Connecticut v. AEP: A Long History of Nuisance Law

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The Second Circuit, in its September 21, 2009 decision in *State of Connecticut v. American Electric Power Company*,[1] did exactly what common law courts in America are designed to do: resolve the parties' differences in a peaceful fashion. The issue before the court—the harms caused by the global warming pollution of the five largest power companies in the country—was a new setting for common law, but the basic approach of the court was deeply rooted in the fundamental precepts of our judicial system. While the ruling is only preliminary (the case is far from having reached the merits) and may be mooted by either Congressional or administrative action, the decision is pivotal in holding that states could bring a federal common law nuisance case seeking to require the country's largest greenhouse gas (GHG) polluters to reduce their emissions. As such, the decision represents an encouraging reminder of the important role of the courts.

Much of the genesis of the case stems from the nature of the federal system. When states suffer from pollution caused by sources outside the state, they generally ask the federal government to step in and address the interstate pollution. Specific provisions in the Clean Air Act and the Clean Water Act, for example, allow states to seek such redress from EPA and impose a duty on EPA to respond.[2] But at times, the national government does not act. It is part of the beauty of the federal system that in such cases the citizens of the downwind (or downstream) state are not left hopeless and helpless. If the federal government does not act, the states themselves may act.

The state of New York (where I was the Assistant Attorney General in charge of the Environmental Protection Bureau) and other Northeastern

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1. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009) (petition for rehearing *en banc* denied Mar. 5, 2010).

2. *See*, *e.g.*, Clean Air Act § 126(b), 42 U.S.C. § 7426(b) (2006).

states were in just such a situation with respect to the sulfur dioxide and nitrogen oxide emissions from coal-fired power plants in the Midwest. These power plants were causing acid rain, smog, thousands of premature deaths, elevated asthma rates, and other harms in downwind states. Over seventy-five percent of the pollutants measured on top of an Adirondack mountain, for example, were determined to come from out of state.[3] For years, however, EPA could not or would not require the upwind polluters to reduce their emissions. So, at last, New York and other states sued the polluters directly. In a series of cases under the Clean Air Act, several states (and the United States which joined the cases) and environmental groups (including NRDC), obtained decisions and settlements dramatically reducing this smog and acid rain causing pollution.[4]

This precedent was in the minds of state lawyers as we recognized that the federal government was not acting to reduce the emissions of GHGs that were causing climate changes. Many states (including New York) had petitioned, and were at that time suing, EPA to act on GHG pollution. These efforts, working their ways through the DC Circuit at the time, eventually ended in 2007 in the decision of the Supreme Court in *Massachusetts v. EPA*.[5] Yet, several states also wanted to challenge the polluters directly, recognizing that their citizens were already suffering real and serious injuries that needed redress. California's snow pack, for example, on which it depends for its water supplies, was melting faster each year.[6] Weather patterns had changed in New York.[7] Future but "certainly impending"[8] injuries further included increased illness and death from heat waves, beach erosion, increased smog, lowered Great Lake water levels, increased sea levels, and widespread disruption of ecosystems.[9]

3. Liaquat Husain & Vincent A. Dutkiewicz, *A Long-Term (1975–1988) Study of Atmospheric SO_4: Regional Contributions and Concentration Trends*, 24A ATMOSPHERIC ENV'T 1175, 1175–87 (1990).

4. *See, e.g.*, U.S. v. Am. Elec. Power Service Corp., 258 F.Supp.2d 804 (S.D. Ohio 2003); U.S. v. Ohio Edison Co., 276 F.Supp.2d 829 (S.D. Ohio, 2003). *See also* New York v. Mirant New York, Inc., 300 B.R. 174 (S.D.N.Y. 2003) (settlement for $1.4 million in June 2003); Consent Decree in New York v. Orange & Rockland Utilities, Inc., No. 3581-03 (N.Y. Sup. Ct. filed June 10, 2003), *available at* http://www.ag.ny.gov/media_center/2003/jun/orange_rockland_consent_decree.pdf.

5. 549 U.S. 497 (2007).

6. State Plaintiffs' Complaint ¶ 119, Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265 (S.D. N.Y. 2005), *available at* 2004 WL 5614397.

7. *Id.* at ¶ 104.

8. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

9. State Plaintiffs' Complaint ¶¶ 103–46, Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265 (S.D. N.Y. 2005), *available at* 2004 WL 5614397.

At the time the case was filed and decided, there was no law or regulation that "spoke directly" to the issue of carbon dioxide pollution from power plants; accordingly the states sued under the common law of nuisance.[10] Furthermore, although thousands of industrial sources emit carbon dioxide, hundreds of state and federal nuisance cases (as well as statutory cases) make clear that the injured parties need not sue in one case all parties that contributed to the harm. Thus, the states sued the five largest carbon dioxide polluters which together own dozens of power plants throughout the United States and jointly emit 650 million tons of carbon dioxide pollution each year—as much as all of Canada emits and about ten percent of the entire country's emissions.[11]

As noted, after the plaintiffs—eight states, the City of New York, and three land trusts—filed suit, the defendants moved to dismiss.[12] They asserted that the case failed to state a claim in that the federal common law of nuisance could not address global warming pollution, that if the common law did allow such a claim, it was displaced (or preempted) by various federal statutory and other actions, that the plaintiffs lacked standing, the court lacked personal jurisdiction over most defendants, and that the actions of defendant Tennessee Valley Authority were immune from suit.[13] In language recently reiterated in defendants' motion for rehearing, the power companies argued that the case would require the court to "address broad and far-reaching socioeconomic issues that require resolution not of questions of law but of fundamental disputes over *policy*."[14] In a short, ten-page decision, the district court dismissed the case as a political question.[15]

More than three years after a long and lively oral argument, the Second Circuit ruled.[16] By then, Judge (now Justice) Sotomayor had moved to the Supreme Court. The remaining two judges (one appointed by

10. EPA is now moving quickly to regulate carbon dioxide from power plants, but to date the agency has only proposed requiring the monitoring of emissions from all sources and limits on emissions from new or modified power plants. *See infra* notes 34–35 and accompanying text.

11. State Plaintiffs' Complaint ¶ 2, Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265 (S.D. N.Y. 2005), *available at* 2004 WL 5614397; UNITED NATIONS STATISTICS DIVISION, MILLENNIUM DEVELOPMENT GOALS INDICATORS: CARBON DIOXIDE EMISSIONS (CO2), THOUSAND METRIC TONS OF CO2 (CDIAC) (data through 2006), *available at* http://unstats.un.org/unsd/mdg/SeriesDetail.aspx?srid=749.

12. Def.'s Mot. Dismiss, Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp.2d 265 (S.D. N.Y. 2005), *available at* 2004 WL 5614407.

13. *Id.*

14. Appellees Mot. Reh'g 1, Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009), *available at* 2009 WL 3756471.

15. Connecticut v. Am. Elec. Power Co., Inc., 406 F.Supp. 2d 265 (S.D.N.Y. 2005).

16. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309 (2d Cir. 2009).

President George H.W. Bush and one appointed by President George W. Bush) joined in a 139-page decision determining that all plaintiffs had standing under Article III of the Constitution and that the states had *parens patriae* standing.[17] The court also found that the case did not present a political question, noting that adjudication of nuisance cases is "constitutionally committed" to the judiciary[18] and that "defendants' argument is undermined by the fact that federal courts have successfully adjudicated complex common law nuisance cases for over a century."[19] In addition, the court ruled that the case stated a claim under federal common law of nuisance, that the common law here was not displaced by any other federal action, and that TVA's actions were not immune.[20]

While all aspects of the decision deserve attention, perhaps one of the most significant is the ruling that the states can, in fact, bring a legal action against each company as a public nuisance.[21] While defendants' principal claim was that such a cause of action would be a radical extension of the law, plaintiffs argued, and the court held, that this was merely upholding a long tradition of judicial protection for the environment.[22]

The basic law of nuisance goes back hundreds of years. In the often-cited *Aldred's Case* of 1610, the court took action when "thick smoke [and] noxious vapors . . . render[ed] the occupancy of adjoining property dangerous, intolerable, or even uncomfortable."[23] The United States adopted the English common law and, over the years, the U.S. Supreme Court often relied on federal common law to resolve interstate pollution disputes.

The Second Circuit started its discussion of nuisance by quoting Justice Harlan—often held up as one of the lions of judicial conservatism—from an 1887 case "wax[ing] eloquent on nuisance law," noting that law's ability to "give a more speedy, effectual, and permanent remedy than can be had at law."[24] The court reaffirmed that they need not wait until legislature enacts a law and "'though not frequently exercised, the power undoubtedly exists in courts of equity . . . to protect

17. *Id.* at 338.
18. *Id.* at 323.
19. *Id.* at 326.
20. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d at 315.
21. *Id.* at 358–59.
22. *Id.*
23. Camfield v. United States, 167 U.S. 518 (1897) (citing Aldred's Case, (1610) 77 Eng. Rep. 816 (K.B.)).
24. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d at 350 (quoting Mugler v. Kansas, 123 U.S. 623, 673 (1887)).

the public against injury.'"[25]

The court then examined a 1906 ruling in *Missouri v. Illinois*, where the Supreme Court—long before Congress or state legislatures limited water pollution as they do now—allowed Missouri to sue Illinois for dumping raw sewage into the Mississippi River, threatening the St. Louis drinking water supply.[26] The Court held that under our Constitution, "if the health and comfort of the inhabitants of a state are threatened . . . it was to be expected that upon the [federal courts] would be devolved the duty of providing a remedy."[27]

In *Georgia v. Tennessee Copper Co.*, Justice Oliver Wendell Holmes—another famously conservative Justice—not only allowed Georgia to sue polluters in Tennessee over "sulphurous fumes" wafting across the border, but—in a subsequent decree—imposed precise pollution limits on the upwind copper smelter.[28] He built upon one of the most profound principles of our Union: that states cannot wage economic or other war against other states. That core concept, which has pulled the fifty states into one country for more than 200 years, came with the need for the federal government, including the courts, to solve interstate disputes. "When the states by their union made the forcible abatement of outside nuisances impossible to each . . . . [T]hey did not renounce the possibility of making reasonable demands [to protect] their quasi-sovereign interests . . . in this court."[29] As Justice Holmes recognized, peaceful resolution of disputes by the courts is not a radical or liberal notion; it is a core part of America.

More recently, in 1971 the Supreme Court continued this trend in *Illinois v. Milwaukee*, allowing Illinois to sue Milwaukee under nuisance law for threatening its drinking water by dumping sewage into Lake Michigan.[30] In *American Electric Power* the Second Circuit noted:

> *Milwaukee I* stands for the proposition that if the extant statutes governing water pollution do not cover a plaintiff's claims and provide a remedy, a plaintiff is free to bring its claim under the federal common law of nuisance; a plaintiff is not obligated to await the fashioning of a comprehensive approach to domestic water pollution before it can bring an action to invoke the remedy it seeks.[31]

25. *Id.*
26. Missouri v. Illinois, 180 U.S. 208 (1901).
27. *Id.* at 241.
28. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Georgia v. Tennessee Copper Co., 237 U.S. 678 (1915).
29. *Id.*
30. Illinois v. Milwaukee, 406 U.S. 91 (1972).
31. Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 330 (2d Cir. 2009).

In *American Electric Power*, the power companies argued that any court ruling would be tantamount to re-ordering all U.S. economic activity by imposing broad new limits on carbon dioxide. Plaintiffs responded that they were merely seeking redress from specific injuries to which defendants' pollution contributed. The Second Circuit agreed: "Nowhere . . . do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead they seek to limit emissions from six domestic coal-fired electricity plants."[32]

The court closed by quoting from the *Milwaukee* case: "It may happen that new federal laws . . . may in time pre-empt the field of the federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance" by pollution.[33] NRDC and many others are working hard right now to get the Senate to pass a comprehensive clean energy and climate protection bill, so we hope "that [soon] comes to pass."[34]

While the court focused on the possible preemption of the cause of action by Congressional action, it did also discuss the possible displacement of the claim by administrative action. The U.S. Supreme Court in *Massachusetts v. EPA* upheld the authority of EPA to impose limits on carbon dioxide and other greenhouse gases. New York, other states, and environmental organizations have already both petitioned and sued the EPA to do just that. Since the change of administrations, the Obama EPA under Administrator Lisa Jackson has already proposed rules to require all large sources of carbon dioxide to report their emissions and has proposed a "tailoring rule" which sets the stage for imposing limits on carbon dioxide emissions from new and existing power plants.[35] When these rules become final, and are either upheld upon the likely industry challenge or not challenged within the applicable statute of limitations, displacement of the nuisance cause of action is possible.

Of course, the ruling is only preliminary. It reversed the district court's dismissal of the case on political question grounds. Defendants

32. *Id.* at 325.
33. *Id.* at 392–93 (quoting Illinois v. Milwaukee, 406 U.S. at 106).
34. *Id.* at 393.
35. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Mandatory Reporting of Greenhouse Gases Rule, 74 Fed. Reg. 56,260 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89, et seq.).

have already moved for rehearing and they may seek certiorari if rehearing is denied. When the case goes back to the district court, the defendants are likely to renew their motions to dismiss on personal jurisdiction grounds; only one of the five main defendants is based in New York, where the suit was brought. If those motions are not successful, the case would still proceed through discovery and likely summary judgment motions and/or a trial. Thus, there is far to go before the court orders the power companies to reduce their carbon dioxide pollution.

When this decision is taken together with the progress of the EPA in imposing regulatory limits on greenhouse gas emissions under the Clean Air Act, it means that two of the three branches of government can and will take action to address the most serious environmental issue we have ever faced. We are all working hard to get Congress to take action since Congress can craft a broader, more comprehensive, and perhaps more finely tuned program. If Congress does act, it is possible that the common law action, at least for injunctive relief, could be displaced. It is also possible that EPA could shift its focus to implementing the new act rather than implementing rules under the Clean Air Act. We are fortunate that we live in a country with three branches of government—and two levels of sovereignty—so that the unfortunate inaction of one branch does not leave our citizens without hope or recourse.