



Transcript of CleanLaw Episode 39: Richard Lazarus Talks to Joe Goffman about His New Book "The Rule of Five", March 12, 2020

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Robin Just: Welcome to CleanLaw from the Environmental & Energy Law program at Harvard Law School. In this episode, our executive director, Joe Goffman, speaks with Harvard Law School professor Richard Lazarus about his forthcoming book, *The Rule of Five*, which describes the drama, strategy, cast of characters, and above all, the lawyering by both the litigators and the Justices that led to the seminal Supreme Court decision in *Massachusetts versus EPA*. Richard's book will be available on March 10th. We hope you enjoy this podcast.

Joe Goffman: Hi Richard. Thank you very much for coming by and recording this interview about your absolutely fabulous new book, *The Rule of Five*. I have to say that even though I'm riddled with biases and preconceptions, I think I could free myself enough to say, after having read it, that this really is a tremendous piece of work. It was really compelling. In fact, at times, it had an almost Dickensian thrust from a narrative point of view and from the way you drew so many portraits of so many compelling characters. Even if your readers or potential readers are not law wonks like us, they could get a lot, really get a lot out of this.

Richard Lazarus: I'm delighted to hear that. Let me tell you a little bit about sort of why I wrote it because that's all music to my ears. I worked in the solicitor general's office in the late 1980s and I decided then I wanted some time to write a book that really brought to life the strategy behind litigation, particularly Supreme Court litigation, because I found it so fascinating. How one crafted arguments, how one anticipated other side's arguments, how one anticipated questions from the Justice's, how one tried to frame issues, how one tried basically to win cases, or less frequently, not lose cases badly. You knew you were going to lose, but you wanted to lose it in a way that we call the soft landing.

Richard: I always knew I wanted to write a book like that and I wanted to write it for a popular audience, and not sort of for legal scholars. I really wanted to write to people more broadly. The other thing I knew I wanted to do was write a popular book about the challenge of environmental law making, why it's so interesting, why it's so important, why it's so hard, why it's so divisive, why it's so politically contentious and it's not just based on this sort of simplistic notion that there are good people and bad people. In fact, the issues are hard. The politics is hard, the economics is hard. The science is hard. It's tough decisions. So, I've always wanted to do that.



Richard: Then in 2007 when the Supreme Court decided this case, Massachusetts for EPA, which is really the most significant environmental law decision ever decided by the US Supreme Court, I knew I had the case. At that point I said, all right, this is my case. This is the case that brings together these things I wanted to write for a broad audience. Then basically, I had to fight for about eight years till 2015 to have the time. The other things we all do with our lives, the teaching, there's scholarship, there's litigating current Supreme Court cases rather than talking about the past. So it took me a while to free up the time. It wasn't till 2015 that then I really started researching for the first time.

Richard: Then about a year and a half researching, just gathering documents, gathering extraordinary paper record of everything that happened. Everyone's emails, everyone's draft briefs, everyone involved in the litigation, FOI requests, public information requests of state government, of the federal government, just amassing boxes, boxes of material. Then I had to take a year off for other things and sort of late 2016, early 2017 was really when I started to write the book. For me, it's pretty exciting to actually have it done.

Joe: Well, it's an exciting book. The very first thing you said about what your objective was, which is to really lay out or reveal how litigation of this sort is done and what its component elements are, really succeeded. I say this because even though obviously I have a background in environmental law, I've never really done it as a litigator, and yet you were able, at least for this reader, to elicit a real sense of identification and sympathy with the enterprise of making change through litigation and all the component elements of strategy and persuasion. It's interesting at the very end you draw on a parallel with *Brown versus the Board of Education*, and maybe we should get to this later, but you reveal whether you intended it or not the extent, but ultimately the limits of litigation by itself as a tour or agent of change.

Richard: Yeah. That's one of the lessons. There's several lessons from the book. Certainly one of them is the limits of litigation. It was fascinating for me. I spent a fair amount of time researching Thurgood Marshall as a Supreme Court advocate and what the Court did and the decision making in *Brown* in 1954. It wasn't until probably late in the process that I realized the parallels. That's why I have a section actually called *Green Shades of Brown* in terms of it. The other thing you mentioned, I just want to focus on for a second, and that is you've mentioned my reference to people, and that was deliberate. I've never written a book to a popular audience.

Joe: We should step back and make sure that everybody knows, among your many long and accomplished careers, you have a career as an author and you have written a couple of books of very different type and kind. Why don't you just remind us of your previous writing?



Richard: Yeah, I generally write really about two things, but mostly to law audiences and scholarly audiences. A lot of my scholarship is looking at environmental law and the theoretical challenges of making, maintaining environmental law over time. Probably my best known work in that area is a book I published about 15 years ago called *The Making of Environmental Law*, which really explores the emergence of modern environmental law in the early 1970s and its trials and evolutionary trends since then. Actually, I'm working now on a second edition of that book.

Joe: No wonder it's part of the canon, Richard. No false modesty here.

Richard: So I write a lot about that and then about discrete areas in environmental law, which are challenging, ranging from environmental Justice, to environmental crime, to the regulatory taking property rights issue. I focus in on discreet areas, but then I have another part of my scholarship which is completely different than environmental law, which in other quarters I'm much better known for, and that is about Supreme Court decision making, where I've written about how the Court makes decisions, the impact of the advocacy of decision making process, the internal dynamics within the Court itself on writing, drafting opinions and opinion assignment within the Court. I've always had those two areas, but it's always been about ideas and theory and application of ideas. It's really been sort of legal scholarship, not as abstract as some of my colleagues do.

Richard: I like to be engaged in real world events, but I've never written about people before. What everyone advised me, not everyone, but the people I talk to, and then I went out and read a lot of books that I viewed as models. Whether it was Anthony Lewis's *Gideon's Trumpet*, or Richard Kluger's *Simple Justice on Brown*. What quickly became apparent to me is if you want to write a book to a popular audience about things that I wanted to write about, I had to have people front and center. I had people's personalities front and center, and so I did a lot of research on people. I interviewed a lot of people. One of the biggest challenges that I had here is that any major environmental lawmaking moment, this one by litigation, it doesn't involve a few people. It involves a lot of people, but I also decided early on I wasn't going to be Charles Dickens.

Richard: This wasn't going to be *Bleak House* where you would have to have an index of the 50 or 60 characters involved so that people have to remind themselves who's related to who in this book, that I could reference a fair number, but I had to only focus on a few because people would lose track. So really just a few people I follow through the whole book. In terms of the sort of protagonists, the people who brought the litigation, I call them the carbon dioxide warriors.



Joe: What was interesting is that comment you just made that if there's a major effort and ultimately a major success to make change in law or policy, requires a large number of contributors, to use a cliché, it's probably worn out, it does take not a village, but probably a small town to accomplish something on the scale of a litigation like this that goes all the way through the Court, the same as with legislation or regulation.

Richard: There were probably about 50 to 60 at least lawyers on the environmental side of this litigation. I focus on about five. So I have 45 people who are mad at me.

Joe: Yeah, well and I don't know that necessarily because you were fair to your readers by giving us a very well-rounded portrait of the five people you focused on. We got a real sense of how much goes into an individual lawyer's presence in a case like this, and it's everything from ambition and ego on one side and a sort of extraneous agendas as well as the critical mission of the effort.

Richard: What the book really tried to do, which is why that conflict becomes out, is tell the behind the scenes story of Massachusetts versus EPA. Again, sort of the most significant environmental case the Court has ever decided involving climate change or any environmental issue. I tell, in the behind the scenes story, there are really three scenes in particular that I'm focusing on. One is behind the scenes with the people who brought the litigation, the environmental groups and the states. So behind the scenes there. The second one, behind the scenes of the Bush administration, and that is the EPA and the White House. The folks who made the decision not to regulate greenhouse gases, which prompted the litigation.

Richard: Finally, and fun for me, behind the scenes of the Courts, the other side of the lectern. So what was happening in the DC Circuit in the judge's chambers? No less interesting of course, what was happening in the Supreme Court, not just on the advocate side of the lectern, but the other side? After the Chief Justice bangs his gavel and says, "The case is submitted," and everyone gets up and leaves. What happened there in the crafting of the opinion? That's really behind the scenes. One thing you learn, and for those of you who litigated, and I'm sure you've been close enough to litigation to know, if you have a big environmental case, and this was as big as they get, people care deeply. The stakes are huge. A lot of the conflict is understandable, it's not avoidable.

Richard: If you take an issue about climate change where people really, this is their life's work, this is an issue they care about more than anything else, and they should given its importance, and you put people together, a lot of very smart people together and the legal issues are hard, invariably they're going to disagree. Disagree about how to argue, when to argue, who to argue, and given those stakes, they're going to fight. There's often a lot of conflict. This case, the



intensity almost was destructive. At the end of the day, they did a brilliant job and they won, and they did it in historic fashion. It's the first time ever the United States Supreme Court has overturned a lower Court and ruled against EPA and the president in an environmental case. Never before.

Richard: But there was a personal cost to that as you see in the book, but it wasn't a bad faith conflict. It's a good faith conflict. But even good faith conflicts could be destructive and intense, and the winners in this case, many of them, they won this historic case, they've never spoken. They haven't spoken since the day of the argument.

Joe: I guess, let me confess as a reader that your characterization of them, I think is just and fair. I don't question, either what you said now or from reading the book, that the conflicts or the disagreements were made in good faith, but ...

Richard: And driven by their own ambition.

Joe: That's right. The thing that was really striking to me as a reader is that you, to some extent, forefronted, in some of the characters, not just their commitment to the mission or the cause, but also their strong sense of their personal ambition and personal stakes. There are a number of developments where it seemed as if the good of the case had to compete with the individual ambition of the individual involved. One of the things that struck me about this book is that the three scenes which you look behind, Bush administration's decision to handle the petition in a particular way, the carbon dioxide warriors, that is the litigators' collective iterative decisions to handle the case in a particular way, and ultimately Justice Steven's decision to handle his task in particular way.

Richard: Exactly right. To write the opinion himself.

Joe: Exactly. What was really interesting to me is that because there were some ulterior agendas on the part of the political appointees in the Bush administration, which were along the lines of trying to establish once and for all the legal proposition that the Clean Air Act didn't cover greenhouse gas emissions. There was a bit of ultimately self-sabotage there, that cliché overreach applies, and ultimately, in the long run, undercut the robustness of the government's case in defending the decision. There were times when I felt as a reader that the litigators succeeded almost despite themselves. Then you have the hero of the case in some ways, which is Justice Stevens who actually seem to have this ability to integrate his understanding of what motivated his colleagues with what he was trying to accomplish. He's the one, in my mind, who teaches the most enlightened lessons of what went on behind the scenes.



- Richard: No, I think that's a fair description. You certainly learn that very good lawyering makes a difference. The environmental groups of the states here did some really good lawyering. They had to do a lot of battles, but at several stages their lawyering, I think bordered on brilliantly pragmatic. In other words, how to pitch their case and how to narrow their case and narrow their ask in order to win. I think they very much showed something, which I always try to teach my students, and that is the best environmental lawyers are not the best environmentalist. They're the best lawyers.
- Joe: Bingo.
- Richard: And these folks knew not to go up there and give arguments to the Justices to prove their environmental bonafides. My guess is that a real climate believer who had slept over night before the Supreme Court were to walk into that Courtroom would have been appalled to hear the things that Jim Milkey on behalf of the Massachusetts Environmentalist was saying, because it was such a narrow ask of the Court, but they did that to win and they won. They got the five votes. Stevens, in writing the opinion, ran for it. He then turned it back into an environmental case, and that was a crucial maneuver by him. We could've had a very different opinion, but Stevens took their narrow ask and really produced a blockbuster of an opinion.
- Joe: Can we spend a little time, why don't we tell the Jim Milkey story, in particular, the way you present his oral argument. The oral argument as you presented it was an absolute tour de force, and your presentation of it was a tour de force. What's so great about it is that it has this novelist quality, which is in the run up to the oral argument, he was really beleaguered by his would be or notional allies who continually let him know how little confidence they had in him, and it took the intervention of the attorney general of the State of Massachusetts, Jim's boss, just to secure his place as the attorney who was going to make the oral argument. Yet, out of this adversity, he emerges in your book as just absolutely masterful in winning the case.
- Richard: I'm not overstating that. It is in fact one of the best Supreme Court arguments I've seen, I was there at the time, and read it afterwards, and I teach it all the time in class. It was a tour de force. It was a great argument and it's also true that it's fascinating to see what led up to it.
- Joe: By the way, I'm wanted to ask how you're doing in negotiating the movie rights for it. I described this book to some of my colleagues here in the program. We've already cast it for you. The only question we have is, should we ask the Coen Brothers to direct it or? But anyway...



Richard: Jim Milkey was a career attorney with the Massachusetts AG's office. He went to Harvard Law School and Harvard College, also did a master's degree in urban planning and then he went off to the State of AGs office, really to be a public servant, but by the early 2000s, he was looking for a way to make his mark. He felt like he wanted to make his mark in the world. He wanted to do something bigger and more significant and he became part of this whole group of people during the Massachusetts versus EPA case. It's not happenstance, by the way, that the name of the case is Massachusetts versus EPA. One, everyone understood the case would look better if the states were the lead, and two, Milkey maneuvered to have Massachusetts name be first.

Richard: What a lot of who people don't do Supreme Court litigation don't appreciate is that almost every time there's a big Supreme Court case and there are multiple parties on one side, and here there were dozens of parties on the sort of environmental state side, only one attorney can argue. In the lower Courts, multiple people argue all the time. The Supreme Court really only lets one argue. As a result, there are battle royals with everyone wanting their chance at the United States Supreme Court. They're going to argue the big case. A lot of people want to argue, and there were fights over who's going to argue the case, and this case was no exception.

Richard: There was a huge fight within the parties about who would do the argument, and it was not a pleasant fight, and was never our fight.

Joe: Milkey's trip to the lectern in the Supreme Court it was absolute hell to get there.

Richard: Milkey secured it after a large battle within the group, and then he had to do arguments, what's called a moot Court. He did several moot Courts practice arguments. He did, I think at least three if not four. In these moot Courts, the purpose of a moot Court is to rip you apart. It is to destroy your argument because that's how you prepare for the real thing. Moot should be harder, and because there'd been such a battle going in, when Milkey is doing one moot after another and his colleagues on his same side see him being ripped apart, they're falling apart, and it became to such a head, they were so upset, and remember, they believed in this issue.

Richard: Some of them had worked for decades on the climate issue, and they think we're going to lose because we don't have the right lawyer, and we knew that before. So they didn't trust them in the beginning, and then you see a moot Court, they're still not trusting him. There was so little trust. They weren't speaking. He wouldn't even speak to them at this point, that only about 10 days before the actual argument, long after you could possibly think this is a plausible idea, they called him at home on a Saturday morning and told him to step aside



and not do it. So by the time he shows up there he has been battered and beaten. He has most attorneys on his side making it quite clear they don't believe in him. He walks in that day, and I can tell you I was less surprised than others when he came in, because I knew this story at that time.

Joe: Did you moot ...?

Richard: I was part of the moot Court at the Georgetown Supreme Court institute. I ran his last moot Court at that point. I know how it works. I know how people rise to the occasion. I know how moots work. Jim walked in there and he was on fire. You could look at it. Every time he gets asked a question, he front loads his answer. It is a great argument. He has themes, he has a thesis sentence, he has transitions, and right at the outset, he tames, no less than Justice Antonin Scalia, and that's not easy to do. He then answers quite effectively a whole series of questions from the Chief Justice Roberts after answering a barrage of questions from Scalia. He does the same with Roberts who is not nearly as harsh or aggressive, but he's a really good lawyer, he was a good advocate.

Richard: He knows how to hit your weak spots. He does that really well, and he just comes away from it and you're thinking, by the time he started, and everyone's in the Court were going, they might win this case. They might in fact win this case.

Joe: Well, Milkey, the story of Milkey, Jim Milkey in your book really illustrates two of, not only his strengths but two of your strengths as an author. First, you start out as a reader kind of ambivalent about him because of something you just said. You say this in the book and you said it a moment ago, which is he decides he wants to do this because he decides that he, Jim Milkey, wants to make a mark. I think to people who identify with the cause, you could scratch your head and say, well, was this about climate change and making progress or was this about Jim Milkey making his mark? That kind of mixed motivation makes you less than sympathetic.

Joe: Then you follow him through the book as he's time and time again, getting the crap beaten out of him, either directly by his so-called allies, or by his allies giving him the cold shoulder when he, say submits comments on draft briefs. Then he goes to the moot Court, and instead of his allies appreciating how empowering and strengthening the moot Court process is, what they take away from it is that he's going to fail. And then, on virtually the eve of argument, as you said, they do, I would say the most destructive thing, which is say, sorry, after all your months of preparation, we want to substitute somebody else, and then comes in and he delivers, he saves the day.



- Richard: Right. There are even two more things. The morning of the argument, it's 9:00 AM or probably 8:58 AM, two minutes before the marshal comes in and escorts you up to the Supreme Court room. Jim Milkey is standing by the John Marshall Statute in the basement of the Supreme Court. One of his co-counsel who he's known for decades walks up and says to him, "Jim, I hope you prove I'm the biggest asshole in the world today." That was simply reminder of the fact, he's saying, I think you're going to fail today, but prove I'm wrong. But the other thing that Jim did, which is a moment I think of courage or tenacity, and certainly made a difference historically, and it's one of the other lessons of the book that one person, it wasn't just Jim, that one person can make a difference.
- Richard: And that is almost no one wanted to seek further review after they lost initially in the DC Circuit. Everyone wanted to fold the tent.
- Joe: I think this would be a good time to go back to the oral argument, and you do a really great job in the book of laying out how he crafted the argument and how he got into a kind of working partnership with Justice Breyer to really draw out the point. Because again, I say this is a non-litigator, it's stunning.
- Richard: Well, this had to do with the fact there were three issues in the case. The first issue is whether the plaintiffs in this case actually had article three standing, I mean, the kind of legal injury required to bring a case in federal Court. The second issue was whether greenhouse gases were air pollutants or not. Just a pure question we say of law and it looks at the meaning of the words and the statute passed by Congress. Then there was a third issue in the case. The third issue in the case was even if they had standing, even if greenhouse gases are air pollutants, meaning of the statute, whether EPA and this was EPA's final backup argument for why they should win. The EPA, the discretion not to decide at this point in time whether greenhouse gases are air pollutants or not.
- Richard: The Court in this case could have gone, just to that issue, decided that against the state environment and never reached the question whether greenhouse gas are air pollutants. So it would have been a complete loss in that perspective. The problem they had is on that last question where the EPA had the discretion not to decide. Without doubt, EPA had the far stronger argument. Their argument on standing was, I think you go either way, their argument on whether greenhouse gas are air pollutants, I thought was a weak argument EPA's, but their argument whether EPA had the discretion not to decide this issue was almost, according to settled administrative law, a slam dunk winner. That was a tough issue. And Milkey had argument with the support of the brief writers, but Milkey had really articulated the only possible grounds upon which EPA could lose a very, very narrow thing.



- Richard: He didn't shy away from its narrowness. He didn't pretend to sell the Court a bigger argument than it was, which would've lost all credibility. He had a very narrow argument. And then, when the attorney for the United States, deputy solicitor general Greg Garre stood up, Breyer slammed it home. Breyer is the one who took that argument from Milkey's top side oral argument, and he just did a great job of exposing the weakness of the solicitor general's argument. With all due respect, though, I have to say, I thought the solicitor general's attorney did about as good a job as he could of. The mistake that had been made was not his.
- Joe: It was upstream.
- Richard: Right. The mistake that was made was by the political people at EPA. The political people at EPA had crafted this document, had written in a way. If they'd actually done a better job of paying attention to their career lawyers within the EPA general counsel's office who would not have written it that way, they would have won that issue. But their arrogance and their desire to slam this home led to sloppy legal work, I think initiated by political appointees of the Bush administration, and then years later, this one little sentence came back and Breyer drove it home.
- Joe: Right. Let's dwell on this a bit. Let me say if I understand what you wrote in the book and what Jim Milkey did at the lectern. Essentially what the petitioners pointed out on this issue was that, of course, EPA had the discretion well settled under administrative law to not decide at any given moment that they were going to conclude that greenhouse gases presented a danger to public health and the environment. But essentially what Milkey ordered was the way they explain their decision, they didn't exercise their discretion based on a good sound reason. What you point out in the book is that all Milkey asked for was, even if the agency goes back and makes the same decision, the next time they do it, they have to use legitimate lawful reasons for making that decision.
- Richard: It's even more precise than that. Everyone acknowledged and Milkey acknowledged that EPA could have said, "We're busy." They could have said, "We have a lot of things on our plate," but instead, they gave about eight reasons of why they weren't going.
- Joe: Most of which were political.
- Richard: Right. Most were political. Probably a couple of them might've been okay, but one of them basically was, we don't think the statute makes sense. We don't like the statute. What Milkey said is, that's not a legitimate reason. The fact you disagree with Congress's determination of policy, so you can't give that reason. What Breyer did, and Breyer was just your classic law professor. He asks these



meandering questions which are hard to follow. Breyer basically pointed out to Greg Garre that what the government had done in denying the petition to regulate. They had listed these eight reasons, one of which was we don't like the statute, and said, "In light of these considerations we're going to deny the petition."

Richard: Breyer said they hadn't said that any one of them was alone by itself enough to deny it. They'd referred to them all, which means we don't yet know what they would do if we conclude one of those is illegitimate because they had relied on the considerations, not just on any one of them. If they just relied on one or said any one of them is sufficient, they might have won the case. It was a classic lawyer's mistake, and Breyer sent it home. There was one really interesting moment at argument, and that is when Jim Milkey stood up to do his rebuttal. When he stood up to his rebuttal, Scalia had spotted what was happening here. He could see the handwriting on the wall. He could see that that narrow argument about considerations and one being tainted might well mean the side he favored, the government, was going to lose.

Richard: So, he tried to basically, through humor and jocularly, he tried to get Milkey to concede that wasn't really what they were arguing. When Milkey stood up to do his rebuttal, even before Milkey could say, Mr. Chief Justice, may it please the Court," Scalia sort of who was just incredibly brilliant tactician, he said, "Mr. Milkey, you don't possibly mean whatever," laughing. And Milkey said, "Of course not." And everyone burst into laughter. What Milkey didn't realize at the time was that, and this is his one slip, not surprising, was that by embracing what Scalia said, he might of well have conceded away the narrowness of their argument. That's when ...

Joe: He might have conceded away the winning point.

Richard: The winning point, and that's when Breyer just jumped in and Breyer stopped everything, and said, "Wait a second, Mr Milkey. What was your answer to Justice Scalia's question? I thought your answer would be this. I thought your answer would be that that's exactly what you're arguing." Milkey quickly realized that Breyer was throwing him lifeline, understood what Scalia had done and grabbed it. It's that kind of sort of back and forth and strategy and detail that I really try to bring out.

Joe: Well, again, the trio of Lazarus, Milkey and Breyer really make for a wonderful chapter. You said something, and this is a bit of a segue. You said something earlier that what people have to appreciate in this kind of work is that when you want to be an environmental lawyer, if the important attribute is not being a good environmentalist so much as it's being a good lawyer. What you described as the sort of initial mistake, which is the way the EPA years earlier had



explained its decision not to take action, appears to have been written not as a series of carefully crafted legal arguments, but as a sort of almost broad brush or blunderbuss of political and policy arguments including we prefer our policy to the policy embedded in the Clean Air Act.

Joe: That seems to me to have, if you will, the political appointees fingerprints all over it, in fact you even report that in the book. I think it's an illustration of something that we're watching even now with this administration. You characterize the then assistant administrator for air and radiation, Jeff Holmstead as, instead of, if you will, leaving well enough alone and not responding to the original petition at all, looking at the petition as an opportunity to not only make a political point but try to enshrine the political agenda into the law. That really, several years later, at the lectern and from the bench in Justice Breyer's seat, that move unraveled.

Richard: Yeah, absolutely. What you see happening in this case, and I think it is what we're seeing happening right now with the Trump administration is what I might refer to as reverse engineering. That is, they first decide what they think the answer has to be and then they try to take law and science and find some way to kind of Jerry rig it to make it look like it supports it.

Joe: Trying to make it look like a legal decision and then say this is the only interpretation of the law that's available.

Richard: It just doesn't work. When you do that, you're very likely to be doing something which is arbitrary and capricious. Here, it began with Dick Cheney, no less than the vice president United States. He wasn't content in having George Bush sign a letter which said, I'm not going to regulate greenhouse gases. I want there to be legislation on this. As a matter of policy, I'm not going to do it. He could have done that, but instead Cheney had Bush sign a letter which said greenhouse gases aren't air pollutants. He answered a legal question. Cheney's not a lawyer. He didn't consult with any lawyers. He didn't consult with EPA, the general counsel's office or any of the lawyers who were there. He didn't even consult with Christine Todd Whitman, the general counsel EPA, but he decided that's my answer. Greenhouse gas are not air pollutants. It may have been provided by some sort of policy type lawyers at the White House, but they hadn't done any real legal analysis and they stepped on it and then they paid the price.

Richard: They paid for the price for that in the US Supreme Court about four years later. Bad lawyering can get you into trouble just like good lawyering in this case can rescue you.

Joe: We're observing that same kind of strategy being replicated where in the case of say, the Affordable Clean Energy rule, instead of simply arguing that the



statute allows us to choose one of several different policy approaches and here's our preferred policy approach and we're cool because our preferred policy approach is consistent with a reasonable interpretation of the statute, they go for broke, the same way Cheney and Holmstead did in the ACE rule, which is to say there's only one interpretation. Period. End of story. Don't ask any questions, and oh, by the way, the interpretation is perfectly aligned with our policy preference.

Richard: Right, and you lose credibility. When you make that argument, you lose credibility, and even then when you make a backup argument, you've kind of lost the momentum. You've lost the Court. That's happening right now in a whole series of areas with the Trump administration, and it certainly happened in this case. In this case, they insisted not really in the lower Courts and the way the EPA wrote the opinion, it wasn't, we have discretion to decide that greenhouse gas are not air pollutants. It's the only reasonable way to read the statute. They made that argument, in their opinion, they made that argument for the DC Circuit, and they really repelled even some conservative judges on the DC Circuit. I think that happened to some extent the Supreme Court.

Richard: I think one reason they lost in the Supreme Court was the fact that EPA had made this sort of mistake, which Milky and then Breyer exploited on that third issue by deciding not to decide, but I think they also lost all three issues in the Court in part because they lost credibility once they argued that greenhouse gases are not air pollutant, which is a very hard argument to make with a straight face. Because statute defines an air pollutant as a chemical compound emitted into the ambient air, and there's not much doubt that greenhouse gases are chemical compounds emitted to the ambient air, including methane, which EPA had already said that it regulated. Once you've lost credibility with judges or Justices on one issue, they're not quite listening so well to the rest of your argument. I think that also hurt them.

Joe: Let's talk about the Justice, your chapter title refers to as the bow tie Jedi master, and then conclude with what you took away in terms of the lessons learned from really studying and writing about this sequence of events.

Richard: Yeah. Justice John Paul Stevens. Justice Stevens wrote the opinion for the Court of Massachusetts versus EPA. He's the one Justice I spoke to on the record about the case. I've talked to other Justice, but the only one who spoke on the record with me was Justice John Paul Stevens. It was a highlight of the research was flying down to Fort Lauderdale was spending time with Justice Stevens talking about the case, just a remarkable person. Justice Stevens, what's so fascinating about him and his life is when he got on the Court in the 1970s, he was actually Justice Douglas's replacement appointed to the Court by a Gerald Ford.



Richard:

When Justice Stevens first got on the Court, obviously he was sort of a fairly conservative Republican. He had been an antitrust lawyer or a business lawyer before he went on the Seventh Circuit. He was somebody who sort of a kind of classic. He was a loner. He very much was a maverick who wrote for himself. It'd often be a unanimous opinions and then a separate opinion by Justice Stevens, eight to one, separate concurrent opinion. He's a very independent minded individual. Then over time, Justice Stevens changed and his role on the Court changed. By the time he was on the Court in the 90s, certainly in the early 2000s, as his seniority rose in the Court, he was not the decisive vote like O'Connor was or like Justice Kennedy was, he wasn't this swing voter in the middle, but he was a senior Justice for Massachusetts versus EPA, he was the most senior Justice next to the Chief Justice.

Richard:

That meant that when he was in the majority and the Chief wasn't, he had the opinion assignment authority, and therefore he had the ability and authority to try to figure out how to keep that majority. When the Justices voted conference in favor one way or the other, it's a tentative vote and votes change during the opinion drafting process. Once Justice Stevens had the authority, and I would say the responsibility, to make sure that those majorities held, he no longer wrote for himself. He became what I refer to the Jedi master. He became the master of keeping that majority and of getting that majority, of getting that swing Justice, not just a vote with them initially, but to stay with them. So when this case happened and the vote was five to four in conference and Justice Stevens was the senior Justice of the majority, and Justice Kennedy had supplied the fifth vote in the case, Justice Stevens faced a challenge.

Richard:

He knew two things. He knew one, he cared tremendously about this issue. He felt strongly, he said, when I talked to him, he felt strongly the opinion here should be opinion written to the public, that too many people were not taking the climate issue seriously and he was just sort of at a loss to understand why so many Republicans didn't take the issue seriously. He felt this the case we could write to the public. At the same time, he knew that he only would have an opinion for the Court in favor of Massachusetts if Justice Kennedy kept with the majority, and Justice Kennedy was known in close cases, including environmental cases for wandering, for shifting sides. So he said to himself, I can assign this case to myself and write a more significant opinion, but at risk of losing Justice Kennedy or I could assign the opinion to Justice Kennedy.

Richard:

You assign it to the most marginal Justice. If you do that, the odds are that Justice switching sides are virtually nil. Justice Stevens told me about how he had seen Justice Brennan in an important civil rights case make the mistake of assigning to himself, Brennan, and then losing Kennedy and losing the majority. So, he's very wary of not assigning to Kennedy. At the end of the day, he decided to assign it to himself. I think partly a little ego, a big case, he wanted to



do it, but also because he things he wanted to say and things he wanted the opinion to say. And his worry was, or I assign Justice Kennedy, this could be a very narrowly written opinion. But then he took on the great responsibility of making sure he could keep Kennedy, and while he's trying to keep Kennedy on board, Justice Scalia and Chief Justice Roberts are doing everything they can to write opinions to pull Kennedy back.

Richard: It took Stevens, I think eight drafts to get Kennedy over. If you read the opinion you can see him making overt references to Kennedy to keep him on that side, quoting Kennedy, quoting prior opinions of Kennedy and then making qualifications in the opinion, make it a little bit narrow in some parts to get Kennedy still there, but never shied away from the opening of the opinion where he makes it quite clear he's making it a statement to the American people about the threat of climate change.

Joe: Well, in the book Stevens is the other, sort of puts in the other tour de force performance as does your rendering of that performance. What really comes across is what a great job he does in terms of relationship management that's informed by what the other Justices interests are and what motivates them and that's really well presented.

Richard: It does a great job. There is a cost to it. If one looks at the opinion, there are some parts which are like a little opaque. In the reasoning, that's often how you keep a majority. You keep a majority by being less clear, not more clear.

Joe: Well, as you very succinctly lay out in the book, there's sort of three parts. There's the broad part about climate science and greenhouse gases. There's the very narrow targeted part about the extent to which the agency has to go back and fix the problem, but that's well short of issuing a kind of proactive remedy. Then, there's the vague part on the standing issue, which maybe muddies things up, but it means that current laws at the time on that kind of hold serve.

Richard: Then there's the unqualified part that greenhouse gas are air pollutants, which we thought was simple. This is also where you see, I think from Stevens and for Milkey and the other lawyers, and this is where they basically took a page from Thurgood Marshall. Thurgood Marshall won Brown this ...

Joe: As an advocate.

Richard: As an advocate, an extraordinary victory, and no one would actually say that this case is as sort of historic as Brown v. Board of Education. It's a big case, but Brown is sort of one of their few biggest cases ever decided by the Supreme Court in a matter of constitutional law. But the way Marshall won Brown was a small ask. He established a broad principle, and that, is segregation in public



school education as unlawful, violates the constitution. But where he and the Justices basically qualified was the remedy, because that's how they kept it unanimous. That's how they kept it. So broad was on the remedy, and that's what Stevens did too here. Stevens qualified on the remedy and certainly Jim Milky and the environment petitioners, they knew they could only win this case by doing a small ask, and that's what a smart lawyer does.

Richard: A smart lawyer knows how to win. They're not giving a speech to Congress, they're not giving a speech to a bunch of constituents. They're not bringing a speech to a bunch of wonderful environmentalist who believe, as I do and most of us do, that climate change is one of the greatest threats that humankind faces right now. When you're in front of the United States Supreme Court, that's not your job. Your job is to make a legal argument that can win. Once you win, including win narrow, then you celebrate, then you take it, then you try to explode it into something more. But here you try to win. This the case which was against all odds. It was against all odds when they initially brought it. One thing we haven't talked about at all is, when this case was first brought, there was this one guy, this guy Joe Mendelson with the Center for Technology Assessment.

Richard: I start my book in the early 1990s because I wasn't planning to do that when I started researching it, but I realized it really started then with this one fellow Joe Mendelson who's not with any of the big fancy environmental groups. He could never have gotten a job with them. He's in this little walk-up place on Capitol Hill where there are very few people. They are living paycheck to paycheck and sometimes there's really no paycheck at all. He brings this case, and he brings this case actually over the objection, the constant objection of the mainstream environmental groups who are so upset with him at some point on pressing this issue that they actually lobby to have his funding cut off from one of his grant makers.

Richard: He's the one who brings the case in the first place. I'm happy to say he was sitting there at counsel table when the case was argued. This is a fellow who kept his eye on the ball. He never let his ego get in the way. He always understood, and I tell you, if you look at any of the briefs, it was terrific. He's in there editing the brief all along the way. He's not a principle brief writer, but he's there. He's doing constructive..., and on the day of the decision, he's the last one who hears about it. Everyone else in Washington DC is out there giving press conferences and media releases, but not Joe. I think he felt probably a little miffed at the time. The officer said he couldn't help but smile. He knew he had brought this case and he knew that he had won the case. There are several unsung heroes in this case, not just one, but I put Joe Mendelson up there.



Joe: I agree. I happen to know Joe and I've known him since about the late '90s, and in the best sense of the word, he's unassuming. It's never about Joe Mendelson, it's about the subject matter or the cause. Your paragraph where you recount how he learned about the case, about the victory and his fairly detached observation of how everybody else was running to the microphone while he was just drinking in and savoring the satisfaction.

Richard: Including the people who would try to stop him from doing this.

Joe: Absolutely. You portray him as just sort of blowing past any temptation to be bitter and refocusing on the cause and the victory itself. Are there any lessons learned that you haven't already conveyed that you would like arising advocates or law students to ...?

Richard: I think I mentioned this, but I think one lesson is good lawyering makes a difference, that it's not enough just to care about the cause and be a passionate individual about causes. If you want to be a cause lawyer, you better be a good lawyer, which means you better know your federal Courts. You better know your civil procedure, you better know your evidence. More often than not, it's these other legal issues that cut across lots of areas of law which are decisive. So, one good lawyering makes a difference, and in this case there were some great lawyering by the environmental petitioners at the States and the environmental groups.

Richard: Good lawyering by them made a big difference in this case. They made a series of tough decisions, including small asks that made all the difference. Good lawyering by Justice John Paul Stevens made a difference. He's a good lawyer. You talk to his law clerks, all these incredibly bright, fancy, pedigreed young people, and they all said that when he walked in the room there was no question who the best lawyer was, he blew their mind away. David Tatel, the DC Circuit judge who wrote the dissent of the case, another brilliant lawyer. The difference good lawyering makes, I think is one lesson. Another lesson which I haven't talked about and that is that one needs to fight to make history, that history doesn't make itself.

Richard: One of the arguments I often hear, and too often from young people, but also some of my own peers, which I resist, is that they say somebody else is on the wrong side of history. That's not how history happens. You have to fight to make history. You want to make something happen, it's not going to happen with you being passive. You're going to have to get out there and fight for it. In this case, they fought for it. They fought for it and they made history. They made history, it wasn't easy, made history with their win in the Supreme Court, and that allowed the Obama administration to take this case, to take this win and enact a sweeping series of laws.



Richard: That also then leads to the other lesson, which is that litigation's never enough, especially in the area of environmental law. To win a big environmental case, you're almost always going against very powerful opposition. Environmental law tends to challenge the here and now and to protect the future. The here and now is powerful, the here and now votes, the here and now has a lot of economic power, a lot of political power. If you beat them in a Court case like this one, huge Court case, they don't go away. They're back. They're back. In other cases, it's like playing whack-a-mole, and they're back politically. In this instance, as we know, and certainly I never predicted this when I started the research of this in 2015, just as Paris agreement is happening as a result of Mass versus EPA, opponents of climate change made history in 2016.

Richard: They elected a president of United States. It takes more than the five Justices of the Supreme Court to ultimately prevail in this area. A presidential candidate who campaigned on the climate issue, he didn't run away from it, he campaigned on it, but against it, against addressing the issue. In that one, I think sometimes a lot of who people care about the climate issue were passive, whether the candidate was or was not the best one on the Democratic side, they basically were passive, and as a result, the other side made history. I don't think good history, but they made history. Litigation is essential. It did a huge amount here, but at the end of the day, it's not just the votes of Justices that make a difference, it's the votes of individual people around the country. That's something that's quite sobering right now as the next election happens. Massachusetts versus EPA historic decision led to a sea change in the United States in our law and told the rest of the world for the first time that we were serious about addressing climate.

Richard: Whether that legacy of the case and the hard work of the Obama administration after that, whether that can be maintained, it's not yet gone. There's lots of efforts unraveled by the current ministraton. But whether that's maintained, that promise is kept of the decision, that depends, in many respects on the next election and the votes of lots of people, and that means the votes of every single individual.

Joe: Well, thank you, Richard for this discussion and thank you especially for an absolutely brilliant book.

Richard: Well, thank you. Thank you, Joe.

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