Remarks on *Connecticut v. American Electric Power*

by Hon. Peter Hall

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I was told that part of the reason I was invited to speak here was that I had given a warm welcome to participants at a recent "takings" program held at the Vermont Law School. The other reason was my involvement in the recent case from my circuit that my chambers has been in the habit of referring to as the "global warming" case, and which I think the legal community now knows as *American Electric Power*,[1] or *AEP*, as I see it referred to in cases from time to time.

One thing to get ready to speak here, that I suspect anyone would do, is look to see what relevant commentary, if any, there is out there and also how any other courts have treated the analysis, if at all, that we undertook in the *AEP* decision. In doing so, I violated a cardinal rule I had as a trial attorney, which was never, ever read what the media is saying about you while you're mid-trial. I was delighted to find that the district courts in my circuit cited it with approval. In Central California, however, there was one case that was perhaps due for somewhat different treatment if it went up on appeal.

The problem with giving remarks like this particularly around judicial decisions is that I'm a judge, and what I say here may be held against me by someone in the future or may cause someone legitimately, whether I intend it or not, to question my impartiality. I know that my predecessor from Vermont, the Hon. James Oakes, who served as Chief Judge of the U.S. Court of Appeals for the Second Circuit, gave remarks at this program about two decades ago out in California. He had just authored an opinion that I understand he was more than pleased to talk about. My former law firm was on the losing side of that decision, and I had helped work on the brief. I will note that about two-thirds of that opinion was devoted to talking about Vermont state law—the wonderful creation known as Act 250, our environmental permitting law—and had perhaps less to do with federal law. I think Judge Oakes, in speaking, was therefore freer to hold forth on Vermont law, since we all know that anything that a federal judge says about state law amounts to dicta.

AEP, on the other hand, is a discussion purely of federal law or federal law principles. Thus, given the probability that I will encounter some or all of these issues again, perhaps even in *AEP* itself, I will be more circumspect about my remarks and make the following disclaimer: Anything I say this afternoon that appears to be in any way at odds with what I have written, is not intended to be so and, thus, it is not.

I know a number of people have told me that they've read the decision; for those who haven't, I am going to run through it, and then I just want to pick up on a few points and make some brief comments.

There were two cases that were consolidated in front of the district court in the Southern District of New York. In one of them, seven states and the city of New York were suing power companies: American Electric Power and a subsidiary and several others. There was also a separate suit consolidated with the first before the district court (Judge Loretta A. Preska) brought by Land Trusts against the same set of power companies. The case was decided on a motion to dismiss. The complaint alleged in part, at least as to the power companies, that they produced one-quarter of the power sector's carbon dioxide (CO_2), that there were millions of tons of CO_2 a year produced by them going into the atmosphere, and that that CO_2 constituted 10% of those emissions in the United States. The states asserted that there was substantial impact from these emissions costing them billions of dollars to fix. There was a present injury alleged with respect to the state of California and the already ongoing diminishment of the snow pack and the resulting effect. Principally, however, the states asserted that the impact of the CO_2 emissions on global warming was something that was going to occur in the future and would increase.

The Trusts, in a slightly different position, of course, asserted that they held land for the public to enjoy, they were the owners of those large tracts of land, and these were being affected much in the same way as the land that the states were asserting was subject to the effects of global warming. The Trusts also alleged—where this goes, we won't know for a while—that one of the effects of global warming on the Trusts' property was a diminishment of the aesthetics of that property.

There were motions to dismiss filed by the power companies. They asserted a whole range of defenses, if you will,

1. Connecticut v. AEP, 582 F.3d 309, 39 ELR 20215 (2d Cir. 2009).

and I'm going to read from the opinion just to give you the district court's disposition:

> In an Amended Opinion and Order, the district court dismissed the complaints, interpreting Defendants' argument that "separation-of-powers principles foreclosed recognition of the unprecedented 'nuisance' action plaintiffs assert" as an argument that the case raised a non-justiciable political question. *Id.* at 271. [*Am. Elec. Power Co.*, 406 F. Supp. 2d] enumerated six factors that may indicate the existence of a non-justiciable political question, the district court stated that "[a]lthough several of these [*Baker v. Carr*] indicia have formed the basis for finding that Plaintiffs raise a non-justiciable political question, the third indicator is particularly pertinent to this case." *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271-72. The court based its conclusion that the case was non-justiciable solely on that third *Baker* factor, finding that Plaintiffs' causes of action were " 'impossib[le] [to] decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).[2]

So, clearly here, the district court had essentially accepted a separation-of-powers argument in the guise that it was presented and dismissed the case on political question grounds. It did not address any of the other arguments that had been made.

The court of appeals, as you know, reversed the district court's decision with respect to the political question analysis. The other arguments raised before the court that the district court had not decided were well briefed by both sides. The circuit court exercised its discretion to decide them rather than just send the case back for the district court to take another step, another bite at the apple, if you will, figuring that if the issues were raised sufficiently for us to reach reasoned determinations, the guidance would help at least move the process along rather than perhaps receiving a future appeal from another dismissal on a different basis that was already fully briefed before us at the time.

On the political question doctrine, the defendants raised principally domestic constitutional issues and arguments related to the conduct of foreign relations, suggesting that the resolution of global warming was textually committed to another branch of the government, and as a matter of foreign relations was committed to the executive. We found neither argument persuasive, so we reversed the district court's determination with respect to political question and went on to consider the other issues.

Principally—and I'm going to leave the TVA out of this because they made a separate argument applicable to them—with respect to global warming, the issues were (1) standing, (2) whether there was a cause of action recognized for a public nuisance and adequately pleaded in the complaints, and (3) whether such a cause of action analyzed under the federal common law of nuisance had been displaced by one or several enactments of the U.S. Congress.

As to standing for the states, just to review, the court found that the states had both parens patriae and propriety interests so that they had adequately pleaded standing. There is the question, of course, whether there was an injury-in-fact. *Massachusetts v. EPA*[3] came down after the case was argued. We asked for additional briefing based on the opinion in that case and its effect on the arguments that had been made in the case before us. We were guided in large part by language in that case.

As to many of the assertions that the harm that would occur was in the future, we relied, as I said, directly on *Massachusetts*, saying that while the risk of catastrophic harm was remote, it was real and it was, at least as the opinion goes on to say, the reality of that harm that gave the states standing.

Now, let me flag just one issue or remind of you one thing. Again, this was decided essentially on a filed complaint teed up against motions to dismiss. So, we're at the initial stage of the litigation. As to the issue of causation and traceability, the court turned really to principles of public nuisance law to suggest or to hold at least that, as under the Restatement's analysis of nuisance law, if there are combined perpetrators of the nuisance, so long as they are each perpetrating harm, you don't need to sort out who is the cause and point to what the particular actor has done that has had an effect. There has been criticism of this analysis, as I alluded to earlier and that is in the *Native Village of Kivalina v. Exxon Mobil Corp.*[4] decision, so reasonable judges can differ about many things, and this is obviously one of them. The issue of redressability, also a factor to be examined as part of standing, was whether the courts had the ability to provide some relief. Again, we were guided by the U.S. Supreme Court's holding in *Massachusetts* to find that, at least for purposes of standing, the courts were capable of doing that.

As to the issue of the federal common law of nuisance, we held that there is an action under federal common law for public nuisance. Based on some law that has evolved in our circuit and in the Restatement, we essentially turned to the Restatement for an articulation of that principle, noting that there had to be pleaded an unreasonable interference with a right common to the general public. Much of the defendants' argument in the case attempted to steer the analysis to Supreme Court jurisprudence dealing with original jurisdiction—that is, with that Court's jurisdiction over a dispute between two states. We found, however, that the analysis we were required to undertake had nothing to do with original jurisdiction but was essentially much more akin to garden-variety nuisance action.

As to the non-state entities, we wrestled with and ultimately came out holding that non-state actors or plaintiffs could bring an action to enjoin a public nuisance under federal common law. Recall that the developing jurisprudence had focused principally on the states as the parties who were permitted to invoke federal common law to pursue these actions. So, there was an open question, or at least one undecided in our circuit, as to whether private actors could also

2. 582 F.3d 309, 319.

3. 549 U.S. 497, 37 ELR 20075 (2007).

4. 663 F. Supp. 2d 863, 39 ELR 20236 (N.D. Cal. 2009).

do that. In addition, there was a question whether New York City could do the same. In any event, we held that the various parties, New York City, the private actors—that is, the Trusts—and the states could bring such an action.

Now, let me just say all of this having been written in 100+ pages, and watching the commentary or looking at the commentary, we all know as we sit in this room that clearly the last word has not been written either on this issue or frankly in this case. Let me point out at least three issues that I think are still open because reasonable persons have differing views about them. One, we decided the issue, but as you all know, how a trial court or appeals court reviews the issue of standing depends upon how far the case has progressed in the course of the litigation when the issue of standing is being examined. The most lenient analysis of standing takes place when one is examining the issue based solely on the allegations in the complaint. In this case, we are at that stage. We note in the opinion that standing is not an issue that is foreclosed. As this case progresses through pretrial practice and presumably on to trial at some point, whether a plaintiff has standing, I suggest, may get more difficult to prove and is an issue that will still exist at least for some of the parties who are participating in the litigation.

I suggest there's another issue to which I alluded a moment ago regarding the cause of action itself. First, with respect to the private parties, I know the last word has not been written on whether private entities, private persons, can invoke federal common law in order to pursue a claim in federal court. I suggest that that issue is still alive and well. It may be set for the *AEP* case barring some decision from the higher court. It is still an issue alive and well out there in the various other circuits in which many of you practice.

Finally, there's the issue of displacement. The parties argue that the Clean Air Act (CAA)[5] displaced the common law of nuisance and that the court had no authority, no power, because of that displacement, to invoke the common law to further define it. And they made a number of other arguments under various acts. The result of our analysis speaks for itself, but in sum, we held none of the legislation truly displaced or was intended by Congress to displace the common law.

The other observation I would make, and this is speaking with my former hat on as a litigator who's tried a fair number of cases and participated in, although not through to the end of trial, some environmental litigation. It seems to me, as I suspect it seems to you, that as well-pleaded as the *AEP* complaint is, at least as our court has held, this may be a very difficult case ultimately to prove. The parties are seeking relief in equity; it's a trial to a judge; judges are human. We have various takes on evidence that we hear—particularly, I suspect, on expert evidence, which, I have to imagine, will be needed in this case ultimately to prove that the plaintiffs are entitled to relief in these causes of action. Whether those evidentiary burdens can be proven by a preponderance of the evidence certainly remains an open question.

The district courts in turn, if plaintiffs in these types of cases are successful, become supervisors of the injunctive relief available in common-law nuisance actions. On the one hand, I pose the question whether you really want that to happen, and I suggest, given the variety of different parameters affecting the relief a single judge would be managing, you really might not want a judge supervising the relief you would be seeking.

On the other hand, I started thinking about all of the civil rights litigation that went on that ultimately evolved into laws that got passed and actions taken by the U.S. Department of Justice to enforce court-ordered and legislated rights, and I asked myself who ended up supervising those results, whether desegregating schools or ordering busing or ordering states how to ensure voting rights. So, perhaps the district court judges are stuck with supervising some form of relief, whether they do it nuisance action-by-nuisance action or in the process of enforcing some broader legislative effort that might come into play.

Let me close by taking us back to the issue of displacement, because that is where we ended up in the opinion, and by way of probably addressing the more uniform relief that I think we would like to see, whether we're looking to impose it or are on the receiving end of it. Displacement may well be where the game is played out and comes to a conclusion most quickly, at least with respect to federal common-law nuisance actions. So, while displacement may sound the death knell, which I suggest it might, of the federal common-law cause of action for public nuisance with respect to CO_2 emissions, the viability of the cause of action at the present time—and it is, I suggest, viable at least in the Second Circuit—may provide a backstop to whatever regulations may be crafted to displace the nuisance action. Such regulations may also provide perhaps some small impetus to the extent that folks want to fight over the regulations and beat, strengthen, or weaken them.

It seems to me that to the extent there exists, perhaps like a sword of Damocles hanging over the resolution of the regulatory issue, the opportunity to pursue or to continue to pursue a nuisance action, that fact may help in a political sense, at least with the executive branch: one, to get them moving to create regulations; and two, perhaps to control a bit the fight that will surely emerge once those regulations are promulgated. The other thing that might occur is that maybe in some way the existence of this nuisance action or the possibility and viability of such nuisance actions in general may serve as a way to achieve, or at least influence the achievement of, the 60-vote majority.

5. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.