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Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy

A. Raymond Randolph, Moderator*

Last week I was in Edinburgh, Scotland, speaking about federalism and comparing the U.S. system with the European Community (EC) system under the recently ratified Maastricht Treaty.1 Twelve European nations are now bound together as members of the European Community. They know, as do we, that decentralized government and vigorous environmental regulation do not always go hand in hand. The classic problem of decentralized government is what economists call "spillover effects." Everyone realizes that air and water pollution do not respect jurisdictional boundaries. As you heard from the last panel, the dangers associated with nuclear power are not confined to the geographic location of the reactor. Effective environmental regulation therefore tends to be centralized.

But spillover effects are not the only reasons for centralizing environmental regulation. On January 1, 1993, the European Community put into place what it calls the "four freedoms,"—the free migration among the member nations of capital, labor, commodities, and services.2 We have learned in the United States that free movement of capital, labor, and commodities builds pressure for centralized government. It undermines the incentive of each individual state to impose its own stringent controls. States understandably fear handicapping their own industries by putting them at a competitive disadvantage with the industries of other states. They worry about driving their industries elsewhere. They do not want to impose laws that appear unattractive to companies thinking about locating within their
borders. Of course, none of this is new. Years ago, Justice Brandeis spoke of the concern about exit in terms of a competition in laxity.3

As capital, commodities, and, to some extent, labor begin to migrate freely not only from state to state but also from nation to nation, pressure also increases for worldwide uniformity. Thus, we see demands for trade agreements that set uniform environmental standards. We see proposals for universal environmental standards to deal with such matters as ozone depletion, global warming, and biodiversity. And we hear calls to expand the reach of our environmental laws to companies operating overseas.

The issues raised by these considerations go to the heart of our panel's topic: Is international uniformity regarding environmental regulation desirable? Is it achievable? How can uniform standards be enforced? What effect would a uniform system have on our national sovereignty and our political processes? How would global environmental policy affect economic development and freedom in developing nations? How should one assess the costs and benefits of decentralized environmental regulation? Should domestic environmental law extend beyond our borders?

Each of our speakers will have ten minutes. We will begin with the Honorable David Doniger, who works in the White House Office of Environmental Policy and holds the rather far-reaching title of Associate Director for Global Environment.

The next speaker will be Professor Emeritus Abram Chayes, who holds the Felix Frankfurter Chair at Harvard, and who had the good fortune of clerking for that great Justice.

The third speaker will be Professor Thomas Merrill, who holds the John Paul Stevens Chair at Northwestern Law School and formerly served as Deputy Solicitor General of the United States. Professor Merrill's other distinction is that he is the only former Rhodes Scholar not working in the White House.

The final speaker will be Professor Christopher Stone, who is the A.P. Crocker Professor of Law at the University of Southern California. Professor Stone has taught the quite related subjects of environmental law and white collar crime.