



By Richard Lazarus

What the Law Supposes Is a Ass

The Fifth Circuit's ruling in late May in *Comer v. Murphy Oil* reminds me of a famous, though dated, colloquy in Charles Dickens's wonderful novel *Oliver Twist*. In that story, upon being told that "the law supposes that your wife acts under your direction," Mr. Bumble famously responds "If the law supposes that . . . the law is a [*sic*] ass — a [*sic*] idiot."

In *Comer*, the plaintiffs are seeking money damages from defendant energy, fossil fuel, and chemical industries on the ground that their greenhouse gas emissions damaged plaintiffs' property by increasing Hurricane Katrina's ferocity. The district court dismissed the lawsuit, which, standing alone, was not surprising. One would expect that many judges would be skeptical that plaintiffs could establish that the defendants proximately caused hurricane damage. But the court never permitted the plaintiffs to try to make that clearly difficult evidentiary showing of causation and instead dismissed the case at the outset based on the "political question doctrine." The judge reasoned that plaintiffs' various legal theories amounted to a "debate about global warming" that is "best left to the executive and legislative branches."

On appeal, a three-judge panel of the Fifth Circuit last October affirmed in part and reversed in part. The panel concluded that the plaintiffs lacked "prudential standing" to bring some

of their state law claims, because they amounted to generalized grievances not sufficiently different from those that any person could make, but that the plaintiffs could maintain other tort law claims based on state nuisance, trespass, and negligence law.

According to the panel, neither the political question doctrine nor standing requirements barred the lawsuit. The political question doctrine does not serve as a bar because state "common law tort rules provide long-established standards for adjudicating the nuisance, trespass, and negligence claims at issue." Nor were any of the requirements that plaintiffs possess "standing" to invoke the jurisdiction of a federal court a bar. Relying on the Supreme Court's recent decision in *Massachusetts v. EPA*, the panel held that the linkage between increased greenhouse gas emissions, global warming, and stronger hurricanes was sufficiently established to meet the standing requirement that the actions of the defendants must be "fairly traceable" to the plaintiffs' alleged injury.

In sending the case back to the trial court, the panel made clear, however, that it was deciding only that the plaintiffs should be permitted to try to establish defendants' tort liability and not that the plaintiffs had yet to make such a showing. Indeed, one judge wrote separately to say that he thought plaintiffs would be unable to do so and had the court reached that issue, he would have favored dismissal on that alternative ground.

No doubt because of the significance of the panel's jurisdictional rulings, the Fifth Circuit subsequently granted rehearing en banc. The rehearing order was striking because seven of the total of 16 judges on the Fifth Circuit recused themselves because of conflicts of interest.

But that is when the unusual first became extraordinary and then bizarre. After briefing and before argu-

ment, the Fifth Circuit announced that an eighth judge now had a conflict and was recused from the case, depriving the full court of the necessary quorum to decide the issue. Although the plaintiffs then assumed the practical effect would be a reinstatement of the initial favorable panel ruling, the Fifth Circuit did just the opposite. The court announced that because it had vacated the panel ruling when it still had an en banc quorum, but now lacked a quorum to decide the case, the only possible disposition was to dismiss the appeal altogether, reinstating the unfavorable trial court ruling.

Now, this is where the Fifth Circuit should have paid greater heed to Dickens's Mr. Bumble. If this is in fact what "the law supposes," then it truly would be an "ass." The notion that a federal appellate court loses power to provide an aggrieved plaintiff with a statutory right to appeal because the en banc court loses its quorum would be truly idiotic.

But the good news is that it is not true or at least I don't think so. One can hotly dispute whether the plaintiffs in this case will ultimately be able to satisfy the challenging burden of establishing proximate causation. But it should be beyond cavil that a federal appellate court in these truly odd circumstances retains the authority to allow an appeal before a three-judge panel. Whether that means reinstatement of the original panel ruling is perhaps a more difficult question, but what is not difficult is that at the very least the right to appeal still exists to a three-judge panel, which the chief judge has the authority to ensure is provided, including back before the original panel of judges.

There is no need to make the law an ass, when it is not.

Richard Lazarus is Justice William J. Brennan Jr. Professor of Law at Georgetown. He can be reached at lazarusr@law.georgetown.edu.

*When the unusual
first became
extraordinary and
then bizarre*