

William O. Douglas's Former Clerk Sitting on Key Climate Change Case

A path-breaking climate case now pending in federal district court, *The People of the State of California v. BP P.L.C.*, has surprising roots in the environmentalists' most celebrated Supreme Court justice. William O. Douglas was an uncompromising green. He served on the Court for almost 37 years, longer than any other justice. Yet, to his great unhappiness, failing health compelled Douglas to resign in 1975 just when modern environmental law in the United States was emerging in full force.

Justice Douglas's former law clerk, Judge William Alsup, is the presiding judge in the *BP* case, in which San Francisco and Oakland are suing under California public nuisance law the largest producers of fossil fuels. The complaint's gist is that the defendants, "despite long-knowing that their products posed severe risks to the global climate," nonetheless "produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming." The complaints seek an "abatement fund" to pay the costs of addressing rising sea levels.

The case before Judge Alsup is one of several such state common law climate cases recently brought by private tort plaintiff firms. The lawsuits are modeled after the successful multimillion-dollar litigation brought by states against the tobacco industry. Like the tobacco litigation, the climate complaints allege that the relevant industry knew and hid from the public scientific studies that demonstrated the harm its product was causing.

The new litigation is deliberately different from the climate nuisance cases rejected by the Supreme Court in *American Electric Power Co. v. Connecticut* in 2011. In *AEP*, a unanimous

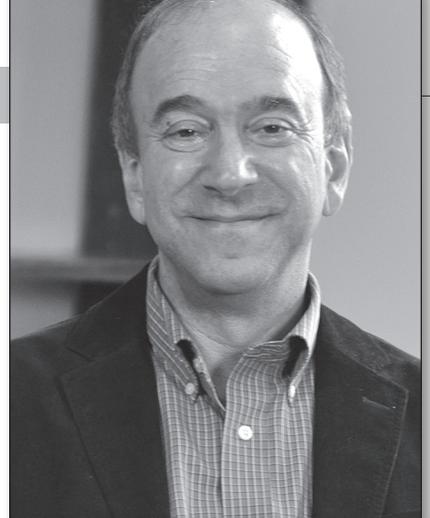
Court held that the federal Clean Air Act displaced the availability of a federal common law nuisance action for injunctive relief to limit the greenhouse gas emissions from the nation's power plant industry.

First, these latest lawsuits are expressly based on state, not federal common law. They accordingly both avoid *AEP*'s holding that the federal common law of nuisance has been overridden by the CAA and take effective advantage of the act's express preservation of state law causes of action.

Second, the defendants are the largest fossil fuel producers and not, as in *AEP*, the largest emitters. The suits accordingly do not, as in *AEP*, seek redress on the theory that the defendants themselves emitted unreasonably high levels of greenhouse gases. They instead allege that unduly high levels of greenhouse gas emissions resulted from defendants' knowing concealment of scientific information that might well have prompted the public to demand, and the government to require, significant emissions reductions decades ago.

It is far too soon to discern whether these ambitious theories of tort liability will be successful. But, in early skirmishes, there has been a noteworthy development.

In February, Alsup granted the defendants' motion to remove the cases from state court. The plaintiffs had argued removal was inappropriate because their cases relied exclusively on state and not federal law. Alsup held that removal was appropriate because plaintiffs' complaint, though couched in terms of state nuisance law, must be understood to be based on federal common law. Relying on the Supreme Court's 1972 ruling in *Illinois v. City of Milwaukee*, Alsup reasoned that it made no sense to have a lawsuit with



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such a broad geographic and national sweep be governed by state rather than federal common law.

Yet, the defendants who won their removal motion may regret their victory. The plaintiffs seem to be embracing their defeat. The likely reason for the reversal is that, in granting removal, Judge Alsup indicated that, unlike in *AEP*, a federal common law of nuisance action against fossil fuel producers might not be displaced by the CAA. Alsup's suggested distinction is that the current cases base tort liability on concealment of information, which, unlike emissions levels, is not regulated by the federal statute.

Nor did Alsup stop there. He further ordered the parties to provide his court this past March with a five-hour "global warming and climate change tutorial." A math major in college, Alsup pummeled the scientists and Chevron's attorneys with specific questions on climate science.

Whether Alsup's initial embrace of the case will lead to a favorable ruling for plaintiffs remains unclear. A different federal judge in California rejected an identical removal petition filed in another batch of municipal climate nuisance cases. What is clear, though, is that Judge Alsup's former boss would be pleased. The author of the Supreme Court ruling in *Illinois v. City of Milwaukee* upon which Alsup relied for his ruling endorsing federal common law of nuisance was Douglas, of course, and Alsup was his law clerk at the time of that 1972 ruling.