

The Rule of Five

The Rule of Five

Making Climate History
at the Supreme Court

Richard J. Lazarus

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TO JEANNIE, SAM, JESSE, and
JUSTICE JOHN PAUL STEVENS,
the author of *Massachusetts v. EPA*

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Prelude

On the morning of April 2, 2007, the United States Supreme Court announced its decision in *Massachusetts v. United States Environmental Protection Agency*, the most important environmental law case ever decided by the Court. The stakes were enormous. At issue was the legal authority and responsibility of the United States government to address the most pressing global environmental problem of our time—climate change.

One person, Joe Mendelson, acting very much alone, had triggered the events that had led to this moment. Fed up with the lack of action during the presidency of Bill Clinton to address the climate issue, he had decided to do something about it, even when other environmentalists had urged him to stand down. By the time the case reached the Supreme Court, George W. Bush was president and Mendelson had been joined by dozens of lawyers; together, they made up a team that called themselves “The Carbon Dioxide Warriors.” They sought to do something no environmentalist had ever done before: take a case to the Supreme Court and defeat the president of the United States. Now it was up to the nine Justices of the Supreme Court to decide.

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A ruling in favor of a coalition of states, local governments, and environmental groups led by Massachusetts could mean that after years of inaction, the United States would finally take action to address a global threat with potentially catastrophic consequences for which the United States, more than any other nation, was largely responsible. A loss, by contrast, could set back or even destroy efforts across the country to bring lawsuits to force the federal government to act on the climate issue. The latter prospect was why many thoughtful environmentalists had tried to prevent the *Massachusetts* case from ever going before the Justices. They were justifiably worried they might not only lose, but lose big.

This book tells the story of *Massachusetts v. EPA*. It is an unlikely yet nonetheless hopeful and inspiring story that reveals the best of Supreme Court litigation today, while acknowledging why it is hard to make law to address climate change. The *Massachusetts* story underscores the serendipitous pathways and fascinating personalities that can lead to a historic ruling. It also opens a window into the Court itself, and the many ways in which environmental cases present particular challenges both for the Justices and for the advocates who appear before them.

1

Joe

October 20, 1999. Joe Mendelson pulled his desk drawer open and reached inside. The several-hundred-page petition he had drafted more than a year earlier was still there, as he knew it would be. For all those months, the decision to file—or not—had weighed on him. It was a classic late October autumn day in the nation’s capital, in the low fifties, sunny with a sporadic light drizzle. But this was not just any day. It was the day Joe Mendelson edged himself to the point of acting.

Mendelson was a public interest attorney working for the International Center for Technology Assessment, a big name for a tiny, shoestring environmental organization no one had ever heard of. In his early thirties, married with two young children, he was still youthfully fit and could easily have passed for a decade younger. Until recently his Capitol Hill office had consisted of a small bedroom overlooking an alley in a small townhouse across from a liquor store. Calling it an office may in fact be too grand; he kept his file cabinet in the bedroom closet. A city housing inspector certainly hadn’t been impressed.

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A few weeks earlier Mendelson and his four colleagues had relocated to an even smaller suite of rooms in a nondescript building on the Hill after the inspector had questioned the legality of their office in a residential neighborhood. As Mendelson sat staring into his desk drawer, he knew his job lacked the status and trappings of the better-heeled national environmental public interest groups. But he also knew he lacked their bureaucratic constraints. He could decide largely on his own whether legal action was needed. And he had decided that the need for such action now was obvious. The consequences, however, were far less so.¹

The first generation of environmental public interest lawyers, in the 1970s and 1980s, had focused on easily visible and immediately harmful industrial air and water pollution. But Mendelson, who began law school in 1988, became a public interest lawyer just when alarms were beginning to sound about the less visible, more complex, and potentially catastrophic problem of what was then called global warming. In June 1988, only a few months before his first day of classes, James E. Hansen, a National Aeronautics and Space Administration scientist, testified before Congress that the earth was warming as a result of the “greenhouse effect”—the absorption in the upper atmosphere of heat from the sun by certain human-produced gases. Hansen spoke in the measured words of a scientist, but with such ominous and dramatic import that the *New York Times* published a front-page article on his testimony and included a graph produced by Hansen and a colleague showing that the four warmest years in the past century had all occurred in the 1980s. “The greenhouse effect is here,” Hansen declared.²

“Yesterday’s Gone”

When Senator Al Gore from Tennessee was elected vice president in November 1992, environmentalists had reason to be pleased. Gore had written “the book” on climate change—*Earth in the Balance*—

proposing an ambitious, if not radical, “Global Marshall Plan” to avert environmental devastation.³ In his book Gore did not mince words on the urgency of the problem and the need for immediate and sweeping governmental efforts. “We must take bold and unequivocal action,” he insisted. The “rescue of the environment” must be no less than “the central organizing principle for civilization.” “Complacency” can no longer be afforded, Gore warned, because the nation, indeed the entire world, is “facing a rapidly deteriorating environment” that “threatens absolute disaster.”⁴

What was more, the environmentalists knew that Clinton had chosen Gore to be his running mate not despite Gore’s boldly stated environmental ambitions but because of them. Clinton picked Gore in large part because Gore’s book bolstered his chances of winning the presidency. He knew that his own environmental record as governor of Arkansas was anything but clean. Indeed, it bordered on the abysmal, which is why founding members of the Sierra Club’s Arkansas chapter resigned in protest when the national Sierra Club organization endorsed Clinton for president.⁵

Governor Bill Clinton’s administration had burned toxic waste at Superfund hazardous waste sites, failed to crack down on massive water contamination caused by the state’s powerful hog and poultry industries, declined to prevent clear-cutting of forests, and proposed a water quality standard for the toxic chemical dioxin that was one hundred times less restrictive than the standard recommended by United States Environmental Protection Agency (EPA).⁶ Clinton proudly touted himself as the “jobs” candidate—a central part of his celebrated campaign theme, “It’s the economy, stupid.” Clinton was a self-described “new Democrat” who could win a national election. He frequently drew contrasts between himself and the left-leaning Democratic candidates who had lost the three previous elections to Ronald Reagan (twice) and George H. W. Bush.⁷

But Clinton was well aware that his “new Democrat” status created vulnerabilities within the more liberal base of the party, whose

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votes and enthusiasm he would need in November. That is where Gore fit in. Clinton hoped Gore could help him with those liberal Democrats who were naturally wary of a southern, moderate governor from Arkansas. When Gore's presence on the ticket generated mocking criticism from his counterpart on the Republican ticket, Senator Dan Quayle from Indiana—who described *Earth in the Balance's* call for sweeping legal and policy changes to address climate change as “bizarre,” “detached from reality,” and “devoid of common sense”⁸—political commentators were divided on whether Clinton's choice would prove to be a “brilliant stroke” or “stupid.”⁹

Before the book's publication, Gore's own political future was unclear, given his dismal showing when he had run for president in 1988. Gore had known, during his short-lived campaign, that he had little chance of winning. He was only forty years old, three years into his first term as senator from Tennessee. After eight years of the Reagan presidency, the Democratic field of presidential candidates was crowded with more senior party leaders. Gore's aim was to make a good enough showing to set himself up for a more effective run one or two election cycles later.

But his plan backfired. That he had presented himself as presidential at such a young age was seen as raw political hubris, suggesting that he lacked both maturity and seriousness. He emerged from the process a failed candidate rather than a promising future one. He undermined his claim to be a Democrat capable of winning southern states by losing to the civil rights leader Jesse Jackson in several Democratic presidential primaries in the South, and he did little better in the Northeast. After garnering only 10 percent of the vote in the New York primary, Gore dropped out. Chastened by his poor showing in 1988, and no longer perceived as a viable national candidate for the White House, Gore did not even campaign for the presidency in 1992.¹⁰

Instead, he wrote and published *Earth in the Balance* to accomplish a political makeover. And it worked. The book was on the

New York Times Best Sellers list for much of 1992 and effectively rebooted Gore's political career. The book's luster with the liberal wing of the Democratic Party was sufficient to overcome those who strongly advised Clinton against a running mate from a nearby southern state who, like Clinton himself, was youthful and lacked gravitas. The Clinton-Gore campaign embraced its youthfulness, promising a generational change, underscored by the campaign's official song, Fleetwood Mac's "Don't Stop," and its refrain: "Yesterday's gone, yesterday's gone."

Clinton and Gore's success in November 1992 did more than place Gore as the president's partner in the White House. The election catapulted him into the pole position for the presidency in the 2000 election. Ironically, those very same presidential ambitions simultaneously doomed Gore's willingness to take on the climate issue during his eight years as vice president with anything close to the vigor he had promised. In his book, Gore had presciently described his own limitations: "I have become very impatient with my own tendency to put a finger to the political winds and proceed cautiously," he wrote. He promised that the compelling nature of the climate problem would make him act differently this time: "The integrity of the environment is not just another issue to be used in the political games for popularity, votes or attention," he wrote. "The time has long since come to take more political risks—and endure much more political criticism—by proposing tougher, more effective solutions and fighting hard for their enactment."¹¹

Gore championed many important environmental initiatives while in office—but not on climate change, the issue he had described as the most pressing of all. On the climate issue, Gore, in significant respects, did the exact opposite of what he had preached. He declined to take the "political risk,"¹² deciding instead to maintain a low profile in order to enhance his own prospects for the presidency in 2000.

Gore's retreat from climate change advocacy in favor of electability was evident as early as the fall of 1992 at the Democratic

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National Convention, when he sensed that the strong views expressed in his book might hurt him politically. His own campaign manager even sought to distance him from the book's promises by stating that the book had merely "laid th[em] out as a series of ideas to be thought about and contemplated" rather than as formal proposals for action.¹³ As vice president, Gore similarly declined to embrace the role of zealous advocate for climate change regulation within the administration, in the face of political opposition. To be sure, he persuaded Clinton to appoint to significant environmental positions within the administration former congressional staffers who shared his environmental concerns, including Carol Browner as administrator of the EPA and Katie McGinty as chair of the White House Council on Environmental Quality. But when confronted by Republicans in Congress and climate skeptics within the Clinton administration, Gore and his team mostly allowed themselves to be pushed to the side.

Mendelson and other environmentalists were unforgiving. By December, Gore found himself the target of barbed criticism by the same environmentalists who had championed his candidacy five years earlier. They viewed the United States' position on greenhouse gas emissions reduction as little different from what it had been under President Bush. Gore's balancing act was further undermined when the two State Department officials who were leading the international climate negotiations on behalf of the United States (Assistant Secretary of State Eileen Claussen and Undersecretary of State Tim Wirth) both abruptly left the team, reportedly out of frustration with both Gore and Clinton, shortly before the United Nations summit for international climate negotiations scheduled for Kyoto, Japan, in 1997.¹⁴

At the last minute, President Clinton sent Gore to present the U.S. position. Gore's charge in Kyoto was the opposite of the bold, affirmative action that his book had argued was essential. It amounted to a retreat. The White House tasked him with dissuading other

nations from agreeing to emissions reductions that would be too stringent to be politically palatable back in the United States. The European Union's proposal called for significantly greater emissions reductions than those Gore was touting on behalf of the United States.¹⁵

The vice president found himself pushed and pulled by two conflicting political constituencies: the short-term economic concerns of the labor movement, whose support he would need for the 2000 national elections, and the environmental concerns of the progressive Democratic base, whose support would likely play an outsized role in the Democratic nomination process. Gore was himself especially concerned about labor's vocal opposition to tougher climate controls. The United Mine Workers union funded a study that produced the exaggerated claim that the climate change agreement being debated in Kyoto would cost 1.6 million jobs in the United States. As a presidential hopeful, Gore could ill afford to create an enemy of the labor movement.¹⁶

Because of the insistence of the United States negotiating team in Kyoto, the other nations ultimately agreed to relax the amount of overall emissions reductions required by individual nations. In the immediate aftermath of the signing of the Kyoto Protocol, the *Washington Post* reported that any public support environmentalists tried to offer Gore was belied by "their bitter disappointment and sense of betrayal. . . . [T]here was a consensus that what Gore wanted was an agreement that would cover his political bases, and not one that would protect the global climate."¹⁷

Gore's concerns were not illusory. Even the watered-down version of the Kyoto Protocol agreed to by the Clinton administration incurred the wrath of Congress. Before the final negotiations were concluded, the U.S. Senate voted 95–0 in favor of the "Byrd-Hagel Resolution"—named after Democratic Senator Robert Byrd of West Virginia and Republican Senator Chuck Hagel of Nebraska—which declared that the United States should not be a signatory to any

protocol that did not mandate new specific commitments to reduce greenhouse gas emissions from China, Brazil, Mexico, India, and South Korea—which the pending negotiations would not do.¹⁸

Between 1992, when Gore published his book, and 2000, when he again ran for president, the climate problem was not standing still. Absent any meaningful program to limit greenhouse gas emissions, the economic boom of the 1990s resulted in ever-higher loadings of greenhouse gases in the earth's atmosphere. A concentration of 354 parts per million in 1990 had increased to 370 parts per million by 2000, significantly crossing the 350 parts per million threshold that scientists believed was environmentally sustainable.¹⁹ Climate scientists across the globe were also growing ever more certain in their assessments of the dire consequences of such increased atmospheric concentrations of greenhouse gases. For the first time, scientists were able to describe how the regional impacts of climate change would vary, with dramatic increases in precipitation in some places and extreme drought in others. They detailed the severe ongoing reductions in the thickness in Arctic sea ice, the massive permanent loss of coral reefs, and the potentially devastating reduction in places where existing plant and animal species could survive. Scientists were also able to conclude with even more confidence that these potentially catastrophic climate consequences were the result of increased greenhouse gas emissions from human activities, and not due merely to natural forces.²⁰

“The Queen of Clean Air”

Mendelson and other environmentalists looked to Carol Browner, Clinton's EPA administrator, to take action to restrict greenhouse gas emissions in response to the mounting scientific evidence of the serious threats posed by climate change. Gore's own protégé, only thirty-six years old when she took the helm at the EPA in January 1993, Browner was the youngest administrator in the agency's history. Appearing in

striking photo-shoots in *Vogue* magazine, with her stylish, short-cropped brown hair and no-nonsense demeanor, Browner brought a fresh face and youthful energy to the agency. She was a captivating, charismatic, and effective spokesperson for environmental protection and was only the second woman to head the EPA.²¹

Browner was dogged and unrelenting. She invigorated the Clean Water Act's long-dormant water quality standards program, after decades of agency inaction. She launched Clean Air Act enforcement actions coast to coast, taking on the nation's aging and heavily polluting power plants, which for decades had used loopholes (supported by the EPA) that had allowed them to avoid either retiring or upgrading their pollution control equipment. And in 1996 she shepherded through Congress two significant environmental laws—the Food Quality Protection Act and the reauthorization of the Safe Drinking Water Act—overcoming a Congress otherwise wholly paralyzed by partisan divide.²²

Nor did Browner shy away from confronting the president, his economic team, or congressional skeptics in her overriding desire to improve water and air quality. She was known as a fighter with a strong inside game, quite capable of outmaneuvering those who opposed her efforts. As the EPA administrator, Browner succeeded in significantly strengthening national air quality standards and related pollution control requirements. In what the *New York Times* described at the time as “a remarkable piece of bureaucratic bravura,” she surmounted objections from the White House, especially the president's economic team, and issued tougher emissions rules designed to reduce unhealthy levels of ozone and particulate matter in the air. Browner's more demanding air pollution standards resulted in banner front-page headlines in the *New York Times* and the *Washington Post*. Her picture appeared in the coveted spot above the fold in the *Times*, and *Time* magazine dubbed her “the queen of clean air.”²³

Browner took no victory laps. Instead, she sprinted to the finish line. In her final weeks at the EPA, she overcame industry objections

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to create, for the first time ever, the legal basis for strict regulation of mercury from coal-fired power plants.²⁴ By the close of the Clinton administration at noon on January 20, 2001, Browner was only three days shy of her eighth anniversary at the EPA. Now forty-four years old, the EPA's youngest administrator had become its longest-serving administrator ever.

For much of her tenure, Browner faced fierce congressional opposition. In the 1994 midterm elections, the Republican Party's campaign platform—expressed by its “Contract with America”—firmly placed a bull's-eye on Browner and the EPA. The vast majority of the Contract's provisions singled out the EPA for criticism. Republican candidates who supported the Contract claimed that excessive EPA regulations were undermining economic growth and prosperity and eroding private property rights.

When the Republicans captured a majority in the House of Representatives that November, the newly elected speaker, Newt Gingrich, left no doubt that Browner's EPA was Public Enemy No. 1. Gingrich immediately targeted the EPA for massive budgetary cutbacks, and his new committee chairs compelled Browner to appear at oversight hearing after oversight hearing at which she and her agency were loudly denounced in nationally televised broadcasts.²⁵

Browner's greatest congressional nemesis was the House majority whip, Tom DeLay, who, for all practical purposes, was a member of Congress *because* of his deep antipathy for the EPA. Immediately after graduating from college in 1970 with a bachelor's degree in biology, DeLay had joined the pesticide manufacturing business. Eventually he had purchased his own company, where he earned the moniker “The Exterminator.” DeLay vehemently opposed the EPA pesticide regulations because of their adverse economic impact on his business profits. When first elected to Congress from his home district in southwest Texas in 1984, he quickly established his national reputation as the EPA's biggest (and loudest) critic.²⁶

Nor did his harsh condemnations ebb as he rose through the ranks and became the House majority whip. Light years in political differences separated the White House and House majority whip during President Clinton's second term, as DeLay championed the House effort to impeach the president. Yet notwithstanding those differences, some common ground remained between the two camps on the question of whether the federal government should exercise authority to restrict greenhouse gas emissions to address climate change absent federal legislation. DeLay was vehemently opposed to any such regulation, and the White House, determined not to trigger a battle with Congress on the climate issue in the lead-up to the 2000 presidential election, was no less committed to reassuring DeLay that no such regulations were in the offing.²⁷

On March 11, 1998, Carol Browner outmaneuvered both DeLay and her own boss. In unscripted congressional testimony that had not been approved by the White House, she staked out the historic position that the EPA already possessed statutory authority to regulate greenhouse gas emissions. The setting was a congressional appropriations subcommittee hearing to consider the EPA's budget for the upcoming fiscal year. It was not designed to be a high-profile event, despite the fact that DeLay was a member of the House appropriations subcommittee. The hearing took place in small, cramped quarters with little physical separation between the witnesses and their congressional inquisitors. As Browner later recalled, she sat so close to the committee members that it was as if they were "sitting on top of each other."²⁸

DeLay's questions were unqualifiedly hostile. For her part, Browner did not shy away from being confrontational right back, easily matching DeLay's sarcasm with her own. Their exchange, to observers in the hearing room that day, resembled a classic D.C. political game of cat and mouse. The complication was that DeLay and Browner both saw themselves as the cat and the other as the mouse.

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For two consecutive days DeLay used the appropriations hearing to try to pin Browner down. He repeatedly accused Browner of undertaking a clandestine effort to implement the Kyoto Protocol that the Senate had roundly denounced. DeLay trashed her actions on climate as unconstitutional. With obvious sarcasm, he demanded to know whether Browner thought it was “morally irresponsible to let constitutional scruples stand in the way of saving the world from a climate catastrophe.” Browner shot back, asking if DeLay was questioning her “commitment to the Constitution.” In response, DeLay threw a pocket-sized version of the Constitution at Browner.²⁹

On the second day of the hearing, DeLay played what he clearly believed was his trump card; he brandished an internal EPA memo prepared by a midlevel political appointee in the EPA’s Air Office that had been leaked to the press, which took the position that the EPA already possessed the legal authority under the Clean Air Act to regulate greenhouse gases. The memo had a cautionary footer on every page declaring “Predecisional, do not quote or cite,” and neither the EPA’s Office of General Counsel, nor Browner, nor anyone in their offices had ever heard of the memo, let alone reviewed it, when it appeared in the press. The memo nonetheless became quick fodder for conservative commentators, who denounced both its conclusions and the EPA. For DeLay, the leaked memo was the smoking gun for which he had long been looking. It supported his accusation that Browner’s EPA was secretly implementing the Kyoto Protocol in defiance of Congress.³⁰

Browner responded by disclaiming any knowledge of the memo’s existence prior to the recent media reports. She testified that she did not even know who at the EPA had written the memo. But to the surprise of her staff, and especially her lawyers back at headquarters, she did not back away from the memo’s conclusion that the Environmental Protection Agency possessed authority over greenhouse gases because they constituted Clean Air Act “air pollutants.” Instead, she willingly embraced the proposition.³¹

The most telling moment of the exchange took place in response to DeLay's final question. Stung by Browner's answers, DeLay demanded that Browner supply him with a "legal opinion" to back up her position. Browner's one word response—"Certainly"—masked the significance of what had just happened.³²

The White House, which has to approve congressional testimony by agency heads, would never have approved Browner's testifying that the EPA possessed the authority to regulate greenhouse gases. Nor would the White House ever have approved the EPA's issuing agency guidance or a regulation that took that legal position. But because of Browner's unscripted and unapproved testimony in a congressional hearing, a member of Congress had formally asked the EPA to provide Congress with a legal opinion on the question. Now, the agency had no choice but to answer. Normal bureaucratic hurdles to the EPA's issuing such an opinion, including prior White House approval, had been effectively circumnavigated.

The White House was caught off-guard by Browner's testimony, and so was her staff. Back at the EPA there was definitely a sense of "Oh my, this is great, but can we defend it?"³³ Immediately after Browner's declaration, the EPA's chief lawyer and his staff quickly went to work and in short order produced a legal opinion backing up Browner's testimony. Browner submitted the opinion to Congress and it became an official part of the congressional record.³⁴

Blindsided by the unscripted action of the EPA chief, some officials in the White House and several in the president's cabinet were more than a little displeased. They demanded that Browner assure congressional Republicans (and Democrats from coal states) and industry that the EPA would not take any steps to exercise its Clean Air Act authority to restrict greenhouse gas emissions.³⁵

With her hand forced, Browner made that political commitment to Congress.³⁶ But in his small D.C. office, Joe Mendelson had not.

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