NO. 05-1120

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*
Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICUS CURIAE* MADELEINE K. ALBRIGHT IN SUPPORT OF PETITIONERS

JODY FREEMAN
HARVARD LAW SCHOOL
CAMBRIDGE, MA
02138
(617) 496-4121

KATHLEEN M. SULLIVAN
Counsel of Record
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
555 Twin Dolphin Drive,
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

August 31, 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES, REGULATIONS, AND TREATIES

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

Amicus Madeleine K. Albright served as Secretary of State of the United States from 1997 to 2001. From 1993 to 1997, Dr. Albright was the United States permanent representative to the United Nations. Dr. Albright has longstanding professional expertise in foreign policy and international diplomacy, and a strong interest in the Court's resolution of the legal issues in this case to the extent that they bear on foreign policy and international diplomacy.

Now a principal of The Albright Group LLC, a global strategy firm, and the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service, Dr. Albright also serves on the board of directors of the Council on Foreign Relations and the Aspen Institute.

Amicus does not advocate any particular foreign policy approach to global climate change, and takes no position here on the merits of the current government's approach to climate change. The purpose of this brief is to alert the Court to the disturbing implications of one of the government's claims in this case: that the EPA Administrator may decline to regulate greenhouse gases under the Clean Air Act, even if he has the requisite regulatory authority, based in part on foreign policy considerations unrelated to the statutory criteria established by Congress.

---

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *Amicus Curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *Amicus* has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Clean Air Act, § 202(a)(1), provides that the Administrator of the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant" from any class of motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7521(a)(1). In denying a petition seeking regulation under this provision of certain greenhouse gases ("GHGs") emitted by motor vehicles, the EPA claimed several policy rationales unrelated to these express statutory criteria. Among them, it asserted a foreign policy rationale, namely that "[u]nilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies." Pet. App. A86. The agency concludes that, "[u]navoidably, climate change raises important foreign policy issues, and it is the President's prerogative to address them." *Id.*

Amicus has three objections to this assertion based on her longstanding experience in foreign policy and international diplomacy. *First*, the EPA possesses neither the mandate nor the expertise necessary to make foreign policy judgments. Congress has not authorized the EPA to consider foreign policy in the exercise of its "judgment" whether to regulate greenhouse gases; indeed, foreign policy is nowhere mentioned in the relevant provision. Congress has been careful to separate the EPA's domestic regulatory function from the formulation of international climate policy, which Congress has specifically assigned, in the Global Climate Protection Act of 1987, to the Department of State.

Second, even if foreign policy considerations were relevant to the EPA's "judgment" under the Clean Air Act, § 202(a)(1), the EPA's foreign policy rationale for

withholding regulation here does not deserve deference under either *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The EPA's judgment was not produced through consultation with expert foreign policy agencies. It also contradicts relevant diplomatic experience. There is no natural tension between domestic regulation and the ability of the United States to conduct foreign policy on climate change or related matters. Withholding regulation has not been a pre-condition for engaging other nations in global solutions in the past.

Moreover, the EPA's rationale conflicts with the government's own foreign policy on global warming. The EPA's rationale implies that withholding domestic regulation is necessary to ensure the government's ability to bargain with other nations over GHG. This might be true if the government were pursuing a "bargain through leverage" strategy, in which the government withheld mandatory domestic reductions unless and until other nations agreed to mandatory reductions as well. But the government is not doing so. It is pursuing instead a policy of encouraging voluntary action on the part of developing nations, consistent with the economic development priorities of those nations. Domestic regulation under § 202(a)(1) cannot "weaken" the government's ability to persuade developing nations to make voluntary reductions consistent with their own priorities.

Third, the EPA's invocation of a speculative foreign policy concern as a basis for declining to implement a domestic statutory mandate has troubling implications beyond this case. If this Court were to accept the existence of such an amorphous foreign policy override, any statutory provision requiring agency "judgment" on the basis of statutory criteria could be transformed into a discretionary question of foreign relations, raising serious separation of powers concerns. Given the number of domestic issues that are now the subject

of international negotiation, the opportunities for executive invocation of such a foreign policy trump are substantial. In the long run, the nation's diplomatic efforts are likely to be compromised by such an approach.

For these reasons, *Amicus* supports reversal of the judgment of the D.C. Circuit below.

ARGUMENT

Nothing in the Clean Air Act, § 202(a)(1), refers to foreign policy. Rather, that provision states simply that the Administrator of the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant" from any class of motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7521(a)(1). The EPA claims nonetheless that foreign policy considerations help to justify its refusal to regulate greenhouse gas ("GHG") emissions. Specifically, the Administrator asserts that domestic regulation of greenhouse gases could "weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies," and suggests that climate change must be left to the foreign policy prerogative of the President without agency action. Pet. App. A86.

This claim is unpersuasive as a matter of foreign policy and international diplomacy, for three reasons. First, foreign policy considerations are not relevant to EPA's domestic regulatory judgment under the Clean Air Act, § 202(a)(1). Congress has made this clear both in the plain text of the Clean Air Act and in the Global Climate Protection Act of 1987. Second, even if foreign policy considerations were relevant to the EPA's judgment under § 202(a)(1), the particular foreign policy rationale the EPA offers here for withholding domestic regulation is not entitled to deference

under any applicable standard of review. The EPA's foreign policy claims have no support in the record, contradict relevant diplomatic experience, appear not to be the product of consultation with relevant expert foreign policy agencies, and are irrational in light of the government's own foreign policy on climate change. Finally, if speculative foreign policy considerations may be used by the EPA to justify a refusal to regulate, as the EPA suggests, then foreign policy might become a trump card for the executive branch in a variety of domestic matters that are subject to international negotiation. This argument invites the misuse of foreign policy for domestic policy goals. Under such an approach, the long-term diplomatic interests of the United States would be compromised, not enhanced.

I. Foreign Policy Considerations Should Play No Role in the EPA's Exercise of Judgment Regarding Domestic Regulation of Greenhouse Gases under the Clean Air Act, § 202(a)(1)

Congress has not delegated foreign policy considerations to the EPA under the Clean Air Act, § 202(a)(1). The language of the statute omits any foreign policy concerns, and a negative implication may be drawn from the fact that Congress has elsewhere delegated responsibility for global climate change policy to the Department of State, not the EPA.

To begin with, the Clean Air Act, § 202(a)(1), nowhere mentions foreign policy as a relevant consideration, limiting the EPA's "judgment" instead to the narrow question of whether motor vehicles emitting greenhouse gases can "cause or contribute to air pollution which may . . . endanger public health of welfare." Congress well knows how to delegate foreign policy tasks to executive agencies, including in the environmental area. Indeed, several sections of the Clean Air Act specifically refer to some aspect of United States foreign

policy or international law.[2] Section 202(a)(1), by contrast, remains resoundingly silent on foreign policy considerations.

Moreover, Congress has made the irrelevance of foreign policy to the EPA's domestic judgments under § 202(a)(1) doubly clear by designating the Department of State, not the EPA, as the executive agency responsible for United States foreign policy regarding climate change. *See* Global Climate Protection Act of 1987 ("GCPA"), Pub. L. No. 100-204, § 1103(c), 1987 U.S.C.C.A.N. (101 Stat.) 1331, 1409. The GCPA tasks the State Department with the coordination of "United States Policy in the International Arena"[3] and, in contrast, charges the EPA with the formulation of "United States policy." *See* GCPA § 1103(b) ("The President, through the Environmental

---

[2] *See e.g.*, 42 U.S.C. § 7415 (under the title "International Air Pollution," stating that when the Administrator believes that pollution originating in the United States is endangering the public health or welfare in another nation, he shall notify the governor of the state from which the emissions originate, which must modify its policy to prevent such endangerment); § 7617 (under the title "Stratospheric Ozone Protection," providing that "the President through the Secretary of State and the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums and shall report to the Congress periodically on efforts to arrive at such agreements"); § 7702(a) (under the heading "Congressional findings on acid rain," stating that "[t]he Congress finds and declares that acid precipitation resulting from other than natural sources . . . could affect areas distant from sources and thus involve issues of national and international policy").

[3] Under the heading "Coordination of United States Policy in the International Arena," GCPA § 1103(c) states: "The Secretary of State shall be responsible to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy, including the United Nations Environmental Program and other international organizations."

Protection Agency, shall be responsible for developing and proposing to Congress a coordinated *national* policy on global climate change" (emphasis added)).

In addition, the GCPA conspicuously omits the State Department from the list of agencies whose findings the EPA must consider before making domestic climate policy.[4] The listed agencies are primarily responsible for scientific findings relevant to EPA's threshold "endangerment" determination under § 202(a)(1). This supports the claim that Congress intends the EPA's domestic regulatory judgments to be independent of foreign policy considerations and focused instead on the express statutory criteria.

If anything, the GCPA suggests that the EPA has it backwards: the State Department must take account of minimum regulatory standards in *domestic* regulation when formulating *international* climate policy, not the other way around. Thus, domestic climate regulation is a floor below which international agreements may not go. *See* GCPA § 1103(c) ("In the formulation of [aspects of U.S. policy requiring multilateral diplomacy], the Secretary of State shall, under the direction of the President, work jointly with the Administrator of the Environmental Protection Agency and other United States agencies concerned with environmental protection, consistent with applicable Federal law."). But Congress has given no indication that domestic policy must similarly defer to foreign policy in the international climate policy arena. In the face of such contrary congressional

[4] *See* GCPA § 1103 (b) ("Such policy formulation shall consider research findings of the Committee on Earth Sciences of the Federal Coordinating Council on Science and Engineering Technology, the National Academy of Sciences, the National Oceanic and Atmospheric Administration, the National Science Foundation, the National Aeronautic and Space Administration, the Department of Energy, the Environmental Protection Agency, and other organizations engaged in the conduct of scientific research.").

indications, the EPA's assertion of foreign policy grounds to decline to regulate domestic greenhouse gases is unauthorized.

II. The EPA's Alleged Foreign Policy Rationale Deserves No Special Deference Because It Lacks Foundation in Agency Expertise and Is Contrary to Relevant Diplomatic Experience

Even if foreign policy considerations were relevant to the EPA's "judgment" under the Clean Air Act, § 202(a)(1), the EPA's foreign policy rationale in this case warrants no special deference. Agencies are entitled to deference only for judgments made pursuant to their specific mandates. For example, deference is appropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

By contrast, when an agency acts on matters not delegated to the agency by statute and beyond its expertise, no special deference is appropriate. *See Gonzalez v. Oregon*, 126 S. Ct. 904, 922 (2006) (holding that the Attorney General's statutory authority to schedule controlled substances did not extend to prohibiting doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure, noting that "deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment").

In keeping with these general principles, this Court has deferred to administrative agencies on matters of foreign policy only when those agencies can claim a statutory

mandate to consider foreign policy, and when they possess concomitant expertise. *See Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986) (deferring to the Secretary of Commerce's refusal to certify a nation's non-conformity where the relevant statute specifically directed the agency to determine whether the nation's fishing practices undermined international conservation programs). *See also Sumimoto Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (deferring to the State Department's interpretation of an international treaty on grounds that, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (according weight to decisions of the Immigration and Naturalization Service because of the agency's "greater immigration-related expertise").

Here, as with the Department of Justice's interpretation of its authority in *Gonzalez v. Oregon*, the EPA's interpretation that its § 202(a)(1) "judgment" includes foreign policy discretion was not made pursuant to any delegation by Congress. Unlike the Department of Commerce in *Japan Whaling*, the EPA was not charged by Congress with making any finding regarding foreign nations or international agreements. Indeed, foreign policy is nowhere mentioned in § 202(a)(1). The appropriate standard of review is therefore not that applied in *Chevron* but rather that applied in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) (holding an agency interpretation entitled to respect only to the extent it has the power to persuade).

Under *Skidmore*, the EPA's foreign policy rationale is not entitled to deference. Here, as in *Gonzalez v. Oregon*, the agency came up with its policy rationale entirely on its own, even though it lacked the relevant expertise. Nothing in the record suggests that the EPA consulted with the Department

of State, the National Security Council, or any other relevant agency with foreign policy expertise, on whether its foreign policy position was appropriate.

Even if the more deferential *Chevron* standard of review were applicable, the EPA's rationale does not meet the requisite standard of reasonableness. To begin with, there is nothing in the record to support the EPA's assertion that domestic regulation would "weaken" United States efforts to engage developing nations in reducing their greenhouse gas emissions. Diplomatic experience suggests that this assertion is incorrect. Withholding regulation has not in the past been a pre-condition for engaging other nations in global solutions to environmental problems. The United States is party to several international agreements on air pollution that were negotiated *after* related domestic regulation was already authorized and underway.[5] These agreements suggest that prior domestic regulation does not tie the government's diplomatic hands on a matter of global concern when it later negotiates international agreements.

It is at least equally plausible that domestic regulation might help prompt other nations to join in later international responses to global environmental problems. For example,

---

[5] *See* Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10,541, *reprinted in* 18 I.L.M. 1442. *See also* Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, Nov. 30, 1999, State Dept. No. 05-181, *available at* http://www.unece.org/env/lrtap/full%20text/ 1999%20Multi.E.Amended.2005.pdf; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, June 24, 1998, State Dept. No. 04-33, *available at* http://www.unece.org/env/lrtap/full%20text/ 1998.Heavy.Metals.e.pdf; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, Oct. 31, 1988, T.I.A.S No. 12,086, *available at* http://www.unece.org/env/lrtap/full%20text/ 1988.NOX.e.pdf.

early United States regulation of ozone-depleting substances helped to spur an international process that ultimately resulted in the Montreal Protocol, the agreement that phased out ozone-damaging chlorofluorocarbons.[6] Thus, there is no natural tension between domestic regulation and the ability of the United States to conduct foreign policy on climate change or related matters.

The EPA also claimed in its petition denial that the benefits of unilateral regulation of greenhouse gases by the United States could be "lost" because increases in emissions by developing nations could "overwhelm" them. Pet. App. A86. Yet again, past diplomatic experience casts doubt on such an assertion. Early United States reductions of ozone-depleting substances were not overwhelmed by increased emissions from other nations; indeed, reductions by the United States were key to securing concomitant reductions by other nations. *See* RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY 6 (1991) ("[A]n *individual nation's policies and leadership* made a major difference. The United States undertook such leadership in achieving international agreement on ozone protection. The U.S. government set the example by being the first to take regulatory action against the suspect chemicals. Later, it developed a comprehensive global plan for protecting the ozone layer and tenaciously campaigned for its international acceptance through bilateral and multilateral initiatives. . . . ") (emphasis in original)). *See also* John K. Setear, *Ozone, Iteration and International Law*, 40 VA. J. INT'L L. 193, 196 (1999).

The EPA's foreign policy rationale for withholding regulation might perhaps have some rationality if it were United States policy to seek leverage against other nations for

[6] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10 (1987), 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989).

mandatory emissions reductions, by withholding mandatory domestic reductions unless and until other nations agreed to mandatory reductions as well. In that event, it might be the case that any premature domestic reductions would be overwhelmed by other nations' failure to comply.

But any such reasoning is belied in this case by the government's own actual international policy on climate change, which eschews a policy of pursuing mandatory reductions in favor of voluntary action.[7] The United States has formally articulated, and is actively pursuing, a policy of encouraging voluntary action on the part of developing nations, consistent with the economic development priorities of those nations. This policy is exemplified by United States participation in the Asia Pacific Partnership on Clean Development and Climate.[8] While *Amicus* takes no position

---

[7] The EPA's petition denial cites the Montreal Protocol as an illustration of *its* point that international agreements requiring mutual mandatory reductions are necessary to ensure that the benefits of unilateral reductions are not lost. The EPA's example, however, makes *Amicus*' point. The Montreal Protocol shows that a leverage strategy is only plausible if a state actually engages in bargaining: under Presidents Ronald Reagan and George H.W. Bush, the United States actively participated in and signed the Montreal Protocol, pursuing a leverage strategy similar to that the EPA cited. By contrast, current climate policy has formally rejected a diplomatic strategy of bargaining for mandatory reductions.

[8] *See* Fact Sheet: The Asia-Pacific Partnership on Clean Development and Climate, *available at* http://www.whitehouse.gov/news/releases/2006/01/20060111-8.html; James L. Connaughton, Chairman, White House Council on Environmental Quality, Testimony before the United States Senate Committee on Commerce, Science & Transportation Subcommittee on Global Climate Change (Apr. 5, 2006) (describing the Asia-Pacific Partnership on Clean Development and Climate Change as "focus[ing] on voluntary practical measures to create new investment opportunities, build local capacity, and remove barriers to the introduction of cleaner, more efficient technologies").

on the merits of this policy, it is difficult to see how domestic regulation under § 202(a)(1) could "weaken" the government's ability to persuade developing nations to make voluntary reductions consistent with their own priorities.

The United States has declined to pursue mandatory emissions reductions under the auspices of the U.N. Framework Convention on Climate Change,[9] the Kyoto Protocol,[10] or any other international bi-lateral or multi-lateral process whose purpose is to provide the forum for negotiating *quid pro quo* reductions in greenhouse gas emissions. Administration policy has remained consistent on this point. In 2001, the President sent a letter to four Senators stating his opposition to the Kyoto Protocol, and reversing his earlier policy of calling for mandatory emissions cuts.[11] Two weeks later, the United States abandoned the Kyoto Protocol, announcing that it did not support the agreement and would not transmit it to the Senate for its advice and consent to ratification.[12] The government then began entering into bi-lateral and multilateral agreements with other nations geared *not* toward bargaining over targets and timetables for mandatory reductions, but instead toward voluntary

---

[9] United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC NO. 102-38 (1992), 31 I.L.M. 849. President George H.W. Bush signed the Treaty and it was ratified by the Senate in 1992. S. Rep. No. 103-35, at 76-78 (1993).

[10] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22.

[11] *See* Text of a Letter From the President, Mar. 13, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/03/20010314.html ("I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a "pollutant" under the Clean Air Act.").

[12] *See, e.g.*, *U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N.Y. TIMES (Mar. 27, 2001).

programs.[13] In December 2005, nations gathered in Montreal, Canada for the Eleventh Session of the Conference of Parties to the Rio Declaration and the First Meeting of the Parties to the Kyoto Protocol. There, the United States reiterated that it is not pursuing a leverage strategy; rather, the nation's official position opposes any such formal negotiations.[14]

Thus, domestic regulation of greenhouse gases would seem consistent with, not contrary to, the government's foreign policy on global climate change. Whatever the best international strategy on climate change might be, there is

---

[13] These international agreements currently include (a) the Methane-to-Markets Partnership; (b) the International Partnership for a Hydrogen Economy; (c) Carbon Sequestration Leadership Forum; (d) Generation IV International Forum; (e) Renewable Energy and Energy Efficiency Partnership; (f) Regional and Bilateral Cooperation; (g) Global Environmental Facility; (h) Tropical Forest Conservation Act (TFCA) and (i) the Asia-Pacific Partnership on Clean Development and Climate. *See* Secretary, Climate Change Fact Sheet: The Bush Administration's Action on Global Climate Change (May 18, 2005), *available at* http://www.state.gov/g/oes/rls/fs/ 46741.htm.

[14] *See* Harlan Watson, Senior Climate Negotiator and Alternate Head of U.S. Delegation, Remarks on President's Non-Paper (Dec. 2, 2005) *available at* http://www.state.gov/g /oes/rls/rm/57688.htm ("The United States is opposed to any such discussions under the Framework Convention. . . . The U.S. position remains consistent: We see no change in current conditions that would result in a negotiated agreement consistent with the U.S. approach. . .We are not a party to the Kyoto Protocol and we do not support any such approach under the Convention for future commitments"); Paula Dobriansky, Under Secretary of State for Democracy and Global Affairs and Head of U.S. Delegation to the Conference of Parties to the UNFCCC, Remarks to the Conference of Parties to the UN Framework Convention on Climate Change (Dec. 7, 2005), *available at* http://www.state.gov/g/rls/rm/2005/57867.htm ("[The United States opposes] formalized discussions—specifically formalized discussions that provide a basis for negotiations. It is our belief that progress cannot be made through these formalized discussions. . . . [W]e also believe firmly that negotiations will not reap progress, as I indicated, because there are differing perspectives").

nothing in the record, relevant diplomatic experience or the government's own foreign policy on climate change, to support EPA's foreign policy rationale for withholding domestic regulation. On any applicable standard of review, it is not entitled to any special deference.

III. An Agency's Use of a Foreign Policy Trump to Avoid Domestic Regulation Mandated by Congress Would Raise Serious Separation of Powers Concerns and Might Well Compromise Diplomacy

Lacking any statutory delegation or relevant diplomatic precedent, the EPA petition denial relies on vague notions of executive power in support of its argument that foreign policy concerns should override congressional intent. This argument has troubling implications beyond this case, the Clean Air Act, or the context of global warming. In certain contexts, it is clearly appropriate for courts to defer to executive determinations about the foreign policy interests of the United States. But where Congress has carefully divided domestic and foreign policy tasks, as it has in the global climate change context, vague and speculative invocations of foreign policy should be insufficient to displace the congressional scheme.

The foreign policy trump the EPA has invoked here cannot be confined to the Clean Air Act. Numerous statutes require administrative agencies to make "judgments" prior to regulating, while conditioning those judgments on specific statutory criteria.[15] Agencies may not override those criteria

[15] *See, e.g.*, 42 U.S.C. § 7409 (creating two-step process for establishing national ambient air quality standards, including threshold determination whether pollutant is harmful to health and welfare); § 7411(b)(1) (requiring EPA Administrator to regulate emissions from stationary sources by first listing a "category" of sources when "in his judgment it causes or contributes to air pollution which may reasonably be anticipated to endanger health of welfare"). *See also* Federal Food, Drug,

for policy reasons that are *ultra vires*. *Whitman v. American Trucking* 531 U.S. 457 (2001). Contrary to the EPA's argument, *ultra vires* foreign policy reasons are no exception. If the Court were to accept a foreign policy override even where Congress has clearly set forth wholly domestic criteria, as it has in § 202(a)(1), then virtually any statute requiring agency "judgment" could be transformed into a discretionary question of foreign relations, raising serious separation of powers concerns.

It is no answer to suggest that, even if an area of domestic regulation has not yet produced international negotiations, it might do so in the future, requiring domestic regulatory abstinence now for the sake of future foreign policy. The range of domestic issues over which the federal government might be involved in international negotiations is vast, and opportunities for such executive invocation of a foreign policy trump would be difficult to cabin. The traditional foreign policy agenda has expanded to include a wide variety of social, cultural, labor, environmental and health issues that were previously thought to be exclusively domestic concerns. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism,* 83 VA. L. REV. 1617, 1671-

---

and Cosmetic Act, 21 U.S.C.A. § 355 (authorizing the Food and Drug Administration to regulate "new drugs," which requires a threshold determination based on the definition of "new drug" in Section 321(p)); Occupational Safety and Health Act, 29 U.S.C. § 652(8) (defining "occupational safety and health standard"); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum*, 448 U.S. 607, 614-15 (1980) (establishing that OSHA definition contains a threshold determination that the toxic poses a significant health risk in the workplace); Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(1)(B) (requiring EPA to publish a maximum contaminant level goal and promulgate a national primary drinking water regulation for a contaminant if the Administrator determines, among other things, that "in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems").

72 (1997) ("Traditionally, public international law regulated relations among nations. It rarely overlapped with domestic law, and it rarely regulated private activity. Today, by contrast, it frequently regulates both public and private activities that were formerly domestic concerns." (internal citations omitted)). There are literally thousands of international instruments, including treaties, non-binding declarations, executive agreements, voluntary undertakings, memoranda of understanding, partnerships, and the like, to which the United States is currently party, or in which the United States plays some role or *could* play some role in the future.[16]

In some instances, the implications of the EPA's position might benefit the United States as a practical matter; in others, they might not. But there is a danger that in the long term, the diplomatic interests of the United States might well be compromised, not enhanced, if executive agencies had plenary power to allow foreign policy considerations to trump regulatory judgments that Congress required them to make. Administrations of different political leanings have all from time to time made representations internationally that their negotiating positions are limited by Acts of Congress and that

[16] On environmental matters alone, there are over a thousand such agreements. "By 1992, there were more than 900 international legal instruments (mostly binding) that were either fully directed to environmental protection or had more than one important provision addressing the issue." ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1 & n.1 (Edith Brown Weiss & Harold K. Jacobson, eds., 1998) (describing compilation undertaken by editors). Since then, the United Nations Treaty Series catalogues an additional 173 bilateral and 44 multilateral treaties under the category of "Environment." A standard compilation, updated through 2003, identifies 166 major non-binding international instruments related to the environment. *See* INTERNATIONAL ENVIRONMENTAL SOFT LAW: COLLECTION OF RELEVANT INSTRUMENTS (W.E. Burhenne, ed., 1993).

there are minimum domestic statutory standards that must be observed. This is particularly true in negotiations on trade, fisheries, commercial access, and military aid. Freeing the Executive from the constraints of domestic legislation in these and other instances would fundamentally alter the practice of diplomacy, and jeopardize the careful balance of power and roles that characterize the management of United States foreign relations.[17] The executive latitude implied by the EPA's petition denial in this case thus might well come at a high price, not only for Congress, which could see its statutory standards ignored, but for future presidents, who, in many instances, could no longer credibly claim that they are unable to act in a way sought by a foreign negotiator. This would remove a valuable tool used regularly to limit the agenda for diplomacy.

An interpretation of the Clean Air Act that permits the invocation of a foreign policy override thus would invite the misuse of foreign policy to achieve domestic policy goals. It would enhance the executive branch at the expense of Congress under the guise of foreign policy necessity while undermining the long-term diplomatic interests of the United States. In an era of in which many domestic issues are tinged with foreign policy overtones, and where nations leverage and trade across many issues and interests, the opportunities for executive mischief are plenty. Thus diplomatic prudence, as well as the plain language of the Clean Air Act and this Court's precedents, support rejection of the EPA's expansive interpretation of its foreign policy discretion to ignore the domestic regulatory mandates Congress set forth in the Clean Air Act.

---

[17] *See* LISA MARTIN, DEMOCRATIC COMMITMENTS, LEGISLATURES AND INTERNATIONAL COOPERATION 22 (2000) ("In democracies institutionalized legislative integration is a key determinant of the credibility of commitments.").

CONCLUSION

For the foregoing reasons, and those stated in the Brief of Petitioner, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JODY FREEMAN
HARVARD LAW SCHOOL
CAMBRIDGE, MA
02138
(617) 496-4121

KATHLEEN M. SULLIVAN
Counsel of Record
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
555 Twin Dolphin Drive,
Suite 560
Redwood Shores, CA 94065
(650) 801-5000

Counsel for Amicus Curiae

August 31, 2006