**Where to start? When does any history start?**

*Richard Nixon: Clean air and clean water, the wise use of our land, the protection of wildlife and our natural beauty,*

**[mumbled] ...nooo to early...**

*George H.W. Bush: I want to call upon all of you to join me in enacting into a law a new Clean Air Act this year…*

**...I don’t think here either...**

*Al Gore: We came to Kyoto to find new ways to bridge our differences, the imperative here is to do what we promise rather than to promise what we cannot do.*

**...maybe...**

*George W. Bush: We will require all power plants to meet clean-air standards in order to reduce emissions of sulfur dioxide, nitrogen dioxide, mercury and carbon di - dioxide within a reasonable period of time*

**Let’s start here. It’s as good a place as any, when you’re trying to pick a starting point for a cascade of falling dominoes. This was the largely-forgotten moment in the 2000 presidential campaign that George W. Bush said he would regulate greenhouse gas emissions.**

**You may think of Al Gore as the original “global warming” politician… but in 2000, it actually seemed like it would be his rival - George W. Bush - who would enact the first meaningful regulations of greenhouse gas emissions.**

*Richard Lazarus: … because it was George Bush and not Al Gore in the 2000 election… it was Bush who campaigned on the promise that he would regulate greenhouse emissions from the nation’s powerplants… he said that in September of 2000… he went to the left of Al Gore on the issue.*

**This is Richard Lazarus, a law professor at Harvard specializing in environmental law.**

**When George W. Bush won, he signalled to the world just how seriously he was going to take climate change. And he did that by appointing a woman named Christine Todd-Whitman as head of the Environmental Protection Agency..**

*George W. Bush: [2:30-] She is a… strong person. She is plenty capable of taking on this difficult but important assignment.*

**She was governor of New Jersey… and a rising star in the Republican Party.**

*Christine Todd Whitman: Mr. President, I am honored to be asked to serve as the administrator of the Environmental Protection Agency… [fade under and out]*

*Richard Lazarus: There’s been no one before or since of the national political stature or clout made head of EPA, no one more, than Christine Todd Whitman… she was presidential timber… she was a household name in the United States back then.*

*Christine Todd Whitman: Teddy Roosevelt, our first conservationist president once said I recognize the right and the duty to develop and use the natural resources of our land. But I do not recognize their right to waste them for the generations that come after.*

*Richard Lazarus: Most people who were watching this, including environmentalists… thought the bush administration was going to be the hero on the climate issue.*

**While the EPA isn’t usually a jumping off point for the presidency, as far as cabinet positions go… if it were going to be, being the Republican who spearheaded the nation’s response to climate change would be a very visible, very politically shrewd move.**

*Christine Todd Whitman [5:40]: I have never underestimated the importance of environmental protection, just as I have never over-estimated the ease in achieving it.*

*Jeff Holmstead: Governor Whitman had been assured by the Whitehouse that yes that was part of her mandate.*

**This is Jeff Holmstead. He worked in George W. Bush’s EPA. Christine Todd Whitman was Jeff’s boss, but he was in charge of the branch of the EPA that would have to figure this all out… how to make Bush the hero on the climate issue.**

[Crossfire Theme]

*Clip: Live from Washington. Crossfire… [fades down]*

**One of the first orders of business for Christine Todd Whitman, just five weeks after inauguration, was a trip to Italy for international climate talks… and before she left she went on TV.**

*Clip: Governor, tonight as we sit here the environmental conservatives are up in arms.*

*Jeff Holmstead: People in the white house were aware of what the president had said, and so she felt like when she went on Crossfire that she would not be getting crosswise with the administration.*

*Christine Todd Whitman: He has also been very clear that the science is good on global warming, it does exist, there is a real problem that we as a world face from global warming and to the extent that introducing CO2 to the discussion is going to have an impact on global warming, that’s an important step to take.*

*Jeff Holmstead: In terms of whether it was the appearance on crossfire that created the stir. I think it had actually been started before then…*

[building music]

*Jeff Holmstead: You certainly had people in industry who understood what a big deal this was… and how potentially problematic it was from an economic perspective… so I think there had been lobbying going on for months before that.*

[more build]

*Jeff Holmstead: But I do think that sort of that all came to a head.*

**In response to lobbying from fossil fuel-related industries, and to members of Congress from the states where those industries were particularly powerful, the Bush administration** [**crafted a letter.**](https://www.presidency.ucsb.edu/documents/letter-members-the-senate-the-kyoto-protocol-climate-change)

**They never consulted Christine Todd-Whitman, the rising Republican star who signed on to tackle on climate change…**

**And in this letter, they completely disavowed Bush’s campaign pledge on greenhouse gases.**

*Christine Todd Whitman: And it was a big reaction, it was a big reaction, it was a very big reaction. It was a British paper I think that said, with one stroke of a pen the President has determined that there are more important things in the world than the rest of the world, basically… that the United States is more important.*

**That’s Christine Todd-Whitman again. She declined to be interviewed for this story, but back in 2007, she talked to Frontline.**

*Christine Todd Whitman: The way it happened was the equivalent to flipping the bird, frankly… to the rest of the world, on an issue about which they felt so deeply.*

**This flip essentially ended Christine Todd-Whitman’s national political career. The Bush administration completely pulled the rug out from under her. They let her go on TV and say one thing, and then while she was in Europe, without consulting her they did the exact opposite. She left the office after a couple of years, after repeatedly coming to conflict with the White House.. There was no more buzz about her as a possible presidential candidate.**

*Christine Todd Whitman: I have never underestimated the importance of environmental protection… [fades downs]*

[Music Fades]

**It’s so hard to say when any history starts. Which domino was this decision? Was it the first… was it just another that fell?**

**At the very least… it’s a prologue... to a causal chain that once seemed like it would be one of the most important in the history of the planet… and seen in a certain light, it may still be.**

[Outside/In Theme Music]

*Janet McCabe: I mean it was like, you couldn’t write this in Hollywood.*

*Jim Milkey: I faced enormous pressure to throw in the towel.*

*Jeff Holmstead: I don’t think we will know the true legacy for years into the future*

*Jim Milkey: … telling me the future of the environmental movement was on my head.*

*Lisa Heinzerling: It’s not a position of respect that they’re taking, it’s a position of intransigence.*

*Janet McCabe: Once it was stayed, Boom. Everything stopped*

*Justin Schwab: The Supreme Court does not hand out cert like candy, but its entirely reasonable to expect that these issues will come before it for a fifth, and potentially final statement in this saga.*

[Outside/In Theme Music]

**This is Outside/In, a show about the natural world and how we use it. I’m Sam Evans-Brown. Today on the show, we’re bringing you inside what may be the most important environmental Supreme Court Decision in history. It’s a story about trying to confront the one of the greatest challenges of the 21st century, with one of the most celebrated laws of the 20th century. As such, ultimately, it’s a story of the power … and the limits… of the law.**

[Outside/In Theme Music Posts and fades]

**The story all starts with a little piece of legislation… called the Clean Air Act.**

*Ann Carlson: Ok, we are. I'm recording.*

**And Ann Carlson is a scholar of the Clean Air Act at the UCLA school of Law… she wrote a book...**

*Ann Carlson: ...called Lessons from the Clean Air Act*

**The Clean Air Act was first passed in the 60s, but it didn’t really become what it is today until it was amended in 1970. Ann says those amendments were a sea-change. They were the first time that public health was put first, ahead of the profit of regulated industries.**

**As a law, it’s remarkable for a couple of reasons.**

*Ann Carlson: It is very flexible, it's very flexible, but it's also very stringent at the same time.*

**It was written at a time when America was starting to get a little freaked out by just how much we could affect the environment… smog, industrial fumes, sulfur… these invisible pollutants were becoming more and more… visible.**

*Ann Carlson: In 1970, the air quality around the country was terrible. It's hard to describe how bad it was, especially in Los Angeles. But this is true in especially cities around the country. I grew up in Los Angeles, so I was 10 years old in 1970. And for two thirds of the year, we used to have air quality that was so bad that we were supposed to stay indoors.*

**And the people who crafted the law… they wanted to go big… they didn’t want to handcuff future generations… they didn’t know what they didn't know.**

*Ann Carlson: It said basically you need to regulate any pollutant that is dangerous public health and welfare. And that is really common. And it was up to EPA to figure out what those pollutants were. So the air then the act had to define what is a pollutant. And so it defines it really, really broadly.*

**Under the Clean Air Act, a pollutant is defined as “anything that is a danger to human health and welfare”. Broad, right?**  **Which brings us to the first big legal question of this story… Are greenhouse gasses, like CO2, pollutants?**

**From our perspective in 2020, it might seem like the answer to this is an obvious “yes”. But legally, this is a debate that had been raging for years before George W. Bush ever had to weigh in on it… I mean, CO2 is a substance we all exhale every minute of the day. It’s a fundamental part of the composition of our atmosphere.**

**In fact, during the Clinton years this had been the subject of a high profile exchange between then GOP House Majority Whip Tom Delay and Clinton’s EPA administrator, Carol Browner.**

*Ann Carlson: They’re in a hearing, and Tom DeLay essentially asks Carol Browner if the EPA has the authority to regulate greenhouse gas emissions. I think he's expecting her to say no. And she says yes. And she turns to her counsel and says, you know, we will produce a* [*memo*](https://www.law.virginia.edu/news/202003/how-supreme-court-case-turned-professor-jon-cannons-memo) *on that.*

**This memo represented a tantalizing possibility. A plan B. If Congress wasn’t willing to pass a specific climate change law, maybe there was a work around. Maybe the executive branch could just do it… all on their own.**

**And more to the point… maybe they had to. Because there’s another historic feature of the Clean Air Act.**

*Ann Carlson: Congress also says we're not just going to rely on the Environmental Protection Agency. We're also going to allow citizens to sue if the Environmental Protection Agency isn't doing its job.*

**It was actually the first law to explicitly include a citizen’s right to sue.**

*Ann Carlson: And that's actually one of the ways that we get to Massachusetts versus EPA.*

[music]

**Massachusetts versus EPA. The author of that memo, now a law professor at the University of Virginia,** [**later wrote**](https://www.virginialawreview.org/sites/virginialawreview.org/files/cannon.pdf) **“I am not suggesting this is Brown v. Board of Education for the environment, but it may be as close as we will come.”**

**…**

**I started this story with one row of dominoes… one tumbling column of tiles… the story of the Bush administration dramatically pulling the rug from underneath Christine Todd Whitman. But there is an alternate… earlier… parallel place that we might have started this story. And it starts with that memo… written under the Clinton Administration.**

**While Clinton’s EPA had said “YES. Greenhouse gasses are pollution under The Clean Air Act,” They hadn’t done anything about it.**

**For environmentalists, this was really frustrating. At the time Congress was in control of Republicans so passing a NEW climate change bill was a stretch, but over in the executive branch, they had Al Gore as second in command, supposedly this champion for the global warming issue. And then they had a legal opinion that said, we already have the authority to regulate greenhouse gases, we don’t need the legislative branch. And yet… no one was taking action.**

*Joe Mendelson: The Environmental Protection Agency was looking at traditional pollutants, but whenever you mentioned greenhouse gases, and regulating those from the tailpipe of a vehicle, the EPA kind of… kind of avoided the subject.*

**Joe Mendelson, is now senior counsel for Tesla, but once upon a time he was working for a tiny DC-based environmental non-profit called the Center for Technology Assessment.**

**While the big environmental groups — the National Resources Defense Council, the Environmental Defense Fund, the Sierra Club — didn’t want to make trouble, because they wanted to help Al Gore win the 2000 election, Joe and his organization wanted to see progress.**

*Joe Mendelson: If everyone believes the authority exists, but no one's willing to take the legal steps to actually implement that authority and actually use it, then what good is it?*

**And so he tried to push them. He filed a petition, asking the EPA to regulate carbon emissions from the tailpipes of cars. It wasn’t a citizen’s lawsuit yet… but it was the beginnings of one.**

**At the time his daughters were 1 and 3 years old.**

*Joe Mendelson: Raising them as little children, I would sometimes be in their bedroom in a in a rocking chair either trying to put them to bed and sit with them and kind of read over legal work, including this petition. So it's a yeah. In some ways the third child that was born at the time.*

[Music]

**At first it seemed like this was going to work. The Clinton administration called Joe in for a meeting, and told him they were going to use this threat of a lawsuit as a launchpad for their own plans on greenhouse gases. But then Bush was inaugurated president… and the petition was left in limbo.**

[Music fades]

**Now… put a pin in Joe Mendelson laboring in obscurity in his nursery. Let’s go back to where we DID start our story.**

George W. Bush: She is plenty capable of taking on this difficult but important assignment

**When the Bush administration dramatically cut the legs out from under its high profile pick to run the EPA, New Jersey governor Christine Todd Whitman.**

*Christine Todd Whitman: The way it happened was the equivalent to flipping the bird, frankly…*

**We started there because it was that decision that got Jim Milkey’s attention.**

*Jim Milkey: It was a fairly dramatic moment because it became clear at that point that the federal government, at least voluntarily, was simply not going to do anything and was taking itself out of the game.*

**While today, he’s a judge on the Massachusetts Court of Appeals, back in the year 2001 , Jim Milkey was taking a year off as a lawyer with the environmental department of the Massachusetts Attorney General’s office. He was in Denmark with his family — gaining a very european perspective on climate change.**

*Jim Milkey: I did make a decision that when I came back, which was July of 2001, I would do everything in my power to try to carve out a state role in this area.*

**How could a little state, like Massachusetts, take on a global challenge, like climate change? The answer is litigation to force the federal government to take action.**

*Jim Milkey: Our job was to sue people, to defend state officials when they got sued. There's an old expression that if your only tool is a hammer, every problem starts to look like a nail. And we had to develop our nail and our hammer.*

**Milkey and a small crew of lawyers from other like-minded states got to work crafting their own legal argument to force the Bush Administration to act on climate.**

**In the meantime, entirely separately, Joe Mendelson had sued to demand a response to his petition demanding regulation of greenhouse gases from cars, and had been told yes, we’ll give you your response.**

*Joe Mendelson: I remember walking through a snowstorm to get some chocolate milk for our kids. When David Bookbinder and I were on a call with the EPA saying, OK, here's what the settlement’s going to look like.*

**In response the EPA put out a document, again disavowing any federal role in regulating CO2, and it had a whole host of explanations for why: it said the science of climate change was still uncertain, it said the department of transportation already regulated fuel economy standards, it said if it stepped in it might mess up ongoing international climate talks, it said it didn’t have the authority to use the Clean Air Act to regulate greenhouse gas emissions and even if it did, the Clean Air Act didn’t say it HAD to regulate pollution… only that it COULD.**

**In all, there were seven reasons why not. In short,** [**it threw everything AND the kitchen sink at Joe’s petition.**](https://www.federalregister.gov/documents/2003/09/08/03-22764/control-of-emissions-from-new-highway-vehicles-and-engines)

**And this is where Jim Milkey, who had a hammer... found his nail.**

[Music]

**Jim and Joe decided to join forces - to combine their two hither-to-for separate efforts, into one. It is here that our two rows of dominoes merge into one.**

*Jim Milkey: We anticipated what their precise response was going to be*

**So as soon as the EPA issued their reply —**

*Jim Milkey: I believe it was August 28, 2003.*

**Joe and Jim were ready.**

*Jim Milkey: we were able to go to the other states and say, this is what we are doing. Do you want to join us?*

**All in all, 12 states and 30 environmental groups including Joe Mendelson’s all joined together on one case. Which… because Jim filed first was called...**

*Many voices: Massachusetts versus EPA.*

**… Massachusetts versus EPA.**

**The lawsuit demanded the EPA recognize excessive carbon dioxide emissions as pollution. It was based on the Clean Air Act which — written in 1970 — never really contemplated** [**a problem so wicked**](https://web.archive.org/web/20070930021510/http://www.uctc.net/mwebber/Rittel+Webber+Dilemmas+General_Theory_of_Planning.pdf) **as climate change, but which had this very flexible definition of pollution… anything that endangers human health or welfare. Based on that definition, and on the US government’s own climate science, it argued that CO2 must be considered pollution.**

**What began as a document written alone in Joe Mendelson’sdaughter’s nursery, grew into a jangly, somewhat dysfunctional coalition of fifty lawyers, from states and from environmental groups.**

*Jim Milkey: You say how do you manage that? Part of the answer is it cannot be managed!*

**This wobbly team of environmental advocates struggled to get out of their own way.**

[music]

*Jim Milkey: We didn't always see eye to eye, nor do we always get along. And by far and I mean this quite sincerely. The hardest part of the case was dealing with our own side. And as I like to say, of the seven or eight lawyers who were sort of at the core of this. Many of them had personalities as difficult and egos as big as my own.*

*Richard Lazarus: They had very strong, vehement disagreements, and those disagreements became destructive and almost unravelled their case.*

**Harvard’s Richard Lazarus again, whose book, *The Rule of Five: Making Climate History at the Supreme Court* is a detailed accounting of this lawsuit.**

**The first step was the DC Circuit Court of Appeals.**

**It took two years from when the case was announced to when they received their decision. Two years of herding fifty cats with egos, corralling them to agree on the structure and strategy of their briefs.**

**And when that decision came out… they had lost.**

*Jim Milkey: When the D.C. Circuit ruled, it was in a sense neither a victory nor a defeat because the three judge panel split in three different directions.*

**And out of that split decision came a new risk. Standing: the right of a plaintiff to bring a lawsuit.**

*Jim Milkey: The standing issues were quite serious.*

**Standing, when it comes to the harms wrought by climate change is the second big legal question that this case would eventually decide. Traditionally, standing law...**

*Jim Milkey: ...demands immediate, particularized injury...*

**Whoever brings a lawsuit - whether it’s a person or a state - needs to prove that they are connected to and explicitly harmed by the action or lack of action challenged in the case.**

**Essentially, they needed to prove global warming is bad… and prove that it was being made demonstrably worse by the EPA sitting on its hands… that every ton of carbon emitted was causing a little more and a little more harm.**

**Compare that to what people perceived to be the nature of global warming...**

*Jim Milkey: ...which is long term. Incremental, hard to pinpoint to any particular place*

**In the mid-2000s, just fifteenish short years ago... for many, climate change was still perceived as a problem that was far off… with impacts happening 30… 50… 100 years from now, and before then… everything is the same. As if a pot of water suddenly leaps from cold to boiling, and never gets hot enough to burn you in interim.**

*Jim Milkey: One judge thought we had standing. One of the three judges assumed we had standing and ruled against us on other grounds. And the third judge said, Judge Sentelle said essentially global warming is so pervasive, if it is true that no one has standing.*

**If that one judge of the three were right. It would have long-lasting effects on the ability of anyone to bring a climate change lawsuit under the Clean Air Act.**

**And the fact that one judge had ruled based on standing and standing alone meant if they appealed this question would be central once they reached the Supreme Court. There was a lot at stake.**

*Jim Milkey: I faced enormous pressure from the environmental groups to throw in the towel at that point, and there the head of NRDC was calling me from New York, telling me things like the future of the environmental movement was on my head.*

**Think about it:**

**Their lawyers would have to stand up in front of the Supreme Court justices and make the case that the global warming is real, that the pervasive world-wide slow burn that are climate impacts are manifesting NOW — that states are being harmed NOW -- and that you could blame the EPA for at least part of it.**

**But what if they lost?**

**HERE’S WHAT COULD HAPPEN: It would be the end of the Plan B. The executive branch could never use the Clean Air Act to regulate CO2, no matter who was in the White House. But also a precedent could be set: depending on the exact wording of the decision, states, and individuals would find it harder sue the federal government over damages incurred by climate change, they might even lose the right to do so.**

**It could be a crippling blow.**

*Jim Milkey: And it was... it got. Extremely heated and uh difficult.*

**So, there was immense pressure to quit while they were ahead. Cut their losses, wait for a better opportunity, a better case.**

**But Jim Milkey wanted to keep going.**

*Jim Milkey: If we're afraid to bring the case because we might lose, we've already lost.*

**He thought — we’re already there. The Bush administration already is dead set against using the Clean Air Act to regulate CO2.**

[Music]

**First they asked for a rehearing, were told no… and so they decided to go all the way to the top.**

**Jim drafted an appeal to the Supreme Court, asking them to review the case. These petitions are not easy to craft. After all, there are thousands of them every year, and only a select few are chosen for review. You’ve got to get the court’s attention. You’ve got to prove that something in the lower courts went WRONG.**

**So Jim wrote his appeal, and floated it by the ragtag band of lawyers and environmentalists the case had tenuously cobbled together.**

*Richard Lazarus: Jim's draft was the one time there was consensus among all the states and environmentalists... and that's that Jim's draft was terrible.*

**The last ditch effort to save what may be the most significant environmental lawsuit in history, after a break.**

**<<<<<<<<<<<<<<<<<<<<<<<<<Break>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>**

**When Jim Milkey’s first drafted his appeal to the Supreme Court, asking them to review their case against the EPA, he made his argument based on CO2 as pollution. It was technical, internationally-focused, science-based...**

**Which is fine, if your audience is donors to environmental groups...**

*Lisa Heinzerling: It struck me that this Supreme Court wasn’t particularly interested in environmental protection or international law.*

**And this is when Lisa Heinzerling enters our story. Lisa is a professor at the Georgetown University Law Center, but before that she served in the Obama administration as a climate advisor, and had been a clerk for Supreme Court Justice William Brennan, but between all of that had spent three years at the Massachusetts Attorney General’s office.**

*Lisa Heinzerling: And at that time Jim Milkey was effectively my boss...*

[Music]

*Lisa Heinzerling: ... and so we got to know each other very well. We were friends and he liked the way I wrote briefs.*

**After Milkey’s first stab at the appeal was generally panned by his colleagues, he enlisted Lisa. He understood that she knew how to craft an argument that could get the Supreme Court’s attention.**

**The enormity of this job is a little hard to overstate. The EPA was created in 1970. When Lisa Heinzerling took over writing the briefs for Massachusetts v EPA it was 2006. According to Richard Lazarus, in that timespan, the Supreme Court had never taken a case where an environmental group had lost to the EPA in lower court. Never.**

**Heinzerling refocused the whole case on the reasons that the EPA had given for denying Joe Mendelson’s petition. The EPAs error, she calls it.**

*Lisa Heinzerling: And that error was to allow the EPA simply to say… you know… I just don’t want to do this at this time… we’re not interested in taking on climate change.*

**If you remember, in their response, the EPA listed****seven reasons why they said no to the petition… the kitchen sink.**

*Lisa Heinzerling: Almost a seemingly random list of reasons why it didn’t want to regulate.*

**Among the seven reasons the EPA gave for why they wouldn’t regulate carbon, they had listed one that was generally understood to be true: Congress may have passed the Clean Air Act, but the EPA gets to decide how — and when to enforce it. This is called their discretion... The EPA can put off regulation as long as it makes sense.**

**But then there was all this other stuff… 6 other reasons that sounded… a lot more political in nature.**

*Lisa Heinzerling: So even if the statute was perfectly clear that EPA could regulate, had EPA adequately explained why it would not?*

[music]

**This was where Lisa Heinzerling found inspiration in a story from 1853, written by Herman Melville…**

*Lisa Heinzerling: I even opened the new version of the cert petition with a quote from Bartelby the Scrivener, who famously says, when asked to perform his job, “I would prefer not to.”*

**In the story, Bartleby, a copyist, starts passively refusing to do work.**

**So Lisa’s trick here was to reframe a case that really the environmental movement wanted to be about climate change, and make it a case about something which catnip to the justices Supreme Court: separation of powers.**

*Lisa Heinzerling: The basic legal error was a quite fundamental error of administrative law.*

**In the Clean Air Act, Congress told the EPA it had to regulate air pollution. It said you’ve got discretion in how to do it, but how much discretion. Unlimited discretion?**

*Lisa Heinzerling: “I would prefer not to.”*

**Can it give a list that includes a bunch of political considerations as a reason not to act? Like hey we don’t want to screw up the President’s strategy at the climate talks? Isn’t that tantamount to saying, the President can ignore congress?**

[music]

**This reframing to focus on the balance of power between the three branches of government is what Lisa Heinzerling — who had worked for a Supreme Court justice and seen what makes them decide to take a case — brought to their appeal.**

**Each year only .1 or .2 percent of the cert petitions that are written wind up being taken by the supreme Court…**

**In June of 2005, Lisa’s petition was *accepted*.**

**The first time, ever, that the Supreme Court had taken an appeal by environmental groups challenging a decision in favor of EPA.**

*Lisa Heinzerling: They’re just human people and they have their priors and their own idiosyncrasies and preferences about styles of arguments. And so yeah, I think an argument at this level, even a legal argument at this level is an exercise in creativity that most people wouldn’t expect.*

[music fades]

**And so they had their three hurdles… three things they had to convince the Supreme Court were true. . First… that greenhouses gases be considered pollution under a law that didn’t have climate change in mind when they wrote it.**

*Ann Carlson: they said basically you need to regulate any pollutant that endangers public health and welfare and is really common*

**Second… that the state of Massachusetts being caused harm by the decision of the EPA not to do anything about that pollution.**

*Jim Milkey: ...immediate, particularized injury...*

**And lastly, when the EPA decided to do nothing about that pollution, they made that choice for the wrong reasons.**

*Lisa Heinzerling: ...a fundamental error of administrative law.*

[pause]

*Clerk: We’ll hear argument first today in 05-1120. Massachusetts v. Environmental Protection Agency.*

*Jim Milkey: Mr Chief Justice, and may it please the court… [fades down]*

**Argument day… the Olympics of lawyering.**

*Joe Mendelson: You’re very close. You’re sitting down, they’re up on the dias. And they have very nice chairs that they can lean back in and kind of spin a little bit around.*

*Jim Milkey: We have shown that the sea levels are already occurring from the current amounts of greenhouse gases in the air, and that means it’s only going to get worse as —*

*Antonin Scalia: Well when? When is the predicted cataclysm?*

*Jim Milkey: Your honor it’s not so much a cataclysm as ongoing harm. The harm doesn’t so much spring up in the year 2100, it plays out continually over time.*

*Joe Mendelson: At one point during the oral argument one of the justices asked a question. A little bit of spittle came out of his mouth and landed on my paper. [laughs]*

*Antonin Scalia: I gather that there is something of a consensus on warming, but not a consensus on how much of that is attributable to human activity.*

**Antonin Scalia was the first justice to ask questions… and they weren’t friendly questions.**

*Antonin Scalia: And I gather that… what what is it… seven percent of the total carbon dioxide emissions are attributable automobiles in the united states?*

*Jim Milkey: [00:59:32-00:59:38] I have a bad habit that, you know, I I have a need to correct people.*

*Jim Milkey: It’s actually six percent your honor.*

*Antonin Scalia: Six percent, thank you. [mumbles]*

*Jim Milkey: All the books on Supreme Court practice say never, EVER, interrupt a supreme court justice unless it’s really really important. And frankly, I think I shocked him at that time because it was I was correcting him against our interest. And he realized that he you know, he was facing someone who was not trying to pull the wool over his eyes.*

*Antonin Scalia: Only new cars would be affected right, so even the reduction of the six percent would take a few years, wouldn’t it?*

*Richard Lazarus: The amazing thing that happened that morning was that Jim Milkey tamed Justice Scalia.*

*Jim Milkey: Your honor we have shown on the record that a 40 percent reduction on carbon dioxide is currently feasible. And since those emissions are —*

*Antonin Scalia: Well not in the first year…*

*Jim Milkey: No no, we agree your honor—*

*Anton Scalia: I mean ultimately... [fades down]*

*Richard Lazarus: As skilled as justly, it was as tough and insightful as his questions were. Jim Bilkey handled them one at a time, handled them just perfectly.*

*Antonin Scalia:Is that how it works? I'm not a scientist, but I'd be surprised if it was so rigid.*

*Jim Milkey: Your Honor, I don't believe it's established it's necessarily a straight line. But I want to emphasize that small vertical rises cause a large loss of horizontal land. For example, where the slope is less than 2 percent, which is true of much of the Massachusetts coastline, every foot rise will create a loss of more than 50 feet of horizontal land.*

*Richard Lazarus: It became clear that Jim had the upper hand.*

[music]

*Antonin Scalia: That isn't, that isn't... your assertion is that after the pollutant leaves the air and goes up into the stratosphere it is contributing to global warming.*

*Jim Milkey: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.*

*Antonin Scalia: Troposphere, whatever. I told you before I'm not a scientist. [Laughter] That's why I don't want to have to deal with global warming, to tell you the truth.*

[Music]

**What would — months later — become clear, was that the crucial question, came during the questioning of the lawyer for the EPA… . And it came not from justice Scalia, but from Justice Stephen Breyer. And it was almost straight from Lisa’s brief**

*Stephen Breyer: Now their claim with respect to that, is that at least three of the four considerations are not proper things for the agency to take into account: namely whether the President wants to do something different, whether we're running foreign policy properly, whether cooperation with other countries are relevant to this particular issue. So what they've asked us to do is send it back so they can get the right reasons. Now... if they want not to do it. What's your response to that?*

**What Breyer is asking here is a little confusing, so let me break it down here.**

**He’s saying is that, when the EPA threw the kitchen sink at Joe Mendelsohn’s first petition… giving all sorts of reasons why they wouldn’t regulate carbon… they made the mistake of adding an S. They said in light of these “considerations…”**

**They implied that all of those reasons should be taken and understood as a group… both the legitimate ones, like EPA’s broad discretionary powers, and the illegitimate ones.**

**Which… isn’t it kind of amazing to think… the fate of a decision this large… the future of climate policy in the United States… resting on a single letter.**

**That’s what you’d hear that EPA’s lawyer, whose name is Gregory Garre, isn’t getting.**

*Gregory Garre: The petitioners acknowledge that was an appropriate consideration for the agency. So even if you think the other considerations were inappropriate, and we certainly do not, but even if you think they are, the agency gave an appropriate reason.*

*And that reasons--*

*Stephen G. Breyer: When I write an opinion... when I write an opinion, sometimes I write the words: "We decide this matter in light of the following three factors taken together." And I guess a lawyer who said, "one of those factors alone the Court has held justified the result all by itself.” --in saying the Court has held that, I guess that wouldn't be so. That would be a bad lawyer, wouldn't it? They write that all of these considerations justify our result, again… one of them by themselves, it sounds, they think would not have been sufficient.*

[Music]

*Jim Milkey: There really wasn't much press conference coverage until the court finally ruled on April 2nd of next year, 2007.*

**If you haven’t deduced already… the EPA lost. The states and environmental groups won. The four justices appointed by democrats had been joined by Justice Kennedy as the swing vote.**

**And if you read the decision, the ultimate reason they won is very narrow. The judges did say that greenhouse gases seem to meet the EPAs definition of pollution. They did say that Massachusetts was suffering harm because of climate change, but all they said was that EPA had to go back and apply proper — legal — reasons if they were going to decline to regulate.**

*Jim Milkey: That's all the case, in a technical sense, did. Notwithstanding that, the coverage of the case was along the lines of ‘Supreme Court declares global warming, real rebukes, Bush administration orders solution be found.’*

[Music]

*Jim Milkey: which in a technical sense is quite inaccurate but has some truth to it in a larger sense.*

**Despite the very narrow ask, and really the very narrow technical meaning of the opinion… its language is grandiose.**

*Jim Milkey: The majority opinion by Justice Stevens wanted none of that and and started out saying respected scientists say, and then includes a list, a long list of all the anticipated harms from climate change. And so in a larger sense, this was the court putting its imprimatur on the problem.*

**The ruling cleared the way for the EPA, responding to the sole direction of the president… without ANY action by congress… to use the Clean Air Act to regulate the emission of greenhouse gases.**

**The fallout from that decision meant that, after a few years, not only could the agency regulate carbon, they would be required to.**

**Which is why, even today, the Trump administration is crafting new regulations… new rules, ostensibly, to limit greenhouse gas emissions.**

*Jeff Holmstead: The Trump administration has adopted this program, that really is designed to establish the limits of what EPA’s regulatory authority is under the Clean Air Act.*

*Janet McCabe: But the Clean Air Act… I would not say it has run its course, or met its match.*

*Justin Schwab: In other words, Massachusetts isn’t the final word on this subject.*

**After the break… the dominoes keep falling.**

**<<<<<<<<<<<<<<<<<<<<<<<Break 2>>>>>>>>>>>>>>>>>>>>>>>>>>>>>**

**I noted at the beginning that the lawyer who wrote the original legal opinion that suggested the Clean Air Act could be used to regulate carbon dioxide said that Massachusetts v EPA is the closest we’ll come to a Brown v the Board of Education for the environment… one declared segregation in public schools unconstitutional, the other strongly suggests the federal government has to fight climate change.**

**Both big statements. Statements that feel landmark… like nation-changing decisions.**

**But let’s follow that comparison.**

*Barack Obama: Thank you Georgetown, everyone please be seated and my first announcement today is that you should all take off your jackets… and I’m going to do the same. [cheers] It’s not that sexy.*

**During Barack Obama’s presidency, Congress took a stab at Plan A: passing a big, sweeping climate change law. It was called Waxman-Markey, it was a cap-and-trade bill and it went down in flames.**

**So the Obama administration took Plan B — using executive authority to regulate greenhouse gases using the Clean Air Act as Massachusetts v EPA said they could — and ran with it.**

*Barack Obama: ...because the decisions that we make now and in the years ahead will have a profound impact on the world that all of you inherit.*

**They wrote something called an endangerment finding that officially declared six key, greenhouse gases “pollution.”  
  
They used that finding to craft new fuel efficiency standards for cars and trucks, regulations on new power plants that burn coal and natural gas….**

*Barack Obama: and the question is now, whether we will have the courage to act before it’s too late*

**...and finally in 2013...**

*Barack Obama: As a president, as a father, and as an American, I’m here to say: we need to act.*

**...a sweeping, and politically risky plan to use the Clean Air Act to reduce carbon emissions from existing US power plants, named the Clean Power Plan.**

**With all of this in their pocket — the Obama administration went…**

*John Kerry: Mr. Secretary General, Monsieur le Président de La France…*

**… to Paris… to the United Nations. And in 2016....**

*John Kerry: When 196 nations simultaneously, said a resounding yes.*

**This is something that I think many, even in the environmental movement don’t fully grasp. The US commitment to the Paris Accords was based almost entirely on the authority affirmed in Massachusetts v EPA. And so in a very concrete way, this history… which in so far as any history has a beginning, started in Joe Mendelson’s nursery...**

*Joe Mendelson: I would sometimes be in their bedroom in a in a rocking chair either trying to put them to bed and sit with them and kind of read over legal work, including this petition. So it's a yeah. In some ways the third child that was born at the time.*

**… ended here.**

*John Kerry: That is why our gathering today is in fact, historic. The United States looks forward to formally joining this agreement, this year, and we call on all of our international partners to do so.*

[Music]

**Except, of course, history doesn’t have an end.**

**Because if the US Supreme Court told the federal government that CO2 should be considered a pollutant in 2007… why isn’t that happening?**

**How is it that we’re not hearing all about this new wave of citizen lawsuits designed to force the federal government to comply with Massachusetts v. EPA… to regulate greenhouse gas emissions?**

**Well, for one, those lawsuits are happening, but the reason they don’t get more attention is because litigation is not legislation. Interpreting policy is not as powerful as making it.**

**Well, if you think think back to Brown v. Board of Education. That landmark 1954 decision led to some progress... but the court didn’t specify how to desegregate… which opened the door to differing interpretations and evasions of the ruling on the state and local levels. In Massachusetts v EPA, the court said greenhouse gases are pollution but didn’t specify how to reduce that pollution — and the *how* may just be the achilles heel of the ruling.**

**Massachusetts v. EPA relies on The Clean Air Act, a law which is fifty-years-old as of this year, to deal with a challenge it wasn’t imagined to combat.**

**And that makes it extremely vulnerable to legal challenges.**

**Two, examples of this:**

**The first weakness: while the definition of pollution in the Clean Air Act is extremely broad, because the authors wanted it to be flexible — “anything that is a danger to human health and welfare” — it’s obvious it was written with certain pollutants in mind when you look at the thresholds that trigger regulation.**

[music]

*Janet McCabe: The amount of pollution that triggers permitting and review has been set in the Clean Air Act at either one hundred tons per year or two hundred and fifty tons per year.*

**That’s Janet McCabe. She was the Obama administration EPA official who was the primary architect of the Clean Power Plan. In the 1970s, the authors of the Clean Air Act wanted to focus on large-scale polluters. They said, if you’re just in your yard gardening, releasing the chemicals that create ground-level ozone, you shouldn’t need to get a permit.**

**So they said you only need a permit if you’re emitting 100 tons or more. Which is a lot when we’re talking nitrogen oxides… but in carbon dioxide terms.**

*Janet McCabe: Well a hundred tons of CO2… is not much.*

*Sam Evans-Brown: [laughing] A large kindergarten class might emit…*

*Janet McCabe: Right? Or an apartment building! Or a boiler at a mall!*

**In the United States, the average PERSON emits around 16 tons a year. So, if you’ve got a big family, would you need to get a permit from the federal government?**

*Janet McCabe: The Clean Air Act couldn't possibly have contemplated that thousands and thousands of new types of non industrial sources would have to get Clean Air Act permits.*

**In their attempt to finagle this, the Obama Administration laid out a roadmap: they said we’ll start with the big polluters, and work our way down, and eventually, we’ll decide how small of an emitter will be required to get a permit.**

**This proposal, landed them back in the Supreme Court. In another lawsuit, decided in 2014**

**...in another lawsuit that was decided in 2014.**

**This case, was the unfortunately named UARG v. EPA, which stands for the Utility Air Regulatory Group...**

*Justin Schwab: ...an ad-hoc association founded by the electric utility industry for purposes among other things of potentially challenging EPA regulations.*

**UARG! (sorry)...**

*Justin Schwab: [File 2: 00:02:14-00:02:17] The majority of the Supreme Court in UARG said you cannot do that.*

**This is Justin Schwab who until last year was deputy general counsel in the Trump administration’s EPA.**

**In this case, the Justices *really* didn’t like this “we’ll start with the big emitters and figure out the rest later” approach.**

*Justin Schwab: They said we, the Supreme Court, are not willing to stand on the dock and wave goodbye to EPA as it engages on a multi-year voyage of discovery and decides what it really wants to do.*

**This wasn’t a huge defeat. They told the EPA to just keep regulating the polluters they already were anyway… the ones who were already getting Clean Air Act permits..**

**But, it signaled trouble ahead.**

*Justin Schwab: And they said in UARG, we will greet it with heightened skepticism where an agency purports to discover in an obscure or dormant provision of the statute sweeping authority over important parts of the nation’s economy.*

**In other words, if all of the sudden a law that has never or rarely been used is invoked in a dramatic new way, the court gets suspicious. This is called the elephants-in-mouseholes doctrine.**

**Which brings us to the second legal weakness.**

[Music]

**In the Obama administration’s regulations for existing power plants, the Clean Power Plan, they wrote the rules as if they were regulating the entire grid.**

**But in the 1970 Clean Air Act, there are certain turns of phrase — for example, referring to “an existing source” of pollution — at least imply the law was talking about regulating facilities at the individual level. Which is what had always been done.**

*Justin Schwab: The Clean Power Plan radically departed from that tradition and from that implicit interpretation of the limits of the EPA’s authority*

**Again, the climate change strategy of one of the largest greenhouse gas emitting economies in the world, coming down to grammar.**

[music]

**And it *seems* that this got them in trouble again. A new coalition of states and industrial groups who did not want to revamp their grids challenged the Clean Power Plan… asked the DC Circuit Court of Appeals to issue a stay — that is, to *stop* the Obama administration in its tracks while they challenged their plan in court.**

**The DC circuit declined to do that, but… in Feb 2016, the Supreme Court stepped in..**

*Janet McCabe: [01:13:08-01:13:21] and you know, amazed everybody when they when they issued the stay and course it was all was right around the time that Justice Scalia, you know, it was one of maybe one of the last things he weighed in on before he passed away. You know, I mean, it it was like, you couldn’t write this in Hollywood… Once it was stayed, Boom. Everything stopped.*

*Justin Schwab: And by black letter law and by the Supreme Court's own precedents, in order to issue that stay, the Supreme Court had to determine that there was a likelihood of success on the merits of the challenge. We don't know what aspect of the challenge. The Supreme Court* [*did not give any commentary on its stay*](https://www.documentcloud.org/documents/2709346-15A773-West-Virginia-v-EPA-Order-c1.html?embed=true&responsive=false&sidebar=false&text=false)*. But we know that a majority of the Supreme Court found that there was a likelihood of success on the merits of the challenge against the Clean Power Plan.*

**In other words, they thought something about the Clean Power Plan was illegal.**

**This stay might mean that if a test of Massachusetts v EPA ever comes before the Supreme Court, they might deal it a blow. They might decide that there is no elephant in this mousehole… that while greenhouse gases may be pollution under the Clean Air Act to, it doesn’t have enough power to actually reign that pollution in.**

[Music]

**The Trump administration has now put forward their own proposals to regulate emissions. Their coal plant rule, for instance, is called the Affordable Clean Energy Rule… or ACE. Their new car emissions rules are called the Safer Fuel Efficient Vehicle Rules… or SAFE. Both do much less to reduce emissions than their Obama era counterparts.**

**And surprise surprise… both are being challenged in court. And either of those challenges has the potential to wind up — again — before the highest court in the land.**

*Justin Schwab: The Supreme Court does not hand out cert like candy, but it's entirely reasonable to expect that these issues will come before it for a fifth, and potentially final statement in this saga.*

[Music Fades]

**This is the peril of the Plan B… of relying on THE CLEAN AIR ACT — a law that did not have climate change in mind when it was written — as our de facto federal climate policy.**

*Ann Carlson: I guess I think at the end of the day, if one of these regulatory programs that comes up through the Clean Air Act to regulate greenhouse gas emissions gets to the Supreme Court, it really will be the Supreme Court is everything on this question.*

**UCLA’s Ann Carlson again, author of *Lessons from the Clean Air Act.***

*Ann Carlson: So when we're thinking about whether the Clean Air Act is a powerful tool, at the end of the day, the ultimate decision about that question is going to reside in the Supreme Court.*

**That would be the end of Plan B.**

[Music]

**But the end of Plan B… means that all that remains is to go back to Plan A. - asking Congress to write a new Clean Air Act… for the 21st century.**

*Jeff Holmstead: But one of the things that why I think it's important is ...right now, if you have the environmental community that believes that they can achieve the emission reductions they need under the current Clean Air Act, there's much less of an incentive for them to push for legislation.*

**Jeff Holmstead again. From George W. Bush’s EPA.**

**There is** [**a group of political scientists**](https://www.cambridge.org/core/journals/perspectives-on-politics/article/nonparty-government-bipartisan-lawmaking-and-party-power-in-congress/5500EC62EA53CE786B3A69C51BB29E0C) **out there who have observed that major, lasting political changes… the types of laws that aren’t overturned the next time someone from the opposite party is elected… tend to be passed by bi-partisan coalitions.**

**The Clean Air Act for instance, was passed 73 to zero in the senate in 1970. That was shortly after 10 percent of the entire United States took to the streets in protest, for the first Earth day.**

*Jeff Holmstead: And I think if EPA if if if those limits are established and it becomes understood that EPA’s ability under under the current Clean Air Act is relatively limited, there will likely be much more pressure on on Congress to develop something that actually, you know, will be longer lasting and won't change from administration to administration. And I think that's a very important thing. And I think that I think that within the next decade, maybe less. I think there will be some sort of comprehensive climate change legislation.*

**So again… when does a history end? It doesn’t.**

*Jeff Holmstead: What I would say is… the legacy of Massachusetts v EPA is still being written, and I don’t think we will know the true legacy for years into the future.*

[sounds of climate protest rising to crescendo and cutting off]

[Outside/In theme Music]

Credits:

OUTSIDE/IN IS WAS PRODUCED THIS WEEK BY me Sam Evans-Brown with help from Taylor Quimby, Justine Paradis, Hannah McCarthy, Nick Capodice, and Felix Poon.

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