Connecticut v. American Electric Power: Public Nuisance and Global Warming

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October 24, 2009

Introduction

- Connecticut v. American Electric Power, 2009 WL 2996729 (2d Cir., Sept. 21, 2009)
- 2-0 decision issued by Judges McLaughlin (Bush I appointee) and Hall (Bush II)
  - Judge Sotomayor took no part in the opinion
- Reversed and remanded district court decision, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (Preska, J.), dismissing case on political question grounds

AEP Background

- Defendants: American Electric Power, Cinergy (Duke Energy), Southern, TVA, and XCel
  - Were 5 largest emitters of CO_2 in the U.S.
  - Owned 174 fossil fuel burning power plants in 20 states that emitted approx. 650 million tpy of CO_2 (= to 10% of all CO_2 emissions in the U.S., or 2.5% of worldwide CO_2)
- Lawsuits filed 7/2004 by 8 states (CA, CT, IA, NJ, RI, VT, and WI) and NYC, and by 3 land trusts under common law public nuisance for harms caused by global warming
- Remedy: require each defendant to abate its contribution to the nuisance by reducing their CO_2 emissions each year for at least a decade

Plaintiffs' Injuries from Global Warming (Present and Future)

- Heat-related deaths and illnesses
- Respiratory illnesses associated with increased ground-level smog
- Loss of beaches, wetlands, etc.
- More droughts and floods
- Regional impacts (snowpack in CA, loss of hardwood forests in Northeast)
- Species extinction

AEP: 4 Main Legal Issues

- Political Question
  - Although district court's opinion addressed only this first issue, the parties briefed and argued all grounds raised by Ds for dismissal for lack of SMJ or failure to state a claim
- Standing
- Stating a Claim Under Federal Common Law Nuisance
- Displacement (preemption)

Legal Issue #1: Political Question

- District court: Case presents a “non-justiciable political question” that requires an initial policy determination by one of the political branches
- 2d Circuit: Supreme Court has narrowly construed the political question doctrine; does not = a “political case.” Excludes from judicial review controversies that revolve around policy choices and determinations constitutionally committed to Congress or the executive branch.
- 2d Circuit applies the 6 political question factors from Supreme Court’s Baker v. Carr decision

Legal Issue #1: Political Question
Baker v. Carr Factors

- District court relied on the third factor, that an "initial policy determination" by the elected branches was required (regulation of CO2) before the court could entertain the suit
- 2d Circuit rejects. If existing statutes do not cover a plaintiff's claim or provide a remedy, common law nuisance has long filled that void (citing Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (applying federal common law nuisance in interstate water pollution dispute).

Legal Issue #1: Political Question <u>Baker v. Carr</u> Factors (cont.)

- 1st factor ("dominant"): Whether, under separation of powers principles, a decision has been exclusively committed to the legislative and executive branches
- 2d Circuit: "Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change. . . A decision by a single federal court concerning a common law nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a national or international emissions policy." Slip op., at 23.

Legal Issue #2: Standing Parens Patriae

- Ability of the state to sue to protect the health and well-being of its residents
  - Snapp v. Puerto Rico, 458 U.S. 592 (1982)
    - 3-part test: State must: (1) articulate interest apart from private parties, (2) express a quasi-sovereign interest, (3) allege injury to a substantial segment of its population
- States met: concern for the health and well-being of residents against global warming harms a "classic" example of quasi-sovereign interest
  - Mass. v. EPA: Supreme Court "arguably muddled state proprietary and parens patriae standing" (Lujan test; "special solicitude;" Mass.' interest as property owner). In any event, States also satisfied Lujan test.

Legal Issue #2: Standing (cont.)

- States, NYC, and Trusts met Article III standing based on their proprietary interests:
  - Allegations of current and future harms are sufficient allegations of injury-in-fact – exposure as injury (p.55)
    - e.g., actual: reduced size of CA snowpack, coastal erosion; future: increased flooding (NYC); salinization of marshes (Trusts)
  - Causation (traceability): satisfied in multiple polluter case where each D contributes to overall pollution load, i.e., need not "fingerprint" pollutants back to an individual D
    - Restatement of Torts (p. 58)
  - Remedy (redressability): met here because an injunction would reduce the overall rate of global warming and thus affect the magnitude of Ps' injuries
    - Mass v. EPA: Need not show remedy would reverse global warming; just that it would slow or reduce it (p. 63)

Legal Issue #3: Stating a Claim of Public Nuisance

- Public nuisance = an unreasonable interference with exercise of a public right
  - U.S. v. Bushey, 363 F.Supp. 110 (D.Vt.1973) (Oakes, J.) (adopted Restatement def'n of public nuisance); NC v. TVA, 593 F.Supp.2d 812 (W.D.N.C. 2009)
- Federal common law nuisance: typically used in interstate pollution cases in absence of applicable regulatory regime
  - Illinois v. Milwaukee, 406 U.S. 91 (1972) (water); GA v. Tennessee Copper, 206 U.S. 230 (1907) (air)

Legal Issue #3: Stating a Claim of Public Nuisance (cont.)

- States have stated a claim: Ds' emissions, by contributing to global warming, constitute an unreasonable interference with public comfort and safety (p.70)
  - Rejects Ds' argument that nuisance claim only available for a "simple type" (pp. 74-77)
  - Similarly rejects arguments that nuisance must be noxious or localized (pp. 78-80)

Legal Issue #3: Stating a Claim of Public Nuisance (cont.)

- Trusts: “Who”: Restatement of Torts, § 821C: must suffer harm different kind other members of the public exercising a common right
  - Harm different in kind from individual landholders because Trusts have legally recognized missions to preserve ecologically sensitive land and they own significant lands threatened by global warming (p.98)
- Trusts have stated a claim, Restatement, § 821B
  - Alleged significant interference with public right to be free from widespread environmental harm caused by global warming = unreasonable interference (p. 101)

Legal Issue #4: Displacement (Preemption)

- AEP: Congress has displaced fed'l common law in the area of air pollution regulation and by its decision not to regulate CO_2 in the 1990 CAAA
- Court: To displace common law, Congress must speak directly to the particular issue in the case
  - Court found situation now w/r/t global warming to be similar to state of water pollution law in 1972. Milwaukee I: S. Ct. held that federal common law governed interstate water pollution dispute, notwithstanding that Congress had "enacted numerous laws touching interstate waters" (p. 103)

Legal Issue #4: Displacement (Preemption) (cont.)

- No laws in place that address remedy sought by plaintiffs – requiring the reduction of global warming pollution from power plants (pp.109-19)
  - Re. EPA's proposed endangerment finding w/r/t greenhouse gases from new motor vehicles, court reasons that until EPA completes the rulemaking, it could not speculate whether the hypothetical regulation of greenhouse gases would in fact speak directly to the particular issue raised here by plaintiffs (p.119)
- "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance" (p.139)

AEP: Next steps in the case

- Additional appeal proceedings
  - D's intend to file for rehearing and rehearing en banc (11/5/09 deadline)
  - Cert. petitions?
- Discovery

AEP: Subsequent Developments

- Village of Kivalina v. Exxon Mobil, 2009 WL 3326113 (N.D. Cal., Sept. 30, 2009)
  - Dismissing Alaskan village's common law nuisance claims seeking damages for harm by global warming
  - Bases: Political question, lack of standing
- Comer v. Murphy Oil, 07-60756 (5th Cir., Oct. 16, 2009), available at: www.ca5.uscourts.gov
  - Reverses dismissal of private plaintiffs' nuisance claims for Hurricane Katrina-related damages exacerbated by global warming
  - Plaintiffs have standing, no political question

AEP: Potential Implications

- Groundbreaking decision (1st appeals court to examine availability of tort remedy for harms associated with global warming) yet basic (simply affirms that common law is available to deal with disputes that the legislative or executive branches have not yet addressed)
- Additional lawsuits by states, public interest groups, or private parties?
- Further impetus for national legislation?