

## American Courts in Climate Emergency

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Global climate change is the most urgent issue of this or any century, but the Executive and Legislative Branches of the U.S. government have so far failed to address it with the level of substance and seriousness it requires. The two branches of our three-branch government have been locked in a power struggle for many years.

Although the United States ratified the United Nations Framework Convention on Climate Change in 1992, the U.S. Senate effectively scuttled the world's first global climate treaty – the Kyoto Accord – five years later when it unanimously approved a resolution making clear that it would not give its consent to President William Clinton to ratify the agreement. During the presidency of Barak Obama, Congress refused to act against climate change, so President Obama used executive orders and directives to implement a climate action plan. He used an executive agreement that did not require Congress's consent to sign the Paris climate accord on America's behalf. With the stroke of his pen, President Trump is methodically resending President Obama's climate action plan.

In 2007, the U.S. Supreme Court ruled in a lawsuit brought by several states who believed that the Environmental Protection Agency was obligated under law to regulate the gases responsible for climate change. The Court ruled that EPA would have to regulate the pollution if it certified there was a threat to public health and welfare. Under a new Administration, the EPA so certified and it issued the first-ever constraints on carbon dioxide pollution from power plants. However, President Trump's EPA superseded the rule with a significantly weaker alternative.

Frustrated by the lack of action from Congress and the White House, many environmental organizations and states have turned to the courts. This has raised a very important question: On

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the issue of global warming, can the federal courts step in where the Executive and Legislative branches have refused to tread?

The answer has several dimensions. First, it is important to appreciate that the Founders created an independent Judiciary, equal in power to the Executive and Legislative branches to ensure that jurisprudence would be grounded on the Rule of Law, unencumbered by coercion and the shifting winds of populism or politics.

Second, the courts can only perform their function through actual cases or controversies, brought by parties who have standing (I.e., who are injured by the actions which are the subjects of the cases) against the parties allegedly causing the injuries. The Courts occupy a unique position: They can provide a forum that will produce, through trial, a factual record and findings that, unlike unsworn narratives and partisan propaganda, have undergone the probative tests of reliability, sworn testimony, cross-examination, and an opportunity for all the parties to present their evidence.

Far from being a limitation, this is one of the strengths of the Judiciary's role. The Court is not a partisan in the controversy. Rather it provides a forum wherein the facts in contest are developed through trial, findings of fact are made, and the law, including whatever Constitutional issues are implicated, is applied to the proven facts.

Third, through testimony and decisions, the Courts are able to establish a factual record on a contested issue, based on testimony given under oath and subject to laws against perjury.

With several lawsuits concerning climate change now being adjudicated, it is important to recall the Preamble to our nation's foundational document, the Constitution:

*We the People of the United States, in Order to form a more perfect Union establish Justice, insure domestic tranquility, provide for the common defense, promote the general Welfare, and secure Blessings of Liberty to ourselves, and our Posterity, do ordain and establish this Constitution for the United States of America.*

The rights enshrined in the Constitution apply to us all. The courts are charged with promoting the “general welfare” – the well-being of all Americans, not just those who have amassed power. Perhaps most importantly, this obligation applies to future generations -- “our Posterity” -- as well as to present generations. Climate change is not only a threat to the present generation; it is an even greater and existential threat to our posterity.

Do the Courts have a role in providing a forum for litigation wherein those injured by climate change may seek relief against parties allegedly causing or contributing to this phenomenon? My answer is: How could they not? These are the civil rights cases of the 21st Century. Civil rights cases have historically invoked the authority of all three branches of government, with each having an important and vital part in promoting and protecting the rights and liberties of the people.

We also must be mindful that part of our common law heritage is the ages-old concept that a fundamental purpose of that social compact we call “government” is the preservation of natural resources needed by the people to sustain life, such as forests, lakes, rivers, streams, territorial seas etc. , and to hold and manage such resources for the benefit of the people. Whether one calls this obligation a “public trust” or an inherent obligation of Sovereignty is of little consequence, but it is a duty that is traceable back to Roman law and is clearly a component of our common law heritage.

Yet there are those who, in pursuit of private interests and profit, vociferously advocate the sale by our government of our public resources to the private sector. Even the sale of our territorial seas to private oil companies is viewed in some corners as within the power of our government. This strikes at the very heart of the social compact between the people who are governed and those whom the people have consented to govern them as defined by our Constitution and common law heritage.

It would be remiss to end this discussion without referencing the practical effect of the Citizens United ruling on our democratic institutions and, indeed, our very democracy. Only the Judiciary

is forbidden territory for such corporate “investments” in government today. Thus, it is even more important for the Courts to step up to their role as a co-equal and independent branch, and to perform their duty to address the civil rights challenges of the 21st Century.

It has been said that the wheels of justice turn slowly, more slowly perhaps than the climate crisis demands. But the Courts can expedite proceedings for good cause. In the end, a trial in the public forum of a court is an extremely important tool of Democracy. It openly informs and educates the people by revealing the Truth, not a “narrative.”