Yesterday, the Supreme Court granted cert. in several cases to hear the following question:

"Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."

The fundamental issue is whether it was unreasonable for EPA to interpret section 112 to preclude consideration of cost at this particular stage of the regulatory process — not only different from what the Court thinks is the best interpretation, but s position that no reasonable person could take. The Supreme Court and lower courts have rarely found agency interpretations unreasonable in cases where the statute was ambiguous. This is called the *Chevron* Step 2 analysis, while deciding whether the statute is ambiguous is called *Chevron* Step 1. The rationales for the *Chevron* doctrine are that Congress meant agencies to work out statutory ambiguities and that it is better for politically accountable members of the executive branch to do that, as opposed to federal judges with lifetime appointments.

By conventional standards, EPA has a very reasonable argument against considering costs when deciding whether to include power plants in the hazardous substance regulations that apply to all other industries. The applicable provision (section 112(n)(1) calls on EPA to report to Congress on whether power plant emissions threaten public health (which they do) and about alternate control technologies. EPA then is required to regulate power plants "if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." That's all very open-ended, and it seems entirely reasonable to interpret it to mean that EPA should regulate if the emissions in fact endanger public health (which they do). It seems redundant to consider costs at this stage since costs will then be considered anyway at the next stage, when EPA actually determines how much control the industry needs it. Cost is not considered in including other industries in the regulations. Moreover, as EPA points out, once power plants get included, they would have to stay included even if it later turned out that the regulations were ruinously expensive, because the provision governing delisting clearly does not allow consideration of costs. EPA's interpretation may or may not be the best one, but it doesn't seem patently unreasonable. Courts, including the Supreme Court, have certainly upheld much less plausible interpretations of statutes by agencies.

The grant of cert. in this case suggests that there may be four Justices who are willing to change the approach to reviewing agency interpretations of statutes. One possibility is that they want to put some teeth into *Chevron* Step 2 analysis. "Reasonable" may turn out to mean something like "almost as plausible as the alternative interpretation." In that case,

Chevron would mean only that the agency wins in cases where there's a near tie between opposing interpretations of the statute. Alternatively, there may be four Justice who want to hold that statutes should always be interpreted to allow consideration of costs, except when Congress clearly excludes cost considerations. That's a position that Cass Sunstein and others have advocated. In any event, the cert. grant seems to show that the some of the Justices are tired to deferring to agencies and think the executive branch needs to be reined in more. That also fits with the Court's decision to hear the Obamacare case this year, another case where the normal standards for granting review seem absent. Maybe some of the Justices have been listening to Mitch McConnell and John Boehner's complaints about executive initiatives.

Some people have suggested that EPA's refusal to consider cost in this setting is inconsistent with what the agency did in the *EME Homer* case, where it did consider cost in applying a provision of the Clean Air Act that was silent on the matter. But there's no inconsistency. First, the point of *Chevron* is that the agency gets to choose either way when statutes are unclear. T:he Court upheld the agency's choice in *EME Homer* but that doesn't mean that the agency was compelled to make that choice. Second, in *EME Homer* the agency was trying to find the cheapest way of cleaning up the air. Here, a particular industry is asking for a special exemption from the rules applying to all other industries so that it can continue emitting toxic substances and harming the public. The two situations just aren't comparable.

EPA's analysis showed that implementing the regulation would prevent 11,000 premature deaths a year, not to mention preventing IQ losses among children. (The lives saved aren't directly because of mercury reductions; they're because the control technology would also reduce particulates.) Putting asie the legal technicalities, it would be tragic if the Court further delayed this important regulation.