International Climate Action Without Congress: Does §115 of the Clean Air Act Provide Sufficient Authority?

by David R. Baake

David R. Baake received his J.D. from Harvard Law School in May 2014. He will begin a Ford Foundation Post-Graduate Fellowship at the Natural Resources Defense Council later this year.

Summary

The ongoing rancor in Congress over climate change makes it unlikely that the United States will ratify a treaty as a successor to the Kyoto Protocol. Executive agreements are often seen as interchangeable with Article II treaties, and §115 of the Clean Air Act may provide a needed statutory hook for President Barack Obama to conclude executive agreements on climate change. This Article finds that President Obama likely has authority to bind the United States to greenhouse gas emission targets under this legislative provision and that his actions are likely not judicially reviewable.

In December 2015, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) will meet in Paris to consider a successor to the Kyoto Protocol. The success of these negotiations will depend, in large part, on whether the United States is willing to commit to binding emissions targets for greenhouse gases (GHGs). At present, it is unclear whether the country will be in a position so to make such a commitment. This uncertainty is chiefly due to ongoing gridlock on Capitol Hill and the opposition of many in the U.S. Senate to increased environmental regulation.

Given uncertainty about Congress' willingness to approve an international agreement committing the United States to binding emissions targets, it is worth considering whether President Barack Obama's Administration could conclude such an agreement without Congress.[1] This Article argues that the Administration has sufficient authority to conclude an executive agreement committing the United States to abate any emissions that endanger the public health or welfare of any UNFCCC member. Under settled principles of U.S. executive agreement law, the president is permitted to conclude an executive agreement on any matter that could be reached by the treaty power, provided that such agreement is authorized by statute. Section 115 of the Clean Air Act (CAA)[2] appears to authorize the president to conclude executive agreements to address the "[e]ndangerment of public health or welfare in foreign countries from [air] pollution emitted in the United States." Accordingly, the president likely has sufficient legal authority to commit the United States to binding emissions targets at the Paris conference, with or without the approval of Congress.

This Article provides background on U.S. executive agreement law and §115, and considers legal issues related to the possible implementation of an agreement committing the United States to binding emissions targets. Part I offers background on U.S. executive agreement law, to demonstrate the dominant view that executive agreements are wholly interchangeable with Article II treaties, and that the president is permitted to conclude an executive agreement without subsequent congressional action whenever an existing statute authorizes him to do so. Part II considers the interpretive principles used in determining whether a statute delegates executive agreement authority to the president. That part concludes that statutory authority to *implement* an executive agreement is probably insufficient

1. *See generally* Hannah Chang, *International Executive Agreements on Climate Change*, 35 Colum. J. Envtl. L. 337 (2010); Nigel Purvis, *The Case for Climate Protection Authority*, 49 Va. J. Int'l L. 1007 (2009); Kevin Bundy et al., Yes, He Can: President Obama's Power to Make an International Climate Commitment Without Waiting for Congress (Ctr. for Biological Diversity, Climate L. Inst., Working Paper No. 2, Dec. 2009).
2. Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, at §7415, ELR Stat. CAA §§101-618. Summaries of §115's legislative and litigation histories are provided in Appendixes A and B, respectively.

to support the inference of authority to *conclude* such an agreement. However, a delegation of executive agreement authority need not be explicit, and a statute will support an executive agreement so long as the statute can be reasonably construed to provide such authority.

Part III considers whether §115 could be construed to provide the president with authority to conclude executive agreements on international air pollution. Section 115 authorizes the U.S. Environmental Protection Agency (EPA) to take abatement action with respect to "air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country," provided that the relevant foreign country "has given the United States essentially the same rights." Although §115 does not explicitly delegate executive agreement authority to the president, such a delegation is reasonably inferable from this provision, in light of its structure and purpose, as well as legislative history indicating that its drafters intended to authorize the president to "seek agreements [with foreign countries] to help protect U.S. citizens from air pollution originating in those countries."

Part IV briefly considers whether an executive agreement concluded pursuant to §115, or the administrative findings that would be necessary to implement such an agreement under this provision, would be subject to judicial review. That part concludes that neither the agreement nor the administrative findings would properly be subject to judicial review, because review is precluded by the political question doctrine, unavailable under the Administrative Procedure Act (APA),[3] or both. The Article concludes with the proposition that the president currently has sufficient legal authority to enter and implement an executive agreement requiring the United States to reduce its GHG emissions, with or without Congress.

I. The President's Authority to Unilaterally Conclude an International Agreement

The president can unilaterally conclude an international agreement in three circumstances: (1) if the agreement is nonbinding; (2) if the agreement falls within the president's independent authority under the U.S. Constitution; or (3) if the agreement falls within authority delegated to the executive by a statute or treaty. Although only the third category seems directly implicated here, it is worth briefly discussing each option.

Presidents have historically claimed authority to enter nonbinding agreements with foreign countries without obtaining congressional authorization,[4] and this practice has not been subject to serious challenge.[5] Nonbinding agreements are agreements of a political nature that are not intended to create binding obligations under international law[6]; the Copenhagen Accord—concluded unilaterally on behalf of the United States by President Obama—is a recent example of such an agreement.[7] A party to a nonbinding agreement, unlike a party to a typical binding agreement, can withdraw from the agreement at any time without violating international law.[8] For this reason, nonbinding agreements are not a satisfactory alternative where the parties desire to create long-term commitments with the force of law.

If the president wants to conclude a binding international agreement without subsequent congressional action, he must rely on his independent authority under the Constitution (in which case the agreement will be a "sole executive agreement"), or authority delegated to him by an existing treaty or statute (in which case the agreement will be a "treaty-executive agreement" or an "ex ante congressional-executive agreement").[9] The claim settlement agreement negotiated by President Jimmy Carter in response to the Iran hostage crisis, pursuant to the president's authority as the nation's "sole representative with foreign nations,"[10] is an example of a sole executive agreement.[11] The agreements negotiated by various presidents under the Agricultural Trade Development and Assistance Act of 1954, which authorizes the Secretary of Agriculture to "negotiate and execute agreements with developing countries and private entities to finance the sale and exportation of agricultural commodities to such countries and entities,"[12] are examples of ex ante congressional-executive agreements. Agreements

3. 5 U.S.C. §§500-596, *available in* ELR Stat. Admin. Proc.

4. Michael John Garcia, Cong. Research Serv., RL32528, International Law and Agreements: Their Effect Upon U.S. Law 5 (2013) ("The Executive has long claimed the authority to enter [nonbinding] agreements on behalf of the United States without congressional authorization.").
5. *But see* Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution,* 49 Va. J. Int'l L. 507, 576 (2009) (arguing that, in some circumstances, the president should "afford Congress . . . affirmative opportunities for involvement" in the process of negotiating and implementing nonbinding agreements).
6. *See* Cong. Research Serv., S. Prt. 106-71, Treaties and Other International Agreements: The Role of the United States Senate 58 (2001) [hereinafter Treaties and Other International Agreements].
7. *See* Chang, *supra* note 1, at 337.
8. *See* Treaties and Other International Agreements, *supra* note 6, at 59; Vienna Convention on the Law of Treaties, art. 56(1), May 23, 1969, 1155 U.N.T.S. 331 (establishing default requirements governing withdrawal from a binding international agreement).
9. *See* Restatement (Third) of Foreign Relations Law §303 (1987).
10. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting 10 Annals of Cong. 613 (Mar. 7, 1800)).
11. *See generally* Dames & Moore v. Regan, 453 U.S. 654 (1981).
12. 7 U.S.C. §1701; *see* Purvis, *supra* note 1, at 1025 n.48.

of either type take effect upon being signed by the president, without any subsequent congressional action.

Although nowhere mentioned in the Constitution, these agreements have been used by presidents since the founding of the Republic to make significant commitments to foreign countries.[13] Their legitimacy is now beyond question.[14] Provided that the president does not exceed the scope of his authority under the relevant constitutional provision, treaty, or statute, there is no limit to his ability to unilaterally conclude an international agreement instead of seeking the U.S. Senate's advice and consent under Article II, Section 2.[15] A unilateral presidential agreement binds the United States as effectively as an Article II treaty under international law,[16] and becomes "supreme Law of the Land" within the meaning of the Supremacy Clause,[17] just as an Article II treaty would. Hence, these agreements provide the president with enormous power to unilaterally transform U.S. foreign relations.

II. Interpretive Principles Governing the Inference of Executive Agreement Authority From a Silent or Ambiguous Statute

As noted above, it is well settled as a matter of U.S. constitutional law that the president is permitted to conclude an executive agreement without subsequent congressional approval where Congress has delegated executive agreement authority by statute. But how does one determine whether such a delegation has occurred?

An explicit grant of executive agreement authority is not necessary, provided that the relevant statute fairly implies the need for an agreement. The president has long asserted the authority to conclude executive agreements pursuant to implied delegations of executive agreement authority,[18] and the U.S. Supreme Court affirmed this authority in its 1981 decision in *Dames & Moore v. Regan*.[19] *Dames & Moore* considered an executive agreement finalized without explicit congressional authorization that suspended the claims of U.S. nationals against Iran in exchange for the release of U.S. hostages. The Court began its analysis by asserting that the "failure of Congress specifically to delegate authority does not, especially in the area[ ] of foreign policy . . . imply congressional disapproval of action taken by the Executive."[20] Having concluded that the absence of explicit authorization could not support the inference that Congress intended to prohibit the agreement, the Court turned to other indicia of congressional intent to determine whether executive agreement authority had been delegated by implication. The Court concluded that Congress, by enacting statutes that were "closely related" to the question of the president's authority to conclude an executive agreement to resolve a hostage crisis, had evinced the "intent to accord the President broad discretion" in resolving these disputes.[21] This intent, the Court found, was sufficient reason to uphold the agreement.[22]

Dames & Moore stands for the proposition that Congress' failure to explicitly delegate executive agreement authority is insufficient to support the inference that Congress intended to deny this authority. This proposition appears to comport with historical practice. A study prepared for the Senate Foreign Relations Committee found that the president has historically been understood to have the authority to unilaterally conclude an executive agreement where he acts "in conformity with a generally enunciated congressional policy *implied* from the terms of [an] enactment."[23] *Dames & Moore*'s embrace of this proposition has been cited by lower courts in considering the scope of the president's executive agreement authority[24] and has been incorporated into the Third Restatement of Foreign Relations Law.[25] It thus appears to be a robust feature of U.S. executive agreement law.

While it is well established that the president is permitted to infer executive agreement authority from any statute that can be reasonably construed to delegate such authority, there are limits on the president's ability to infer such authority. In particular, statutory authority to *implement* an executive agreement is probably insufficient to support the inference of authority to *conclude* such an agreement. Presidents have occasionally argued otherwise,[26] and have con-

13. *See, e.g.*, Louis Henkin, Foreign Affairs and the United States Constitution 219 (1996) (noting that "[w]ithout the consent of the Senate (or authorization or approval by both houses of Congress), Presidents from Washington to Clinton have made many thousands of agreements, differing in formality and importance, on matters running the gamut of U.S. foreign relations").
14. *See* Treaties and Other International Agreements, *supra* note 6, at 77 ("it is now well-settled that the treaty mode is not an exclusive means of agreement-making for the United States and that executive agreements may validly co-exist with treaties under the Constitution").
15. *See* Restatement (Third) of Foreign Relations Law §303; *see also id.*, cmt. e ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.").
16. *See* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 ("Every [international agreement] in force is binding upon the parties to it and must be performed by them in good faith."); *see also id.* art. 46:
    > A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
17. *See* Restatement (Third) of Foreign Relations Law §303 cmt. j; Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (finding that a sole executive agreement preempted an inconsistent state statute).
18. *See* Treaties and Other International Agreements, *supra* note 6, at 79 (discussing presidential use of the Tariff Act of 1890).
19. 453 U.S. 654 (1981).
20. *Id.* at 678 (citing Haig v. Aigee, 453 U.S. 280, 291 (1981)) (internal formatting omitted).
21. *Id.*
22. *See id.* at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").
23. Treaties and Other International Agreements, *supra* note 6, at 79 (emphasis added).
24. *See* Barquero v. United States, 18 F.3d 1311, 1315-16 (5th Cir. 1994).
25. Restatement (Third) of Foreign Relations Law, §303 cmt. e (stating that the president may conclude an executive agreement if "Congress . . . enact[s] legislation that requires, *or fairly implies*, the need for an agreement") (emphasis added).
26. *See, e.g.*, Office of the U.S. Trade Rep., ACTA: Meeting U.S. Objectives (Fact Sheet, Sept. 2011) [hereinafter ACTA Fact Sheet], *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/

cluded several agreements on authority purportedly derived from implementation-supporting legislation.[27] However, these agreements have consistently been met with congressional resistance.[28] Moreover, the Obama Administration recently abandoned its argument that conclusion authority for the Anti-Counterfeit Trade Agreement (ACTA) was inferable from implementation-supporting legislation,[29] suggesting that the Administration recognized the serious legal and policy concerns associated with this position.[30]

In light of the history of congressional resistance to the idea that implementation authority implies conclusion authority, the Obama Administration's recent retreat from this view, and the strong policy arguments against permitting the president to obligate the United States, as a matter of international law, to maintain a given statute or regulatory program unchanged, it should be recognized that implementation authority is generally insufficient to imply conclusion authority. Absent some statute or treaty that can reasonably be construed to authorize the executive to bind the United States as a matter of international law, the executive should not be permitted to do so.

III. Can Executive Agreement Authority Be Derived From §115?

The interpretive principles discussed above suggest that §115 can be reasonably construed to provide the president with executive agreement authority. Section 115 creates a remedy for foreign countries endangered by air pollution emitted in the United States, conditioned on the foreign country's provision of a reciprocal remedy. Section 115(a) provides:

> [w]henever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency, has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country, or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.[31]

Section 115(b) provides that this formal notification constitutes a finding that the relevant state implementation plan (SIP) is inadequate and must be revised to prevent endangerment to the foreign country.[32] Section 115(c) provides that this remedy shall only be available "to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country" by §115.[33]

To begin, it should be noted that the executive clearly has authority to *implement* an executive agreement on international air pollution under §115.[34] This fact alone would be sufficient reason to infer conclusion authority from §115, on the argument (originally advanced by the Obama Administration with respect to ACTA[35]) that implementation authority implies conclusion authority in all cases. But if one accepts the proposition that the president can only conclude a congressional-executive agreement pursuant to a specific delegation of authority (as critics of the Administration's handling of ACTA urged, and the Administration apparently came to accept), it is necessary to determine whether §115 can be reasonably construed to delegate executive agreement authority.

Any construction of §115 must begin with the statute's text.[36] In contrast to other provisions of federal law (and indeed, other provisions of the CAA),[37] §115 does not explicitly delegate executive agreement authority. But, in light of *Dames & Moore*, it is clear that the absence of an explicit delegation is not dispositive. Instead, it is necessary to look to other indicia of congressional intent—including the statute's legislative history, structure, and purpose—to determine whether agreement authority has been delegated by implication.

Section 115's legislative history, structure, and purpose strongly suggest that the provision can be read to authorize

acta-meeting-us-objectives (stating that, because a proposed executive agreement was "consistent with existing U.S. law and d[id] not require the enactment of implementing legislation," the president was authorized to "enter into and carry out the requirements of the Agreement under existing legal authority").

27. *See* Phillip R. Trimble, International Law: United States Foreign Relations Law 131 (2002) (discussing one president's reliance on domestic gas rationing legislation as authority for an executive agreement on the matter); Purvis, *supra* note 1, at 1043 (noting that "U.S. practice includes several . . . examples of executive agreements having to do with the environment that were concluded without the authorization of Congress and implemented based entirely on existing environmental statutes"); *see also* ACTA Fact Sheet, *supra* note 26.
28. *See* Trimble, *supra* note 27, at 131 (describing congressional resistance to agreement concluded on the basis of implementation authority); *see also* Letter from Senator Ron Wyden, to President Barack Obama (Oct. 12, 2011), *available at* http://www.wyden.senate.gov (challenging the Obama Administration's claim that the existence of implementation authority for the Anti-Counterfeit Trade Agreement was sufficient to authorize conclusion of this agreement).
29. *See* Jack Goldsmith, *The Doubtful Constitutionality of ACTA as an* Ex Ante *Congressional-Executive Agreement*, Lawfare (May 21, 2012).
30. *See generally* Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, Wash. Post (Mar. 26, 2010) (expressing concern about the impact of ACTA on separation of powers, transparency, and public deliberation).
31. 42 U.S.C. §7415(a).
32. *Id.* at §7415(b).
33. *Id.* at §7415(c).
34. *See, e.g.*, Roger Martella & Matthew Paulson, *Regulation of Greenhouse Gases Under Section 115 of the Clean Air Act*, Daily Env't Rep. (BNA) (Mar. 13, 2009); Hannah Chang, *Cap and Trade Under the Clean Air Act?: Rethinking §115*, 40 ELR 10894 (Sept. 2010).
35. *See* ACTA Fact Sheet, *supra* note 26 ("ACTA is consistent with existing U.S. law and does not require the enactment of implementing legislation. The United States may therefore enter into and carry out the requirements of the Agreement under existing legal authority.").
36. *See, e.g.*, CSX Transp., Inc. v. Alabama Dep't of Revenue, 131 S. Ct. 1101, 1107 (2011) ("We begin, as in any case of statutory interpretation, with the language of the statute.").
37. *See* CAA §617, 42 U.S.C. §7671p(a) ("The President shall undertake to enter into international agreements . . . to develop standards and regulations which protect the stratosphere consistent with regulations applicable within the United States.").

executive agreements on international air pollution.[38] The most convincing support for this proposition comes from a 1965 Report by the Senate Committee on Public Works. The Report explained that §115 was intended to allow the United States to "cooperate with foreign countries in cases involving endangerment of health or welfare."[39] The Report further "urge[d] the administration to seek agreements with Canada and Mexico to help protect U.S. citizens from air pollution originating in those countries."[40] These statements provide unmistakable evidence that Congress contemplated, and approved of, the president's use of his §115 authority to enter executive agreements on international air pollution.

Section 115's structure provides additional support for this proposition. Section 115(a), uniquely among provisions of the CAA, entrusts the Secretary of State with responsibility to order air pollution reductions.[41] Congress' decision to confer this authority upon the Secretary of State—"the President's principal adviser on U.S. foreign policy"[42]—is clear evidence that Congress contemplated the executive's use of §115 for diplomatic purposes. Further, Congress provided in §115(b) that any foreign country affected by air pollution emitted in the United States "shall be invited to appear at any public hearing" for an SIP revision instituted under this provision,[43] indicating that Congress intended for foreign countries to play an active role in the §115 process without any further invitation from Congress.

Finally, the purpose of §115 strongly suggests that the provision should be read to delegate executive agreement authority to the president. Section 115's legislative history reveals that Congress enacted this provision to promote international amity and to satisfy U.S. obligations under international law.[44] The text of the statute reveals two additional purposes: to protect the health and welfare of individuals in foreign countries; and to establish reciprocal remedies under foreign law to protect the health and welfare of individuals in the United States.[45] In many cases, these purposes will best be served by the conclusion of an executive agreement. Because EPA can only implement SIP revisions under §115(b) if a foreign country has first satisfied §115(c)'s reciprocity requirements, securing reciprocity is a necessary prerequisite to accomplishing any of §115's other objectives. As a practical matter, the easiest way for the United States to ensure that a foreign country will grant the United States reciprocity is to conclude an executive agreement with this country. Absent such an agreement, there will be perpetual uncertainty concerning the existence of reciprocity. Even if a foreign country enacts legislation to protect the United States from harmful air pollution, "whether [the foreign country] in fact exercises or interprets that [legislation] in a manner that provides essentially the same rights to the U.S. [will be] a dynamic determination" that will need to be continually reevaluated.[46] Executive agreements can significantly reduce this uncertainty by eliciting a reciprocity commitment that is binding as a matter of international law.

This analysis suggests that §115 provides sufficient authority to support an executive agreement addressing the "[e]ndangerment of public health or welfare in foreign countries from [air] pollution emitted in the United States." The fact that §115 does not explicitly delegate executive agreement authority is irrelevant as a matter of law under *Dames & Moore*. Moreover, the legislative history, structure, and purpose of §115 provide strong evidence that the president's conclusion of an international air pollution agreement would comport with the "generally enunciated congressional policy" implied by §115.[47] Therefore, §115 can and should be construed to authorize the president to enter binding agreements on international air pollution.

This conclusion is further supported if §115 is compared to two other statutes that have been found to implicitly delegate executive agreement authority to the president: the Tariff Act of 1890 and the Packwood Amendment. The former authorized the president to suspend a foreign country's trade privileges if the country imposed duties or other exactions upon U.S. exports that the president deemed to be "reciprocally unequal and unreasonable."[48] The latter required the Secretary of State to withhold fishing privileges from a foreign country if the Secretary of Commerce certified that its nationals were engaged in activities that diminished the effectiveness of the International Convention for the Regulation of Whaling (ICRW).[49] Although neither statute explicitly delegated executive agreement authority, both were interpreted to delegate such authority implicitly. The Tariff Act was cited as authority for 10 executive agreements in the decades after its enactment,[50] while the Packwood Amendment apparently served as sufficient authority for a controversial executive agreement whereby

38. The executive is permitted to adopt any construction of §115 that is permissible as a matter of statutory construction and reasonable as a matter of policy, regardless whether this construction concerns the scope of the executive's jurisdiction. *See* City of Arlington, TX v. FCC, 133 S. Ct. 1863, 43 ELR 20112 (2013).
39. S. Rep. No. 89-192 at 4 (1965).
40. *Id.*
41. 42 U.S.C. §7415(a) (providing that the EPA Administrator is required to initiate the SIP revision process when, inter alia, "the Secretary of State requests him to do so").
42. U.S. Department of State, *Duties of the Secretary of State* (Jan. 20, 2009), *available at* www.state.gov/secretary/115194.htm.
43. 42 U.S.C. §7415(b).
44. *See* S. Rep. No. 89-192, *supra* note 39, at 6; H.R. Rep. No. 89-899 at 6, 17 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3608, at 3612–13, 3623; *see also* Appendix A, for an overview of §115's legislative history.
45. *See* 42 U.S.C. §7415(a), (c); *see also id.* §7401(b) (stating that the purpose of the CAA is "to protect and enhance the quality of [U.S.] air resources so as to promote the public health and welfare and the productive capacity of its population").
46. Letter from Douglas M. Costle, Administrator, U.S. EPA, to Edmund S. Muskie, Secretary of State (Jan. 13, 1981) (reproduced at 613 F. Supp. 1486-88). For background on this letter, see the discussion of *Thomas v. New York* in Appendix B.
47. Treaties and Other International Agreements, *supra* note 6, at 79 (stating that the executive can conclude an executive agreement under an ambiguous statute if doing so comports with "generally enunciated congressional policy implied from the terms of [an] enactment").
48. *See* Tariff Act of 1890, §3, 26 Stat. 612.
49. 16 U.S.C. §1821(e)(2)(A)(i).
50. *See* Treaties and Other International Agreements, *supra* note 6, at 79 n.73.

the United States agreed to waive the Amendment's sanctions for a country engaged in activities diminishing the effectiveness of the ICRW, in return for that country's pledge to undertake alternative conservation activities.[51]

The president's executive agreement authority under these two statutes appears to rest on the same inference: namely, that when Congress grants the president the authority to modify the rights of a foreign country, it intends (or should be understood to intend) to permit him to do so with an eye towards advancing the diplomatic interests of the United States. This understanding is probably an accurate reflection of congressional intent in most cases, and is well-suited to accommodate the president's unique constitutional authority over foreign affairs.[52]

The same approach that justified the inference of executive agreement authority from the Tariff Act and the Packwood Amendment would also support the inference of executive agreement authority from §115. The basic design of §115 is identical to that of the Tariff Act and the Packwood Amendment, except that §115 confers discretionary authority upon the executive to grant a new benefit under U.S. law to a foreign country, while the Tariff Act and the Packwood Amendment conferred discretionary authority upon the executive to withdraw an existing benefit under U.S. law from a foreign country. This is a distinction without a difference: Regardless of whether the president is exercising discretionary authority to grant a benefit or withdraw one, it surely makes sense to permit him to do so with an eye towards advancing the diplomatic interests of the United States. This close analogy between §115 and the historical sources of executive agreement authority provides additional support for the proposition that §115 should be understood to implicitly delegate executive agreement authority.

If §115 does provide the president with authority to finalize executive agreements on international air pollution, the implications for international climate negotiations are obvious. Because the Supreme Court has definitively established that GHGs are "air pollutants" within the meaning of the CAA,[53] the analysis above suggests that the president has authority to unilaterally conclude an executive agreement on GHG abatement. Such an agreement might involve U.S. commitment to make a §115(a) endangerment finding with respect to its GHG emissions in excess of a specified cap, in exchange for another country's commitment to "grant the United States essentially the same rights with respect to the . . . control"[54] of GHGs by instituting its own cap. In principle, there is no reason why the executive should not be permitted to make a §115(a) endangerment finding covering a large group of foreign countries (e.g., all UNFCCC members), in exchange for each country's commitment to grant the United States a reciprocal benefit. This suggests that the president likely has authority to unilaterally commit the United States to binding emissions targets at the Paris conference.[55]

IV. Judicial Review

The final inquiry is whether an executive agreement concluded pursuant to §115, or the endangerment and reciprocity findings that might be taken to implement such an agreement,[56] would be subject to judicial review. Because federal courts cannot hear separation-of-powers challenges to presidential action modifying U.S. international obligations absent a "constitutional impasse" between the political branches,[57] it is unlikely that an

51. Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 16 ELR 20742 (1986). The *Japan Whaling* Court did not directly address the source of the Secretary's executive agreement authority. However, the opinion is best read as seeking to demonstrate the lesser proposition—that the Packwood Amendment did not *preclude* the Secretary's executive agreement—by proving the greater proposition—that the Amendment could reasonably be construed to *authorize* the Secretary's agreement. If the Court were only interested in whether the Amendment negated the Secretary's authority to enter the agreement under some other law, it would have been sufficient to demonstrate that the Amendment did not explicitly displace this authority, since repeals by implication are disfavored. But neither the Court nor the litigants even identified an external source of authority for the Secretary's agreement. Instead, the Court sought to demonstrate that the executive agreement advanced the purpose of the Packwood Amendment itself. In concluding that "Congress' primary goal was to protect and conserve whales and other endangered species" and that "[t]he Secretary furthered this objective by entering into the agreement with Japan," the Court established a sufficient predicate for the inference of executive agreement authority under the historically accepted test. *See* Treaties and Other International Agreements, *supra* note 6, at 79 (concluding that the executive can conclude an executive agreement under an ambiguous statute if doing so comports with "generally enunciated congressional policy implied from the terms of [an] enactment"). Given the Court's finding that a sufficient predicate for the inference of executive agreement authority was established, and the absence of a plausible alternative to the Packwood Amendment as the source of executive agreement authority, *Japan Whaling* is best read as resting on the implicit holding that the Secretary was permitted to infer executive agreement authority from the Packwood Amendment.

52. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting 10 Annals of Cong. 613 (Mar. 7, 1800)).

53. *See* Massachusetts v. EPA, 549 U.S. 497, 529, 37 ELR 20075 (2007). Although most commentators and judges agree that *Massachusetts* resolved this issue, others argue that GHGs might be "air pollutants" for certain sections of the CAA and not others. *See* Coal. for Responsible Reg., Inc. v. EPA, No. 09-1322, 2012 WL 6621785, 42 ELR 20260 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). Even if this is so, there is nothing in §115 to suggest that a narrower understanding of the term "air pollutant" (one that excludes GHGs) would be appropriate for its purposes.

54. CAA §115(c), 42 U.S.C. §7415(c).

55. It should be noted that, in approving the UNFCCC, the Senate Foreign Relations Committee indicated its expectation that the president would seek Senate approval before agreeing to binding emissions targets under the framework. *See* S. Exec. Rep. No. 102-55, at 14 (1992). However, this statement is not legally binding upon the executive branch. *See* Purvis, *supra* note 1, at 1049. Moreover, this statement does not apply to executive agreements concluded outside of the UNFCCC process.

56. An executive agreement concluded pursuant to §115 does not have to be implemented under this provision; the greater power (to conclude *and* to implement under §115) would appear to imply the lesser power (to conclude but not to implement) in this instance. Nonetheless, there are reasons to believe that §115 would be especially well-suited to achieve the significant emissions reductions that an executive agreement would require. *See* Martella & Paulson, *supra* note 34; Chang, *id*. Thus, it is worth considering the possibility that §115 will be used to implement any executive climate agreement.

57. Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (rejecting as unripe a separation-of-powers challenge to President Carter's unilateral termination of a mutual defense treaty with Taiwan, because Congress "ha[d] taken no official action" to oppose the president's action); *see*

executive agreement concluded pursuant to §115 could be challenged directly. However, courts are permitted to consider separation-of-powers challenges to the executive's implementation of an international agreement even if no constitutional impasse exists, and may rule on the constitutionality of the underlying international agreement in the process.[58] Therefore, it is necessary to consider whether federal courts would have jurisdiction to review endangerment and reciprocity findings promulgated in order to implement an executive agreement on international air pollution abatement under §115. Section A considers whether a court would have jurisdiction to review the endangerment finding; Section B considers whether a court would have jurisdiction to review the reciprocity finding. This part concludes that neither finding would be subject to judicial review.

A. *Endangerment Finding*

Under §115(a), there are two ways that the president could go about promulgating an endangerment finding. The president could order EPA to issue a finding declaring that, "upon receipt of reports, surveys or studies from any duly constituted international agency," it had reason to believe that GHGs emitted in the United States were contributing to the endangerment of public health or welfare in a foreign country.[59] Alternatively, the president could order the Secretary of State to formally request an endangerment finding after making an "alleg[ation]" that GHGs emitted in the United States are contributing to the endangerment of a foreign country.[60]

An endangerment finding made by the first method would probably not escape judicial review. Section 307(b)(1) of the CAA provides that the appropriate federal court of appeals shall have jurisdiction to review "any . . . final action of the Administrator [under the CAA]" provided that the petition for review is filed within 60 days of the finalization of the action.[61] A reviewing court could invalidate the endangerment finding if it was found to be, inter alia, arbitrary or capricious or in excess of statutory authority.[62] *New York v. Thomas*[63] suggests that the reviewing court would evaluate whether the endangerment finding was made on the basis of reports from a duly constituted international agency and whether this report provided EPA with "reason to believe" that GHGs emitted in the United States were contributing to the endangerment of public health or welfare in a foreign country.[64] While there is little question that reports, surveys, and studies from duly constituted international agencies provide reason to believe that GHGs emitted in the United States are contributing to the endangerment of public health or welfare in foreign countries,[65] judicial review of EPA's endangerment finding would create uncertainty surrounding the implementation of the executive agreement, and should be avoided if possible.

The president could probably avoid this uncertainty by using the second method to make the endangerment finding. Action taken by the Secretary of State is not reviewable under the CAA, and it is doubtful that such action would be reviewable under the APA. While the Secretary's request for an endangerment finding would be "final agency action for which there is no other adequate remedy in a court,"[66] such action is probably "committed to agency discretion by law" and thus exempt from review under the APA.[67] This exception applies where a statute explicitly grants an agency authority to be used "for any reason the [agency] considers appropriate,"[68] or where Congress' intent to delegate such unfettered discretion is inferable from the absence of any statutory language providing "readily identifiable objective criteria" to constrain the agency's discretion.[69]

Section 115(a) provides that EPA is required to make an endangerment finding if "the Secretary of State requests [it] to do so with respect to such pollution which the Secretary . . . *alleges*" is causing endangerment to a foreign country.[70] An allegation is "[s]omething declared or asserted as a matter of fact . . . *without its having yet been proved*."[71] Thus, Congress granted the Secretary authority to request an endangerment finding without requiring him to prove

also Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001) (holding that the political question doctrine precluded judicial inquiry into whether the president was permitted to conclude the North American Free Trade Agreement without obtaining the consent of two-thirds of the Senate).

58. *See, e.g.*, *Dames & Moore*, 453 U.S. at 654 (considering challenge to executive order implementing executive agreement with Iran; ruling on the constitutionality of the underlying executive agreement).
59. 42 U.S.C. §7415(a). It is unnecessary to consider whether the president has directive authority over EPA as a legal matter because he clearly has such authority as a practical matter. *See* Press Release, White House, Presidential Memorandum: Power Sector Carbon Pollution Standards (June 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.
60. *Id.* The president unquestionably has directive authority over the Secretary. *See* 22 U.S.C. §2656 (providing that the Secretary of State "shall conduct the business of the department in such manner as the President shall direct").
61. 42 U.S.C. §7607(b)(1).
62. 5 U.S.C. §706(a)(2). Section 307(b) does not establish a separate standard of review, so the APA's standard of review would apply.
63. 613 F. Supp. 1472, 15 ELR 20748 (D.D.C. 1985).
64. *See* Appendix B, for a discussion of *New York v. Thomas*.
65. *See* Coal. for Responsible Reg. v. EPA, 684 F.3d 102, 121 (D.C. Cir. 2012) ("EPA had before it substantial record evidence that anthropogenic emissions of greenhouse gases 'very likely' caused warming of the climate over the last several decades" and the record "also support[ed] EPA's conclusion that climate change endangers human welfare by creating risk to food production and agriculture, forestry, energy, infrastructure, ecosystems, and wildlife"); *id.* at 120 (noting with approval EPA's reliance on reports from the Intergovernmental Panel on Climate Change).
66. 5 U.S.C. §704 ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review" under the APA).
67. 5 U.S.C. §701(a)(2).
68. Steenholdt v. FAA, 341 F.3d 633 (D.C. Cir. 2003).
69. Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 643 (10th Cir. 1990); *accord* Webster v. Doe, 486 U.S. 592, 599 (1988) (holding that this exception applies where "statutes are drawn in such broad terms that in a given case there is no law to apply") (internal citations omitted).
70. 42 U.S.C. §7415(a) (emphasis added).
71. Black's Law Dictionary (9th ed. 2009) (definition 2, allegation) (emphasis added); *accord* Merriam-Webster (online edition) (definition 2, allege) ("to assert without proof or before proving"), *at* http://www.merriam-webster.com/dictionary/allege (last visited May 28, 2014).

the necessity of such a finding. Moreover, Congress failed to provide any "readily identifiable objective criteria" to constrain the Secretary's discretion. This clearly suggests that Congress intended to allow the Secretary to request an endangerment finding for any reason he considered appropriate, such that the decision is "committed to agency discretion by law."[72]

This conclusion is reinforced by the structure of §115(a). If Congress intended for an endangerment finding to be made only in situations where unambiguous scientific evidence supported such a finding, there would be no reason to grant the Secretary of State authority under this subsection. The only possible explanation for granting the Secretary this authority is that Congress wanted to allow the executive branch to promulgate an endangerment finding for diplomatic reasons, even in the absence of an unambiguous factual basis for such a finding.

In light of these considerations, a request by the Secretary of State for an endangerment finding should be understood to be "committed to agency discretion by law," and hence, unreviewable under the APA. If the president wishes to avoid litigation pertaining to the endangerment finding, he should order the Secretary of State to request such a finding.[73]

B. Reciprocity Finding

Section 307(b)(1) of the CAA provides statutory jurisdiction to review the Administrator's reciprocity finding.[74] However, there is a plausible argument that the political question doctrine precludes judicial review of this finding. The political question doctrine prevents courts from deciding questions "which are by the constitution and laws[ ] submitted to the executive."[75] The Court has held that the "conduct of the foreign relations . . . is not subject to judicial inquiry or decision."[76] Emphatically, this does not mean that the executive's *authority* to act in the foreign affairs domain is beyond review. The Court has repeatedly held—and recently reiterated—that the judiciary is permitted to invalidate actions in the foreign affairs domains that are ultra vires.[77] In some cases, this will require the Court to adjudicate disputes as to the proper distribution of foreign affairs power between the political branches.[78] But if a court determines that the executive branch has constitutional or statutory authority to make a particular foreign affairs decision, the court's inquiry is at its end. The court cannot cast doubt upon the wisdom of the executive's exercise of its authority, for doing so would risk "supplant[ing] a foreign policy decision of the political branches with the court['s] own unmoored determination."[79]

Whether a foreign state has complied with its obligations under international law is a quintessential example of a political question. For example, *Clark v. Allen* held that the political question doctrine defeated jurisdiction in a case raising "the question whether a [foreign] state [was] in a position to perform its treaty obligations."[80] By analogy, the question whether a foreign country has provided the United States with a reciprocal remedy for international air pollution should also be immunized from judicial review. Were a court to second-guess the executive's factual determination as to a foreign country's ability to provide the United States with a reciprocal remedy, it would risk supplanting the president's judgment on a "delicate" and "complex" question of foreign policy with its own "unmoored" determination, something that Supreme Court precedent clearly forbids.

V. Conclusion: The President Can Act Without Congress

This Article suggests that, perhaps contrary to conventional wisdom, President Obama has sufficient legal authority to bind the United States to reducing its emissions of GHGs to the extent that these emissions endanger the public health or welfare of U.S. foreign partners. Such an agreement, once concluded under CAA §115, could be implemented in a variety of ways. The president could direct EPA to implement the agreement by taking further action under CAA §111(d)[81] and other provisions of the CAA that have already been used to regulate GHGs.

Alternatively, the president could implement the agreement under §115 itself, by issuing an executive order requiring the Secretary of State to request an endangerment finding pursuant to §115(a), and EPA to promulgate a reciprocity finding pursuant to §115(c). There is a good argument that these findings should be shielded from judicial review by the APA's exception for decisions "committed to

72. *Cf. Webster*, 486 U.S. at 600 (holding that the "committed to agency discretion by law" exception applied where a statute permitted the director of the Central Intelligence Agency to discharge any employee when he "deem[ed]" it necessary to do so).
73. Because there is likely no statutory jurisdiction to review the Secretary's action, it is not necessary to consider whether the political question doctrine would bar review of this decision.
74. 42 U.S.C. §7607(b)(1) (providing for review "of final action, taken by the Administrator" under the CAA).
75. Marbury v. Madison, 5 U.S. 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").
76. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918); *accord* Chicago & S. Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility.").
77. *See* Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).
78. *See id.* at 1427 (holding that the judiciary had authority to rule on the constitutionality of a statute that purported to require the Secretary of State to issue passports listing Jerusalem as the capital of Israel); Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 233, 16 ELR 20742 (1986) (inquiring into the executive's compliance with the Packwood Amendment).
79. *Zivotofsky*, *supra* note 77, at 1427; *see also* Munaf v. Geren, 553 U.S. 674, 702 (2008) (concluding that the judiciary lacked competence to second-guess the executive's determination that a U.S. citizen could be transferred to Iraqi custody without risk of torture).
80. 331 U.S. 503, 514 (1947); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (holding that the act of state doctrine, a relative of the political question doctrine, forbade courts in the United States to inquire into "the validity of the public acts a recognized foreign sovereign power committed within its own territory").
81. 42 U.S.C. §7411(d).

agency discretion by law" and the political question doctrine, respectively. Once promulgated, the findings would automatically trigger §115(b)'s SIP revision process,[82] and states would have two years to submit a plan adequate to eliminate the dangerous GHG pollution.[83] If a state failed to submit an adequate plan within two years, EPA would be authorized to adopt a federal implementation plan (FIP) for that state.[84] Using FIPs, EPA could establish a cap-and-trade program covering all states unwilling or unable to develop their own plans.[85]

These FIPs would, of course, be subject to judicial review and implementation difficulties that are beyond the scope of this Article. However, there is no limit, in principle, to the executive's ability to use §115 to reduce GHG emissions that endanger global public health. Accordingly, the principal barrier to effective climate policy in the United States going forward will be political rather than legal.[86] Environmentalists and others concerned about climate change should adjust their efforts accordingly.

Appendix A: Section 115's Legislative History

Section 115 is originally descended from §5 of the Clean Air Act of 1963. Section 5 established an abatement conference procedure whereby a state's governor or air pollution control agency could petition the Secretary of Health, Education, and Welfare[87] to call a conference to address interstate air pollution.[88] Upon receiving such a petition, the Secretary was required to convene all affected parties (including agencies from both the petitioning state and the respondent state) to determine whether the respondent state should take remedial action.[89] If, after the conference, the Secretary determined that remedial action was needed, the respondent state was given at least six months to take the recommended action.[90]

After this compliance period, the Secretary was required to determine whether the respondent state had taken the necessary remedial action.[91] If the Secretary determined that such action was lacking, he was required to call a second public hearing, which would issue a second set of recommendations.[92] The respondent state would be given an additional period of not less than six months to comply with these recommendations.[93] If, after the end of this second compliance period, the respondent state still had not secured abatement of the pollution, the Secretary could request that the Attorney General bring a suit on behalf of the United States to secure abatement.[94]

In 1965, §5 was renumbered §105 and amended to deal with international air pollution for the first time.[95] The newly added subparagraph provided, in pertinent part:

> Whenever the Secretary, upon receipt of reports, surveys, or studies from any duly constituted international agency, has reason to believe that any air pollution . . . which endangers the health or welfare of persons in a foreign country is occurring . . . [he] shall give formal notification thereof to the air pollution control agency of the municipality where such . . . discharges originate . . . and shall call promptly a conference of such agency or agencies.[96]

The new subparagraph also provided that foreign countries adversely affected by the pollution would be allowed to participate in the conference and any proceedings resulting from it, but limited the availability of this remedy to foreign countries that provided a reciprocal remedy to the United States.[97]

Congress' decision to extend the abatement conference procedure to cover international air pollution appears to have been motivated by a desire to promote international amity, to provide legal protection for neighboring countries, and to satisfy U.S. obligations under international law. Evidence of this purpose appears several times in the legislative history for the 1965 Amendments. For example, a report by the Senate Committee on Public Works praised the new subparagraph for advancing the interests of "international amity" and "fairness to the people of other countries."[98] The committee also expressed its desire to see this provision used to promote "cooperat[ion] with foreign countries," and urged the president "to seek agreements with Canada and Mexico to help protect U.S. citizens from air pollution originating in those countries."[99] A report by the U.S. House of Representatives Committee on Interstate and Foreign Commerce expressed similar sentiments. The report declared that "the United States cannot in good conscience decline to protect its neighbors from pollution which is beyond their legal control," and praised the new subparagraph as a "highly desirable" means to ensure "[t]he maintenance of amicable relations with neighboring countries and the fulfillment of our international obligations."[100]

Congress would revisit this provision—renumbered as §115—for a final time in 1977.[101] The 1977 Amendments scrapped the abatement conference procedure, provid-

82. 42 U.S.C. §7415(b).
83. 42 U.S.C. §7410(c)(1).
84. *Id.*
85. *See* Martella & Paulson, *supra* note 34; Chang, *id.*
86. *Cf.* Purvis, *supra* note 1, at 1042 (maintaining that the president has legal authority to conclude an executive agreement on climate change mitigation but noting that, in the present political climate, the president "would undoubtedly create a domestic political firestorm" if he used this authority).
87. The U.S. Department of Health, Education, and Welfare was charged with administering the CAA prior to the creation of EPA in 1970.
88. *See* Pub. L. No. 88-206, §5(c)(1)(A) (1963).
89. *Id.* at §5(c), (d).
90. *Id.* at §5(d).
91. *Id.* at §5(e)(1), (2).
92. *Id.*
93. *Id.* at §5(e)(3).
94. *Id.* at §5(f)(1).
95. Clean Air Act Amendments of 1965, Pub. L. No. 89-272, tit. I, §§101(2)-(3), 102.
96. Pub. L. No. 89-272, tit. I, §102(d).
97. *Id.*
98. S. Rep. No. 89-192, *supra* note 39, at 6.
99. *Id.* at 4.
100. H.R. Rep. No. 89-899, *supra* note 44, at 6, 17.
101. *See* Clean Air Act Amendments of 1977, Pub L. No. 95-95, tit. I, §114. The provision was renumbered as §115 in 1970, but was not otherwise modified. *See* Pub. L. No. 91-604, §§4(a), (b)(2)-(10), 15(c)(2).

ing instead that EPA's promulgation of an endangerment and a reciprocity finding would trigger a mandatory SIP revision.[102] Congress elected to replace the abatement conference procedure because it was concerned that this procedure was "lengthy and uncertain," and ineffectual relative to the implementation plan approach.[103] Nothing in the legislative history of the 1977 Amendments suggests that Congress' decision to replace the abatement conference procedure (which indisputably applied to all air pollutants regulated under the CAA) with the SIP revision procedure reflected a desire to limit the applicability of §115 to criteria pollutants (those for which EPA has established a national ambient air quality standard under CAA §109[104]). Indeed, §115's cross-reference to CAA §110(a)(2)(H)(ii), which requires each SIP to provide for plan revision "whenever the Administrator finds . . . that the plan is inadequate to attain the national ambient air quality standard which it implements *or* to otherwise comply with any additional requirements established under this chapter,"[105] suggests that Congress intended for §115 to apply to all air pollutants regulated under the CAA.[106]

Appendix B: Section 115's Litigation History

Only two sets of cases have arisen under §115: *Thomas v. New York*[107] and *Her Majesty the Queen in Right of Ontario v. EPA*.[108] The *Thomas* case commenced in 1985, when state governments, citizen groups, and individuals filed a civil action in the U.S. District Court for the District of Columbia alleging that EPA had violated a nondiscretionary duty under §115 by failing to order several midwestern states to submit SIP revisions to address sulfur dioxide and nitrogen oxide emissions that were allegedly responsible for the endangerment of the public health or welfare in Canada.[109] To establish the existence of such a duty, the plaintiffs pointed to a letter sent during the final days of the Carter Administration from then-EPA Administrator Douglas M. Costle to then-Secretary of State Edmund S. Muskie.[110] The Costle letter addressed the question whether §115 was applicable to sulfur dioxide and nitrogen oxide pollution traveling from the United States into Canada and contributing to acid precipitation there.[111] The letter concluded that "acid deposition is endangering public welfare in the U.S. and Canada and . . . U.S. and Canadian sources contribute to the problem not only in the country where they are located but also in the neighboring country,"[112] citing a report issued by the International Joint Commission (IJC) for this proposition.[113] The Costle letter further concluded that amendments to the Canadian Clean Air Act "provide[d] essentially the same rights to the United States as Section 115 provide[d] to Canada."[114] The plaintiffs in *Thomas* argued that these statements were sufficient to trigger §115(a)'s notification requirement.[115] The district court agreed. In its analysis of the Costle letter's impact, the court first addressed the requirement that any §115(a) endangerment finding be based on "reports, surveys, or studies from [a] duly constituted international agency."[116] The court found that Costle had based his endangerment finding on a report issued by the IJC. Moreover, the court concluded that although the phrase "duly constituted international agency" was not defined in the CAA or its legislative history, the IJC surely constituted such an agency, given its role in "resolving transboundary water and navigational disputes" and the failure of any party to challenge its legitimacy.[117]

Next, the court turned to the question whether Administrator Costle had, on the basis of the IJC report, "reason to believe" that U.S. emissions were causing or contributing to the endangerment of public health or welfare in Canada, sufficient to trigger §115(a)'s notification requirement.[118] The court examined the IJC report and concluded that the report "would have afforded Costle ample basis upon which to conclude that air pollutants in the United States contribute to acid precipitation occurring in Canada such that it could reasonably be anticipated that the public health and welfare of Canada would be endangered."[119] In a footnote, the court noted that the Costle letter did not identify specific states that were responsible for causing or contributing to this endangerment.[120] Nonetheless, the court found that the Costle letter was sufficient to trigger the §115(a) SIP notification requirement, reasoning that "the obligation to identify the polluting states is incidental

102. *Id.*
103. S. Rep. No. 94-717, at 44 (1976). The abatement conference procedure was apparently so ineffectual that it had never been utilized to address international pollution. *See id.*
104. 42 U.S.C. §7409.
105. 42 U.S.C. §7410(a)(2)(H)(ii).
106. This point has been made by previous commentators. *See* Martella & Paulson, *supra* note 34, at 8 (concluding that §115 "is not in any way limited to criteria pollutants"); Chang, *id.* at 10895 (concluding that "neither statutory language nor legislative history links pollutants regulated by §115 to pollutants with established NAAQS, otherwise referred to as criteria pollutants").
107. 802 F.2d 1443, 16 ELR 20925 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).
108. 912 F.2d 1525, 20 ELR 21354 (D.C. Cir. 1990).
109. New York v. Thomas, 613 F. Supp. 1472, 15 ELR 20748 (D.D.C. 1985), *rev'd by* Thomas v. New York, 802 F.2d 1443, 16 ELR 20925 (D.C. Cir. 1986).
110. *Id.* at 1476.
111. *See* Letter from Douglas M. Costle, Administrator, U.S. EPA, to Edmund S. Muskie, Secretary, Department of State (Jan. 13, 1981) [hereinafter Costle Letter] (reproduced in *Thomas*, *supra* note 105, 613 F. Supp. at 1486-88).
112. *Id.*
113. *Id.* (citing International Joint Commission, Seventh Annual Report on Great Lakes Water Quality (Oct. 1980)). The International Joint Commission (IJC) is an international organization created by the 1909 Boundary Waters Treaty between Canada and the United States to "prevent[ ] and resolve[ ] disputes between the United States of America and Canada under the [treaty] . . . ." *See* www.ijc.org/en_/About_the_IJC (last visited Aug. 5, 2013).
114. *Id.*
115. *Thomas*, *supra* note 109, 613 F. Supp. at 1476.
116. 42 U.S.C. §7415(a); *see id.*
117. *Thomas*, *supra* note 109, 613 F. Supp. at 1482.
118. *Id.*
119. *Id.*
120. *Id.* at 1484, n.*.

to giving formal notification," not a condition precedent to the Administrator's duty to notify under this section.[121]

Finally, the court considered whether the statements in the Costle letter regarding the Canadian Clean Air Act constituted a §115(c) reciprocity finding.[122] Examining the language of the Costle letter—which hewed closely to that of §115(c)[123]—the court concluded that the Administrator had indeed made a reciprocity finding under §115(c).[124] The court noted, however, that the Costle letter indicated that this finding "could be changed should the U.S. conclude that future Canadian actions interpreting or implementing their legislation were not giving essentially the same rights to the U.S."[125] Consistent with this language, the court concluded that the current Administrator should be given an opportunity to review this reciprocity finding before issuing any notification pursuant to §115(a).[126]

After concluding that the Costle letter had satisfied the conditions precedent to §115(a)'s notification requirement, the district court considered three arguments against granting this letter legal significance.[127] First, the court considered the defendants' argument that the Costle letter had no legal significance because "letters cannot constitute formal administrative decision-making."[128] The court rejected this argument, concluding that official correspondence was an acceptable means of taking formal action under the CAA.[129]

Second, the court considered the defendants' argument that the Costle letter had been revoked by a subsequent letter from President Ronald Reagan's EPA Administrator Anne Gorsuch.[130] The court rejected this argument, citing the Supreme Court's *State Farm* decision for the proposition that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change,"[131] and concluding that the Gorsuch letter had not negated the legal effect of the Costle letter because the former lacked such analysis.[132] Finally, the court considered the defendants' argument that §115(a)'s notification requirement was actually discretionary with the Administrator.[133] The court dismissed this argument, concluding that it was foreclosed by the plain language of §115(a), which provides that the Administrator "*shall* give formal notification" whenever the relevant conditions are satisfied.[134]

The district court concluded that, because the Costle letter contained endangerment and reciprocity findings that had not been revoked, it was now "incumbent upon the current EPA Administrator to give formal notification to the governors of the states in which harmful emissions originate and to set in motion the necessary processes to require a plan revision so as to prevent or eliminate the endangerment encompassed by the Costle determination."[135] The court issued an order to this effect.[136]

The Court of Appeals for the D.C. Circuit reversed.[137] Then-U.S. Circuit Judge Antonin Scalia delivered a short opinion explaining that the Costle letter's endangerment and reciprocity findings were not binding on the current Administrator because the findings had not been subject to notice and comment under APA §553(b).[138] The court noted that the APA requires notice and comment for any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,"[139] unless the statement is an interpretive rule, a rule of agency organization, or a general statement of policy.[140] Because the §115 endangerment and reciprocity findings constituted statements "designed to implement . . . law or policy," the court reasoned, EPA could not issue them without complying with APA §553(b)'s notice-and-comment procedures, unless one of APA §553(b)'s exceptions applied.[141]

The D.C. Circuit then considered each exception to APA §553(b)'s notice-and-comment requirement in turn. The court concluded that the "interpretive rule" exception did not apply because the endangerment and reciprocity findings were not interpretations of an existing statute or rule.[142] The "rule of agency organization" exception did not apply because the findings would "substantially affect the rights and interests of private parties."[143] And the "general statement of policy" exception did not apply because—assuming, per the petitioners' argument, that these findings would "*force*[ ] the EPA to take direct and substantial regulatory action"—these findings necessarily did more than "express, without the force of law, the EPA's tentative intentions for the future."[144] Because none of the exceptions to APA §553(b)'s notice-and-comment requirement applied to Administrator Costle's endangerment and reciprocity findings, the court concluded that these findings were without the force of law and could not serve as the

121. *Id.*
122. *Id.* at 1483.
123. *Compare* Costle Letter, *supra* note 111 ("[T]he Amendments to the Canadian Clean Air Act do give adequate authority to the Government of Canada to provide *essentially the same rights* to the United States as Section 115 provides to Canada") (emphasis added), *with* CAA §115(c) ("This section shall apply only to a foreign country which the Administrator determines has given the United States *essentially the same rights* with respect to the prevention or control of air pollution occurring in that country as is given that country by this section") (emphasis added).
124. *Thomas*, *supra* note 109, 613 F. Supp. at 1483-84.
125. *Id.* at 1483 (citing Costle Letter, *supra* note 111).
126. *Id.* at 1484.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Thomas*, *supra* note 109, 613 F. Supp. at 1485.
131. Motor Vehicle Mfrs. Ass'n of the United States, Inc., v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 13 ELR 20672 (1983).
132. *Thomas*, *supra* note 109, 613 F. Supp. at 1485.
133. *Id.*
134. *Id.* (citing 42 U.S.C. §7415(a)). The court also examined the provision's legislative history and case law; nothing in either that supported the defendant's reading.
135. *Id.*
136. *Id.*
137. Thomas v. New York, 802 F.2d 1443, 16 ELR 20925 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).
138. *Id.* at 1446-47. Section 553(b) of the APA is codified at 5 U.S.C. §553(b).
139. *Id.* at 1446 (citing 5 U.S.C. §551(4)).
140. *Id.* at 1447 (citing 5 U.S.C. §553(b)(A)).
141. *Id.* at 1446 (citing 5 U.S.C. §551(4)).
142. *Thomas*, *supra* note 137, 802 F.2d at 1447.
143. *Id.* at 1447 (internal citations and formatting omitted).
144. *Id.*

basis for judicial relief.[145] In light of this dispositive conclusion, the court declined to address any of the appellants' other arguments.[146]

In *Her Majesty the Queen in Right of Ontario v. EPA*, the province of Ontario, along with a number of U.S. state governments and environmental groups, filed petitions with EPA for rulemaking under APA §553(e).[147] The petitions requested that EPA promulgate endangerment and reciprocity findings with regard to acid deposition in Canada.[148] The petitions asserted that several reports from duly constituted international agencies supported an endangerment finding, that §115(c)'s reciprocity requirements were satisfied, and that the Costle letter had specifically made both findings and had never been revoked by EPA.[149] The petitions did not request that EPA identify states or sources responsible for the relevant pollution, because the petitioners did not consider such identification to be a necessary prerequisite to the issuance of the endangerment and reciprocity findings.[150]

After a meeting between EPA and the petitioners, Don R. Clay, the Acting Assistant Administrator for Air and Radiation, sent letters to counsel for the Ontario and New York petitioners.[151] The Clay letters stated that EPA read §115 to require a "unitary proceeding" on substantive and remedial questions.[152] Thus, EPA felt it could not issue an endangerment finding until it had sufficient information to identify the states responsible for this endangerment and provide them with formal notification.[153] Further, because EPA felt that its knowledge of the acid rain problem was insufficient "to make a judgment regarding the state-by-state or even the aggregate reductions necessary to eliminate observed effects," EPA considered itself unable to act on the petition by making the requested endangerment and reciprocity findings.[154]

The petitioners sought review in the D.C. Circuit,[155] arguing that the letters constituted final Agency action denying their petition, and that this action was arbitrary and capricious because EPA had sufficient information to publish its endangerment and reciprocity findings for notice and comment.[156] The D.C. Circuit reviewed this petition in *Her Majesty the Queen in Right of Ontario v. EPA*.[157]

The court first considered two jurisdictional matters: whether the Clay letters constituted final agency action within the meaning of CAA §307(b)(1)[158] and, if so, whether this action was ripe for judicial review.[159] With respect to the first question, the court concluded that the Clay letters represented final Agency action as to EPA's interpretation of §115, because EPA had "clearly and unequivocally rejected . . . petitioners' requests for a separate proceeding limited to the endangerment and reciprocity findings" on the basis of this construction.[160] With respect to the second question, the court concluded that this final Agency action was ripe for judicial review because it raised a purely legal question that the court could resolve without further development of information, and because Congress had declared a preference for prompt review of EPA actions under the CAA, thereby eliminating the need to inquire into the "hardship to the parties of withholding court consideration."[161]

After addressing these jurisdictional concerns, the D.C. Circuit turned to the merits.[162] The court applied the *Chevron v. NRDC*[163] framework to determine whether EPA's construction of §115 should be permitted to stand.[164] The court determined that nothing in the language, structure, or legislative history of §115 expressed a clear and unambiguous congressional intent regarding the need for a unitary proceeding.[165] Moreover, the court determined that it was reasonable for EPA to resist promulgating an endangerment finding before it had sufficient knowledge to remedy the endangerment by providing formal notification to the polluting states.[166] In light of these determinations, the court denied the petition.[167]

145. *Id.* at 1448 ("because the findings were issued without notice and comment, they cannot be the basis for the judicial relief appellees seek").
146. *Id.* at 1447.
147. Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1529, 20 ELR 21354 (D.C. Cir. 1990).
148. *Id.* at 1529-30.
149. *Id.*
150. *Id.* at 1530. Petitioners likely relied on the district court's opinion in *New York v. Thomas* for the proposition that "the obligation to identify the polluting states is incidental to giving formal notification" and not a condition precedent to the Administrator's duty to notify. *See* 613 F. Supp. 1472, 1484 n.* (D.D.C. 1985), *overruled on other grounds by* 802 F.2d 1443, 16 ELR 20925 (D.C. Cir. 1986).
151. *Her Majesty the Queen*, *supra* note 147, 912 F.2d at 1530.
152. *Id.* (citing Letter from Don R. Clay, to James M. Hecker (Oct. 14, 1988)).
153. *Id.*
154. *Id.*
155. Petitions for review of EPA's final actions under the CAA must be filed directly in the appropriate federal court of appeals. 42 U.S.C. §7607(b).
156. *Her Majesty the Queen*, *supra* note 147, 912 F.2d at 1530-31.
157. 912 F.2d 1525, 20 ELR 21354 (D.C. Cir. 1990).
158. 42 U.S.C. §7607(b)(1).
159. *Her Majesty the Queen*, *supra* note 147, 912 F.2d at 1530-31.
160. *Id.* at 1531.
161. *Id.* at 1532-33 (citing Abbot Labs. v. Gardner, 387 U.S. 136, 149 (1967)).
162. *Id.* at 1533.
163. 467 U.S. 837, 14 ELR 20507 (1984).
164. *Her Majesty the Queen*, *supra* note 147, 912 F.2d at 1533 (citing *Chevron*).
165. *Id.*
166. *Id.*
167. *Id.* at 1535.