

## ***Defending the Planet: A Columbia Law Podcast*** **Episode 4: “Climate Change in the Courts”**

[00:00:04] **Peter Lehner:** In the United States, there is a history of 200 years or more of courts addressing environmental harms that the legislature had not yet acted on.

[00:00:15] **Michael Burger:** We’re talking about a problem that is systemic, endemic. Litigation can do a lot, but it certainly can’t do everything.

[00:00:23] **Lehner:** We’ve had dozens of years of energy policy that favors fossil fuel-emitting generators of electricity. We need to change some of the rules.

[00:00:34] **Michael B. Gerrard:** This is *Defending the Planet* from Columbia Law School. I’m your host, Michael Gerrard. I’m a professor at Columbia Law School, where I teach courses on environmental and energy law and serve as faculty director of the Sabin Center for Climate Change Law. Each week, I’ll be joined by guests who are experts in the field, including several of my colleagues at Columbia. In this series, we’ll be talking about combating the climate crisis through one of the most important and effective sets of tools at our disposal: the law.

[00:01:14] **Gerrard:** Royal Dutch Shell, one of the world’s largest oil and gas conglomerates, announced earlier this year that it would drastically reduce the carbon intensity of its products by 20% by 2030 and by a full 100% by 2050. But in May, in a landmark ruling, a Dutch court told Shell that its target must be significantly higher: a 45% reduction in actual CO2 emissions by 2030 all along its supply chain, not just its own operations. This was the first court to hold a company, rather than a government, accountable for its impact on the climate. Just about everyone agrees that Congress and the parliaments of other nations should take the lead in adopting policies that will drive down greenhouse gas emissions. But Congress has not passed any broad laws on climate change, and the laws adopted in other nations are uniformly too weak. So environmental groups and others around the world are resorting to the courts, both to enforce the laws we have and to interpret constitutional and human rights and common law and other legal theories that’s applying to climate change. Using the courts to force a change in public policy or private behavior is far from new. Strategic litigation has been employed to advance civil rights and gender equality in the U.S. and privacy and human rights across Europe. The question now is how effective litigation can be in constraining carbon emissions, particularly since climate change transcends legal and geographic jurisdictions. How far can lawsuits go when solving the climate crisis? My guests today to discuss this are Michael Burger and Peter Lehner.

Michael Burger works with me as the executive director of Columbia's Sabin Center for Climate Change Law and is an alumnus of Columbia Law School. He writes about climate change litigation and has authored numerous amicus briefs on behalf of the U.S. Conference of Mayors and the National League of Cities in major climate cases. He also works on ongoing cases against fossil fuel companies in the United States.

Columbia Law alumnus Peter Lehner is managing attorney of the Sustainable Food and Farming Program at Earthjustice. He was previously executive director of the Natural Resources Defense Council and the NRDC Action Fund and chief of the Environmental Protection Bureau of the New York State Attorney General's Office. Peter teaches a seminar on food systems and U.S. environmental law at Columbia Law. Welcome, Mike and Peter.

The Sabin Center tracks all of the climate change litigation around the world. We post that on a website, [www.climatecasechart.com](http://www.climatecasechart.com). Our database is used by lawyers, judges, scholars, and activists all over the world. Mike, in very broad terms, can you talk about who is suing whom over what and why they are resorting to the courts?

[00:04:23] **Burger:** You touched on why individuals are resorting to the courts in your introductory remarks. I see going to court as a, as a move of last resort. When political organizing and social mobilization have fallen short of achieving the goal, subnational governments, community groups, environmental organizations, and individuals of all ages are taking to the courts in order to combat climate change. The types of cases we see are really across the map. They run the full spectrum. The plaintiffs in these cases include, as I said, individuals, community groups, environmental organizations, clean energy groups, cities, states, and the federal government in the United States and in similar entities operating in other countries as well. The defendants primarily involve governments, but also include private companies, including fossil fuel companies and manufacturers. The causes of action that are being raised are really numerous. The majority of the cases that we see do invoke existing statutes and policies as the basis. So the Clean Air Act, the Endangered Species Act, the Clean Water Act, the National Environmental Policy Act in the United States, environmental impact assessment and clean energy and climate change policies in other countries. Those most often are the source of the law that entities are seeking to enforce in the courts. We also see a smaller number of cases that really grab the headlines that feature more innovative and potentially game-changing causes of action or claims. These include claims under the public trust doctrine, lawsuits that claim that domestic constitutions require governments to take more ambitious action on climate change, cases that claim that international human rights require national governments to take more ambitious action on climate change, and cases that use common law theories, whether it be the duty of care in the Shell case in the Netherlands or a nuisance or trespass or negligence-based theories in the United States, against fossil fuel companies and other private actors seeking to hold them accountable for the damages caused by climate change.

[00:06:49] **Gerrard:** More than 80% of all the climate change lawsuits in the world are in the U.S. Why is it that the U.S. is the site of much more climate change litigation than the rest of the world combined?

[00:07:02] **Burger:** I think that the plain, the plain answer is the United States is a litigious country, and litigation is kind of baked into our culture. And so we've seen a lot of climate action here. Another potential answer is that our government has been more resistant to climate action than other governments. And so individuals and subnational governments have had to go to court in order to force action, whereas in other places governments have, perhaps, been more willing to at least adopt policies and legislation that expressly address the climate crisis.

[00:07:38] **Lehner:** I might actually have a somewhat different answer to that question, Mike, and that I see the courts in the United States as having a very long history of stepping in to resolve disputes. Legislation is in many ways a better process in terms of getting a comprehensive resolution, but it's a long process, and courts will address the dispute in front of them. That's their job. And that dispute can sometimes be a novel question of environmental harm. And when I was at the state of New York, we sued the five largest power companies that together were responsible for about 2 1/2% of the world's greenhouse gas emissions. And we brought it under common law. And we recognized that in the United States, there is a history of 200 years or more of courts addressing environmental harms that the legislature had not yet acted on. And the lower court agreed with us that we had a cause of action for nuisance against these power plant emitters of carbon dioxide. Now, of course, at that time, the federal EPA, this was in 2004, was very aggressively, really, denying they had the authority to regulate greenhouse gases under the Clean Air Act. So there was no question of a statute taking the place of common law because EPA was saying there was no statutory authority. Now, when this case got to the U.S. Supreme Court in 2011, by that time, the Obama administration was saying they did have the authority to regulate greenhouse gases, and the Supreme Court in *Massachusetts v. EPA* had said, yes, the Clean Air Act gives EPA the authority. So that balance between common law and statutory law was very different. But I think it is really important to recognize that we plaintiffs turn to the courts because they, their job is to resolve disputes, and they probably have a larger role in doing that than in many other countries.

[00:09:52] **Gerrard:** An additional reason why we have so much more litigation in general in the U.S. than in many other countries is that in many other countries the loser has to pay the other side's attorney's fees. And so it's risky to bring a lawsuit that you're not confident you're going to win. Peter, you used to be the executive director of one of the nation's leading public interest environmental law organizations, NRDC. And now you're with another one, Earthjustice. What are these organizations see as the role of litigation in the fight against climate change? And what sorts of cases do they take on?

[00:10:26] **Lehner:** Many of our cases are focused on addressing sources of climate change pollution. So we are challenging some of the major emitters, such as coal-fired power plants, or trying to prevent the development of infrastructure that will continue as locked into a fossil fuel emitting future, say, a natural gas pipeline or natural gas power plant. We also are trying to level the playing field, really. We've had dozens of years of policy, energy policy, largely set at the states but in some extent also at the federal level, that favors the fossil fuel-emitting generators of electricity. And so we need to change some of the rules about how clean energy is paid for, things such as net metering, so if you put solar panels on your roof, you get to take advantage of the excess energy that you may generate from those solar panels. We also look at opportunities to reduce

fossil fuel pollution from the demand side, which is to say energy efficiency, whether it be of vehicles or buildings or appliances that are inside the buildings. A large part, of course, of our fossil fuel emission causing greenhouse gases is from the burning of fossil fuels for one of those purposes. And all of that can be generally made much, much more efficient. And yet, and even though there's often tremendous cost savings to consumers for this, the market doesn't necessarily get there on its own, which is why Congress has established the requirement for very aggressive energy efficiency standards. But those often need to be enforced in court.

[00:12:23] **Gerrard:** Mike, are there are some kinds of cases that the big organizations tend not to take on?

[00:12:29] **Burger:** Every pathway to net zero greenhouse gas emissions by mid-century involves a scale and pace of building out utility scale renewable energy facilities that is really, quite simply, mind boggling. We're talking about building a, today's largest solar field every day for the next 30 years in order to achieve this goal. Now, what that means, practically speaking, is that these large wind farms and solar farms have to go somewhere. Local siting battles are inevitable when, when trying to locate large infrastructure. People don't want large industrial facilities in their backyard. Traditionally, or at least to date, we haven't, we haven't seen a lot of litigation involvement from the big green groups on this particular front. We at the Sabin Center have, have started to try and fill that gap through our Renewable Energy Legal Defense Initiative, which does provide legal representation to individuals and to organizations that are interested in weighing in, in administrative proceedings and in litigation, in favor of siting large-scale renewable energy facilities. But the prospect of each individual facility having to obtain its permits and go through litigation, it will make the task of achieving our deep decarbonization goals almost impossible. The need for finding win-win solutions, for coherent planning, for looking at things regionally, if not nationally, is evident. There just needs to be something more coherent that operates that a larger scale if we're going to achieve this particular goal. So I think that, I do think that litigation is inevitable. But the real work to be done here is in finding the most efficient way to address as many of these facilities at once as we can.

[00:14:28] **Gerrard:** So, Peter, you were involved in one of the very first cases about climate change. Can you tell us about that?

[00:14:34] **Lehner:** That was the *Connecticut v. American Electric Power* case.

[00:14:38] **Gerrard:** Actually, I was talking about the Los Angeles.

[00:14:41] **Lehner:** Sure. One of the very earliest cases in climate change was the city of Los Angeles against the National Highway Traffic Safety Administration brought in 1989, I think. And we were, we the city of New York, as well as some states, as well as NRDC, were challenging President Reagan's rollback of fuel economy standards. We argued both about local air quality impacts of weakening the air quality, the fuel economy standards, and also the climate change impacts. And at that time, the science was actually pretty new in a sense. But still, the court recognized that the, that climate change does state a cognizable claim. Now, we lost on the merits because the court, the agency was saying they were going to consider these issues. So we didn't win in

our NEPA claim. But I think it is important to recognize that climate change has been in the courts for now, almost, what, over almost 35 years.

[00:15:52] **Gerrard:** Peter talked about the *Connecticut v. American Electric Power* case, where the Supreme Court in 2011 said that the fact that there is the Clean Air Act means that the federal court should not be using federal common law to resolve these cases. And that was for an injunction. Several years went by and there were no lawsuits. The second round of cases began in 2017, when Trump was in office, and the federal government was, again, doing nothing about climate change. And that also played a role in why these cases were brought. Mike, can you say a word about the role of the Supreme Court in these cases?

[00:16:29] **Burger:** The 9th Circuit Court of Appeals has remanded a case brought by the city of Oakland and another case brought by the city of San Francisco to, to state court. And in that decision, it rejected the theory put forward by the defendant fossil fuel companies that these nuisance lawsuits are really federal and ought to be heard in federal court as a result and instead said that they are properly state, state causes of action and properly heard in state court. The defendants have petitioned that decision to the Supreme Court. And if the Supreme Court decides to hear that case, which will also now be heard in multiple circuit courts of appeals, I think we'll get a decision from the Supreme Court that gets more to the heart of the cases more quickly.

[00:17:24] **Gerrard:** So far, a lot of the fighting there has been whether these cases belong in federal court or state court. The plaintiffs want to be in state court, the defendants want to be in federal court. But none of the cases has gotten to the scientific issues of attribution. However, there was this very recent decision from a Dutch court about Royal Dutch Shell. Mike, can you tell us about that?

[00:17:46] **Burger:** The district court for The Hague found that the Dutch duty of care, an unwritten principle of law that is to some extent codified in the Dutch civil code, obligates Shell to reduce its emissions significantly by the year 2030 and to net zero by the year 2050. The, in reaching its decision, the court relied on a wide range of sources in interpreting the, the duty of care. This included international human rights law, it included the UNFCCC and the Paris Agreement, the United Nations Framework Convention on Climate Change in the Paris Agreement. It included the Intergovernmental Panel on Climate Change reports, including its 1.5 degree special report. So it was a decision that really looked at the science of climate change, the international policy and politics of climate change, and the reality of climate change on the ground and the impacts being felt by Dutch citizens and that will be felt by Dutch citizens in the future, to interpret what the, what the corporation's obligations were. It was a highly significant decision for any number of reasons, one of which is that another one of the sources it relied on was the guiding principles, business, for businesses and human rights, which is, to my mind, one of, one of a few, if not the first decision, to really take those soft law principles and seek to inscribe them into domestic hard law and make them binding on a corporation specifically in relationship to controlling its impacts on climate change.

[00:19:34] **Lehner:** I find it interesting, actually, that that theory, Mike, is fairly similar to the theory that underlay the *Connecticut* and *New York v. AEP* case in 2004. We were

claiming a nuisance, which is really the, the general duty not to create harm, to take care, very similar to that that the Dutch court found. And we used a bit of a fair share argument: The states were taking efforts to reduce their emissions, so should these polluters. So it's sort of interesting that that fundamental theory is still very real. In the AEP case, of course, it was simply, arguably a technical matter; the Supreme Court found that the Clean Air Act displaced the common law. But they did not disrupt the idea that there is a nuisance cause of action and a general duty not to create harm. And for those places where there is not a statutory program in place that is addressing climate change, that duty would still be very vibrant.

[00:20:42] **Burger:** An interesting aspect of the Shell decision, consistent with that—with what, with what Peter is referring to—the court also expressly addressed the question of, or the fact that Shell's reducing its scope one, scope two, and scope three emissions—the emissions associated not only with its direct operations but with the ultimate combustion of its fossil fuels—will do very little if, if almost nothing at all, to actually address the climate crisis because of a variety of factors, including global markets for oil and gas and the sheer number of contributors to the climate pollution problem. But the court said that that doesn't mean that this company gets off the hook just because its impact will be limited. And, in fact, the court said that those other companies will have their own obligations to follow.

[00:21:35] **Gerrard:** So this Dutch decision was by a single trial-level judge, and Shell has indicated that it'll appeal. But it comes from the same trial court that issued a decision in a case called *Urgenda*, which was ultimately affirmed by the Dutch Supreme Court. And that was an extremely important decision. Mike, can you tell us a little bit about that one?

[00:21:57] **Burger:** Well, the Dutch, the *Urgenda* decision is one of a handful of cases from courts around the world, not in the United States but in other countries, where high courts have found that the national government has an obligation under national constitution or under some other source of law to increase the ambition of its climate action. We have seen decisions now in the Netherlands, in Germany, in Colombia, in India, in Pakistan, and in other places where courts are, have shown themselves willing to hold governments accountable to their own climate commitments as well as to climate science and what climate science demands.

[00:22:44] **Gerrard:** In the United States, have there been attempts to try to get decisions that have the kind of broad impact across the entire economy, similar to what the Dutch and the German and the other cases have done?

[00:22:59] **Burger:** The *Juliana* case, which is, I think, probably familiar to many of the listeners of this podcast, is the closest example we have and, in fact, is very similar in its theory. In the *Juliana* case, youth plaintiffs filed a lawsuit against the United States government alleging that the government had violated their substantive due process right to a stable, a stable climate system and had also violated its own obligation under the public trust doctrine to preserve and protect natural resources for future generations in the ways in which it both failed to adequately regulate greenhouse gas emissions and in its active decisions in, for instance, leasing public lands for fossil fuel development. Those, that, that lawsuit has had kind of an epic journey through the courts. Most, the

most recent decision being a decision by the 9th, by the 9th Circuit Court of Appeals, which dismissed the case on standing grounds. And what's important to me in thinking about *Juliana* and the 9th Circuit's decision, the 9th Circuit did not do away with the constitutional claim or the public trust claim. The plaintiffs in the *Juliana* case sought a court order to the U.S. government to create a climate drawdown plan, that is a plan from the United States government to reduce global greenhouse gas concentrations to a level consistent with pre-industrial levels. The court found that that scale, that scope of relief, the idea that a court and that a United States court was going to order the federal government to take that kind of sweeping action was beyond the authority of the court, and so it could not remedy, it could not provide the plaintiffs with the remedy they sought, and therefore, there was no standing to bring the lawsuit. The lawsuit is now in an interesting posture. The 9th Circuit remanded it to the district court to dismiss it. But the district court has directed the plaintiffs and the United States government to enter into settlement discussions over a limited period of time. And that is where that case now sits.

[00:25:24] **Gerrard:** So the, the 9th Circuit in dismissing the *Juliana* case agreed that climate change is happening, that it's mostly caused by humans, and that it is a crisis that really poses an existential threat. They didn't disagree with any of that. They basically said it's not the job of the courts to render this kind of decision. They said it's up to Congress and the executive branch, and if they're not going to act, neither, neither will the courts. So it fundamentally came down to an issue of the separation of powers. Do you think that—given the current composition of the Supreme Court, the six to three conservative majority on the Supreme Court—there is much prospect for this kind of broad strategic climate change litigation succeeding at the federal level?

[00:26:13] **Lehner:** I'm going to jump in and say I don't want to predict anything about the courts and this court in particular, but there are some justices that have recognized the important role of common law. And I really do think it's important to emphasize—and I'm going back to our Connecticut and New York v. AEP case—that the U.S. courts have a long history of dealing with environmental problems before the legislature did. Some of the early ones were, say, pollution of the Mississippi River from far upstream coming downstream and affecting a downstream city's water supply. And this was 70 years before the Clean Water Act. And how was a court going to deal with this? They were used to dealing with very local nuisances and local water pollution. But rather than saying, whoa, this is too complicated, this is too big an issue, this is too far away, they were willing to recognize that there's a real harm being caused here. It could be shown that the far upstream pollution was damaging the water supply of those downstream and that the courts had a duty to try to address it. And here we have court after court recognizing the reality of climate change. That's at whatever time there might have been when some said, well, climate change is not yet proven, very few courts are saying that. Now the climate change is recognized as a real environmental harm. And ideally, perhaps, the federal government, through legislative and executive action, will act. But the courts do have a very long common law history of addressing environmental harms that are not otherwise being addressed. And so—and I say this without making any prediction about a specific case or specific court—but I think we have to recognize that we are quite lucky, I think, in this country having both a very strong common law history as well as a very robust legislative history.

[00:28:16] **Gerrard:** No court anywhere in the world has cast doubt on climate change or the human role in it. The deniers of climate change are loudly heard in various legislative chambers and various television and radio channels. But they've gotten nowhere in any court in the world.

[00:28:36] **Lehner:** And that's because courts tend to listen to the facts presented to them. And those facts are absolutely rock solid about the reality of climate change.

[00:28:46] **Gerrard:** So *Juliana* is a, was a very broad strategic kind of case. Peter, do you think that a lot of the other lawsuits that are much smaller and get less attention also add up to a big strategy?

[00:29:01] **Lehner:** Absolutely. If you look at the change of our energy system and therefore the change in emissions of greenhouse gas emissions from, say, energy production or, say, transportation, this is largely the result of those more specific cases accelerating clean energy at a state public utilities commission or closing a coal plant and having it replaced by a wind farm or a solar farm or an energy efficiency program. And that is adding up tremendously. That is the success we have had so far in this country is really more a function of all of those cases working together than of any one big case saying climate change is a problem and the federal government should get going.

[00:29:53] **Gerrard:** So overall, on a macro basis, how much impact do you think that litigation can have on climate change?

[00:29:59] **Lehner:** Well, I spent a lot of my time on it, so I think it can have a lot. But the reality is it's a mixture. Litigation is not something one does entirely independent of other activities. Litigation is, and is and always has been, part of a larger strategy that includes legislative change; it may include administrative change; litigation can be an opportunity to educate the public who then can educate and support policymakers, that is to say, politicians who support clean energy opportunities. And so I don't think one can look at decisions entirely independently from the context in which they are in as a part of a legislative, administrative, public education, scientific innovation, market economy strategy, all of these things are changing together, and litigation has an important role but is certainly not the only part of it.

[00:31:05] **Burger:** Yeah, I agree with that, absolutely, and I guess I would just add that, you know, litigation can force action from reluctant actors and it can protect rights for those who stand in harm's way. It is probably not the best mechanism to transform an economy the size of the United States or our global economy. It can be an important trigger, it can be an important lever, but it is not the, is not the solve in and of itself. You know, I think it's useful to look back at *Brown v. Board of Education*. *Brown v. Board of Education* did not solve desegregation, right? It was not the only lawsuit about that issue, either before or after. There were years and years and years of litigation that followed as well as all of the other activities that had to happen at the federal, state, and local level to even begin to address desegregation, which remains a very prominent issue. And I don't think we should expect anything different in the climate change context. We're talking about a problem that is systemic, endemic, and cuts across the



entirety of our, of our economy, our energy, and our social reality. And so litigation can do a lot, but it certainly can't do everything.

[00:32:28] **Gerrard:** Do you see climate change litigation going off on any new directions in the next several years?

[00:32:35] **Burger:** I think that we will continue to see litigation that seeks to force emissions reduction through a range of theories, including human rights-based theories, constitutional theories, public trust theories, as well as statutory and policy-based theories. But as the impacts of climate change become more frequent, more intense, and more severe, and more and more people are impacted in more and more drastic ways, I think we're going to see people taking to courts to address those issues.

[00:33:06] **Lehner:** I think as the reality of climate change is, becomes more and more apparent in all these different aspects of our life—in our health, in our daily commute, in our workplace, in every aspect of our, really, our safety of where and how we live—that will itself be an important effort in getting better executive and legislative response to climate change. Right now, a lot of people can still think climate change is somewhere else, it's twenty-one hundred, it's not now. And as climate change impacts, more and more are understood as being here and now and real and harmful, there'll be a lot more people who will want to jump in and try to be part of the solution.

[00:34:02] **Gerrard:** Mike and Peter, thanks so much for joining us. My guests today were Michael Burger and Peter Lehner. Join me next time for another episode of *Defending the Planet*, and make sure to follow us wherever you get your podcasts. Thanks so much for listening.

[00:34:17] **Gerrard:** *Defending the Planet* is brought to you by Columbia Law School and is produced by the Office of Communications, Marketing, and Public Affairs at Columbia Law School. Our executive producer is Michael Patullo. Julie Godsoe, Nancy Goldfarb, and Cary Midland, producers. Editing and engineering by Jake Rosati. Writing by Martha Moore and Dan Shaw. Production coordination by Zoe Attridge. Special thanks to Michael Burger and the Sabin Center for Climate Change Law. If you like what you hear, please leave us a review on your podcast platform. The more reviews we have, the more people who get to listen. If you're interested in learning more about the law and climate change, visit us at [law.columbia.edu](http://law.columbia.edu) or follow us on [Facebook](#), [Twitter](#), and [Instagram](#). You can also follow the Sabin Center on Twitter, [@SabinCenter](#).