3-1-2010

Arrival Then Denial: Interpreting §203(a) of the Clean Air Act, Analyzing Evidentiary Challenges, & Assessing Conflicting Statutory Directives

Jesse Levine
American University Washington College of Law, jesse.levine@gmail.com

INDEPENDENT RESEARCH PROJECT

“Arrival Then Denial”

Interpreting §203(a) of the Clean Air Act, Analyzing Evidentiary Challenges, & Assessing Conflicting Statutory Directives

Jesse Levine

03/24/10

Overarching Introduction & Roadmap

Although academic in nature, this paper can largely function as an EPA practitioner's guide on the statutory authority and evidentiary rules underlying a case against an importer of uncertified engines. Part One employs the canons of statutory interpretation and applicable administrative precedents in a thorough analysis of §203(a) of the Clean Air Act (CAA). Part Two utilizes the Federal Rules of Evidence to solve the evidentiary challenge of proving one's case without possession of the real evidence. Lastly Part Three addresses how importations through NAFTA have had the effect of weakening the CAA and the National Environmental Policy Act (NEPA).

Part One: Statutory Interpretation

I. Introduction: Arrival Then Denial

An "arrival then denial" occurs when uncertified engines arrive at a U.S. port, but are denied entry to the U.S. by Customs & Border Protection (Customs). In most cases these uncertified engines are sent back to the country of origin. The question presented in Part One is whether an "arrival then denial" constitutes an importation under §203(a) of the CAA. CAA §203(a) prohibits:

> The distribution in commerce, sale, offering for sale, introduction, or delivery for introduction, into commerce, or, the *importation* into the U.S., of any [uncertified] new motor vehicle or new motor vehicle engine. (Emphasis added.)

II. Why This Matters

Due to resource constraints, a sizeable number of uncertified engines slip past Customs and enter the U.S. each year.[1] According to EPA, uncertified engines emanating from China have been surging.[2] This trend has been fueled by a dramatic increase in the number of foreign manufacturers of uncertified engines, an uptick in the number of inexperienced U.S. importers,

and the ease of e-commerce.[3] Uncertified engines, without proper controls, have been estimated to emit at least 30% more emissions than their certified counterparts.[4] Such emissions exacerbate climate change, acid rain, and air quality generally.[5]

EPA attorneys assert that their best tool to stem this tide is a strong enforcement program with stiff penalties for importers of uncertified engines.[6] Over a ten-month tracking period in 2006, EPA assessed $819,155 in penalties for the importation of 55,832 uncertified engines valued at nearly $13 million.[7] Over a subsequent eighteen-month tracking period from 2007-2008, EPA assessed $2.4 million in penalties for the importation of 48,000 uncertified engines.[8]

According to EPA, the threat of civil penalties creates a real disincentive for importers of uncertified engines.[9] Without this disincentive, EPA fears that a new calculus would emerge causing uncertified-engine shipments to exponentially grow.[10] Importers may determine that the benefit of selling what slips past Customs outweighs the downside of potentially having to pay extra shipping costs for a sale that never materialized. If an "arrival then denial" does not constitute an importation under CAA §203(a), then no CAA violation has occurred, and no §205(a) penalties may be imposed. §205(a) states that:

> Any person who violates [§203(a)] . . . shall be subject to a civil penalty of not more than $25,000. . . . Any such violation of [§203(a)] shall constitute a separate offense with respect to each [uncertified] motor vehicle or motor vehicle engine.

III. Thesis

At first glance, it's not clear whether an "arrival then denial" constitutes an importation under §203(a). The term "importation" is not defined in its respective title, Title II. Furthermore, the canons of statutory interpretation can at times lead to contradictory conclusions. But here, the weight of the canons and precedents on agency authority support the conclusion

that an "arrival then denial" constitutes an importation under §203(a). Therefore in an "arrival then denial" scenario, EPA should have the authority to impose §205(a) penalties on importers.

IV. Historical Development of the CAA

The historical development of the CAA provides strong evidence that an "arrival then denial" constitutes an importation under §203(a). According to Sutherland Statutory Construction, "in the case of amendatory acts, the presumption of change has unique application to an act which purports to change an existing statute" (citing Stone v. INS).[11] Additionally "when a statute is amended and words are omitted, courts presume that the legislature intended the statute to have a meaning different from the one it had before amendment" (citing Hazardous Waste Council v. EPA).[12] Likewise when a statutory provision is deleted in a subsequent reenactment, the omitted term cannot be read into the later statute (Id.).[13]

In Stone v. INS,[14] the Supreme Court found Congress' amendment to §106 of the Immigration and Naturalization Act (INA) to be a deliberate change intended to expedite judicial review of administrative orders.[15] The Court stated that had Congress intended to maintain the status quo, "there would have been no reason for Congress to have included the [amendment]. The reasonable construction is that the amendment was enacted as an exception, not just to state an already existing rule."[16] Therefore Stone stands for the straightforward rule that when Congress amends a statute, "it intends the amendment to have real and substantial effect."[17]

In Hazardous Waste Council v. EPA, the D.C. Circuit rejected EPA's reliance on language which had been removed from the Resource Conservation and Recovery Act (RCRA).[18] This case centered on EPA's justification for refusing to list oil as a hazardous substance. EPA expressed concerns that such a listing might inhibit oil recycling programs. In 1980, EPA's justification was allowed by a provision of RCRA. But by 1984, Congress had

removed that provision from the statute. Therefore EPA's subsequent reliance on the provision was rejected by the D.C. Circuit. "When a statutory provision is deleted in a subsequent reenactment, the omitted term cannot be read into the later statute."[19]

Applied here both Hazardous Waste Council and Stone provide guidance on how to interpret Congress' amendments to CAA §203. In 1970 Congress amended §203(a) from initially prohibiting importations of uncertified engines "for sale or resale," to subsequently prohibiting importations of uncertified engines regardless of subsequent transactions. Furthermore §203(b) initially instructed Customs to deny entry to uncertified engines "offered for importation." But through the 1970 amendment, Congress included an instruction for Customs to also deny entry to uncertified engines which had been "imported."

While the language changes are subtle, they do prove that Congress intended an "arrival then denial" to constitute an importation under §203(a). First, Congress did not want the §203(a) prohibition to be dependent upon subsequent sales or re-sales. Second, by noting that Customs could deny entry to uncertified engines "offered for importation" and "imported," Congress conflated the terms. Logically if Customs can deny entry to imported uncertified engines, then Congress must have envisioned an importation materializing during a Customs inspection prior to official entry into the U.S. If that were not the case, Congress could have just left the language of §203(b) alone. Therefore the amendments to §203 reflect congressional intent to encompass an "arrival then denial" within the scope of "importation."

V. The Rule Against Redundancy

The rule against redundancy provides compelling evidence that an "arrival then denial" constitutes an "importation" under §203(a). The Supreme Court has expressed a "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the

same enactment" (Circuit City v. Adams).[20] While the rule against redundancy "does not necessarily have the strength to turn a tide of good cause to come out the other way," (Gutierrez v. Ada),[21] it is nonetheless a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant" (Kungys v. US) (plurality opinion by Scalia, J.).[22]

In Circuit City, the Supreme Court applied the rule against redundancy to limit the scope of an exemption under the Federal Arbitration Act (FAA). The FAA exempted seamen, railroad employees, or any other class of workers engaged in interstate commerce. The question presented here was whether the phrase "any other class of worker engaged in interstate commerce" expanded the exemption beyond the transportation field. In finding that it did not, the Court invoked the rule against redundancy and held that an overly broad scope would improperly render the terms "seamen" and railroad employees" completely "pointless" and "superfluous."[23]

However, the Supreme Court in Gutierrez held that the rule against redundancy does have its limits. Here the Court analyzed an election law for the territory of Guam. The statute at issue stated that "if no candidates receive a majority of the votes cast in any election, a runoff election shall be held."[24] The question presented was whether runoff elections were necessary if a gubernatorial candidate received a majority of votes, but her respective party slate did not. In holding that runoff elections were not necessary in that scenario, the Court rested its reasoning on other canons and public policy reasons. Essentially, the Court found it hard to believe that Congress wanted runoff elections to be held in a scenario likely to occur often. While acknowledging the value of the rule against redundancy, the Court dismissed it here because the weight of the canons pointed against it.

In Kungys, a plurality of the Supreme Court applied the "cardinal rule" against redundancy to reject a concurring Justice's interpretation of the Immigration and Nationality Act (INA). The question presented here centered on what grounds were sufficient to denaturalize a citizen under INA §1451(a). Section 1451(a) listed the following grounds: illegal procurement of, concealment of a material fact in, or willful misrepresentation in an immigration application. Justice Stevens' concurrence essentially dismissed the "illegal procurement of" ground as a mere redundancy. But the plurality rejected that interpretation and held that any one of the listed grounds of §1451(a), in and of itself, would be sufficient to denaturalize a citizen.

As noted *supra*, CAA §203(a) prohibits both the "importation" and "introduction into commerce" of uncertified engines. Applied here, Circuit City and Kungys support the conclusion that "importation" in CAA §203(a) must have its own unique meaning separate from "introduction into commerce." While the latter involves goods reaching U.S. soil and passing through Customs, the former does not. Furthermore, a conflated interpretation of "importation" would reduce the term to mere surplusage. Although Gutierrez is worth noting, it can easily be distinguished here. In Gutierrez public policy and the weight of the other canons overmatched the rule against redundancy. Here the public policy of environmental protection favors the conclusion that an "arrival then denial" constitutes an importation. Moreover that same conclusion is supported here not just by the rule against redundancy, but also by the weight of the other canons.

VI. Legislative History & Purpose

The legislative history and purpose behind the CAA provide further evidence that an "arrival then denial" constitutes an importation under §203(a). In both Babbit v. Sweet Home[25] and TVA v. Hill[26] the Supreme Court relied upon the broad protective purpose behind the

Endangered Species Act (ESA) to support its decisions. In Babbitt, the Court upheld the Secretary of the Interior's interpretation of the term "take" to include broad levels of indirect harm. In TVA, the Court acted to prevent the completion of the halfway-developed over-invested Tellico Dam because of its impact on a small fish.

Just as the Court in Babbit and TVA relied upon the ESA's protective purpose to guide its statutory interpretation, a court here could rely upon the CAA's protective purpose to find that an "arrival then denial" constitutes an importation under §203(a). The CAA Committee Reports from 1965, the year when §203(a) first appeared, express broad congressional intent to improve air quality. The House Committee on Interstate and Foreign Commerce identified the obvious evil which the CAA was seeking to abate: air pollution emanating from motor vehicles, affecting thousands of communities in all parts of the country, and imposing a serious threat to public health and national welfare.[27] The Committee also identified the adverse effects of air pollution ranging from respiratory diseases such as asthma, bronchitis, emphysema, and lung cancer, to economic losses amounting to several billion dollars annually.[28] The Committee was also concerned about automotive smog occurring with increasing frequency and severity in urban areas throughout the U.S.[29]

Despite the primary focus on domestic air quality, the Committee also expressed concern about domestic sources polluting foreign nations such as Canada and Mexico. The House Committee Report wrote that, "as a member of the North American community, the U.S. cannot in good conscience decline to protect its neighbors from pollution which is beyond their legal control."[30]

The 1970 Committee Reports echoed the environmental concerns delineated in the 1965 Committee Reports. However the 1970 Committee Reports also confirmed congressional intent

to: (1) remove the "for sale or resale" language from §203(a); and, (2) extend the provisions in §203(b) from new vehicles and engines to new vessels and engines.[31]

From all of this legislative history, it clearly can be said that Congress was concerned about air pollution emanating from motor vehicles or engines in the U.S. Moreover Congress indicated an interest in collaborating with foreign nations in a reciprocal manner to mitigate air pollution. But most tellingly, the legislative history confirms that the 1970 amendments were a deliberate attempt to broaden the meaning of "importation" in §203(a) by removing the "for sale or resale" language. Therefore interpreting an "arrival then denial" to constitute an importation under §203(a) would be completely in line with the aforementioned goals outlined in the legislative history.

VII. Delineated Agency Authority

Despite the fact that EPA and Customs have interconnected responsibilities in an "arrival then denial" scenario, EPA's statutory authority to administer its penalty scheme is not dependent on Customs' interpretation of §203(a). In Gonzalez v. Oregon,[32] the Supreme Court analyzed the precise statutory language to determine the limits and extent of agencies' respective powers. In Collins v. NTSB,[33] the DC Circuit relied upon public policy to resolve an inter-agency dispute over administrative powers.

In Gonzalez v. Oregon, the case centered on whether the U.S. Attorney General (AG) had the authority under the Controlled Substances Act (CSA) to unilaterally criminalize euthanasia through an interpretive rule. The purpose of the CSA was to combat drug abuse, and to control legitimate and illegitimate traffic in controlled substances. The CSA criminalized the manufacture, distribution, dispensing, and possession of substances classified within the CSA's five separate gradations. The CSA permitted the AG to include, remove, or alter any

classification for any controlled substance. However, the AG could not act without evidentiary support from the Secretary of Health and Human Services (HHS). But in this case, instead of deferring to the HHS Secretary, the AG moved unilaterally and without statutory authority to criminalize euthanasia.

In striking down the AG's actions, the Court spoke of the dangers of giving the AG unrestrained power to criminalize whichever medical procedures he deemed illegitimate. Moreover the Court stated that the structure of the CSA conveyed an unwillingness to cede medical judgments to an executive official lacking medical expertise. Finding no delegation, and therefore no Chevron[34] deference, the Court considered the AG's arguments under Skidmore[35] respect, and struck down the AG's interpretive rule.

In Collins v. NTSB, the D.C. Circuit relied upon public policy to resolve a dispute between the U.S. Coast Guard and the National Transportation Safety Board (NTSB). The dispute centered on the proper interpretation of Rule 34(d) of the International Regulations for Avoiding Collisions at Sea.[36] Rule 34(d) states:

> When a vessel fails to understand the intentions or actions of another, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall sound five short and rapid blasts of the whistle.

In this case a Coast Guard administrative law judge (ALJ) found a captain to have violated Rule 34(d), and therefore suspended the captain's license for five months. On subsequent appeals, the Commandant of the Coast Guard affirmed the ALJ's order, but the NTSB reversed on highly textualist grounds, holding that since the captain was certain that a collision was impending, he was not required to sound his whistle in accordance with Rule 34(d).

In assessing the procedural history, the D.C. Circuit first argued that the NTSB should have reviewed the prior decisions solely to determine regulatory consistency and reasonableness. Next the D.C. Circuit stated the following rule on deference for conflicting agency positions:

> For generic statutes like the APA, FOIA, and FACA, the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions de novo. For statutes like the FDIA, where the agencies have specialized enforcement responsibilities but their authority potentially overlaps--thus creating risks of inconsistency or uncertainty--de novo review may also be necessary. But for statutes where expert enforcement agencies have mutually exclusive authority over separate sets of regulated persons, the above concerns don't work against application of *Chevron* deference.[37]

Citing the Coast Guard's expertise in maritime safety, and the obvious public safety value in maintaining the efficacy of Rule 34(d), the Court analyzed the Coast Guard's initial decision under Skidmore deference, and reversed the NTSB.

Applied here, Gonzalez and Collins would call for deference to EPA's interpretation of its own penalty scheme under §203(a) and §205. Nowhere in the plain language of the CAA does Customs have authority to impinge upon EPA's penalty scheme. Therefore an attempt by Customs to interfere with EPA's clearly delineated role/responsibilities would likely result in an outcome similar to Gonzalez and Collins: reprimand from the courts.

VIII. Chevron Deference

Beyond the canons and precedents on agency authority, EPA's most basic legal argument depends upon a determination that "importation" in §203(a) is ambiguous, and that EPA promulgated a rule interpreting the term. Given the inherent dispute at issue, it's fair to conclude that the term is ambiguous. However, whether EPA has promulgated a rule defining the term is another matter of dispute. Under Chevron v. NRDC,[38] when Congress has been silent or

ambiguous, an agency may, through informal rulemaking, promulgate a reasonable and permissible statutory construction which will receive deference from the courts. The construction very well might have been a different one than the court might have chosen itself. Nevertheless, under the Chevron doctrine the court will not disturb the agency's choice.

Chevron deference is partly based upon the public interest model, which assumes that agencies are acting as experts on behalf of the public. But, the public interest model has been largely rejected by academics, in favor of the public choice model, which assumes that agencies have been captured by special interests.[39] Chevron deference is also justified by an assumption that Congress delegates authority to specific agencies to fill in the gaps of statutes. Furthermore, Chevron deference encourages notice-and-comment rulemaking, which gives parties a say in regulatory matters and provides for a generally transparent process. Lastly, Chevron deference gives agencies the flexibility to adopt or change policies over time based upon evidence and/or changing attitudes among the public.

Some jurists argue that because of non-delegation concerns, the gap-filling rationale might be unconstitutional.[40] However, from Yakus v. US (1944) through at least Whitman v. American Trucking (2001), the Supreme Court has resoundingly rejected the non-delegation doctrine. As long as Congress provides an agency with a modicum of an intelligible principle, the non-delegation doctrine will not apply. Here the non-delegation doctrine is certainly not at issue. Congress has provided EPA with otherwise very clear guidance in §203(a): keep uncertified mobile sources out of the U.S. The only question is how?

As noted *supra*, there is some dispute as to whether EPA promulgated a regulation on the precise issue of the proper definition of "importation" in §203(a). In 40 CFR 85.1501, the

EPA, acting under the authority of §203 among other sections, states that its regulations regarding the importation of uncertified engines are applicable when such goods are "offered for importation" or are "imported" into the United States. By doing so, EPA might have indicated a preference for regulating uncertified engines which have been imported and "offered for importation."

But 40 CFR 85.1501 may only apply to §203(b), since it parrots the language from that provision. Conceivably, EPA could have just included the phrase "offered for importation" in 40 CFR 85.1501 to solely address the issue of denial of entry to the U.S., and not to interpret the term "importation" in §203(a) in a broader way. Nevertheless, EPA's most basic Chevron argument is that 40 CFR 85.1501 interpreted "importation" in §203(a) to include the phrase "offered for importation," and that interpretation should be given Chevron deference.

IX. Mead/Skidmore Respect

Even under Mead deference, a court would likely still find that an "arrival then denial" constitutes an importation under §203(a).[41] Justice Scalia, dissenting in U.S. v. Mead, stated that the Court would be sorting out the consequences of the Mead doctrine for years to come.[42] One of the main targets of Scalia's venom was Justice Souter's statement on behalf of the Court that "we have sometimes found reasons for Chevron deference even when no such administrative formality [i.e., formal adjudication or informal rulemaking] was required and none was afforded."[43] Therefore, under Mead, very informal action may receive Skidmore or Chevron deference without much guidance as to why one might be a better approach for any given set of facts. Unlike Chevron's clear deferential posture, Skidmore gives the agency's statutory construction some vague and uncertain amount of respect.

According to a survey by Professor William Eskridge of Yale University, about 10% of U.S. Supreme Court Chevron cases involved very informal agency action clearly not derived from lawmaking grants – agency letters, interpretive guidance memoranda, and even opinions voiced in amicus briefs.[44] According to Eskridge, for technical statutes, the court is unlikely to be nearly as knowledgeable as the agency, and is likely to find its submissions persuasive.[45] For statutes that involve meaty allocational issues, such as federal-state relations, group rights, or labor disputes, the Court will be less deferential.[46]

Adding further to the uncertainty, Eskridge compiled data outlining the Justices' correlation towards upholding agency action depending on their own ideological leanings.[47] For example, Justices Scalia and Thomas were in agreement with conservative agency interpretations 72% and 76% of the time, versus 54% and 47% for liberal agency interpretations.[48] Likewise, Justices Breyer and Ginsburg were in agreement with liberal agency interpretations 80% and 77% of the time, versus 65% and 62% for conservative agency interpretations.[49]

Nevertheless, despite all of the uncertainty in the Skidmore/Mead doctrine, importers might argue that 40 CFR 85.1501 did not address the precise issue in §203(a), and therefore EPA's position would only be supported by very informal measures. As a result, such agency action would likely not be deserving of Chevron deference, but instead deserving of a weaker and vaguer Skidmore/Mead respect. Nevertheless while the outcome would be less certain than under Chevron, a court would still likely find that an "arrival then denial" constitutes an importation under §203(a).

X. Counterarguments

The whole act/code rule and the canon of expressio unius provide conflicting evidence on whether an "arrival then denial" constitutes an importation under CAA §203. In Green v. Bock

Laundry[50] and WV Hospitals v. Casey,[51] Justice Scalia, in his respective concurring and majority opinions, stated that ambiguous terms ought to be understood by looking to the surrounding body of law into which the terms must be integrated.

In Green v. Bock Laundry, Justice Scalia used the whole code rule to uphold the potentially unconstitutional Federal Rule of Evidence 609(a). The problem with Rule 609(a) was that it seemingly allowed litigants to impeach the character of civil plaintiffs, but not of civil defendants. Justice Scalia interpreted the rule to apply to civil plaintiffs and defendants, but not to criminal defendants. By doing so he reasoned that this interpretation was "most consistent with the policy of law in general and the Rules of Evidence in giving special protection to defendants in criminal cases."[52]

In WV Hospitals, the Supreme Court addressed the question presented of whether successful plaintiffs in civil rights suits would be able to recoup attorney fees as well as expert witness fees.[53] The statute explicitly only allowed for attorney fees. However the Court sought to determine whether "attorney fees" might implicitly include expert witness fees. In rejecting such an interpretation, Justice Scalia reasoned that many other statutes explicitly listed attorney fees along with expert witness fees. Therefore the omission of the latter term here indicated a deliberate congressional preference to leave it out. Furthermore, Justice Scalia stated that if attorney fees were to include expert fees, "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy."[54]

When applied to the facts at hand, Green and WV Hospitals both provide noteworthy evidence that an "arrival then denial" might not constitute an importation under §203(a). In and of itself, the lack of an explicit definition for "importation" in Title II of the CAA may not be significant. But, given the explicit inclusive definitions of "importation" in Title VI of the CAA

and in environmental contexts throughout the U.S. Code, the principle of expresio unius very well might prevail. However that evidence could also cut the other way. Since "importation" is defined to include an "arrival then denial" in environmental contexts throughout the US Code, the term logically could also be interpreted that way in §203(a).

XI. Statutory Interpretation Conclusion

The weight of the canons and precedents on agency authority strongly support the conclusion that an "arrival then denial" constitutes an importation under §203(a). While the canons of expressio unius and the whole act rule provide some conflicting evidence, they do not have the strength to turn the tide against the weight of these other authorities (See Gutierrez v. Ada).[55] Therefore since an "arrival then denial" likely constitutes an importation in contravention of §203(a), EPA has strong legal authority to impose §205(a) penalties on importers whose uncertified engines arrive yet ultimately are denied.

Part Two: Proving the CAA Violation

I. Evidentiary Introduction

Beyond the statutory construction issue detailed *supra*, there is also the evidentiary question of how to prove a CAA violation if the real evidence, uncertified engines, have been shipped back to their country of origin. Part Two will detail the Federal Rules of Evidence on relevancy, testimony, and authentication that EPA and Customs must follow to ensure their demonstrative and testimonial evidence is admissible and sufficient to prove their case.

II. Relevancy

As long as EPA photographic and testimonial evidence is relevant and not inflammatory or misleading, it almost certainly will pass the first evidentiary bar. Rule 401 states that "relevant evidence" has a tendency to make the existence of any fact of consequence more or

less probable than it would be without the evidence.[56] Rule 402 states that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the Federal Rules, or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible.[57]

Rule 403 states that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.[58] Since EPA and Customs' standard evidentiary practices comply with these rules, their photographic and testimonial evidence will almost certainly pass this initial evidentiary bar.

Through civil case law at the state and federal levels, several types of controversial evidence have been deemed irrelevant under Rules 401, 402, and 403. Namely, status evidence such as a defendant's wealth or geographic location tends to be irrelevant if it hurts the defendant. Likewise, evidence which will unnecessarily inflame a jury also tends to be irrelevant. Since those concerns likely would not resonate here, photographic or testimonial evidence of uncertified engines is highly likely to be relevant.

In Cleveland v. Peter Kiewit,[59] the Sixth Circuit held that Mr. Kiewit was entitled to a new trial due to the improper introduction of irrelevant evidence in his case below. This case was a negligence action against Mr. Kiewit's company for its work on a Cleveland dock which subsequently collapsed. In making its case, the city of Cleveland continually referenced the company's large size, its out-of-state headquarters, and its nine million dollar contract with the Army Corps of Engineers. Despite the fact that the trial court instructed the jury to disregard these facts, the Sixth Circuit held that these irrelevant facts were so prejudicial that a new trial was the only fair remedy in line with Rules 401, 402, and 403.

Likewise, evidence of poverty is generally deemed to be irrelevant. In State v. Mathis,[60] a first-degree murder case, the prosecution cross-examined the defendant on his net worth and job history. By doing so, the State was attempting to make the inference that because the defendant was poor, he was likely to commit a robbery. The trial court allowed in some of these questions and rejected others. On appeal, the Supreme Court of New Jersey noted that the prosecution's inference cast an unfair suspicion on poor people and unnecessarily cast too wide a net. Therefore such admitted questions below were struck down on appeal, and the case was remanded back to the trial court.

Additionally, unnecessarily inflammatory evidence tends to be irrelevant under Rule 403. In Evansville School v. Price,[61] a wrongful death case, Indiana's intermediate appellate court addressed the question presented of whether a photograph of the deceased boy should have been introduced below. The plaintiff argued that the photograph was properly introduced because it corroborated testimony that the boy was a "nice looking and healthy chap" and that he was properly interred.[62] The defendant argued that there was testimony on the record as to the boy's health prior to death, and that the picture could not establish the boy's condition before death. Concerned that the irrelevant photograph might have inflamed the jury, the appellate court struck down the trial court's decision to allow the photograph and granted the defendant a new trial.

Applied here, the introduction of testimonial or photographic evidence of imported uncertified engines would not contravene Rules 401, 402, or 403. Nor would the potentially unduly prejudicial issues of financial status, geographic location, or inflammatory content arise here. Instead the evidence here would make it more probable for a fact finder to determine that a

§203(a) violation occurred. Therefore such evidence would very likely be admissible on relevance grounds.

III. Testimony: Competence & Expert Status

In accordance with the federal rules listed *infra*, Customs officers would likely be deemed competent and qualified to testify as experts on the importation of uncertified engines. Rule 601 states that every person is competent to be a witness except as otherwise provided in the rules. However in civil actions and proceedings, if State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.[63]

Rule 702 states that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[64]

Rule 704 states that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[65] Based upon the aforementioned rules, particularly Rule 702, Customs officers would likely be able to testify as expert witnesses given their extensive training and experience on the importation of uncertified engines.

A basic evidentiary point of the Federal Rules, exhibited by Rule 601, is that nearly everyone except for the very young and mentally infirm can testify. Even those with incentives to lie may testify. In Washington v. Texas,[66] the U.S. Supreme Court struck down a Texas statute which prevented criminal defendants from introducing alleged co-conspirators as

witnesses. The Court held that the concern that a person might commit perjury isn't great enough to warrant violation of the 6th Amendment.

At times, even young children and alcoholics have been deemed competent to testify. In Evans v. State,[67] the Supreme Court of Nevada deemed a four-year-old girl, Adriana Ventura, to be a competent witness. In this case, Adriana was the sole witness to the murders of four people. Although unable to identify the assailants in a line-up, Adriana's testimony squared with the circumstantial evidence of the case. Additionally her story remained consistent over time. Moreover the trial court determined that Adriana readily admitted when she did not know something, and did not appear to make up facts just to answer a question. In finding that Adriana was able to receive just impressions and receive them truthfully, the trial court allowed her to testify and the Supreme Court of Nevada affirmed.

In U.S. v. Heinlein,[68] the defendants were convicted of felony murder among other crimes. The only eyewitness was James Harding, an alcoholic. Applying a similar test from Evans, the DC Circuit determined Harding's testimony to be consistent and corroborated by circumstantial evidence. Despite Mr. Harding's alcoholism, the DC Circuit affirmed the trial court's decision to forgo a mental examination and accept Mr. Hardings' testimony into the record.

As for expert witnesses, courts have required their qualifications to be substantiated and their knowledge to be greater than the average layman. In Elcock v. Kmart Corp.,[69] the question presented was whether Dr. Chester Copemann, an alleged expert in vocational rehabilitation, was sufficiently qualified to speak to the proper amount of damages in a negligence case. The lower court had pause because he had not graduated with a degree in the field. Yet he did take relevant classes and study relevant literature. Without more, the lower court and Third Circuit found Dr.

Copemann to be qualified on the subject because he possessed knowledge greater than the average layman.

In a similar vein, the Eighth Circuit in Wheeling Steel v. Beelman River,[70] accepted the proffered expert witness' qualifications, but found that the expert had testified beyond the scope of his knowledge. While the court determined that Dr. Curtis was an expert hydrologist qualified to testify on flood risk management, Dr. Curtis "sorely lacked the education, employment, or other practical personal experiences" to testify on safe warehousing practices.[71] Evidently Dr. Curtis did not study, write, or work on warehousing practices throughout his career. Therefore the Eighth Circuit held that the lower court erred in allowing Dr. Curtis to testify "beyond the scope of his expertise" and that such error unduly prejudiced Wheeling Steel.[72]

Applied here, Customs officers certainly possess competence beyond that of an infant or alcoholic. Additionally their training and qualifications as Customs officers would very likely suffice as proof to substantiate their expertise on the importation of uncertified engines. Therefore with sufficient competency and qualifications, Customs officers would very likely be able to testify as experts on this issue. The only limitation on such testimony would be that they may only testify within the scope of their expertise.

IV. Authentication & Photographs

Without custody of the real evidence, EPA and Customs must rely upon testimonial and photographic evidence of the uncertified engines to prove their case. The Federal Rules of evidence require photographs to be authenticated for admission in a civil or criminal case. Rule 901(a) states that the requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[73] Rule 901(b) lists the following methods of authentication as examples: (1) testimony from a witness with knowledge that the

matter is what it's claimed to be; or (2) distinctive characteristics, appearance, substance or internal patterns taken in conjunction with the circumstances.[74] Therefore testimony from a Customs officer with knowledge of the importation will be sufficient to authenticate a photograph displaying the distinctive characteristics of the uncertified engines.

Semet v. Andorra Nurseries[75] is a good example of the importance of and challenges underlying authentication. In this case the plaintiff Milton Sugarman, an electrical contractor, was sent to a construction site by his employer, Andorra Nurseries. Mr. Sugarman's task was to string a line from an electric service box to nearby poles for the purpose of carrying electric current. While doing this work, Mr. Sugarman fell from atop a company ladder which had unexpectedly telescoped on him. Mr. Sugarman was rushed to the hospital to treat his injuries.

Fifty two days later, an engineer hired by Mr. Sugarman, Martin Alkon, visited the construction site and examined a ladder directed to him by an unnamed employee. While at trial, the plaintiff moved to introduce Mr. Alkon's testimony and photographs of the ladder to explain why the ladder collapsed. The Pennsylvania trial court deemed such photographs and testimony inadmissible. Not only could the condition of the ladder have deteriorated over the course of the fifty two days, Mr. Alkon also might not have examined the correct ladder at the construction site. The Pennsylvania Supreme Court affirmed the lower court ruling, and stated that a photograph must be shown to be a faithful and accurate reproduction of the object in question. With no proof that the photograph was faithful and accurate, Mr. Sugarman was left without a remedy.

But the mere passage of time does not deem a photograph inadmissible. In Nicolosi v. Livingston Parish,[76] an elementary school student, Patricia Nicolosi, fought on school grounds, sustained serious injuries, and sued the school for negligence. The plaintiffs' main argument was

that their daughter tripped over pipes, logs and other hazardous objects negligently exposed in the back of the school band room.

Testimony of teachers on duty at the time of the accident disputed that the accident occurred in that treacherous area of the school. In the school's defense, it introduced twelve photographs of where it asserted the accident occurred. The plaintiffs objected to the introduction of the photographs because they had been taken eight months after the accident and because they were allegedly not authenticated. In countering these claims, the defense noted that the passage of time was irrelevant because there had been no change in the physical structures of the buildings photographed. Furthermore, the person who took the pictures authenticated the photographs through testimony. Therefore the trial court determined and the First Circuit affirmed that the photographs were admissible.

Although not necessary here, courts have even found circumstantial evidence to be sufficient to authenticate photographs. In US v. Stearns,[77] the government brought theft charges against Ms. Stern for allegedly stealing a thirty-seven foot sailing vessel named the Sea Wind. In contesting the charges, Ms. Stern claimed that she took the Sea Wind to protect it from vandalism. She further claimed that she attempted to tow her own boat, the Iola, behind the Sea Wind, but turbulent waters had allegedly sunk the Iola. The government claimed that Ms. Stern concocted the idea of towing the boat, and instead disposed of the Iola to facilitate her theft of the Sea Wind.

As proof of Ms. Stern's plot, the government presented photographs taken on Ms. Stern's camera. The photographs displayed the Sea Wind with the Iola's distinctive red netting, and the Iola nearby with no netting, in otherwise sound condition, being left behind. The inference being

that Ms. Stern never intended to save the Iola – instead she took its useful parts and bolted away with the Sea Wind. Without further proof, this circumstantial evidence was sufficient for Judge Kennedy writing on behalf of the Ninth Circuit to find the pictures to be probative, admissible, and authenticated.

Applied here, concerns regarding authentication, timing, and circumstantial evidence likely would not be at issue. Customs' protocol is to photograph the distinctive characteristics of uncertified engines shortly after importation. Such distinctive characteristics include the model, serial number, and missing emission controls for the engines. The first two details can fairly easily be matched up with importation documentation to prove that the photographed engines are the ones which EPA and Customs purport them to be. Photographic evidence revealing the lack of emission controls on an engine can also be probative based on basic engineering concepts and national industry standards. Therefore it is very likely that Customs' photographs would be probative, admissible, and authenticated.

V. Evidentiary Conclusion

EPA and Customs' standard evidentiary practices should be sufficient to prove their case of CAA violations. As long as they do not stray from their practices, their evidence should relevant, probative, and authenticated. Likewise Customs witnesses almost certainly will be deemed competent experts based upon their training and experience. As long as these experts do not speak outside the scope of their expertise, their testimony should also be admissible and probative. Therefore the lack of real evidence here should not be a legal or practical impediment to proving a CAA violation in court.

Part Three: How NAFTA Weakened NEPA & the CAA

I. Introduction: Arrival Then Approval

An "arrival then approval" occurs when cargo trucks emanating from Mexico reach the U.S./Mexico border, clear Customs, deliver their goods in the U.S., and then return back to Mexico. But unlike an arrival then denial, the concern here is not with the goods per se, but more so with the emissions from the transporting vessels. The legal question presented for Part Three is whether the aggregate truck emissions from "arrival then approvals" implicate state implementation plans (SIPs); and (2) if so, whether agency regulations on this issue need to be supported by an environmental impact statement (EIS) and CAA conformity standards?

These questions were litigated and answered in U.S. v. Public Citizen.[78] The Ninth Circuit held that arrival then approvals implicate SIPs, therefore corresponding regulations need to be supported by EISs and conformance with the CAA. But in a unanimous opinion Supreme Court opinion, Justice Thomas essentially mooted the question presented, and found that the agency here had no authority to remedy the environmental problem at issue. This final section will expound upon the courts' reasoning and analyze the merits of both decisions.

II. Background

NAFTA was signed by the leaders of Mexico, Canada, and the United States in December of 1992.[79] NAFTA's provisions regarding the entry of Mexican commercial trucking to the U.S. were set to be implemented between 1995 and 2000.[80] However due to safety concerns, the U.S. initially refused access to such trucks beyond a handful of Border States, referred to as the commercial zone.[81] Mexico protested the U.S. action before an international arbitration panel and prevailed.[82] The panel concluded that the U.S. was in breach of its NAFTA

obligations, but noted that the U.S. had the authority to impose more stringent safety regulations upon Mexican trucks.[83]

In December 2001, Congress imposed twenty-two preconditions on the Department of Transportation (DOT) for its program granting the Mexican commercial trucking industry access to the U.S. beyond the commercial zone.[84] In March 2002, the Federal Motor Carrier Safety Administration (FMCSA) promulgated three regulations to comply with the congressional directives. The regulations outlined: (1) an application process for Mexican trucks to operate beyond the commercial zone; (2) a safety monitoring and compliance system; and, (3) a certification program for safety auditors and inspectors.[85]

In November 2002, the DOT Secretary announced that the preconditions had been met and directed the FMCSA to act upon applications from Mexican trucking companies seeking to do business beyond the commercial zone.[86] In implementing the regulations, DOT conducted a preliminary environmental assessment (EA), but claimed that an environmental impact statement (EIS) would be unnecessary because the regulations would not significantly affect the environment. Instead, DOT issued a Finding of No Significant Impact (FONSI) with its EA in January of 2002. Likewise, DOT did not prepare a CAA conformity determination because it deemed itself covered by the statutory exemptions.

Shortly thereafter a coalition of labor and environmental groups ranging from the Teamsters to the Natural Resources Defense Council challenged the regulations for non-compliance with NEPA and the CAA. NEPA §102 requires all agencies of the Federal Government to include with every regulation significantly affecting the quality of the environment an EIS regarding the proposed action.[87] CAA §176 states that no agency of the Federal Government shall permit any activity which does not conform to a SIP.[88] Conformity

means that such activities will not cause or contribute to any new violation of any standard in any area.[89]

III. Ninth Circuit Reasoning

As threshold issues, the Ninth Circuit found that the coalition had standing, had been injured, had established causation and judicial action could redress such injury.[90] Regarding NEPA, the Ninth Circuit pointed to 40 CFR §1501.4 which states that if the EA finds that the agency's action may significantly affect the environment, then an EIS must be prepared. In its defense, DOT claimed that there would be no increase in the traffic of Mexican trucks due to the regulations. It then asserted that even if an increase were to occur, the regulations themselves would not be the direct cause of the increase. Instead DOT asserted that a presidential rescission of a moratorium on Mexican trucks operating beyond the commercial zone, not the regulations themselves, would be the cause of such an increase.

The Ninth Circuit found DOT's reasoning to be circuitous because when DOT prepared its EA, it was reasonably foreseeable that the President would rescind the moratorium. Likewise DOT's EA did not address the potential of increased trucking leading to increased emission levels throughout the U.S. The court determined that this approach fell far below the requirements of NEPA. As for the CAA conformity claim, DOT relied upon the two exceptions within the Act: (1) when total and indirect emissions are at levels lower than those listed in the regulations; and (2) actions which would not result in more than a de minimis increase in emissions. Finding DOT's EA emissions analysis to be illusory because it did not factor in the foreseeable presidential rescission of the moratorium, the court also found DOT to be in violation of the CAA conformity provision.

IV. U.S. Supreme Court Reasoning

Unlike the Ninth Circuit, the Supreme Court's central focus was on threshold jurisdictional matters.[91] Pointing to 49 USCA 13902, the Court noted that the plain statutory language required the FMCSA to grant registration to foreign vehicles upon compliance with applicable safety regulations. Nowhere in the statute is the FMCSA empowered to impose emissions controls or establish environmental requirements unrelated to motor carrier safety.

Given the FMCSA's limited authority, the Court harped on the potential redressability problem. The Court noted that the only way the FMCSA could feasibly mitigate environmental harm would be to impose more onerous safety standards. But this idea was dismissed by the Court because the respondents could not provide reliable evidence on the value of doing so. Furthermore the Court saw FMCSA as an actor with a limited ability to address this problem because the president had control over the moratorium. Lastly the Court found FMCSA's regulations to be too attenuated from any environmental harm to necessitate an EIS or to invoke the CAA conformance requirement.

V. Arrival Then Approval Analysis & Conclusion

The Supreme Court certainly weakened NEPA and the CAA, albeit indirectly, in Public Citizen.[92] Despite the fact that the FMCSA had limited authority, its regulations led to degraded air quality. FMCSA in its EA conceded that at least 270,000 of the 400,000 Mexican trucks which could take advantage of the new regulations had been manufactured without effective emission controls.[93]

Perhaps this decision can be best explained as one providing deference to executive authority, particularly on foreign policy matters such as the implementation of treaties. Or perhaps this is just a problem redressable only by congressional action. Nevertheless despite the

Court's sound reading of FMSCA's statutory authority, the conflict with the plain language and purposes of NEPA and the CAA was undeniable, and the court's dismissal of such was insufficiently reasoned. The Court would have been better served to have forced FMCSA to prepare an EIS. That way the integrity of NEPA and the CAA would have been respected and the environmental harm would have been better documented.

Tying It All Together: Overarching Conclusion

Statutory interpretation can be more of an art than a science. The most trusted legal authorities, the canons and administrative precedents, paint a picture here indicating that an arrival then denial constitutes an importation under §203(a). While the picture is not perfect, it is certainly persuasive. Since Congress does not speak with one clear voice on any given issue, let alone on an obscure one, perhaps a persuasive picture is the best legal scholars can hope for. On the evidentiary front, the loss of real evidence is less of a problem than one might have expected. Through standard practices for handling imported uncertified engines, EPA and Customs can still build a strong case even if the real evidence subsequently leaves the U.S. Lastly, the NAFTA issue reveals the limits of the CAA and exemplifies the continual struggle between environmental protection and free trade. Consequently while EPA holds broad authority to act against uncertified mobile sources, its authority is not without limits.

---

[1] In 2008, approximately 11 million ocean-going cargo containers arrived at U.S. ports (Department of Homeland Security Office of Inspector General: CUSTOMS's Ability to Detect Biological and Chemical Threats in Maritime Cargo Containers 2 (2009). Given national security concerns and other practical challenges, there is little publicly available data detailing the number of illegal goods which surpass CUSTOMS inspections and enter the U.S. Yet, EPA has amassed evidence of foreign uncertified engines being sold in the U.S.

[2] 8 US EPA, Office of Civ. Enforcement, Enforcement Alert 2 (2006).

[3] 8 US EPA, Office of Civ. Enforcement, Enforcement Alert 2 (2006).

[4] http://www.epa.gov/compliance/resources/cases/civil/caa/mtd.html

[5] US Environmental Protection Agency, Carbon Monoxide, Mobile Source Emissions, http://www.epa.gov/air/urbanair/nox/chf.html (last visited Feb. 16, 2009).
[6] Interview with David Alexander, Senior Attorney, EPA Air Enforcement Division (Jan. 28, 2010).
[7] 8 US EPA, Office of Civ. Enforcement, Enforcement Alert 2 (2006).
[8] Isin, Wick, Kushner, Environmental Protection Through Border Protection, 387 (2008).
[9] Interview with David Alexander, Senior Attorney, EPA Air Enforcement Division (Jan. 28, 2010).
[10] Interview with David Alexander, Senior Attorney, EPA Air Enforcement Division (Jan. 28, 2010).
[11] Norman J. Singer et al., 1A Sutherland Statutory Construction, §22:29 Construction of Amendatory Acts (2009), (citing Stone v. I.N.S., 514 U.S. 386, (1995)).
[12] Norman J. Singer et al., 1A Sutherland Statutory Construction, §22:29 Construction of Amendatory Acts (2009), (citing Hazardous Waste Treatment Council v. U.S.E.P.A., 861 F.2d 270, (D.C. Cir. 1988)).
[13] Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (C.A.D.C. 1988)
[14] Stone v. I.N.S., 514 U.S. 386, (1995).
[15] Stone v. I.N.S., 514 U.S. 393, (1995).
[16] Stone v. I.N.S., 514 U.S. 397, (1995).
[17] Stone v. I.N.S., 514 U.S. 397, (1995).
[18] Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (C.A.D.C. 1988).
[19] Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (C.A.D.C. 1988).
[20] Circuit City Stores, Inc. v. Adams 532 U.S. 113, (2001).
[21] Gutierrez v. Ada, 528 US 250, 258 (2000).
[22] Kungys v. US, 485 US 759, 778 (1988).
[23] Circuit City Stores, Inc. v. Adams 532 U.S. 113, (2001).
[24] Gutierrez v. Ada, 528 US 250, 258 (2000).
[25] Babbit v. Sweet Home, 515 US 687 (1995).
[26] TVA v. Hill, 437 US 153 (1978).
[27] Committee on Interstate and Foreign Commerce H.R. Rep. No. 89-899, at 3 (1965).
[28] Committee on Interstate and Foreign Commerce H.R. Rep. No. 89-899, at 4 (1965).
[29] Committee on Interstate and Foreign Commerce H.R. Rep. No. 89-899, at 4 (1965).
[30] Committee on Interstate and Foreign Commerce H.R. Rep. No. 89-899, at 6 (1965).
[31] Committee on Public Works S. Rep. No. 91-1196, at 61 (1970).
[32] Gonzalez v. Oregon, 546 US 243, (2006).
[33] Collins v. NTSB, 351 F.3d 1246 (2003).
[34] Chevron v. NRDC, 467 US 837 (1984).
[35] Skidmore v. Swift, 323 US 134 (1944).
[36] Collins v. NTSB, 351 F.3d 1246 (2003).
[37] Collins v. NTSB, 351 F.3d 1254 (2003).
[38] Chevron v. NRDC, 467 US 837 (1984).
[39] Ronald A. Cass et al., Administrative Law Cases and Materials, 6-7 (Aspen Publishers 2006).
[40] See Justice Thomas' concurrence in Whitman v. American Trucking, in which he states that on a future day he would be willing "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." 531 U.S. 457 (2001).
[41] US v. Mead Corp., 533 US 218 (2001).
[42] US v. Mead Corp., 533 US 218 (2001).
[43] US v. Mead Corp., 533 US 218 (2001).
[44] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1224 (Thomson West 2007).
[45] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1225 (Thomson West 2007).
[46] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1225 (Thomson West 2007).
[47] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1226 (Thomson West 2007).
[48] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1226 (Thomson West 2007).

[49] William N. Eskridge, Jr. et al., Cases and Materials on Legislation, Statutes and the Creation of Public Policy, 1226 (Thomson West 2007).
[50] Green v. Bock Laundry, 490 U.S. 504 (1989).
[51] West Virginia Univ. Hospitals v. Casey, 499 U.S. 83 (1991).
[52] Green v. Bock Laundry, 490 U.S. 504 (1989).
[53] West Virginia Univ. Hospitals v. Casey, 499 U.S. 83 (1991).
[54] West Virginia Univ. Hospitals v. Casey, 499 U.S. 83 (1991).
[55] Gutierrez v. Ada, 528 US 250, 258 (2000).
[56] Fed. R. Evid. 401
[57] Fed. R. Evid. 402
[58] Fed. R. Evid. 403
[59] City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir., 1980).
[60] State v. Mathis, 221 A.2d 529, (Sup. Ct. of NJ, 1966).
[61] Evansville School v. Price, 208 N.E.2d 689 (App. Ct. of IN, 1965).
[62] Evansville School v. Price, 208 N.E.2d 689 (App. Ct. of IN, 1965).
[63] Fed. R. Evid. 601
[64] Fed. R. Evid. 702
[65] Fed. R. Evid. 704
[66] Washington v. Texas, 388 U.S. 14 (1967).
[67] Evans v. State, 28 P.3d 498 (Sup. Ct of NV, 2001).
[68] U.S. v. Heinlein, 490 F.2d 725 (D.C. Cir., 1973).
[69] Elcock v. Kmart Corp., 233 F.3d 734 (3d. Cir., 2000).
[70] Wheeling Steel v. Beelman River, 254 F.3d 706 (8th Cir., 2001).
[71] Wheeling Steel v. Beelman River, 254 F.3d 711 (8th Cir., 2001).
[72] Wheeling Steel v. Beelman River, 254 F.3d 712 (8th Cir., 2001).
[73] Fed. R. Evid. 901a
[74] Fed. R. Evid. 901b
[75] Semet v. Andorra Nurseries, 219 A.2d 357 (Pa. 1966).
[76] Nicolosi v. Livingston Parish, 441 So.2d 1261 (1st Cir., 1983).
[77] US v. Stearns, 550 F.2d 1167 (9th Cir., 1977).
[78] U.S. v. Public Citizen, 316 F.3d 1002 (9th Cir., 2003); U.S. v. Public Citizen, 541 U.S. 752 (2004).
[79] U.S. v. Public Citizen, 541 U.S. 752 (2004).
[80] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 1 (Feb. 2010).
[81] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 1 (Feb. 2010).
[82] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 1 (Feb. 2010).
[83] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 2 (Feb. 2010).
[84] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 2 (Feb. 2010).
[85] Mexican-Domiciled Truck Safety Regulations, 67 Fed. Reg. 12,702, 12,758, and 12,776 (Mar. 19, 2002).
[86] NAFTA Implementation: The Future of Commercial Trucking Across the Mexican Border, Congr. Research Service 2 (Feb. 2010).
[87] 42 USCA 4332(C)
[88] 42 USCA 7506(c)(1)
[89] 42 USCA 7506(c)(1)(A)-(B)
[90] Public Citizen v. US, 316 F.3d 1025 (9th Cir., 2003).
[91] Dept. of Transp. v. Public Citizen, 541 U.S. 752 (2004).
[92] Dept. of Transp. v. Public Citizen, 541 U.S. 752 (2004).
[93] Public Citizen v. US, 316 F.3d 1025 (9th Cir., 2003).