Keynote Address

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The last time I spoke before a lawyers’ convention of the Federalist Society was almost exactly two years ago, at the end of the first week of Justice Thomas’ first round of confirmation hearings in the Judiciary Committee. At that time, despite the best efforts of some of my colleagues on the committee and of outside interest groups, then-Judge Thomas was sailing toward confirmation in the full Senate by a respectable margin. You may recall that when I was here before you, I predicted that as the desperation level of his opponents increased, Judge Thomas might be asked by the committee if he had delayed the release of the hostages in 1980; if he had been in Dallas in November 1963; or if he could prove that he was not involved in the alleged poisoning of President Zachary Taylor. Little did I know, however, that, if anything, I was understating just how desperate Clarence Thomas’ opponents were, and what that desperation would lead to.

Ladies and gentlemen, I don’t need to replay for you what happened next. But I will say that I am pleased that Clarence Thomas is now a Justice of the Supreme Court. Justice Thomas knows that his obligation is to the written law, not to a scrapbook of favorable press clippings. He has always called them as he sees them.

What the attack on Clarence Thomas’ confirmation demonstrated, of course, is that the very concept of the rule of law has been corrupted by ideology out of control. Adjudication in the courts is now seen by many simply as a continuation of politics by other means. And, with the possible exceptions of civil rights and the alleged constitutional right to privacy, no area better illustrates the danger that ideological crusades can pose to the rule of law than does environmental law.

In a thoughtful article ten years ago in the American Spectator, Professor Robert Nisbet observed that “[i]n its more militant and aggressive manifestations environmentalism has become a social movement devoted increasingly to political, social, and economic ends. More and more, in both structure and aim, environmentalism resembles other fundamentally revolutionary movements in Western religious and political history.”

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To be sure, organized environmentalism does not trace its origins to such exotic sources. Instead, as William Tucker demonstrated in his book *Progress and Privilege*, Theodore Roosevelt and other conservationists at the turn of the century sought to regulate the use of natural resources so that they were preserved for use by future generations.\(^2\) As one such conservationist said about reforestation, "[t]he object of our forest policy is not to preserve the forests because they are beautiful . . . or because they are refuges for wild creatures of the wilderness . . . but [rather it is for] the making of prosperous homes."\(^3\)

Contrast that approach, if you will, with the near-mysticism evident in the following passage from Al Gore's book, *Earth in the Balance*:

The cleavage in the modern world between mind and body, man and nature, has created a new kind of addiction: I believe that our civilization is, in effect, addicted to the consumption of the earth itself. This addictive relationship distracts us from the pain of what we have lost: a direct experience of our connection to the vividness, vibrancy, and aliveness of the rest of the natural world. The froth and frenzy of industrial civilization mask our deep loneliness for that communion with the world that can lift our spirits and fill our senses with the richness and immediacy of life itself.\(^4\)

And the press gave Dan Quayle a hard time.

Anyway, although I am not quite sure what the Vice President was trying to say, this passage does seem to support Professor Nisbet's claim that what originally "was a movement in prudence and efficiency, designed to increase and prolong economic growth . . . has become . . . a sectarian struggle to abolish economic growth as far as possible, to preserve the wilderness at whatever cost to economy and democratic society."\(^5\) And, I would add, at whatever cost to the rule of law.

At almost every stage of making and enforcing environmental law, traditional legal principles increasingly are given short shrift. At the law-making stage, for instance, the Clinton administration recently announced a major change in wetlands policy, a change that it accomplished by regulatory fiat.\(^6\) Of course, a change in regulatory policy where there is statutory authority to make such a change is unremarkable. What was remarkable about the administration's announcement

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was not only its acknowledgement that the new regulations were inconsistent with the relevant statutory authority, but also its suggestion that Congress might want to consider amending those statutes to bring them into line with the new regulations.

With that kind of approach to the separation of powers, it is perhaps not surprising that the same administration also recently announced that it would permit congressional investigators to question line attorneys, in the Justice Department's Environment and Natural Resources Division, about their supposedly "lax" handling of criminal enforcement cases. While the administration's motive for this unprecedented and startling decision was undoubtedly to embarrass the preceding administration, I believe that this decision also rested, at least in part, on the assumption that the environment is different, and traditional rules just don't apply. I should note that I am not alone in my concern here; Jimmy Carter's second Attorney General, Benjamin Civiletti, recently expressed concern over the new policy.

This decision to permit John Dingell's investigators to second-guess line attorneys' exercise of prosecutorial discretion sends a clear signal to those attorneys: if you decide not to initiate a criminal prosecution, no matter how flimsy the case, you do so at risk to your own career, or worse. Given the fate of Ted Olson and other executive branch personnel at the hands of congressional inquisitors, these line attorneys might reasonably conclude that they had better indict or be indicted.

While this state of affairs would be outrageous in any division of the Justice Department, it is particularly unfortunate in the Environment and Natural Resources Division, for two reasons. First, as former Office of Management and Budget Deputy General Counsel John Cooney and his co-authors recently observed, the imprecision of the relevant regulations that the Division enforces makes it difficult to define what constitutes a criminal violation. Second, we in Congress have regrettably conferred enormous discretion upon prosecutors to determine the requisite degree of intent that warrants criminal enforcement.

9. Congressman John D. Dingell (D-Mich.) chairs the House Energy and Commerce Committee, which investigated the Justice Department's handling of these claims.
12. Id.
Despite exhaustive efforts over sixteen years, the U.S. Environmental Protection Agency (EPA) has never been able to delineate precisely what constitutes a "hazardous waste" subject to regulation.\textsuperscript{13} This is due to the Resource Conservation and Recovery Act of 1976\textsuperscript{14} (RCRA), which erroneously assumes that substances are either hazardous or not hazardous. But hazardousness "is contextual rather than absolute. It depends upon a variety of circumstances (such as the type of disposal), which, in turn, controls such critical factors as the concentrations to which people are exposed and the effects."\textsuperscript{15}

RCRA regulations adopt a complex classification scheme to determine whether a substance is hazardous. These classifications, however, do not necessarily have any relationship to the actual risk to the public. The same substance may or may not be classified as hazardous in different instances, depending on how it was generated. For instance, if a solvent-laden rag is used for cleaning, whether or not the rag is deemed to be hazardous, and thus subject to RCRA, depends upon whether the solvent was first applied to the object being cleaned or to the rag itself.\textsuperscript{16} In one case, you have a hazardous waste whose illegal disposal can subject you to criminal sanction. In the other, RCRA does not apply and you can dispose of the rag in any manner that you wish. As Cooney and his co-authors observe: "To argue over these technical issues in the civil context is one thing. To base a criminal prosecution upon the subtleties of an extremely complex regulatory system is quite another. This point is all the more important since the federal sentencing guidelines virtually guarantee some prison time upon conviction."\textsuperscript{17}

A bad situation is made all the worse because there is no theoretical distinction between environmental violations that are civil or administrative and those that are criminal. While the statutes in question generally require proof that the defendant acted knowingly, these provisions have usually been construed by the courts—even in criminal cases—to require only a showing of general intent, that is, that the defendant knew what was being done.\textsuperscript{18} A specific intent

\textsuperscript{13} For the statutory definition of hazardous waste, see 42 U.S.C. § 6903(5) (1988). The characteristics of hazardous wastes are listed at id. § 6921(a). For EPA's definitions, see 40 C.F.R. § 261.3 (1993).


\textsuperscript{15} Starr et al., supra note 11, at 8.

\textsuperscript{16} See 40 C.F.R. § 261.3(b)(2) ("[i]n the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed in subpart D is first added to the solid waste," this solid waste becomes a hazardous waste) (emphasis added).

\textsuperscript{17} Starr et al., supra note 11, at 9-10.

\textsuperscript{18} See, e.g., United States v. Hayes Int'l Corp., 786 F.2d 1499, 1503 (11th Cir. 1986) ("[I]t is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions. . . . [I]t would be no defense to claim no
standard, in contrast, would require that the defendant knowingly violated the law or regulation in question. Thus, the question of whether to pursue a case civilly or criminally is left to the individual prosecutor, who knows that John Dingell and his staff will be looking over his shoulder even as he exercises that discretion.

In light of this extraordinary pressure on line attorneys in the Environment and Natural Resources Division to produce scalps, is it any wonder that the number of environmental criminal prosecutions initiated by the Justice Department since January 20, 1993, has increased substantially? Even if most of these prosecutions are ultimately tossed out by the courts, as I think many will be, that is of small comfort to businesspeople who have to put their lives on hold for months or years and spend hundreds of thousands of dollars in legal fees to defeat dubious charges, which would not even have been brought just a year ago.

Joining the witch hunt for environmental malefactors, most recently, has been the United States Sentencing Commission. Notwithstanding that the existing sentencing guidelines already prescribe penalties for criminal law violations by corporations and other juridical entities, the Commission sua sponte decided that environmental crimes should be singled out for special attention. Accordingly, the Commission promulgated draft sentencing guidelines prescribing especially harsh sentences for corporate environmental violators. Among other things, these draft guidelines would permit cleanup costs to be the basis for calculating a fine, even in the absence of intentional or reckless behavior. The guidelines also fail to include scienter in establishing standards for base fines. Instead, the Commission proposes that scienter be merely one of several aggravating factors. In my view, scienter is a fundamental principle of criminal law, and a finding of scienter should be required before a fine, much less imprisonment, is imposed.

Turning to civil enforcement of the environmental laws, my assessment is not much more cheerful. In civil litigation, Article III standing has been watered down substantially over the years under a host of environmental statutes. Private parties and interest groups with no real injury in fact nonetheless may sue to enforce these laws.

knowledge that the paint waste was a hazardous waste within the meaning of the regulations; nor would it be a defense to argue ignorance of the permit requirement.”); United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). But see United States v. Speach, 968 F.2d 795, 796 (9th Cir. 1992) (holding that RCRA requires proof that defendant knew that a facility to which he transported hazardous waste lacked a permit).

If justiciability could be so eroded in civil environmental enforcement, it was perhaps only natural that traditional legal principles for determining liability—such as fault and causation—would be undermined. In a case brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980\(^20\) (CERCLA or Superfund), for example, liability for environmental damage can accrue simply because of a predecessor-in-title's wrongdoing, notwithstanding the current landowner's lack of knowledge of, or involvement in, any prior wrongdoing.\(^21\) Moreover, to compound the possibility of injustice, this strict liability under Superfund can be joint and several, and retroactive. Hence, persons or companies with no involvement, or only de minimis involvement, in the contamination, or who actually complied with the legal standards for waste disposal decades ago, can find themselves saddled under Superfund with ruinous liability for cleanup costs.

Amazingly, as if U.S. lending institutions did not have enough other problems in this economy, at least one federal court of appeals has held that a secured creditor of a contaminated site may be liable as well for the cleanup if it participated in the management of that site "to a degree indicating a capacity to influence the corporation's treatment of hazardous waste."\(^22\) Prior to this ruling, it had been understood that actual participation in the management of a contaminated site was required to trigger liability under CERCLA.

CERCLA, of course, is not the only environmental statute run amok. The Clean Water Act of 1972\(^23\) prohibits the discharge of wastes into the "navigable waters of the United States"\(^24\) without a permit. "Navigable waters" has been bureaucratically construed to include so-called wetlands,\(^25\) which no one can really define with any precision. I am sure that many of you would be surprised to learn that according to EPA and the Army Corps of Engineers, a considerable portion of my state of Utah is "wetlands." As a result, landowners and ranchers throughout Utah who want merely to use their property must first seek permits from EPA and the Corps of Engineers, ostensibly because they will be discharging wastes into the navigable waters of the United States.

\(^{21}\) Id. § 9607(a)(1) (liability for owner and operator of a facility); see also, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985).
\(^{22}\) United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (emphasis added).
\(^{24}\) 33 U.S.C. § 1344.
\(^{25}\) See, e.g., 33 C.F.R. § 328.3(a) (1993); 40 C.F.R. § 230.3(s) (1993).
Finally, I should note that under several environmental statutes, in calculating damages, the traditional principle of looking to the prevailing party's economic loss has given way to determining damages on the basis of cleanup costs or damage to nature. Hence, we have seen the economic anomaly, if not absurdity, of forcing environmental defendants to pay cleanup costs that grossly exceed any reasonable market value of the property contaminated.

I have touched on only a few of the issues that will be discussed at this conference today and tomorrow, and what I have touched on I am sure you will hear about in much greater detail from those who are truly experts in the field. I will close with this thought. The Federalist Society has contributed enormously to the shifting of intellectual tides in jurisprudence in this country over the last several years. To be sure, while many unfortunate decisions and legal doctrines that arose during the Warren and Burger Courts remain on the books, the judicial methodology employed by federal courts in those eras—judicial freestyle, as I call it—has largely abated. Certainly, judicial appointments over the last twelve years have contributed to arresting that trend. But almost as important, I think, has been the work that this Society has done to ensure that legal doctrines such as originalism are at least discussed in the law schools.

That being said, there still is much work to be done. Environmental law appears to be an intellectual backwater that seems to have been largely immune from the ferment in other areas of jurisprudence that this Society helped bring about. I hope that your conference this weekend will begin to change that. Keep up the good work.