

The NY Times [reports](#) that one issue in the confirmation hearing may be a case involving climate change. The plaintiffs sued under the federal common law of nuisance for injunctive relief against public utilities for their carbon emissions. The case has now been pending before a panel including Judge Sotomayor for several years.

It's definitely an interesting case. The district court [held](#) that the case presented a "political question" and hence was not justiciable. This was a somewhat peculiar application of the political question doctrine, which applies when a case lacks any legal standards (like the reasonableness of the period required to ratify a constitutional amendment), or the Constitution assigns an issue to another branch of government (like impeachment), or the court would be interfering with the conduct of foreign affairs (like deciding the date on which a war has ended). But courts hear nuisance cases all the time. The district judge argued that the scale of the climate change issue made this case different, but the Supreme Court has never said that the importance of a case made it a "political question" — and certainly didn't think so in *Bush v. Gore*.

It seems unlikely that the Second Circuit will affirm on the basis of the political question doctrine, but there are many other issues in the case. Still, the long delay is peculiar.

What is likely to make this an unproductive topic for questioning is that Judge Sotomayor really can't say anything about deliberations in a pending case. So there probably won't be much to talk about.