

MAKING A CASE for the Environment

by melanie d.g. kaplan

AT GEORGETOWN LAW



In February 2006, Professor Lisa Heinzerling was itching for a new global warming project. “I had been thinking, ‘How can I use my skills to do something?’” Heinzerling remembers. “I knew I wouldn’t do the one thing or the only thing, but I wanted to help out and do something.” Shortly thereafter, she clicked open an email that would prove to be crucial in her quest.

James Milkey, an assistant attorney general of Massachusetts, sent Heinzerling (who had worked for the state herself, also as assistant attorney general), along with 30 petitioners, a draft of the Massachusetts v. EPA cert petition that would be submitted to the Supreme Court. The case, if accepted by the Court, would be the first to be heard on climate change.



“He wanted comments on the draft, and I thought it could be improved upon,” Heinzerling says. She sent Milkey a rewritten draft, and the petition was submitted to the Supreme Court the following month.

On the morning of June 26, 2006, Professor Richard Lazarus, the faculty director of Georgetown Law Center’s Supreme Court Institute, was at his computer, waiting for the Supreme Court to post its list of cases for which it had granted certiorari. The posting came a few minutes after 10, and when Lazarus saw the Massachusetts v. EPA case he was elated. Moments later, he sent an e-mail to Milkey and Heinzerling: “BINGO!” he wrote. “Great news.”

Heinzerling says she was astonished when she learned about the coup. “I was thrilled,” she says. “There was no reason for [the Court] to take this case. There was no ruling below on the marquee issue — whether the EPA has the authority to regulate greenhouse gases. And there were some other cases coming down the pike that raised similar issues. It was really unexpected.”

That night, Heinzerling had an uneventful evening at home with her family, but she was starting to prepare herself mentally, hoping she would be asked to be the primary author on the brief. And the following day, Milkey and David Bookbinder, senior attorney at Sierra Club, who had been involved with the case since its origins in 1999, called Heinzerling with the question she had been hoping for, and the answer to her own question of how she could use her skills to help fight global warming.

“When they called, I told them ‘yes’ right away,” Heinzerling says. “[Deciding to write a Supreme Court brief] is never a decision. It was very easy.”

Other than Heinzerling’s non-decision decision, little about *Massachusetts v. EPA* (for which a ruling will be announced this spring) can be characterized as easy. It began in 1999 when 20 petitioners asked the EPA to regulate motor vehicle emission of greenhouse gases, including CO₂, under the Clean Air Act. In 2003, the EPA formally denied the petition, finding that it had no authority to regulate CO₂ and that even if it did, it refused to exercise it.

In response, the petitioners, which now consisted of 12 states, three cities, one territory and 13 organizations, asked the U.S. Court of Appeals for the D.C. Circuit to review the Agency’s denial. In April 2005, a deeply divided Court dismissed the case, and later that year, the Court sitting en banc denied a petition to rehear the case by a vote of four to three, leaving the panel decision in place.

So after little encouragement for the petitioners in the past, the Supreme Court’s decision to grant review last summer came as a surprise to those involved. But for Heinzerling, there was little time for shock. She started on the brief right away and spent her summer working seven days a week, an average of nine or 10 hours a day.

Heinzerling’s research assistant, Justin Wade (L’08), says, “She would come into the office, and the first thing she’d say was, ‘Well, when I re-read the [several-hundred-page] Clean Air Act yesterday...’” Wade said he was hired before the Court granted review of the case and never expected to work on a Supreme Court brief while in law school. He said he helped Heinzerling with some of the nitty-gritty research. “I saw how complicated it was,” he says, “and just how many people are involved in a case like this.”

FAMILY AFFAIR

In fact, there were an unusually large number of groups involved in this case, says Lazarus. On the petitioners' side, there were about 30 amici briefs. "[That number] shows an extraordinary effort to try to get the government to take this issue seriously," he says. Briefs were written on behalf of a religious organization, the ski industry, environmental groups, energy companies and state and local governments.

For Georgetown, the case called for strength in three areas in which the Law Center excels: the environment, the Supreme Court and public service. Accordingly, several members of the faculty and alumni family stepped up to contribute their time and expertise. Lazarus provided editorial oversight of the briefs and played a significant role preparing Milkey, the petitioners' counsel of record, for oral arguments. The Sierra Club's Bookbinder, an adjunct at the Law Center, served as one of the attorneys who coordinated the litigation.

In addition, a number of alums were involved in the case: Steph Tai (L'00), assistant professor at the University of Wisconsin Law School, was the lead author on an amicus brief filed on behalf of climate scientists. Jennifer Bradley (L'04), an attorney at the Community Rights Council, helped draft an amicus

brief on behalf of the Conference of Mayors and several other local government groups. Frances Raskin (L'99) filed an amicus brief on behalf of Trustees for Alaska. Caitlin Halligan (L'95), former solicitor general of New York, helped in commenting on the brief for petitioners.

Heinzerling says it was very satisfying to see so many groups agree on the basic approach.

"They all represent what is best about Georgetown in general — a mix of pretty high level thinking with practical reality," she says. "You take fairly sophisticated legal analysis and pair that with a problem that's immense — and that is addressable — and you get this wonderful combination of intellectual interest and pragmatic helpfulness."

Several of the alumni involved with *Massachusetts v. EPA* say being able to contribute to a Supreme Court case on global warming was a dream come true. Tai, who

had studied atmospheric chemistry as an undergraduate, says she went to law school specifically to learn better ways for scientists to present their research to lawyers and policy-makers.

At the Law Center, she studied under Lazarus, completed an internship at the Department of Justice in the environmental division and spent a few months working at the Sierra Club. She says the contacts she has made through the school are invaluable, and being able to contribute to this case is a career highlight.



ENVIRONMENTAL LAW IS HOT AGAIN

Interest in environmental law ebbs and flows, depending on environmental issues of the day, recent legislation and the political party of the current administration. But recently, the faculty has noticed a surge of interest that resembles that of the 1980s.

“The word is that environmental law was a really hot area in the ‘80s, because of the Superfund legislation,” says Professor Richard Lazarus, referring to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), enacted by Congress in 1980 to clean up the nation’s uncontrolled hazardous waste sites. After that, industries realized they had to comply with new laws and amended laws, and they needed lawyers to advise them. So, according to several professors, there was a huge growth in employment at this time for young associates who were literate in environmental law.



Professor Hope Babcock says there has always been a core group of “tree-huggers,” but when Democrats took over in the 1990s, they drifted away, which resulted in a downturn in the environmental law program. “In the last couple years, we’ve had the Republicans in power, and the interest shot back up again,” she says. “It woke up all the tree-huggers.”

Babcock says the students today are different than they were two decades ago. “They are really environmentalists,” she says. “Not everyone, but it’s a marked difference from previous decades. Today, the attitude is, ‘We really care deeply about [the environment] and want to argue about it.’”

It’s an attitude that gladdens the heart of Edith Brown Weiss, Francis Cabell Brown Professor of International Law, whose calls for “intergenerational equity” (described in her groundbreaking book *In Fairness to Future Generations*) brought a deeper, more philosophical dimension to the study of environmental law. Brown Weiss, who helped students found the Georgetown International Environmental Law Review almost 20 years ago, is “an environmental force of nature at the World



Bank,” says Robert Rosing (L’07), editor in chief of the Review’s 19th volume. Brown Weiss chairs the World Bank’s three-member inspection panel. “It’s urgent that all people have a decent standard of living and live sustainably on Earth. Students are realizing that we must protect our planet. Everyone will suffer if we don’t, but poor people will suffer the most.”

Professor Peter Byrne, who teaches property, land use regulation and historic preservation law, says today’s students are “really fascinated by the issues. Many of them have a public-interest orientation and are really committed to working on the issues. It’s a great group to teach.”

Susannah Foster (L’08) studied biology in college and thought she’d work as a scientist, but she ended up coming to Georgetown for its strong environmental law faculty and its location in the nation’s capital. She is one of the three students who head up the Environmental Law Society, which organizes networking events and panels. “The faculty is amazing,” she says of the environmental law program. “And being able to help professor Heinzerling with the [*Massachusetts v. EPA*] brief is just one example of an unusual opportunity for students here.” Foster says her work for Heinzerling included editing, cite checking and research, such as the legislative history of the word “climate.”

Environmental law may not be as cutting-edge as it was 20 years ago, but students understand that environmental issues affect virtually every aspect of modern life and a modern legal practice these days.

“You can’t pick up the newspaper today without an article on the front page on environmental law, climate change or wetlands protection,” says Babcock, whose class is almost back up to the size it was in 1991. “Somebody is doing something to make the environment worse, and these students want to do something about it.”

— M.D.G.K.

Raskin, who started her own firm in Anchorage this year, says since she was a child, she has dreamed about representing native peoples. Her role in the case was writing what she calls the human interest piece. “We provided the Court with the perspective that global warming isn’t something that’s going to happen in a decade or a generation,” she says. “It’s happening. In parts of Alaska, the sea ice is melting, and that has very serious consequences. We’ve seen drowned polar bears, polar bear cannibalism, stranded walrus pups and other very serious impacts.” Raskin says one of her clients stopped counting at five when she asked him how many members of his family had fallen through the ice and died. “We wanted to let the Court know it’s a very dire situation up here.” She says being able to work on the most important environmental issue of our time and being able to represent people with a unique and fascinating culture is invigorating. But the truth, she says, is also disturbing.

For the environmental law professors, the opportunity to work on the Supreme Court case was also a personal as well as professional coup. “This case is very important to me,” Lazarus says. “Global climate change is one of the big issues facing the world right now, and it was so important to get the Court at some level to say the administration isn’t doing enough.”

Heinzerling says she has been concerned about the environment since she was a third grader in Minnesota, when her teacher talked not only about how the environment was being polluted, but how humans were part of the problem. She says it is “shameful” how long it took for this issue to reach its current level of public awareness and alarm.

“We’ve had laws on the books that could address this problem for decades,” she says. “Now we wake up in D.C. in January, and it feels like spring.”

GLOBAL WARMING ON CAMPUS



As summer turned to fall, the buzz around campus over *Massachusetts v. EPA* grew. On November 10, the Georgetown Environmental Law & Policy Institute held a crowded half-day program connected with the roll-out of its report called “Global Warming in the Courts,” written by fellow Justin Pidot, who graduated from Stanford Law School last year. One of the panels focused on *Massachusetts v. EPA* and covered the other lawsuits (there are more than a dozen) related to global warming that are currently on the dockets of our federal and state courts. The panel included Heinzerling, Michigan’s assistant Attorney General and two practitioners who work on global warming cases.



GELPI, under John Echeverria’s leadership since it was created eight years ago, spearheads research and education relating to the protection of the environment and conservation of natural resources. Echeverria says the public interest in climate change has increased now that it has emerged as the number one environmental issue in the country. “When new social problems emerge, the law begins to reflect that concern,” he says. “The question is, how will legal institutions respond.”

“I think *Massachusetts v. EPA* illustrates the way in which the engagement of the faculty and staff at GELPI — and their advocacy activities — create wonderful opportunities for the students outside the classroom,” says Professor Peter Byrne, faculty director at GELPI. “I think it’s pretty exciting for students to learn by doing and to see the law being made in front of them. It’s a very rare opportunity.”



HOPEFUL PESSIMISM

On the morning of November 29, 2006, the Supreme Court heard oral arguments in *Massachusetts v. EPA*. The petitioners asked that the Court direct the EPA to reconsider whether to issue regulations, in accordance with the Court's reading of the Clean Air Act. That afternoon, GELPI held a post-oral argument briefing with Heinzerling, Lazarus and partners from Wilkie Farr & Gallagher and Hunton & Williams, firms that have been involved in Clean Air Act litigation.

Three days later, Washington awoke to a glorious, spring-like day that later reached 75 degrees. Typically, Lazarus would find that temperature unsettling. But on this day, it warmed his heart. "That's when the justices were meeting to vote in conference," he says. "I wanted them — while walking to work and looking outside and voting — to think about the weather."

For those deeply involved with *Massachusetts v. EPA*, the process was bittersweet. On one hand, it was a chance to work on a remarkably important issue and one that resonates especially with those who have devoted their schooling and career to the environment. Furthermore, the attention surrounding the case has increased public awareness and helped educate people about the reality of climate change.

But on the other hand, these members of the Law Center's environmental law family can become gloomy in no time when discussing the state of our environment, particularly on an unseasonably warm winter day.

Bookbinder, who has been at the Sierra Club for five years, says even if we stopped carbon emissions today, things would continue to go downhill. "Every year we put more CO₂ up there than we did the year before," he says. "So the best we can do is have some sectors decrease the rate of increase. The trends are all accelerating faster than anyone predicted. It's really scary."

Byrne says he is pessimistic about whether a policy will develop fast enough to deal with these issues. "I think a lot of behaviors that have led to global warming are very deeply embedded in our culture," he says. "But, one can be a hopeful pessimist."

Going through this process during the last year, Heinzerling says the most important lesson she learned was that her efforts were only a very small part of the puzzle. "People kept thinking this case would solve the problem of climate change," she says. "And I'd say, 'No!' Even if we won everything we asked for, it's still a catastrophic problem."

"It can be disheartening," she says. "There are some days when I think — the coral reefs are gone, the polar bears are gone, and we wonder: What have we done? Fifty years from now, things will look a whole lot different, no matter what we do. Then I think maybe there is something we can do. We can act now and prevent further harm. And that makes me optimistic."

REAL-WORLD ENVIRONMENTAL EXPERIENCE

When Sara Colangelo (L'07) goes to work at the Department of Justice's environment and natural resources division this summer, she will arrive directly from law school — but with a stockpile of real-world experience. And for that, she credits her work with the Environmental Justice Project of the Institute for Public Representation (IPR), a public interest law firm and clinical education program founded by the Law Center in 1971. The environmental project is one of three concentrations at IPR, where students and graduate fellows act as counsel for clients who are unable to obtain effective legal representation.

"The experience was a highlight of my time at law school, because it enabled me to take what I learned in the classroom and see how that was applied in the real world," she says. "I saw all the different parts of litigation and administrative law and saw how a case is filed and put together. That was amazing for me. These are things that you'd never see in the classroom."

Colangelo says she worked at IPR nearly full-time last fall, largely on a complaint filed opposing the Inter-County Connector highway project in Maryland. "I was working on a great, cutting-edge legal question that's tied into this current global warming litigation," Colangelo says. "It was very hands-on."

Professor Hope Babcock, who started the environmental component of IPR in 1991 after working as general counsel for the National Audubon Society, says it was one of the first law school clinics to address the environmental problems of minorities and low-income individuals. Today, there are more than a dozen others.

"Despite the fact that the world is now more aware of environmental injustices and there are more lawyers addressing these problems, the problems continue," Babcock says, "and there is, sadly, always more than enough work to do." The project focuses largely on the economically disadvantaged and minority populations in and around D.C. Clients range from the Mattaponi Indian Tribe in Virginia to Citizens Against Chumming Inc. on the Chesapeake Bay.

In the clinic, students work on their legal writing and learn about the preparation of legal documents. Colangelo says one of the biggest advantages of the clinic for her was working closely with Babcock. "A professor is reviewing your work personally," she says. "Having someone with that experience working with you really pushes you to the next level."

If you would like to be notified of future Law Center environmental and natural resource law events, please e-mail alumnlaw@law.georgetown.edu.

— M.D.G.K.