

The Rule of Five – Making Climate History at the Supreme Court

Given on October 1, 2020 by Richard Lazarus, Howard and Katherine Aibel Professor of Law at Harvard Law School. It is part of the Regulatory Policy Program's lunch seminar series at the Mossavar-Rahmani Center for Business & Government.

Joseph Aldy:

Welcome to the Regulatory Policy seminar. I'm Joe Aldy, the faculty chair of the Regulatory Policy Program for the Mossavar-Rahmani Center for Business and Government here at the Harvard Kennedy School. We're thrilled to have you with us here today. We are excited to have our colleague from Harvard Law School, Richard Lazarus.

Joseph Aldy:

Professor Lazarus is the Howard and Katherine Abel Professor of Law at Harvard University. He teaches environmental law, natural resources law, Supreme Court advocacy, and torts. He has participated in representation of the United States, state, local governments, and environmental groups before the US Supreme Court on 40 cases, and has had the pleasure of presenting all argument in 14 of those cases.

Richard Lazarus:

Pleasure?

Joseph Aldy:

Pleasure. Professor Lazarus has recently published a book that came out this spring, *The Rule of Five*, that is a fantastic story. I mean that is a story as one academic colleague to another. It's a great read. A fantastic story about the history of how we came about thinking about the regulation of greenhouse gases under the Clean Air Act, telling us, really, over several decades culminating with the Supreme Court ruling in 2007. Professor Lazarus is going to present to us here over the next half hour or so. He'll be using presentation slides here in a moment that he'll bring up.

Joseph Aldy:

I ask you to have questions ready. You can use the Q&A tab at the bottom of the Zoom screen. I will be, then, curating the questions throughout once Professor Lazarus is done with his remarks. I would also like to remind you that we are recording this session and we will be posting it to the Regulatory Policy seminar web page. If you have some friends or colleagues who couldn't join us live, I know some of us have friends who are all over the world at this time, please let them know that they're welcome to check this out online once we have it posted.

Joseph Aldy:

We will end a couple of minutes early today, about 12:55 Eastern Time, because Professor Lazarus has to run to another Zoom Room to teach his class. With that, let me now turn it over and say, welcome, Richard. It's great to have you here in this seminar.

Richard Lazarus:

Thanks, Joe. Let me just do my share screen now with all of you in a moment. Making sure everyone can see that.

Joseph Aldy:

That looks good.

Richard Lazarus:

Great. We're in business, then. Thanks, Joe. Really, this is fun. It's a pleasure to be over at the Kennedy School, at least in the Kennedy School Zoom room for this livestream event, hosted by the Mossavar-Rahmani Center for Business and Government. I really give special thanks to Joe for inviting me to give this talk. My talk is about my recently published book, called, *The Rule of Five*. You can see it behind me. Making Climate History at the US Supreme Court. I'm going to divide my talk into three parts, then, followed by Q&A.

Richard Lazarus:

First, I'll give you a sense of the arc of the story and my overall goal in writing the book. Second, I'm going to highlight parts of the book story, pride with a sense of the book's voice and what makes the story so engaging. I'm going to show you some surprises. You have to buy the book to find out everything that's in it. Third, I want to address an unanticipated challenge I had as an author in writing this book. Then, how I chose to address it.

Richard Lazarus:

Let's begin with the story's arc and its primary objective. It's divided into 20 chapters, followed by an epilogue. The arc, it really begins with a guy named Joe. I'm sorry, it's not Joe, but another wonderful Joe, a guy named Joe. The story ends with the Supreme Court ruling that made history, the most important of our law cases ever decided by the United States Supreme Court. It's called *Massachusetts versus EPA*, often referred to as *Environmental Laws, Brown v. Board of Education*, a case that not only transformed the US climate change law, but it's had worldwide impact.

Richard Lazarus:

What were my primary goals for writing this book? First, to write a book for a popular audience that revealed what makes the Supreme Court advocacy so challenging, so fascinating, and from both sides electric, where the advocate stands to argue before the justices, but then, also, the other side within the court itself, other side elector behind the red curtains. I want to open a window and let the general public see inside. The extraordinary amount of strategy, maneuvering, conflict, the personal and professional drama, and not from bad motives when the stakes are so high. It's hard to get higher than climate change.

Richard Lazarus:

I also wanted to write a book for general audiences that revealed what has made it so difficult for our country to address the climate change issue. Why it's proven so hard, often for reasons most don't know, and why for that same reason this case was so important. No more important environmental issue faced the US and the world today than climate change. As the coronavirus is underscored for all of us, there's no escaping the need for global cooperation when you face these kinds of global threats.

Richard Lazarus:

I began researching this book in 2015, really researched 2015, 2016, wrote it in 2018, 2019. I approached the book, research the way I would a Supreme Court would. We're talking scorched earth. I'm going to get every document of any kind. I interviewed everybody, Clinton administration officials, Bush administration officials, lawyers Republicans officials, lawyers for the states, lawyers for the federal government, lawyers for industry. I interviewed judges. Yes, I interviewed justices.

Richard Lazarus:

I also sought all their underlying documents. I have, knowing far more than I think any of the participants know. They were surprised to find out things about the case. They had worked on the case.

Richard Lazarus:

Public record requests, but really voluntary. People gave me boxes and boxes and boxes of their materials or notes. Of course, these days, they give you jump drives, too.

Richard Lazarus:

All right. Here are a few highlights for the book, just dancing through it a little bit, illustrative parts of the story. Chapter One, of course, begins with the opening scene. It's October 1999. After a year of delay, Joe Mendelson walks from his Capitol office. He goes down to EPA. He handles a petition. It demands that Clinton EPA, that's the Clinton EPA, regulate greenhouse gas emissions for motor vehicles. Joe, by October 1999, was fed up with the Clinton administration for the lack of any action to regulate greenhouse gas emissions.

Richard Lazarus:

In 1992 and '03, he was hopeful. After all, the Vice President was Al Gore, who wrote a June 1992, Earth in the Balance. He said, "This is an issue we can't compromise on politically. It's the biggest issue we're facing." He said that year after year after year, and they didn't get any greenhouse gas emissions.

Richard Lazarus:

Who is Joe Mendelson? He's a young public interest lawyer who worked for public interest organization I can guarantee that almost no one, even at the Harvard Kennedy School, has heard of. That's the Center for Technology Assessment. They had a total of five employees, a couple of full-time, the rest part-time. They were paycheck-to-paycheck, and quite often for no paycheck at all. Its small office is on Capitol Hill. They were evicted from those offices by the local zoning where it sits, not long before Joe was writing this petition.

Richard Lazarus:

Joe worked very much alone. He worked on the petition late at night by his daughter's crib. None of the powerful natural groups like Energy Sierra Club, Earthjustice. None supported it. In fact, some of them, at times, actively imposed his efforts, oppose them. Even tried at one point to cut off his funding of his organization. They didn't have much funding.

Richard Lazarus:

But, Joe refused to ban. He filed his petition demanding that EPA regulate greenhouse gas emissions. Joe's view was they weren't his bosses, the other groups. They cannot tell them what to do. They had a lot of resources. He didn't have a lot of resources. He didn't have their bureaucracy. He could decide on

his own what he thought made sense. He drafted the petition on October 1998. He put it in a desk drawer. It took a year to decide to file. There's so much pressure not to. Then, finally, on October '99, he pulled the pressure, he pulled the trigger. That's when he walked down the EPA, hand-filed it and sent a courtesy copy to Al Gore in the White House as well.

Richard Lazarus:

Joe's petition made a pretty simple argument. But, when it arrived at EPA, it was received by doctor clerk, Jamie Poole. Jamie Poole signed it, dated it, put it in a metal cart. I walked the pathway of the metal cart a couple of years ago down to the EPA General Counsel's Office.

Richard Lazarus:

No one at the time Joe filed that petition, no one remotely imagined that, eight years later, it arrived in the Supreme Court. The petition said, "EPA, you have the authority and the obligation to regulate greenhouse gas emissions from new motor vehicles. They are air pollutants and they're endangering public health and welfare. You must do that under the Air Act."

Richard Lazarus:

Now, at first, Joe actually had reason to think after a little bit the EPA might grant the petition. Not the Clinton administration. When they received it, ignored it deliberately. They did not want to touch that issue, especially, when Al Gore was trying to run for president. But, once the Bush administration took office in January of 2001, that's when he had good reason to think it might be granted. Why? Because of the Bush cabinet.

Richard Lazarus:

Bush had named as EPA Administrator, Christine Todd Whitman, former governor of New Jersey, a person of enormous national stature, a moderate Republican, and a climate hawk, someone who took the job because she believed in addressing greenhouse gas emissions and regulating them. That's the reason she did it, "I can do that from this position." Also in that cabinet was Secretary of State Colin Powell, also a climate hawk.

Richard Lazarus:

Within a week of the administration taking office, he had a briefing in his office on climate change issue, because he viewed it as a major national security threat, as did Condoleezza Rice, then the National Security Advisor. No one is a bigger climate hawk than Paul O'Neill, Secretary of Treasury. Paul O'Neill felt so strongly about the climate issue, that before the very first cabinet meeting on the Bush White House in January 2001, he went early to the White House. He went into the room where they're all going to meet, and he put in front of every cabinet members chairs a copy of his speech he'd given a year or so earlier, comparing the threat of climate change to nuclear holocaust. All of them were dead set on regulating greenhouse gas emissions. Christine Todd Whitman went off to Italy to tell the rest of the world of that.

Richard Lazarus:

But, none of them anticipated they would very quickly and very suddenly be completely and utterly demolished in their efforts by this guy, Vice President Dick Cheney who was close to the energy industry. He came in and he kneecapped them. He came in and he got George Bush, who had pledged in his campaign to regulate greenhouse gas emissions. George Bush had made that pledge, to regulate

greenhouse gas emissions. Cheney got him to renege on that campaign promise within a few weeks, early February 2003. Publicly, in a letter to the Congress, saying, "Greenhouse gases are not air pollutants. We have no authority to regulate them. It'd be a bad idea to regulate them." That was the end of the effort.

Richard Lazarus:

But, here's the thing. In sabotaging the efforts of Whitman, Powell, Rice, and O'Neill, Cheney's allies, they made a misstep. They were not lawyers, and they stumbled on law. They did not listen or consult with any of the career expert lawyers at EPA or Department of Justice. The way they promoted EPA is denial of the petition, which EPA did, denied Joe's petition in September 2003. They made some mistakes. Those mistakes became their undoing several years later.

Richard Lazarus:

Now, there is nothing easy or smooth over about the pathway of Joe's petition in the United States Supreme Court. By the time Joe reached the courts, the first court to hear the issue was US Court of Appeals for the DC Circuit in Washington DC. That's because in the Clean Air Act, these kinds of cases don't go to district court trial court. They go right to the Federal Court of Appeals. DC Circuit has exclusive jurisdiction over it.

Richard Lazarus:

But, now, he was no longer alone. There are hundreds of lawyers on his side. With about a dozen states and more than 2,000 national environmental groups. They called themselves the Carbon Dioxide Warriors. They lost that first round in the courts. It's sort of confusing, fragmented, split decision, like two to one. When they lost in the DC Circuit, every one of those lawyers but one [inaudible 00:13:23] the case.

Richard Lazarus:

They said, "All right. It's a bad opinion but not much precedential damage. Wait and fight this another day in a different case that's not too risky to go at." Only one attorney out of those hundreds thought further review should be taken. That was Jim Milkey from none other than the Commonwealth of Massachusetts. Jim Milkey, Head of the Environmental Division of the Attorney General's Office in Massachusetts. He had been there for years. Harvard undergrad of Harvard Law School at MIT. I think, Urban Planning degree as well. Jim Milkey was the only one who said, "I think you should roll the dice. I don't think we should acquiesce in this laws." Everyone else thought, "Terrible idea. You risk a major loss if you seek further review. Don't do it."

Richard Lazarus:

There was enormous pressure put on Milkey not to file. At one point, Frances Beinecke, a wonderful, very distinguished Head of the Natural Resources Defense Council, called Milkey's boss to lobby against Massachusetts filing anything more. Then, she called at Milkey and said, "The future of the environmental movement is on your head if you do those." Those are chilling words. But, it didn't chill Jim Milkey. Jim Milkey knew they couldn't stop him. Any one of the parties could seek further review. He said, "We're going to file." Reilly backed him up. The Attorney General backed him up.

Richard Lazarus:

At that point, once they were filing, everyone joined the petition, because not that they wanted to file, but they were not going to have him file and not be part of it. They wanted to control it. Control was being argued. He actually thought he's always been granted, anyway. I believe it might look like they were fragmenting within it.

Richard Lazarus:

The Supreme Court, to everyone's shock, I mean, shock, granted review. No one actually thought. They didn't want it to happen. They never thought it would happen. Why? Because the last time the Supreme Court had granted review at the request of environmentalists over the federal government's opposition was 1971, 35 years earlier. The court doesn't do it. They grant quests and industries' requests, they grant requests when EPA wants it on either side, but not over the federal government's opposition. But, they granted it.

Richard Lazarus:

The Carbon Dioxide Warriors were like beside themselves. They couldn't believe it. It was going to be the first climate change case ever before the United States Supreme Court. They reacted with expletives of different versions, some more secular than others. But, Milkey, when he happened, they're all celebrating, all the ones who didn't want the petition filed are celebrating. Milkey is celebrating, thinking, "What have we done?" Because they could lose the case. If they lost the case, they could set back climate change efforts for a long time. It wasn't clear who had voted to grant the case, whether liberals or conservatives had voted to grant. You don't know who voted to grant. He worried a great deal.

Richard Lazarus:

Now, I'm going to fast-forward. Over the summer of 2006, the environmental groups filed fabulous briefs, fabulous written briefs championed by a wonderful legal academic group, just a very strong brief for all the petitions.

Richard Lazarus:

But, once that brief was filed in sort of, I think, early September 2006, then, a fight which is hidden below the surface sort of erupted. That was, who has to do the oral argument in the Supreme Court? I can tell you, I've been involved in a lot of Supreme Court cases. I advise people a lot of cases on the side did so a little bit in this case as well. Here's the easy part. Everyone agrees the best person on the team should argue the case. Everyone believes that person should make the best argument. That's easy.

Richard Lazarus:

Now, with about 100 lawyers on one side of the case here. The lower courts allow divided argument. You have two, three, sometimes four, especially, when there are many parties in the case. Supreme Court doesn't. They want to hear from one, not multiple.

Richard Lazarus:

There's conflict deciding who's going to do it. Sometimes, the coin flip to decide who's going to do it. The stakes and the emotions run high as do the competing egos and ambitions. Standard operating procedure. But, in this instance, the oral argument conflict was extraordinarily destructive. I have never seen one before then. I have seen a lot. It was incredibly intense. In fact, it was so intense that 13... take

that back... 14 years later, because it happened at the beginning of October of 2006, 14 years later, the principles involved are still not speaking. They were good friends and colleagues.

Richard Lazarus:

Then, even after, it was seemingly settled that Jim Milkey, as the person who pushed the case, who he had been the counsel of record all along the Supreme Court. Jim Milkey would argue it. He'd been preparing for several weeks, brutal preparation for the argument. The environmental groups who didn't want him, the states wanted Milkey, the environmental groups have their own preferred advocate. The environmental group attempted no less than a coup d'etat days before the argument to replace Milkey with their preferred attorney.

Richard Lazarus:

They called him up on a Saturday morning, about a week and a couple days before the actual argument. They said, "You got to go. We've seen your practices. You're not competent. You're going to do a bad job. You're going to lose this big case. You have to step aside." Well, let me tell you, I've done cases. You don't do that. You can't bring in another person who's not been preparing a few days before the actual argument. That's a disaster to do it. You build the person you've got. You build up their self-confidence. You tell them and you help them prepare. You don't do this.

Richard Lazarus:

The fact that it was such a crazy idea underscores the level of distrust, the level of fragmentation within that team. Jim Milkey was stunned. He stabilized. He said, "That's not going to happen." It didn't.

Richard Lazarus:

The next several chapters describe the oral argument in the case. These chapters are designed to give the readers a sense of, first of all, this is studying physical setting in the courtroom. If you get a chance, you should go. The extraordinary give and take between the justice and the advocates, but, also, very importantly, between the justices themselves.

Richard Lazarus:

What people don't realize is, when the justices have an hour of oral argument case, that's their standard, when they walk in that room of the argument, it is the first time the justices, the nine justices hear what their colleagues think about a case. By tradition, they don't talk about the case in the briefs until the oral argument. In an oral argument, they're spending an hour learning what each other thinks through the questions they ask. They all know that. They're all using their questions to try to lobby their colleagues on the bench.

Richard Lazarus:

The advocate is given this incredible opportunity. They're there for that hour. They can hear what the justices are thinking. They can participate in that. They're only 74 inches away from the advocate, sorry, between the bench where the justices sit and the advocate standing. It's really close. You're there. The bench bows. It's like they're around you as well. It's extraordinary notion of formality and intimacy. It's a great opportunity. But, don't underestimate it, it's an unbelievable challenge, too.

Richard Lazarus:

What the advocate has to do is decide how to frame the issues in the case, stand up there, and do the initial framing in a way most likely to win. It's all about framing. It can make a huge difference. You frame the case one way. If this is the way you should be thinking about justices, you could lose. You frame it in another way, this way to think about it, you might win. You have to anticipate all the hard questions, develop crisp answers. It's a hot bench. The norm is the advocate is interrupted and has to answer questions 50 to 75 times in 30 minutes. Do the math.

Richard Lazarus:

The questions take up some of your time, so you've got to be quick and fast and on point and be subject to mock and ridicule. No. It's not quite as bad as Tuesday night's debate. But, they just jump all over you. You have no interrupted time. Now, there's a little at bit the beginning, but not back then. You go, and they're joining and they're interrupting you and putting words in your mouth and mocking. If they're trying to [inaudible 00:22:42] the other justices, you have nothing to do with it.

Richard Lazarus:

The justices, though, are much more polite than that. But, it's demanding, but not like our president. Trying to hit one of their questions directly is including trying to hit a major league baseball pitch.

Richard Lazarus:

The book describes the oral argument in detail. Milkey is back and forth with Justice Scalia and Chief Justice Roberts in particular. He had 23 questions from Justice Scalia alone during that argument. Here are our justices. This is how they sit, a quite attractive group.

Richard Lazarus:

Here's the beginning to Milkey's argument in the Supreme Court. I want you not just to read it. I want you to hear it. I'm going to play the sound. Joe, if you can give me a little thumbs up to make sure we can hear it. Here we go.

Speaker 3:

Mr. Milkey.

Jim Milkey:

Mr. Chief Justice, and may it please the Court: If I may, I'd like to frame the merits very quickly and then turn immediately to standing. Although the case before you arises in an important policy area, it turns on ordinary principles of statutory interpretation and administrative law. EPA made a decision based on two grounds, both of which constitute plain errors of law reviewable under any standard.

Jim Milkey:

We are not asking the Court to pass judgment on the science of climate change or to order EPA to set emission standards. We simply want EPA to revisit the rulemaking petition based upon permissible considerations.

Richard Lazarus:

That's his beginning. That beginning, it's like 37, 38 words, whatever it is. That beginning was as carefully discussed, debated, planned out as the beginning of a Broadway production. There's nothing [inaudible

00:24:33] about it. How do I frame the case in the exact words? Imagine if you were climate activists and you had, which many did, slept on the cold sidewalk in Washington DC on November 28 before this argument.

Richard Lazarus:

The next day was going to be the climate change case before the United States Supreme Court, the most important, compelling, existential issue to face the world and to face the Supreme Court, *Brown v. Board of Education*. This is your chance for your champion to tell the court what an unbelievably important issue this is, what the Bush administration has flagrantly, unlawfully done.

Richard Lazarus:

Instead, your champion stands there and says, "This is a question that arises important policy area. But, it's really a question of order in administrative law. Nothing special about it. We're not asking you to pass judgment on the science of climate. You don't have to do that. You don't have the order to do anything. We just want EPA to visit the rulemaking petition based upon permissible considerations."

Richard Lazarus:

You'd be outraged. What's our guy doing? He's throwing the case. He's not. He's making, actually, a fabulous legal argument to nine justices. He's trying to win the case. He's not giving a speech to a rally of climate activists. He's not running for office. He's not testifying before Congress. He is trying to get five votes. That's the Rule of Five: five votes out of nine from the United States Supreme Court. He has to speak their language. It might make your heart, it does make my heart go aflutter to think about climate change. It doesn't make the hearts of those nine justices back then a flutter. What makes their heart beat faster? Administrative law.

Richard Lazarus:

He's presenting the case to get their votes, not your vote, their votes. The best environmental lawyers are the best lawyers. He's been a great lawyer here. He said, "How do I frame it?" The way to win this case is to make it about these principles of administrative law, tradition and order, nothing radical about it at all. I'm not asking for anything, because he's not going to win that way. It is conservative court. He need that five votes, he needs at least one conservative. He's downplaying the ask, making it clear that we're not asking for much and we can do it without making any kind of radical notion of law.

Richard Lazarus:

All right, take us to the conference. Two days after the argument, the justices meet in their private conference room. The conference room is behind the courtroom, behind the red curtains across the hall, into the conference room. I took a walk along that as well. You walk in the conference room. When the justices there are talking about a case, no one's allowed to rebut the justices, no secretaries, no assistants, no law clerks, only the justices.

Richard Lazarus:

They sit in a way based on seniority. The Chief Justice has the most senior seat. That's the seat on the east side of the room. Justice John Paul Stevens, next senior. He sits on the opposite side, the west side of the room. The other justices go in decreasing order of seniority, Scalia, Kennedy, Thomas, Souter, Ginsburg, Breyer, and Alito. He was a Junior Justice. That's why he's there. He's just been on the court.

Actually, Roberts has just been on the court for a few months, about a year and a half. He's Chief, so he gets the senior seat.

Richard Lazarus:

Alito, by contrast, has been on almost the same amount of time. He has to stand for the door, if anyone knocks. He is the Junior Justice. They go around the room. What they do is they spend a little time talking about a case. Roberts goes first. He summarized the case in a few minutes. He has his vote before anyone else talks. Then, Stevens gives his vote. No one else talk. They go around and give their vote.

Richard Lazarus:

There's not a big discussion. No. They give their votes in order. They go around the room. Everyone wants to know, really, what one person's vote is going to be. That's going to be Justice Kennedy. It's pretty clear from the case and their inklings to the argument that this is going to be a closer divided case, and Justice Kennedy is going to be the decisive in the case. That's what happens.

Richard Lazarus:

Robert says, "Affirm the lower court in favor of EPA." Steven says, "Reverse." They go around and Kennedy says, "Reverse." That means five to four.

Richard Lazarus:

Here's what most people don't realize. Once that vote happens, that decides really only one thing. That is who is the senior justice in the tentative majority? Those votes are not binding. Nothing is binding until someone writes an opinion, which five justices agree to. As soon as they're out of that conference room, the justice and dissent are trying to get the other justice to vote that, with writing. Because, the only thing it's writing, not talking. It's what the Supreme Court does. They have to write it and get the votes.

Richard Lazarus:

Kennedy has been known to switch votes. Stevens had to make a big decision as a senior justice of the majority and that is, who does he give the opinion assignment to? He could give it a naturale to himself. Big case, big, big case. He's hardly the senior justice majority very often, because the conservatives take most of the cases, especially that term. Or, he could do what people strategically do, is give it to the most marginal justice. The justice whose vote you're most worried about losing. Then, you give it here to Kennedy.

Richard Lazarus:

I talked to Stevens about that. Stevens said, that's the challenge. He remembered how Brennan, in early civil rights case, took the opinion for himself as senior justice. His decisive vote was Kennedy. Kennedy abandoned him. His dissent, his majority became dissenting opinion in a major blockbuster civil rights case. Stevens is worried about that. He finally decided, "I'll take it myself. I'm going to do this one by myself." Then, he had the job of keeping Kennedy and keeping his vote.

Richard Lazarus:

He put up draft number one of the opinion. Three of the justices join him, in a sense of circulating their dissents. Stevens got one. Roberts got another. Stevens gets only three votes. So, four in total.

Richard Lazarus:

He puts out draft number two, four votes. Three, four votes. Four, four votes. Five, four votes. When this happens, you try to get that person to join, you make compromise, qualifications, more changes. It's rare to get them on. Five, four votes. Six, four votes. Seven, four votes.

Richard Lazarus:

At one point, [inaudible 00:31:27] made Justice Souter, and no one knew this before, I didn't. Justice Souter drafted a separate concurring opinion. Ruth Bader Ginsburg joined it. He didn't like some of the compromise remade. He didn't like that there wasn't tougher language to EPA about their responsibilities. Draft number eight, Kennedy signs. Souter and Ginsburg withdraw that opinion, which is why no one ever knew it existed.

Richard Lazarus:

Stevens published his opinion and he goes to town. He makes compromises needed, but he makes us a climate change case from the very first sentence. That he didn't want Kennedy to write some narrow opinion, which would tally. He told me, "This is an important issue to me. I'm a Republican. I'm very frustrated. Republicans are not taking the climate change issue seriously." Environmental groups in the states sweep the table on the law. They win on everything, all three issues before the court, even which they were fairly weak on, they won that one, too.

Richard Lazarus:

Stevens says, writes this way, which is a call to action about climate change. It has a major effect, not just on law but on politics. It was the Supreme Court who's saying, "This is a huge issue. EPA has to act on it." It's an amazing opinion that way. Although, sometimes he tried to outline it a little complicated to read, and what his reason is? That's what happens if you try to make compromise to get a vote. Sometimes, you have to avoid some things to get that fifth vote. He was a Jedi Master at this.

Richard Lazarus:

The book, then, tells the story about how the case made history, is a historic ruling. But, it's the Obama administration, which took this loss of the Bush administration. As of January 2009, they ran with it. They'd hoped for legislation. They never got it. They took the loss of EPA and they built a massive amount of regulatory obligations based on that. They did it and they took the promise of the case, and they sought to realize it. That's because the people on the White House, and that includes Barack Obama, it also includes Joe Aldy who was also in the White House.

Joseph Aldy:

[inaudible 00:33:51].

Richard Lazarus:

And, My colleague, [Jody Freeman 00:33:53]. They knew one thing. That is the United States could not solve the climate change problem alone, that the rest of the world would have to join, it has to be international agreement. Every agreement had not happened and frustrated, because the rest of the

world understandably said, "United States, you first. More of those greenhouse gas emission in the atmosphere are from you than anybody else. China may do more per year at that point, but this stuff accumulates over time. It's your thing. We're not going to curtail and promise the commitments unless you go first."

Richard Lazarus:

That's why every effort before that had failed. Obama administration officials understood, and the president no less give an incredible talk on January 26, 2009, one week after taking office, a call to action on the climate issue. Obama administration knew they had, hopefully, two terms but just enough time, maybe, to convince the rest of world. By December 2015, when Paris Agreement happened, the US was all in. They did that through realizing the authority given to them and the mandate by Massachusetts versus EPA.

Richard Lazarus:

New motor vehicles, of course, first. Landfills, methane production, and, of course, the Clean Power Plan, which comes out for power plants in October 2015, they're pushing it out to get there before Paris. It works. We have the first national historic, international historic agreement on climate change, December 2015.

Richard Lazarus:

Now, when I started writing this book and researching in December 2015, I knew the story's ending. It was a pretty great story. The trajectory was obvious. You start with Joe, back in actually '89 the book begins or so. You end up with Paris in 2015. Then, I know you guys at the Kennedy School are a lot smarter on these things than the folks like me over the law school.

Richard Lazarus:

In December 2015, I did not anticipate one thing. I'm sure you guys did. You saw it coming. I did not anticipate by the time my book would be done, that Donald Trump would be the president of the United States. That was my unanticipated challenge I mentioned in the beginning. That is, what to do with it? What to do with this book with Donald Trump?

Richard Lazarus:

Here are the three things I knew. One, I knew I had to explain it. I had explained how it fit the story. I've explained its relevance, especially, its historic relevance. Also, do something else. I did not want this book to become yet another Trump book. I did not want this book to be wed to the latest event of the moment. I always try to tell a book with a long half-life, to tell a story about people, about law, about courts, about an important issue that would be sort of seen to readers for a long time.

Richard Lazarus:

What people could do? Long past the presidency of Donald Trump, [inaudible 00:37:06] years from now to be able to enjoy and learn from the thrilling story told, and be inspired by it. Perhaps, even say now, if I didn't have the books life did long enough to have some reader years from now, pick it up, read the book, come to the epilogue, and say, "Now, who is that guy Donald Trump that's mentioned in the epilogue?" That's a role. The role of the epilogue is to place Donald Trump in perspective, what lessons the book's story has for us all. Lessons like the difference one person can make.

Richard Lazarus:

Here, we had many different one persons. We had Joe Mendelson. We had Jim Milkey. We had judges. We had justices. People who stepped up to the plate against all odds, they made a difference. Also, to underscore the fact that it's not the votes of five justices that can achieve long-standing, transformative change that the country may need.

Richard Lazarus:

Probably, what education wasn't amazing is none is more important that. It did not get rid of racism in the United States. It was important catalyst for all kinds of laws unbelievably valuable. But, at the end of the day, on issues like this, whether it's racism or whether it's climate change, it takes all three of the votes of more than five justices. It takes the votes of people in elections. That's how we make transformative change in the United States.

Richard Lazarus:

Supreme Court decisions can catalyze, push, cajole. They can lead progress. But, we do it through elections. That's our system. It's not courts. Its elections. That's why the timing of this book, it actually might talk to you all, you might prefer to go live at the Kennedy School, it's so important. In case you don't know, there is an election coming up. It's in just a little more than a month from now. It's a very, very important election. A lot is at stake.

Richard Lazarus:

On that one, it's not going to be the votes of the five justices or nine justices, or, currently, eight justices, many of them who don't vote, actually, in elections, because they think they shouldn't vote elections. It's your vote and the votes of people whom you knew. That's what's going to determine whether Massachusetts versus EPA realizes its real promise. Thanks very much. Absolutely delighted to be joining you in the seat, Joe. I'll stop my share screen, too.

Joseph Aldy:

Thank you, Richard. That was fantastic. I want to remind everybody who is joining us here to use the Q&A tab at the bottom of the screen. You can type in your questions there. I will relay them to Richard. As the questions come in, I want to reflect a little bit on this. Richard, I haven't talked about this. It wasn't just that I joined the team under President Obama and we actually took this and started working quickly on implementing what had come out of Mass. v. EPA. I was a junior staffer at the Council of Economic Advisers in 1999, working on, among other things, climate change policy.

Joseph Aldy:

I did a lot in 1997 on Kyoto. Then, sort of post-Kyoto, how can we get more countries involved. That was the big political barrier we were facing in our domestic politics. It was a surprise when we heard about the testimony that Richard writes about that, then EPA Administrator Carol Browner made up on Capitol Hill saying, "Sure, we get the legal authority to regulate greenhouse gases."

Joseph Aldy:

It's one of those things where I remember, and he writes a little bit about this early in the book, about how the White House was a bit surprised by that. We were. But, it does say something about how much things have changed in 1999 with the, then leading candidate and eventually, the nominee of the

Democratic Party. It thought it was probably the most adamant advocate for climate change policy and taking action on climate change. Now, Al Gore, not really wanting to embrace that issue much.

Joseph Aldy:

We fast forward to 2008. We actually had both presidential candidates being pretty ambitious on this. When we came in, I remember working on the presidential transition team for President Elect Obama at the end of early '09. The environmental community wanted us to do the Endangerment Finding on day one. It's, "You've got to do this on day one." We had to say, on day one, two things happen. The President takes an oath and we party. There's no work really being done that day, other than that.

Joseph Aldy:

We also emphasize the importance that we do this right. I think it gets to when we think about the law. Really, it's a compelling story. I really enjoyed reading this. We make sure it shows up on the screen here. You want to make sure you do it right.

Joseph Aldy:

There's some of this, as Richard said earlier, there was these early missteps in the Bush administration that set the stage, really, for the success by the challengers in *Mass. v. EPA*. In Obama, it was clear, we're going to do the Endangerment Finding. It's like the first thing you have to do as a condition for, then, regulating greenhouse gases. We're going to make sure it's ironclad. It says something that, even in a Trump administration, where they've had some of the advocates on the other side saying, "We want to undo the Endangerment Finding," they haven't tried.

Joseph Aldy:

I think it's a testament to the staff, the scientists, the experts, and the lawyers at EPA, for when they did the Endangerment Finding, because they were able to take what came out of *Mass. v. EPA*, and then, build this really solid foundation for how we move forward. I do want to ask a question about that, though, in a moment about how we might think going forward.

Joseph Aldy:

The one question I had, because it's a question I always had about this that I didn't know until I read this book, which is, why Section 202? Why motor vehicles? Why not power plants?

Richard Lazarus:

[crosstalk 00:43:17].

Joseph Aldy:

In the '90s, we were thinking more about power plants, to be honest, at least, within the Clinton White House. I'd love to hear this, because it says something about, I think it's chance. Part of it also says about how we think about the role of Clean Air Act that gives the public the opportunity to use the legal system to try to petition for action.

Richard Lazarus:

I can answer your question because I asked that question. When the Bush administration is there, and, actually, during the Clinton administration, there was a lot of debate which way to go. Different groups

went different ways. Some people brought common law nuisance lawsuits against the government, or against the industry, saying, "You should regulate under the common law of nuisance what you're doing.

Richard Lazarus:

Others looked at different versions of the Clean Air Act. Some went after national ambient air quality standards under Section 107. Some targeted sort of the stationary sources. Joe was the one who targeted motor vehicles. That was because the Center for Technology Assessment was interested in technological innovation, and they were interested in cars. Cars was the thing they cared about. They didn't think about power plants. They thought about cars and motor vehicles.

Richard Lazarus:

Joe is the first one out. He's the first one who files a petition. It ends up being the one that becomes the vehicle. It's when it gets denied by the Bush administration, and then, leads to the first lawsuit. There are other cases that were sort of out there the periphery hanging out, but they didn't move. They stood by the wayside. It was serendipity, personal interest. That was really that they were a car group. They want a power [inaudible 00:45:05]. You're managing power plants, great target.

Richard Lazarus:

The other thing I want to mention that you said a moment ago, because it meant a lot to me, was that the Obama administration got that proposed Endangerment draft out, I think on April 2nd of 2009. That is speed of light. The reason they could do it, and this is where they did it right, and the Bush administration did, is they work with the career people. The Obama administration, they didn't have all the science of the study. But, the EPA, those EPA scientists during the Bush administration, they were working. They were studying. They were working. They had done all the studies of endangerment, whether it was there or not. That's what they do.

Richard Lazarus:

The Bush administration hadn't actually stopped them from working. That's one thing different than the Trump group, because he tries to sort of stop the career people from actually doing their jobs. The Bush administration said, "No regulation," but the EPA scientists, the economists, they were doing their work.

Richard Lazarus:

When the Obama people come in and they're willing to talk to them and defer to them and respect them, they're like, "Here it is." Then, the hard work has to be done to actually craft [inaudible 00:46:22] information, that you could do it by April 2nd. It's not like the Obama people were working from scratch in January 2009. They knew how to work with career people and respect them.

Richard Lazarus:

That, of course, has been that one of the big failings of the Trump administration. That's why they keep losing, case after case after case in the courts, because they're sloppy and impulsive, and they don't listen to their expert lawyers. Career people, they'll work for you. Democracy says this is elected, that work with that president that work with that EPA. They're not going to be irresponsible, not low professional who lack thoughts of integrity. They'll work with you. But, this group doesn't work for them. So, they lose.

Joseph Aldy:

When we look back to 2009, we had this process with the Endangerment Finding, the Obama administration went forward on regulatory efforts through both EPA and they worked with the Department of Transportation on the so-called car rule to reduce CO2 emissions from the tailpipes of vehicles.

Joseph Aldy:

Of course, at the same time, the Obama administration is working with Congress on new legislation. Waxman-Markey passed the House of Representatives that would have created an economy-wide cap and trade program, and, of course, as we all know, it failed in the Senate over the course of the rest of 2009, 2010.

Joseph Aldy:

Richard, let me ask you, this is from one of our colleagues, Professor [Stevens 00:47:44], when you look back at this and you think about suppose in a counterfactual Waxman-Markey become law, would we have thought of the Supreme Court case? Would we have thought of the regulatory actions by the Obama administration differently, if we had instead been the now in year, I think it would have been year eight or year nine of implementation of Waxman-Markey, had it become law?

Richard Lazarus:

Yes, absolutely. The case would not have, as a practical matter, have the snippets it had. It would have been used. This would have been the story.

Richard Lazarus:

People beginning at the Obama administration, they used the fact of *Mass. versus EPA* as leverage to try to convince Congress that, let's have some legislation which really looks at this issue, does that national cap and trade program, does trade omission allowances. Let's not force us to rely on this language written in 1970 and to try to Jerry Rig it to get something really interesting and innovative, like the Clean Power Plan and the rest.

Richard Lazarus:

But, no one thinks that's the best way to do it. It was like, if you don't give us something which is sensible and which has trade-offs. Let's have market allowances, which also allow for payments which we use to help communities that are hurt by this transition to a different kind of electricity grid. Let's help the communities in West Virginia and the rest. You can put in a really wonderful program by legislation.

Richard Lazarus:

EPA is much more circumscribed what they can do with an old statute and try to make it work. They did amazing things. What would have happened if we got the legislation, is *Mass. versus EPA* significance would have been as leveraged to create what was really needed, which was national legislation with cap and trade right in the middle.

Joseph Aldy:

As one of the staff working for President Obama, I had a lot of meetings with congressional staff. We used that line quite often to say, "We can do this under the Clean Air Act, but this approach is more

comprehensive. It can be better designed," the point you made. I recall having a meeting, probably late summer or so of 2010 with some Senate staff, Democratic Senate staff. They said, "It would be really good if we waited another two years." I know you're saying that, but, let's see. I said, "We've been working with you now for almost two years to try to get legislation." We've said, "If we don't get legislation, we're going to go down the regulatory route. Don't just ask for another two-year delay."

Joseph Aldy:

Now, what's interesting about this, it gets to how we think about the politics. It echoes a little bit of the politics going back to the late '90s. In the end, it's clear, the election of the Republican House of Representatives in November of 2010, there's not going to be legislation in 2011 or 2012. It wasn't really until the summer of 2013 that President Obama really takes that next step to go beyond just what we can do regulating motor vehicles, announces the Climate Change Plan, that then charges EPA to move forward, that then culminates with the Clean Power Plan, and methane regulations, etc. You can see that, well, at least, for President Obama, he knew he'd run his last election.

Richard Lazarus:

Look, I don't have a lot of time, but I got a [crosstalk 00:50:59].

Joseph Aldy:

Please, please.

Richard Lazarus:

A couple of things. One that people also forget was in June, when the Waxman-Markey stuff is happening, which is June of-

Joseph Aldy:

June 2009 is when they voted it in the House.

Richard Lazarus:

They vote it out. At that point, by June of '09, the Democrats have majority of the House of about 60 or 80 votes. By June of '09, they have 60 senators, who are Democrat or aligned with the Democratic Party. They have a super-majority in both chambers and they can't get it passed. The reason they can't get it passed is Democratic Senators. Democratic Senators who are worried about the risk of voting for climate, because it might be politically unpopular.

Richard Lazarus:

Why does Barack Obama kind of retreat a little bit in 2011, 2012? I've done a search, a word search for Obama. He said the words "climate change" and "global warming" about 80 times in 2009, about 80 times in 2010. After they lost the House, some of us have said to him, "Don't say those words ever again." He did not start uttering the words "climate change" and "global warming" until he wins reelection in 2012. Then, they run with it. It is complicated, a hard political issue for a lot of people. It's not just the Republicans. The Democrats have found it to be hard, too. Maybe, that has changed now. We may have had see a change in the country. That'll be very important for the next president.

Joseph Aldy:

Let me ask one final question here. Of course, under Trump, we've seen a lot of conservative judges at lower level courts having failed, too, and we're now waiting to see about a third seat in the Supreme Court. What does this mean when we think about sort of the future of climate change policy and regulation, both the odds that a case moves from lower courts that are now being decided by more conservative judges that may not be as enthusiastic about a massive EPA ruling, as well as what might be the future in which is green court might try to reverse *Mass. v. EPA*? We'd like to hear your thoughts on this.

Richard Lazarus:

They will reverse *Mass. versus EPA*. *Mass. versus EPA* is greenhouse gases are air pollutants under the Clean Air Act. Supreme Court does not overturn prior cases statutory interpretation. They do constitutional [inaudible 00:53:22]. I can find you some counter-examples, but they're very distinguishable from this case.

Richard Lazarus:

Here's the problem, though. If the next administration, assuming it's a Biden administration, has to try to do all the kind of creative things that need to be done to address this problem with the old language, there's going to be tension with that language on what needs to be done. Skeptical judges and justices may find that the regulations being done are beyond the statutory language. That's the risk here. That's why, if there's a new administration, they needed a new statute. You actually need the Congress to pass something.

Richard Lazarus:

They haven't revised the Clean Air Act since 1990. That's 30 years ago, before a lot of your students were born. They haven't. We need a new statute. [inaudible 00:54:11] climate change. It still can be done. A lot can be done with the existing Clean Air Act. But, doing all the more ambitious things, we'll fight like crazy in the courts to say it's lawful. I worry about more conservative judges and justices, but not if we get new legislation. Those judges and justices will follow the new legislation. We get in the language, we'll win.

Joseph Aldy:

Great. I know Richard has to run a class. It's a couple of minutes before 1:00. One last thing before we wrap up. I want to remind everyone that the seminar will meet again in three weeks on October 22nd.

Joseph Aldy:

A related seminar, we're going to have share the floor with the former chair of the Federal Energy Regulatory Commission. She will be speaking on challenges to successful de-carbonization in the United States, and strategies to overcome them.

Joseph Aldy:

Finally, Professor Lazarus, it is a pleasure and an honor to be able to share this hour with you. Thank you so much for joining us. Thank you for writing. Like what I said, it is a compelling story. I really encourage everyone, even you're like the law can get kind of technical and you get into some of the details.

Richard Lazarus:

[crosstalk 00:55:15].

Joseph Aldy:

It's not this story. This is a great story about the challenges of how we, as a society, how we and our government across all the different branches, how we might try to work together and deal with all the different kinds of big-picture politics and little-picture politics come together to actually tackle the challenge of climate change. It is really a great read. I'm thrilled that the book is out. I'm thrilled to be able to sort of share this story and share the insights from all of your work on this, Richard. Again, thank you for joining us. We look forward to seeing you again, and, hopefully, soon in person, so we can continue conversations about the future of climate policies.

Richard Lazarus:

Thanks, Joe. In my next book, the Joe in the first chapter will be Joe Aldy.

Joseph Aldy:

I look forward to that.

Richard Lazarus:

All right. Take care.

Joseph Aldy:

Take care. Take care. Bye-bye.