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Panel II: Public Versus Private Environmental Regulation

Jerry E. Smith, Moderator*

The topic of this morning's first panel is "Public Versus Private Environmental Regulation." In environmental law, as in certain other areas of the law such as consumer protection, public law has largely replaced either voluntary restraint or private enforcement through the courts as the means of achieving perceived public policy goals, deterring or punishing wrongdoers, and rectifying harm to persons or property. Traditionally, however, the courts were called on to accomplish these aims by compensating, where possible, those directly harmed by pollution or other environmental wrongs. The common law of nuisance, for example, was recognized at least as far back as Blackstone as a means of deterring and compensating for the pollution of streams by commercial enterprises.

Many defend tort law as an effective, flexible, and efficient means of spreading risk and shifting resources from the wrongdoer to the victim. Yet, others cite the cost of litigation, the problem of identifying the victims of widespread environmental damage, and the free-rider problem as justifications for the shifting focus to public regulation. Such advocates also stress the need for an overriding positive public policy to achieve widespread and consistent environmental relief. In defense of the traditional system, advocates of tort remedies question the ability of public and largely politically charged institutions to address pollution concerns in a way that avoids economic damage. They assert that only the market can supply the proper incentives for environmental protection.

Our speakers this morning will address a number of topics and questions regarding the choice between public and private regulation. Is it too late? or to put it another way, are the perceived environmental problems too great to be solved through private enforcement in the courts? Can the courts really deal effectively with such problems as the ozone layer and hazardous spills on the high seas?

Further, are the courts suited for the task of enforcing environmental laws either through administrative agencies or through private tort remedies? Or do things such as the lack of technical expertise in

* Judge, United States Court of Appeals for the Fifth Circuit.
the courts and burdensome discovery make the courts as ill-suited to enforce CERCLA\(^1\) as they might be to compensate downstream landowners for discharges from a factory?

Can private action be a substitute for public regulation or should market-based mechanisms serve as a blueprint for regulation? Is there a future for what has been called free market environmentalism? Finally, as in so many other areas of public policy debate, do we reach the conclusion that the answer lies somewhere in between reliance wholly upon either private regulation through the courts or regulation through public agencies?

We have a distinguished panel this morning and all of them have participated previously in Federalist Society events, for which the Society is grateful.

The first speaker will be the Honorable C. Boyden Gray. He served as counsel to the President from 1989 to 1993. He received his B.A. from Harvard and his law degree from the University of North Carolina, where he was editor in chief of the *Law Review*. After law school, Boyden served as a clerk for Chief Justice Earl Warren.

The next speaker will be Professor Richard Lazarus. Professor Lazarus teaches at the Washington University School of Law in St. Louis. He also has taught at Northwestern, George Washington, and Indiana Universities. He served in the Land and Natural Resources Division of the Department of Justice as an assistant to the Solicitor General. He holds his undergraduate and law degrees from the University of Illinois. Professor Lazarus represented the South Carolina Coastal Council in the *Lucas* case.\(^2\)

Peter Huber is a senior fellow at the Manhattan Institute for Public Research. He is a founding partner of the Washington law firm of Kellogg, Huber and Hanson. He received his Ph.D. from the Massachusetts Institute of Technology, where he taught for six years, and earned his law degree at Harvard. He clerked for Judge Ruth Bader Ginsburg on the D.C. Circuit and for Justice Sandra Day O'Connor.

Finally, we will hear from Cass Sunstein, Professor of Law at the University of Chicago. He served as an attorney adviser in the Office of Legal Counsel in the Department of Justice. He is a graduate of Harvard University and Harvard Law School, and he served as a law clerk to Justice Thurgood Marshall.

This distinguished and controversial panel will enable me to do what I like best, which is to engage in an exercise in judicial restraint.

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Only if the speakers run over their allotted times will I find it necessary to become an activist judge.

With that I turn the program over to Boyden Gray.