



CleanLaw 61

Carrie Jenks and Kevin Poloncarz on the Petitions to the Supreme Court of the D.C. Circuit's decision vacating ACE – September 7, 2021

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Hugo Fowler: Welcome to CleanLaw, from the Environmental and Energy Law Program at Harvard Law School. In this episode, our Executive Director, Carrie Jenks, speaks with Kevin Poloncarz, a partner at the law firm, Covington and Burling. Kevin co-chairs the firm's Environmental and Energy Practice Group, Energy Industry Group, and ESG Practice. Kevin and Carrie discuss the appeals to the Supreme Court of the D.C. Circuit decision to vacate and remand the Trump administration's Affordable Clean Energy rule. We hope you enjoy this podcast.

Carrie Jenks: Hi Kevin, thank you for making the time to talk today.

Kevin Poloncarz: Oh, my pleasure to be here, Carrie.

Carrie: Great. Well, I'm excited to discuss with you the cert petitions for the Supreme Court, especially because you and your colleagues at Covington recently submitted on behalf of several power companies an opposition to the petition appealing the D.C. Circuit decision on the Affordable Clean Energy rule, or ACE. And at the start, I think it's important to note that we have worked closely on these issues. Before joining EELP, I worked at M.J. Bradley and Associates, which facilitates the clean energy group and that coalition often submits joint comments on many of EPA's rulemakings including the ones we'll talk about today. And over the years, a subset of those companies have engaged in litigation for rules that they commented on, and that's where you stepped in and you represented that subset.

Carrie: But before we dig into the case and the underlying law, for our listeners thinking about practicing environmental law and what that might mean, I think it would be helpful maybe to start with how you got into these cases and where you are, because I've seen your work as unique as well as fun, especially as it relates to climate change.

Kevin: Sure. I'm happy to do it, Carrie, and glad you asked that question because my practice is a bit unique. Having spent the last few years suing the Trump administration on rollbacks of climate and environmental protections and doing it from a large law firm. What I hear, I talk to a lot of law students – we're currently doing on campus interviewing, we're doing it remotely – is that folks who are really invested in environmental law these days think you can't do that work at a big firm. And so if you like environmental law and you're going to spend a second summer at a big firm, you should go do something like



commercial litigation because you won't end up on the wrong side of history. And I like explaining to folks, to young students that you really can take control of your career through a bit of intentionality and a bit of serendipity and find yourself working with clients with whom you have affinities and doing work that you think is serving the greater good, both from your own subjective perspective, but from those of people you respect.

Kevin: So how did I get into this work? The long story is, back in 2008, I was, I would have been 35 years old, one of my partners was heading over to an event at the Democratic National Convention in Denver and shared a cab with two guys who had just had their permit for a gas-fired power plant in California rejected by EPA's Environmental Appeals Board and had their heads in their hands. They had an \$800 million project on the rocks and they're like, "Gee, we think we really need a real air lawyer, do you know anyone?" My partner said, "Yeah, I do." And that began my journey in working for Calpine Corporation, which was the developer of that project. We faced off a lot of opposition and we knew Obama was elected and was going to be coming into office and there was this line of cases in the Environmental Appeals Board at that time that strongly suggested that if a power plant permit were to come up to the EAB in the future and it didn't have a limit on its greenhouse gas emissions, that it would be rejected.

Kevin: So what we did, even before it was required, this was in the very early days of the Obama administration, is we created a voluntary greenhouse gas-backed limit. It was a federal air permit, but we put it in there voluntarily. It's nevertheless enforceable. And it kind of became the example for how EPA would craft these backed limits for this global externality, not like criteria pollutants. And it was just me and a lawyer from the agency just trying to think about how you apply this old-fashioned tool to this new fashioned problem. That effort got me somewhat labeled as a greener type of industry lawyer. And that led to some of the work that I did with you for some of the power companies on a variety of matters throughout the Obama administration.

Kevin: And ultimately, we participated in a very long en banc oral argument in the D.C. Circuit a few weeks prior to the 2016 election where we represented utility companies who were defending the Clean Power Plan. And then in the Trump administration, we represented companies who were suing the Trump administration for the repeal of the Clean Power Plan. There's a whole set of other rules, but that's how it all got started. And I'm very glad to have been on the journey with you.

Carrie: Same. It has been fun. And I think it will continue as we see what the Biden administration does.

Kevin: I hope it won't be as much fun as the Trump administration was.



Carrie: Not as interesting. Maybe I'll start with a little background just for our listeners on EPA greenhouse gas regulations for the power sector, and then we can turn to what's before the Supreme Court and potentially at stake. So the statute, as you mentioned, is Section 111 of the Clean Air Act. We first saw this through the Clean Power Plan with the Obama administration, the ACE rule with the Trump administration, and now we're waiting to see what the Biden administration does. But more specifically, the question is whether EPA can use Section 111 to establish Best System of Emission Reduction, or BSER, for greenhouse gas emissions from power plants, and then what can EPA consider and what can it not consider when it sets that standard for existing power plants.

Carrie: Now, the Obama administration's Clean Power Plan relied on what could be done to units by themselves to reduce greenhouse gas emissions, as well as what emission reduction opportunities could be leveraged in light of how the grid operates. And this latter is often referred to as generation shifting, meaning the shifting of power generation from one plant to another. In the Obama administration, others, including the clients you represent, argued that power plants are unique and that unlike other sectors, they produce electricity that's interchangeable. Meaning one electron from a wind farm is the same as an electron from a coal-fired power plant given the way the grid operates. And that shifting of generation is already occurring. It's how we run the grid today, and that's regardless of any requirements for greenhouse gases.

Carrie: By contrast, the Trump administration disagreed. It argued that the Clean Air Act required EPA to only consider heat rate improvement technologies and practices known as inside the fence line measures. However, states, some of your clients, Kevin, environmental NGOs, they challenged that reading of the Act. The D.C. Circuit heard oral arguments uniquely via Zoom for more than nine hours in early October of 2020. And then they issued an opinion the day before President Biden's inauguration and they held that the EPA erred in concluding that the Act required EPA to only consider measures that apply at or to the source. So therefore, the court vacated and remanded ACE. And so as of today, we don't have the Clean Power Plan, the Affordable Clean Energy rule has been vacated and the Biden administration is now considering what to do in terms of designing a new rule. But that brings us to what we want to discuss today, which is that several petitioners have filed to the Supreme Court an appeal of the D.C. Circuit case. So Kevin, maybe you want to start with who are the various parties on both sides?

Kevin: Sure. There are four petitions for cert filed with the Supreme Court. And today is actually the day in which the petitioners are filing their reply briefs. We've already seen two of them. There's one petition that has 19 states on it. And that's being led by West Virginia. And then there's another petition brought solely by the state of North Dakota. North Dakota, throughout these proceedings over the past five, six years, has always had its own gloss on federalism requirements. And so they kind of amplify their arguments



separately from the other states on their side. And then Kentucky is an amicus in support of those. So they got like three briefs essentially. So that's 21 states on one side.

Kevin: On the other side are 24 states and they're primarily led by the New York AG's office. Then there's two coal companies, Westmoreland Mining Holdings and North American Coal Company. They are producers of coal. So those are the four petitioners. There were some parties who came in in support of them, like as an amicus, Basin Electric, as well as this group that calls themselves America's Power, which as best as we can tell is a bunch of coal mining companies and companies that service the mining industry, like even railroads that work for coal companies.

Kevin: So there you have the parties who are petitioning and notably, none of the petitioners are actually regulated entities under the case rule or the Clean Power Plan. There's no power companies there. And then on the other side, you have our states led by New York, the ENGOs, environmental groups. That's how we call them, ENGOs, trade associations, like Advanced Energy Economy. And then my clients, which in the case included nine power companies. They're a mix of the largest municipal utility in the country, the largest state power authority, some other municipal utilities, some investor-owned utilities, all with diverse resource mix.

Carrie: Thanks. Could you keep going a little bit about what are some of the key points that you raised on the brief that you submitted on behalf of those power companies?

Kevin: The main thrust of the argument was that because EPA said it's going to be reconsidering the scope of its authority under 111(d) on a clean slate, and it said that in filings in the D.C. Circuit post decision, it just wouldn't make sense for the court to review this question at this time. The Supreme Court doesn't review hypothetical questions about how an agency might apply its authority. Rather it should review a record of how the agency has actually applied its authority. We said that a lot of the arguments in the petitions were based on just conjecture of what EPA is going to do. They essentially were positing that EPA is going to publish a Clean Power Plan 2.0 and that's not known at this time. And courts usually like to avoid getting involved in a dispute unless there is a real concrete dispute. That's Article III of our constitution. Judges decide cases or controversies. They don't issue advisory guidance to agencies on how they should apply their authority.

Kevin: A couple other things we said is that this question of what constitutes the best system of emission reduction for the power sector, it's highly dependent upon technology and trends within the electricity sector. We've seen these precipitous drops in costs of renewable generation technology, even from the time when the Clean Power Plan was promulgated back in 2015. The goals for the Clean Power Plan that were supposed to start in effect in 2022 and keep



ratcheting down emissions until 2030, the 2030 target actually ended up being achieved on a nationwide basis a decade in advance, even though the rule never went into effect. And that was because of these dramatic changes occurring and the incredible demand from consumers for clean power and the steep reductions in the cost of these renewable generation technologies.

Kevin: And so we said that given this rapid pace of transformation, it really made sense for the court to grapple with how EPA actually applies the statutory criteria to decide what constitutes the best system. One of the petitioners went so far as to say the Clean Power Plan's a relic. I mean, we agree and think that it really makes sense, if this issue is going to be reviewed, to let the agency decide on a record what its authority is. And then if parties are aggrieved by that they can petition to the D.C. Circuit and ultimately, it could go up to the Supreme Court.

Kevin: The other main point that we emphasized is that the D.C. Circuit's ruling was incredibly narrow. My clients really weren't in this case to defend the Clean Power Plan. And some of them didn't even support the Clean Power Plan. But they all agreed that the statute did not unambiguously and categorically prohibit EPA from considering anything other than something you can strap on to the end of an individual generating unit. And that's why they got involved. Because if it were just a question of the swing of the pendulum and EPA deciding that, "Well, we're going to review our statutory authority differently in light of the need to promote energy independence or cost considerations or to promote coal." The former administration was quite unabashed about that. Then my clients might not have sued, but EPA really took a legally risky position in finding that the statute categorically and unambiguously denied EPA the opportunity to consider the way the grid functions and defining the best system. That just doesn't seem right.

Kevin: Particularly given that the reception we saw in an en banc argument a few weeks before President Trump was elected, indicated that the D.C. Circuit, a number of judges on that court really seemed to suggest that they agreed with EPA at that time, that if the agency wanted to, they could interpret the statute to have broader authority for EPA to define the best system and the court would defer to that under what we usually call Chevron Step two.

Carrie: So, just picking up on what you said, Kevin, there's no doubt, and I think I agree, that the D.C. Circuit didn't have a broad holding, that EPA must consider measures that were included in the Clean Power Plan. But I guess maybe we could talk about what's at stake if the Supreme Court does take this up. So for example, you mentioned Kentucky, they submitted an amicus brief, and that goes pretty far to raise questions about the scope of Massachusetts v. EPA, which is the Supreme Court case that affirmed EPA's authority to regulate greenhouse gas emissions as air pollutants and several petitioners, and those supporting the petition, suggests that EPA will use Section 111 to eliminate coal-fired power plants.



- Carrie: And while the petitioners generally acknowledge that EPA can regulate emissions under *Mass. v. EPA*, I read some of the briefs suggesting to the court that EPA can now do something more than that, and issue a rule, and they state that they could issue a rule that would eliminate an industry. So given that they're raising these questions, what do you see is the risk if the court were to take up this case now, as opposed to once we see what the Biden administration decides to do?
- Kevin: Well, I think you're wise to raise the Kentucky brief, because why did Kentucky not petition for cert and instead file its own amicus, because they wanted to put this red meat out there for some of the conservative justices that, "You know court, when you decided *Massachusetts v. EPA*, you decided that if EPA decided there was an endangerment that yes, greenhouse gases could be a regulated pollutant under the Clean Air Act, maybe you really didn't mean to arm EPA to become the decider of which industries survive and which die." And so that's essentially the point that they're trying to prop up with the court and hope that four justices will think that maybe we didn't quite mean to give EPA this vast authority as the petitioner's posit. We don't agree that that's either what 111(d) does or that's what the D.C. Circuit decision holds. But what they're really trying to do is gain the attention of the conservative justices on the court. Many of whom never were quite in agreement with the holding of *Massachusetts v. EPA* and with Justice Kennedy off the court, we of course have a newly composed court. It is more conservative.
- Kevin: So I view the Kentucky brief as really a Hail Mary pass for them to try to get the court to take up, in addition to the question of what is the agency's authority under 111(d), what did you in fact mean, Court, when you essentially waved EPA on in regulating greenhouse gases? You couldn't have contemplated this.
- Carrie: Yeah. And I guess the counter to that is that, at some point, we do need to know what EPA can and can't do. And all sides think uncertainty is not a good thing – the back and forth we're seeing between these rules. But I think an interesting point you raised in the brief that you submitted on behalf of the power companies is that these concerns about uncertainty are not the result of the D.C. Circuit decision and that the industry is making changes despite this back and forth. And I think it's interesting to see what changes that you mentioned happened without any regulation in place. But could you talk a bit about the fact, the points that you raised about how a decision by the Supreme Court would not solve the uncertainty that is facing the industry?
- Kevin: Yeah. So what they say is that industry is essentially, in the electricity sector they're really speaking of, is being hamstrung by this uncertainty so that they're not able to make investments because the electricity sector is notorious for having very long-term planning horizons. We do integrated resource planning over 20-year horizons to say like, "What's the demand going to be? And how are we going to fulfill it?" And they say that this uncertainty precludes investments from being made and that therefore, the court just ultimately



needs to answer this question, "What can EPA do under 111(d) now?" So that industry has the certainty it needs to make investments.

Kevin: Two points to that. First, the record abundantly reflects that the uncertainty created by the Clean Power Plan, then the ACE rule, and now the D.C. Circuit's decision hasn't stopped the race to decarbonize the electricity sector, even since the time the ACE rule was promulgated. There's been so many more states that have signed up to 100% clean power goals. And so that's just a real false point that somehow this regulatory uncertainty is standing as an obstacle to investment.

Kevin: The second and more relevant legal point is that, even if the Supreme Court were to decide, imagine they were to endorse the view of the Trump administration, that the best system must consist of only that which can be applied at and to an individual power plant, that doesn't answer a lot of questions about how EPA could issue a best system of emission reduction that comported with that legal standard. EPA could decide that co-firing of natural gas at coal-fired power plants was part of the best system. That would meet the "at and to" criterion, or they could decide something more aggressive like that partial carbon capture and sequestration is required for existing coal-fired power plants, or maybe even gas-fired power plants, or they could decide something like co-firing of hydrogen is required for plants that can fire natural gas. There's a lot of talk out there. And I have many, many clients who are very interested in green hydrogen as a way to decarbonize base load generation.

Kevin: And so even if the court were to take up that question now, EPA would need to sort through the statutory criterion of considering cost, availability, the energy sector generally, and they would need to apply those criteria to the facts as they exist today, in order to determine what is the best system. So just answering the question in the abstract by the court to say, "Yes, the ACE rule was right," doesn't resolve the question of what ultimately is going to be required for the power sector.

Carrie: I'm going to take us down into two weedy legal questions, and then we'll come back out. But I think there are two that keep getting raised in the press and I think they're important and have gotten raised by the petitioners and also in the Clean Power Plan litigation. So the first is the major questions doctrine. And the US and others argued that that legal doctrine is not implicated here because there's no question that EPA must implement Section 111, but Judge Walker raised this issue and his dissent regarding the Clean Power Plan. And I know it was raised in the ACE litigation as well. And I would assume that some on the Supreme Court could be interested. So could you explain what the respondents argued and why you argued that this issue is not right for the Supreme Court at this time?

Kevin: So in the classic administrative law framework... And we do need to get a little bit of weedy here for the ad law nerds out there, they'll be happy. If a statute is



clear on its face at Chevron Step One, that's the interpretation that is allowable. However, if there's ambiguity in the statute, the agency is usually afforded discretion at Chevron Step Two, to interpret the statute in accordance with all the statutory criteria. And then the court will defer to the agency's reasonable interpretation. So long as it's reasonable, they'll defer to it. There is this idea out there that comes in a number of case laws on statutory interpretation, and we kind of refer to it sometimes as Chevron Step Zero, that where an issue is of significance economically or politically, a court should not blithely construe Congress to have granted the agency discretion to do something that isn't evidenced by a clear statement in the statute itself.

Kevin: And so that's kind of like the major questions doctrine, like big issues of economic significance, and the Clear Statement Rule is what it's called. The reason fundamentally that this is not at issue in this case is because EPA decided the ACE rule, based solely upon a Chevron Step One analysis, that is that the statute unambiguously forecloses consideration of anything other than that which can be installed at an individual generation unit. They acknowledged the major questions doctrine as a principal out there that in their mind gave further credence to their position, but they disclaimed that it was the basis upon which they were deciding the appropriate scope of EPA's authority in issuing the ACE rule.

Kevin: And so courts always take an agency's justification at face value. They're not going to allow the agency to change its justification for a rule in litigation. And so in litigation, EPA defended the ACE rule by saying, "Yes, the statute unambiguously forecloses this." They did not base their defense upon the major questions doctrine and the D.C. Circuit's very narrow holding was merely that EPA got it wrong at that first step when they decided that the statute unambiguously foreclosed them. They didn't answer questions of whether the major questions doctrine might be applicable or not in deciding that. They ultimately held that the major questions doctrine did not apply to this question because the AEP v. Connecticut, that's the case that decided that EPA's authority under this statutory provision, displaced federal common law nuisance suits. In that case, the Supreme Court pronounced that 111 gives EPA the authority to decide whether and how to regulate power sector greenhouse gas emissions. And so from the court's perspective, it's clear that EPA has this authority, not only to decide whether to regulate greenhouse gas emissions, but how to regulate greenhouse gas emissions.

Kevin: There's another really interesting point in the major questions doctrine jurisprudence. It's usually viewed not as a question of how, but whether in the first instance, meaning that it's a question like the classic cases *Brown and Williamson v. FDA*, did Congress intend for the FDA to regulate tobacco as a drug when they issued legislation authorizing the FDA to regulate drugs? That's a question of a statutory, like a threshold question of authority. Does the agency have authority in this area? It's not a question of how the agency exercises the authority that is clearly laid out in the statute. In this instance, we



know that power plants have been regulated under Section 111 for decades, for all their pollutants under the Clean Air Act. And so it's not leaps and bounds of statutory authority that's being pronounced by the agency. It's merely a question of how the agency is implementing that authority and applying the statutory criteria to the specific question and the specific pollutant of CO2.

Carrie: The second one, I'll try to explain, but I will acknowledge it makes my head hurt. But that is the question of Section 111 v. Section 112 of the Clean Air Act and whether the House amendment and the Senate amendment that was passed by Congress controls. And the underlying issue is that the House and the Senate amendments, the 1990 Clean Air Act amendments, had a little bit different wording for Section 111. And the issue argued by some petitioners, is that the House amendment to Section 111 should be read to preclude the regulation of greenhouse gas emissions from power plants if power plants, as that source category, are already regulated under Section 112, which they are because of the Mercury and Air Toxics rules, which regulates hazardous air pollutants.

Carrie: By contrast, those opposing the cert petitions argued that both the House and the Senate amendment should be read to allow EPA to regulate greenhouse gas emissions from power plants, because under Section 111, greenhouse gas emissions are not regulated under Section 112.

Carrie: And this whole issue arises because the conference report by Congress during the 1990 amendment process included the House and Senate amendments, they were both passed by Congress, both signed by the president, and they were both part of the public law. However, there's an office, the Congress' Office of Legal Revision Council, and that's whose job it is to publish the US code. And that office selected the House amendment to be published. So as a result, the petitioners have argued that the language in the House amendment, the one that was picked to be codified excludes from Section 111, the source category power plants, because that source is regulated under 112.

Carrie: Now the D.C. Circuit rejected this reasoning. They held that EPA can regulate greenhouse gas emissions because those same emissions are not regulated under 112. However, Judge Walker in his dissent for the D.C. Circuit, makes clear that he agreed with the petitioners and he does spend some time explaining why he thought EPA lacked authority to regulate power plants under 111. So Kevin, I know in the oral arguments for the Clean Power Plan, this question was also raised. I wondered if you could give a little bit of insight on what you think some of the justices might think about this issue?

Kevin: Sure. What we did have in addition to the oral argument, nine hours of it in front of the D.C. Circuit last October, we did have an en banc argument in front of the D.C. Circuit in September of 2016. One of the judges on that panel is now on the Supreme Court. That was then Judge Kavanaugh. And Judge



Kavanaugh greeted this argument with a little bit of skepticism. I think I recall him saying something to the West Virginia Solicitor General, that, "Counselor, when I finished reading your argument, I needed a stiff drink. I mean the back and forth, the House did this, the Senate did this." And I think he called it a hall of mirrors. And so that would suggest to me that now Justice Kavanaugh and perhaps others similarly situated conservative justices on the court might not be amenable to this dueling amendments argument that some office of law revision council gets to choose which version of the statute, both of which were enacted into law and signed into the public laws governs in this instance.

Kevin: And I recall there as well, Judge Millett who was on the en banc panel and then presided over the en banc argument last October, she really in 2016 held DOJ's feet to the fire to say, "Okay, how does this work Department of Justice lawyer?" And mind you, she's a former Department of Justice lawyer. "You're speaking on behalf of the whole government. What is the position of the US government on what happens in this very unique circumstance?" And the position of the government at that time was, and consistently held throughout the Trump administration, is that, "No, where this situation comes up, you should try to read them in harmony with one another and not in a fashion that would suggest that one House of Congress really intended to essentially neuter an important provision of the Clean Air Act in what were described as miscellaneous amendments."

Kevin: And so remember, this all is just, these were cross-references that were being updated to reflect the fact that Congress said, "EPA, you've been too slow in regulating hazardous air pollutants. So we're going to publish a list of those and say you need to regulate all of these." And they needed to update these cross-references to say, "Well, if it's one of those pollutants on that list, it can't be regulated under 111." That's the context. And when you look at it in that context, the structure of the statute, the way 110 regulates criteria pollutants, 112 regulates hazardous air pollutants, and 111(d) is this catch all for those which are neither criteria pollutants or hazardous pollutants, it makes a lot of sense. And so that's the position that the court held, that the agency held consistent throughout so many administrations. So it would be surprising, in my mind, if the Supreme Court were to grant cert, if they were to do it based upon the argument presented by Judge Walker's dissent.

Carrie: Kevin, you've seen, and you've mentioned a few of them, a lot of interesting twists and turns on these related cases, you mentioned the D.C. Circuit oral argument was six hours or more before the en banc panel. For the ACE oral argument, it was over nine hours on a Zoom. And my question is, despite those two surprising pieces, what's been the most interesting or most surprising in this litigation process?

Kevin: The most surprising part of the whole litigation process, I think... Well, two answers. First of all, that EPA in the Trump administration took this very legally risky move to defend their interpretation of how 111(d) functions solely on the



basis of a Chevron Step One analysis. They could have, were they wisely counseled, decided, "Yeah, we think the statute's clear at Chevron Step One, but we're going to put on some belt and suspenders, and we're going to say that, but even if it isn't clear at Chevron Step One, we're deciding that it's a reasonable interpretation at Chevron Step Two to limit the best system to that which can be applied at and to an individual plant." The reason they didn't do that is because they knew if they did that, the D.C. Circuit would be almost certain to uphold the EPA's interpretation upon a Chevron Step Two analysis.

Kevin: They wouldn't decide that the statute unambiguously held this unless it was a very conservative panel draw. They would more likely say, the agency decided if not step one, then step two. And they would've said, "Okay, the statute can reasonably be interpreted as EPA interprets it." And they didn't want that. That wasn't enough. What EPA wanted in the Trump administration was to bind the hands of any future administration from ever utilizing this provision of the Clean Air Act to achieve meaningful reductions from any sector, but the power sector in particular. And so that really surprised me because that was a bold political move and not a legally defensible one. And so it's not surprising that we had the result we had out of the D.C. Circuit.

Kevin: The other most surprising thing to me in the course of this litigation and particularly the oral argument was a colloquy I had with Judge Walker in the 2020 oral argument. He was really grappling all day. He's new to the court. D.C. Circuit decides all of these important issues of energy policy, of environmental policy, and he acknowledged as much. He's new to the court. He says, "I don't really understand how the electricity sector functions. This is all new to me." And he asked me this very genuine, honest question, as the representative of industry saying, "Counselor, maybe you can explain to me how it works from the time a lump of coal is pulled out of a coal mine to the time I flip my light switch and the light goes on." And I was a little bit daunted by the task. I said, something like, "Oh, you're asking me to do a power systems 101, and that could take some time."

Kevin: We launched into it, nevertheless, and I gave him like a three or four minute tutorial of how competitive markets work, how that differs from vertically integrated markets, how marginal costs of fuels, be they coal or a beam of sunlight dictate which units might get dispatched in a competitive market clearing auction. And that was really surprising. He seemed somewhat satisfied by the answer, but Judge Millett gave me golf claps on the Zoom screen, which was a particularly delightful response.

Kevin: When I was mooted for the argument, a number of parties on my side said, "If Judge Walker tries to get you off your main points, get off of whatever rabbit hole he's trying to get you to go down and get back to your main points as soon as possible." But my view, in retrospect, I just went where he wanted to go, because it sounded like a really genuine question. My role as counselor and representative of these companies in electricity sector was to bring that



knowledge to bear. I went there with him and I explained to him my understanding of how it worked and it seemed to make sense to him. And I think it was the right call in the moment. So it's one of those things you can't prepare for. I certainly had not, in my wildest dreams, imagined that I'd have to do that in an oral argument, but that's the reason for oral argument. We're not there to recite what's in our briefs. We're there to help cast light on things that the judges may really be wondering about.

Carrie: Yeah. I also think it helps, your background. It was only a question that a few lawyers on that panel could really dig into. And I think you did a great job explaining. To explain the electricity market in three to four minutes is not an easy task, but I agree you did answer his questions and I think it helped because it matters how the electric sector works for how these rules might apply as well.

Kevin: Absolutely.

Carrie: Speaking on that, I think that example is also one skill I've observed in your writing, is your ability to use very little words to make strong arguments. As many folks know, there is a negotiation when you're writing a brief for one side on which parties get how many words, because the court will only give you so many words for a side. And even when you have very few words, I've described your briefs as haiku briefs, which I mean as a compliment. They're persuasive. In an oral argument, the example you just gave, you've been able to hit on just the right point, at the right time. Maybe taking a step back, how do you prepare for oral argument or how do you write briefs? And what other advice might you have for lawyers wanting to do this kind of work?

Kevin: Well preparation for oral argument, you need to, my view, is that you need to talk out your arguments in front of a mirror, in front of yourself. As ridiculous as this sounds. And it needs to sound genuine. It needs to sound spoken word. You need to get out the prepositional phrases. You need to get out the compound sentences and you really need to understand, we're already dealing with really complex subject matter. We're dealing with the underpinnings of administrative law. We're dealing with a very complex statute, like the Clean Air Act. We're dealing with the complexities of how the electricity sector functions. You don't have time or space for complex compound structures in your argument. And so my overall advice and I've given it to other younger lawyers, is talk through your argument and keep cutting out everything you can possibly cut out and cut, cut, cut until you get to what you really think is the essence and have those points at your fingertips so that you have your 30 second, well-reasoned and very, very concise response to specific questions that the judges may ask you.

Kevin: You always won't get those questions, but it helps refine your thinking about what is really at issue in this case and what you should be expounding upon in the very few minutes you have in oral argument. And I think the same



principles apply to brief writing. You don't need to be lengthy in order to prove your point. The winningest points will be those which are clear and simple on their face. And so to the same extent that you should prune, prune, prune out any excess from your argument in oral argument, you should do the same thing in your brief. There's no excuse in my mind for overly lengthy briefs.

Kevin: And the D.C. Circuit is quite draconian in their word limitations. And so they hold that view. And so for a court that holds that view and is going to be receiving arguments from lots of different sides or for the Supreme Court, which is going to be flipping through these cert petitions and responses among hundreds of them when they go to conference, you need to be pointed and not get bogged down in the details. That's a good lesson for any lawyer, no matter whether they're working in this space or any other space or anyone, frankly, who's trying to be a good communicator.

Carrie: I think that's a great note to end on. Is there anything else that you want to raise before we wrap up?

Kevin: No.

Carrie: Well, thank you, Kevin, very much for taking the time for your insights. We'll wait to see what the court decides and then what EPA decides to do in terms of a new rulemaking as well. But thank you.

Kevin: Thank you. It's been fun.

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