EPA won an important victory in the D.C. Circuit today. In *White Stallion Energy Center v. EPA*, the court upheld EPA's new regulations limiting mercury from coal-fired power plants. The main issue in the case was about a threshold requirement for regulation. Before setting limits on mercury from coal plants, EPA had to consider studies of the health impact of the pollution and determine that regulations were "appropriate and necessary." EPA interpreted this as a two-part requirement: it first had to find a health hazard and that control technology was available, then show that other regulatory measures would not be as effective.

Under the Supreme Court's *Chevron* doctrine, the court was required to uphold this interpretation of the statute so long as it was reasonable. Given the vagueness of the term "appropriate," this seems like as reasonable an interpretation as any. In dissent, Judge Kavanaugh argued that EPA had to consider regulatory costs before finding regulation was appropriate. He pointed to legislative history that showed Congress wanted to avoid unnecessary costly regulation. The trouble with that argument is that EPA's regulation does ensure that regulation is really necessary because (a) there is a real threat to public health that cannot be dealt with otherwise and (b) regulation *can* address the problem because the necessary technology is already in use in the industry. Reading a cost-benefit requirement into this provision, when the provision doesn't explicitly call for consideration of costs, might be one possible reading of the term "appropriate." But EPA's reading is entirely reasonable, especially given that the statute as a whole is often stubbornly cost-insensitive..

The real driving force behind Kavanaugh's dissent, as he makes clear, is that he thinks it's really bad policy for EPA to create important regulations without a cost-benefit analysis. He provides a page of quotes from scholars about what a bad idea this is. As the majority points out, many of these scholars were actually complaining that the Clean Air Act foolishly rejected thei approach. Whether or not these scholars are right about what the law should be, they don't provide any evidence of what it actually is.

Kavanaugh is a judge who is reluctant to find any daylight between his views of good policy and his view of the law. Not, at least, unless the precedents or the statutory language are so clear that he just has no choice. The trouble is that Congress delegated these policy decision to EPA, not to the judge. That majority was on solid ground in rejecting his viewpoint.

In policy terms, the regulation provides limited benefits through its direct effect on

mercury pollution. But the technology used to control mercury will also cut fine particulates that pose a substantial health hazard. We can all breathe easier as a result of the court’s decision.