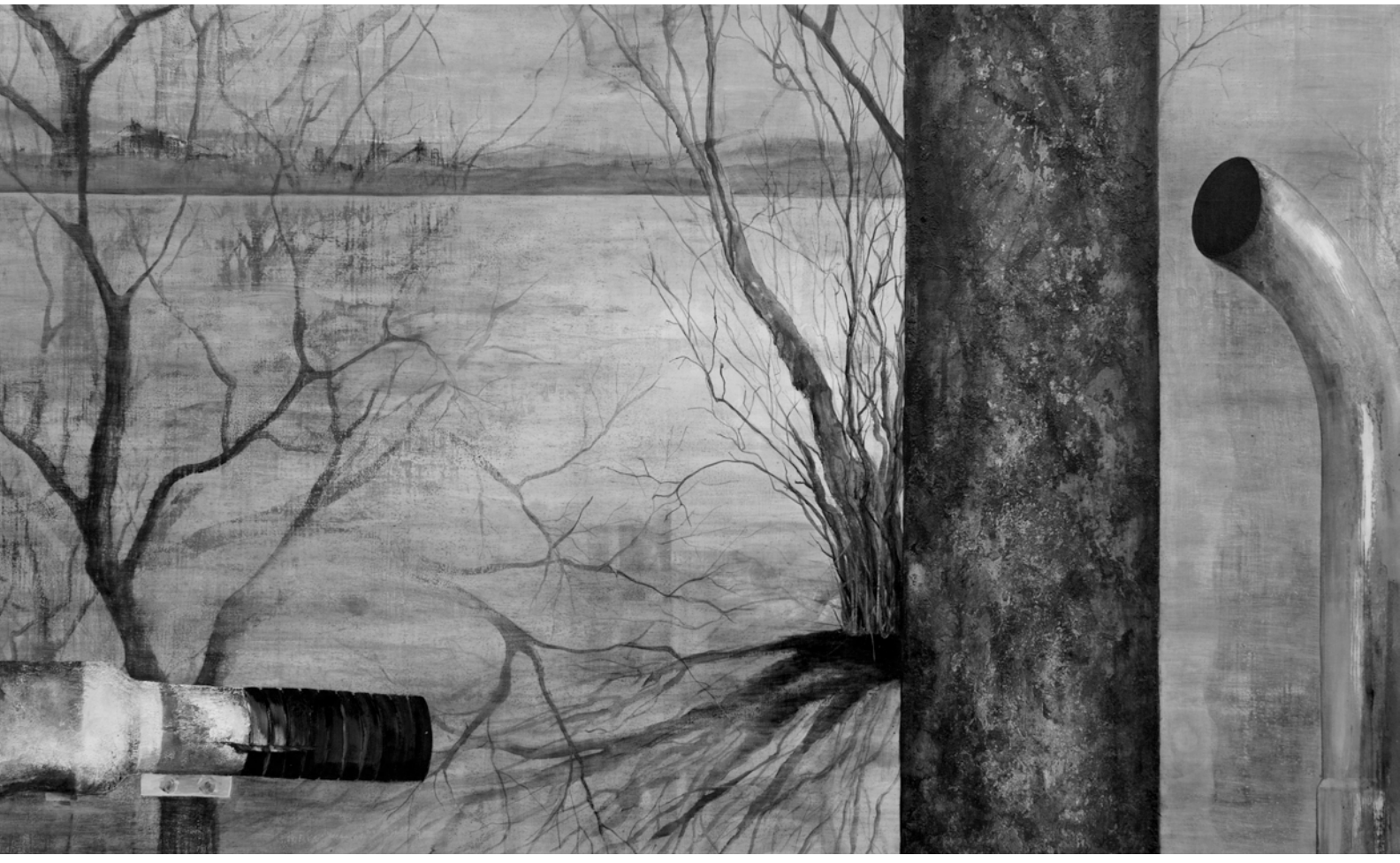
An Article Turns Into Supreme Court Superfund Action



Scenario: The U.S. Supreme Court grants certiorari on an issue you've been writing about. The expected publication date of your article is after the Court will have heard argument but before it will have issued a decision. What do you do?

Professor Craig Johnston '85 faced this question in January when the Court granted review in *Unites States v. Atlantic Research Corporation*. With the luxury of a sabbatical in front of him, Johnston decided to convert his article into a Supreme Court amicus brief. Thus began a process that led to an exciting spring for him and students Jamie Saul '07, Ellen Trescott '07, and Dan Mensher '07. Clinical Professor Allison LaPlante '02, of our Pacific Environmental Advocacy Center, also supported the effort.

The case involved the question of whether those who bear potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (also known as CERCLA or Superfund) may sue others who are potentially liable under the statute (known as "potentially responsible parties" or PRPs). This issue might arise most typically in a situation in which one party contaminates land and then sells it to another. In most circumstances, as the current owner of the contaminated property, the buyer would be the party strictly liable under CERCLA. If the buyer were to clean up the property—either voluntarily or at the behest of the relevant state—the question would be whether it could then sue the seller to recover some or all of its cleanup costs.

CERCLA has two provisions that have potential relevance to this circumstance, section 107(a)(4)(B) and section 113(f). Until 2004, the lower courts, mostly relying on section 113(f), had held that those who engaged in voluntary cleanups had a cause of action against other PRPs. In 2004, however, the Supreme Court held in *Cooper Industries v. Aviall Services* that section 113(f) applies only in situations in which either the Environmental Protection Agency or the state has first filed

suit against the would-be plaintiff. This cast doubt on the future of private-party cost recovery in the common scenarios where private parties either engage in voluntary cleanup or proceed under informal state supervision.

The *Atlantic Research* case involved a voluntary cleanup scenario in which the current owner was suing the government for cost recovery based on the Department of Defense's alleged involvement at the site. As a result, the United States took the exceedingly narrow view that only those who themselves bear no potential responsibility under CERCLA can invoke private-party cost recovery under section 107(a)(4)(B).

After deciding to write a brief, Johnston began to strategize with Joel Gross of Arnold and Porter, in Washington, D.C., about the most effective set of clients on whose behalf the brief could be submitted. The goal was to maximize the possibility that the justices would read the brief and take it seriously. The original idea was to put together a consortium of interests involving former federal officials, industrial entities (such as British Petroleum), environmental groups (such as the Natural Resources Defense Council), and law professors. This would demonstrate that parties representing a wide variety of interests not usually united in environmental matters all strongly disagreed with the government's position in the case.

Ultimately, the former federal officials decided they wanted their brief to focus solely on policy issues. The American Petroleum Institute and other industrial allies also decided to write their own brief. Johnston took the lead on the NRDC/law professors brief.

Johnston and his team had two goals while working on their brief. The first was to state the legal argument as clearly and as concisely as possible. The second was to convince the Court that the government's interpretation would render section 107(a)(4) essentially a null set.

To achieve the first goal, Johnston worked with research assistant Jamie Saul to refine the arguments from the draft article. They set out to give the legal argument a historical arc, starting with the original language of the statute as enacted in 1980 and then describing how the case law and statutory changes evolved.

On the second front, research assistants Ellen Trescott and Dan Mensher and PEAC lawyer Allison LaPlante read every CERCLA opinion reported on Westlaw between 1995 and 2000. This totaled more than 425 decisions involving 364 contaminated sites, but their efforts paid off. The team verified that during that time period only one case had been filed that would even arguably meet the government's cramped reading of section 107(a)(4)(B). (The case involved a cleanup contractor who was suing the other PRPs after the party that hired it declared bankruptcy.)

The brief-writing process was only the beginning of Lewis & Clark's involvement in the case. Professor Richard Lazarus of Georgetown University Law Center invited Johnston to attend a moot court session for Atlantic Research and the State of Washington, which, on behalf of 40 states, had filed an amicus brief in support of Atlantic Research. In addition, Lazarus asked Johnston to help teach a class session that would focus on the case. Once in D.C., Johnston also participated in a second moot court at the National Association of Attorneys General. And, on the Friday before the Monday-morning argument, he and others took part in a brainstorming session with the advocates who would be arguing in support of the respondent, Atlantic Research.

Professor Craig Johnston '85

In the end, the oral argument went extremely well. The advocates, Tom Armstrong for Atlantic Research and Jay Geck for the State of Washington, did a tremendous job. For the Lewis & Clark students, one of the highlights came when Tom Armstrong cited the empirical research they had done.

In June, when the Supreme Court unanimously ruled in Atlantic Research's favor, no one was particularly surprised. The opinion, written by Justice Thomas, was short and to the point. It was a very satisfying conclusion for Johnston and his able team.