Juliana v US: Getting Ready to Rumble

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Image: YouTube Screenshot of Michael Buffer in Rocky VI.

Supreme Court Tells White House 'No,'
As A Buncha Kids Sue The Government Over Global Warming
---from an article by Alex Parker

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Since the US Supreme Court's (SCOTUS) July 30th denial of the federal government's motions to dismiss the case of *Juliana vs. US,* the plaintiffs and their attorneys have been preparing for trial—the one the Trump administration had hoped to avoid and that others are calling *the trial of the century.*

Barring a last-minute reprieve from the court, the Trump administration must now stand in open court and defend itself against the charge they are denying the 21 youthful plaintiffs in the case, their constitutional right to a habitable environment. In what appeared to be another effort to push back the trial date, government attorneys complained to Magistrate Judge Thomas Coffin that they thought themselves unable to depose all 21 plaintiffs before the trial on October 29, 2018.

Judge Coffin reminded **Administration attorneys** they had earlier taken a pass on opportunities for pre-trial discovery—presumably expecting to prevail in their dismissal motions. Coffin viewed the August 16th status report as **a ham-handed attempt to stall the case**; a tactic he said he hadn't encountered before as a judge.

One of the plaintiffs' attorneys, Julia Olson, assured the court that all were doing their best to make themselves available; she reminded the Administration's attorneys that any plaintiffs not deposed before they could be examined on the witness stand during the trial.

It appears that Administration lawyers are still undaunted in their efforts to have the case dismissed under a *writ of mandamus*—claiming among other things that the plaintiffs have no standing to sue and that the Oregon District Court is unable to redress the plaintiffs in the event the appellate court(s) confirms plaintiffs' right to a trial.

The timing of the new mandamus motion is likely to be immediately after Judge Aiken once more denies the Administration's pending request for a summary dismissal. Despite all of the hemming, hawing and stalling by the Government's attorneys, Phil Gregory--one of the plaintiffs' co-counsels—expects the trial will begin on time.

The High Court's July decision was of historical significance and may be accurately cast in terms of ***firsts*** and ***lasts*****.** It will be **the first-time climate-science is debated in open court**—likely the only forum in these partisan times in which global warming can be honestly and fairly argued.

Although the **first time the Supreme Court has ruled on the case**, it is **not the last time** the case is likely to be heard by the High Court. Whatever the outcome in the trial court **it is a near certainty that the decision will be appealed**—likely all the way **back to the Supreme Court.**

A final court victory in the case would be **the first to establish a constitutional right to a habitable environment** and place upon **the federal government** the **responsibility** of **holding in trust the nation's natural resources.**

The July 30th decision may have been **the last Supreme Court case** in which **Justice Anthony Kennedy** will have **tipped the decision in favor of the environment,** much as he did in *Massachusetts v EPA* ***and*** *Rapanos v US*—***the cases that*** led respectively to the Clean Power Plan (CPP)

and the Waters Rule of the US (WOTUS). WOTUS and the CPP are among the most litigated environmental regulations in history.

I say "*may have been"* because Monday's decision didn't indicate how each of the justices voted. Given their individual histories and the need for five justices to agree, it is a reasonable guess. When the case next comes before SCOTUS, it is likely to face Trump's nominee, Brett Kavanaugh, to replace Kennedy.

As a judge on US Court of Appeals for the DC Circuit, **Kavanaugh has expressed belief in the causes and consequences of climate change,** as alleged by the *Juliana* plaintiffs. However, he has regularly ruled against judicial efforts to combat climate change—believing it a matter for the legislative and executive branches of government and not for the courts. (For a discussion of Trump's SCOTUS nominee, Brett Kavanaugh, see here.

It is easy enough to **appreciate why the Administration is *desperately* trying to avoid having to explain itself in open court. How will Trump and company explain why they don't accept what most of the world's scientists are saying about the causes and consequences of global climate change?** Moreover, should the plaintiffs prevail, Trump and company would face having to undo all it has done to wipe away Obama's environmental legacy.

A loss in *Juliana* would **require the Administration to replace many of the policies and programs Trump has frequently and publicly opposed**, e.g., the CPP and auto fuel standards. Measures that would now need to be significantly stricter than the recently announced replacement for the CPP and the proposed freezing of auto emission standard to the already agreed to 2020 target of 37 mpg rather than the Obama target of 54 mpg.

An established constitutional right to a sustainable environment would be to partisan politics what Alexander's blade was to Gordius' obdurate knot. The establishment of **a federal constitutional right** to a habitable environment **would call into question every effort made by the Trump administration** to roll back the nation's environmental laws to pre-Nixonian times.

It doesn't stop there, however. **A decision for the plaintiffs could place the nation's national resources like land, water, and forests into a public trust under the trusteeship of the federal government potentially stopping Trump's or anyone else's administration from giving away the Grand-Staircase-Escalante, Bears Ears and other federal lands and landmarks or opening them up to commercial exploitation.** Neither would it stop there.

Should *Juliana* cross final finish-line, i.e., result in a favorable Supreme Court decision, **it may be fairly argued** that **the nation is obligated** to rejoin the global community by **signing on to international climate treaties and accords—**in deference to the global nature of the problem.

These and other possibilities have generated an enormous amount of excitement within both the climate defending and denying communities. **It all depends, of course, on how the High Court's decision will read after all the dust settles.**

The excitement of the environmental community is being tempered—rightfully—by deniers reminding them that the High Court's decision was not without words of caution and warning:

> *The breadth of respondents' claims is striking, however, and* ***the justiciability of those claims presents substantial grounds for difference of opinion.*** *The District Court should take these concerns into account in assessing* ***the burdens of discovery and trial****, as well as* ***the desirability of a prompt ruling on the Government's pending dispositive motions.***

As a first of its kind, *Juliana* naturally pushes the bounds of existing case law, just as *Brown vs. Board of Education* and the cases leading up to it were thought to do. It is in the nature of landmark legal decisions to do.

The denier community finds solace and hope in the language of the Court. It suggests **there is no correlation between letting the case go to trial and a majority of the justices believing the case can win on its merits.**

Deniers are also **latching on to the recent decision of the King County Superior Court** in *Aji P. vs. State of Washington.* The case, another of Our Children's Trust, is a **state version of *Juliana*.** Judge Michael Scott **granted the State's petition to dismiss** the case based on his determination that the issues involved were for the legislative and executive branches of government to decide—not the courts. An opinion seemingly in agreement with the beliefs Judge Kavanaugh will carry on to the High Court bench.

Judge Scott acknowledged the seriousness of the threat climate change poses to society. He took special care to encourage the plaintiffs to continue pursuing their demands and not to be put off by his dismissal of the case. Andrew Welle, co-counsel for plaintiffs and staff attorney at Our Children's Trust said: "Plaintiffs intend to continue the pursuit of their urgent constitutional claims by appealing Judge Scott's decision to Washington's appellate courts.

There are complicated questions of science and law to be answered in *Juliana* and the *Juliana-inspired* cases now in state and federal courts. Somewhat surprisingly perhaps, **the science-based questions may turn out to be the easiest to answer**—assuming the courts continue to view the preponderance of scientific data and analysis to be controlling.

Although the Trump administration continues **to deny** the evidence-based causes and consequences of global climate change, it is **increasingly a discredited minority opinion** seen driven by party affiliation. Even the major **oil companies have come to admit in open court** that **climate change is not the hoax** Trumpsters claim it to be.

Exxon, Chevron and other companies are backing up their acknowledged belief in climate change in a variety of ways, including by **exiting ultra-conservative organizations** like the American Legislative Exchange Council (ALEC) **that continue to support** more **coal and less climate-related regulation.**

The *Juliana* attorneys will be calling credentialled climate scientists like James Hansen, formerly of NASA and called the father of global awareness of climate change, to the witness stand to explain for the court why the overwhelming consensus of the scientific community backs up the plaintiffs' allegations. **It will be interesting to hear how and with whom the Administration's intends to refute plaintiffs' evidence-based claims of the causes and consequences of climate change.**

According to Gregory, Administration lawyers haven't yet indicated who their expert witnesses will be. He does wonder if they will call political appointees or career civil servants to explain the science behind their denials. I think it would be hard to find any of the career professionals willing to stand up and spout fake science.

Gregory anticipates this to be a full-blown trial taking at least eight weeks to conclude. Judge Aiken has already indicated that she intends to split the trial into two pieces—liability and remedy.

Interestingly, the plaintiffs have not specified what relief they hope to be awarded, leaving it up to the Government to propose after it is found liable. Whatever the proposal, it will have to be even more aggressive than anything the Obama administration put forward.

It is well-established that the CPP and other Obama era initiatives were themselves not aggressive enough to keep Earth's warming below even a 2-degree Centigrade threshold before the end of the century. Add to this all that has been lost since Trump has taken office. The nation has a lot of catching up to do.

Notwithstanding the overwhelming scientific evidence in support of plaintiffs' claims, **there are complicated questions of law to be decided. Government defendants** have continually **argued that the courts are not the appropriate venues** in which to debate and decide what amounts to central pieces of a national energy and environmental policy. The **authority**, they say, **rests**

with the legislative and executive branches of government, and **the court's involvement crosses the line between ruling on the law and writing it.**

It's **an argument that Judge Scott in the *Aji P.* case agreed with** insofar as the Washington State constitution was concerned. **The answer depends** in part upon **whether a court's ordering the federal government to devise and implement a regulatory policy adequate to the task** of modulating the rise of global temperatures enough to preserve the environment for future generations **will be considered a ruling on existing law,** e.g., the Clean Air Act, **or the writing of a new one.**

Readers are reminded that **the US Supreme Court decision in *Massachusetts vs. EPA*** that ultimately led to the Obama administration's drafting the CPP and other air quality laws **was by a 5 to 4 vote**—with Justice Kennedy voting against his four conservative colleagues. **The question** before the High Court **was whether EPA had the authority** and responsibility **under existing law** for **regulating carbon** emissions from automobiles. (For additional information on these issues see Juliana v US: For Children of All Ages and other articles on Civil Notion.)

The ***Massachusetts* court interpreted the Clean Air Act as giving EPA the needed authority** to regulate carbon emissions, but **only after the Agency determined that climate change is real, harmful and caused by such discharges.** Will the judges and justices hearing and reviewing the *Juliana* case consider the decision in the ***Massachusetts* case settled law? Alternatively, will they determine** that to redress the plaintiffs for the injury already caused them and protect them from future harms, **it will be necessary for the Congress to pass new laws? Can a court**—even the US Supreme Court—order Congress and the president to do anything?

Despite the apparent glee expressed by climate deniers over **the words of caution in the July 30th SCOTUS decision, the legal questions have previously been introduced multiple times** to the trial and appellate courts. **Despite** any of the enunciated **concerns *Juliana* has made it** through **to** the **trial** stage, which itself is **a considerable accomplishment no matter the ultimate outcome** of the case.

True to **the Trumpian creed,** the **Administration's lawyers have** repeatedly **attacked and accused the trial judge**, Ann Aiken, of letting the case go forward. The accusatory claim is her having endorsed *"a never-before-recognized fundamental right to a particular climate system that lacks any support in the Constitution, this court's precedents, or this nation's history and tradition."*

The Trumpeters are surely basing their accusation on an earlier Aiken order, in **which the Judge expressed *no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society***. Judges Kavanaugh and Scott have said similar things.

Whether Judge Aiken thinks it is **a right to be guaranteed by the US Constitution,** however, **is another matter.** To-date, **the trial court's rulings have been affirmed by the U.S. Court of Appeals for the Ninth Circuit and now the nation's highest court.** The Administration's accusation is, in my opinion, evidence of their disdain for the rule of law and fear of being steam-rolled in court by the scientific evidence behind the plaintiffs' climate allegations. I am confident that **should Judge Aiken let a personal opinion cloud her legal judgment** or a faulty legal opinion force the government to do things that oughtn't to be done that **the judges and justices above her in our nation's legal system will rectify the situation.** The checks and balances within the judicial system contributes mightily to its enduring strength.

What does age have to do with it?

I have asked this question often in my life—both when I was younger and now that I'm older, although for much different reasons. As an attorney and political strategist, I perfectly understand the significance of the ages of the *Juliana* plaintiffs—all of whom were under the age of majority when the case was filed in 2015, none of whom I hope will be my age by the time it is finally decided. Justice is not always swift.

The age of the plaintiffs is not inconsequential in terms of the cumulative harms they are likely to endure over the course of their lives—certainly much higher than I will at this point in my life. Their having to face decades of an increasingly rapid rate of warming goes to the question of damages as well as having a certain amount of PR value.

There is no question the youth of the plaintiffs also has media appeal. Would the same case brought by Generation X-ers receive an equal amount of media attention? Probably not. The attention of policymakers and voters is not without value. One of the things that I, climate deniers and the conservative justices now on or soon to be on the Supreme Court can agree on is that Congress needs to act—either at the direction of the court, in response to constituent demand or response to the growing number of natural disasters. Each day of delay increases the frequency of forest fires, droughts, monsoons, the melting of ice caps, the loss of species and increased human mortality and morbidity.

The plaintiffs' ages, however, have a distinct downside—although for no substantive reason. Whether one is 16 or 72 the questions of climate change and a person's right under the US Constitution is serious business. The pursuit and preservation of those rights are fundamental to our system and a source of its enduring strength. It is to be respected.

Still, there are those who use the age of the *Juliana* plaintiffs to denigrate the case's importance and dismiss its seriousness. I speak here mostly of how some climate deniers have "flipped" the case off as child's play, or a case of exploitation by unscrupulous environmentalists and their attorneys. However, climate-science believers are not immune to speaking of the suit in terms of a cute human-interest story. This is some serious shit we're talking about and is not to be considered lightly because some detractor wants you to think of it as child's play.

A reporter for the Daily Caller wrote last December:

Environmentalists and regulators have increasingly used children as reasons to fight global warming. Former President Barack Obama, for example, used his own daughter's asthma attacks to personalize the climate debate. Environmental groups have jumped on this bandwagon and routinely claim global warming will make asthma and other respiratory illnesses much worse.

Our Children's Trust's campaign is no different. Olson's inspiration for inviting children to bring lawsuits stems from her colleague Mary Christina Wood, a University of Oregon law professor who first introduced global warming as a brand of the public trust doctrine in law.

Wood and Olson's goal is to force massive reforestation and carbon capture that would theoretically return the planet to a sustainable level of atmospheric carbon dioxide, which they believe is 350 parts per million. The idea is grounded in the internationally recognized principle known as the Public Trust Doctrine, which argues a government can be held liable for damaging natural resources that are held in public trust.

The Heartland Institute, according to the Daily Caller, is to be congratulated for its "always being public about its ultimate goals—to keep global warming alarmists from winning the public debate." Marc Morano, executive director of Climate Depot, a project of the Committee for a Constructive Tomorrow and a frequent presenter at Heartland events, *says [the] environmentalists' use of children to enact climate policies they couldn't get through legislation is just another underhanded tactic activists employ.* Morano continues:

> *Using kids to fight the climate change battles is disgusting, but sadly expected. A child-based lawsuit brings in media, money, and attempts to prey on fears of 'the children's' future ruined by 'climate change.*

These and other comments follow in the line of those who opposed the message of the student survivors of the Marjory Stoneman Douglas High School shootings. Rather than an open and

respectful debate about gun control, some gun advocates chose to defend themselves by attacking the children who made it out alive—accusing them of what? Being too—young, naive, stupid to know the real truth of the matter and that guns kill people?

Perhaps I am missing their point, and their fingers were being pointed at the students' parents or guardians for allowing their children to be used by unscrupulous actors. When I was 16, I resented being told I was too young to understand what the right to an education was about or that I didn't have any clue about when I was being used. At 19 and 20 I disliked being told that with age I would understand why some of my professors were summoned to Washington to answer the questions of the House Committee on Un-American Activities for what they were forcing into my unsuspecting head.

Today's youth are way more sophisticated than I ever was at their age. Why shouldn't young people be trusted to weigh the scientific evidence and come to a reasonable conclusion?

At 72, I am certain that truth is neither age-dependent nor the right to speak up age constrained—especially in the US. My question to those who deny the science behind the claims of the *Juliana* plaintiffs is not *why do you believe it false, but* **why are you afraid to have it debated in open court—an atmosphere governed by established rules of evidence and as free from arrogation as any forum in today's partisan world?**

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