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USLP Brief Charges Conservation Is Unconstitutional

On June 6, the U.S. Labor Party will submit an amicus curiae to the U.S. Supreme Court in the case of Consumers Company v. Nekson Aeschliman, Saginaw Valley Nuclear Study Group, *now on appeal to the U.S. Supreme Court in response to decision by Judge Bazelon of the Washington, D.C. Circuit Court of Appeals.*

The case is one of the most significant brought under the National Environmental Policy Act (NEPA), which has been continually used by Naderite environmentalists to impose a "zero-growth" straight jacket on U.S. industry under the guise of protecting the environment.

Since December 1967, environmentalists have attempted to block the construction of two nuclear power reactors in Midland, Michigan through various legal maneuvers. Most recently, D.C. Circuit Judge Bazelon held that despite numerous procedural delays, construction could still be halted by the fact that the Consumers Power had not considered "conservation" as a viable alternative to building the reactor.

The U.S. Labor Party's amicus brief argues that Judge Bazelon's interpretation of the National Environmental Policy Act is not consonant with the U.S. Constitution or with the idea of progress which is the natural law basis of the Constitution. This is the first effort to attack the usage of NEPA on the basis of the real history of the American Republic.

SUMMARY OF ARGUMENT

Congress did not intend to legislate an end to industrial growth when it passed NEPA in 1969, nor did Congress intend to repeal the commitment to "scientific and industrial progress" spelled out explicitly in the Atomic Energy Act of 1954, a commitment which expresses the unique foundations of the American republic. Had Congress legislated an end to technological progress, such an Act would have been in violation of the most fundamental principles of the American Revolution and the United States Constitution. Nonetheless, this is the interpretation which has been placed upon NEPA by the court below in this and earlier cases.

The court below erred by interpreting NEPA in a manner contradictory to both the language and history of NEPA; namely by holding that NEPA requires the consideration of alternatives which are inconsistent with the mandate of the Atomic Energy Commission, now the Commission. Specifically, the court committed plain error by ruling that "conservation," i.e., reducing the production and consumption of energy, is a "colorable" alternative to building the power plant in question....

ARGUMENT

Introduction. The question before this Court revolves around the proper construction of the National Environmental Policy Act of 1969. As the history of NEPA in the courts make clear, this Act is open to a variety of interpretations. One interpretation, adopted by the court below, is that the *non-production* of energy, and restraint of economic growth, are viable, ponderable alternatives to the production of power under NEPA. Another interpretation is that NEPA represents a congressional commitment to the accomplishment of economic growth and technological progress by those means which have the least deleterious effects on the environment. *Amicus* here submits that the latter interpretation is that which is virtually compelled by every canon of construction.

The American Republic is unique among the Western nations in that it is the only country founded upon an explicit commitment to scientific and technological progress. A commitment to the idea of progress is the natural-law foundation of the United States Constitution, and is the generative principle which guided this country through its revolution and its replacement of the Articles of Confederation by the Constitution of 1787. To impute to Congress the intent to reverse this traditional policy *sub silento* would be monstrous — although this is exactly what the court below and some other lower courts have done. Such an imputation would defy 200 years of American history, it would defy this Nation's remarkable Constitution, and it would defy numerous other explicit congressional declarations. Congress's concern that technological progress continue in a manner which takes environmental considerations into account should not be read as an intent to attack technological progress *per se*, the very foundation of our republic.

The Constitutional Interpretation of NEPA

We clearly have before us two possible interpretations of NEPA. One interpretation would be that which is consistent with the Atomic Energy Act's policy to develop atomic energy so as to "increase the standard of living" and "to encourage maximum scientific and industrial progress." The other interpretation would be that which views NEPA as hostile to the "national commitment to economic growth and development" (Caldwell) and as intended to "control...the destructive engine of material progress" (*Calvert Cliffs*)....

History could not be clearer that the foundations of the U.S. Constitution, and indeed of the Republic itself, were forged in the battle for progress. Countless parliamentary statutes and edicts during the first half of the

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eighteenth century were devoted to stifling industrial and commercial expansion in America. Legislation such as the Iron Act of 1750 — an act which prohibited the production of finished iron products in the colonies — put up formidable barriers to the development of manufactures and rising living standards for the colonial population. It was against this constriction of the "American genius for mechanical improvement" that Benjamin Franklin, George Washington, John Adams, Thomas Jefferson and others led a revolution and then constituted the United States of America.

Even after the Revolutionary War was won, however, the sabotage from the British throne did not cease. Instead of legislation, trade warfare, credit cutoff, and the fomenting of anarchy within the newly formed United States was directed to stifle the economic growth of the new republic. If the United States had not created the political structure for a rapidly developing *national* economy, it was virtually doomed to being split among the major European powers and returned to the status of a plantation. The Constitution was the solution arrived at by Washington, Alexander Hamilton, Franklin and other leading patriots, as the lawful political framework for building a strong industrial nation...

Without question, this was also the understanding of the early Supreme Court, and was expressed most profoundly by Chief Justice John Marshall and Associate Justice Joseph Story. Major decisions of Marshall and Story, such as *Gibbons v. Ogden*, 9 Wheaton 1 (1824), *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819), or *McCulloch v. Maryland*, 4 Wheaton 316 (1819), can only be understood as expressing a commitment to a policy of encouraging the rapid development of commerce and industry, and of fashioning the instrumentalities of government to that end...

In his renowned *Commentaries on the Constitution*, (1833), Story noted,

> "A question has recently been made, whether Congress have a constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures." (*Commentaries*, II, Section 1077)
>
> "Now it is well known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures...
>
> "It is manifest, from contemporaneous documents, that one object of the Constitution was to encourage manufactures and agriculture by this very use of the power. *(1)* (II, Section 1082)

Story's famous dissent in the *Charles River Bridge* case located his views of contracts and charters in the context of public development, and, indeed, it could have been written as a commentary on the circumstances surrounding the construction of commercial nuclear reactors today, under the procedures mandated by interpretations of NEPA:

> "I can conceive of no surer plan to arrest all public improvements, founded upon private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security and to productiveness." *Charles River Bridge v. Warren Bridge*, 11 Peters 420, 608, (1837)....

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(1) Elliot's Debates, 74, 75, 76, 77, 115; 3 Elliot's Debates, 31, 32, 33; 2 Amer. Museum, 371, 372, 373; 3 Amer. Museum, 62, 554, 557; The Federalist, No. 12, 41; 1 Truck. Black. Comm. App. 237, 238; 1 American Museum, 16, 282, 289, 429, 432; Id. 434; Hamilton's Report on Manufactures, in 1791; 4 Elliot's Debates, App. 351 to 354.