SUPREME COURT OF THE UNITED STATES

Nos. 99–1257 and 99–1426

CHRISTINE TODD WHITMAN, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS
99–1257 *v.*
AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

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99–1426 *v.*
CHRISTINE TODD WHITMAN, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[February 27, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

Section 109(b)(1) delegates to the Administrator of the Environmental Protection Agency (EPA) the authority to promulgate national ambient air quality standards (NAAQS). In Part III of its opinion, *ante*, at 11–15, the Court convincingly explains why the Court of Appeals erred when it concluded that §109 effected "an unconstitutional delegation of legislative power." *American Trucking Assns., Inc.* v. *EPA*, 175 F. 3d 1027, 1033 (CADC 1999) (per curiam). I wholeheartedly endorse the Court's result and endorse its explanation of its reasons, albeit with the

following caveat.

The Court has two choices. We could choose to articulate our ultimate disposition of this issue 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, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding,[1] I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."[2]

The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it. See Black's Law Dictionary 899 (6th ed. 1990) (defining "legislation" as, *inter alia*, "[f]ormulation of rule[s] for the future"); 1 K. Davis & R. Pierce, Administrative Law Treatise §2.3, p. 37 (3d ed. 1994) ("If legislative power means the power to make rules of conduct that bind everyone based on resolution of major policy issues, scores of agencies exercise

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[1] See, *e.g.*, *Touby* v. *United States,* 500 U. S. 160, 165 (1991); *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77, 85 (1932); *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 407 (1928); *Field* v. *Clark,* 143 U. S. 649, 692 (1892).

[2] See *Mistretta* v. *United States,* 488 U. S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power . . ."). See also *Loving* v. *United States,* 517 U. S. 748, 758 (1996) ("[The nondelegation] principle does not mean . . . that only Congress can make a rule of prospective force"); 1 K. Davis & R. Pierce, Administrative Law Treatise §2.6, p. 66 (3d ed. 1994) ("Except for two 1935 cases, the Court has never enforced its frequently announced prohibition on congressional delegation of legislative power").

legislative power routinely by promulgating what are candidly called 'legislative rules'"). If the NAAQS that the EPA promulgated had been prescribed by Congress, everyone would agree that those rules would be the product of an exercise of "legislative power." The same characterization is appropriate when an agency exercises rulemaking authority pursuant to a permissible delegation from Congress.

My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. In Article I, the Framers vested "All legislative Powers" in the Congress, Art. I., §1, just as in Article II they vested the "executive Power" in the President, Art. II, §1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others. See *Bowsher* v. *Synar,* 478 U. S. 714, 752 (1986) (STEVENS, J., concurring in judgment) ("Despite the statement in Article I of the Constitution that 'All legislative powers herein granted shall be vested in a Congress of the United States,' it is far from novel to acknowledge that independent agencies do indeed exercise legislative powers"); *INS* v. *Chadha,* 462 U. S. 919, 985–986 (1983) (White, J., dissenting) ("[L]egislative power can be exercised by independent agencies and Executive departments . . ."); 1 Davis §2.6, p. 66 ("The Court was probably mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power"). Surely the authority granted to members of the Cabinet and federal law enforcement agents is properly characterized as "Executive" even though not exercised by the President. Cf. *Morrison* v. *Olson,* 487 U. S. 654, 705-706 (1988) (SCALIA, J., dissenting) (arguing that the independent counsel exercised "executive power" unconstrained by the President).

It 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. Accordingly, while I join Parts I, II, and IV of the Court's opinion, and agree with almost everything said in Part III, I would hold that when Congress enacted §109, it effected a constitutional delegation of legislative power to the EPA.