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# Panel I Symposium- A New Legal Frontier in the Fight against Global Warming

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# PANEL I

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PROF. JOHNSON: Good morning. I am Nicholas Johnson. I am the Moderator of the *ELR* now, previously the *ELJ*.

My job today is to referee, to the degree that the folks to my left get overly frisky. I talked to them earlier, and I am committed to the view that they are going to behave themselves – but, hopefully, not too much.

I am going to introduce folks as they come up. Our first speaker today is Ms. Grace Soderberg. She is the Assistant General Counsel for the National Association of Regulatory Utility Commissioners. In this capacity, she advocates the Commission's position in front of the Federal Energy Regulatory Commission and other agencies. Grace is a 1999 graduate of Vanderbilt University Law School. She clerked for Judge William Haynes of the Middle District of Tennessee. She is currently working on an LLM from The George Washington University Law School.

Grace will educate us on one perspective of the issue that the Dean introduced us to.

MS. SODERBERG: Thank you, Professor.

First, I need to do some things as well. I need to thank Fordham University, and I want to single out Hannah Amoah. She has been wonderful about just going through the logistics and some of the mundane things that helped me in moving me along and getting me up here. I want to thank Fordham Law School for the invitation. I am very excited to be here because, first, I am a New Yorker, so I am glad to be home. I have a special relationship with the Fordham University campus up in Rose Hill, and so it brings back great memories. As you have heard, I graduated from law school just in 1999, so it is nice to be back in a law school environment.

I am humbled by our panelists and being a part of this panel – first, a former ALJ from one of our member commissions in New York, NRDC. We have worked with Kit Kennedy on many issues. The Professor mentioned that maybe we could be keeping a referee busy, but I think on some of the issues we agree, and we have worked together. And, of course, my other colleague from Nixon Peabody.

[Slide] First, I would like to start with a disclaimer that I am here for me, for Grace Soderberg. I am not speaking for NARUC. Any of my views are not NARUC views, although NARUC has an ad hoc committee on global climate change. NARUC supports the various measures and has various partnerships in mitigating greenhouse gas emissions and for combating this problem.

Let me just give you a little background about NARUC. Our members are the state commissions around the country. We are their voice in Washington, so they have a voice with Congress or with the Federal Energy Regulatory Commission, with the FCC. I am their energy attorney, so I focus on energy issues. However, in my previous career at DOJ I was focusing on environmental issues, so I feel glad to be home again in another way.

Right now, in my present position, I am also their environmental attorney, because, as you all know, as this lawsuit shows, when we deal with power generation, with electricity or gas, we have to worry about air emissions, the Clean Air Act, and, of course, global climate change.

[Slide] In my presentation, we will discuss that global climate change is a true global problem. We can't pick out discrete areas or discrete entities to focus on. Rather, we do need global cooperation. This is one of those truly global problems, where an effect in one area has far-reaching effects in other parts.

I will start with a brief overview of the problem of global climate change and certain areas that impact some of the overarching challenges in this area. With that, I will discuss international actions to address global climate change, as well as the various entities involved. Then I will get to the multistate tort lawsuit at issue, and then talk about the possible solutions out there, and the various methods.

My thesis is that this lawsuit – it is good to bring political awareness and social awareness as to this problem. As a representative of the states, we like it when our states are out there doing things, and our local governments are doing things. However, I do feel personally that the judicial process and the judicial arena is probably not the right place to deal with this problem. That is when I will discuss the possible methods for dealing with this problem, as well as gaps that I perceive, with some conclusions of what I think as we go forward.

[Slide] First, as to the problem of global climate change, I know I am preaching to the choir. As you all know, it is the earth's climate response, the greenhouse gas concentrations in the atmosphere, and the primary cause of that is the increase of greenhouse gas emissions from fossil fuel burning. Of those greenhouse gas emissions, carbon dioxide comprises nearly 50 percent of that. Of that, 80 percent is manmade. Those are from the folks that our commissions regulate. This is the burning of fossil fuels from heat, transportation, and electricity.

[Slide] This next slide highlights some of the challenges that we have to deal with in this arena. First, there is this conflict between developed countries and developing countries. Currently, developed countries are the primary contributors to greenhouse gases. Of those, the United States is the largest producer of greenhouse gas emissions currently. However, that will change as we go forward. China is expected to surpass the United States as the largest greenhouse gas emitter, and in the future, developing countries will surpass developed countries in greenhouse gas emissions. However, since $CO_2$ is banked in the atmosphere, even going forward, the banked $CO_2$ can be traced back to developing countries.

[Slide] As we know, there are many effects for global climate change:

- There is sea-level rise — and that could affect many low-lying areas;
- Weather impacts — that could be a vigorous hydrological cycle, with droughts and floods;

- Public health effects, especially in the developing countries;
- Flora disruption;
- Drinking-water impact;
- Glacial retreat; and
- Reduced biodiversity, whether in forests, freshwater, or oceans.

[Slide] Now I will discuss the international actions and international entities dealing with climate change. Back in 1990, the Second World Climate Conference recommended a framework climate change convention. This resulted in negotiations in 1992, and from that came the Framework Convention on Climate Change, in 1992.

[Slide] The United States is a signatory to that. The framework contains nonbinding political aims, with the long-term objective of stabilizing greenhouse gas concentrations. The framework outlines few specific substantive obligations to curb global climate change.

One of the criticisms is that the goals are not binding commitments. However, it had various principles that guide the evolution of the regime, including equity between developed and developing nations.

[Slide] The Berlin Mandate called for such additional commitments from developed nations. It resulted in the Kyoto Protocol in 1997. However, in 2001, the Bush Administration announced that the United States would not ratify the Kyoto Protocol. This resulted in the gap and the split with the United States as to the rest of the world, and especially the European Union.

[Slide] Last month was actually a landmark event. The Kyoto Protocol entered into force. That contains long-term architecture with legally binding national commitments to reduce total greenhouse gas emissions. It also includes short-term commitments for the period of 2008 to 2012. The goal is to cut greenhouse gas emissions in developed countries by 5 percent from 1992 levels to 2012. But even in force, what is key is that the Kyoto Protocol applies to only about a quarter of the world's greenhouse gas emissions. So even then, since we have this global problem, it is just dealing with a subset.

That is one of the criticisms of the Kyoto Protocol, besides its being this complex global system. While it was very ambitious, some say it would have been better to deal with it bottom-up and grow rather than to start so large, because this way, from the bottom up, we are dealing with the political ramifications and the various international –let's say, the intrigue of various nations around the world.

The biggest hurdle for the United States still is that the Kyoto Protocol doesn't have commitments from developing countries. There are some who say that there just isn't equity. Developing countries have had a seat at the table. However, they haven't had the same level of commitments.

[Slide] With that background, I move on to the multistate tort lawsuit at issue here: (a) I want to highlight that there is this underlying tension between developed and developing countries; and (b) as to international agreements, although the Kyoto Protocol is enforced, the United States is not a part of it, and even then, it is just dealing with a certain subset of emitters.

Various states and the City of New York filed this suit. It is against the big power emitters out there, AEP from the Midwest, the Southern Company, the large power company out there in the Southeast, the Tennessee Valley Authority, Xcel Energy, and Cinergy. In essence, they assert a public nuisance claim that the $CO_2$ emissions from these folks, which are about 650 tons a year, are contributing to global climate change. One of the key things that the plaintiffs are asking for is an injunction, wanting these defendants to reduce the emissions of $CO_2$.

[Slide] These defendants operate about 174 fossil fuel-burning power plants in about twenty states, with interstate effects. They want there to be found joint and several liability for those folks. EPA data has shown that five of the defendants are the top five producers of $CO_2$ emissions in the United States.

[Slide] I do want to note that "public nuisance," as a legal theory, has been used in environmental cases before. As the law students here can remember from tort law, it is the interference of the plaintiff's interest. As for a public nuisance, it is interference with the general public's interest.

I think there are many pros to this lawsuit, besides shaking up the political landscape. There is corrective justice. Global climate change has global effects. So those who are causing the problem should be held liable. Since the effects are so far-reaching and there are so many entities that could be affected, it does cut down on transaction costs. This is, in a sense, kind of like a class action suit – let's bring them all together and find these large potentially liable parties and bring them to court and let's find them liable.

Also, if we do find them liable, these fossil fuel companies will be forced to internalize the costs of climate change. In a way, they are realizing that fossil fuels cost more, so it would kind of force them,

through a judicial forum – to encourage them to use more alternative sources, such as renewables and more energy-efficient.

[Slide] Also, polluter pays, from environmental law and tort law: Those who could have been harmed should be compensated. This lawsuit doesn't ask for money. However, this could be like a springboard for other things. It asks for an injunction and any other remedy the court sees fit. However, besides an injunction, we could start talking about being compensated. That could be just something down the line.

Also, like I said, it brings publicity. It could exert the pressure on the power industry to reduce their greenhouse gas emissions. Also it could show political pressure. We could show, "Well, we're going into the courts now. Maybe the legislative process needs to step up a bit. We need help in this area." Also public awareness, just for the everyday person – and even, with that, the shareholders can start to exert pressure on the power industry as well.

[Slide] However, there are some negatives of this lawsuit. Once it goes forward, I think there will be difficulty in proving such a claim. First, although there is consensus that global climate change is happening and it is caused by greenhouse gas emissions, in a judicial forum, I am not so sure the scientific knowledge could be sufficient to prove it as a legal matter. Also there are problems as to tort law. Besides these folks, who are the potential defendants? How can we trace the harms to those actions? It would be pretty difficult trying to ascertain the particular point sources – let's say, for AEP. How do we trace back to AEP that these emissions are coming from them specifically in apportioning the damage among these defendants?

I think judicial decision-making cannot replace legislative mandate. I think that is one of the areas that is missing here. There are folks who say that we need some type of federal legislation.

Also litigation could be inefficient and piecemeal. It is slower. We have to go through the courts, get a decision, and then go on to the next set of defendants. Even if every large power company were found liable, again it is still piecemeal. It is only subsets of who is really contributing to the problem. It is a global problem. Like I said, we need an explicit national policy statement, and case law doesn't do that. Federal legislation needs to do that.

[Slide] There are some solutions in play right now on our domestic front. There is the contract approach. DOE and Power Partners, which includes members like EEI, which are the large power companies, EPSA, the NRECA — these are the big power sector generators — they signed a memorandum of understanding

for a voluntary framework. But again, it is a contract approach. As you all know, contracts can be breached.

There are also voluntary approaches. The Bush Administration had a greenhouse gas initiative and a Climate Leaders Program. They are seeking reductions by certain amounts. The Climate Leaders include AEP and Cinergy, two of the defendants in this lawsuit. However, again, it is voluntary. It is like these goals that don't have any, I feel, bite to them.

With that, there are greenhouse gas registries, which came out of the Energy Policy Act. I think that is a good foundation, if there is a cap-and-trade program. However, we don't have such a program.

[Slide] There are also state and regional initiatives. Various states have legislation, either directly or indirectly, dealing with climate change. California is on the forefront. There are regional greenhouse gas registries around the country. But again, it is not a federal statement. Each state, sure, can have its own regulations. However, it is still in a piecemeal sort of way. I think the future for this is to have a cap-and-trade program. That has been recommended as a way of moving these folks forward.

Also there was federal legislation that was introduced last year. That was the Climate Stewardship Act. Of course, it didn't pass. Then there is the Climate Change Subcommittee that Ted Stevens had wanted to start for this new Congress. That could be a forum where we could have new legislation.

[Slide] To be sure, global climate change is a difficult problem to tackle. Part of that is that the United States needs to assess their impact on the problem, acknowledge how they have contributed to the problem, as well as being part of the solution. One of the challenges is that domestic dialogue. How do we regulate this fossil fuel-based economy? As you see, these are some pretty big players. They provide some basic services, like transportation and energy. Overarching that is the international arena. We still have this tension between developed and developing countries, folks who like Kyoto, folks who don't like Kyoto. Even then, all of this consensus that global climate change is occurring – there are still challenges to the scientific basis.

[Slide] I say that a balanced approach of various means is what we need to do, not only the areas I discussed earlier, but some other gaps that are missing as to federal legislation. With that, global climate change can't be addressed in a vacuum. It can't be U.S. versus the world. It is, rather, U.S. within the world, U.S. as a

developed country working in cooperation with developing countries.

I applaud this lawsuit. It is a back-to-basics approach to addressing this environmental problem. It exemplifies a public nuisance. I think it is great for shaking up the landscape. However, I think there are, like I said, problems with proving it.

[Slide] I think one of the big solutions is to have federal legislation, like I said, because it will embody the domestic statement. It will be a comprehensive approach. We should have a cap-and-trade, because that is one of the key solutions. There is a European cap-and-trade program currently. McCain and Lieberman, the sponsors of the legislation, have said that the United States will be left behind as the federal cap-and-trade goes forward – just economics. So rather than command and control, and having these companies being forced to have these greenhouse gas emissions reduced, it will be economics. Once there is a cap-and-trade program, it will be in their economic interest to find new technologies to trade with the global market, to trade with the E.U.

So as we go forward, I think that is a way that we can reconcile this developed and developing countries conflict and the United States' gap with the rest of the world and the E.U.

With that, I will thank you. I will answer any questions in the question-and-answer period.

PROF. JOHNSON: Thank you, Grace. That was a very nice job, and very helpful in terms of framing the issues for us and introducing us to some of the questions. It was a nice summary of some of the alternatives that we can talk about as the day proceeds.

I want to introduce now David Doniger, who is Policy Director for the National Resources Defense Council Climate Change Center. David started working for the NRDC in 1978. He took some time off to do very good work with the Clinton Administration, where he was Director of Climate Change Policy at U.S. EPA, and before that, was counsel to the head of EPA's Clean Air Program.

David received his master's degree and his law degree from the University of California at Berkeley and holds a B.A. in History from Yale. He will advance our discussion.

MR. DONIGER: Thank you for the opportunity to discuss this case on carbon dioxide litigation approaches with you today.

I thought I would first give a little bit of a presentation, in addition to what Grace has, about what global warming is all about and why it is so urgent. It is very common, even in communities of people who deal with this all the time, to forget that this is not a problem

that is in the future; it is not a problem that we have a long time to deal with. It is very urgent, because global warming is already happening. With each passing year, we load up the atmosphere with more carbon dioxide and the other global-warming pollutants.

An image that I like to use to describe this problem is that it is like filling up a bathtub with taps that are running full speed and a drain that is almost totally plugged up. The atmosphere gets fuller and fuller of carbon dioxide and the other global-warming gases, and once you decide that you have too much in the tub, you can't get rid of it. It is not like sulfur dioxide or conventional pollutants that cause smog and other kinds of air pollution, which are literally here today and gone tomorrow. If you make progress in getting power plants to put sulfur controls on, for example, the pollution in the atmosphere responds almost immediately, within a few days to a week.

In fact, when there was the big power failure last year, the air was substantially cleaner in the several days after the power failure – not that I recommend that as a clean-air technique, but it does show how quickly conventional pollution responds.

But global warming pollution lasts in the atmospheric bathtub for a century or more, depending upon the pollutants. Some of them will be around for 10,000 years.

So the decisions we make today are filling up the atmosphere with pollution that we will live with for the rest of our lives, that our children and grandchildren will live with for the rest of their lives. The higher the level in the tub, the more the impact, the longer we will be stuck with this. It is that much more important to turn off the taps or turn down the taps as early as possible.

That is a policy overview. A little bit about the impacts.

[Slide] There is more and more clear documentation from federal and international reports, the most recent being the Arctic climate impact assessment, that the Arctic regions are warming at an incredibly rapid rate. Sea ice in the Arctic Ocean – the outline in red represents the boundary of the sea ice in 1979. The picture represents 2003. The sequences down at the bottom show the decline in sea ice expected through this century. That has broad ecological effects, broad effects on the people who live in that region, whom you will hear from later today.

Perhaps the most worrisome scenario is the melting of the loaf of ice on Greenland, which is conveniently held above sea level. It is a huge storage of water, as in other glaciers around the world. But this is the biggest one. If the temperature rises to the point where this

loaf of ice melts, you will have an inexorable and unavoidable sea-level rise that could top, I think, seven meters before it stops, about twenty-one feet. We would not be comfortable having this presentation here in that world.

[Slide] Sooner than that, you get inundation – this is not just a distant problem in the Far North – you get inundation of the low-lying coastal regions in the United States. Here is an illustration of sea-level-rise impacts in Florida and Louisiana.

[Slide] You get a dramatic increase in the temperatures of cities, of heat waves. You get droughts. There is a severe drought in the western United States now, not yet broken, even though they had significant rains early this year. One of the projections is that what we will have across the West, especially in the western mountain regions, is less snow, more rain, and what that means is less snowpack – which isn't good for skiing, which is why we have some allies in the National Ski Areas Association, the "Keep Winter Cool" campaign. (I have been urging us to form a "Keep Summer Cool" campaign to go along with it.) But you will end up with a reduction in the snowpack in the mountains of the West. What is that snowpack? It is their reservoir system for urban and irrigation water in the West. The water will come down as rain and run off earlier in the year, so you will have flooding in the early parts of the year and droughts through the summers – not a pretty picture.

[Slide] This is an illustration of the urgency. The upward-sloping purplish-pinkish path is the business-as-usual emissions path. This is a global picture, the number of gigatons of carbon emissions going into the atmosphere. It just illustrates that if you want to keep the levels from increasing to truly dangerous levels – and let me give you some reference points.

We started before the Industrial Revolution at about 270 parts per million of carbon dioxide. We are now at about 380 and rising fast, because the rate of emissions has been increasing worldwide. If you want to keep the bathtub level from exceeding 450 parts per million, there are still some choices left about the pathway in time to do that. You can start now with reductions – this is the green path – and have a relatively smooth and relatively gentle slope downwards through the rest of this century in terms of continuing to make emission reductions.

But the longer we wait, the more the reductions have to come on a crash basis. They have to be deeper in the end, they have to be sharper at the beginning, and this is going to translate into a much greater expense. More likely, it means that we just won't do it, and

we will end up suffering with higher concentrations. We will foreclose the options of keeping the concentrations in the atmosphere bathtub at some level where the consequences won't be too bad.

A couple more details about the science. The most, perhaps, important scientific findings of the last year were published in December 2004 in the journal *Nature*, in the U.K. Scientists, in several papers in that issue of *Nature*, linked global-warming pollution to the European heatwave in 2003. That heatwave killed upwards of 15,000 people in Europe. I have seen estimates of 25,000 or 30,000. The emissions of $CO_2$ and other global-warming pollutants, in the judgment of these scientists, have already doubled, at least, the probability of extreme heatwaves like that 2003 event. In other words, they are saying the 2003 event itself had a higher probability of being caused because of pollution already in the atmosphere, and the event has a high probability of being repeated.

They actually project that if greenhouse gas emissions continue to rise on their business-as-usual global trajectory, the 2003 temperatures will not be the outlier, but they will be the norm by the 2040s, with half the summers being even hotter than the summer of 2003.

There is a paper done jointly by, I think, a physicist and a lawyer in the same journal. What they conclude is that the global-warming pollution has, "loaded the weather dice, raising the chances of repeating the weather conditions of 2003 by a factor of 2 to 4, with higher risks to follow as emissions rise." They conclude, "It will be increasingly hard to argue that any resulting damage was unforeseeable." They predict a rise in litigation to determine who pays for the damage caused by global warming.

It is also important to recognize that American industry leaders increasingly know this and are being quite candid about it. I have a couple of quotes that I didn't have time to make into slides.

Matt Pawa's [phonetic] article, which is in the CLE package here – Matt is here with us, as one of the co-counsel in this case, which I will talk about in a minute – Matt has a lot of the science and the recent statements by power company officials in his article in that package. But there are a couple of others I would point to.

American Electric Power has said, on their website, "Enough is known about the science and environmental impacts of climate change for us to take actions to address the consequences."

The head of Exelon, another big electric power company, has said, "We accept that the science on global warming is overwhelming." He has also said there should be mandatory carbon constraints.

Several of them have said that they accept the inevitability of living under a cap, that carbon constraints would be inevitable. Wayne Brunetti, the CEO of Xcel Energy, another one of the defendants in this case, said, "Give us a date, tell us how much we need to cut, give us the flexibility to meet the goals, and we'll get it done."

That brings me to the lawsuit. The plaintiffs, as you know, are the eight states and the City of New York. I should name them: Connecticut, California, New York, New Jersey, Rhode Island, Vermont, Wisconsin, and Iowa, plus the City of New York. There is a parallel case brought by two land trusts, the Open Space Institute in New York and the Audubon Society of New Hampshire. NRDC and Matt Pawa represent the land trusts in that litigation. There are several people from attorney generals' offices here, two of my colleagues from the New Jersey office.

The land trusts have lands which have been preserved, coastal lands and forest lands, for their unique ecological properties. They are open to the public, preserved for the long term. Yet these lands are at risk of going underwater and having the tree species and so on run out of the region by global-warming impacts. The impacts on these lands are cited by those two plaintiffs as well.

We think we have a good, strong case in the tradition of public nuisance law. The idea of a public nuisance is a flexible and evolving concept. There is no short list of historically accepted and not-to-be enlarged list of public nuisances, which is an odd little position taken by the defendants. As science evolves, as knowledge evolves, new nuisances are recognized, and global warming fits the characteristics of nuisance.

The power companies are the five biggest in the country. They alone represent 10 percent of the $CO_2$ emissions in the country. $CO_2$ is about 85 percent of the total problem of global warming. I think it is much larger than the 50 percent that Grace suggested. The power sector in the United States is 40 percent of the U.S. and 10 percent of the world. So these companies alone are a substantial share of U.S. and world emissions.

We seek the abatement of their emissions. We don't seek damages. We seek an abatement schedule that would be consistent with their part of an overall solution – in other words, to get them on a ramp-down of some shape similar to that.

There are well-established doctrines that states and other plaintiffs in public nuisance can go after contributors to a problem one at a time. It is not necessary to have everybody in front of you. It is no defense, for example, for a plant that pollutes a stream to say that there are other plants that pollute the stream, and you can't come after me unless you come after everybody all at the same time. That is not a recognized defense.

This is a suit under federal common law. There is a well-established federal common law of interstate pollution. It goes back to the beginning of last century, if not before. One of the key cases is *Georgia v. Tennessee Copper*, a case in which Justice Oliver Wendell Holmes said that one state has the right to bring suit like this over the pollution impacts across the border as a consequence of having joined the Union and given up its right to make war one against another.

The cases in the 1970s of the Supreme Court in the water-pollution field hold that there is an interstate law of water-pollution public nuisance. It has been argued that this has been displaced by statutory law. The Clean Air Act, according to the Environmental Protection Agency, doesn't reach carbon dioxide. As a result, there is no federal regulatory law that says what should take place here and establishes rules and remedies and therefore displaces the common law. So the common law is still there and prevails, and we are seeking to use it.

The defendants, in the motions to dismiss which have been filed and are pending before Judge Preska in the Southern District here, have made a number of arguments, some of which I have touched on. They have argued that there can be no new nuisances; there can only be old nuisances. They argue that they are just a teeny-weeny part of this, and they can't be addressed in a case like this. I have responded to those general arguments already.

They argue that the Congress has established a policy that there shouldn't be any regulation of global warming. That is kind of a laughable claim. There are congressional enactments for research, and there are congressional enactments that recognize global warming is real, and there are congressional enactments to report emissions. Congress hasn't spoken to the emission reductions, but it hasn't, certainly, articulated any policy that the current emissions are a good thing or are hunky-dory, and they have in no way displaced the common law.

This is my favorite argument: That we are interfering with the President's ability to bargain with the developing countries, because,

they say, if unilateral steps are required under U.S. law, somehow the President would lose bargaining leverage with other countries. I guess that is an argument that we should have the filthiest possible country in order to maintain the most bargaining leverage with China and India.

I think – and I will return to the bigger picture of where this fits in, in order to close my presentation – this is a good lawsuit in and of itself. We are prosecuting it as an effort to enforce the law. It is obvious that there is a context that this is taking place in. If we were successful, it might influence the position that these companies or others take with regard to federal legislation. That would be a good consequence. It is not the point. The point is to begin to abate this pollution through all legal means necessary.

The overall solution ultimately will have to be to get all American participants to do something and begin to abate their emissions. I think that is the key to getting other countries to participate. The average American emits five to ten times as much carbon dioxide upstream, from all of the power- and fuel-related things that we do, compared to the people who live in China. We have been at this for a 250-year head-start over China, in terms of the Industrial Revolution. It is important that China participate, because they are contributing to the same bathtub that we are. But it is important also that we shoulder our burdens and recognize that our leadership has to come first, at least the initial steps, in order to convince the developing countries that we are serious about this and it is a joint enterprise and not some kind of a plot to hold down their development.

I am quite hopeful that this case will help move the ball forward, but we are going to prosecute it straight up as a lawsuit as we have brought it.

[Slide] There is one other cartoon in the context of the developed versus the developing world. This is from Toles, our *Washington Post* cartoonist.

We have to address this problem in the United States. It is really shocking that the United States, as the world's largest emitter of global-warming pollution, is outside the treaty, has no substitute domestic program of its own. Australia is not part of it either, but they don't deny that they have a responsibility to curb their emissions. Australia won't join the treaty, but they have pledged to meet its targets. The United States is the only country whose government has blown this off entirely. If, as a second-order

consequence of enforcing the law, we have some influence on that, that would be a good thing.

Thank you.

PROF. JOHNSON: Thanks, David. That really advanced our conversation and was, for me, an informative summary of the litigation. Not all of us have been privy to all of the details and all of the arguments. That really moves us along.

Eleanor Stein is our next speaker. Eleanor is an Associate Professor at Albany Law School and, prior to that, served for many years as administrative law judge at the New York State Public Service Commission in Albany, where she presided over and mediated complex multiparty public policy proceedings dealing with the environment and utility rates and competitive practices of New York's electric and telecommunications utilities. Eleanor is going to move us further along.

PROF. STEIN: I hope to.

Thank you. I would also like to thank Hannah and the other organizers of this conference. I think we couldn't be talking about a more important range of issues.

In the absence of a PowerPoint, I am going to read a poem, an analog poem, to establish a context. It is a poem called "The Arc of Consequence," and it was written by Marge Piercy. I am just going to read two stanzas that, for me, frame the issues that are in front of us today:

> The classic rainbow shows as an arc,
> A bridge strung in thinning clouds.
> But I have seen it flash a perfect circle,
> Rising and falling and rising again,
> Through the octave of colors,
> A sun shape rolling like a wheel of light.
> Think of it as a promise,
> That what we do continues in an arc of consequence,
> Flickers in our children's genes,
> Collects in each spleen and liver,
> Gleams in the apple,
> And coats the down of the drowning auk.
> When you see the rainbow iridescence shiver in the oil slick,
> Smeared on the waves of the poisoned river,
> Shudder for the covenant broken.
> For we are given only this floating, round ark
> With the dead moon for company and warning.

I am going to speak about a case that has been taking place in New York, the case which I presided over as administrative law judge with the New York Commission. It is a counterpoint, really, to both of the presentations that we have heard, because it is looking at a state – and, to some extent, a local – response to the issues of global warming.

I would begin by saying that, in my own view, we need all the measures that we can get and all the approaches and all the attacks – litigated, regulated, mediated, legislated, and just plain old marching in the streets.

I will say that energy policy has traditionally been an exclusive preserve of industry, environmental policy experts, scientists, and regulators. But today the question of energy costs and consequences for the U.S.'s traditional and current reliance on fossil fuels has reached a whole new level of debate. In fact, the public discourse, especially on global warming and fossil-fuel reliance, is taking place in Hollywood and on the bestseller list. I think that is a very good thing, because this discourse has to take place out in public and involve everyone in this country.

Although I would urge you not to get your science from a thriller, even a thriller with footnotes, I would suggest that grasping the studies, reading them for yourself, reading *Nature* – these are not, actually, particularly difficult or inaccessible scientific studies. They tend to have summaries and to be readable by lawyers and other non-scientists. Given the importance of these issues – and for you students, young people, whose futures are very much at stake and whose children's futures are at stake – I would urge you to have a look at the original sources and do the work.

I think Americans are beginning to understand, possibly for the first time in our history, that there is an energy cost to all of the consumption and many of the other decisions that we make, and that hidden within everything we do or drive or buy is a hidden cost of energy. So a decision to buy a bottle of Chilean wine, which, in my view, is a good decision in many ways, also means you are absorbing the cost of the transportation of that product by fossil-fuel consumption. A decision to buy an avocado from California is a decision not to support a local farm that might deliver things to your doorway at a much lower energy cost. Beginning to see how we live in terms of measurable energy costs, I think, is something that is our on doorsteps today. And I think that is a good thing.

So from these remote policy and esoteric issues about how electrons work and how power is generated, these issues have begun

to be brought home to our doorsteps. It was made very clear to me in presiding over this case about the use of renewable energy in New York, when I received almost 2,000 letters from New Yorkers urging the adoption of one or another policy in terms of how the state was going to reduce its reliance on fossil fuel. What particularly sticks in my mind is a short, handwritten letter, in pencil, from a schoolteacher out in Palmyra, New York, which is kind of a suburb of Rochester. She said, "Dear Judge Stein: I've never written a letter to a public official in my life. I've never gone to a public meeting in my life. But I think it's very important that we do something about global warming, and I support the adoption of this program. Very sincerely yours, Ellen Winters." She had a couple of drawings that her second-graders had done about pollution.

I want to give you a very brief case study of the New York renewables case. I think that it stands for both the promise and the possibilities of state and local action, but it also stands for the limitations. So I would like to talk about the promise and possibility first and then call your attention to some of the limitations. I think there is only so much that state and regional initiatives can do, although I think they are very important.

The impetus for this case came from a statement by Governor Pataki in January 2003, in the State of the State, saying that he was going to order his Public Service Commission to design a program to reduce the reliance on fossil fuels in the state of New York, so that 25 percent of the electricity we would consume would come from renewable resources, such as solar power, wind power, or hydropower, by the year 2013.

The commission instituted its proceeding in February of 2003, and it concluded it in September of last year. It adopted an order establishing this program, which I will tell you a little bit about. The specifics that led to this adoption were the identification of New York-specific climate impacts resulting from fossil-fuel dependence. These were an increase by more than 1 degree Fahrenheit in New York, and specifically as was measured in Albany – 1 degree doesn't sound like a lot, but it is actually an enormous increase – and an increase in precipitation throughout the state by as much as 20 percent, with projections for the next hundred years of a rise to two to eight degrees in temperature and a 10 to 20 percent further increase in precipitation. That is rain and snow. So those are some local impacts.

It is also true that, notwithstanding many laudable efforts by New York to decrease its reliance on fossil fuel, the proportion of the

state's electricity that is generated from renewable sources has decreased from almost 30 percent in 1963 to 22 percent in 1979, and today to 19 percent. So there was the identification that without some aggressive measure – yes, commanded and controlled by government – there was not going to be an automatic market corrective, and that, in fact, market forces were driving down the proportion of renewable energy in the state.

The measure that was adopted by the New York commission – and this is in the context of – and I am not going to go into this – a national and statewide deregulation of the electric industry – is something called a "renewable portfolio standard," or RPS. Think of a portfolio like a stock portfolio or an artist's portfolio. Every jurisdiction has a portfolio of investments it makes in energy. The idea here is to diversify, like the financial experts tell us, New York's energy portfolio to increase its holdings, so to speak, in electricity generated from those technologies that don't contribute to greenhouse gas emissions. That is, essentially, wind power, hydropower, solar power, and some other technologies.

There are now eighteen states and probably two Canadian provinces that have programs of this kind in operation. They have identified a range of targets: How much of a reduction in fossil-fuel use do we want to attain, and over what period of time? Anywhere from 2 percent in some states up to close to 15 percent in others, with California being the most aggressive. New York chose a target of 25 percent by 2013. But, remember, we are starting at 19 percent. If you look at David's chart of emission reductions, you have to realize that the New York target really is more like 6 or 7 percent, because we start where we start; we don't start at zero. In New York we are starting at about 19 percent, mostly from Niagara Falls, a large hydropower development.

The way these work – and this is kind of a market mechanism, although it is mandated by the state – is that the state will create an incentive to developers to come in and build windmills, build small hydro projects, install solar generation in the state, and these technologies, which today are still more expensive than buying electricity generated by natural gas, will be paid for by, essentially, a modest, if not minimal, increase in every New Yorker's electric bill. You will see that increase beginning in September of this year. We are hoping that it is going to be two or three pennies on the dollar – maybe two – but we won't really know until it takes place. So have a look for it.

This funding will create an incentive for the development of renewable resources. The concept is that, instead of seeing electricity simply as one product, an RPS program or a cap-and-trade program creates a new commodity that has value. That commodity is the environmental benefits of, say, solar power or wind power. So there are now active trading desks, where renewable attributes are given dollar value and are traded locally, nationally, internationally. In fact, throughout the two-year life of this case, I regularly received phone calls from commodities brokers in Europe wanting to know when the market was going to open to buy renewable attributes with the imprimatur of the state of New York.

Other state and local initiatives include the Regional Greenhouse Gas Task Force, which Grace referred to, which is a Northeast states initiative. This group of states, were they a country being looked at in the Kyoto context, would be the sixth-largest emitter of greenhouse gases in the world. So the effect of a regional initiative on reducing emissions can be enormous. If they are able to move forward and solve all the problems involved in, as you can imagine, bringing together all these different state governments, different parties, different systems, different energy systems, they could have a real effect.

Similarly, there have been local initiatives. The mayor of Seattle has called for 140 mayors to ratify Kyoto, to match the 140 nations that ratified Kyoto, as a way to both increase the supply of renewables and raise consciousness and create a political force for greenhouse gas reductions.

Those are the positive aspects of these programs. The New York program is going forward. I want to just mention two kinds of obstacles – one is practical obstacles, and the other category is legal obstacles – to the effectiveness of these programs. It is the existence of these obstacles that make me an advocate for the state of Connecticut and Open Space Institute litigation as a way to increase public knowledge, look for victories in federal court, and raise the stakes, because these state and local programs have tremendous limits.

As a practical matter, the states are operating under a lot of restraints of federal law. One is, Congress passed something called the production tax credit, which expires at the end of this year. It is a one-year benefit, which gives substantial federal tax incentives to, especially, wind developers. But to take advantage of these, their windmills have to be in operation by the end of this year. That is an enormous amount of pressure and creates enormous uncertainty in

terms of their ability to get investment. These programs don't work unless someone can build the wind farms. There are enormous practical obstacles, and that is one.

A second, which you may have been reading about, concerns disputes over siting. The example I will tell you about, which has been in *The New York Times* a lot in the last couple of weeks, is that there is currently a proposal to site a small wind farm, ten windmills, in the High Peaks region of the Adirondacks. That proposal is being fought over within the environmental community itself. On the one hand, the forever-wild, pristine wilderness area of the Adirondacks needs to be preserved, and on the other hand, if we don't reduce greenhouse gas emissions, it will actually not be preserved.

This is a big dispute. Siting these things is not easy. There is community opposition and there is environmentalist opposition. You can't just say, "Here, we've written an order on paper, and in four years we're going to have an additional 6 percent renewable energy in New York." You have to make it happen, and government can't make it happen alone. It is going to take the environmental community, the business community, renewable developers, and all of us to make these things happen. All of those parties participated in the case. The outcome of the case was intended to give everyone a voice and a role in how the program was implemented.

The other set of obstacles are legal. These are the traditional obstacles to local action and state action:

Number one, the Commerce Clause: Some states' renewable programs favor generation in-state, and commentators have raised issues about whether that is potentially a Commerce Clause violation, burdening interstate commerce.

Others have raised questions about NAFTA, especially because a lot of American power is imported from Canada. Is there a NAFTA problem in raising barriers to trade, arguably, from requiring certain, specific characteristics for electricity imported under these programs?

A third is the danger of congressional preemption. Should Congress or the EPA or the Federal Energy Regulatory Commission decide that the federal government has occupied the field with respect to greenhouse gas emissions, is that going to limit or endanger these state programs or make them very risky for investors?

Finally, the other legal problem is the inherent limitation on state authority. In New York, the commission did not establish a credit trading program – which I am not going to go into in any detail – but

the problem was, the state public service law didn't give it the authority to do that. So state authority is, by its nature, limited.

I would just conclude by saying that, notwithstanding that these state programs represent a real step forward, fundamentally state and local initiatives cannot substitute for the reordering of our national energy priorities. The state goals range from 2 percent to 15 percent, but climate scientists today are estimating that reductions on the order of 50 percent – and some say as much as 70 percent – of our greenhouse gas emissions are necessary to actually affect the course of climate change, or even to stabilize at the current level of disruption of climate.

In that context, we are in an era where the priority of our federal policy is the protection of the petroleum industry by all means, including military occupation of the Middle East. Our goals of emission reduction can never be attained in this climate. In order to make the kinds of changes that are necessary to prevent the increasing climate disruption, all of this is going to have to be taken on by the American public and by you.

Thank you.

PROF. JOHNSON: Thank you, Eleanor. I found that particularly helpful, especially the concept of the state models as a way of thinking about how we proceed at the federal level. Also it struck me that part of what you were alerting us to was the possibility that the solutions that we propose maybe have impacts that are simply an increase in our electric bill, but they might also require a change in behavior – not just industry behavior, but our behavior. It strikes me that that will have an impact on the conversation that we have about this going forward.

Scott Turner is our next and last speaker. Scott is in private practice. He chaired the Nixon Peabody Environmental Practice Group for fourteen years. His current work concentrates on environmental law and matters relating to the permitting and regulation of industrial facilities.

Scott received his J.D. from Washington and Lee University, *magna cum laude*, and his B.A. from Colgate. He is going to advance another part of this conversation.

MR. TURNER: Good morning, everyone. Thank you again, Professor, for the introduction. Thanks to Hannah and her colleagues for putting together just an absolutely first-rate Symposium again.

This is the second symposium that I have participated in. I enjoy it immensely every time I am here. I find the interaction very

stimulating and challenging. I love being part of a panel talking about a very important national and international issue.

I wish, like Grace, I could say I graduated from law school in 1999. But, alas, I did not. The battle scars are here to prove it.

I am here to talk about why I think the lawsuit that David and his colleagues are involved in is the wrong strategy. I think it is wrong for a number of reasons, both practical and intellectual. I want to talk about those.

[Slide] First, let me offer the observation that what we are talking about here today, this particular lawsuit, is not about a scientific issue, it is not about a legal issue; it is, rather, about a political issue. That is "political" with a small "p," not a Republican/Democrat issue, not a juicy political scandal, but rather a political issue that confronts the American democracy.

Because I do describe this as a political issue, let me offer a definition. By "political issue," I mean an issue that is complex to its very core, that requires investigation, study, deliberation, and most importantly, involves a balancing of competing values and competing interests. How nice it would be if we had the luxury of looking at global warming in a unidimensional, purely environmental sense. I wish we had that luxury. We do not. That is what makes this issue so difficult for us, as a nation and as a democracy, to grapple with.

My working premise is that it is our political branches that need to deal with this issue. That is the way our democracy is structured. These are the branches that are directly accountable to all of us as the electorate, in contrast to the judiciary, which is appointed for life and is not particularly accountable to the electorate and, as I will offer later, not particularly well-suited to deal with issues like this – notwithstanding Dave's articulate effort to make this a simple public nuisance problem.

[Slide] I think this slide pretty graphically indicates my point. This is a political issue. It has been in the political forum for a long time. That is part of our frustration, but it is also part of the explanation for how complex the issue is. Congress has asked our federal agencies to study the issue. Congress has reached conclusions about the issue, including determining on three separate occasions that United States implementation of Kyoto would pose a significant economic risk to our economy and that it was not prudent to give a pass to developing countries, when those are the people we are now competing with in the global economy.

So it has been in the political forum, and it, today, is in the political forum. As we speak, in Congress, there is debate going on over the Clear Skies bill, there is debate going on over McCain-Lieberman, over the Carper bill; Senator Jeffords has a bill – there is lots of debate going on over this.

[Slide] So why are we in the courts, if this is being debated in the legislative forum and among the executive branch? Well, there are a number of reasons, I suspect – frustration, impatience; I think we sense that, we hear that – perhaps an element of political advantage. This is, after all, a capital "P" political society in which we live.

Then there is the issue of tactical pressure, which I think David put his finger on. Can this lawsuit make the political branches work on the issue more than they, to come to some result other than the one they have already come to? Can it do something to affect the actions of the emitters?

The question I would ask all of you to think about, however, is, is this lawsuit the best use of the energies of all the talented people in those eight states and in the City of New York and the talented people in the environmental groups that are involved in this lawsuit? That is the question I would ask you to think about.

[Slide] The intellectual seed for this tactic was planted in 2003 in an article that appeared in the *Columbia Journal of Environmental Law*. In this article, the author, Mr. Grossman, articulates two theories that he thought could be used to address the $CO_2$ issue in a legal-judicial context. Products liability he examines in some detail in his article, and he also examines the theory that is at the centerpiece of the states' case, the public nuisance theory.

[Slide] These slides really just recap much of what you have heard about the nature of the case from Grace and from David, and so I won't spend any time on those.

[Slide] What I would like to address, though, are what I see to be the two core constitutional issues that are at play in this case. These are issues that are, indeed, separate in the Constitution but, I would argue, are related, as I will discuss in a minute.

The first is the concept of separation of powers. By that I mean that we have political branches of government that deal with political issues, in the way I defined "political issue" at the beginning of the talk, and then we have a judiciary that interprets and applies the results of those political decisions, the statutes that are passed.

The second constitutional core reason that I think this lawsuit is misplaced is that we have something in the Constitution called Article III. In Article III, we have the fundamental prerequisite for

all federal litigation. The question here is, should these particular plaintiffs be permitted access to the federal judiciary to press this particular issue? Is there the, quote/unquote, case or controversy that you are all familiar with, those of you who are law students – or are becoming familiar with – is there a case or controversy here that meets the bar of Article III?

[Slide] First, the separation of powers. Again, where you have a complex issue that impacts the entire U.S. economy, where should that be resolved, judiciary or executive and legislative branches, the political branches? Again and again, the Supreme Court has reaffirmed the position that where you need to balance competing values and interests in our democratic system, it is the business of our elected representatives, the political branches, not the courts.

[Slide] Why is global climate change a political issue? Why should it be resolved in the political branches? I think for a lot of reasons that we have heard discussed here today – the economic health of the country. Air pollution issues, in particular, have historically required a balancing of the social interest in eliminating air pollution against the social interest in the activity that creates the air pollution. There is a balance there. You eliminate one, you cause problems for the other, and vice versa. Historically, the courts have recognized that the branches of government need to pay attention to striking that balance.

To me, the obvious endgame here of forcing coal plant reductions of $CO_2$ emissions is the elimination of coal from our generation mix. We heard Professor Stein say that it may take 50 to 75 percent reductions worldwide to actually stabilize what we see going on in our environment. If those are the kinds of reductions you are talking about, I don't see a role for coal.

I think it is one of the often-unstated but not necessarily unstated premises of those that are pushing for $CO_2$ reductions in our coal fleet that the ultimate endgame is the elimination of burning coal in the United States. That will have significant economic consequences. It will also have significant national energy security consequences. Coal is our prime domestic energy resource. Without it, we are held hostage by foreign sources of natural gas, of petroleum. We do not have enough to sustain ourselves indigenously. Without our domestic resources, we have a national energy security problem.

How we balance that against this very real problem of global warming is an issue that, I submit, is a political issue and, under separation-of-powers principles, belongs in the political branches.

Lastly, there is a foreign-relations implication to this. I think we would all agree that this is a global issue that requires a global solution. That is where Kyoto was headed. The solution will only come as a result of international negotiation that leads to coordinated action. I don't think we can solve this problem without China and India being part of the solution. As much as I would like to think that we could lead by example and use the bully pulpit, as Dave suggested, to make the Chinese give up their very, very ambitious expansion of coal burning for electric generation – I would like to think that our doing the right thing all by ourselves would bring them to heel. I think in the real world that is not likely to happen.

[Slide] The last point that I would leave you with on separation of powers is, it is not like this issue isn't being addressed. It is clearly not being addressed to the satisfaction of eight states. It is not being addressed to the satisfaction of the NRDC. But they are not the only parts of our political constituency here in the U.S. There is action. There will continue to be action. I think that it is in the political branches where the action should remain.

[Slide] Just a word about standing. Even if the plaintiffs were to persuade the Southern District of New York that they had a cause of action here, that they were really entitled to bring a public nuisance action here, there is a standing problem.

[Slide] Those of you that have taken con-law understand that there are three minimum requirements that have been established historically for making standing: injury in fact, causal connection, and redressability. The plaintiffs here have problems on each of these scores. It is an unfortunate problem for the plaintiffs to have, because this is not your classic, simple public nuisance suit – pollution in the river, harm downstream, maybe multiple defendants and you have only sued one, but there is a known array of defendants. Here we are talking about an entire world with homogeneous pollution that is all over the globe. This is not the set of facts that are going to allow these plaintiffs to establish they have standing to bring this lawsuit.

[Slide] I want to just conclude by talking for a moment about the redressability component of standing. I think this is the one where the plaintiffs probably fall as short as they do anywhere. The defendants' activities that are challenged in this lawsuit amount to less than 2.5 percent of worldwide, manmade $CO_2$ emissions. I don't think Dave or any scientist who studied this problem would contend that this is going to reverse or substantially reduce the risk that we are all facing from global warming.

[Slide] In conclusion, lest there be any misunderstanding about my position here, there it is.

Now, let me say, on a personal level, I believe that the world needs to act. I believe that the United States needs to be part of that. But I would challenge the plaintiff states and the plaintiff environmental groups to use their energy and their resources to mobilize their citizenry, their members, and rally – take to the streets, as Professor Stein said – their elected representatives to more vigorously press the issue with the political branches. That is the way we resolve complex issues in our American democracy, and I think that is the appropriate forum we should be pressing this in, as impatient and as frustrated as we may be. To me, that is the way our democracy was intended to work.

Thank you, and I look forward to our discussions.

PROF. JOHNSON: Thanks, Scott. I couldn't be happier with the progression of discussions here. It is a tribute to Hannah and the others. Folks behaved themselves, but it is not over yet.

I also hope that this turns out to be a written document that others can enjoy, because it frames the complexity of this issue in, I think, a very nice way.

We have at least fifteen minutes here for questions, and perhaps more. I am just going to get out of the way and administer the questions. I will open the floor and invite your questions now.

I see Professor McGee over to my left.

QUESTION: The last talk – I have questions for the last speaker [inaudible]. I really admire [inaudible]. I don't think I have ever been that clear about anything [inaudible].

It depends on your theory of democracy, though. When the United States has worked, the Congress has never been the sole way of solving crucial domestic issues. As you know, there is has been oscillation between torts, the executive branch, and the Congress. One only needs to think of the trust busters at the turn of the century, the Civil War. I could go on and on [inaudible] Congress became paralyzed. Not to be the one to mention it, but the great classic was that of race. Congress and the state legislatures were completely paralyzed [inaudible], and only because the courts had the courage [inaudible] to [inaudible] the racial issue was it ever solved. If we had been waiting on the Congress to solve the racial issue, Nick Johnson and I would be [inaudible], and there wouldn't be anybody of color in this room today.

So it is theoretically nice to talk about the Congress as being the proper place, but you and I well know that the Congress has always

been not the representative of the popular will, but a collection of interest groups [inaudible]. We don't have a Congress which really represents the people of the United States. Nothing sets my teeth on edge like hearing Frist talk about the American people. But I don't want to get political about this.

I want to just say that analytically you cannot say that the Congress represents the American people in any sort of real broad sense.

MR. TURNER: I will say, though, that the Congress can be moved to act. There are any number of occasions in American history where Congress has been moved to act, whether led by the executive or not led by the executive.

QUESTIONER: Or led by the courts.

MR. TURNER: And I would distinguish our struggle with race relations from this issue because the way the courts were able to deal with race relations was through the use of the U.S. Constitution. There were constitutional underpinnings to that issue. Here we are talking about a common-law issue. I think that courts need to be much less activist. The Supreme Court has counseled courts to be much less activist in this area than in areas where we are talking about bedrock constitutional principles like race relations.

QUESTIONER: That leads me to my question to Mr. Doniger. Of the four suits out there, the four theories – and I will be talking about this in the afternoon; one is the NEPA/SEPA case, one is the $CO_2$ petition, there is the human rights case, and there is your case – I actually think your case is the strongest on substantive law.

The problem, though, is, now that it has been mentioned about the courts and the Congress, Scalia in *Lucas* had a very, very limited view of – and I take it that the center-right of the Court thinks the nuisance law ended somewhere around the election of Abraham Lincoln. They do not agree with me or what I think is nuisance law, well-received through the common law, that it is constant evolution; it is completely ad hoc. He argues, as you know, in *Lucas* that judicially invented nuisances are to be looked at very carefully and, really, with a presumption of invalidity.

I think you probably could win in the state courts, but I wonder about what the ultimate fate of this is going to be if it goes to the Supreme Court.

There is also the Erie question, that brooding omnipresence that has not been mentioned here by either side. That is an issue that is very interesting. You may be right in your complaint that it is an exception.

I think the big problem is whether or not you can sell the nuisance argument, given increasingly conservative views of using the courts to fashion new forms of nuisance.

MR. DONIGER: Thanks. I will try to answer your question and comment on the last answer.

This is not an appeal to activism. I don't think that we are trying to invent a new nuisance. There is an interstate common-law doctrine of public nuisance in the area of water and air pollution. There is an effort by the defendants in this case to say that global warming is just totally different from air pollution. It is not. $CO_2$ is another pollutant that comes from the combustion of fuels, like the other pollutants, except that the Clean Air Act hasn't addressed it. The Clean Air Act is not like the Clean Water Act. The Clean Water Act prohibits all discharges unless they are permitted. The Clean Air Act is structured to forbid selected discharges, and those which it doesn't speak to are not preempted.

So we have a traditional body of law being applied to a different set of facts, but it is not a new or activist theory.

I don't know that we can predict what – we can't predict what the district judge will do, let alone what the appeals court and the Supreme Court will do. But we think we have a solid case, pieced together, really, out of non-novel doctrines. There is nothing about this case that breaks new ground, except, perhaps, packaging it together.

I must also reject the notion that, because this is an issue which the Congress could address or the President could deal with in foreign policy, that locks out the area of common law as a potential solution. We are not trying to change the entire economy. We are not trying to get a policy resolution of this issue of a comprehensive nature. We are trying to deal with the emissions of five companies as the biggest emitters in the United States, but on their own terms.

First of all, we think state attorneys general have a standing to do this kind of litigation which doesn't require the three-part showing that you mentioned. But we also think we can meet the three-part showing. There is harm occurring now. It would partly redress that harm to reduce these emissions.

Actually, the homogeneity of carbon dioxide emissions and dispersion throughout the atmosphere makes it easier, not harder, to attribute pollution in the air, and the impacts of pollution in the air, to individual contributors. It is all a matter of proportions. It is not a matter of determining whether the plume traveled north-by-northwest, exactly in a certain direction, from point A to point B.

So there is a lot about global warming science that is better established and easier for courts to deal with in common-law nuisance than would be the case with other kinds of air and water pollution.

PROF. JOHNSON: Other questions?

QUESTION: Thank you for all of your presentations. I found them very interesting.

I just wanted to pose something to each of the speakers, if you could weigh in on it – whoever wants to jump in first. What are your thoughts on the McCain-Lieberman Act? We know that that was put before Congress last year, in the last congressional session, and it garnered forty-three votes in the Senate, which was considered a victory by many. Would that be an acceptable way for the United States to try to address this problem? Part B, what do you think its chances are of being passed?

MR. DONIGER: Maybe I could just quickly say that NRDC supports this bill. We also support power plant-specific legislation that would address all four of the pollutants. Therefore, we are adamant in our opposition to the ill-named Clear Skies bill.

The McCain-Lieberman is a combination reminiscent of McCain and Feingold with campaign finance. They didn't do that well their first time out. They came hammering back over and over again until they got the coalition they needed to pass the legislation. That is quite up-front. That is Senator McCain's strategy on this.

We think, ultimately, some kind of national cap-and-trade legislation for greenhouse gases, maybe first focusing on the power sector, maybe first a multisectoral thing, is going to pass. We are working hard for that. I can assure you that our advocacy for that legislation is not hampered by the resources we are devoting to this litigation.

In fact, I appreciate, if I may, the invitation to get our members focused on that. It would be nice to get the companies focused on that, too.

MR. TURNER: As your remarks indicated, David, I think the companies are focused on it. What I think the companies are crying out for is an approach to this that is like McCain-Lieberman; that is a cap-and-trade; that recognizes that this is a multisector problem, that this issue can't be solved on the backs of coal-fired power plants alone; and, until there are technologies in place to deal with sequestration of $CO_2$ from coal-fired power plants, that cap-and-trade is the only answer to a regulatory solution.

The injunctive relief that you are seeking in your litigation is anything but a cap-and-trade. It is going to require – without knowing what you might propose to the courts, ultimately, if you got to that stage – I don't see how there could be a cap-and-trade with only five defendants.

MR. DONIGER: Watch this space.

MR. TURNER: To answer the question, do I think McCain-Lieberman will pass? I think it or something like it will. I would encourage all of you to let your representatives know, if you support one or another of these bills, because that is what builds momentum for this kind of thing. It is not going to take very many more votes in the Senate to bring something forward.

PROF. JOHNSON: We have another question in the middle.

QUESTION: A number of panelists brought up the need to bring developing nations into some type of relationship regarding emissions. I will just throw this out to the panel generally. What are your perspectives on the allegations that a lot of developing countries have levied against the United States and Western Europe that this is just a form of cultural imperialism, that it is Western standards being applied to developing nations that have not had the chance to develop yet, that have historically been put at a disadvantage vis-à-vis the West, particularly in light of the fact that in the post-9/11 world – the desire of the Western world to avoid that label.

What are your perspectives on that, regarding bringing them to the point of an international compact for greenhouse emissions?

PROF. STEIN: If I may start, I would suggest that, at the very least, the U.S. refusal to ratify Kyoto and the U.S. withdrawal from so many other global governance instruments over the last few years makes it really impossible for the U.S. to argue against that charge. Even if the position were that a developing country should have greater obligations under Kyoto, the U.S. refusal to have any obligations whatsoever under Kyoto tremendously undercuts, I think, our government's standing or moral high ground on that issue.

I think it is not only in the area of global warming, but in the area of the International Criminal Court, the Convention on the Rights of the Child, and so on, that the U.S. refusal to engage with the world on critical issues undermines our world position enormously.

MR. DONIGER: In the Clinton Administration – I don't think this is featured in my intro – I was a negotiator of Kyoto. I was on the U.S. team.

One of the tragedies of that negotiation is that it occurred in a context of forty or fifty years of North-South confrontation. But what we were offering in the previous administration was – we weren't good at talking about it, frankly – a new way of thinking about this problem as a pact of mutual advantage. The international emissions trading tool allows an opportunity to reduce emissions in the developed countries, to reduce emissions in the developing countries, and transfer technology and resources, through the private market – not through government aid budgets – so that Chinese, Indian, other major developing countries' energy sectors could continue to develop, but more cleanly. It would actually turn the cleanup of the oncoming Chinese energy development, for example, into a commodity of value that the Chinese could sell to the West as another export.

So if the deal were struck right, it would be a win-win-win. Our jointly felt – North and South – need to avert the consequences of global warming would be served. It would be a win in reducing emissions. It would be a win for the North, because we would take on an obligation, but have a cheaper way to meet it, if we had the international cooperation. It would be a win for the South in that they would take on an obligation to grow more cleanly and have more capital resources with which to accomplish that.

So it had an international trade dimension, where the new commodity was the carbon allocation.

We really weren't able to get that across in the 1990s. A number of the developing countries, including China, are beginning to get it now, that they have another export, which the West may want to help buy. The trouble is, the current administration has its head in the sand on this and is not engaged.

But there is a deal to be struck between the North and the South, maybe not in a 180-nation forum, maybe in a smaller group, like a group of ten or fifteen countries, including China and India, Europe and the United States. Ten or so countries represent 60 or 70 percent of the world's emissions. You could strike a deal on the Kyoto architecture in a group like that that was to mutual advantage and help us all our economies grow, but with the benefit of curbing global warming.

MR. TURNER: My take on this is that it would have been great if that kind of deal could have been struck at Kyoto. It was not, and we are dealing with the consequences of that. There has to be a way to bring the developing nations into this program. If we don't, we risk severe dislocation here in our developed countries.

As to cultural imperialism, those kinds of charges are easy to throw out. I will leave it to the partisans to say whether we are or are not in a position as a country to react to those. But my personal position is that China's place in the world is because of choices that the Chinese have made and not because of choices that we made for them.

MS. SODERBERG: I would just add that we have to go back to the root of what this problem is about. It is global, rather than parsing out certain parts, the developed countries having the only commitment. With that, with these international agreements, if parties like developing countries have a seat at the table, they should have the requisite commitments that come with it. The commitments may not come now. They could be a framework that, as we go forward – maybe developed countries will have the commitments now – but as we go forward, I think it is just a matter of equity. If you are bargaining, if you are in some type of contract or treaty, you need to be able to give something, too. I think that could come with commitments as we go forward from those developing countries.

PROF. JOHNSON: We have almost exactly met our schedule. I just want to thank our panel for doing what I think is an extraordinary job.