CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

A VIEW FROM THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

CONSTITUTIONAL ENVIRONMENTALISM AND MATURE ENVIRONMENTALISM

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Overview

My remarks today will focus on two things. First, I'll address constitutional environmentalism, focusing on the recent *Juliana v. United States* litigation in the Ninth Circuit.[1] Second, I'll address the concept of mature environmentalism—environmentalism grounded in realism and pragmatism.

Mature environmentalism applies our Nation's decades of experience in environmental law to regulate in a manner that optimizes environmental benefits, while minimizing the inefficiencies and wastes that can be created by unnecessarily burdensome rules. I'll specifically address the latter topic in the context of the National Environmental Policy Act (NEPA) and proposed reforms pending to NEPA's implementing regulations.

The U.S. Justice Department's Environment & Natural Resources Division

Before I get into the substance of my discussion, I'll tell you briefly about the work of the Environment and Natural Resources Division (ENRD). ENRD has been in existence for nearly 110 years, and our history is built on service, integrity, and adherence to the rule of law. Our work falls into two major categories. On the environmental side, we litigate under our nation's pollution laws. On the natural resources side, our work involves the laws that govern and manage public lands and resources, as well as many Indian law matters. In fact, one of the older names for our Division, because of that natural resources work, is the "Lands Division." Indeed, just last week I was meeting with Attorney General Barr and he referred to it as the Lands Division. So old titles die hard.

On the environmental side, ENRD has both affirmative enforcement actions and defensive matters. On average, the work is about evenly divided between the two. Regardless of which side we're on—whether we're

[1] *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020).

bringing suit or defending an agency's decision—the Division represents the interest of the United States in the courts, both federal and state.

ENRD litigation responsibilities include enforcing the nation's civil and criminal pollution control laws, defending agency programs and activities, and representing the United States in various matters about public lands and natural resources—including the acquisition of property, bringing and defending actions under the wildlife protection statutes, and litigating cases concerning the resources and other rights of Indian tribes.

In the fiscal year 2018, ENRD obtained over 3.2 billion dollars in injunctive relief, over 100 million dollars in costs, and 54 million dollars in civil penalties. We also achieved criminal convictions of forty-seven defendants in thirty-one cases. We secured criminal penalties totaling 48 million dollars and confinement totaling sixty-five years for seventy separate individuals.

Our defensive work includes supporting the nation's investment in infrastructure projects and energy security. Building infrastructure is a key part of the President's agenda to promote job creation and grow the U.S. economy. ENRD advances the missions of the Defense Department and the Homeland Security Department to keep our nation safe, secure, and resilient.

I think it's fair to say that, in this Administration, we're seeing a reinvigoration of the ideals that are part of the fabric of the United States: respect for individual liberty, respect for property rights, appreciation of the role that state and local governments play in our federalist system, emphasis on self-reliance and economical productivity, and promotion of the wise use of our abundant natural resources.

Constitutional Environmentalism and the Juliana *Decision*

I'd now like to turn to my first topic, which is discussing the *Juliana* case and the basic constitutional principles that it implicated. In January of this year, the Ninth Circuit issued an opinion in *Juliana v. United States*.[2] This decision was part of what was called the "Our Children's Trust" litigation.

That set of cases is part of a series of attempts to use the ancient common law concept of a public trust to compel courts across the country to advance policy goals that have been favored by the various groups that support the *Juliana* litigation.[3]

There were two other causes of action at work in this case, both of which sounded in substantive due process (as did the claim for breach of trust). One was for recognition of a new constitutional right to "a stable climate." The second was for recognition of a right to be free of the so-called "carbon economy."

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[2] 947 F.3d 1159.

[3] *See generally* Our Children's Trust, State Legal Actions, https://www.ourchildrenstrust.org/state-legal-actions (last visited June 27, 2020) (listing cases brought in all 50 states).

For illustrative purposes, I will focus on the Public Trust Doctrine.[4] The Public Trust Doctrine is derived from Roman law. The idea was that some components of the physical world are inherently public, such that public access to them cannot be abrogated. Under Roman law, as the Justinian Code provides, "[t]he air, running water, the sea, and consequently the seashore," were considered by "natural law" to be common to all.[5]

British common law recognized that the King and the nation held dominion and title over certain submerged lands.[6] Often this public trust was used to ensure that people could travel by boat over various water bodies, including lakes, rivers, and oceans. For more on that, you can see *Phillips Petroleum Company vs. Mississippi*, where the Court stated: "At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation ... Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders[.]"[7]

The seminal United States Supreme Court case addressing the Public Trust Doctrine is *Illinois Central Railroad vs. Illinois*.[8] In this case, the Illinois legislature conveyed title to submerged lands beneath the harbor of Chicago to the Illinois Central Railroad Company. As a result of the transfer, the railroad would control a 200-foot-wide strip of land and submerged lands

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[4] For general background on the Public Trust Doctrine, I recommend James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Envtl. L. 527 (1989).

[5] J. INST. 2.1.1 pr.

[6] *See Phillips Petrol. Co. v. Miss.*, 484 U.S. 469, 473 (1988).

[7] *Id.*

[8] 146 U.S. 387 (1892).

along the shore of Lake Michigan in order to build a railway, warehouses, piers, and other structures.[9]

The issue for the Supreme Court was whether the Illinois legislature could deprive the State of its ownership of the submerged lands in the harbor of Chicago—in other words, whether the State could cede its rights in the harbor. The Supreme Court held that it could not, stating : "The state can no more abdicate its trust over property in which the whole people are interested like navigable waters and soils under them than it can abdicate its police powers in the administration of government and the preservation of the peace."[10]

In light of the value of the harbor of Chicago for the people of Illinois, the Court found that the "idea that its legislature could deprive the state of control over its bed and waters and place the same in the hands of a private corporation … could not be defended."[11]

My point in highlighting this history is to illustrate that the Public Trust Doctrine in Rome, Great Britain, and the United States has historically been tied to commerce and mobility, and that allowing private interests to hijack public access to rivers and lakes and tidelands was seen as inconsistent with the common law. This remains true today. The collective interests of the American public in access to certain features of the landscape cannot be sold or delegated to any particular interest group. By that same rule, however, individual interests cannot use the Public Trust Doctrine as a tool to undermine the representative government that we have created in the Constitution.

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[9] *Id.* at 438.

[10] *Id.* at 453.

[11] *Id.* at 454.

So how does the concept of a trust relate to the Public Trust Doctrine? A trust is a traditional arrangement in law through which legal and equitable title to property are held by divergent people or legal entities.[12] If you look at the Public Trust Doctrine in this way, you could say that legal title to an encumbered property would lie with the state or federal government or some other entity; but equitable title would lie with the public, so the government entity would be required to manage the property in the interest of the public.[13] This approach, however, leaves out an important element to the traditional trust doctrine: the creator of the trust.[14]

Typically, a trust is created by someone for the benefit of someone else. Often, the creator of the trust seeks to put control over management of the asset in a carefully selected trustee's hands, even though the beneficiary of the trust is someone else. For example, a wealthy parent could leave property in trust for his minor children or a donor might make property available via a trust to a university, something I'm sure that most universities in America, including this one, are familiar with.

The purpose of the trust is typically made clear at the time the trust is created. The Public Trust Doctrine, however, is not a good fit with this aspect of trust law.[15] Most importantly, this is because the "trustor" (often "grantor") under the Public Trust Doctrine is a pure abstraction, in that there never was a formal trust in the first place. Without an actual trustor, and without an actual trust instrument, the "purpose" of the trust is difficult or impossible to ascertain. This poor fit between the Public Trust Doctrine and

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[12] *See* Huffman, *supra* n.4, at 534.

[13] *See id.* at 534-35.

[14] *See id.*

[15] *See id.* at 535-36.

trust law helps highlight some of the problems with the use or attempted use of the Public Trust Doctrine as a tool to advance environmental interests.

Let me give you some background on the "Our Children's Trust" lawsuits in *Juliana v. United States*. I can begin by noting that, since around 2011, the federal government and state governments have responded to dozens of judicial challenges based on the Public Trust Doctrine. Almost all of those claims have been dismissed for various, yet related reasons.

First, lawsuits cannot be initiated as generalized grievances. They require plaintiffs with standing to sue, and, to establish standing, those plaintiffs must be able to demonstrate concrete harm that the government has imposed upon them.[16]

Even if those elements are satisfied, plaintiffs must also demonstrate that the courts can redress their harm.[17] In other words, an order of the court has to be able to award some relief that addresses the alleged problem and that relief has to be legitimate part of the court's arsenal. Remember, too, that courts are not supposed to address questions that find themselves on the wrong side of the political question doctrine. Those questions are instead left for the political branches, not surprisingly, and ultimately to the American people.[18]

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[16] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–78 (1992).

[17] *See id.*

[18] *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962).

The dozens of more recent atmospheric trust cases have generally been unable to overcome these arguments.[19] I'll focus my discussion on one of the rare public trust cases that, at least at the district court stage, was not dismissed. That case is *Juliana*.

In *Juliana*, a group of children and their guardians sought to establish for the first time in American jurisprudence that the United States has an obligation under the Public Trust Doctrine, as reinforced by the two other constitutional theories I mentioned (*i.e.*, an "affirmative right," as it were, to a stable climate, and a "negative right" to be free from the problems associated with the carbon economy). The ultimate goal of the *Juliana* Plaintiffs was to protect the rights of current and future citizens to a clean and stable climate system.

For the public trust claims, the Plaintiffs alleged that the Government has violated its duty as a trustee of public resources by failing to sufficiently protect the atmosphere, water, seas, seashores, and wildlife. Putting this in terms of the traditional trust framework we have just discussed, the *Juliana* Plaintiffs would put themselves in the role of a trust beneficiary and they would put the federal courts, essentially, in the role traditionally reserved for the creator and enforcer of the trust. Thus, the Plaintiffs in *Juliana* wanted the courts, rather than the political process, to resolve critical issues about national public policy.

In their constitutional claims, the *Juliana* Plaintiffs alleged that the government had infringed their constitutional rights of life, liberty, and property. The claim of property infringement was based on the allegation that the government had deliberately allowed atmospheric CO_2 levels to rise, causing extreme weather events, sea level rise, and ocean acidification. The *Juliana* case was brought in August 2015 against President Obama (President

[19] *See generally* Public Trust Claims, Sabin Center for Climate Change Law, http://climatecasechart.com/case-category/public-trust-claims/ (last visited July 16, 2020) (listing public trust claims).

Trump was later substituted), the Executive Office of the President, three subcomponents of that office, and eight cabinet departments and agencies.

Plaintiffs asked the District Court to order the President and the other officials in administrative agencies named as defendants to "prepare and implement an enforceable, national, remedial plan to phase out fossil fuel emissions and drawdown excess atmospheric CO_2."[20] In response, the United States argued that the *Juliana* Plaintiffs lacked standing, that their action was not a cognizable case or controversy under Article III of the Constitution, that the Public Trust Doctrine in particular had no basis in federal law, and that, even if there were a valid Public Trust Doctrine at the federal level, any such claim would be blocked or displaced by several federal statutes.

We also argued that the Plaintiffs' constitutional claims failed as a matter of law, because there is no such thing as a fundamental right to a stable climate system or to be free of a "carbon economy," and because Plaintiffs' constitutional rights were not infringed. I'm going to focus now on the constitutional dimension of the arguments that were made in *Juliana*.

Congress has power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[21] Every major environmental law drafted in the 1970s and '80s relies on the Commerce Clause to restrict air and water pollution or to protect endangered species. By passing these laws, Congress operationalized specific aspects of the Commerce Clause power and directed EPA or some other agency—EPA just being the most common example—to regulate in a particular way.

EPA, for example, then using that delegated authority, can issue regulations that carry the force of law. And that delegation is essentially

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[20] *Juliana v. United States*, 6:15-cv-01517, ECF No. 1 at 95 (Aug. 12, 2015).

[21] U.S. CONST. art. I, § 8, cl. 3.

how executive agencies create and carry out their rulemaking authorities under the commerce rubric. The Constitution, however, does not contain any express language about protecting the environment. I've read it many times and that language just isn't there.

The Obama Administration was similarly concerned, I think, in light of this constitutional backdrop, with the novel theory advanced in *Juliana*, and it initially responded to *Juliana* by making many of the same arguments that the Trump Administration advanced or continued to advance in the Ninth Circuit.

The Constitution's lack of specific environmental text makes sense in historical context. The Constitution came into force in 1789, more than 230 years ago. It is an old document. The idea of the environment, especially of a fragile environment, as a thing that needs protection, is a relatively new idea. The drafters surely knew about such things as smelly pig farms and what they and our English forebears called "nuisances," which are still actionable at common law. But the earliest known comprehensive, scientific examination of human activity degrading the earth's ecosystem was George Perkins Marsh's classic work, "Man in Nature: Or, Physical Geography as Modified by Human Action." That book was not published until 1864—75 years after the Constitution was signed.

The revered naturalist, John Muir, who is considered an environmental philosopher and sometimes one of the fathers of the National Parks System, was working in a wagon wheel factory until the mid-1860s. His influential environmental writing campaign did not begin until much later, in the 1800s.[22] Aldo Leopold was another philosopher in the environmental area, and his thinking also influenced the environmental

[22] *See* John Muir, Wikipedia, https://en.wikipedia.org/wiki/John_Muir (last visited July 16, 2020).

movement, but his most influential book, "A Sand County Almanac," was not published until 1949.

This illustrates that the modern environmental movement really did not begin until the 1960s and '70s, and it largely emerged as a result of some highly publicized environmental disasters or ferment arising out those incidents.[23] In other words, environmentalism and environmental thinking were not well-established concepts or frames of reference that the framers were considering in 1789.

I would now like to turn my focus to how this relatively young environmental movement has engaged the legal system. Litigation by that movement, like litigation by any social or political movement, must consider and work within the structure and text of the Constitution itself. The law-making structure created by the Constitution contains some obviously dominant features. First, there are three branches of government with separate powers. Second, we are committed under the constitutional framework to de-centralized government and federalism—the idea of dividing sovereign responsibilities between federal, state, and even local governments.

Through the Constitution, our Nation's Founders established specifically enumerated and limited sources of federal authority. Congress then used those specifically enumerated authorities to craft specific laws—laws that effectively outline the power of federal executive agencies. General police powers, and general authorities necessary to preserve safety, are reserved to the States. The Tenth Amendment's reservation of powers to the States thus carries with it an implied limitation on the scope of the federal government's authority to intrude on the sovereignty of those States.

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[23] *See* Earth Day, Wikipedia, https://en.wikipedia.org/wiki/Earth_Day (last visited July 16, 2020).

It is fair to say that the authority among the branches of government is fragmented. That's a feature of checks and balances. In other words, our Constitution bears the marks of a strong structural bias, as it were, toward the incremental and somewhat slowed-down development of the laws, given the difficulty of securing consensus among the many branches. Regrettably, however, respect for those checks and balances is clearly on the decline these days.

Laws in our country, in the modern era, are often based on coalitions and compromise. Law is not, nor should it be, based on impulsive edicts issued from high levels of government in the fashion of diktat. These features protect the American people from the type of tyranny that is an anathema to our constitutional system. As Justice Frankfurter famously wrote in his separate opinion in *Youngstown Sheet & Tube Co. v. Sawyer*:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.[24]

Not only is the decision-making process among the three branches of government intentionally fragmented, but the decentralized nature of our government also impacts the way decisions are made. Although the federal government has broad law-making authorities, those are limited to the enumerated powers, as I noted previously. The general exercise of police power is reserved to the States. States are also immune from some types of

[24] 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

direction from the federal government that imposes monetary liability. That is, States—much like the United States itself—enjoy certain forms of sovereign immunity, even though they are not supremely sovereign.[25]

This is all part of our constitutional design. And the multiplicity of players and concerns in this system means that there's often no "one size fits all" solution to a problem. The localized costs and benefits of a particular policy need to be considered. The most stringent laws and regulations possible may save lives from exposure to some environmental risk, but the costs of those same laws and regulations may undermine actual businesses and cause the loss of jobs to actual families and, indeed, could result in net loss to human welfare, not net improvement.

Our Constitution implicitly recognizes that dynamic and ensures that, through our representative, republican form of government, and through our reliance on local decision-makers where the federalist system so dictates, the federal government is forced to grapple with—and be accountable for—the practical impact of its decisions.

The Constitution also addresses property rights.[26] Particularly, I'm talking about the clause that grants Congress plenary power to manage and govern the federal government's land. This is known as the "Property Clause." And let me tell you: the federal government owns an immense amount of land—about 30 percent of the land in America is owned by the federal government. Hence, the original name from the ENRD, "The Lands Division."

Now it may seem odd that I'm using the word "rights" to describe the *federal government's* claim to property, but the Property Clause is firmly rooted in the traditional property law model. This model assigns rights in

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[25] *See* U.S. CONST. amend. XI.

[26] *See* U.S. CONST. art. IV, § 3, c. 2.

property to *owners*. By contrast, it does not assign rights in either the resources or the environmental amenities of property to non-owners, except perhaps in the narrow context of a nuisance running from one property to another (and putting sovereign immunity to the side as well). In other words, the Property Clause does not allow for the regulation of property rights in natural resources except as Congress directs.

The Spending Clause of the Constitution is also similarly limited.[27] Although Congress has power to spend money for the "general Welfare," and even to attach conditions to the use of federal money, the key here is that the spending power is not a source of regulatory power. If Congress wants someone to do something via the Spending Clause, as opposed to via the Commerce Clause, it has to pay for it. It turned out to be central to the various Affordable Care Act cases that Congress makes the federal government a major purchaser or funder of medical services, as just one example.[28]

For these reasons, neither the Property Clause nor the Spending Clause has typically been used to support much environmental legislation, except in the public lands area. Instead the go-to clause to support the nation's broad environmental laws has always been the Commerce Clause.[29] Almost all environmental law at the federal level is based on a broad reading of that clause. The Commerce Clause has been interpreted to authorize federal environmental legislation on a theory that activities that affect the environment also significantly impact interstate commerce.

As I said before, the Constitution gives Congress power to "regulate Commerce … among the several States." To take advantage of this language, Congress would—ideally—demonstrate a link between what it

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[27] *See* U.S. CONST. art. I, § 8, cl. 1.

[28] *See, e.g., Nat'l. Fed. of Ind. Businesses v. Sebelius*, 567 U.S. 519 (2012).

[29] *See* U.S. CONST. art. I, § 8, cl. 3.

enacts and the world of interstate commerce. But not all federal activities that impact the environment are commercial in nature, and many of our environmental laws are framed purely in environmental terms and not in commercial terms. And it's important to remember that our system of government is defined by restraint of power. Moreover, there's a clear inclination in both the text and structure of the Constitution to protect private property,[30] and even contracts.[31] The framers also sought to protect such related concepts as the idea of a national common market.[32]

The Bill of Rights provides further protections from big government, including protections for speech and the free exercise of religion, as well as protection from unreasonable searches and seizures. We developed these checks to limit broad governmental powers. And these protections, read in combination with the specific enumerated powers granted to the federal government, highlight the tension between the broad goals of environmental protection and the specific constitutional grants of authority that limit all three branches of government.

For this reason, broad pieces of legislation and attempts to develop new rights through litigation are sometimes inconsistent with the self-restrained principles of government created by the Constitution. For example, an aggressive theory of ecological rights would threaten the constitutionally protected right to own, use, and enjoy private property. In

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[30] *See* U.S. CONST. amend. V ("No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.")

[31] *See* U.S. CONST. art. I, § 10, cl. 3 ("No State shall … pass any Law … impairing the Obligation of Contracts.").

[32] *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution was framed … upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

other words, newfangled environmental theories sometimes don't exactly square with the theory, design, and practice of our Constitution.

The Framers created a limited government. Public trust claims and other attempts to compel public action advanced in *Juliana* and similar cases, we think, are rightly seen as attempts to erode the limits on federal authority in a manner that violates the Constitution. The earlier stages of the *Juliana* case involved a significant amount of legal wrangling, including a petition to the Supreme Court for the stay of an impending District Court trial date. It is fair to say that the litigation was unprecedented in its scope, and managing it required an extreme amount of federal resources to defend, over a timeline that crossed from the Obama Administration into the Trump Administration. The Supreme Court initially denied the Government's request for a stay as premature, at the same time expressing skepticism about the lawsuit, describing the breadth of the Plaintiffs' claims as "striking" and requesting that the District Court issue a prompt ruling on the Government's motion challenging the justiciability of those claims.[33]

Following the Supreme Court's direction, the Government filed two motions to dismiss in July 2018. The government identified several grounds for dismissal, including lack of standing, failure to raise a cognizable constitutional claim, and failure to state a viable federal public trust theory. Those motions were denied at the district court level. That court ruled that the Plaintiffs had established Article III standing by alleging that they had been harmed by the effects of global climate change through increased droughts, wildfires, and flooding. And, the district court said, the Plaintiffs had adequately pleaded that the government's regulations and failure to further regulate fossil fuels had caused their injuries.

The court determined that these injuries could be redressed by ordering the federal government to cease a wide range of regulatory permitting activities associated with the energy sector of the United States

[33] *United States v. U.S. Dist. Court*, 139 S. Ct. 1 (2018).

economy. On the merits, the district court held that the Plaintiffs had stated a claim under the Fifth Amendment's Due Process Clause. The court found in the Fifth Amendment's protection against the deprivation of life, liberty, or property without due process of law a previously unrecognized fundamental right to "a climate system capable of sustaining human life."[34] And the court also determined that Plaintiffs had adequately alleged infringement of that right.

In addition, the court concluded that Plaintiffs had adequately stated a claim under the "Federal Public Trust Doctrine," which the Court held imposes a judicially enforceable prohibition on the Government's "depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens."[35] Plaintiffs' public trust claims, the court concluded, were "properly categorized as substantive due process claims."[36]

So, with less than two weeks remaining before a scheduled ten-week trial, the government again sought relief from the Ninth Circuit, unsuccessfully, and then from the Supreme Court. The Supreme Court, once more, denied the government's stay application, this time on the ground that "adequate relief may be available in the United States Court of Appeals for the Ninth Circuit."[37] The United States then sought an interlocutory appeal from the district court and later from the Ninth Circuit.

Consistent with our earlier discussion, we explained in briefing that the separation of powers prevents citizens from pressing generalized

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[34] *Juliana v. United States*, 217 F. Supp. 3d. 1224, 1250 (D. Or. 2016).

[35] *Id*. at 1253 (citations omitted; internal quotations omitted).

[36] *Id*. at 1261.

[37] *In re U.S.*, 139 S. Ct. 452, 452 (2018).

grievances—in other words, grievances that are really just political gripes—in the hands of judges. The universal nature of the wrongful acts that the Plaintiffs alleged—as well as relief they sought—illustrates the harm of allowing such claims. Although the Plaintiffs argued that children in particular were being hurt by the "carbon economy," the unavoidable fact about alleged harms from climate change is that it's not about one set of "bad" actors inflicting special damage on another set of people who ultimately become Plaintiffs. Instead, this is a situation where, if the Plaintiffs are correct, everyone is both the "source" and the "victim" of the injury, not just in the United States, but around the world. And—even more bizarre from the perspective of separated powers and representative government, the remedy the Plaintiffs sought was to have a single district judge—a person who does not answer to the voters—make broad determinations regarding the plan that the Executive Branch would have to submit to move away from a carbon economy. This plan would have to have roots in many areas of policy, including energy, transportation, public lands, and pollution control.

In our view, the Constitution assigns such determinations to the political process, not to the courts. We argued that this suit not only failed to satisfy the basic elements of standing, but also was utterly unheard of in the courts in Westminster—which was the template with which the Framers would have been familiar, and which they adopted by implication in 1789 when the Constitution became operative, and when the first Congress enacted the first statute to organize the federal judiciary.[38]

Ultimately, the Ninth Circuit agreed with one of our arguments. On January 17, 2020, a panel of that Court dismissed the *Juliana* lawsuit.[39] The two judges of the majority ruled that the Plaintiffs lacked standing, because

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[38] *See* An Act to establish the Judicial Courts of the United States, 1 Stat. 73 (1789).

[39] 947 F.3d 1159.

they could not show redressability. That is, they could not show that a decision in their favor would likely ameliorate the injuries in fact that they alleged. The panel also recognized, essentially, that climate policies must come from the Legislative Branch or from the Executive Branch. Thus, the Court concluded, the relief sought was beyond the constitutional power of the judiciary.

Fundamentally, the judicial power of United States is to "to render dispositive judgments" in "cases in controversies" as defined by Article III of the Constitution. Where there is no judicially cognizable case or controversy, the courts lack authority. The *Juliana* case was held not to present a case or controversy cognizable under Article III.

Functionally, the Plaintiffs had asked the Court to review and assess the entirety of Congress' and the Executive Branch's programs and regulatory decisions relating to climate change, and then to pass on those policies, programs, and agency actions or interactions. Put another way, the Plaintiffs sought to use the courts to oversee the Legislative and Executive Branches. But, as the Ninth Circuit held, courts lack such intrusive and sweeping powers.

The Constitution authorizes Congress to enact government-wide measures using its specifically enumerated powers, and it gives the President the power to oversee the Executive Branch and its exercise of power delegated to it by Congress.

I would like to conclude the *Juliana* portion of our discussion with a couple of questions for you to think on. Whether you agree or disagree with the positions that political parties take on climate change issues and policies, how do you think significant political decisions should be made? Should they be made through the political process, or do you think they should be made by federal judges in response to a small group of local citizens who object to the current state of affairs, whatever that may be?

In my view, the Constitution gives the answer. In the words of President Lincoln, our government is "a government of the people, by the people, and for the people."[40] Our political leaders are elected by our citizens or are accountable to them. They make decisions in the federal government, and they do so in full view of the electorate. Big decisions of policy—about how we should produce the energy that we need, about how we should support both industry and protect the environment—these are questions for the political system that the Framers had in mind, and the President Lincoln remembered at Gettysburg. The novel theories at issue in *Juliana* simply were not meant for the courts. This is why we never saw anything like those claims being advanced in the history of the common law, on either side of the Atlantic.

Mature Environmentalism and the Case of NEPA Reform

So now let me turn to a discussion of mature environmentalism, and this Administration's effort to approach environmental issues in that framework. Mature environmentalism, as I'll define it here, involves the application of realism and pragmatism in developing environmental strategies that fully respect both Congress' intent in enacting federal environmental laws as well as constitutional limits on the power of Congress and the government as a whole.

I think some of the early environmental laws, especially the NEPA statute that I'm going to talk about, had a highly aspirational nature to them. For instance, one of the earliest statements made in the NEPA statute is that it's designed to encourage productive and enjoyable harmony between man and the environment, which is not exactly the stuff of which specific legal mandates are typically made.

The approaches that we're taking now, I think, are informed by the federal government's decades of experience in administering environmental

[40] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

laws and defending challenges to them. To apply mature environmentalism to address the problem, we need to start by carefully studying the past and learning from our successes and failures. We need to evaluate what has worked and what hasn't and focus on implications for a broad range of important interests potentially affected by the federal government's decision-making, not exclusively on environmental concerns.

In developing strategy for long-term environmental success, we ultimately want to identify approaches that will continue to ensure strong protections for human health and the environment, of course, but (to the extent we can) without the costs, inefficiencies, and waste that can be generated by unnecessarily burdensome regulations. We don't want federal agencies expending taxpayer money on dotting i's that don't need dotting and crossing t's that don't need crossing.

Rather than continuing to focus on mature environmentalism in the abstract, I want to focus the remainder of my lecture on one specific example of that concept in practice. That example is the President's Council on Environmental Quality's proposed amendments to its regulations implementing the National Environmental Policy Act or NEPA. NEPA was signed into law in 1970 and thus we're at the 50-year anniversary of the statute. The statute primarily requires federal agencies to consider the potential environmental impacts of proposed actions in connection with their decision-making.

NEPA created the President's Council on Environmental Quality or CEQ, which promulgated regulations implementing the statute in 1978. To help you understand the mature environmentalism concept, I want to walk you through the aspirational beginnings of NEPA and how it was initially interpreted by the D.C. Circuit and CEQ in the 1970s. I'll then describe some of the unintended consequences that ensued. These include but are in no way limited to long delays and increased costs for infrastructure projects and other important federal actions. These delays and costs have constrained or even retarded economic growth.

President Trump made it a priority for the federal government to modernize federal permitting and environmental reviews for infrastructure projects. CEQ's proposed amendments to the NEPA regulations flowed directly from, and are a key component of, that initiative. Of course, those regulations at this point are only in proposed form and my comments are not intended to prejudge whether or how they will be finalized. But the proposal provides an excellent example and illustration of the concept of mature environmentalism for a number of reasons.

The proposed rule seeks to ensure that environmental reviews do not unnecessarily delay infrastructure projects and that public taxpayer money is not expended on useless, inefficient, or duplicative analyses. More generally, the amendments seek to ensure that federal agencies retain flexibility, as Congress intended when it enacted NEPA, to strike appropriate balances in decision-making between environmental, economic, and other important values. In other words, the amendments are intended to recognize and respect the importance of environmental protection without taking it to such an unyielding extreme as to unnecessarily limit economic growth or frustrate other competing interests.

I mentioned that the regulations are proposed. I should tell the audience that just last Monday, I was in Federal District Court in Roanoke, Virginia, where an unprecedented attempt was made by an environmental group to halt the rulemaking process. Using the FOIA statute, the group argued that the regulation should be help up, pending them getting all of the documents that they're requesting or alternatively that the district judge had the broad equitable power to extend the comment period.

I opposed those arguments. The district judge ruled from the bench that he did not have the power to grant the relief that the environmental

group, the Southern Environmental Law Center, was seeking and he indicated that a decision on that would be forthcoming this week.[41]

But returning to history, NEPA, one of our most important early environmental laws, was signed by President Nixon on January 1, 1970. The Nation celebrated the first Earth Day just several months later and many of our landmark environmental laws were enacted or very substantially amended at roughly this same point in our nation's history.

Looking back at NEPA's enactment with the statute's 50th anniversary immediately behind us and Earth Day's 50th anniversary immediately ahead, I think it's fair to say that Congress enacted NEPA at a time when the Nation was motivated by admirable environmental aspirations. But now, 50 years later, I think we're in a position to have learned a lot of lessons.

NEPA consists substantially of directional hopes. For instance, Section 101 of NEPA states that it's the policy of the federal government in cooperation with state and local governments and the public "to use all practical means and measures including financial and technical assistance in a manner calculated to foster and promote the general welfare to create and maintain conditions under which man and nature can co-exist in productive harmony and fulfill the social, economic, and other requirements present and in future generations of Americans." NEPA elaborates on this policy direction by referencing specific national goals, such as "assuring for all Americans safe, helpful, productive, and esthetically and culturally pleasing surroundings."

Section 102 of NEPA for the most part states that agencies of the federal government must, to the fullest extent possible, conduct their activities in accordance with these policies and comply with specific requirements.

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[41] I would go on to win that motion. *See S. Envtl. Law Ctr. v. Council on Envtl. Quality*, No. 3:18-cv-113, ECF No. 41 (W.D. Va. Mar. 19, 2020).

The specific requirement at the heart of NEPA—an enforceable command that is of pivotal relevance to the remainder of my lecture—is that each federal agency shall "include in every recommendation or report on proposals for legislation or other major federal actions significantly affecting the quality of the human environment a detailed statement."

That detailed statement is commonly referred to as an Environmental Impact Statement, or EIS, and the statute requires that it include specific content. Among other things, the EIS must discuss "the environmental impact of the proposed action" and "alternatives to the proposed action."[42] A few months after signing NEPA into law, President Nixon issued Executive Order 11514 to establish policy for the federal government in furtherance of NEPA and to define the NEPA responsibilities of CEQ. The order, again, reflected the aspirational approach of the time. It broadly directed federal agencies, for example, to "monitor, evaluate, and control on a continuing basis their agency's activity so as to protect and advance the quality of the environment."

The *Calvert Cliffs* case in the D.C. Circuit is perhaps the earliest example, and one very close in time to the statute's enactment, of the aspirational spirit of the statute in that age.[43] That spirit was carried over into the opinion in *Calvert Cliffs*.

In *Calvert Cliffs*, the Court considered whether procedural rules adopted by the Atomic Energy Commission to govern consideration of environmental matters in connection with agency decision-making did or did not comply with NEPA. Writing for the Court in 1971, and effectively looking into a crystal ball, Circuit Judge J. Skelly Wright observed that the consolidated cases were "only the beginning of what promises to be a flood

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[42] 42 U.S.C. § 4332(c).

[43] *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

of new litigation. Litigation seeking judicial assistance in protecting our environment."[44]

The Court explained that "several recently enacted statutes attest to the commitment of the Government to control at long last the constructive engine of material progress."[45] Examining NEPA's structure and approach, the D.C. Circuit reasoned that Congress did not establish environmental protection as an exclusive goal and instead "desired a reordering of priorities so that environmental costs and benefits will assume their proper place along with other considerations."[46]

The Court thus viewed NEPA as mandating a balancing of interests and leaving room for responsible exercises of discretion in federal agency decision-making. The Court stated that the statute "may not require particular substantive results in particular problematic instances."[47] However, to ensure that NEPA's purposes are served, the Court reasoned that NEPA's enforceable commands must be complied with unless there is a clear conflict with another federal statute.

The Court viewed considerations of "administrative difficulty, delay or economic cost" (and this is, again, notwithstanding that Congress talked in NEPA about balancing) "as entirely irrelevant."[48] The Court stated that NEPA required agency decision-makers to take account of all possible approaches to a particular project. The Court added that "the sweep of

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[44] *Id.* at 1111.

[45] *Id.*

[46] *Id.* at 1112.

[47] *Id.*

[48] *Id.* at 1115.

NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action."[49]

The specific issues addressed by the Court were whether particular procedures adopted by the agency complied with NEPA or not. For example, under one procedure, environmental data and analyses prepared by agency regulatory staff physically accompanied an application through the agency review process, but they received no consideration whatsoever from the Hearing Board that reviewed staff recommendations.

The Court viewed this procedure as making "a mockery of the act."[50] It noted that no possible purpose could be served by NEPA's EIS requirement under which an EIS must accompany proposed actions, if "accompany" refers only to the physical act of passing along environmental analyses with other papers. The Court explained that "accompany" must be read as evincing congressional intent that environmental factors described in the EIS actually be considered in agency decision-making.

The Court also invalidated, among other things, procedures that precluded the public from raising and the Commission from examining any problem of water quality or any other aspect of environmental quality for which standards have been established by other responsible agencies.

Again, the Court reviewed the procedures as being in fundamental conflict with the basic purpose of NEPA. The Court stated there may be significant environmental damage, even when another responsible agency's environmental standards are complied with. Thus, in the Court's view, the agency's wholesale refusal to consider water quality or other aspects of

[49] *Id.* at 1122.

[50] *Id.* at 1117.

environmental quality would preclude it from carrying out the NEPA-mandated balancing of environmental and other costs versus benefits.

Although *Calvert Cliffs* remains a leading early case interpreting NEPA, it predates the Supreme Court's subsequent interpretation of the statute and CEQ's regulations. Certain passages of opinion no longer accurately reflect how the statute is interpreted and complied with at this point. In my view, those passages are best viewed as reflecting the aspirational interpretations of NEPA consistent with the spirit of those times and do not represent a view informed by decades of experience under that statute.

For example, later-issued Supreme Court decisions made clear that NEPA imposes only procedural requirements on agencies and does not mandate by one means or another any substantive results. Also, NEPA does not impose on federal agencies a requirement to balance costs versus environmental benefits, although this is an area where courts occasionally continue to misstep in interpreting the statute because the costs of any sensible procedural environmental mandate are surely relevant to how it can best be applied. And, finally, attempting to conduct such balancing in a meaningful way, even if one were following *Calvert Cliffs*, is not as straightforward as one might think that it is.

The *Kleppe* case, decided in 1976, is one of the Supreme Court's earliest decisions interpreting NEPA.[51] It concerned coal mining on federal public lands, an activity that may not be carried out without approvals from the Department of the Interior and potentially other federal agencies. And just as an aside, I'll say that part of the action that was challenged in the *Juliana* case included, not only activities under the pollution control statutes, but also how the carbon economy (so-called) was being supported by decisions

[51] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

by the land and resource agencies in granting federal leases to engage in mining, for example.

The Plaintiffs in *Kleppe* primarily contended that the statute required Interior to prepare an EIS for coal mining for the entire Northern Great Plains Region, an area containing public lands rich with coal and other resources. Interior disputed this obligation. The agency had completed several studies about coal mining within the borders of that region, but it had not conducted a comprehensive regional plan for coal mining that would define the scope and limits of development. The only mining proposals under consideration by the agency were of local or national scope.

The Court of Appeals, nonetheless, held that Interior violated NEPA after applying its own four-part balancing test for determining when an agency must begin preparing an EIS. The Supreme Court reversed, relying primarily on the actual language of NEPA. It reasoned that NEPA's EIS requirement imposed "a procedural duty" upon agencies that is "quite precise."[52] It essentially held that the EIS must be prepared by an agency by the time an agency makes a recommendation or report on an actual proposal for major federal action, not merely because the agency was engaged in an activity that might someday result in a proposal.

The Supreme Court also noted pragmatic concerns. It explained that the balancing test developed and applied by the Court of Appeals would "invite judicial involvement in the day-to-day decision-making process of the agencies" and "invite litigation and result in the preparation of a good many, unnecessary impact statements."[53]

In 1977, Executive Order 11514 was amended by Executive Order 11991. It directed CEQ to issue regulations to federal agencies for the implementation of NEPA. CEQ issued comprehensive regulations the next

[52] *Id.* at 406.

[53] *Id.*

year. Courts often view Executive Order 11991 as having made CEQ's regulations binding on federal agencies. Courts afford CEQ regulations substantial deference, and, after the *Public Citizen* case that I'll mention, I believe "*Chevron* deference" as well.[54] As the regulations were issued over 40 years ago, the overwhelming majority of NEPA cases have been decided by the courts since the regulations were issued and by applying those regulations.

So the Supreme Court case that I want to mention in this area is the *Public Citizen* case, sometimes referred to back then as the "Mexican trucks case."[55] I was in the "Bush 43 Administration" during the time that that case was litigated and I was a forceful proponent of securing Supreme Court review of the Ninth Circuit ruling there and worked on the briefing at both the appellate and Supreme Court stages of the case.

In *Public Citizen*, the Plaintiff argued that NEPA required the Department of Transportation's Federal Motor Carrier Safety Administration to evaluate environmental effects from cross-border trucking from Mexico into the United States with an EIS. I think the easiest way to refer to the Federal Motor Carrier Safety Administration is as the Department of Transportation or DOT. Under laws enacted by Congress, DOT had no discretion to deny applications by a motor carrier seeking authority to operate, provided the applicant had demonstrated compliance with certain safety and financial responsibility requirements. However, there was a moratorium imposed by Congress and extended by the President that barred motor carriers domiciled in Mexico from obtaining authority to operate in the United States.

In 1992, as part of the North American Free Trade Agreement, the United States agreed to phase out that moratorium. President Bush then

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[54] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[55] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

declared his intention to lift it once DOT issued regulations governing grants of operating authority to the Mexico-domiciled carriers. Congress then enacted legislation that required DOT to impose specific application and safety monitoring requirements on the Mexican motor carriers before processing any applications.

Before promulgating the regulations contemplated by the President and Congress, DOT analyzed the potential environmental impacts flowing from the particular requirements of the regulations, but it did not analyze the effects of emissions that would occur once the moratorium was lifted due to the mere increased presence of Mexican trucks in the United States. This is what the Plaintiffs in the case wanted.

The Supreme Court, when it reviewed the case, noted that CEQ's 1978 regulations required federal agencies to consider both direct and indirect effects. Direct effects under the regulations are those caused by the federal agency action that occur at the same time and place as the action, whereas indirect effects include effects that are caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable.

The Court acknowledged that the issuance of DOT's regulations were a "but for" cause of increased truck emissions. In other words, the emissions would not occur but for DOT's issuance of the regulations. The Court also acknowledged that the emissions were reasonably foreseeable. However, the Court nonetheless went on to hold that DOT was under no obligation to consider them for NEPA purposes.

And actually, the case that I was going to argue on Thursday in Cincinnati—before coronavirus sent me packing back to Washington, D.C.—

is a follow-on case to *Public Citizen*. I was looking forward to arguing it, but I'm sure it will be rescheduled.[56]

Most notably, the Supreme Court in *Public Citizen* reasoned that NEPA does not require a federal agency to consider a particular effect merely because the agency's action is a "but for" cause of that effect. The Court explained that it had previously held that NEPA requires a reasonably close causal relationship between an effect and the alleged cause, analogizing the inquiry to the familiar doctrine of proximate cause from tort law.

The Court further explained that courts must consider Congress' intent and declared policies in order to "draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[57] The Court also reasoned that inherent in NEPA and CEQ's regulations is a rule of reason that enables agencies to determine whether and to what extent to prepare an EIS based on the usefulness of potential information to the decision-making process. The Court reasoned that, where preparation of an EIS would serve no purpose, "no rule of reason worthy of that title would require an agency to prepare an EIS."[58]

Turning back to the facts of the case, the Court observed that requiring DOT to prepare an EIS analyzing the effects of increased emissions from the operation of the Mexican trucks in the U.S. would not serve the purposes underlying NEPA. Because DOT had limited statutory authority over trucking operations, consideration of the increased emissions would not

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[56] It was later rescheduled to April 2020 and held via Zoom. The *Public Citizen* case, among other authority, was applied to reverse the district court there. *See Nat'l. Wildlife Fed. v. Sec. of the U.S. Dep't of Transp.*, 960 F.3d 872 (6th Cir. 2020).

[57] *Pub. Citizen*, 541 U.S. at 767.

[58] *Id*.

meaningfully inform decision-making. The Court viewed the President, not DOT, as the legally relevant cause of the cross-border trucking operations and associated emissions. The Court held that, because DOT had no ability to prevent the emissions due to its limited statutory authority, it was not a legally relevant cause of the effect and did not have to consider it for NEPA purposes.

So, contrast the *Calvert Cliffs* case on the one hand, which I think of as a kind of aspirational, early-stage environmentalism, with *Public Citizen*, which I think is properly characterized as an example of mature environmentalism, on the other.

Unfortunately, notwithstanding the pragmatic interpretations of the statute in the Supreme Court decisions that I've discussed, NEPA compliance has resulted in unintended and unexpected consequences for a broad range of infrastructure projects. These include, but are by no means limited to, increased delays, costs, and burdens for the proponents of projects that require federal agency approvals, all resulting in reduced or deferred benefits for the public.

CEQ's Chair, Mary Neumayr, identified one example in a *Washington Examiner* op-ed. She noted that it took over five and a half years for the federal government to comply with NEPA for a new metro station in Northern Virginia. This delayed major benefits for the local community and the region. In addition to reducing commuter delays, the project is expected to generate billions of dollars in private investment and create jobs.

Over roughly the last two decades, Congress and our Presidents have observed these kinds of consequences and have sought to address the quagmire of impacts that have been imposed in a broad range of ways, such as focusing on improving the efficiency of federal programming and environmental reviews for discrete categories of infrastructure projects.

Our infrastructure, nevertheless, largely remains in a state of disrepair. And if you make a trip abroad, especially to a country like China, and you see the speed with which infrastructure projects go up, you know that we're falling farther behind. And I say that not because I advocate that we proceed with the speed of China, but just that we're at the opposite end of the spectrum at this point. We proceed far too slowly.

During this Administration, President Trump has doubled down on infrastructure. The President issued Executive Orders that, among other things, made modernizing infrastructure permitting and environmental reviews a top priority for federal agencies. Indeed, the President directed a federal government-wide focus on reducing unnecessary costs, delays, and other burdens associated with federal permitting and regulations in general, and NEPA environmental reviews in particular.

Part of this initiative, consistent, I think, with the idea behind mature environmentalism, is understanding what has worked and what hasn't worked. Under the President's direction, CEQ thus issued an advanced notice of proposed rulemaking broadly requesting public input on how it should modernize its NEPA regulations.

On that effort, CEQ received over 12,500 comments. CEQ also collected and analyzed data. It determined that, notwithstanding prior efforts to modernize federal permitting and environmental reviews, the average time the federal government takes to complete an EIS is roughly four and a half years. And, even after an EIS had been prepared and a decision to move forward with construction is made, litigation can further delay projects. In fact, judges wielding NEPA have sometimes been known to put the kibosh on projects, even after project completion.

CEQ also determined that, although its regulations require that an EIS normally be less than 150 pages (or 300 pages for actions of unusual scope or complexity), the average length for an EIS exceeds *600 pages* at this point. So, going from the advanced notice of proposed rulemaking to the proposed

rulemaking stage, CEQ recognized that its 1978 regulations appeared to be outdated.

And so it proposed amendments in January of this year that, if finalized, would comprehensively modernize those regulations for the first time in four decades. The proposed amendments contain a number of changes intended to modernize, simplify, and accelerate NEPA analyses to limit unintended consequences of the kind I discussed earlier.

For example, proposed amendments would establish presumptive time limits of two years for the completion of EISs, specify presumptive page limits, require collaboration among federal agencies, and, where appropriate, require a single EIS for projects that require multiple federal agencies to issue authorizations. The proposals also attempt to cabin some of the excesses that come from NEPA litigation.

For instance, there's a newly designed exhaustion requirement that CEQ has proposed. They've also proposed that the action agencies that carry out NEPA analysis be able to require bonds. And CEQ proposed a variety of other things. For example, the proposed amendments would reasonably clarify whether NEPA applies, as a threshold matter, in certain circumstances and the required scope of NEPA review when it does apply.

Under the proposed amendments, federal agencies would not need to prepare EIS's in connection with nondiscretionary decisions, which reflects the *Public Citizen* case I was talking about earlier, or for federal projects with only minimal federal funding or involvement. And, under the proposed amendments, an agency would only need to consider effects that are reasonably foreseeable and have a reasonably close causal connection to the agency action. Cumulative impacts would no longer be required to be analyzed. The proposed regulations also clarify that only technically and economically feasible alternatives need to be considered in an EIS.

There are a number of other reforms. I think they largely fall under a kind of law-and-economics rubric of recognizing that, when the value of obtaining more information, in terms of greater insight gained, exceeds its cost, in terms of resources expended or time lost, then we should obtain more information. But when that calculus flips, and the information we're gaining is less valuable than the cost of obtaining it, then by all means we should stop. I'll refer you to the NPRM itself without describing those aspects of the proposed rule in detail. In general, however, I think these amendments are an excellent example of mature environmentalism. Of course, at this point, they're proposals, but I think that I can safely say that a proposal can be something that reflects a mature attitude towards this area of the law.

I think the proposal reflects realistic and pragmatic approaches to NEPA compliance that have been informed by careful study and decades of experience. Yet at the same time, they fully respect Congress' intent in enacting the statute by ensuring that federal agencies retain flexibility to strike appropriate balances in decision-making between environmental economic and other important variables.

The proposed amendments also take account of judicial scrutiny of the statute over the last five decades. In fact, some of the proposed amendments codify principles established in case law, such as the *Public Citizen* case. Others would clarify the meaning of regulations that have not been interpreted in a consistent manner by the courts.

So in conclusion, I thank you for your time and attention. I hope that the talk leaves you with a greater appreciation for constitutional environmentalism and for mature environmentalism.

And I also hope you approve of the important work that the federal government is trying to do in this area in carrying out its responsibilities. So with that, I will conclude and give any extra time to Jonathan for questions.

PROF. ADLER: Well, great. Thank you for that. And I have a bunch of questions. We have a little bit of time for questions, some from me and some from viewers who have been sending in questions.

MR. CLARK: Viewers have been sending in questions?

PROF. ADLER: Yes, viewers have been sending me questions. And the benefit of doing it this way is I can filter and decide which questions to ask and make sure that they're questions and not statements. Because some of the viewers of this program are going to be the people that practice in this area or people who hope to practice in this area, like students who are interested in environmental law. I'd like to begin if you can just say a little bit more about the relationship that the Environment and Natural Resources Division has with client agencies.

EPA, Department of Interior and so on are your clients and you are representing them in actions they are taking implementing this Administration's policies, but also policies that were, perhaps, decided by predecessors, I'm sure the Obama Administration policies, and there may even be some left over, given the way that some of these cases drag on, from the Bush Administration.

So can you say a little bit about how—what the relationship is like, how much influence you have, how, perhaps, similar it is or different it is from clients in private practice? You know, when your clients are doing something bad in private practice, hopefully, you can convince them to take a course of action that will be easier to defend. Is that different when you're dealing with agencies at the same level? Can you describe some of that?

MR. CLARK: Sure. Well, so I'm a veteran now of the Bush 43 Administration and this Administration. And so in the Bush 43 Administration, even though I came in at the start, there were a whole bunch

of Clinton Administration matters that I continued to defend. That's just something that goes along with the territory. And it's something that I think maybe people don't fully appreciate. It shows the continuity of government. So some things change quickly. Other things, it takes a while to change.

At the Justice Department, if you're working in a defensive capacity, you're in the role of essentially being reactive for the most part to that. And similarly, in this Administration, even though I came in at the middle of this presidential term, we are still defending a fair number of things from the Obama Administration. The *Juliana* case, obviously, was one of those examples.

In terms of the role of public versus private, the Justice Department I think has a lot of historical prerogatives and a lot of independent kind of throw weight that make it unique as compared to being a lawyer in private practice. So I think clients—as you rightly looked at it—good clients take your legal advice, but you can't always be assured that they will.

And in private practice, you're much more subject to what your client wants to do. You might counsel and them, but if they decide to go in a different direction, that's where you are. There's certainly some of that in practice in the federal government. For instance, right, I know you have a great interest in *Chevron* powers. So it's not like the Justice Department typically wields those powers, right? It's one for the substantive agencies to wield. So that might be EPA as to the Clean Air Act or the Interior Department as to the Endangered Species Act.

So, at Justice you don't hold the reins of that; you're more subject to what they do and in that sense, that's more—kind of more like private practice. But in general, I think the Justice Department plays a much different role than a private litigator.

PROF. ADLER: Okay. And do the agencies seek your input on, you know, "How easy or difficult is this going to be to defend if we take course

A versus course B?" Do you sometimes find yourself in the position of when you're aware of what agencies are doing perhaps initiating the conversation to say, "Hey, if this is the direction you're going, you might want to do it this way, because if you don't do it this way, we're going to have a really hard time when we're in the D.C. Circuit defending that?"

MR. CLARK: Yes, to all of those questions—correct. We get involved early and often. And oftentimes rulemakings affect multiple agencies, so OMB is interested in what our views are and we get brought in that way as well. There are a lot different ways we can be brought in. It's great if your advice is acted on, but sometimes it's not.

And so one of the frustrating things actually is that there are these folks in the outside world who are keeping score cards and the like. Then, if something is being held against you, roughly speaking, when you know internally that you wouldn't have done it that way, that can be frustrating. But that comes along with the territory. It's not like I can give a speech where I say, "Hey, my real record is x%, because you should deduct these other cases that I wouldn't have actually done that way but my clients were driving the bus."

PROF. ADLER: Now you mentioned *Chevron* and certainly, there are quite a few folks in the Administration or related to or connected to the Administration that have been quite critical of *Chevron* deference. Some of the conservative jurists—Supreme Court justices—have been critical of *Chevron* deference. Certainly, some academics and commentators have. And some have noticed some cases in which it appears as if the Administration or Justice Department, in particular, has reached out in some way *not* to rely on *Chevron* deference that perhaps agencies have. So I'll give two examples and you may or may not be able to comment on these examples.

One that's certainly outside of your authority is a case relating to the bump stock ban. During an oral argument in the D.C. Circuit, the Justice

Department said, "We're not relying on *Chevron* deference at all" and the D.C. Circuit had to decide, "Could an agency waive *Chevron* deference?" An example that you may be able to talk about is the Affordable Clean Energy or ACE Rule. In this rule, the EPA has not only withdrawn the Clean Power Plan of the Obama Administration, but also had adopted an interpretation of the Clean Air Act that is restrictive at *Chevron* step one.

And, at least, as I read what the EPA is doing, it is not saying, "We believe this is what the statute means at *Chevron* Step One, but if you disagree with us, we would still adopt this approach at *Chevron* Step Two." Instead, the EPA is simply saying, "This is what the statute means at *Chevron* Step One, full stop. We're not even going to go beyond that." I understand why EPA may believe that's the correct interpretation of the Act. But it also seems to be coming from the standpoint of a litigation strategy. And won't not making the *Chevron* Step Two argument as well ultimately make for a position that is harder to defend in Court?

Regarding the outsider's observation that the Administration seems to be deliberately backing away from relying on *Chevron* when it doesn't have to—is that accurate or is that just speculation? You know, I don't know if you can comment on what's going on with that.

MR. CLARK: I shouldn't comment on anything that's happening on the bump stock ban, because I'm not involved and that would be appropriately seen by others in the Department as me speaking outside my lane. The ACE Rule is within my lane, but it's unlike *Juliana*, which is essentially winding down. By contrast, the ACE Rule is really just kind of ramping up in the courts.

So I think I'll be silent on that one (ACE) too. But just as a general matter, I'll say that I was thinking about this problem yesterday and I was characterizing it to one of my counsel in an e-mail in this way: "Is *Chevron* of

the nature that it's—it's just like The Dude abides,"[59] if you see what I mean, or "is it something that you can wax on, wax off."[60] Wow, that's two movie analogies for the price of one, Jonathan!

It's amazing how many unique—as much as you think you know about administrative law— how many things come up that you realize there isn't a lot of law on yet. One of the things, I think, that this Administration has done a fair amount of—where I think there needs to be more scholarship—is on this whole concept of having multi-step rules, right? There have been step-zero rules and step-one rules and step-two rules and raising interesting questions such as how does that interact with the mootness doctrine? It's all a kind of unchartered territory.

PROF. ADLER: Sure. Related to defending agency rules, last term, I guess, it was last term, the Supreme Court in *Kisor v. Wilkie* scaled back *Auer* deference, didn't overturn it, but certainly at the very least turned it into a multi-step test that certainty would seem to apply that. Have you noticed as someone who's defending agency actions any difference in the way that not having as robust an *Auer* deference to rely upon affects the way you strategize about how to defend agency action or has it not really made much difference?

MR. CLARK: So at the moment in a different case, I'm grappling with cases that have sort of typical '70s, early '80s balancing tests in them and I tend to think that, as compared to enforcing the unvarnished constitutional or statutory text, balancing tests are like self-fulfilling prophecies of critical legal studies in that they affirmatively create indeterminacy. For that reason, in general, I'm not a fan of balancing tests.

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[59] THE BIG LEBOWSKI (Universal Studios 1998), https://www.youtube.com/watch?v=sYsw0KVRjCM at 0:44.

[60] THE KARATE KID (Columbia Pictures 1984), https://www.youtube.com/watch?v=Bg21M2zwG9Q at 1:24.

All else being equal, I like clear, sharp rules. I'm that sort of litigator and thinker in this area. But I don't think that I've seen a huge practical impact from *Kisor* really changing things. Though when you have a potential Supreme Court case, especially one that impacts multiple litigating divisions, multiple agencies, what results is a robust recommendation practice to the Solicitor General. I could say a *lot* of interesting things about that recommendation process as to *Kisor* but confidentiality restricts me as to what I can say …

PROF. ADLER: Sure.

MR. CLARK: about what was presented to the Solicitor General, who made the ultimate call.

PROF. ADLER: Last week, I think it was you issued a memo on "Supplemental Environmental Projects."

MR. CLARK: Yes.

PROF. ADLER: I was wondering if you could say a little bit about what the new policy is, the basis for that, the rationale behind that decision.

MR. CLARK: Sure. It's really my second memo about "Supplemental Environmental Projects" or SEPS.[61] The first memo was in August of last year. That was based on a November 2018 Attorney General Sessions memo about consent decrees with state and local governments. And it follows up on Attorney General Sessions' point in that memo that we should not be doing consent decrees with state and local governments that are designed to

[61] Memorandum of Jeffrey Bossert Clark, Assistant Att'y Gen., "Supplemental Environmental Projects ('SEPs') in Civil Settlements with Private Defendants," (March 12, 2020), available at https://www.justice.gov/enrd/page/file/1257901/download.

extract forms of relief that we could not secure under some governing source of law if a case were to be litigated to judgment.

I noted, in relation to that, that EPA had actually *defined* SEPS as forms of relief that they *could not* get under an applicable source of law. So it looked to me like that led to a simple syllogism that we couldn't do SEPS with state and local governments anymore after the relevant AG Session memo.

And then I began to look into the topic more heavily, because that August memo didn't just cover the Sessions memo, it also covered the Miscellaneous Receipts Act and the problems that scholars and prior opinions from both the Office of Legal Counsel at DOJ and from the Comptroller General had seen with SEPS as against the Miscellaneous Receipts Act.

So this memo, which I just issued last week, on March 12, goes through the Miscellaneous Receipts Act concerns. It also applies my prosecutorial discretion. And what I've decided in that memo—and since then I've seen that EPA is going to abide by it too, even inside its own halls—is that we shouldn't be doing SEPS anymore. I reasoned that they violate the Miscellaneous Receipts Act. And in rough, constitutional terms, as with what I was lecturing about today, I would say, Congress has the power of the purse. Certainly, Congress can delegate that power, but there's still the question of whether Congress has in fact made a delegation in this specific area.

Obviously, we litigate things like border wall cases, where there are delegations that we think authorize the President to move money around among the agencies of the Executive Branch, but here there's really only one form of SEP that Congress itself has actually authorized. So, of course, we'll do that form of SEP when it's appropriate, in mobile source cases, but otherwise, Congress hasn't authorized SEPs. It's been controversial device for decades and I think the memo reaches the right conclusion that the device violates the Miscellaneous Receipts Act.

PROF. ADLER: But Congress could authorize the greater use of SEPS if Congress wanted to?

MR. CLARK: Yes. To be clear, I'm certainly not saying that there's a limitation on Congress' power to make delegations that would authorize SEPs. I think they have the power to do that under current delegation law from the Supreme Court. It's just that they haven't done it in point of fact.

PROF. ADLER: On NEPA reform, how much—I mean, you talked a bunch about the evolution in the jurisprudence and how in your view NEPA at this point is paralysis by analysis and requiring agencies to spend all this time on these reports and then litigation and so on. Is that something that's kind of hardwired into the statute and, if it is hardwired into the statute, should Congress be considering revising NEPA rather than relying upon CEQ's ability to revise regulations in a way that would significantly alter the way NEPA is applied in practice?

MR. CLARK: Several responses to that: First, I'm a fan of Congress acting and I believe that they're the most legitimate body, right? So if they took up NEPA and they revised it to eliminate these problems, or with an eye to do that and then, it came out where it came out, I think that would be tremendous. That's the people getting the benefits of representative government. And conversely, if Congress made the problem worse, then there would be accountability.

I think if you look at the statute, though, the statute is largely the product of this professor—as I understand it—Lynton Caldwell, who consulted with Scoop Jackson about the statute. It doesn't read like any other statute I practice with. It's aspirational. It's soft. It's fuzzy. It's malleable. And I don't think that's really the optimal way that statutes should be written. I think NEPA's sort of unique in that regard.

And then the last thing I would say is that, although I'd prefer, obviously, in all cases if Congress, through the bicameral presentment

process, produced a new law in this area, as a practical matter, it doesn't seem like that's very likely. I think there's a clear delegation in terms of the statute in the way it's worked out as an evolutionary matter for CEQ to interpret it. I also think that there's nothing compelled about the 1970s regulations. Especially in light of the vague nature of the statute, those regulations can be changed.

But in the 1970s regulations, I think they are a lot of self-inflicted extra-process rules that create paralysis by analysis that have only been amended once to get rid of worst-case scenario analysis. It's overdue for those regulations to be revised.

PROF. ADLER: What would you say to the argument that the reason NEPA is aspirational and perhaps a bit soft is that it was ultimately about changing the culture of the agencies that historically had not considered the environmental implications of their actions?

So the Department of Transportation would say, "Oh, we're just going to build a road through a park" or the Department of Energy would just say, "Well, the more we extract, the more we develop, the better," and NEPA was really about placing the environment front and center in their decision-making process, and that necessarily involves a broad aspirational, soft statute, because it's not about requiring specific discrete processes or specific results, but changing the decision-making culture within federal agencies.

MR. CLARK: In a phrase, I don't buy it. I think that laws from Congress, serious laws from serious people for a serious Nation shouldn't be about soft things like changing culture. I think that comes from leadership, right? Culture shifts are the kinds of things that come when the management of an agency sets a different tone at the top.

I think laws should be about what the rules are. Give me the rules. Make the rules clear. And if the rules are clear, then the courts can enforce

the rules and then those rules can have the incidental effect of changing a culture, but you absolutely want to make sure you get the rules right.

PROF. ADLER: Recognizing the little bit of time we have left, I'd like to turn to *Juliana* and climate cases. So first, on *Juliana*, in your view do you think that—would that case have come out differently if the case had been less ambitious if, for example, it had not been a public trust claim, but instead had been maybe a quasi-nuisance claim or focused purely on the development and retraction of carbon-based energy from federal lands as opposed to this broad "federal government isn't taking enough action to safeguard the atmosphere for future generations" type claim?"

MR. CLARK: This strikes me as the kind of question, Jonathan, that sort of separates what you do from what I do, right?—in that I have all sorts of views about such litigation-strategy questions. I do think it's intellectually interesting. I see why you're asking about it. At other times, I've been asked questions about this, but as a rule, I have to say that I don't give free advice to my litigation opponents.

PROF. ADLER: Now the Ninth Circuit, you know, said there was no standing. Do you read the Ninth Circuit as saying that no one has standing for climate cases and, if so, would that be the right result?

MR. CLARK: Well, I'll comment to the extent of pointing to the key standing case in this area. The one that really occupies the field—and that is *Massachusetts v. EPA*.[62] And *Massachusetts v. EPA* says, '*States* have standing.'

For this reason, one of the arguments we made was that none of these Plaintiffs are States, so they don't get any of the benefits of the special solicitude that the *Massachusetts v. EPA* majority created. And thus,

[62] 549 U.S. 497 (2007).

Massachusetts is a significant hurdle for non-State plaintiffs in terms of any other follow-on litigation that might be launched in the climate-change area.

I mean, I don't think I'm giving away much to say that we'll continue to stand on that in the courts as an important distinction. The *Juliana* Plaintiffs tried to go leagues beyond *Massachusetts*. In *Juliana*, we were not talking about States as plaintiffs.

PROF. ADLER: And there was a lack of a procedural right too. This was another important distinction. *Massachusetts v. EPA* talked about how the eminence and redressability aspects of the standing inquiry are lessened when you have a procedural right, which the *Massachusetts* Court said existed in the Clean Air Act. There was no equivalent procedural right being claimed in *Juliana*. Is that an important distinction as well?

MR. CLARK: Yes. And certainly here the Plaintiffs were seeking substantive relief to end the carbon economy, as they put it; right? That's pretty darn substantive.

PROF. ADLER: Right.

MR. CLARK: I would observe, though, that it's a head scratcher for me how the majority in *Massachusetts* really thought that the right there was a procedural right, because NEPA is a procedural right. No quarrel about that and, as we know, the standing test is somewhat relaxed for that purpose, but we're not—we were talking about a petition for rulemaking.

In *Massachusetts*, the Plaintiff wanted a regulation of greenhouse gas emissions from new motor cars and vehicles. That seems very substantive (it's just about the preparation of an environmental impact statement), but, the Supreme Court said what it said. We'll abide by that holding. Logically, it's somewhat puzzling to me, though.

PROF. ADLER: Last question, because I know we're running out of time. Your Division filed suit against California on its cap and trade program which involves an agreement through the Western Climate Initiative with Canadian provinces. I believe there was a decision in that case last week. Could you say a little bit about the theory of the case and I don't know if you can comment yet on whether or not the Justice Department plans to appeal or what comes next in that litigation?

MR. CLARK: Sure. So one technical correction to make, which is something that the Judge put his finger on, is that there was something called the Western Climate Initiative, but now there is a separate entity called WCI, Inc.

PROF. ADLER: Okay.

MR. CLARK: So WCI, Inc. is the real party in interest.

Before I talk about what happened last week, let me talk about what happened the prior week. The Judge refused to dismiss WCI and its Board members—the voting Board members of WCI from that litigation, which are all government officials.

We think WCI is effectively a government entity. And so we moved for summary judgment and then the Defendants cross-moved for summary judgment on the first two counts in our complaint, which were our Treaty Clause and Compact Clause theories. In our view, the Judge, Judge Shubb, from the Eastern District of California, held that a particular line in *Massachusetts v. EPA* is dictum. But that line is one where the Court is talking about the precise *ratio decidendi* of the special solicitude standing analysis. In our view, the key line we were relying on against California and WCI is part of the holding of *Massachusetts*.

Specifically, the Supreme Court in *Massachusetts* says that, at the door to the Union, the States surrendered certain prerogatives like making war on

each other. So that's one reason why we need this kind of special solicitude—so that they can pursue a sort of proxy war in the courts as a substitute. That's how we do it in the more civilized era and in the era after a Union is formed. But here's the critical point—in the course of setting out that analysis, they also said Massachusetts can't make it an emissions treaty with China and India.

And so it looks to us like this agreement is an international cap and trade treaty or compact between California and Quebec—sub-national governments that are not even contiguous. So it's not something that seems to fall into older case law about such matters as adjudicating minor border disputes, but that looks like exactly the same kind of emissions treaty that Supreme Court anticipated in *Massachusetts* should be deemed unconstitutional.

Unfortunately, the Judge ruled against us on both of those counts of the complaint. We still have two other counts of the complaint and, as for our plans on that or about appeal, those topics would be premature for me to address.

(Let me end with a shout out to my daughter, Senna, who is a Case undergrad, and who attended this lecture in person.)

PROF. ADLER: Fair enough. Well, thank you for making the time and coming out. Thank you all of you that are watching on either live on Webcast or will be watching this in the future. Thank you for joining us. We are adjourned.