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Expert Analysis

Supreme Court Ruling on Mercury Shows Little Deference to EPA

By
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On June 29, 2015, the U.S. Supreme Court struck down an Environmental Protection Agency (EPA) rule on mercury from power plants. The decision, *Michigan v. EPA*,[1] is less significant for its effect on mercury emissions than for what it says about the court's deference to EPA in cases of statutory ambiguity.

This column discusses the background and context of the case; the majority and dissenting opinions; and the decision's implications for mercury emissions, for judicial review of administrative actions, and for the Clean Power Plan.

Background and Context

When Congress enacted the Clean Air Act in 1970 it told EPA to regulate conventional air pollutants like sulfur dioxide and particulates, and also to set up an especially stringent program for hazardous chemicals. EPA was remarkably slow in doing the latter, and 20 years later, in 1990, Congress amended the Clean Air Act to force EPA to do much more in regulating hazardous air pollutants. One of the most damaging is mercury, which is an impurity in coal and goes up the smokestack when the coal is burned in power plants. First, EPA was required to do a study of the hazards to public health caused by these air emissions from power plants, which it did.

Ten years after the 1990 amendments, in 2000, under President Bill Clinton, EPA issued a finding that power plants are the largest source of mercury emissions in the United States, and that they cause numerous health and environmental problems. When mercury falls back down in rain, it gets into rivers and lakes and is taken up by fish. Pregnant women are advised not to eat certain kinds of fish because the mercury can damage the brain of the developing fetus.

In 2005, under President George W. Bush, EPA reversed itself and said it is not so important to regulate mercury from power plants because other controls being put on them would probably take care of the problem.

After President Barack Obama took office in 2009, EPA looked at the issue once again and decided to regulate mercury from power plants after all. In 2012, after a notice and comment rulemaking, it reinstated the Clinton-era finding from 2000, found there is much new scientific evidence about the hazards of mercury, and imposed emission standards on power plants. The utility industry knew this was coming, and most plants began installing the controls.

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The rule was challenged by both sides in the U.S. Court of Appeals for the D.C. Circuit. Industry said the rule was too stringent, and environmental groups said it was too weak. The D.C. Circuit upheld the rule in its entirety, in a decision signed by Judges Judith Rogers and Merrick Garland, with Judge Brett Kavanaugh dissenting.[2] The Supreme Court granted certiorari.

Majority Opinion

The case revolves around one phrase in the Clean Air Act, which says EPA shall regulate mercury emissions from power plants if it "finds such regulation is appropriate and necessary after considering the results of the study."[3] EPA made its initial finding that it is appropriate and necessary to regulate mercury from power plants based on the mandated study, which found that mercury is hazardous. EPA did not look at the costs at that step, but it did consider costs in its several subsequent steps in setting the specific emissions standards.

EPA concluded that it would cost power plants $9.6 billion per year to comply. The benefits, both direct and indirect, would add up to between $37 billion and $90 billion per year. Thus the benefits would be four to nine times as great as the costs. Most importantly, there would be as many as 11,000 fewer premature deaths annually. The great bulk of the benefits were because the equipment that reduces mercury emissions also captures other pollutants that are even more dangerous.

The 5-4 majority opinion was written by Justice Antonin Scalia. It read the statutory phrase "appropriate and necessary" to require consideration of costs. The concept of costs does not appear in dictionary definitions of "appropriate" or "necessary," but the court said, "one does not need to open up a dictionary in order to realize the capaciousness of this phrase." It said that "no regulation is 'appropriate' if it does significantly more harm than good."

The court cited *Securities and Exchange Commission v. Chenery*[4] in saying that a court may uphold agency action only on the grounds that the agency invoked when it took the action. When it deemed regulation of power plants appropriate, EPA said that cost was irrelevant to that determination but would be considered later. It did not matter to the majority that EPA did consider costs later; it needed to consider costs at that first stage. So the court reversed the D.C. Circuit and remanded for further proceedings.

Dissent

Justice Elena Kagan wrote a dissenting opinion, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. The dissent declared that of course a court may not uphold agency action on grounds different from those the agency gave, but equally, a court may not strike down agency action without considering the reasons the agency gave. Here, EPA said the costs of controls would be examined as a part of developing a regulation.

The dissent agreed with the majority that costs do need to be considered before the standards are issued, but found that it was sufficient for that to happen at various points after the initial finding that regulating mercury was appropriate and necessary. The dissent said the majority was engaged in"micromanagement of EPA's rulemak-

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ing, based on little more than the word 'appropriate,'" and this "runs counter to Congress's allocation of authority between the agency and the courts." The dissent said that "EPA knew when it made that finding that it would consider costs at every subsequent stage, culminating in a formal cost-benefit study. And EPA knew that, absent unusual circumstances, the rule would need to pass that cost-benefit review in order to issue."

The dissent went on to say that "EPA could not have accurately assessed costs at the time of the 'appropriate and necessary' finding.... Under the statutory scheme, that finding comes before—often years before—the agency designs emissions standards. And until EPA knows what standards it will establish, it cannot know what costs they will impose. Nor can those standards even be reasonably guesstimated at such an early stage."

Direct Impact on Emissions

The Supreme Court has remanded the case to the D.C. Circuit, which almost certainly will remand it to EPA to reconsider the "appropriate and necessary" finding. Most observers believe the D.C. Circuit will leave the rule in place while EPA reconsiders, though that is contested and the issue is now being briefed. EPA has indicated it will complete its reconsideration no later than April 2016, and few doubt that EPA will again conclude that mercury from power plants should be regulated, but this time it will include a formal economic analysis. Since EPA has already performed such an analysis and found that the benefits of the rule far exceed the costs, there is little suspense about the results of the new study.

Meanwhile, most of the approximately 460 coal plants that are subject to the rule have already installed the necessary equipment, or have announced that they will close. But 184 obtained extensions until April 2016 to install the equipment,[5] and if the D.C. Circuit does vacate the rule, they may continue to operate without mercury controls until a new rule is in place and takes effect.

Court View on Judicial Review

The majority declares that it is utilizing the standard under *Chevron v. Natural Resources Defense Council*.[6] It acknowledges that the statute is ambiguous, and therefore under *Chevron* the courts should accept the agency's reasonable resolution of the ambiguity. But the decision says EPA strayed far beyond the bounds of reasonable interpretation in deciding not to consider cost at the first step.

It is difficult to locate the deference that the court accorded EPA in the interpretation of this statute that EPA implements, as *Chevron* would seem to require. On July 31, 2015, retired Justice John Paul Stevens addressed this question in a speech to an American Bar Association conference. Two paragraphs from Stevens' speech are so pertinent that they are worth quoting at length.

I must comment on a case involving a truly remarkable departure from the majority's love affair with dictionary definitions as the primary guide to determining the meaning of statutes. In Michigan against the Environmental Protection Agency, the key statutory language in the Clean Air Act instructed the EPA to regulate power plant emissions of noxious substances if it found that it was 'necessary and appropriate' to do so. At the first step of the rulemaking process, the EPA determined that it was appropriate and necessary to regulate certain hazardous air pollutants based on the results of a study that examined harms to public health. After making that initial determination, EPA then promulgated a second regulation requiring the implementation of certain control technologies, and, in doing so, considered the cost of those technologies.

Ignoring dictionary definitions of the adjective 'appropriate' (which do not mention the word 'costs'), and the fact that the word 'necessary' might well impose a duty to regulate even if costs were excessive, the court held that the EPA's initial decision to regulate was defective because it had failed to include any reference to the costs of regulation. Instead of simply accepting the plain meaning of a congressional command or deferring to the agency's reasonable interpretation of a statute that it administers—as *Chevron* requires—the court invalidated regulations that took years to draft and which, according to findings made in the rulemaking process, would have prevented 11,000 premature deaths annually and achieved benefits that exceeded costs by as much as $80 billion each year.

The decision rested squarely on the majority's conclusion that the agency had misinterpreted the words 'necessary and appropriate.' As a former English major in college, and as the author of the majority opinion in *Chevron*, I found that conclusion truly mind-boggling. Such a free-wheeling statutory decision can do even more harm—both to the public health and to the court itself—than misinterpretations of the Constitution.

In sum, Congress has been trying since 1970 to get EPA to regulate substances like mercury in the air. Some of the women who were pregnant when the statute was passed 45 years ago are now great-grandmothers. If the D.C. Circuit does vacate the existing rule, it will be extending this multi-generational paralysis.

If the court has the same composition when the Clean Power Plan reaches it, probably in 2018 or 2019, and if it gives EPA the same degree of deference that it did in 'Michigan,' the plan could be in a lot of trouble.

Effect on Clean Power Plan

On Aug. 3, President Obama announced the Clean Power Plan, which aims to shift electricity production away from coal (at least unless equipped with carbon capture and sequestration devices) and toward natural gas, renewables and efficiency. This plan (together with motor vehicle emission standards) would be the federal action that would achieve the greatest reduction in greenhouse gas emissions, and is the keystone of the U.S. negotiating position for the United Nations climate conference to be held in Paris in December. Like the mercury rule, its main target is coal-fired power plants.

The Clean Power Plan relies on completely different sections of the Clean Air Act than the mercury rule, so the Supreme Court's interpretation of "appropriate and necessary" has no direct bearing. However, the Clean Power Plan involves several other statutory ambiguities—in some ways, more troublesome than those in the mercury rule. Several suits have already been filed against the plan, even though the final version has not yet appeared in the Federal Register. When it does, there will be many more.

Ultimately the Clean Power Plan is likely to be considered by the Supreme Court. The court has already decided three other greenhouse gas cases. The first was *Massachusetts v. EPA* (2007),[7] which held that the Clean Air Act empowers EPA to regulate greenhouse gases. The second was *American Electric Power v. Connecticut* (2011),[8] which found that EPA's power over greenhouse gases displaced the federal common law of nuisance. The third was *Utility Air Regulatory Group v. EPA* (2014),[9] which upheld several EPA regulations on greenhouse gases but struck down one small portion.

If the court has the same composition when the Clean Power Plan reaches it, probably in 2018 or 2019, and if it gives EPA the same degree of deference that it did in *Michigan*, the plan could be in a lot of trouble. On the other hand, Chief Justice John Roberts indicated in *King v. Burwell* (2015),[10] the Affordable Care Act case, that there are certain cases of such "deep economic and political significance" that they should not be analyzed under the Chevron framework. Time will tell whether the Clean Power Plan is deemed to be such a case, and if it is, which way that cuts.

1. __ S.Ct. ___ (2015).
2. *White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014).
3. 42 U.S.C. §7412(n)(1)(A).
4. 318 U.S. 80 (1943).
5. National Association of Clean Air Agencies, "Survey of MATS Compliance Extension Requests," Aug. 11, 2015, available at http://www.4cleanair.org/sites/default/files/Documents/MATSextensionrequests-table-August-2015.pdf.
6. 467 U.S. 837 (1984).
7. 497 U.S. 497.
8. 564 U.S. ___.
9. 134 S.Ct. 2427.
10. 576 U.S. ___.