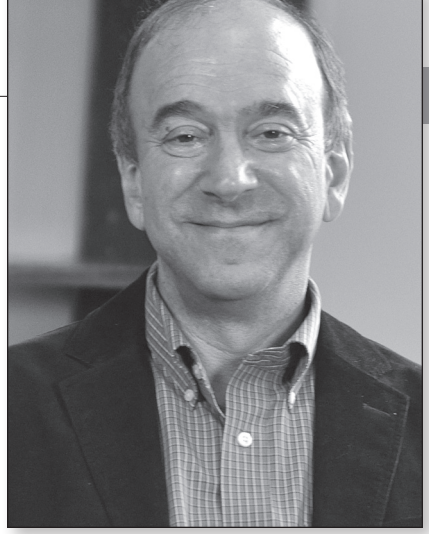

By Richard Lazarus

Did EPA Stray From "Appropriate"?

In *Michigan v. Environmental Protection Agency*, EPA lost. The Supreme Court remanded back to the agency its Clean Air Act Mercury Rule, restricting emissions of certain hazardous air pollutants from power plants for failing to consider costs in the threshold determination whether such regulation was "appropriate."

Yes, the opinion could certainly have been worse for EPA. That is especially true given that the opinion was authored by the agency's seeming High Court nemesis these days, Justice Antonin Scalia. But no amount of spinning can fairly shake the clear bottom line: the power plants achieved a significant victory.

In *Michigan,* the Court held that EPA had strayed beyond the bounds of "reasoned decisionmaking" in choosing to ignore costs in determining whether regulation of hazardous air pollutants from power plants under the Clean Air Act is appropriate. The Court acknowledged that Congress had instructed the agency to ignore costs in deciding whether to regulate hazardous pollutants from other stationary sources. According to the Court, however, Congress had made clear to the agency that power plants were different. That is why Congress mandated only for power plants a threshold determination whether EPA regulation of hazardous air pollutants is appropriate.

The Court carefully explained that it was not dictating the extent to which costs had to be considered, merely that they "require[] at least some attention." Notwithstanding that caveat, the Court did suggest some basic minima. First, it would be neither "rational" nor "appropriate" to spend "billions of dollars in economic cost in return for a few dollars in health or environmental benefits." And, second, "'cost' includes more than the expense of complying with regulation; any disadvantage could be termed a cost." The former suggests a very rough form of cost-benefit analysis and the latter a more expansive notion of costs beyond just compliance costs.

EPA will face two immediate challenges on remand. The first will be to persuade the D.C. Circuit not to vacate the Mercury Rule while the agency corrects the mistakes found by the Supreme Court. The agency can be expected to stress that although it did not consider costs in deciding whether to regulate in the first instance, there is good reason to expect that it will not need to change the Mercury Rule once it does. And, because of the billions of dollars already spent by industry to achieve compliance, it would be exceedingly disruptive to vacate the rule in the interim.

Even more sobering are the implications of the* Michigan *ruling for the Clean Power Plan

Whether the agency is persuasive will likely turn on whether the lower courts agree with EPA that in considering whether regulation is appropriate, it may take into account the Mercury Rule's "ancillary benefits" in reducing particulate pollution, which constitute the vast majority of the rule's quantified benefits.

The agency's other challenge will be more practical. The Mercury Rule has been more than 15 years in the making and the Obama administration now has less than 18 months to promulgate a new final rule, let alone defend it in court. Given the large number of legal issues industry will likely raise on remand before the agency in light of the Supreme Court's ruling, EPA may be hard pressed to get the job done. The agency certainly does not otherwise lack for a full plate of activity these days.

Even more sobering, however, are the potential implications of the Court's ruling in *Michigan* for the agency's Clean Power Plan. The plan, which seeks to regulate greenhouse gas emissions from existing coal-fired power plants, promises to be the Obama administration's signature regulatory achievement, potentially as significant as the administration's signature legislative achievement — the Affordable Care Act.

To be sure, nothing in *Michigan* directly addresses any of the legal issues expected to be raised against the Clean Power Plan. The same statute is involved, the Clean Air Act, but entirely different legal provisions and statutory language will be at issue. The reason for agency concern is more subtle, yet no less real. EPA's defense of the Clean Power Plan will turn on judicial acceptance of expansive interpretations of the agency's statutory authority under existing provisions of the Clean Air Act.

The *Michigan* opinion, by contrast, like the Court's decision last term in *Utility Air Regulatory Group v. EPA,* can be read as reflecting some heightened judicial skepticism of EPA and its tendency to overreach. *Michigan* was a winnable case and there was no lack of effective advocacy on its behalf, either by the lawyers before the Court or by Justice Elena Kagan within the Court, who actively supported EPA at oral argument and then wrote for the dissent.

The *Michigan* lesson is therefore clear. Even winnable cases can be lost. EPA may well be able to mitigate that loss for the Mercury Rule. But the stakes are even larger still for the Clean Power Plan.

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