Case Note

GETTING INTO COURT: STANDING, POLITICAL QUESTIONS AND CLIMATE TORT CLAIMS

INTRODUCTION

Within the time span of 1 month in late 2009, three Federal courts in the USA issued decisions touching on the justiciability[1] of nuisance and other common law tort claims relating to climate change. These cases demonstrate that *Massachusetts v. EPA*[2] (the US Supreme Court Case involving the question of the US Environmental Protection Agency's (EPA) authority to regulate greenhouse gases (GHGs) under the Clean Air Act) has not resolved many questions about the role of the courts in addressing disputes related to climate change. Courts still grapple with the spatial and temporal distances between GHG emissions and their impacts, and still have questions about the appropriate branch of government to determine questions about climate policy. Judges remain divided as to whether the Federal courts should be adjudicating climate-related common law tort claims.

THE CASES[3]

Connecticut v. American Electric Power Co.[4] (*AEP*) involves two cases asserting similar claims. In the first case, eight US States and one city brought suit against five of the biggest power companies in the USA. The second case involves claims filed by three land trusts against the same defendants. The plaintiffs in both suits alleged that defendants' emissions were contributing to global warming, which is causing injury to both human health and natural resources. The plaintiffs brought claims under Federal and State nuisance law 'to force Defendants to cap and then reduce their carbon dioxide emissions'.[5] The District Court dismissed the case after finding that the claims involved political questions.[6] The US Court of Appeals for the Second Circuit reversed the District Court decision.

AEP was followed 9 days later by the District Court decision in *Native Village of Kivalina v. Exxon Mobil Corp.*[7] In this case, the Village of Kivalina, Alaska (which is the governing body of an Inupiat Eskimo community living in the City of Kivalina) brought suit against 24 power and fuel companies. The complaint alleged that the defendants' collective contributions to GHG emissions have contributed to global warming, which has diminished sea ice protecting the coast from erosion to the extent that the entire Kivalina community must be relocated. The complaint included public nuisance claims under both Federal and State common law, as well as claims for civil conspiracy, and concert of action. The District Court granted the defendants' motion to dismiss the claims, holding that the suit was barred by both the political question doctrine and lack of standing.

Comer v. Murphy Oil[8] involves a class action suit brought by Mississippi Gulf Coast land and property owners against various chemical, energy and fossil fuel companies. The suit alleged that GHG emissions by the defendant industries contributed to global warming, which increased the severity of Hurricane Katrina, which destroyed property owned or used by the plaintiffs. In a ruling from the bench, the District Court dismissed the case after finding that the case involved a political question and required policy decisions that 'are best left to the executive and legislative branches of the government'.[9] The US Court of Appeals for the Fifth Circuit divided the claims into two groups. The first group included claims of public and private nuisance, trespass and negligence; and the second group included claims for unjust enrichment, civil conspiracy and fraudulent misrepresentation. The Fifth Circuit found that the plaintiffs had established standing for the first set of claims, reversed the District Court decision with respect to those claims, and returned the case to that Court for a decision on the merits.

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[1] For a discussion of different concepts of justiciability, see *Flast v. Cohen*, n. 10 below.

[2] *Massachusetts v. EPA*, 549 US 497 (2008), (concerning the meaning of Section 202(a)(1) of the Clean Air Act, as amended in 1970 and 1977).

[3] The cases are listed in chronological order.

[4] *Connecticut v. American Electric Power Co*, 582 F.3d 309 (2d Cir. 2009) (decided Sept. 21, 2009; corrected Oct. 2, 2009; amended Dec. 3, 2009) (*AEP*). The decision was decided by a two-judge panel after the third panel member, Judge Sonia Sotomayor, was elevated to the US Supreme Court.

[5] See *AEP*, n. 4 above, at 314.

[6] Ibid.

[7] *Native Village of Kivalina v. Exxon Mobil Corp.*, No. C 08–1138 SBA, 2009 US Dist. Lexis 99563 (N.D. Cal., Sept. 30, 2009) (notice of appeal filed Nov. 5, 2009, No. 09-17490) (*Kivalina*).

[8] *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009) (decided Oct. 16, 2009) (*Comer*).

[9] Ibid., at 860, n. 2.

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The *Kivalina* decision appears to be inconsistent with the outcomes in *AEP* and *Comer*. In the *Comer* and *AEP* cases, the courts found that the plaintiffs had standing for at least some of their claims, and that the claims did not involve a political question. The *Kivalina* judge held both that the claims involved non-justiciable political questions, and that plaintiffs lacked standing. Because the *Kivalina* decision is the only one that found the nuisance claims to be non-justiciable, this article will focus on the reasoning provided by the *Kivalina* Court and compare the reasoning on those issues across the three cases.

JUSTICIABILITY

Article III of the US Constitution restricts the power of the Federal courts to 'cases' and 'controversies'. The US Supreme Court has noted that this provision both limits courts 'to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process', and raises issues about the proper role of the judiciary in balancing powers among the three branches of government.[10] These limitations define the nature of justiciability, 'a concept of uncertain meaning and scope'.[11]

Justiciability refers to the ability of a court to hear and decide the claims made by the parties in a case.[12] A court must dismiss claims found to be non-justiciable and judges must decide whether a case may properly be decided by the court before considering the merits of the claims. Several doctrines have been developed relating to justiciability. Standing and the political question doctrine are the two most relevant to climate litigation in the USA.

Justiciability can apply both to the parties seeking relief and to the issues the parties seek to have adjudicated.[13] The concept of standing focuses on the parties, and whether they have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens to presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues exists'.[14] Many, if not most, environmental cases involve challenges to the plaintiffs' standing to bring their claims.[15] The political question doctrine, in contrast, focuses on issues, and considers whether the question presented is appropriate for resolution by the judiciary, or whether it rightfully belongs to the executive or legislative branches of government. The defendants in several climate lawsuits, including the three instant cases, have claimed that the issues presented raise political questions that should be addressed by the more political branches of government.

Massachusetts v. EPA clarified some issues relating to justiciability, but ambiguities remain. While it addressed similar justiciability issues, *Massachusetts* can be distinguished from the instant cases because it involved questions of statutory construction rather than common law tort claims. Congress had already authorized court challenges to the Clean Air Act, so there was no question that the issue was appropriately before the Federal courts. The Supreme Court briefly considered whether the case involved a political question, an advisory opinion, or a mooted question, and concluded that the 'case suffers from none of these defects'.[16] The Court then turned to a detailed analysis of the standing of the plaintiffs in the case.

Tests for justiciability generally do not draw bright lines. Decisions are heavily fact-dependent, and will vary with the status of the plaintiffs and defendants, with the nature of the claims, and with the arguments presented.[17] Decisions also may differ depending on how comfortable the judge is with the complexity of the case, and with the views of the judge about the role of the courts relative to the other branches of government in ruling on issues that may have political or policy implications. Decisions about justiciability allow judges to act as gatekeepers controlling access to the Federal courts. Judges making these decisions are engaged in deliberations about the role of the courts in a democratic system, as well as the more specific issue of the role of the courts in shaping climate policy.

POLITICAL QUESTION DOCTRINE

The US Supreme Court has stated that '[t]he political question doctrine is "primarily a function of the separation of powers" '.[18] The doctrine has origins in *Marbury v. Madison*, which states that '[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this Court'.[19]

All three cases discussed herein applied the 'formulations' described by the US Supreme Court in *Baker v.*

[10] *Flast v. Cohen*, 392 US 83, 95 (1968) (*Flast*).
[11] Ibid., at 95.
[12] Various jurisdictions and scholars define and apply justiciability differently. As discussed in this section, the US Supreme Court considers standing to fall within the ambit of justiciability. Others separate standing from justiciability. In Canada, for example, justiciability is generally applied as a separate concept from standing. See L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell, 2000).
[13] See *Flast*, n. 10 above, at 99.
[14] Ibid., at 99 (quoting *Baker v. Carr*, 369 US186, 204 (1962) (*Baker*)).
[15] See, e.g., *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).
[16] See *Massachusetts v. EPA*, n. 2 above, at 516.
[17] See, e.g., *Baker*, n. 14 above, at 217; and *Flast*, n. 10 above, at 94–95.
[18] See *AEP*, n. 4 above, at 321 (quoting *Baker*, n. 14 above, at 210.
[19] Ibid., at 321 (quoting *Marbury v. Madison*, 5 US (1 Cranch) 137, 170 (1803)); see also *Comer,* n. 8 above, at 870.

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Carr for determining whether a case presents a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[20]

The *Baker* factors are listed from most to least significant. Any one factor can be determinative, but only when the factor is '*inextricable* from the case at bar'.[21] Not all cases involving political debate are political questions that are non-justiciable. In fact, only twice has the Supreme Court dismissed a case under the political question doctrine.[22] As the three instant cases demonstrate, the sparse application of the doctrine has not prevented District courts from finding that claims involve political questions, particularly in complex cases such as those involving climate change.

The second and third *Baker* factors were dispositive in *Kivalina*, leading the Court to dismiss the case because the claims involved a political question.[23] The Second Circuit had reached a different conclusion regarding these factors only 9 days earlier. In response to the *AEP* defendants' argument that resolving claims linking GHGs and climate change would require complex policy balancing and decisions, the Second Circuit observed that 'Federal courts have successfully adjudicated complex common law public nuisance cases for over a century'.[24] The Court went on to refer to 'a long line of Federal common law of nuisance cases where Federal courts employed familiar public nuisance precepts, grappled with complex scientific evidence, and resolved the issues presented, based on a fully developed record'.[25] The Court noted that the plaintiffs had not asked for policy determinations, but only for a determination as to whether the defendants had engaged in a public nuisance that has contributed to Plaintiffs' injuries. Stating that complexity was an insufficient reason to deny jurisdiction, the Second Circuit panel held that the second *Baker* political question factor did not apply.[26]

The *Kivalina* judge rejected the reasoning of the *AEP* Court, asserting that 'the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm. Rather, the fact finder must also balance the utility and benefit of the alleged nuisance against the harm caused'.[27] The claims in *Kivalina* would require the fact finder to weigh the utility, reliability and safety of various energy choices, and balance these against the risks of flooding due to global warming. Citing the global nature of the sources of GHGs and their impacts, the judge concluded that the 'Plaintiffs' global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. These cases do not provide guidance that would enable the Court to reach a resolution of this case in any "reasoned manner" '.[28]

Both decisions considered the nature of the issues that would need to be balanced in order to reach a decision. The Second Circuit judges expressed confidence that a Federal court could apply traditional tort principles to reach a reasoned decision. The *Kivalina* judge disagreed, saying that such an analysis should be conducted by the political branches. The scale of the climate change issue seemed determinative to the *Kivalina* judge, while the two *AEP* judges were confident that the courts could deal with novel or complex issues. The position of the Court of Appeals for the Ninth Circuit, which will hear the *Kivalina* case on appeal, remains to be seen.[29]

The Fifth Circuit in *Comer* focused primarily on whether the claims in question had been committed to a separate branch of government. The decision does not discuss the second and third *Baker* formulations in detail, but observes that the defendants had not 'shown the absence of judicially discoverable or manageable standards with which to decide this case'.[30] The decision maintains that 'the Federal courts are not free to invoke the political question doctrine to abstain from deciding politically charged cases like this one, but must exercise their jurisdiction as defined by Congress whenever a question is not exclusively committed to

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[20] See *Baker*, n. 14 above, at 217 (numbers added).
[21] See *AEP*, n. 4 above, at 321 (quoting *Baker*, n. 14 above, at 217 (emphasis added)).
[22] Ibid., at 321–22 (referring to R.E. Barkow, 'More Supreme than Court? The Role of the Political Question Doctrine & the Rise of Judicial Supremacy', 102 *Colum. L. Rev.* (2002), 237, 267–68); see also *Comer*, n. 8 above, at 873. Neither Supreme Court case involved either environmental issues or common law tort claims.
[23] See *Kivalina,* n. 7 above, at 21–32. This is the same factor that led the District Court to dismiss in *Connecticut v. American Elec. Power Co*. The *Kivalina* opinion notes that the second and third *Baker* factors can be grouped together under the inquiry, 'Would resolution of the question demand that a court move beyond areas of judicial expertise?' (quoting *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005)).
[24] See *AEP*, n. 4 above., at 326.
[25] Ibid., at 327.
[26] Ibid., at 329–30.
[27] See *Kivalina*, n. 7 above, at 22–23.
[28] Ibid., at 29.
[29] See 'Eroding Alaska Village Appeals Lawsuit Dismissal', *New York Times* (28 January 2010), available at http://www.nytimes.com/aponline/2010/01/28/us/AP-US-Global-Warming-Erosion.html.
[30] See *Comer*, n. 8 above, at 875.

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another branch of the federal government'.[31] The Court also noted that 'Common law tort claims are rarely thought to present non-justiciable political questions',[32] and cited supporting cases from five circuits.

Timing may be the determinative issue. Which branch of government should act first? The *Kivalina* judge clearly wants the political branches to set policy in order to provide standards for the courts to apply in climate cases, while the judges in *AEP* and *Comer* regard a nuisance claim as a way to resolve disputes in the absence of Federal policy and are comfortable acting without additional congressional direction. The Second Circuit panel, in concluding its political question analysis in *AEP*, concluded that:

> . . . given the nature of federal common law, where Congress may, by legislation, displace common law standards by its own statutory or regulatory standards and require courts to follow those standards, there is no need for the protections of the political question doctrine.[33]

Action by other branches of government would affect the way the political question doctrine is regarded in climate litigation. If Congress does pass a Bill regulating climate change, its impact will depend on the scope and wording of the Bill. Congress could choose to explicitly limit or expand tort liability for climate-related claims, or could specify the role of the courts in addressing issues relating to climate change. Other provisions could imply, rather than direct, changes in the roles of the three branches of government with respect to climate change. A federal cap and trade programme, or regulation of GHG emissions by a federal agency, would provide courts with a more certain standard to apply, as well as a policy determination of the relative social costs and benefits of such emissions.

STANDING

The US Supreme Court has stated that '[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues'.[34] Standing frequently is at issue in environmental cases, and has been a critical point of contention in climate litigation.[35] As in *Massachusetts v. EPA*, all three of the courts in the instant cases applied the standing factors described in *Lujan v. Defenders of Wildlife*: injury in fact, traceability and redressability.[36] Traceability (whether plaintiffs' alleged injuries can be linked to defendants' actions) is the primary standing factor on which the three courts disagreed.[37]

The *AEP* defendants claimed, *inter alia*, that it was insufficient for the plaintiffs to allege that the defendants' actions simply contributed to the plaintiffs' injuries. The Second Circuit panel, citing Restatement (Second) of Torts Sections 840E and 877, found that liability is not barred when defendants' actions are not the sole cause of plaintiffs' injuries. The Court also discussed a three-part test from *Powell Duffryn*,[38] a case involving discharges in excess of limits in a Clean Water Act permit, to confirm that liability may attach to one among many contributors.

The District Court in *Kivalina* also addressed this issue. In a footnote, the *Kivalina* judge asserted that the Second Circuit had used 'circular reasoning' in order to find adequate traceability to support standing in *AEP*.[39] After noting that the *Kivalina* plaintiffs relied on Clean Water Act cases for their contribution arguments, the Court drew 'a critical distinction between a statutory water pollution claim versus a common law nuisance claim'.[40] Exceeding a statutory standard gives rise to a presumption that there is a connection between a discharge and an injury. No such presumption can be made in the absence of a statutory standard, as with greenhouse gases, particularly given the attenuated causal chain alleged in this case. The *Kivalina* judge did not address the provisions of the Restatement cited by the Second Circuit, apparently because the plaintiffs had not referred to the Restatement.

The *Comer* defendants argued that the link between their actions and the plaintiffs' injuries was too attenuated to support the causation requirement for standing. The Fifth Circuit ruled that it was too early to essentially make a finding regarding causality on the merits. Standing does not require the establishment of proximate cause, just 'a fairly traceable connection'.[41] The Court held that the plaintiffs had alleged an adequate chain of causation, and at this stage their allegations must be assumed to be true. The decision cited *Massachusetts v. EPA* for the proposition that 'injuries may be fairly traceable to actions that *contribute* to, rather than solely and materially cause, greenhouse gas emissions

[31] Ibid., at 873.
[32] Ibid., at 873–74.
[33] See *AEP*, n. 4 above, at 332.
[34] Ibid., at 339–40 (quoting *Warth v. Seldin*, 422 US 490, 498 (1975)).
[35] *Massachusetts v. EPA*, n. 2 above, involved an extensive standing analysis and granted standing in a split decision after recognizing the special *parens patriae* status of the plaintiff States.
[36] See *Lujan v. Defenders of Wildlife*, n. 15 above, at 560–61.
[37] Burdens of proof shift at different stages of litigation. A finding of traceability for standing purposes does not mean that defendants' actions have caused plaintiffs' injuries. The burden of proof for causation will be higher when the fact finder considers claims on the merits. See, e.g., *AEP*, n. 4 above, at 346; *Comer*, n. 8 above, at 864; and *Kivalina*, n. 7 above, at 34.
[38] See *AEP*, n. 4 above, at 346–47 (citing *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64 (3d Cir. 1990)).
[39] See *Kivalina*, n. 7 above, at 41, n. 7.
[40] Ibid., at 40.
[41] See *Comer*, n. 8 above, at 864 (citations omitted).

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and global warming'.[42] The Second Circuit allowed the case to go forward on the first set of claims, involving nuisance, trespass and negligence.

At least part of the disagreement between *Kivalina* and the other two decisions is over the level of proof of causation required at the standing stage as opposed to the later analysis of claims on their merits. The *Kivalina* judge recognized that '[a]lthough the "traceability" of a plaintiff's harm to the defendant's actions need not rise to the level of proximate causation, Article III [of the US Constitution] *does* require proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact'.[43] Applying a 'seed of the injury' test, the Court found that '[e]ven accepting the allegations of the Complaint as true and construing them in the light most favourable to Plaintiffs, it is not plausible to state which emission – emitted by whom and at what time in the past several centuries and at what place in the world – "caused" Plaintiffs' alleged global warming related injuries'.[44] The judge also concluded that Kivalina is not within the 'zone of discharge' of the defendants' actions, and that the 'Plaintiffs' claim for damages is dependent on a series of events far removed both in space and time from the Defendants' alleged discharge of greenhouse gases'.[45]

Actions by the other branches of government could also affect the standing analysis in climate litigation. Congress could provide standards for access to the courts to adjudicate climate-related claims. Statutory restrictions on GHG emissions could shift the way that plaintiffs frame future claims and the way courts analyse those claims. Regulations would, for example, provide the presumption of a link between discharge of GHGs and an alleged injury that the District Court found to be missing in *Kivalina*.

CONCLUSION

The *AEP*, *Comer*, and *Kivalina* Cases demonstrate how decisions concerning justiciability issues such as standing and the political question doctrine will vary with the status of the plaintiffs and defendants as well as with the nature of the claims made and the authorities cited. Also contributing to variations are the views of the judge about the relative roles of the three branches of government, and the role that the courts should play in shaping complex policy matters such as those relating to climate change. Slight variations in the application of well-known tests can lead to different decisions about whether a case can go forward to be heard on the merits.

Cases about climate change involve complex factual questions with global causes and impacts, along with substantial spatial and temporal distances between causes and effects. Deciding when, why, and how to assign liability for injuries will be challenging in cases that reach decisions on the merits, but plaintiffs must first survive an analysis of the justiciability of their claims. The three climate cases discussed herein demonstrate that *Massachusetts v. EPA* has not resolved disputes over the justiciability of climate-related common law tort claims. Decisions about climate policy from either Congress or federal agencies will resolve some issues and undoubtedly raise new ones. As additional climate lawsuits are filed and decided, it remains to be seen whether clearer standards will emerge, or whether contextual differences in facts, claims, arguments and judges will continue to produce what appear to be inconsistent rulings on justiciability in common law tort cases involving climate change.

***Written by*: Marilyn Averill is an attorney who is currently a doctoral student in Environmental Studies at the University of Colorado at Boulder, where she is affiliated with the Center for Science and Technology Policy Research. Marilyn holds a B.A. from Wellesley College, an M.A. and a J.D. from the University of Colorado, and an M.P.A. from the Kennedy School of Government at Harvard University.**

[42] Ibid., at 866 (emphasis in original).
[43] See *Kivalina*, n. 7 above, at 33 (emphasis in original).
[44] Ibid., at 44.
[45] Ibid., at 47.

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