On Friday, the D.C. Circuit decided *Murray Energy v. EPA*. The court upheld EPA's health-based 2015 air quality standards for ozone against challenges from industry (rules too strong) and environmental groups (rules too weak). However, it rejected a grandfather clause that prevented the new standards from applying to plants whose permit applications were in-process when the standards were issued. It also required EPA to tighten up the "secondary standards" for ozone, which are intended to prevent non-health harms such as damage to vegetation.

If you think the life of a federal circuit judge is all about dramatic constitutional arguments, you might consider one argument that the court had to wrestle with. The environmental challengers argued that "EPA impermissibly departed from CASAC's advice by setting the secondary standard level using a three-year average W126 benchmark without lowering the level to protect against single year exposures associated with median annual tree growth loss of 6%, which CASAC had advised was 'unacceptably high.'" The court observed that:

> "CASAC had advised a maximum level associated with 5.2% annual biomass loss, see J.A. 631, and it expressly cautioned that 6% median growth loss in a single year was unacceptable, see J.A. 518. EPA's use of a benchmark that averages out to less than 6% biomass loss over three years does not accord with CASAC's advice."

I don't mean to imply that this issue, though technical, was unimportant, but just to make the point that both the agency's rule making and the court's opinion had to wrestle with some complex issues that would be hard to reduce to ideology. In the end, the court concluded that the Obama EPA had taken a wrong turn on the 6% issue and sent that aspect of the rule back to EPA for further consideration.

There's another interesting point here, which is that a good deal of the opinion revolves around EPA's failure to follow the recommendation of CASAC (Clean Air Scientific Advisory Committee). The court found that EPA had adequately explained its refusal to follow CASAC on this point, but not on others. The ozone rule of course dated from the Obama Administration. The Trump Administration has made an effort to stack CASAC with industry-friendly scientists. Even so, it seems to be having trouble getting them to buy some of its deregulatory moves.

Although nearly all of the court's opinion deals with these technical issues, there actually was one constitutional issue raised by Murray Energy. Murray argued that the Clean Air

Act, as construed by EPA, unconstitutionally delegated legislative power to EPA. Essentially, the argument was that Congress had given EPA too much discretion in setting the standard. The court had no trouble dispatching this argument, given that a Supreme Court opinion by Justice Scalia had rejected a nearly similar claim.

What makes this issue particularly notable is that at least four Justices seem intent on rethinking the nondelegation doctrine, which could make at least some important regulatory statutes unconstitutional. Justice Gorsuch set out what he thought was a better approach. He stressed that a statute must be clear enough that a court can determine whether an agency has exceeded its authority. As *Murray Energy* illustrates, courts seem very much capable of reviewing EPA's implementation of the Clean Air Act, and they not infrequently set aside regulations when the agency has failed to show that it properly applied the statutory standard. *Murray Energy* also shows why Congress delegates authority to agencies in the first place. It's hard to imagine Congress making a decision about the 6% issue or reviewing the hundreds of scientific studies that EPA considered.

It's interesting to think about how Gorsuch's test would apply here. Gorsuch is willing to allow agencies to "fill in the details" of the statutory scheme. That presumably covers the 6% issue. But it's hard to know just what constitutes a detail. What about the difference between the prior air quality standard, 0.075 parts per millions (ppm), the new standard of 0.070 ppm, and CASAC's recommendation of a standard between 0.065 and 0.070 ppm? Is that a choice only Congress can make because of its economic ramifications? Gorsuch also allows agencies to making factual findings in issuing a regulation. EPA's assignment is to set a standard that protects public health with an adequate margin of safety. Much of this determination is factual, which is why the court's opinion has to dive into the technicalities, but EPA is also making a policy judgment about how much of a margin of safety is needed. This mixture of policy and factual decision-making is typical of agency regulation. It's quite unclear what Gorsuch would have to say about that.

Although there's not much of anything else in the case to attract the Supreme Court's attention, maybe Gorsuch & Company will think this is the right case to revisit delegation doctrine. Or maybe they'll look for a different case, if only to avoid the possible need to overrule an opinion by Justice Scalia on exactly the same statute. We should know about that sometime this Fall.