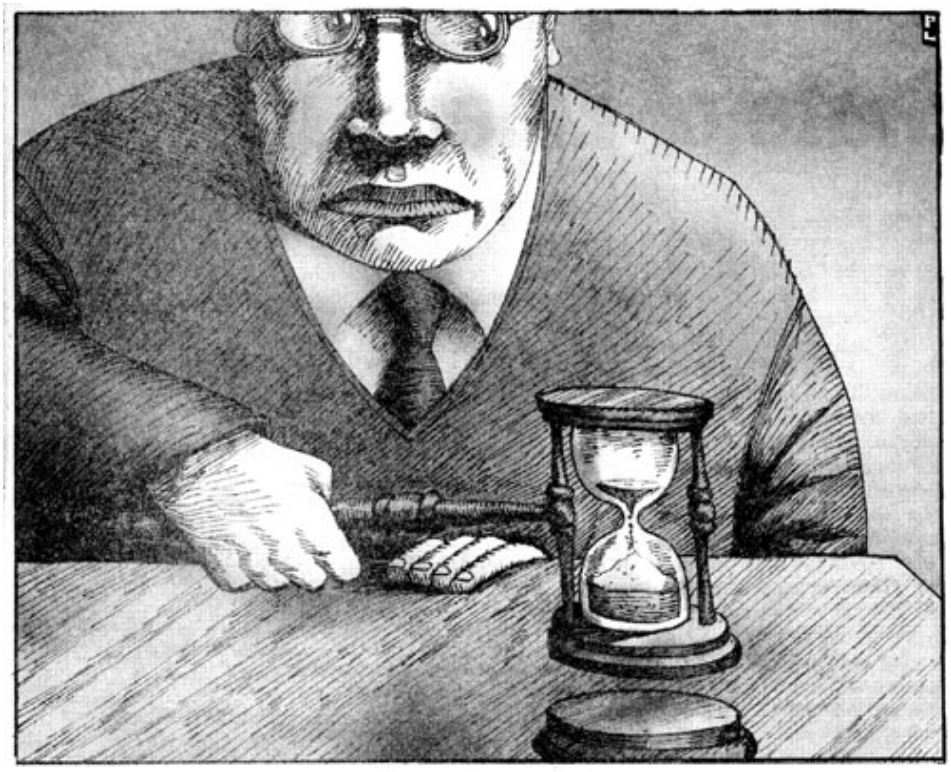
LOS ANGELES
Daily Journal
SINCE 1888
THURSDAY, JUNE 4, 2009

Insight

Moving At A Glacial Pace

By Norman A. Dupont



The stakes in this case could not be higher, and thus, the question of why no decision after three years is even more pressing for the Senate to pose to Sotomayer.

Newspapers and blogs are filled with potential questions for President Obama's nominee to the U.S. Supreme Court, Judge Sonia Sotomayor of the U.S. Court of Appeals for the 2nd Circuit. One really tough question has been largely overlooked by the press: What happened to the panel decision in State of Connecticut v. American Electric Power Co.? This case has been pending for three years since the date of oral argument, June 7, 2006. By the standards of the 2nd Circuit, this delay is extraordinary. By any standard, it calls for some hard questioning of Sotomayor, who is the presiding judge of the panel.

The stakes in this case could not be higher, and thus, the question of why no decision after three years is even more pressing for the Senate to pose to Sotomayor. The parties are major players: the states of Connecticut, California, New York, Iowa, several private parties, including the Audubon Society of New Hampshire, and a number of major power utilities owners, including American Electric Power Company, the Tennessee Valley Authority, the Southern Company and others. The claims are equally important. The state and private plaintiffs sued the utilities under a nuisance theory, alleging that defendants had contributing to global warming that will cause irreparable harm to property and citizens' health within the various states. According to the complaints, the electric power plants at issue are responsible for some "ten percent of the worldwide carbon dioxide emissions" associated with humans.

The defendants raised a fundamental constitutional defense - which the doctrine of "separation of powers" in the various branches meant that federal courts lack jurisdiction to even consider such issues because the determination of both fault and remedy involved a "political question." The federal district court, Judge Loretta Preska, agreed with the defendant power companies and dismissed the action in its entirety. For Preska, the resolution of issues brought by the state and private plaintiffs involved a balancing of "economic, environmental, foreign policy, and national security interests" which a federal court was not capable of determining. This type of policy balancing, according to the district court, was uniquely consigned to the policy making political branches, not the judiciary. Both the states and private land trust plaintiffs filed an appeal within one day of the date of the trial court's entry of its final order. From the filing on Sept. 20, 2005, the 2nd Circuit panel, which consists of Judges Sotomayor, Joseph McLaughlin and Peter W. Hall, kept to a timetable well within the statistical range of any other appeal. Oral argument was held within nine months after the filing of

the appeal. The docket sheet for the 2nd Circuit reveals a routine denial of a request by the power companies to prepare a formal transcript of the oral argument some four months later in September 2006. Then, just over one year after oral argument, the panel issued an order requiring that the parties submit additional letter briefs of "not more than ten single-spaced pages" addressing the impact of the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in which the Supreme Court held that Environmental Protection Agency wrongfully denied the petition filed by a consortium of states to regulate greenhouse gases on the grounds that the EPA lacked authority under the Clean Air Act to regulate such emissions. A majority of the Supreme Court held that the EPA clearly had the authority, and effectively remanded the matter to the agency for further consideration of whether it could find that greenhouse gases could constitute an "endangerment" to human health and the environment.

The 2nd Circuit panel directed the litigants to consider "what, if any, effect the Supreme Court's decision has on the analysis of the doctrine of preemption or whether appellants' claims are displaced by Congressional legislation." In response, both the appellants and the respondents duly filed letter briefs that were formally filed by the court clerk on July 10, 2007.

Thereafter, its docket reveals relatively little activity aside from an occasional notification of change of counsel address, a periodic request for an oral transcript of the argument of June 2006, or other mundane notices. Now, almost exactly three years from the date of the initial oral argument and just shy of two years from the filing of supplemental "letter briefs," the panel has yet to render a decision.

To understand how unusual this type of delay is in the 2nd Circuit, one must review the statistical records maintained by the Administrative Office of the U.S. Courts. The office publishes annual statistics grouped by each circuit. In its 2008 publication, it published the "median time intervals" for appeals arising from the U.S. district courts and showed that for the 2nd Circuit the median time from the notice of appeal filing to a "final disposition" was just less than 18 months, or a year and six months. The office also noted that the 2nd Circuit had only nine cases that had been "under submission" for 12 months or more, presumably included *Connecticut v. American Electric Power*. This panel's non-decision, even if measured from the July 2007 date when supplemental letter briefs were submitted, is well beyond either the median average for disposition and makes this case fall into the 5 percent of cases that were held for more than 12 months among all of the 182 cases that were pending for more than three months from the date of submission. Expert observers are stumped. Richard Frank of the Center for Law, Energy and the Environment at UC Berkeley has confessed that he simply did not understand why no action had been taken. Some bloggers have suggested a deep conspiracy by Sotomayor to avoid a major environmental decision that would have either been seen as "pro-business" by Democratic supporters or "pro-environmental" by Republic senators reviewing her potential nomination. But, one need not engage in any conspiratorial suggestion to pose the simpler question: Is not justice delayed justice denied? Why has this particular panel taken well three years since oral argument and nearly two years from the submittal of supplemental briefs to decide an issue that was framed by the district court in an opinion that was 19 double-spaced pages? This is a question that senators from both sides of the aisle should put to Sotomayor. It bears on her direct record as an appellate judge, and is a matter of the highest importance for the state and private litigants who have waited years for a judicial determination.

Norman A. Dupont is a shareholder at Richards Watson & Gershon in Los Angeles, where his practice focuses on environmental law.