indicated that the proposal must be submitted to Congress prior to judicial review because “an agency’s failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk.”¹²² The court further noted that NAFTA is similar to the census report in *Franklin* in that it, too, is a “moving target” because the President does not have to submit the proposal directly to Congress without further modification.¹²³

Finally, the court answered the plaintiffs’ allegation that the strict application of the *Franklin* direct effects finality test would result in the “death knell” of the EIS on legislative proposals.¹²⁴ The majority decision limited the application of the direct effects test to “those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.”¹²⁵ In essence, the court distinguished situations in which the agency submits the legislation to Congress from those in which the President submits the legislation. The former would be subject to judicial review; the latter would not.

In sum, Model 2, as illustrated by *Franklin*, limits the reviewability of EISs on legislative proposals by defining the challenged action as the underlying action and holding that review is not available until Congress acts on the proposal or the President submits it to Congress.

119 *Id.* at 551.

120 *Id.* at 553.

121 *Id.* at 551. This statement, although logical on its face, inherently conflicts with the purpose of NEPA’s EIS requirement and with cases that mandate the issuance of an EIS before the proposal is submitted to Congress, allowing aggrieved parties to seek judicial review before the issue is moot. See discussion *infra* part II.A.2.

122 5 F.3d at 552 (citing *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991)).

123 *Id.*

124 *Id.*

125 *Id.*

3. *Model 3: Franklin Forecloses Judicial Review of an Agency's Failure to Prepare an EIS on a Legislative Proposal*

Similar to Model 2 courts, a court adhering to a Model 3 approach defines the agency action for purposes of APA review as the underlying action of the proposal. However, according to this model, litigants seeking review of an agency's failure to prepare an EIS on a legislative proposal will never meet the APA finality requirement. Judge Randolph's concurring opinion in *Public Citizen* characterizes this model.¹²⁶ Judge Randolph stated that "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."¹²⁷ He emphasized that *Franklin* held not only that the President is outside the APA's definition of agency, but also that the "action" cannot be considered "final" under the APA unless it will "directly affect the parties."¹²⁸ He then stated that "it is difficult to see how the act of proposing legislation could generate direct effects on parties, or anyone else for that matter."¹²⁹

Interestingly, Judge Randolph, although admitting that this is a "troublesome question,"¹³⁰ refused to say whether the act of proposing legislation constitutes final agency action under the APA. He also admitted that there is an inherent conflict in applying *Franklin's* finality test to NEPA cases: "judicial review under the APA demands 'final agency action' whereas the duty to prepare an impact statement arises earlier."¹³¹ Recognizing this conflict, Judge Randolph noted that *Franklin's* direct effects test as applied in NEPA cases will have to be reconciled with *Kleppe*, which states that the time for judicial review is when someone challenges an agency's failure to prepare an EIS.¹³² Yet, he failed to reconcile the two cases. Although he recognized the dilemma arising within NEPA cases, he was troubled by the majority's inclination to put limits on the *Franklin* test and offered only an unattractive alternative—that the "legislative proposal" would never meet the direct effects test.¹³³

126 *Id.* at 553 (Randolph, J., concurring).

127 *Id.* at 554.

128 *Id.* at 553 (quoting *Franklin*, 112 S. Ct. at 2773).

129 *Id.*

130 *Id.* at 554.

131 *Id.*

132 427 U.S. 390 (1976).

133 5 F.3d at 554.

II ANALYSIS

In this Part, this Note argues that courts should not apply the APA finality requirement in the manner articulated in *Franklin* to NEPA cases. Part II.A argues that the purpose and legislative history of NEPA, the CEQ regulations and the legislative history of the APA strongly weigh in favor of a presumption of review. Part II.B demonstrates that the APA's "final agency action" requirement does not pose an obstacle to the courts' review of an agency's independent statutory obligations. Part II.C discusses the separation of powers issues and argues that they do not require the elimination of all judicial review. Finally, Part II.D proposes the appropriate model by which courts should define the challenged action as the agency failure to abide by NEPA. Additionally, courts should define the agency action as "final" for purposes of APA review after it has completed its recommendation or report on a proposal for legislation. This model best serves the courts' interest of maintaining the appropriate balance of power among the branches.

A. Strong Presumption of Judicial Review

1. NEPA's Legislative History

In determining whether a statute specifically precludes judicial review, courts examine the language, legislative history, and objectives of the statute.¹³⁴ Unfortunately, the language of NEPA does not speak to judicial review of agency compliance with its terms.¹³⁵ Similarly, the legislative history of NEPA provides little guidance. Congress gave little thought to the impact statement requirement, which was added after the introduction of the bill in Congress.¹³⁶ Because the EIS requirement was an afterthought, there is no legislative history regarding the role of the courts as NEPA enforcers.¹³⁷ Despite congressional neglect in addressing the role of the judiciary in enforcing NEPA, the large body of NEPA case law demonstrates the significant role that courts have assumed in policing agency compliance with NEPA's mandates.¹³⁸

¹³⁴ *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

¹³⁵ *See Environmental Defense Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 470 F.2d 289, 299 (8th Cir. 1972) (noting that NEPA is silent on the issue of judicial review).

¹³⁶ *See MANDELKER, supra* note 13, § 2.02, at 2-3.

¹³⁷ However, in *Atchison, Topeka & S.F. Ry. v. Callaway*, the court outlined NEPA precedent establishing judicial review of EISs on proposals for major federal action and stated that there were no reasons to distinguish impact statements on legislative proposals. 431 F. Supp. 722, 725-27 (D.C. Cir. 1977).

¹³⁸ Federal courts have held that judicial review of agency decisions under NEPA is implied. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy*

2. NEPA's Purpose

NEPA's objectives strongly support the proposition that Congress did not intend to preclude judicial review of agency compliance with its statutory mandates. Congress intended federal agencies to consider environmental factors during their decisionmaking process.¹³⁹ The specificity of the actual process by which agencies should factor in environmental considerations speaks to the importance of ensuring agency compliance with the procedure. Without judicial review or some other enforcement mechanism, there is little hope that agencies would comply with what one commentator heralded as the "environmental bill of rights."¹⁴⁰

Prior to NEPA, the majority of federal legislation was "mission-oriented" and left environmental considerations "systematically under represented."¹⁴¹ Congress intended the Act to "provide all agencies . . . with a legislative mandate and a responsibility to consider the consequences of their actions on the environment."¹⁴² Congress devised NEPA in order to guarantee that activities that would have a significant effect on the environment would "proceed only after an ecological analysis and projection of probable effects."¹⁴³

Thus, Congress had a two-fold purpose in drafting the EIS requirement: to guarantee that agencies consider the environmental consequences of their actions and to require them to disseminate the knowledge of these consequences to the public.¹⁴⁴ Thus, the function of the EIS has been described as:

Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) ("NEPA . . . creates judicially enforceable duties").

¹³⁹ 42 U.S.C. §§ 4321, 4331(a).

¹⁴⁰ Evan H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTG. L. REV. 230, 230 (1970).

¹⁴¹ See MANDELKER, *supra* note 13, § 1.02, at 1-3 (quoting A. Dan Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 658 (1972)).

¹⁴² *National Environmental Policy Act: Hearings Before the Senate Comm. on Interior and Insular Affairs on § 1075, § 237 and § 1752*, 91st Cong., 1st Sess. 14 (1969) [hereinafter *Hearings*]. Congress specifically prescribed national environmental goals so that "[n]o agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." See *id.* at 206.

¹⁴³ See MANDELKER, *supra* note 13, § 1.02, at 1-4 (quoting the Congressional White Paper on a National Policy for the Environment, 90th Cong., 2d Sess. 18 (Comm. Print 1968), which was the seed for NEPA's EIS provision).

¹⁴⁴ The Supreme Court described the two purposes of NEPA's EIS requirement as follows:

It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). See also Izaak Walton League of Am. v. Marsh, 655 F.2d 346, 365 (D.C. Cir.), *cert. denied*, 454 U.S. 1092

permit[ting] the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard. . . . [I]t serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project.¹⁴⁵

Furthermore, Congress' objective in light of the EIS is to guarantee that the agencies consider the environment before they make a final decision.¹⁴⁶ The CEQ regulations further this purpose by specifying that the agency must start working on the EIS as soon as it begins working on a proposal.¹⁴⁷ In general, the CEQ regulations state that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."¹⁴⁸ Moreover, the CEQ regulations note that "[t]he statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made."¹⁴⁹

The timing of the EIS in the decisionmaking process is crucial. Decisionmakers must consider the environmental effects of their options early to allow them to choose wisely among options and benefit from the environmental assessment. Furthermore, the EIS affords the general public an opportunity to remain informed of the agency's actions and to involve itself in the decisionmaking process.¹⁵⁰ In order to accomplish this purpose, however, the public needs the teeth of judicial review to enforce an agency's failure to prepare an EIS when

(1981) (noting that the EIS requirement on legislative proposals "in part . . . ensure[s] that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels").

¹⁴⁵ *Silva v. Lynn*, 482 F.2d 1282, 1294 (1st Cir. 1973).

¹⁴⁶ Even Judge Randolph noted in *Public Citizen* that the "main objective of an impact statement is to ensure that the decisionmaker considers environmental effects prior to taking action." 5 F.3d 549, 554 (D.C. Cir. 1993).

¹⁴⁷ The Supreme Court stated in *Andrus v. Sierra Club* that "CEQ's interpretation of NEPA is entitled to substantial deference." 442 U.S. 347, 358 (1979). See Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843 (1980). Courts often adopt CEQ's language in NEPA cases. For example, in *Scientists' Inst. for Pub. Infor., Inc. v. Atomic Energy Comm'n*, the court noted that "the basic thrust of NEPA is to require consideration of environmental effects of proposed agency action long enough before that action is taken so that important agency decisions can meaningfully reflect environmental concerns." 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973).

¹⁴⁸ 40 C.F.R. § 1501.2 (1994).

¹⁴⁹ *Id.* § 1502.5.

¹⁵⁰ *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 365 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981) ("NEPA establishes the environmental impact statement requirement for proposals for legislation in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels.").

appropriate. Early judicial enforcement of the statute best realizes the intent of the law.¹⁵¹ By flagging an agency's failure to comply with NEPA at an early stage, the courts can encourage the agency to consider the environmental consequences of its actions and to keep the public informed.

3. *Legislative History of the APA*

In light of the absence of an express preclusion of judicial review in NEPA, there is a strong presumption of judicial review under the APA.¹⁵² In recommending the enactment of the APA, the 1945 House and Senate Judiciary Committees stated that a statute will very rarely withhold judicial review and to do so the statute "must upon its face give clear and convincing evidence of an intent to withhold it."¹⁵³ Indeed, the Supreme Court adopted the Committee's remarks in *Abbott Laboratories v. Gardner*.¹⁵⁴ The Court stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁵⁵

The House Judiciary Committee emphasized that Congress' failure to write judicial review into a particular statute does not translate into congressional intent to withhold review.¹⁵⁶ In fact, when Congress has wanted to preclude judicial review of NEPA claims, it has done so through specific statutory exemptions. For example, the Defense Authorization Amendments Base Closure and Realignment Act of 1990¹⁵⁷ expressly exempts specific actions of the Secretary and the Commission from NEPA.¹⁵⁸

This clear statutory exemption fits the APA framework: there is a strong presumption of judicial review unless a statute precludes review or commits the action to agency discretion by law.¹⁵⁹ Congress intended that the first exception, statutory preclusion, rarely would be found.¹⁶⁰ Congress did not intend its statutes to be "merely advi-

¹⁵¹ Although the intent of law is best carried out by a consideration of the environmental impact at the beginning of the project, the agency should also gauge the environmental consequences at each stage as planning of the project progresses. See 2 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW §9.02, at 9-102 (1992).

¹⁵² See discussion *supra* part II.A.1.

¹⁵³ *Hearings, supra* note 142, at 275.

¹⁵⁴ 387 U.S. 136 (1967).

¹⁵⁵ *Id.* at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)).

¹⁵⁶ See *Hearings, supra* note 142, at 275.

¹⁵⁷ 10 U.S.C. § 2687 (1988).

¹⁵⁸ See also Department of Defense Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1847-48 (1982) (NEPA exemption regarding MX missile basing system).

¹⁵⁹ 5 U.S.C. § 701.

¹⁶⁰ See *Hearings, supra* note 142, at 275 ("It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.").

sory.”¹⁶¹ Without judicial review, statutes would “be blank checks drawn to the credit of some administrative officer or board.”¹⁶² Similarly, the courts narrowly read the APA’s limitation on judicial review of matters committed to agency discretion, finding it inapplicable to questions of law.¹⁶³

The strong presumption of judicial review under the APA codified the liberal principles of judicial review prior to the APA. As early as *Marbury v. Madison*,¹⁶⁴ the Supreme Court established that an aggrieved party could seek remedy through a writ of mandamus to compel compliance with statutory mandates. Chief Justice Marshall emphasized that one of the first duties of government is to afford every individual the protection of the laws whenever she is injured.¹⁶⁵ Prior to the APA, courts often reviewed claims of agencies exceeding their statutory authority.¹⁶⁶ Thus, without a clear indication from Congress, and in light of the NEPA statutory scheme and objectives, there is little reason to believe that an implied preclusion of judicial review of an agency’s independent statutory obligations exists.¹⁶⁷

Many commentators have applauded this presumption of review. For example, Professor Jaffe notes that “judicial review is the rule. . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest.”¹⁶⁸ The overall presumption of judicial review under the APA was intended to bolster a court’s aggressive review of an agency’s actions. This kind of aggressive review maintains people’s faith in administrative agencies.¹⁶⁹ In addition, the

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (holding that the committed to agency discretion exception is narrow and “applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply’” (quoting *Overton Park v. Volpe*, 401 U.S. 402, 410 (1971))). The legislative history of the APA supports the Chaney holding. See S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945) (If “statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review” but “where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.”).

¹⁶⁴ 5 U.S. (1 Cranch) 137, 163-65 (1803).

¹⁶⁵ *Id.* at 163.

¹⁶⁶ See, e.g., *Stark v. Wickard*, 321 U.S. 288 (1944) (holding producers of milk had standing to sue the Secretary of Agriculture to enjoin Secretary from carrying out regulations he had promulgated); *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (reviewing postmaster general’s detention of mail without statutory authority).

¹⁶⁷ See *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (refusing to find an implied preclusion of judicial review since the Secretary of Labor failed to show with “clear and convincing evidence” that Congress intended to prohibit all judicial review).

¹⁶⁸ Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 432 (1958).

¹⁶⁹ See LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a

strong presumption stands as a guarantee that statutory mandates will not go unnoticed.¹⁷⁰

B. The APA's Final Agency Action Requirement Is Not an Obstacle to Gaining Judicial Review of an Agency's Independent Statutory Obligations

Section 704 of the APA requires "final agency action for which there is no other adequate remedy in court" as a prerequisite to gaining judicial review.¹⁷¹ The legislative history of the APA explains the meaning of this language and the purposes of the Act's finality requirement.¹⁷² Additionally, it supports the proposition that the APA's final agency action requirement permits judicial review of an agency's compliance with its independent statutory obligations, regardless of whether the President plays a role in the final decisionmaking process.

One rationale for the finality doctrine is "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."¹⁷³ The Court in *Franklin* mimicked this language when it articulated the "core question" as "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."¹⁷⁴

However, *Franklin*'s finality test is stricter than that intended by Congress when it designed the APA. Indeed, Congress viewed the APA's finality restriction to be a "mild" one, primarily designed to preclude judicial review of *preliminary* agency decisions.¹⁷⁵ The Senate Judiciary Committee Notes on the APA describe how the finality requirement was "designed . . . to negate any intention to make reviewable merely preliminary or procedural orders."¹⁷⁶ In addition, section 704 states that preliminary or intermediate agency actions and rulings are subject to judicial review upon review of the final agency action.¹⁷⁷

system of administrative power which purports to be legitimate, or legally valid."). See generally Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525 (discussing arguments supporting aggressive judicial review of agency action).

¹⁷⁰ For example, Professor Schwartz notes that "[t]he responsibility of enforcing the limits of statutory grants of authority is a judicial function. . . . Without judicial review, statutory limits would be naught but empty words." BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 8.1 (2d ed. 1984).

¹⁷¹ 5 U.S.C. § 704.

¹⁷² See Garrity-Rokous, *supra* note 72, at 646-49 (discussing the legislative history of the APA).

¹⁷³ *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967).

¹⁷⁴ 112 S. Ct. 2767, 2773 (1992).

¹⁷⁵ See Garrity-Rokous, *supra* note 72, at 647.

¹⁷⁶ See *Hearings*, *supra* note 142, at 27.

¹⁷⁷ 5 U.S.C. § 704.

Thus, Congress intended the final agency action requirement merely to delay judicial review until the agency had taken its final action on the matter at issue. Thus, *Public Citizen's* application of *Franklin* to preclude review of an agency's independent statutory mandates, merely because the President also acts upon the final project, introduces a limitation on a court's jurisdiction not found within the APA.¹⁷⁸

Unless courts can enforce agency compliance with NEPA at the point when an agency has completed its decisionmaking process and failed to prepare an EIS, the purposes and congressional intent of NEPA will not be served.¹⁷⁹ To hold that the parties are not directly affected until the proposed project is underway or until the proposed legislation is passed is to flagrantly disregard Congress' intent in requiring all federal agencies to comply with NEPA. Courts have reviewed allegations of possible NEPA violations even where other actions must be taken before the underlying action will directly injure the plaintiffs.¹⁸⁰ For example, courts have reviewed challenges to an agency's compliance with NEPA's EIS requirement on legislative proposals after the agency has made its recommendation on the legislative proposal, even though Congress could either change the proposal or refuse to enact it.¹⁸¹ If courts are forced to wait until the legislation is enacted or the project completed before they can gain review under the APA, the issue will be moot, since the agency should have assessed the environmental considerations during the process of deciding on a specific course of action, or a specific legislative proposal. More importantly, once the proposal has been adopted, an EIS cannot serve its

¹⁷⁸ See discussion *infra* part II.D.3.

¹⁷⁹ See discussion *supra* parts II.A.1, II.A.2.

¹⁸⁰ For example, courts have on numerous occasions reviewed an agency's EIS on a proposal for a mining or development permit prior to the commencement of the building project, which allegedly may injure the plaintiffs. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (reviewing a challenge to the Forest Service's compliance with NEPA's mitigation and "worse case analysis" EIS requirements prior to issuing a permit for development and operation of a ski resort on national forest land). See also *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142 n.7 (1992) (noting, in dicta, that a person living adjacent to a proposed dam site may challenge an agency's failure to prepare an EIS prior to issuing a license "even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years").

¹⁸¹ See, e.g., *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977) (reviewing a challenge to NEPA's EIS requirement even though Congress had not yet approved the project; holding that the draft EIS was required when proposal submitted to Congress for approval); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.C. Cir. 1991) (reviewing the adequacy of a legislative EIS prior to Congressional determination of the future management of an Alaskan wildlife refuge). See also *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (judicial review of agency's announced procedure for issuing an EIS on a legislative proposal before the agency even issued its legislative proposal).

primary function of informing the debate as to whether the proposal should have been adopted in the first place.¹⁸²

Congress enacted section 704 of the APA in order to avoid premature judicial intervention in the agency decisionmaking process. Congress did not, however, intend to preclude review entirely. Once the agency has taken its final steps in the process, then the issue is "final" for purposes of APA review. Congress has given no reason to believe that this basic rationale, supported in the many finality cases,¹⁸³ should be altered in a situation where the agency's final steps are followed by some presidential action.

C. Separation of Powers Problems Arising From Judicial Review of Matters Involving Presidential Discretion

Suits questioning an administrative agency's compliance with specific statutory mandates do raise legitimate separation of powers concerns. These concerns do not, however, necessitate the total abrogation of judicial review in the face of executive discretion in the legislative process.¹⁸⁴ In *Public Citizen*, the majority stated that the application of *Franklin* to NEPA cases is limited to those situations "in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."¹⁸⁵ Arguably, the court did not want to hear the case because of the President's political role in the legislative process.¹⁸⁶ Furthermore, some may argue that courts have no authority to review a presidential proposal to Congress, especially when such a review includes critiquing the merits of the proposal or the President's adherence to a statute such as NEPA.¹⁸⁷

¹⁸² See 806 F.2d at 1381 (noting that the Department's decision to refuse public comment is "clear and final," the court explained that "[o]nce Congress acts on the information submitted to it, the Trustees will lose their right to comment on the draft LEIS at the administrative level").

¹⁸³ See discussion *supra* part I.C.3.

¹⁸⁴ In fact, *Public Citizen* ultimately leaves administrative agency action unchecked by the judiciary, thereby upsetting the balance of power between the three branches of government. See discussion *infra* part II.D.3.

¹⁸⁵ 5 F.3d 549, 552 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

¹⁸⁶ See *id.* at 553 (leaving the fate of NAFTA in the "hands of the political branches" and noting that the "judiciary has no role to play").

¹⁸⁷ See MANDELKER, *supra* note 13, § 4.06[3][j], at 4-39, 4-40 n.100 ("Additional problems may arise in legislative impact statement cases because the political nature of the legislative process raises separation of powers and redressability problems. . . . Some courts have held that the environmental impact statement for proposals on legislation is judicially unenforceable."). See also *Wingfield v. Office of Mgmt. & Budget*, 9 Env't Rep. Cas. (BNA) 1961, 1963 (D.D.C. 1977) (noting in dicta that "the issue . . . places the Court in conflict with coordinate branches of the Government, since even Plaintiff recognizes that the President, himself, whatever the strictures of [NEPA] could present whatever proposals and recommendations he chose to the Congress without reference to NEPA").

Certainly, separation of powers problems would arise if a court were to review the merits of a presidential decision. Although the Supreme Court in *Marbury v. Madison* held that the courts can review all questions arising out of the Constitution, the Court also noted that there would be some constitutional issues committed to political discretion.¹⁸⁸ Chief Justice Marshall noted that “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”¹⁸⁹

Although courts have generally viewed presidential actions as discretionary, and thus, unreviewable, they have not relinquished the power to determine whether the President has exceeded his constitutional grant of authority.¹⁹⁰ For example, in *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure Case), the Supreme Court held that the Constitution did not authorize President Truman to order the Secretary of Commerce to take possession and operate the nation’s steel mills in the name of national security.¹⁹¹ The courts will also review whether the President has exceeded any congressional grant of authority. Thus, in *Youngstown*, the Supreme Court further held that Congress had not authorized the President to order the Secretary of Commerce to seize the mills. By taking this unauthorized action, President Truman had usurped legislative prerogative.¹⁹²

In addition to reviewing the constitutionality of Presidential actions, the presence of a discretionary matter in a case will not prevent judicial review of an agency’s independent statutory obligations.¹⁹³ *Public Citizen* exemplifies this scenario since the plaintiffs challenged the USTR’s failure to comply with NEPA’s EIS requirement. The plaintiffs did not challenge the President’s compliance with NEPA, nor did the plaintiffs challenge the merits of the President’s NAFTA

188 See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 72 and n.6 (1978).

189 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

190 TRIBE, *supra* note 188, at 73 (*Marbury’s* holding “does not deprive the Court of all power to interpret a constitutional provision: it retains the power to determine whether a particular congressional or executive action comes within the terms of the constitutional grant of authority.”).

191 343 U.S. 579 (1952).

192 TRIBE, *supra* note 188, at 181. See also *Dakota Central Tel. Co. v. South Dakota ex. rel. Payne*, 250 U.S. 163 (1919) (holding that the Court did not have the power to review whether the President abused his discretion in possessing the telephone lines following a congressional delegation to do so, but it could review whether the President exceeded the congressional authority granted him).

193 See also David T. Gibbons, Note, *Nafta vs. The Environment: The Court’s Mandate to Require the Preparation of Environmental Impact Statements for Trade Agreements*, 15 *HAMLIN J. PUB. L. & POL’Y* 101, 119-20 (1994) (arguing that “[t]he effect of denying NEPA claims under APA jurisdiction, because only the President can submit legislative proposals is tantamount to a violation of *Marbury v. Madison* and the well established doctrine of judicial review”).

proposal. Thus, the plaintiffs did not seek to set aside the proposal implementing NAFTA,¹⁹⁴ but sought merely to obtain an order requiring the USTR to complete an EIS.¹⁹⁵

A vast body of NEPA precedent demonstrates the courts' power to review an agency's compliance with NEPA even if the underlying action concerns foreign affairs, such as military matters or matters pertaining to an international agreement. In these scenarios, the President may have the final authority over the matter, given his Article II powers, but the courts can review NEPA compliance by the agencies assisting the President in his final decision. For example, in *Sierra Club v. Adams*, the court reviewed plaintiffs' challenge of the adequacy of the EIS pertaining to the construction of the Darien Gap Highway in Panama and Columbia.¹⁹⁶ Furthermore, in *National Organization for Reform of Marijuana Laws v. United States Department of State*, the court found that an agency had violated NEPA by failing to prepare an EIS regarding the United States' participation in herbicide spraying of marijuana and poppy plants in Mexico.¹⁹⁷ In these cases, the President as commander-in-chief possessed the ultimate constitutional authority over the matter. Nevertheless, the court did not hesitate to review challenges to the agency compliance with NEPA prior to presidential involvement.

In conclusion, potential separation of powers issues do not completely foreclose judicial review of agency compliance with independent statutory obligations. In situations where the President holds the ultimate authority to institute a proposal, the courts are not authorized to review the merits of his decision. However, the President's holding of this ultimate power does not shield agencies from judicial review of their independent statutory obligations. *Franklin*, thus, does not dispense with the need for courts to clearly define the challenged action and to define what constitutes "final agency action" for purposes of affording review under the APA.

¹⁹⁴ Certainly, there would be separation of powers problems if the judiciary were to enjoin the submission or consideration of legislation. The courts cannot enjoin Congress' power to consider legislation because the Constitution grants "[a]ll legislative Powers" to Congress. U.S. CONST. art. I, § 1.

¹⁹⁵ The court in *Colorado Env'tl. Coalition v. Lujan* refuted a separation of powers argument finding that a supplemental EIS prepared by the Secretary of Interior would not interfere with the executive and legislative branches of government. See 803 F. Supp. 364, 370 (D. Colo. 1992) ("Just as Congress does not violate separation of powers by structuring the procedural manner in which the executive branch shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.")

¹⁹⁶ 578 F.2d 389 (D.C. Cir. 1978).

¹⁹⁷ 452 F. Supp. 1226 (D.D.C. 1978).

D. How the Courts Should Define Final Agency Action for Purposes of Judicial Review: The Strengths of Model 1 and the Weaknesses of Models 2 and 3

1. *NEPA and the APA Require Courts to Define the Challenged Action as an Agency's Failure to Prepare an EIS*

Franklin stands for the proposition that courts do not have the power to review the merits of a President's census report. Similarly, according to *Franklin*, courts lack the authority to review the merits of the President's NAFTA proposal. Yet, nothing in *Franklin* prevents a court from reviewing an agency's independent statutory obligations even though the President has the ultimate decisionmaking authority. Thus, in light of *Franklin*, courts must determine what agency action is "final" for purposes of providing APA review. First, this Note argues that the correct approach is to define the challenged action as an agency's failure to comply with its independent statutory obligations. Second, this Note argues that the challenged agency action is "final" once the agency has completed its decisionmaking process.¹⁹⁸ According to this approach, courts can review an agency's failure to abide by NEPA procedures, even though the final substantive decision is made by the President and is unreviewable under the APA.

The language of both NEPA and the APA requires courts to define the challenged action as the agency action rather than as the underlying action. Congress wanted "all agencies of the Federal Government" to prepare impact statements prior to implementing proposed actions and codified this intention in NEPA.¹⁹⁹ Similarly, the APA allows review only of "agency action."²⁰⁰ Plaintiffs, such as those in *Public Citizen*, argued that they suffered injury from an agency's failure to abide by NEPA's procedural mandates. They did not argue that their injury resulted from the underlying proposal—NAFTA. Plaintiffs targeted the USTR's dismissal of NEPA in this situation since the USTR's inaction left them without information regarding the environmental consequences of NAFTA.

By focusing on the agency's action, rather than the underlying proposal, courts serve the purposes of NEPA: to require agencies to look at the environmental consequences of their actions as early as

¹⁹⁸ Model 1, as exemplified by District Court Judge Richey's opinion in *Public Citizen*, emphasizes that the challenged agency action is final once the agency has completed its recommendation on the proposal, and the court need not wait for Congress to act on the proposal. See *Public Citizen v. Office of the U.S. Trade Representative*, 822 F. Supp. 21, 26 (D.D.C.) (emphasizing that the case law clearly dictates that "an EIS must be prepared once such a proposal is completed and that its submission to Congress is not required") (emphasis added), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

¹⁹⁹ 42 U.S.C. § 4332(2)(c).

²⁰⁰ 5 U.S.C. § 704.

possible in the decisionmaking process.²⁰¹ In contrast, courts focusing on the underlying proposal as the challenged action do not serve the purposes of NEPA since this method inevitably delays judicial review until the point is moot.²⁰²

2. *Models 2 and 3 Deny Judicial Review by Focusing on the Underlying Action Rather than the Agency Action*

The majority decision in *Public Citizen* exemplifies the circuit court's inability to correctly identify the challenged action. Contrary to Judge Richey's focus on the agency's failure to abide by NEPA's mandates, the D.C. Circuit focused instead on NAFTA. A careful reading of the majority opinion demonstrates the Circuit's faulty reasoning. Throughout the opinion, it emphasized that "NAFTA is not 'final agency action.'"²⁰³ The focus on NAFTA, however, is misplaced.²⁰⁴ The appropriate question is whether the USTR's actions satisfy the finality test so as to allow a challenge by Public Citizen. Indeed, *Franklin* articulates a two prong test for finality: "[1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties."²⁰⁵

The circuit court bypassed the important steps of identifying the agency action and asking whether that agency has completed its decisionmaking process. This analysis would have led the circuit court to focus on the USTR's actions.²⁰⁶ The USTR completed its decisionmaking process regarding NAFTA when it submitted the legislation to

²⁰¹ See discussion *supra* parts I.A, II.A.2.

²⁰² See *supra* text accompanying notes 179-82.

²⁰³ 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

²⁰⁴ Some commentators also have incorrectly focused on NAFTA as the core to a determination of final agency action. See Gibbons, *supra* note 193, at 114-19.

²⁰⁵ 112 S. Ct. 2767, 2773 (1992).

²⁰⁶ In order to obtain judicial review under the APA, one must challenge an action of a federal agency. There is no reason to doubt that the USTR would meet the "federal agency" requirement in the APA. See Barber, *supra* note 16, at 448 (discussing the evidence supporting this contention). Barber reasons that the USTR has functions independent of advising the President. She also notes that a finding of agency status for the USTR would be consistent with congressional intent that NEPA should reach all federal decisionmaking. *Id.* Indeed, the district court in *Public Citizen* found that:

NAFTA is, in substantial part, a result of the work of the Defendant [USTR] and therefore reviewable under the APA and the NEPA. The Defendant Office of the United States Trade Representative is charged by statute with the responsibility for conducting international trade negotiations, developing and coordinating United States trade policy and imposing any retaliatory trade sanctions on other countries. See 19 U.S.C. §§ 2171, 2411-2417. It is undisputed that the Defendant [USTR] has, in substantial part, negotiated and drafted the NAFTA.

822 F. Supp. 21, 25 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

the President.²⁰⁷ Having identified the USTR as the appropriate federal agency, the court should have asked whether the agency's process, or lack thereof, directly affected the aggrieved parties. By doing so, the circuit court would have found that the USTR's failure to prepare an EIS had a direct effect on the public since the agency made its decision without adequately examining the environmental consequences of NAFTA. NEPA's EIS serves an important informational function to the public. By disregarding a direct statutory mandate, the USTR failed to further Congress' purpose in enacting NEPA, and denied the public information to which they were entitled.²⁰⁸

One might be tempted to account for the circuit court's statement that "NAFTA is not 'final agency action'"²⁰⁹ as sloppy writing, but, in actuality, the error illustrates the court's faulty approach to answering the finality question. The court correctly noted that the "central question . . . is whether Public Citizen has identified some agency action that is final upon which to base APA review."²¹⁰ However, instead of taking the logical approach of first identifying the agency action and then asking whether it is final, the court looked instead for the point at which the whole process is final—or completed—and identified the "agency" as the institution taking that final step. This conceptualization of the legislative time line conveniently allowed the court to dismiss the case by concluding that the President, who effected the last step, was not an "agency," and thus, his action was not reviewable under the APA.²¹¹

This approach completely forecloses judicial review of an agency's failure to abide by NEPA, because in every situation, further action must be taken in order to implement the proposal.²¹² Following this approach insulates agency actions from judicial review and abrogates the need for the APA, a statute that allows judicial review of "agency action for which there is no other adequate remedy in a court."²¹³

207 See *supra* note 8.

208 See discussion *supra* part II.A.2 (discussing NEPA's purposes).

209 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

210 *Id.* at 551.

211 Therefore, the court summarized its holding that the "'final agency action' challenged in this case is the submission of NAFTA to Congress by the President . . . [and] the President's actions are not 'agency action' and thus cannot be reviewed under the APA." *Id.* at 553.

Indeed, the court could have conceptualized the end point as Congress' approval of NAFTA. This too would have been unacceptable, however, since the question of whether the agency had considered the environmental effects of its proposal would have been moot at that time. The time when the President submits the proposal to Congress and the time when Congress passes NAFTA are both irrelevant to the determination of the judgment of an agency's decisionmaking process. See discussion *supra* text accompanying notes 179-82.

212 See *supra* notes 189-82 and accompanying text.

213 5 U.S.C. § 704.

There is no reason to believe that when Congress included the "final agency action" requirement of the APA it intended a procedure that first looked for the final action and then asked whether an agency performed such action.²¹⁴ If Congress had intended this, it would be virtually impossible for plaintiffs to challenge agency compliance with statutes because nonagency action is often required to institute the agency's proposal. The circuit court in *Public Citizen* believed that it sufficiently allayed these fears, however, by limiting *Franklin's* application to those situations in which the President takes the "final step."²¹⁵ However, this distinction based on who submits the final proposal to Congress, an agency or the President, is unfounded in the legislative history of the APA.²¹⁶ Nevertheless, according to *Public Citizen*, the former is subject to judicial review while the latter is not.²¹⁷

Circuit Judge Randolph's analysis in his concurring opinion in *Public Citizen* also demonstrates the consequences of defining the challenged action as the underlying proposal. Judge Randolph shrewdly noted the unique dangers in the NEPA context of holding that the act of proposing legislation does not constitute final action. He stated that "[t]he nub of the problem is that judicial review under the APA demands 'final agency action' whereas the duty to prepare an impact statement arises earlier."²¹⁸

However, Judge Randolph did not provide an adequate answer to this problem. Indeed, he presented an even less attractive model when he, like the majority, characterized NAFTA as the challenged action. Furthermore, he questioned whether a legislative proposal could ever satisfy the *Franklin* finality test. Thus, he could not imagine that the *act of proposing legislation* could ever directly affect the parties; in fact, "no one will be affected, directly or otherwise, unless and until Congress passes the bill and the President signs it into law."²¹⁹ Like the majority, Judge Randolph's observations ignore the agency's failure to follow certain procedures during the process of proposing legislation. This failure to comply with procedural requirements certainly affects the parties. Indeed, the failure to follow NEPA substantively affects an agency's decision.²²⁰

²¹⁴ See discussion *supra* part II.B.

²¹⁵ See 5 F.3d 549, 552 (D.C. Cir. 1993) ("*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties."), *cert. denied*, 114 S. Ct. 685 (1994).

²¹⁶ See discussion *supra* part II.B.

²¹⁷ 5 F.3d at 552.

²¹⁸ *Id.* at 554.

²¹⁹ *Id.* at 553-54.

²²⁰ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *Colorado Envtl. Coalition v. Lujan*, 803 F. Supp. 364,

In sum, adopting Model 2 or 3 will negate judicial review of an agency's failure to comply with NEPA. By focusing on either NAFTA or the act of proposing legislation, the two models allow the courts to abdicate their authority of enforcing agency compliance with statutory mandates.

3. *The Consequences of Surrendering Article III Powers*

An interpretation of *Franklin* that denies judicial review of an agency's independent statutory obligations under NEPA results in serious separation of powers problems. Ultimately, *Public Citizen* leaves agency action unchecked by the judiciary, thereby upsetting the power balance between the three branches of government.

Article III of the Constitution gives federal courts the power to enforce agency compliance with statutory directives.²²¹ There is no reason to deny judicial enforcement of an agency's independent statutory obligations solely because the President is involved with the legislative proposal process.²²² Courts have abandoned the "wooden notion" that each branch must exercise a separate and discrete set of powers and have recognized the interdependence between the branches.²²³ The courts are the final arbiters of conflicts between the executive and the legislature and play an important role in maintaining the appropriate balance of power.²²⁴

By applying *Franklin* to NEPA cases in a manner that exempts agencies from judicial review of their statutory obligations, courts ignore legislative prerogative. Judicial abdication of the courts' constitutionally mandated role of enforcing Article I legislation upsets the balance of power in favor of the Executive: it allows the Executive to exercise uncircumscribed power. Left unchecked, the President could rewrite the laws, thereby usurping the Article I legislative powers that rest with Congress.²²⁵ Since the balance of power in the ad-

368 (D. Colo. 1992) ("Although NEPA itself does not mandate particular results and simply prescribes the necessary process, these procedures are certain to affect the agency's substantive decision.").

²²¹ U.S. CONST. art. III, § 2 ("judicial Power shall extend to all Cases . . . arising under this Constitution, the laws of the United States").

²²² See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 217-18 (1992) ("Agency rejection of congressional enactments, even if motivated by the President himself, is inconsistent with the system of separation of powers.").

²²³ See TRIBE, *supra* note 188, at 16.

²²⁴ For example, in *The Federalist*, Hamilton discusses the role of the courts as an "intermediate body between the people and the legislature." THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

²²⁵ U.S. CONST. art. I. This kind of situation where the President usurps legislative power sounds of the very "tyranny" of which James Madison warned. See THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (noting that "[t]he accumula-

ministrative state is already one that tends to favor the Executive, courts must check any further inflation of this power.²²⁶

Finally, a strict importation of *Franklin* into NEPA cases, where there is both agency and presidential action, acts essentially as a judicial repeal of NEPA's EIS requirement on legislative proposals. Without the power of the courts looming over agencies, there is no reason to believe that they will comply with NEPA.²²⁷ Indeed, because Article II grants the President constitutional power to submit legislation to Congress on behalf of the Executive Branch, all executive agencies could avoid the statutorily required EIS by submitting their proposals through the President.²²⁸ This sort of collusion between the administrative agencies and the President usurps legislative power by ignoring the purpose of a congressional statute.

In sum, the courts should be wary of abdicating their power to review agency action for failure to comply with statutory mandates. Judicial abstention in cases pertaining to an agency's obligation to prepare an EIS for a proposal that will ultimately be reviewed and submitted to Congress by the President will tilt the balance of power among the three branches toward the Executive.

tion of all powers, legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny").

²²⁶ See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 527 (1989) (arguing that the courts should "recognize the constant tendency of regulatory power to flow, centripetally, towards the head of the executive branch and think deliberately and carefully about where to find counterbalance for this tendency").

²²⁷ See *Public Citizen Cert. Petition*, *supra* note 8, at 10 (noting that "because the President has the constitutional power to submit legislation to Congress on behalf of the Executive Branch, . . . it appears likely that no legislative EISs would ever be judicially reviewable under the decision below").

Judge Randolph, however, disagreed with the notion that the lack of judicial review of agency action would translate into noncompliance with NEPA. In his concurrence in *Public Citizen*, he remarked that "there is a big difference between saying that APA review is unavailable and saying that officials do not have to comply with NEPA when they suggest legislation." 5 F.3d 549, 554 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994). He argues that Congress can act as an enforcer of the statute by refusing to consider an agency's proposal if it has not incorporated an EIS. *Id.* Yet, he gives too much credit to Congress' ability to notice that an agency has not prepared an EIS and has neglected important environmental considerations. There is a plethora of legislation governing agency actions and it would be impossible for Congress to keep up with all violations. Ultimately, the public, by challenging an agency action, and the courts, by hearing these challenges, play an important role in checking agency compliance with various statutory mandates. The application of *Franklin* in *Public Citizen* was a significant constraint on the opportunity to review the USTR's actions on behalf of the public interest. Indeed, Congress passed NAFTA without giving much thought to the USTR's failure to prepare an EIS before submitting its proposal to the President.

²²⁸ U.S. CONST. art. II, § 3, cl. I.

CONCLUSION

The application of the *Franklin* finality test in *Public Citizen* sounds the death knell of NEPA's environmental impact statement requirement on legislative proposals. Two decades of NEPA precedent have established plaintiffs' rights to seek judicial review of an agency's failure to prepare an EIS on legislative proposals. These cases enforced the statutory requirement that all agencies prepare an EIS for "every recommendation or report on proposals for legislation . . . significantly affecting the quality of the human environment."²²⁹ Unfortunately, *Public Citizen* eviscerated the legislative proposal prong whenever the agency action involves the President at any point in the proposal process.

At first glance, *Franklin* stands for the uncontroversial proposition that courts cannot review actions involving presidential discretion under the APA. This simple proposition has been expanded, however, to cases where an agency has independent statutory obligations that must be fulfilled before the proposal is either reviewed or submitted to Congress by the President. Denying review of a challenge to an agency's failure to comply with its independent statutory obligations frustrates the purposes of NEPA. The Supreme Court should protect the role of the judiciary in policing agency compliance with NEPA's EIS requirement on legislative proposals and remind courts that their involvement should come at an early stage in the decisionmaking process, thereby fulfilling the purpose of NEPA.

Case law does not clearly define the finality doctrine in NEPA cases. Congress should make clear its intent to have the courts police agency compliance with NEPA's EIS requirement on both major federal actions and legislative proposals. The courts should not hesitate to fulfill congressional intent. No justification exists for the proposition that courts do not have the power to hear cases alleging an agency's failure to comply with NEPA's statutory mandates solely because the President plays some role in the legislative process. Courts should not hide behind the timing doctrines as a convenient escape from making difficult decisions. Furthermore, the finality requirement should not pose a problem because an agency's violation of NEPA by failing to prepare an EIS on a legislative proposal is a final agency action. The agency's failure to consider the environmental consequences of its proposed action during the decisionmaking process is a flagrant violation of NEPA and one that directly affects all citizens. By ignoring this agency inaction, courts mock the nation's first federal environmental policy act and ignore the intent of Congress in passing NEPA.

²²⁹ 42 U.S.C. § 4332(2)(C).

Having identified a problem in the application of *Franklin* to the NEPA realm, this Note presents a plea to the Supreme Court to resolve the present inconsistencies. Unfortunately, the Supreme Court denied certiorari in *Public Citizen v. Office of the United States Trade Representative*, leaving the future of NEPA's EIS requirement on legislative proposals questionable.

Silvia L. Serpet†

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