Mock Supreme Court hears case at UHLC

Should courts or legislators deal with climate change liability?

David Axelrad presents his argument while his opponent Richard Faulk, left, Tracy Hester, and "Justices" Ken Starr, Tom Phillips, and John Cruden listen.

Jan. 19, 2012 -- A distinguished group of jurists brought a semblance of the U.S. Supreme Court to the University of Houston Law Center Thursday with a mock argument on climate change tort liability. At issue was whether a tiny, coastal village in Alaska has standing to sue corporations for their contribution to global warming as well as the question of whether the dispute is a matter for the courts or legislative branch of government.

The bench included Baylor University President Ken Starr, retired Texas Supreme Court Chief Justice Tom Phillips, and John Cruden, president of the Environmental Law Institute. David Axelrad, a partner at Horvitz & Levy, and Richard Faulk, chairman of Gardere Wynne Sewell's Litigation Section, presented arguments for the plaintiff and respondent respectively. The suit, styled *Native Village of Kivalina v. ExxonMobil Corporation, et al*, is pending before the Ninth Circuit Court of Appeals which must decide the jurisdictional issue. The proceeding was sponsored by the Center for Environment, Energy & Natural Resources at the Law Center under the direction of Visiting Assistant Professor Tracy Hester.

Axelrad opened by arguing that global warming had melted the sea ice that protected Kivilina's narrow spit of land from erosion "to the point of imminent destruction." He maintained that the only requirement for the village to establish standing in the case is to demonstrate that the corporations' conduct contributed "substantially" to the damage.

Starr questioned how a select few companies can be singled out "to write big checks" from among the innumerable "scofflaws" worldwide that contribute to climate change. "Should you bring in Greyhound or Trailways," he asked, and how is "substantial" determined? He first raised the question of whether climate change regulation is a matter for the judicial or legislative branch of government to sort out. Starr asked Axelrad if, in effect, he was not trying to set national policy with the suit. The attorney replied that his client is not seeking injunctive relief or new regulations, but rather damages for loss of their village and relocation.

Phillips again questioned whether the issue isn't more of a political question to which Axelrad responded, "No. It doesn't become a political question just because it is politically charged." The reason the suit was filed as a nuisance case, he said, is precisely because Congress and the EPA are still wrestling with climate change regulations. It remains to be seen if or when Congress might act to displace common law, he said, but that shouldn't preclude action under federal common law in the meantime.

In asking for dismissal, Faulk, the respondents' attorney, argued that Kivilina has no standing under Article III of the Constitution because it is not a state and cannot prove a direct causal connection between the corporations and melting of the sea ice. With respect to the political versus judicial question, Faulk noted that the EPA is moving toward regulations which will probably wind up before the court. Why not wait for Congress to act? Cruden asked. Faulk said the court must act within existing law and can't speculate what may or may not happen. Both Starr and Cruden asked why a trial shouldn't be held to bring in experts and let a jury decide who is to blame. Faulk responded in his closing, "We're casting a jury out on what Justice Scalia called 'a sea of imponderables,'" and asking it to decide which among countless global entities is the causal connection to Kivilina's situation – "a task that's almost impossible to accomplish."

After time ran out, the three "justices" offered their assessments of the arguments with words like "masterful," "eloquent," and "excellent." Though none would hazard a guess on the outcome of the case, Phillips did allow that it is a tough one – dismiss it or let a jury decide, which could open the door to others looking for a big check.

Faulk pointed out a "huge teaching point" students and young lawyers could take away from the afternoon session: the argument is not yours, it's the court's. He said a lawyer might prepare a perfect argument with three concise points to prove his case and a wonderful finale only to have a "long-winded judge" (as Starr characterized himself earlier) derail it with a question after point number two with time running out. Remember, he said, "It is their court."