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Symposium: *Whitman v. American Trucking Association*

In *Whitman v. American Trucking Associations, Inc*., the Supreme Court upheld traditional interpretations of §109 of the Clean Air Act, ruling that EPA may consider only public health and safety in setting ambient air quality standards and it may not engage in a cost-benefit analysis, as urged by industry groups. Also, contrary to the decision of the D.C. Circuit, the high Court ruled that EPA's interpretation of its authority to set standards did not amount to an unconstitutional delegation of legislative authority. The Court also held that EPA's implementation policy constituted a final agency action subject to judicial review and that two statutory provisions for ozone, Subpart I and Subpart 2, were seemingly in conflict and EPA must reconcile these provisions on remand. (For the full text of the opinion, see page 377, *infra*. For a summary of the Court's decisions, see page 283, *infra*).

What follows are analyses of the Court's decision by members of the EPAALR Board of Advisors.

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The Supreme Court's recent decision on the big issues posed by *Whitman v. American Trucking Associations*[1]—whether EPA may consider costs in setting national ambient air quality standards (NAAQS) under Clean Air Act (CAA) Section 109(b) and whether Section 109(b)(1) represented an unlawful delegation of legislative power by Congress—should have come as no surprise to any

[1] *Whitman v. American Trucking Ass'ns, Inc.*, No. 99-1257, slip op. (Feb. 27, 2001).

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rational observer. While the backdrop against which this appeal was granted and litigated had engendered its share of high hopes and bleak fears, the outcome should not have been difficult to forecast.

But the startling readiness of the D.C. Circuit to breathe new life into the nearly moribund "non-delegation" doctrine[2] had been a stomach-punch to EPA. If its authority to set NAAQS under Section 109, a pillar of the 1970 Act, could be defeated by dint of a legal theory whose moment had come and gone nearly 65 years earlier,[3] the door seemed open to all nature of disasters. Too, although the D.C. Circuit had rejected industry's argument that EPA should have considered costs in establishing a NAAQS, it seemed an ominous sign that the Supreme Court was willing to take up this question along with EPA's appeal of the non-delegation issue. The D.C. Circuit's *Lead Industries* decision,[4] which decided the cost issue resoundingly in EPA's favor in 1980, had proved unbudgeable in the ensuing decades. Still the inevitable question arose: Why did the Supreme Court determine to review *ATA* on the cost issue, if not to reverse *Lead Industries*? Fittingly or not, the case was argued on election day, leaving court-watchers with the dilemma of choosing between waiting in line to see the proceedings or waiting in line to vote. When, in the weeks that followed, the election itself took center stage at the Court, the end result in *Bush v. Gore*[5]—a jagged split along ideological lines—was read by some as an augury that a similar scenario would unfold in *Whitman v. ATA*.

The Supreme Court's unanimous February 27, 2001, ruling, however, was as sound and cogent as the D.C. Circuit's, at least on the delegation issue, and was confusing and unsystematic. While Justice Scalia's authorship of an opinion that vindicated EPA on the two most critical issues may have seemed like the stuff of industry nightmares, on further consideration it is not so odd at all. Ultimately, on the "cost" and "delegation" issues, the Court's opinion was quite a conservative one.

Adopting the industry's position on the cost issue would have forced the Court to take two steps it must have viewed with great reluctance, if not repugnance. First, it would have meant overturning the *Lead Industries* case and all of the considerable precedent that followed the formidable and exhaustively researched decision by J. Skelley Wright, one of the premier "first-generation" interpreters of the environmental laws. It also would have thrown into doubt the Court's earlier landmark decision in *Union Electric Co. v. EPA*,[6] which held that EPA was not permitted to consider issues of economical or technological feasibility in making approval decisions

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[2] *See American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999). In the face of a well-reasoned dissent, the majority ruled that EPA had construed Sections 108 and 109 "so loosely as to render them unconstitutional delegations of legislative power." *Id.* In the absence of an "intelligible principle" to guide EPA's decision-making in setting a revised NAAQS for ozone, the court remanded the NAAQS so that EPA might attempt to salvage it through a more restrictive construction of the law.

[3] *See U.S. v. Touby*, 909 F.2d 759, 765 (3d Cir. 1990), *aff'd*, 500 U.S. 160 (1991). The D.C. Circuit's "non-delegation" approach is discussed in L. Bergeson and B. Auerbach, "A Smart and Sane Dissent," in Symposium: Regulation After *American Trucking Associations, Inc. v. EPA*, Admin. Law Rptr. Vol, 13, No. 6 at 775 (June 1999).

[4] *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

[5] *Bush and Cheney v. Gore*, 121 S.Ct. 525 (2000).

[6] 427 U.S. 246 (1976).

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on implementation plans submitted by the states under CAA Section 110.

Second, and perhaps more important, embracing the argument that EPA should consider cost in the Section 109 context would have required an enormous departure from strict constructionism. As the Scalia opinion put it, "Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards."[7] In short, "under this most natural of readings," Justice Scalia concluded that the statutory language is "'absolute.'"[8] It would have taken quite an act of contortionism for the Court to have decided otherwise.

Just as the Court's affirmance of the "cost" precedents now seems a foregone conclusion, the D.C. Circuit's "non-delegation" ruling can be viewed as a reversal waiting to happen. Upholding the D.C. Circuit on this issue would have contravened a long line of precedents in which the Supreme Court had refused to second-guess Congress on what quantum of judgment on policy questions allowably could be left to the implementing agencies, a line which comfortably included the case before the Court:[9]

> The scope of discretion §109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."[10]

The D.C. Circuit's bizarre remedy for this perceived instance of unconstitutional delegation—remanding for EPA to adopt an appropriately restrictive construction of Section 109—also sat poorly with the Court. Justice Scalia rightly skewered as "internally contradictory" the notion that an agency could cure an unconstitutional delegation by simply declining to exercise the offending measure of power.[11] It is important to bear in mind, however, that the Court's proper refusal to buy into the D.C. Circuit's theory does not leave prospective challengers with any recourse. While nothing now will be gained by arguing that Section 109 lacks an "intelligible principle," if EPA cannot rationally tie the record in a rulemaking to its result, EPA remains vulnerable to a charge of "arbitrary and capricious" action.

Although the "arbitrary and capricious" standard always has been a difficult one for a challenger to meet, the *Whitman v. ATA* Court may have eased that task by a notch or two. In the final, narrowest part of its opinion—after rejecting EPA's argument that the Court of Appeals lacked jurisdiction to review its policy for implementing the revised ozone NAAQS in current "nonattainment" areas—the Court decided that the implementation policy was unlawful. In so doing, the Court refused to defer to EPA's interpretation of the law, where that interpretation "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear."[12] Accordingly, while citing the familiar

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[7] *Whitman v. ATA*, slip op. at 4.

[8] *Id.* at 4, 5, *citing* D. Currie, Air Pollution: Federal Law and Analysis 4-15 (1981).

[9] *Id.* at 14.

[10] *Id.* at 13-14, *citing Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[11] *Id.* at 12.

[12] *Id.* at 21.

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Chevron formula for judicial review of an agency's interpretation of the statute it administers,[13] the Court continued a discernible and positive trend in cutting back on the quantum of deference it is willing to afford to federal agencies on these issues. The refusal to accord an almost slavish deference to agency decision-making may not be what *Whitman v. ATA* will bring to mind on first, or even on second thought, but it will remain another facet of its legacy.

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Hardly anyone was surprised, except possibly two judges on the U.S. Court of Appeals for the District of Columbia, by the Supreme Court's decision in *American Trucking* that Section 109 of the Clean Air Act is not an unconstitutional delegation by Congress of its lawmaking authority. Section 109(b) instructs EPA to set primary ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." The Court had no difficulty in concluding that this provided sufficiently clear guidance to EPA to set a standard which is "sufficient, but not more [stringent] than necessary" to protect public health. (Slip op. 13). The Court observed that this language is no more vague than comparable language which it had upheld in numerous other statutes including OSHA, the Public Utility Holding Company Act of 1935, and regulatory delegations to the FCC, the ICC and other agencies.

EPA's victory on this point changes nothing on the regulatory landscape. By contrast, a loss would have pulled the foundation out from under 30 years of national standard setting as well as the implementation plans which have been adopted in every state in the country. It would have been devastating, and the implications would have been chaotic.

Far more important to the regulated community was the Court's holding that EPA may not consider costs in setting national ambient air quality standards ("NAAQS"). Here the Court relied not only on the absence of any express authority in Section 109 to consider costs and technological constraints, but on the statutory scheme as a whole. Specifically, the Court first noted that Section 109, in omitting cost considerations, stood in stark contrast to other sections of the Clean Air Act which expressly authorize considerations of cost. The Court included as examples the setting of new source performance standards under Section 111(b), automobile emissions standards under Section 202(a), and aircraft emission standards under Section 231(b), as well as other provisions. Furthermore, the Court pointed out
that costs and technological constraints may be considered when the states actually apply the NAAQS to specific sources or categories of sources through the state implementation plans under Section 110 of the Clean Air Act. The Court had already so held in *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976).

Although Justice Scalia writing for the Court did not allude to the legislative history, Justice Breyer, in a concurring opinion discussed the legislative history at length. He marshaled substantial citations from the 1970 Act and the 1977 Amend-ments supporting the proposition that Congress intended that Section 109 be "technology-forcing," and that the goal of protecting public health was not to be compromised by considerations of cost and technological feasibility.

[13] *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

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The industry litigants had presented respectable arguments that Section 109 does not by its terms preclude EPA from considering costs, that the criteria documents generated by EPA under Section 108 which provide the foundation for the NAAQS includes the gathering of information on costs and technology, and that sound public policy would allow EPA to consider these factors. The fact that the Court rejected these arguments does not change the present regulatory landscape, since the D.C. Circuit had reached this same conclusion 21 years ago in *Lead Industries Assn., Inc. v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980).

Furthermore, the holding will not change EPA's implementation of any other section of the Clean Air Act or, for that matter, any other provision of any of the other statutes which EPA implements. Most of those provisions allow consideration of costs and technology. Even where the statute is silent on the subject, the Court noted, with no expression of disapproval, that the D.C. Circuit has "found authority for the EPA to consider costs" in sections of the Clean Air Act which contain no express authority to that effect (Slip op. 8, n.1, citing *Michigan v. EPA*, 213 F.3d 663, 678-79 (D.C. Cir. 2000); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998); *Natural Resources Defense Counsel Inc. v. EPA*, 824 F.2d 1146, 1154-68 (D.C. Cir. 1987) (en banc)). In fact, in reaching its decision on Section 109 the Court did not rely solely on the absence of cost consideration authority in Section 109, but relied very heavily on the fact that in the actual implementation of the NAAQS states can and do consider costs and technological implications in determining what level of controls to place on what sources in order to bring each air quality region into compliance with the ambient air quality standards.

Today, public policy strongly favors consideration of the costs of compliance of regulations issued by EPA and other agencies. Congress has made this very clear through the enactment of such measures as the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act (1996) and the Congressional Review Act (1996)(used by Congress earlier this month to repeal OSHA's ergonomics rules as too costly). A similar policy by the Executive Branch is reflected in Executive Order 12866 (1993), which requires a regulatory impact analysis for all significant regulatory actions. Thus, in implementing statutory provisions which are silent as to consideration of costs or technological feasibility, these factors should normally be considered unless the overall statutory scheme makes clear Congress' intent that they not be considered.

The Court's holding on the ozone issues is quite helpful to the regulated community. First, the Court rejected EPA's position that its implementation policy with respect to the timing of the ozone standards, which was set forth in a regulatory preamble, was not "final agency action" (Slip op. 17-18). The fact that the action was not codified in a regulation was immaterial. What is important is that EPA's position was as a practical matter "final" and would be applied to the regulated community. The Court also held that the issue was ripe for review since the question is one of statutory interpretation, and review at this time would not "inappropriately interfere with further administrative action" by EPA (Slip op. at 19). The Court also noted that under the "preenforcement review" provisions of the Clean Air Act a much more permissive standard of ripeness is applied than might otherwise apply to a case brought under the review provisions of the Administrative Procedure Act, 5 U.S.C. § 704.

On the merits, Subparts 1 and 2 of Part D of Title I contain somewhat inconsistent and ambiguous

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provisions with respect to implementation timing of the new ozone standard. The Court held that EPA's determination that Subpart 1 would govern to the exclusion of Subpart 2, despite the express language in Subpart 2, indicating that Congress intended that it would apply to the new ozone standards, was unreasonable. The Court gave EPA no *Chevron* deference on this matter of pure statutory interpretation. It directed a remand with instructions to EPA to develop a reasonable interpretation which reconciles the two provisions.

In conclusion, while EPA is understandably pleased that Section 109 was not held unconstitutional and that EPA's position on costs was upheld, there is a lot in the decision which can be constructively utilized by the regulated community as well.

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In *Whitman v. American Trucking Assns., Inc.*, the Supreme Court put to rest the notion that section 109(b)(1) of the Clean Air Act permits EPA to consider economic costs in setting national ambient air quality standards ("NAAQS"), and also buried the related[14] argument that section 109(b)(1) constitutes an impermissible delegation of legislative power to EPA by failing to provide an "intelligible principle" to adequately guide EPA in the exercise of its discretion. However, while the Court resolved these important questions concerning section 109(b), its opinion raises important questions about the role of cost-benefit analysis as applied to numerous other provisions of environmental statutes. It also leaves open the door, at least theoretically, to nondelegation challenges concerning other provisions of environmental statutes, but the odds are now stacked heavily against those challenges; if not dead and buried, the nondelegation doctrine is on life support with respect to environmental legislation.

1. Is Consideration of Cost Presumptively Permitted or Presumptively Prohibited?

In the main opinion written by Justice Scalia, the Court began its analysis of the cost consideration issue by reviewing the language of section 109(b)(1), which directs EPA to set NAAQS that "are requisite to protect the public health," with an "adequate margin of safety." The Court stated that, "[w]ere it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting standards…Nowhere are the costs of achieving such a standard made part of that initial calculation." Slip op. at 3.

The Court then reviewed several arguments raised by industry in an effort to defeat what the Court described as "this most natural of readings" of section 109(b)(1). After rejecting these arguments, the Court stated:

> "Accordingly, to prevail in their present challenge, respondents must show a textual commitment of authority to the EPA to consider costs in setting NAAQS under § 109(b)(1). And because § 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the [Clean Air Act]…that textual commitment must be a clear one. Congress, we have held, does not, one might say, hide elephants in mouseholes [citations omitted]. Respondents' textual arguments ultimately founder upon this principle."

Slip op. at 4.

The Court then reviewed and rejected industry's specific textual arguments, and concluded: "The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the

[14] The Court noted that it could not consider the non-delegation argument until it resolved the cost consideration issue because "the first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers." Slip op. at 3.

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{statute] as a whole, unambiguously bars cost considerations from the NAAQS-setting process . . . ." *Id*. at 5.

The issue posed by the Court's analysis is pointed up by Justice Breyer's concurring opinion. While agreeing that section 109(b)(1) prohibits consideration of economic costs, Justice Breyer stated that he "would not rest this conclusion solely upon § 109's language or upon a presumption . . . that any authority the Act grants the EPA to consider costs must flow from a 'textual commitment' that is 'clear.'" (Breyer, J. concurring, at 1) Rather, in order to "better achieve regulatory goals" and give regulators maximum leeway to optimize the allocation of resources in their decision making, Justice Breyer articulated the following criterion: "[O]ther things being equal, we should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation." He went on to find that in the case of section 109(b)(1), "other things are not equal" because the legislative history and the statute's structure clearly indicates Congress' intent to prohibit consideration of economic costs. *Id*.

The issue, then, is whether the Court's main opinion leaves room for Justice Breyer's presumption—*i.e.,* that congressional silence should be construed as permitting consideration of economic costs—or whether it adopts the opposite presumption, to which Justice Breyer found it necessary to object—*i.e*., that cost considerations are prohibited unless the statute contains a "textual commitment" to cost considerations that is clear."

The answer to this question probably will depend on how central to the overall statutory scheme the Court perceives the particular provision under review. In *American Trucking,* Court emphasized that the NAAQS are the "engine that drives nearly all" of stationary source regulation under the Clean Air Act; it was because of section 109(b)'s central role that the "textual commitment" to economic cost considerations" must be a "particularly clear one." Slip op. at 4. Thus, the Court's willingness to apply Justice Breyer's presumption may be inversely proportional to its perception of the overall importance of the statutory provision under review.

On the other hand, it is possible to read the Court's main opinion as allowing for Justice Breyer's approach in a broader category of cases. The Court's discussion of the need for a clear textual commitment could be read in the context of its bottom-line conclusion—emphasized both at the beginning and the end of its analysis—that section 109(b)(1) *unambiguously bars* cost consideration. *Id*. at 3 and 5. Moreover, the Court s reference to the need for a clear textual commitment comes immediately after it reviewed the numerous instances where the Clean Air Act expressly provides for economic cost considerations, and noted that the Court has "refused to find implicit in ambiguous sections of the [Clean Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id*. at 5. Thus, the Court's reference to the need for clear textual commitment may simply be another way of saying that Congress knew how to write cost considerations into the Clean Air Act when it wanted to, and so the absence of any such reference in section 109(b)(1) in such a key statutory provision is further evidence that Congress intended to preclude cost considerations under that provision.

In any event, we can anticipate further litigation concerning the permissible scope of cost considerations in the absence of clear legislative directives.

2. Would the Inclusion of Costs Considerations, Without Adequate Guidance, Re-Open the Non-Delegation Argument?

In holding that section 109(b)(1) does not violate the nondelegation doctrine, the Court adopted the interpretaion advanced by the Solicitor General—that section 109(b)(1) requires, at a minimum, that "[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health. . . 'Requisite,' in turn, 'means sufficient, but not more than necessary.'" Slip op. at 6. The Court held that these limits on EPA's discretion are similar to other statutory schemes the Court has upheld against nondelegation challenges. *Id*.

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As one supporting example, the Court noted that the section 109(b)(1) limitations resemble provisions of the Occupational Health and Safety Act that were upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute,* 448 607, 646 (1980). The Court further noted that in *Industrial Union*, "even then-Justice Rehnquist, who alone in that case thought the statue violated the nondelegation doctrine . . .,would have upheld [the] statute *if, like the statute here, it did not permit economic costs to be considered* [citing *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 545 (1981)]." (emphasis added). Slip op. at 6.

This passage may encourage some to speculate how Justice Rehnquist—and Justices appointed after 1981—would vote today concerning various statutory provisions that direct EPA to consider economic costs, but that provide little or no guidance as to how costs are to be considered. For example, under the Clean Water Act, EPA must promulgate and periodically revise effluent limitations guidelines for categories of point source discharges under a standard known as "Best Available Technology Economically Achievable" ("BAT"). The statute tells EPA that in determining BAT for an industrial category, EPA is to "consider" costs among other factors. Yet courts and the agency have construed the statute to prohibit true cost-benefit analyses in promulgating BAT; cost is a factor to be "considered" in some nebulous way, rather than rigorously weighed in relation to benefits.[15].

Consequently, the importance EPA accords economic (especially in relation to environmental benefits) in promulgating BAT standards has varied widely from industry to industry, with no "intelligible" principle having been articulated by Congress or EPA. Thus, a statute that prohibits the agency from considering costs altogether may be more acceptable under a nondelegation analysis than a statute that requires costs to be considered with other factors, but provides no meaningful guidance as to what role costs are to play.

[15] *See, e.g., Weyerhaueser Company v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978).

Clearly, the *American Trucking* decision goes a long way towards cutting off non-delegation challenges to environmental legislation. Good-faith arguments can be raised that other provisions of pollution control statutes are so different from section 109(b) of the Clean Air Act that they fail to provide the requisite "intelligible principle" to guide EPA's discretion and therefore remain subject to attack under the nondelegation doctrine. These arguments, however, will clearly face, at best, an uphill battle in light of *American Trucking*.

3. Does the Nondelegation Doctrine Prohibit Delegation of Legislative Power, or Too Much Discretion?

Although of perhaps little practical concern, it is interesting to note that the concurring opinions of Justices Thomas and Justice Stevens both challenge the established foundations of the Court's nondelegation jurisprudence, but disagree fundamentally on the appropriate fix.

Justice Thomas agreed with the Court's main opinion that section 109(b)(1) provides as much of an "intelligible principle" as numerous other statutory provisions that have been upheld against nondelegation challenges. However, in his view the "intelligible principle" requirement may not be the only constitutional limit on congressional grants of power to administrative agencies, because "the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.' U.S. Const., Art. 1, § 1 (emphasis added)." In Justice Thomas's view, there may well be instances where "the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" Justice Thomas stated that he would be willing, in a future case, "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."

Justice Stevens' concurring opinion challenged the Court's existing nondelegation jurisprudence virtually from the opposite direction. He began by observing that the Court had two choices: it could "choose to

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articulate our ultimate disposition . . .by frankly acknowledging that the power delegated to the EPA is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute." Alternatively, the Court could and did choose to "pretend . . .that there is language in our opinions that supports the Court's articulation of our holding." In Justice Stevens' view, it would be "wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'"

Justice Stevens argued that "[t]he proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it." He then noted that agencies frequently exercise legislative powers in the form of rulemaking. In his view, while Article I, § 1 vests all legislative power in Congress, it does not prohibit Congress from delegating that power to others—just as Article II, § 1 vests executive power in the President, but does not prohibit him from delegating those powers. Consequently, according to Justice Stevens, "[i]t seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is 'legislative.' As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it." Therefore, Justice Stevens would hold that section 109 is a permissible congressional delegation of legislative power to EPA.

Conclusion

As is often the case, the Supreme Court's main opinion resolved the issue before it, but leaves considerable grist for the mill of future litigation concerning the role of cost considerations in agency rulemaking and, perhaps, the nondelegation doctrine as applied to environmental statutes that provide less clear guidance to EPA in its standard setting activities.

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Some say *American Trucking* was a big-time loss for American industry. I believe the decision (1) is not that bad on the parts industry parties lost and (2) contains helpful precedent for future challenges to EPA actions.

1. Not That Bad on Lost Parts

On the constitutional front, I know of few practitioners who expected the Court to uphold the D.C. Circuit. The implications were far too dire for many administrative programs and agencies Congress has created.

The more significant issue is whether EPA must consider costs or economic impacts (hereafter "economics") in its decisionmaking. I believe the Court's opinion on this issue is quite limited. First, for those who are not environmental practitioners, it is useful to stress what the Supreme Court did *not* do. The Court did *not* say EPA must as a general matter

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ignore economics, for the case dealt only with the Clean Air Act (one of many laws EPA administers). Moreover, the Court did *not* say EPA must as a general matter ignore economics in its Clean Air Act decisions, for the case dealt with only one type of standard (among many) under the Clean Air Act.

The Court in fact pointed to several Clean Air Act sections that explicitly require EPA to consider economics. This buttressed the Court's conclusion that Section 109 precludes EPA from considering economics in setting ambient air quality standards. Slip op. at 6-7.

But, one may wonder, is the Court saying economics may be considered only where Congress has explicitly said so? This is a critical question, for hundreds of issues arise under EPA's statutes where Congress has not explicitly said whether economics should be considered.

For instance, last month I wrote about two recent D.C. Circuit cases in which the relevant statutory language neither expressly required nor prohibited economic considerations. *Cost-Benefit Analysis Through the Back Door of "Reasoned Decisionmaking"?,* 31 ELR 10228, February, 2001. In both cases, the D.C. Circuit vacated EPA's regulations because EPA had not considered costs in relation to benefits (or because the regulation appeared to have no benefits despite great costs).

I do not believe *American Trucking* undercuts these D.C. Circuit opinions. Nor do I believe it stands for the proposition that economics must be considered only where expressly required by Congress. Rather, the Supreme Court's opinion was based upon a thorough analysis of Section 109, which specifies that primary ambient standards must be "based" on documents that assess health effects only (issued under Section 108) and must be set at levels "requisite to protect the public health" and "with an adequate margin of safety." It is true that Congress could have added, and did not, a clause saying "thou shall not consider economics in setting these standards." But the Court's analysis shows it believed the words of the statute, along with their historical context, were so clear that the text "unambiguously" barred economics from the standard-setting process. Slip op. at 11.

My view is strongly reinforced by the first footnote in the Court's opinion. Slip op. at 8. There the Court cites three cases in which the D.C. Circuit "found authority for the EPA to consider costs" despite statutory silence. *Michigan v. EPA,* 213 F.3d 663, 678-79 (D.C. Cir. 2000); *George E. Warren Corp. v, EPA,* 159 F.3d 616, 623-24 (D.C. Cir. 1998); *NRDC v. EPA,* 824 F.2d 1146, 1154-68 (D.C. Cir. 1987)(*en banc*). The Supreme Court neither states nor implies disagreement with these D.C. Circuit opinions, but rather distinguishes them because none dealt with Section 109 of the Clean Air Act.

In fact, in the *NRDC* opinion cited by the Supreme Court, the D.C. Circuit *en banc* expressly rejected "the petitioner's position that, as a matter of statutory interpretation, cost and technological feasibility may never be considered under the Clean Air Act unless Congress expressly so provides." 824 F.2d at 1157. Rather, the *en banc* D.C. Circuit shifted the burden by saying economics could be ignored only where "there was some indication in the language, structure, or legislative history of the specific provision at issue that Congress intended to preclude consideration of cost and technological feasibility." *Id*.

Thus before *American Trucking*, where there was statutory silence or ambiguity, the law required consideration of economics in EPA decisionmaking. I believe exactly the same holds true after *American Trucking*. The Court simply found Section 109 of the Clean Air Act "unambiguous" on this point. Slip op. at 11.

2. Good Precedent on Other Points

(a) A Boost for D.C. Circuit's *Appalachian* and *Barrick Goldstrike* Precedents

Two D.C. Circuit opinions issued in 2000 struck a blow at EPA's efforts to "immunize" its lawmaking from judicial review by issuing informal "guidance

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documents" rather than undertaking notice-and-comment rulemaking under the Administrative Procedure Act (APA). *Appalachian Power Company v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000); *Barrick Goldstrike Mines v. Browner,* 215 F.3d 45 (D.C. Cir. 2000).

In *Appalachian*, over vigorous opposition from EPA, the D.C. Circuit conducted judicial review of an informal guidance document and vacated it. 208 F.3d at 1028. The D.C. Circuit ruled that even though EPA had issued the guidance without an APA rulemaking process, and even though EPA had included a disclaimer denying the document was a rule, the document was a rule "as a practical matter" and therefore subject to judicial review. *Id*. at 1021. In *Barrick*, the D.C. Circuit reinforced *Appalachian* by ruling that "a preamble plus a guidance plus an enforcement letter from EPA could crystallize an agency position into final agency action" for judicial review. 215 F. 3d at 49.

One issue before the Supreme Court in *American Trucking* was an "implementation policy" under which EPA had opined as to which Clean Air Act sections controlled in certain circumstances. (This involved a complex interpretation of different parts of the Clean Air Act that appeared to address implementation of the air quality standard for ozone in an inconsistent manner.)

EPA argued its implementation policy was not judicially reviewable because it was not a "final action" under the APA or the judicial review section of the Clean Air Act (section 307(b)(1)). EPA did not include its policy within the terms of a regulation. Rather, EPA enunciated its policy in a preamble statement. 62 FR 38873, July 18, 1997.

The fact that EPA chose not to issue a regulation gave the Supreme Court little pause. Sounding very much like the D.C. Circuit's *Appalachian* opinion, the Supreme Court ruled: "Though the agency has not dressed its decision with the conventional accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final." Slip op. at 18-19.

Industry parties may seek to utilize *Appalachian* and *Barrick Goldstrike* by bringing D.C. Circuit challenges to EPA "guidances" and other documents that EPA has chosen not to issue as rules, but which have the practical effect of rules. The above-quoted passage from *American Trucking* should give those efforts a nice boost.

(b) Helpful Language on Ripeness

Virtually all EPA judicial review statutes are of the "pre-enforcement" type. A party wishing to challenge the validity of an EPA regulation (or permit) must either sue within a prescribed time period (usually 60, 90, or 120 days) after the rule or permit's issuance, or forever hold his or her peace. Examples are section 307 of the Clean Air Act and section 7006 of the Resource Conservation and Recovery Act.

One might have logically concluded that Congress had preempted "ripeness" concerns for judicial challenges under these sections. But in a confusing body of case law in the Courts of Appeals, industry lawsuits have sometimes been dismissed on ripeness grounds. Recent examples are *NRDC v. EPA*, 194 F.3d 130, 138 (D.C. Cir. 1999)(dismissing as unripe industry claims but entertaining environmental group's challenges), and *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998)(dismissing as unripe all industry challenges).

Under these precedents, EPA argued in *American Trucking* that its "implementation policy" was not ripe for judicial review. Slip op. at 17. The Supreme Court rejected EPA's arguments, and ruled that in light of the "pre-enforcement" nature of the Clean Air Act's judicial review section, there was a "*lower standard*" for ripeness than in an "ordinary" APA case. Slip op. at 19, emphasis added. While industry parties may continue to face the ripeness issue in challenges to EPA's actions, they should benefit from *American Trucking*'s "lower standard."

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Over the long run, I suspect the *Whitman v. American Trucking Association, Inc.* decision will be cited less for affirming *Lead Industries* and rejecting *Schechter Poultry* than for its discussion of the reviewability of agency action.

The question of when EPA policy determinations become judicially reviewable has been a matter of considerable attention in recent years. And, despite repeated warnings from the courts on the subject (*e.g., Appalachian Power Co. v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000); *Barrick Goldstrike Mines v. Browner,* 215 F.3d 45 (D.C. Cir. 2000), the Agency has continued to try to protect itself from scrutiny by claiming its decisions are not broadly applicable or otherwise final.

In *Whitman*, however, the Court saw through the strategy: "Though the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior thus belies the claim that its interpretation is not final." (*Slip. Op*. At 18-19). What was that behavior? Accepting public comment on a policy proposal, issuing an interpretation and refusing to reconsider it. *Id.* at 18.

Moreover, the Court also found the issue at hand ripe for review, because it required states to "promptly undertake the length and expensive task of developing state implementation plans (SIP's) that will attain the new, more stringent standard within five years." *Id.* at 19. While the Court hedged by saying this injury was sufficient to meet the "lower standard" of ripeness set by Section 307(b) of the Clean Air Act—"whether or not this would suffice in an ordinary case brought under the review provisions of the APA"—the Court's earlier observation that "the phrase 'final action' …bears the same meaning in § 307(b)(1) that it does under the Administrative Procedure Act" implies that next shoe will not be long in dropping.

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