UNCONSTITUTIONALLY LIMITING CONGRESSIONAL TREATY POWER: WHY *NRDC V. EPA* CREATES UNSOUND PRECEDENT FOR U.S. JURISPRUDENCE

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I. INTRODUCTION

The United States is party to the Montreal Protocol[1]—a treaty that calls for the reduction and elimination of the use of methyl bromide.[2] The United States regulates methyl bromide as an ozone depleting substance.[3] In *National Resources Defense Council, Inc. v. Environmental Protection Agency*,[4] the United States Court of Appeals for the D.C. Circuit reviewed a rule issued by the Environmental Protection Agency ("EPA") implementing a "critical use" exemption from the elimination of the use of methyl bromide.[5] The Montreal Protocol allows for "exemptions from the general ban 'to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses *agreed* by them to be critical uses.'"[6] To implement this clause, the Parties meet annually to decide and agree

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1 The Montreal Protocol is also referred to in this paper as "the Treaty." A party or parties to the Montreal Protocol will be referred to as a "Party" or the "Parties."

2 Methyl bromide "is an odorless, colorless gas that has been used as an agricultural soil and structural fumigant to control a wide variety of pests" that "depletes the stratospheric ozone layer and is classified as a Class I ozone-depleting substance." U.S. Envtl. Prot. Agency, The Phaseout of Methyl Bromide, http://www.epa.gov/ozone/mbr/ (last visited Oct. 14, 2007).

3 Clean Air Act, 42 U.S.C. § 7671c(h) (2000).

4 Natural Res. Def. Council, Inc. v. EPA, 464 F.3d 1, 4 (D.C. Cir. 2006) [hereinafter NRDC v. EPA or NRDC]. This case should not be confused with Natural Res. Def. Council, Inc. v. Costle, 184 U.S. App. D.C. 88 (D.C. Cir. 1977), which is also sometimes cited as NRDC v. EPA.

5 *NPDC*, 464 F.3d 1.

6 *Id.* at 4 (quoting The Montreal Protocol on Substances that Deplete the Ozone Layer art. 2H ¶ 5, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29 (as amended at the Fourth Meeting of the Parties at Copenhagen, Nov. 25, 1992), *available at* http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf) (emphasis added).

upon permissible critical exemptions.[7] The National Resources Defense Council ("NRDC")[8] challenged the EPA's rule implementing the critical use exemption on the grounds that it permitted consumption of methyl bromide beyond what the Parties had agreed to at their recent applicable meeting.[9]

The D.C. Circuit Court of Appeals' holding that "decisions of an international body created by treaty" are judicially unenforceable against an administrative agency[10] violates Constitutional separation of powers, runs afoul of applicable precedent, and creates unsettling policy. If the D.C. Circuit's holding stands, it will cripple Congress' power to make dynamic treaties that are necessary to regulate rapid globalization[11] and could be used to limit the international legal effect of decisions of other international bodies.[12]

In Part II, this paper illustrates how the EPA exceeded its authority by allowing greater consumption of methyl bromide than permitted under the Montreal Protocol. Part III demonstrates that the U.S. Constitution affords the creation of international rulemaking bodies. Part IV discusses the Treaty in the framework of contracts law and shows how contracts law permits the creation of bodies to administer parties' ongoing obligations to the contract. Part V demonstrates that the Montreal Protocol decisions are binding on the United States under international law, even if not justiciable in U.S. courts. Finally, this paper argues in Part VI that the D.C. Circuit Court's holding creates unsettling domestic and foreign policy.

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7 *Id.*

8 The National Resources Defense Council is a private non-profit organization with a mission "to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends." Natural Res. Def. Council, Mission Statement, http://www.nrdc.org/about/mission.asp (last visited Nov. 3, 2007).

9 *See NRDC*, 464 F.3d at 5 (Specifically, the NRDC alleged that the Final Rule authorized use of methyl bromide above "the technically and economically feasible minimum" and that the EPA "failed to disclose the full amount of existing stocks, failed to offset new production and consumption by the full amount of these stocks, and failed to reserve the stocks for critical uses.").

10 *Id.* at 7-8.

11 *See infra* Part VI.A.

12 *See infra* Part VI.B.

II. THE EPA EXCEEDED ITS AUTHORITY BY ALLOWING GREATER CONSUMPTION OF METHYL BROMIDE THAN PERMITTED UNDER THE MONTREAL PROTOCOL.

A. THE EPA'S RULE IMPLEMENTING THE CRITICAL USE EXEMPTION PERMITTED CONSUMPTION OF METHYL BROMIDE BEYOND LEVELS MOST RECENTLY AGREED TO BY TREATY MEMBERS.

The EPA's rule implementing the critical use exemption violates the Parties' express agreement. The applicable decision authorizing critical use exemptions for the United States is "Decision Ex.I/3."[13] Decision Ex.I/3 granted a critical use exemption to the United States of 8,942 metric tons of methyl bromide to be made up of 7,659 metric tons of new production and consumption and 1,283 metric tons of consumption from existing stocks.[14] Decision Ex.I/3 also states that "each Party which has an agreed critical use should ensure that the criteria in paragraph 1 of decision IX/6[15] are applied when . . . authorizing the use of methyl bromide and that such procedures *take into account available stocks*."[16] Further, exemptions are permitted "only when all technically and economically feasible steps have been taken to minimize the required use and when methyl bromide is not available from existing stocks."[17]

The EPA proceeded by issuing a final rule implementing the critical use exemption. Consistent with Decision Ex.I/3, the Final Rule permits up to the 8,942 metric tons of new production and consumption, as well as the consumption of the 1,283 metric tons of existing stocks;[18]

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[13] U.N. Env't Programme, *Report of the First Extraordinary Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 14-15, U.N. Doc. UNEP/OzL.Pro.ExMP/1/3, (Mar. 27, 2004) [hereinafter Decision Ex.I/3], *available at* http://ozone.unep.org/Meeting_ Documents/mop/Ex_mop/1ex_mop_3.e.pdf.

[14] *NDRC*, 464 F.3d at 5 (calculating critical use categories based on data from Decision Ex.I/3, *supra* note 13, at 26 annex IIA, IIB).

[15] U.N. Env't Programme, *Report of the Ninth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 26-27, U.N. Doc. UNEP/OzL.Pro.9/12, (Sept. 25, 2004) (establishing critical-use exemptions for methyl bromide), *available at* http://ozone.unep.org/Meeting_Documents/mop/09mop/9mop-12.e.pdf.

[16] Decision Ex.I/3, *supra* note 13, at 15 (emphasis added).

[17] *NRDC*, 464 F.3d at 5 (citing Decision Ex.I/3, *supra* note 13).

[18] Protection of Stratospheric Ozone: Process for Exempting Critical Uses from the Phaseout of Methyl Bromide, 69 Fed. Reg. 76, 982, 76,986 (Dec. 23, 2004).

however, the rule also permits noncritical users to draw upon existing stocks.[19] The NRDC argued that the Final Rule "violated Decision IX/6 and Decision Ex.I/3 because [the] EPA failed to disclose the full amount of existing stocks, failed to offset new production and consumption by the full amount of these stocks, and failed to reserve the stocks for critical uses."[20] Furthermore, the NRDC claimed the Final Rule violated its U.S. obligations under Decisions IX/6 and Ex.I/3 "because the total amount of methyl bromide critical use the Final Rule authorized is not the technically and economically feasible minimum."[21] In spite of its holding, the court in *NRDC* agrees that the Final Rule violates the language and meaning of Decision IX/6 and Decision Ex.I/3, stating that NRDC's claims "depend upon the legal status of Decisions IX/6 and Ex.I/3."[22]

B. THE LANGUAGE OF THE MONTREAL PROTOCOL IS CLEAR IN CALLING FOR CONSENSUS DECISIONS BY THE PARTIES FOR CRITICAL USE EXEMPTIONS.

Although the court in *NRDC* suggests that allowing the decisions of an international body to be judicially enforceable against a domestic administrative agency might violate constitutional[23] and contracts doctrines,[24] it nonetheless bases its holding on the idea that the Montreal Protocol creates an "ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties."[25] Such an interpretation of the Montreal Protocol contravenes the plain meaning of the Treaty's text. The relevant portions of the Montreal Protocol state in full:

> Each Party shall ensure that for the twelve-month period commencing on 1 January 2005, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substance in Annex E [methyl bromide] does not exceed zero. Each Party producing the substance shall, for the same periods, ensure that its calculated level of production of the substance does not exceed zero . . . . This paragraph will apply save to the extent that the Parties

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19 *Id*. at 76,988.
20 *NDRC*, 464 F.3d at 5.
21 *Id.*
22 *Id.*
23 *Id.* at 9.
24 *Id.* at 9-10.
25 *Id.* at 9.

> decide to permit the level of production or consumption that is necessary to satisfy uses *agreed by them* to be critical uses.[26]

In interpreting a rule of law or statute, courts must first look to the plain meaning of its words.[27] The "critical use" clause in the above excerpt may be open to interpretation; however, the plain meaning of "uses agreed by them" precludes a single Party from unilaterally determining their own critical use exceptions.[28] The dictionary definition of agree is "to achieve harmony (as of opinion, feeling, or purpose)."[29] There is no question in this case that the EPA allows for greater methyl bromide consumption than those expressed by the explicit "views, emotions, etc." of the Parties to the Treaty.

Another canon of statutory interpretation instructs courts to "disfavor interpretations of statutes that render language superfluous."[30] The holding in *NRDC* states, "[t]his paragraph will apply save to the extent . . . that is necessary to satisfy uses *agreed by* [the Parties] to be critical uses"[31] as allowing an individual Party or their administrative agencies to unilaterally determine "necessary" uses.[32] Such an interpretation renders the entire paragraph superfluous.

The *NRDC* court argues that "the details of the exemption are not ambiguous," but rather "nonexistent."[33] In *Sumitomo Shoji America, Inc. v. Avagliano*, the Supreme Court held:

> Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.[34]

Here, the intent of the Parties is clear: critical use exceptions are allowed to the extent agreed by the Parties. The *NRDC* court's interpretation that

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[26] The Montreal Protocol on Substances that Deplete the Ozone Layer art. 2H ¶ 5, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29, [hereinafter Montreal Protocol] (as amended at the Fourth Meeting of the Parties at Copenhagen, Nov. 25, 1992) (emphasis added), *available at* http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf.

[27] United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006).

[28] *See* Montreal Protocol, *supra* note 26, art. 2H ¶ 5.

[29] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 43 (Philip Babcock Gove, ed.) (2002).

[30] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

[31] Montreal Protocol, *supra* note 26, art. 2H ¶ 5 (emphasis added).

[32] NDRC v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

[33] *Id.*

[34] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982).

post-ratification decisions "fill in treaty gaps"[35] is incorrect. That the Parties meet annually to "agree" on which critical use exemptions from the general ban on methyl bromide are "necessary" demonstrates an implied understanding of the exemption. The post-ratification "level of production or consumption necessary to satisfy uses *agreed by them* to be critical uses"[36] becomes law by direct language of the Treaty. Whether such deference to an international body is permissible is not a question of treaty interpretation, but rather a question of Constitutional law.

C. THE MONTREAL PROTOCOL IS A BINDING TREATY RATHER THAN AN ONGOING POLITICAL COMMITMENT.

The Montreal Protocol states that "[t]he decisions [to adjust] . . . shall be binding on all Parties."[37] The duty of the court is to give effect to the intent of the parties.[38] The court in *NRDC* offered little explanation as to why it felt the Parties intended the Montreal Protocol to be a political commitment.[39] Regardless, it is doubtful that a more complete explanation could have overcome such strong language as "shall be binding on all Parties."[40] The Parties obviously intended the post-ratification decisions of the Parties to apply.

According to the Constitution, treaties are self-executing and need no enabling legislation to become law.[41] Treaties are the supreme law of the land;[42] therefore, the will of Congress, as expressed in the Montreal Protocol, is enforceable in court even without implementing legislation. Yet, to the extent such implementing legislation was necessary to make the language of the protocol judicially enforceable,

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[35] *NDRC*, 464 F.3d at 9.

[36] Montreal Protocol, *supra* note 26, art. 2H ¶ 5 (emphasis added).

[37] *Id.* at art. 2 ¶ 9(d).

[38] Sumitomo Shoji Am., 457 U.S. at 185; *see also* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 602-03 (1889)

> This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination.

[39] *NDRC*, 464 F.3d at 9.

[40] Montreal Protocol, *supra* note 26, art. 2 ¶ 9(d).

[41] *See infra* Part II.A.

[42] *The Chinese Exclusion Case*, 130 U.S. at 600.

such language exists in the Clean Air Act.[43] "[T]he 1990 amendments to the Act incorporate the entire Montreal Protocol, including 'adjustments adopted by the Parties thereto.'"[44] In addition, the 1990 amendments explicitly forbid the "EPA or a court from 'construing, interpreting, or applying' the Act's terms 'to abrogate the responsibilities and obligations of the United States to implement fully the provisions of the Protocol.'"[45] Because the Constitution treats treaties as equally supreme with federal statutory law, and because the Clean Air Act explicitly incorporates the Montreal Protocol into statutory law, the *NRDC* court cannot properly construe the language of the protocol as a judicially unenforceable political commitment.

To illustrate its assertion that the Montreal Protocol is merely an ongoing political commitment, the D.C. Circuit Court presented an analogy:

> [S]uppose the President signed and the Senate ratified a treaty with Germany and France to conserve fossil fuel. How this is to be accomplished the treaty does not specify. In a later meeting of representatives of the signatory countries at the United Nations, a consensus is reached to lower the speed limits on all major highways of the signatory nations to a maximum of 45 miles per hour. No one would say that United States law has thus been made.[46]

There are several distinctions between the analogy presented by the court and our present case that render the analogy inapplicable. Foremost, unlike methyl bromide, speed limits were not agreed on by the treaty parties to be governed by the treaty. Second, fossil fuels, unlike methyl bromide, were not banned by the treaty with exceptions to the general ban to be determined by agreement of the parties. The court vastly exaggerated the current situation by using weaker treaty language,[47] the speed limits of individual citizens as the subject of international governance, and an international body that has exceeded the scope of its authority.[48] The court's analogy serves as an irrelevant scare tactic,

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[43] *See* Supplemental Brief for Petitioner at 2, *NDRC*, 464 F.3d 1 (No. 04-1438), 2005 WL 2996700.

[44] *Id.* (citing Clean Air Act, 42 U.S.C. § 7671(9) (2000)).

[45] *Id.* (citing Clean Air Act, 42 U.S.C. § 7671m(b) (2000)).

[46] *NDRC*, 464 F.3d at 9.

[47] *Compare id.* (discussing a hypothetical "treaty with Germany and France to conserve fossil fuel"), *and* Montreal Protocol, *supra* note 26, art. 2H ¶ 5 ("Each Party shall ensure that for the twelve-month period commencing on 1 January 2005, and in each twelve-month period thereafter, its calculated level of consumption [and production] of [methyl bromide] does not exceed zero.").

[48] According to the court's hypothetical treaty, the nations did not agree to govern speed limits by consensus. *See NDRC*, 464 F.3d at 9.

presumably intended to draw attention away from the weak basis for its holding.

D. THE EPA EXCEEDED ITS AUTHORITY BY ACTING CONTRARY TO THE WILL OF CONGRESS EXPRESSED IN THE CLEAN AIR ACT AND THE MONTREAL PROTOCOL.

Though considerable deference is given to agency interpretation of an ambiguous statute, "if Congress has clearly expressed an intent contrary to that of the Agency, [the court's] duty is to enforce the will of Congress."[49] To summarize, the intent of Congress has been expressed in both the Clean Air Act and the Montreal Protocol. The Montreal Protocol, which calls for an agreement of the Parties in order for an individual Party to claim a critical use exception to the general ban on methyl bromide,[50] is equal to statutory law and requires no enabling legislation.[51] Yet, the Clean Air Act has nonetheless incorporated the Montreal Protocol into U.S. statutory law.[52] Moreover, the Clean Air Act explicitly orders that the EPA not "abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Protocol."[53] By permitting greater methyl bromide production and consumption than agreed by the Parties to be an acceptable critical use exemption, the EPA exceeded the expressed statutory limitation placed upon it by the Clean Air Act.

The Administrative Procedure Act ("APA") provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[54] The EPA exceeded the statutory limitations of the Clean Air Act as expressly applied to the EPA; the D.C. Circuit should have held the EPA's actions to be unlawful and set them aside. The APA also provides that "[t]o the extent necessary . . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency

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[49] Chem. Mfrs. Ass'n v. Natural Res. Def. Council, 470 U.S. 116, 125 (1985).

[50] Montreal Protocol, *supra* note 26, art. 2H ¶ 5.

[51] *See supra* Part II.A.

[52] *See* Clean Air Act, 42 U.S.C. § 7671c(d) (2000) (authorizing the administrator to make exemptions "[t]o the extent consistent with the Montreal Protocol").

[53] *Id.* § 7671m(b).

[54] 5 U.S.C. § 706(2)(C).

action."[55] The court's holding in *NRDC*—that the ban on methyl bromide was merely a political commitment rather than a binding treaty—fails to fully address the relevant constitutional questions and falls short of fulfilling the court's obligations under the APA.

III. THE U.S. CONSTITUTION ALLOWS THE CREATION OF INTERNATIONAL RULEMAKING BODIES.

A. TREATIES ARE SELF-EXECUTING AND THE SUPREME LAW OF THE LAND.

In *NRDC,* the court's primary holding was that the Clean Air Act and Montreal Protocol create an "ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties."[56] The court's only basis for this finding is that "[n]owhere does the Protocol suggest that the Parties' post-ratification consensus agreements about how to implement the critical-use exemption are binding in domestic courts."[57] The basis for holding that treaties can be merely promissory in character can be found in *The Chinese Exclusion Case*;[58] however, the court in *The Chinese Exclusion Case* also held that "[b]y the constitution, laws made in the pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the law of the land."[59] The court goes on to say:

> If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.[60]

Assuming *arguendo,* that enabling legislation was required to bring the Montreal Protocol into effect, such legislation exists in the

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[55] *Id.* § 706.

[56] NDRC v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

[57] *Id.*

[58] *See The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) ("A treaty . . . is often merely promissory in its character, requiring legislation to carry its stipulations into effect.").

[59] *Id.*

[60] *Id.*

Clean Air Act.[61] The Natural Resources Defense Council argued that the Clean Air Act "expressly incorporates the Protocol's requirements, clarifies that the Act may not be construed to conflict with the Protocol, and provides that where the Act's and the Protocol's provisions differ, 'the more stringent provision shall govern.'"[62] Because the latest expression of the sovereign expressly incorporates the provisions of the Montreal Protocol, courts cannot refuse enforcement on the basis that any portion of the Montreal Protocol is merely promissory in nature. Short of explicitly finding portions of the Montreal Protocol or Clean Air Act unconstitutional, the court should have ruled in the NRDC's favor.

B. THE U.S. CONSTITUTION ALLOWS DELEGATION OF AUTHORITY TO REGULATE METHYL BROMIDE.

The court in *NRDC* argues that a "holding that the Parties' post-ratification side agreements were 'law' would raise serious constitutional questions in light of the nondelegation doctrine."[63] Since as early as 1825, the Supreme Court has allowed the legislature to delegate some limited authority.[64] In *Wayman v. Southard*, Chief Justice Marshall ruled that while "important subjects" need be regulated by the legislature directly, authority can be delegated to "fill up the details."[65] To be sure, this is not an issue of whether the subject matter (allowing for critical use exemptions for methyl bromide consumption) is important or just a detail—it is a detail. The EPA itself is an unelected body. If the amount of methyl bromide allowable were an important subject matter, the nondelegation doctrine would make the regulation of "critical uses" of methyl bromide by both the EPA and the Parties unconstitutional.

The policy behind allowing the delegation of authority is to promote legislative efficiency. "[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress cannot do its job absent an ability to delegate power under broad general

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[61] *See supra* notes 54-55 and accompanying text.

[62] Final Opening Brief for Petitioner at 23, *NDRC*, 464 F.3d 1 (D.C. Cir. 2006) (No. 04-1438), 2005 WL 1666942 (quoting 42 U.S.C. §7671m(b)).

[63] *NDRC*, 464 F.3d at 9.

[64] *See* Wayman v. Southard, 23 U.S. 1, 43 (1825).

[65] *Id.*

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

directives."[66] While these cases refer to delegation of power to a federal agency, the policy interest in efficiency applies equally where there is delegation to an international body. The court in *NRDC* held that "[w]ithout congressional action . . . side agreements reached after a treaty has been ratified are not the law of the land."[67] Yet, here too, treaties and agreements between the United States and the rest of the world are increasingly complex. It is not practical to demand that Congress "fill up the details" in an ongoing treaty regarding an "important subject" when it has already set forth the "general provision[s]."[68]

C. DECISIONS OF INTERNATIONAL BODIES CAN MAKE UNITED STATES LAW.

The grounds for distinguishing the previously cited exceptions to the nondelegation doctrine and our present case is that in this case, some limited authority is being delegated to an international body rather than a domestic agency; however, there are cases dealing with the delegation of legal authority to international bodies, and although the courts did not, in the end, defer to that authority, they also did not go so far as to find such delegation unconstitutional.[69] Furthermore, the court's bases for not deferring to the international bodies in those cases do not fit the facts here.

For example, the court in *NRDC* suggests that *Committee of United States Citizens Living in Nicaragua v. Reagan*[70] "is highly suggestive of the outcome."[71] This author agrees, but disputes both the *NRDC* court's interpretation of the holding in that case and the court's ultimate outcome. The *NRDC* court cites *Committee of United States Citizens* as holding "[T]hat rulings of the [International Court of Justice] do not provide 'substantive legal standards for reviewing agency actions' . . . because the rulings, though authorized by the ratified treaty, were not themselves self-executing treaties."[72] Since neither pinpoint

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[66] Mistretta v. United States, 488 U.S. 361, 372 (1989).

[67] *NDRC*, 464 F.3d at 10.

[68] *See* Wayman, 23 U.S. at 43.

[69] *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 929 (D.C. Cir. 1988) [hereinafter Comm. Of U.S. Citizens].

[70] *Id.*

[71] *NDRC*, 464 F.3d at 10.

[72] *Id.* at 8 (citations omitted).

citation supports the position cited by the D.C. Circuit, the court's proposition in this case lacks precedent and is not persuasive.

First, the *NRDC* court misquotes *Committee of United States Citizens*, which actually reads:

> The statute governing the ICJ provides that "decision[s] of the Court ha[ve] no binding force except between the parties and in respect of that particular case." The ICJ itself, in other words, does not aspire to regulate the actions of the United States toward its own citizens. *ICJ judgments thus resist importation into American law as substantive legal standards*.[73]

The quoted holding of the case specifically relies on a portion of the text within the ICJ statute. Because that clause does not exist either in the Montreal Protocol or the Clean Air Act, and no analogous portion is alleged to exist, that portion of the holding is irrelevant to the outcome in *NRDC*.

The discussion "*at 937-38*," referred to in *NRDC*,[74] addresses whether the ICJ treaty is self-executing in the sense that it provides private rights of action.[75] The court concludes:

> Because only nations can be parties before the ICJ, appellants are not "parties" within the meaning of this paragraph. Clearly, this clause does not contemplate that individuals having no relationship to the ICJ case should enjoy a private right to enforce the ICJ's decision . . . . The Statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of th[e] particular case."[76]

The grounds for distinguishing this holding from our present facts are twofold. First, neither the Montreal Protocol nor the Clean Air Act has a clause explicitly stating that private parties have no cause of action.[77] Second, the EPA has not acted in accordance with the most recent statutory law.[78] Suffice to say that neither pinpoint supports the broad

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[73] *Comm. Of U.S. Citizens*, 859 F. 2d at 942 (internal citations omitted) (emphasis added). The emphasized portion of the quote is the portion that this author believes the *NRDC* court was intending to quote.

[74] *NDRC*, 464 F.3d at 8.

[75] *Comm. of U.S. Citizens*¸ 859 F.2d at 937-38.

[76] *Id.* at 938 (quoting Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031, 1 U.N.T.S. xvi).

[77] *See* Montreal Protocol, *supra* note 26; *see also* Clean Air Act, 42 U.S.C. 7401-7671q (2000).

[78] *See The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) ("[T]he last expression of the sovereign will must control"). In *Comm. of U.S. Citizens*, Congress had enacted legislation that contravened its prior enacted treaty. *Comm. of U.S. Citizens*¸ 859 F.2d at 932. In *NDRC*, the

rule that "the rulings, though authorized by the ratified treaty, were not themselves self-executing treaties" in a sense that might be relevant to the enforcement of Montreal Protocol.[79]

Indeed, much stronger, on point language in *Committee of United States Citizens* suggests that such rulings may be enforceable:

> In short, do violations of international law have domestic legal consequences? The answer largely depends on what form the "violation" takes. Here, the alleged violation is the law that Congress enacted and that the President signed, appropriating funds for the Contras. When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law.[80]

The principle that the "the last expression of the sovereign will must control" is longstanding.[81] In *NRDC*, the form of the violation is quite different—the two political branches are not acting together to contravene the Treaty. In fact, they acted together in passing the Clean Air Act and the Montreal Protocol which clearly asked that the EPA abide by the post-ratification decisions.[82] Subsequently, the EPA, an independent government agency,[83] has acted on its own to violate the clear and unambiguous intent of the law.[84] It stands to reason that under these circumstances, the rulings of an international body should be enforceable against an administrative body, and in any case, that enforcement is not precluded by the holding in *Committee of United States Citizens*. The court in *NRDC* has confused its prior holding in *Committee of United States Citizens*.[85]

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agency simply refused to enforce the "last expression of the sovereign will." *See NDRC*, 464 F.3d 1.

79 *NDRC*, 464 F.3d at 8.

80 *Comm. of U.S. Citizens*¸ 859 F.2d at 935.

81 *The Chinese Exclusion Case*, 130 U.S. at 600.

82 *See NDRC*, 464 F.3d at 3-5.

83 S. REP. NO. 109-275, at 51 (2006) ("[T]he Agency was established as an independent agency in the executive branch on December 2, 1970, by consolidating 15 components from 5 departments and independent agencies.").

84 *See NDRC*, 464 F.3d at 5 (discussing allegations against the EPA).

85 At first glance it might seem acceptable for a court to misconstrue its own holding. However, from a policy perspective, this makes little sense. Appellate and circuit court holdings have power as precedent only to the extent that the opinion as written either survived an appeal or was passed over for an appeal. In this sense, using an old opinion as precedent to support a position not clearly in that opinion is no better than giving a position with no precedent at all.

More recently, in a *per curiam* dissent in *Medellin v. Dretke*, Justice O'Connor suggested that "[r]easonable jurists can vigorously disagree about whether and what legal effect ICJ decisions have in our domestic courts."[86] At issue in that case was whether an ICJ decision was binding in domestic courts in regards to a Mexican national's individually enforceable rights as they pertain to his confession to participating in the rape and murder of two girls.[87] Certainly if reasonable jurists can disagree as to what extent international bodies can confer judicially enforceable rights to criminals—an area of the law that has never and will likely never be found to be delegable to even a domestic agency—there should be substantially less disagreement here, where the legal authority is deemed unimportant enough to have been conferred on a domestic agency.

Additionally, the *Medellin* Court takes issue with the Court of Appeals' refusal to directly engage the constitutional issue of what legal authority, if any, was conferrable upon international bodies, stating that "[t]he Court of Appeals should have granted a COA and given the issue further consideration."[88] The *NRDC* court has similarly refused to undertake the constitutionality of the law stating, "[w]e need not confront the serious likelihood that the statute will be held unconstitutional."[89] No court cares to overstep itself and get overturned; however, in failing to directly deal with the constitutionality of delegating authority to an international body,[90] the court in *NRDC* has set itself up for a remand on this issue so that it may be ripe for appeal.

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[86] Medellin v. Dretke, 544 U.S. 660, 684 (2005) (O'Connor, J., dissenting).

[87] *Id.* at 662.

[88] *Id.* at 684; *see also id.* at 680 ("The Texas court neither asked nor answered the right question: whether an individual can bring a claim under *this* particular treaty.").

[89] *NDRC*, 464 F.3d at 9 (quotations and citations omitted).

[90] *See* Posting of Duncan Hollis to Opinio Juris, http://www.opiniojuris.org/posts/1157507101.shtml (Sept. 5, 2006, 21:45)

> The court does not answer either the delegation doctrine or treaty power questions. Rather, it concludes that the decisions of the Montreal Protocol parties are 'political commitments' and, as such, aren't legally binding. And, if the decisions aren't binding, the Court doesn't have to deal with the Constitutional questions it says exist with respect to the prospect of having legally binding decisions of an international organization.

(last visited Nov. 13, 2007).

D. THE HOLDING IN *NRDC V. EPA* VIOLATES SEPARATION OF POWERS.

It is well established that the legislature must specify standards for agency action and define the scope of the delegated authority in order to comply with separation of powers.[91] Therefore, where an agency exceeds the authority conferred upon it by Congress, courts strike down the agency action as a matter of Constitutional law:

> However, it is axiomatic that *an agency cannot create regulations which are beyond the scope of its delegated authority*. A precondition to deference . . . is a congressional delegation of administrative authority. Legislative authority can be delegated to an executive department so long as Congress provides the administrative agency with standards guiding its actions *such that a court could ascertain whether the will of Congress has been obeyed*.[92]

In *NRDC*, both the Montreal Protocol and the Clean Air Act together instruct the EPA to abide by the post-ratification decisions.[93] Congress provided standards to guide the EPA's actions "such that a court could ascertain whether the will of Congress has been obeyed."[94] The court has, however, chosen not to apply those standards. Because the *NRDC* court allowed the EPA, an executive branch agency, to independently contravene the unambiguous will of Congress, its ruling stands in violation of separation of powers.

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[91] Nagahi v. INS, 219 F.3d 1166, 1169 (10th Cir. 2000) ("Failure to specify definite standards for agency action results in a violation of the constitutional principle of separation of powers.").

[92] *Id.* (emphasis added) (quotations and citations omitted).

[93] *See NDRC*, 464 F.3d at 3-5.

[94] *See generally Nagahi*, 219 F.3d at 1169 (limiting the authority of the INS, an executive branch agency).

IV. CONTRACTS LAW DOES NOT PROHIBIT THE CREATION OF BODIES TO ENFORCE PARTIES' ONGOING OBLIGATIONS TO THE CONTRACT.

A. THE CRITICAL USE EXCEPTION IS NOT AN "AGREEMENT TO AGREE" THAT IS UNENFORCEABLE IN CONTRACT.

In *NRDC*, the D.C. Circuit alleges that interpreting the Montreal Protocol as conferring some legal authority on the subsequent decisions of the Parties would violate contracts law doctrines:

> Article 2H(5) . . . constitutes an "agreement to agree." The parties agree in the Protocol to reach an agreement concerning the types of uses for which new production and consumption will be permitted, and the amounts that will be permitted. "Agreements to agree" are usually not enforceable in contract. And the fruits of those agreements are enforceable only to the extent that they themselves are contracts. There is no doubt that the "decisions" are not treaties.[95]

The court errs by characterizing the Montreal Protocol as an "agreement to agree" to the extent it would be unenforceable in contract.

The only citation the D.C. Circuit provides in support of the idea that agreements to agree are unenforceable in contract is a reference to *Williston on Contracts*, stating the common law is reluctant "to enforce indefinite agreements to agree, for the parties have by their words made clear that there is no intent to be bound in the absence of agreement."[96] For example, a letter of intent to sell real property would constitute an agreement to agree.[97] The Montreal Protocol, taken as a contract, does not fit such an understanding of an agreement to agree. The Parties to the Montreal Protocol plainly intended to contract to ban methyl bromide, save to the extent that they agree that full enforcement of the ban is unnecessary.[98] An analogy to contract law for such an exception is improper.

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[95] *NDRC*, 464 F.3d at 9-10 (citations omitted).

[96] *Id.* at 10 (citing 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:5, at 223-24, n.17 (4th ed. 1990)). The 2007 edition of the treatise uses identical language when discussing agreements to agree. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 3:5, at 311 (4th ed. 2007).

[97] WILLISTON & LORD, *supra* note 96, at § 3:5 n.17 (citing Yonkers v. Otis Elevator Co., 649 F. Supp. 716 (S.D.N.Y. 1986)).

[98] *See* Montreal Protocol, *supra* note 26, at 2H.

Under traditional contract law, it would be unnecessary for two parties to form a contract with a clause allowing them to opt out of continued enforcement of the contract upon the parties' agreement. In such a situation, rather than invalidate the entire contract, a court would likely interpret the clause as suggesting that the parties leave the door open to form a second contract that would modify or invalidate the first—an option that is already available under the law.[99] An analogous interpretation of the Montreal Protocol is wholly inappropriate. It would mean that the Parties agreed to ban methyl bromide, save to the extent the Parties form a second treaty to amend the protocol at their annual meeting. Such an interpretation by analogy to contract is inappropriate as the formalities for treaty formation are much more stringent than for contract formation, and the policy reasons for formality in treaty are much different than for formality in contract.[100]

Formality in contract formation is largely to establish certainty. For example, the Statute of Frauds requires certain contracts to be in writing.[101] Such contracts include contracts for the sale or transfer of an interest in land, contracts that cannot be performed within one year of its making, or sale of goods contracts where the contract price is five hundred dollars or more.[102] Such contracts are more significant than one's everyday promises or exchanges; thus, the Statute of Frauds "has an evidentiary purpose—it is to prevent perjury."[103] Accordingly, there is no justification for a relaxed standard of contract formality where the parties find they need to create exceptions to the terms of the contract.

The policy interest in formality and process for the formation of treaties differs substantially, requiring greater process and formality in initial treaty formation. The process of treaty formation in requiring Congressional consent is a necessary check on the executive branch, ensuring executive power does not run amuck.[104] Yet, "[t]he United

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[99] This is precisely why contracts cases are not analogous to the present case. Parties to a contract would generally not feel the need to include such a clause. As a practical matter, if the parties wanted to form an exception to the contract's full enforcement, they would simply form a second contract. Unlike treaties, contracts can be easily formed.

[100] *See* 1 STEWART MACAULAY, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION 318-19 (2d ed. 2003).

[101] *Id.*

[102] *Id.*

[103] *Id.* at 319 (emphasis omitted).

[104] *See* Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring)

> No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, § 2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that

States enters into approximately 200 executive agreements each year, and it has been observed that the constitutional system 'could not last a month' if the President sought Senate or Congressional consent for every one of them."[105] An analogy to contract law for post-formation exceptions to the Treaty is inappropriate due to the latter's demands for efficiency and formality in the treaty formation process. The need for efficiency in our complex constitutional system suggests that it may be proper for Congress to set forth terms as to the "important subjects" of the contract, and allow post-ratification decisions of the Parties to "fill up the details."[106]

B. PROPER ANALOGY TO CONTRACTS THAT TAKES ACCOUNT OF THE NEED FOR EFFICIENCY SUGGESTS DEFERENCE TO AN INTERNATIONAL BODY WOULD BE PERMISSIBLE.

A proper analogy to contracts includes instances of alternative dispute resolution, which accounts for the need for efficiency. For example, parties may contract to settle disputes in arbitration.[107] The principal policy behind this is that the parties to a contract, in the interest of avoiding costly litigation, may choose to have a dispute resolved by an independent arbiter.[108] Arbiters often have much weaker qualifications to resolve a dispute than a judge or the parties themselves.[109] Although some subjects may not be arbitrated, federal law affords a great deal of deference to the substance and scope of arbitration clauses.[110] This is recognition that the need for efficiency in dispute resolution must be balanced against the need for a process that will determine the most proper outcome, and that balancing act should be left to the parties' discretion in contract formation.

Similarly, the need for efficiency in the regulation of methyl bromide trumps the need for direct Congressional oversight. Like in

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> treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.

(citations omitted).

[105] Dole v. Carter, 444 F. Supp. 1065, 1070 (citations omitted).

[106] Wayman v. Southard, 23 U.S 1, 43 (1825); *see also supra* Part I.A.

[107] 4 AM. JUR. 2D *Alternative Dispute Resolution* § 70 (2007).

[108] *See* In re Bd. of Dirs. of Hopewell Int'l Ins., 275 B.R. 699, 709 (S.D.N.Y. 2002).

[109] *See generally* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 126 (2007) (describing the selection process for arbitrators).

[110] *See id*. § 51.

cases of arbitration, with treaties there is a fundamental balancing of the need for efficiency and the need for direct Congressional oversight. Also like arbitration, there may be "important subjects" where Congress must exercise direct oversight.[111] Yet, where the subject at issue is "unimportant," the balancing of Congressional oversight against the need for efficiency should be left up to Congress rather than the D.C. Circuit. It is this author's position that sufficient precedent as to which subjects are important or unimportant already exists.[112]

Another similarity to arbitration is the issue of severability. Where an arbitration clause in a contract is determined to be void, there is often an issue as to whether the arbitration clause relates only to the remedy or the substance of the contract.[113] If a void arbitration provision is not severable from the balance of the contract, it voids the entire contract.[114] In *NRDC*, there is a similar issue as to the disposition of the Treaty if the post-ratification decisions of the Parties have no legal effect.[115] Such an outcome would be to invalidate a portion of the Treaty.[116] If that portion of the Treaty cannot be cleanly severed from the remainder of the Treaty, the Treaty as a whole should be found invalid. It would seem that the provision allowing for critical use exemptions, to the extent agreed upon by the Parties, cannot be cleanly severed from the general ban on methyl bromide. To allow an administrative agency to come to its own determination of a critical use exemption in violation of the post-ratification decisions of the Parties undermines the entire thrust of promulgating a general ban subject to agreed exceptions. Further, removing the exemptions from the general ban would undermine the intent of leaving the door open to seek exceptions to the ban in an efficient manner. Accordingly, if the D.C. Circuit determined the critical use clause violated contracts doctrines, it should have invalidated the ban outright rather than timidly undermining the ban's thrust.

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[111] *See Wayman*, 23 U.S at 43 (discussing the line between "important subjects" that must be regulated by the legislature and subjects of less interest); *see also supra* Part II.A.

[112] *See supra* Part III.B.

[113] *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 54 (2007) (describing when an arbitration clause is severable from a contract).

[114] *Id.*

[115] *See* NDRC v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

[116] *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 54 (2007).

C. THE CRITICAL USE EXCEPTION IS SPECIFIC ENOUGH TO DEMAND ENFORCEMENT.

The policy behind not enforcing "agreements to agree"[117] relates to a lack of specificity as to what the parties are bound to do.[118] A lack of specificity is a principal distinguishing characteristic between arbitration clauses and "agreements to agree." An agreement to agree is ultimately an agreement to form a second contract, whereas an arbitration clause specifies an understood procedure.[119] The clause in the Montreal Protocol is more similar to an arbitration clause, insofar as it specifies an understood procedure rather than calling for the Parties to make a new separate treaty.[120]

The primary factor to be looked at in interpreting the meaning of a contract is the understanding of the parties:

> The fundamental question in determining the meaning of a contract is always the intent of the parties. This intent is to be gathered by giving to the contract a fair and reasonable interpretation, from the language of the entire contract, considered in the light of the circumstances under which it was made. A contract should be enforced according to the sense which the parties mutually understood it at the time it was made, with greater deference to be given to their clear intent than to any particular words which they may have used to express it.[121]

There is no issue in *NRDC* as to what the Parties intended. This is demonstrated by the fact that the Parties have in fact met since the signing of the original Montreal Protocol, agreed upon critical use exemptions from the general ban on methyl bromide, and done so without any dispute as to what procedure was to be used in coming to an agreement on the critical use exemptions.[122] No Party has alleged that the procedure used was anything but what the Parties understood the Montreal Protocol to call for when the Treaty was formed.[123]

Furthermore, the precise procedure to be used during the annual meeting of the Parties was not at issue in *NRDC*.[124] What was at issue

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[117] *NDRC*, 464 F.3d at 9.
[118] *See* WILLISTON & LORD, *supra* note 96, at § 3:5, at 311.
[119] *See id.*
[120] Montreal Protocol, *supra* note 26*; see also NDRC*, 464 F.3d at 9.
[121] Stevens v. Fanning, 59 Ill. App. 2d 285, 290 (1965) (citations omitted).
[122] *See NDRC*, 464 F.3d at 3-5.
[123] *See id.*
[124] *See generally id.* at 8.

was whether Congress could confer the authority on the Parties to determine the critical use exemptions to the general ban on Methyl Bromide.[125] There is no policy or doctrine in contract that would prevent parties to a contract from conferring subsequent authority to a group made up of parties or their representatives. For example, neither the policy against agreements to agree, nor any other contract doctrine, would prevent two or more corporations from contracting to form a panel of representatives from their corporations, to abide by a specified or understood procedure, and bind themselves to the regular decisions of the panel, so as to avoid repeating the procedure that would normally accompany contract formation among corporations. This is precisely the situation in *NRDC*.

V. THE MONTREAL PROTOCOL DECISIONS ARE BINDING ON THE UNITED STATES UNDER INTERNATIONAL LAW, EVEN IF NOT JUSTICIABLE BY U.S. COURTS.

The *NRDC* court seemed to suggest that there are "only two choices for categorizing a decision of the parties to the Montreal Protocol—either it's 'an ongoing international political commitment' or it's 'binding in domestic courts'"[126] however, the Montreal Protocol can be binding on the United States under international law, even if not justiciable by U.S. courts.[127] This is evident when U.S. courts adopt WTO Appellate Body Decisions.[128] The U.S. Supreme Court in *The Paquete Habana* held that:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what

[125] *Id.*

[126] Hollis, *supra* note 90.

[127] *See id.* (suggesting that the Montreal Protocol could bind the United States under international law).

[128] *See id*.

> the law ought to be, but for trustworthy evidence of what the law really is.[129]

In *Filartiga v. Pena-Irala,* the Second Circuit held that a rule of international law must command "the general assent of civilized nations,"[130] and "[t]he law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"[131]

Accordingly, even if the court in *NRDC* found that the Montreal Protocol does not create U.S. law, it nonetheless becomes law in the United States as the "law of nations."[132] Courts may consult a broad range of sources of international law in determining whether a law of nations exists, including "writing professedly on public law" and the general practice of nations.[133] That broad range encompasses a written treaty insofar as it commands "the general assent of civilized nations."[134]

The "general assent of civilized nations" to the Montreal Protocol is practically unquestionable—one hundred and ninety-one countries have formally signed the Montreal Protocol.[135] This consists of all but one of the one hundred and ninety-two members of the United Nations.[136] In practice, the majority of the Parties to the Montreal Protocol, including developing countries, regularly attend the annual meetings of the Parties.[137] If the *NRDC* court's interpretation of the Montreal Protocol as being merely a "political commitment"[138] is allowed to stand, it would undermine perhaps the most successful

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[129] The Paquete Habana, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113, 163-64, 214-15 (1895)).

[130] Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (quoting The Paquete Habana, 175 U.S. at 694).

[131] *Id.* at 880 (quoting United States v. Smith, 18 U.S. 153, 160-61 (1820); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963)).

[132] *See id.*

[133] *See id.*

[134] *See id.* at 881 (quoting The Paquete Habana, 175 U.S. at 694).

[135] Ozone Secretariat, U.N. Env't Programme, Evolution of the Montreal Protocol: Status of Ratification tbl., http://ozone.unep.org/Ratification_status/index.shtml (last visited Oct. 12, 2007).

[136] *See* U.N., United Nations Member States, http://www.un.org/members/list.shtml (last visited Oct. 12, 2007).

[137] Multilateral Fund for the Implementation of the Montreal Protocol, Montreal Protocol Parties, http://www.multilateralfund.org/montreal_protocol_parties.htm (last visited Oct. 12, 2007).

[138] NDRC v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006).

international agreement in the history of the world,[139] at a time when international cooperation is becoming increasingly necessary.[140]

VI. THE COURT'S HOLDING CREATES UNSETTLING POLICY.

A. THE HOLDING HAS CRIPPLED THE ABILITY OF CONGRESS TO BIND ITSELF TO COMPLEX INTERNATIONAL AGREEMENTS.

The court in *NRDC* claims its "holding in this case in no way diminishes the power of the Executive to enter into international agreements that constrain its own behavior within the confines of statutory and treaty law."[141] This statement could not be further from the truth. The essence of the court's holding is that no domestic legal authority—even that which, in the interest of efficiency, can be delegated to unelected domestic agencies—can be conferred upon international bodies.[142] This is a protectionist, anti-globalization holding.[143] Congress' inability to commit itself, or the agencies that act under its authority, to abide by decisions of international legal authorities without subsequent legislation limits the complexity of international legal agreements in which Congress can participate.[144]

A reason that the Founding Fathers made treaties the supreme law of the land was to send a message to the world that unless Congress, through its democratic processes, said otherwise, the United States could

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[139] *See* KOFI A. ANNAN, WE THE PEOPLES: UNITED NATIONS IN THE 21ST CENTURY 56 (2000) ("Perhaps the single most successful international agreement to date has been the Montreal Protocol.").

[140] *See infra* Part VI.A.

[141] *NDRC*, 464 F.3d at 10.

[142] *See* Hollis, *supra* note 90

> [The *NRDC*] court assumes either that decisions of international organizations can be equated to Congress' lawmaking authority . . . or that for such decisions to have domestic legal force they would need to go through the Article II treaty power . . . . [The court] appears to authorize EPA to ignore the critical use exemption limitations entirely without fear of any 'legal' ramifications."

[143] *See id.* ("I fear that other U.S. courts might pick-up on the idea of treating decisions of international organizations as 'political commitments.'").

[144] *See NDRC*, 464 F.3d at 10 ("Without Congressional action, however, side agreements reached after a treaty has been ratified are not the law of the land . . . .").

be taken at its word.[145] The court's holding vastly changes that message. Now, the United States can be taken at its word only to the extent Congress can keep up with the changing terms of a treaty. As globalization rapidly progresses and countries engage in increasingly and necessarily complex global treaties, the United States will be left behind and looked down upon as a party unwilling and unable to participate in the international system.

It is easy to dismiss this case as unimportant because the problem of ozone depletion is viewed by many, thanks to treaties like the Montreal Protocol, as having been solved.[146] But consider, for example, the problem of global warming; global warming has to do with the overuse of fossil fuels—a necessary economic input.[147] For this reason, fossil fuels cannot be banned outright. A solution lies in some global agreement to restrict fossil fuel usage or greenhouse gas output to a sustainable global maximum, but the problem arises in determining each nation or party's fair share of the maximum sustainable output.[148]

Creating and maintaining an international system to restrict national greenhouse gas output to sustainable levels requires the ability of the United States to defer some legal authority to an international governing body. The United States alone is responsible for more than three-quarters of man-made global greenhouse gas output.[149] Even if a global consensus could be reached on the matter of allocating a nation's fair share of the globe's sustainable greenhouse gas output, if the United States cannot bind itself to defer to an international arbiter to decide when, or if, it has exceeded its fair share of that output, the system would quickly break down. Yet, the issue of global warming is only one

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[145] *See* THE FEDERALIST NO. 3 (John Jay)

> [U]nder the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner . . . . [T]he prospect of present loss or advantage may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations, not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. The case of the treaty of peace with Britain adds great weight to this reasoning.

[146] U.S. Envtl. Prot. Agency, Indicators: Ozone Depletion, http://www.epa.gov/ozone/science/indicat/index.html (last visited Nov. 6, 2007).

[147] U.S. Envtl. Prot. Agency, Climate Change: Basic Information, http://www.epa.gov/climatechange/basicinfo.html (last visited Nov. 5, 2007) [hereinafter Climate Change].

[148] That is to say, some global level of fossil fuel usage that would not further damage or unnaturally warm the earth.

[149] Climate Change, *supra* note 147.

example among many issues that continue to arise as a result of globalization that will require the United States to give some legal authority to the decisions of international governing bodies.

B. THE HOLDING IN THIS CASE COULD BE USED TO LIMIT INTERNATIONAL LEGAL EFFECT OF DECISIONS OF OTHER INTERNATIONAL BODIES.

The cold reality for opponents of legal deference to international authorities is that the United States is already a member of a number of treaties in which it has conferred legal decision-making authority upon international bodies.[150] Take for example, the United States membership in the International Civil Aviation Organization. The Standards and Recommended Practices ("SARPs") of the International Civil Aviation Organization ensure the safety of travelers around the globe.[151] The "millions of employees involved in manufacturing, maintenance and monitoring of the products and services required in the never-ending cycle" of international civil aviation can ensure the safety of travelers around the globe thanks to "the existence of universally accepted standards known as Standards and Recommended Practices."[152] The International Civil Aviation Organization's U.N. mandate "is to ensure the safe, efficient and orderly evolution of international civil aviation."[153] The International Civil Aviation Organization regularly conducts safety audits to ensure proper implementation of SARPs by every member state,[154] and the United States has contracted itself as a member.[155]

Yet, the holding in *NRDC* allows courts to treat the safety standards promulgated by the International Civil Aviation Organization as merely political commitments with no legal ramifications.[156] Surely

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[150] *See, e.g.*, Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, *available at* http://www.icao.int/icaonet/arch/doc/7300/7300_orig.pdf; *see also* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

[151] *See* Air Navigation Bureau, Int'l Civil Aviation Org., Making an ICAO Standard, http://www.icao.int/cgi/goto_m.pl?/icao/en/anb/mais/index.html (last visited Oct. 11, 2007).

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *See* Int'l Civil Aviation Org., ICAO Contracting States, http://www.icao.int/cgi/statesDB4.pl?en (last visited Oct. 11, 2007).

[156] *See* Hollis, *supra* note 90

> Although NRDC probably never envisioned this result, the D.C. Circuit appears to authorize EPA to ignore the critical use exemption limitations entirely without fear of

there is little concern that the safety of aviation in United States falls short of international expectations; however, there could be differences of opinion between the Federal Aviation Administration and the International Civil Aviation Organization as to what safety standard should apply.[157] Under the *NRDC* precedent, a reviewing court could conclude that decisions of the International Civil Aviation Organization are merely political commitments and have no force of law.[158] The interests of the United States, as a member of the International Civil Aviation Organization, are not only to ensure its own compliance, but rather ensure the compliance of other contracting members.[159] Yet, if the United States treats the SARPs as merely political commitments, it has little standing to ask other contracting members to give greater authority to the SARPs. Such an outcome would challenge the legal authority of the International Civil Aviation Organization and could put the safety of international travelers at risk.

There is no shortage of other international organizations that could be undermined by the *NRDC* holding.[160] Being the world's largest economy, it is immensely important that the United States be able to bind itself to the authority of some international organizations so that it can be in the position to ask other nations around the globe do the same.[161] The United States has much more to gain from the international regulation of other nations than it has to lose by being regulated itself. For example, the United States gains more from the international protection of the earth's ozone layer through the Montreal Protocol than it loses in not being able to produce and consume a few thousand metric tons of methyl bromide. Authorizing the "EPA to ignore the critical use exemption

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> any 'legal' ramifications . . . . I fear that other U.S. courts might pick-up on the idea of treating decisions of international organizations as 'political commitments.' For example, couldn't the D.C. Circuit's rationale apply equally to deny international legal effect to the decisions of other international bodies . . . ?

[157] Perhaps the Federal Aviation Administration believes a domestic standard that differs from the SARPs is more effective or efficient.

[158] *See* Hollis, *supra* note 90.

[159] The United States need not sign a treaty to ensure regulation of its own airways.

[160] *See* Hollis, *supra* note 90 ("For example, couldn't the D.C. Circuit's rationale apply equally to deny international legal effect to the decisions of other international bodies (e.g., the standards of the International Civil Aviation Organization, the International Whaling Commission's commercial whaling moratorium, the International Maritime Organization's Regulations)?").

[161] MSN Encarta, United States Economy, http://encarta.msn.com/encyclopedia_1741500821/United_States_Economy.html (last visited Oct. 11, 2007) ("Those levels of production, consumption, and spending make the U.S. economy by far the largest economy the world has ever known . . . .").

limitations entirely without fear of any 'legal' ramifications,"[162] the D.C. Circuit undermined the ability of the United States and Congress to seek continued enforcement of the Montreal Protocol by other member nations. Further, it weakened the negotiating position of the United States in solving future global problems.

VII. CONCLUSION

The holding in *NRDC* is erroneous and should be overturned by the Supreme Court. This paper illustrates how the D.C. Circuit's holding that "decisions of an international body created by treaty" are judicially unenforceable against an administrative agency[163] violates Constitutional separation of powers, runs afoul of applicable precedent, and creates unsettling policy. The EPA's rule implementing the critical use exemption permitted consumption of methyl bromide beyond what the Parties had agreed to at the recent applicable meeting.[164] The primary basis for the court's holding in *NRDC* is that the Montreal Protocol merely creates an "ongoing international political commitment."[165] Yet, this holding flies in the face of the Treaty's plain meaning.[166]

Allowing this holding to stand undermines Congress's power to regulate methyl bromide and protect the earth's ozone layer. The earth's ozone layer is essential for life on earth.[167] Thanks to the global regulation of ozone depleting substances provided by the Montreal Protocol, the ozone layer is beginning to recover; however, this recovery could be side-tracked by excessive use of ozone depleting substances like methyl bromide.[168]

Moreover, the D.C. Circuit's holding in *NRDC* "may well have implications that stretch far beyond the ozone layer that the Montreal Protocol was designed to protect."[169] Permitting an administrative

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[162] Hollis, *supra* note 90.

[163] NDRC v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006).

[164] *See supra* Part I.A.

[165] *NDRC*, 464 F.3d at 9.

[166] *See* United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006) (looking first to the plain meaning to interpret a statute).

[167] John Pickrell, *Ozone Layer May Be on the Mend, New Data Suggest*, NAT'L GEOGRAPHIC NEWS, Aug. 5, 2003, http://news.nationalgeographic.com/news/2003/08/0805_030805_ozone.html (last visited Nov. 6, 2007).

[168] *Id.*

[169] Hollis, *supra* note 90.

agency to blatantly violate a treaty passed by Congress and signed by the President seriously disrupts the balance of power in the United States. Allowing an arm of the executive branch to contravene "the supreme law of the land"[170] is to allow a shift of power towards the Executive.[171] In addition, allowing an unelected administrative body such as the EPA to make or change the clear, unambiguous law put forth by Congress[172] undermines the democratic institutions upon which the United States was founded. For these reasons, the *NRDC* holding should be overturned.

[170] *See The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).
[171] *See* Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring).
[172] *See supra* Part II.B.