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Harte Panel: Questions and Answers

This panel was moderated by Kai N. Lee* and Harry Scheiber† and consisted of Joseph Sax, Christopher Stone,§ and John Harte.**

Lee: Let me begin by posing a question to the panel that grows out of a question inspired by Professor Sax's fascinating talk. The question for Professor Sax is: How would an ecological governmental plan—working, as you say, through increment and indirection—withstanding a legal challenge from industries operating on tradition models—such as the nuisance model—which are so much more concrete than the ecological needs described today?

Professor Sax, would you share some thoughts about how this incremental model, what you call the "common law of our administrative structure," would work against these other, more specific, complaints?

Sax: That is a very good and a very important question. Let me just respond in terms of the way things have been done in the last few years. The kinds of changes that I was describing are, of course, efforts to implement the Endangered Species Act, or efforts to implement Section 404 of the Clean Water Act. So, they have a legal basis. The question is whether these efforts can withstand constitutional challenge. The Clinton Administration has tried to create situations that avoid legal challenges. For example, when they needed water for downstream flows in Idaho—which is a state where there are lot of very conservative farmers who are...
worried about their water supply—the government agreed to buy some water, as well as to use regulatory devices, and to take some of its own water. That is, the government tried to mediate both the legal challenges and, at the same time, tried to address what seemed to be some fairness issues. And, that is the way they have been operating in a whole variety of areas. According to the chief lawyer who has been implementing this strategy, the general perception is that ambiguity is a bad thing. His view is, “Well, we’re using ambiguity. We want to leave everybody uncertain as to whether they could win or lose on one of these challenges.” And so, you can make some progress, and get people to sit down at the table with you; everybody has to put up something, and nobody is quite sure what, exactly, the legal situation is. The idea is, you keep doing that until it becomes a kind of accepted approach and precedent. Eventually people say, “Well, you know, we have done this in twenty, thirty different places, and people live with it. You know, it is not driving anybody out of business, and so forth, and so on.” And, that is the way you make this evolution happen.

Scheibe: Professor Lee’s slideshow showed two environmental organizations’ plans for ecosystem protection in the world, and almost all of the implicated areas were south of the equator or in third-world countries. What are the policy and equity issues involved in such a biodiversity conservation strategy?

Harte: I think my colleagues will have much more to say about the equity issue. I just want to say that I think that if we do not set a good example in biological conservation in the United States, it will be a lot more difficult to get our neighbors to the South to do the same thing. And so, while I agree it is a global problem, and we have to think about it in global terms, I really believe that we should primarily be focusing our efforts on our own ecosystems, in the United States.

Stone: John is absolutely right, and I think that whoever perceived that habitat conservation activities are loaded south of the equator is very sharp. Even on a global scale, part of what the United States can export is “legal technology,” if you will. So, we should get our house in order. I attribute the higher number of spots south of the border to the fact that the poorer countries are those that need my Zone Five and Zone Six subsidy support. So, there is a certain amount of wealth transfer going on, which is what economists call a “bribe”—this is not as bad as it sounds. It
means that, in order to defer development—which would be the alternative for nations that host large forest areas—you do have to transfer a certain amount of funds, as well as experience. And, I think that is being done.

Sax: I agree with both of those comments, and I think they are both very well taken. I think it is also important to keep in mind that, without regard to the site of the development, the developers mostly come from these highly industrialized places. And so, that is where some of the "education," you might call it, needs to be done.

Schelter: Here is a question that changes the focus, somewhat. It is a question from the core of the legal profession. I'll read it exactly:

Sometimes, I fear that environmental lawyers' efforts disproportionately focus attention and resources on specific, narrow issues, such as Superfund. Is there a role for attorneys, working within a traditional litigation-based legal system, that can promote, for example, the goal of sustainability?

Stone: I think not. It is implicit in something that Joe Sax said that litigation is more at home where the causal links are readily identifiable. We have problems of joint causality and transboundary fluxes, which are the sorts of things that are inflicted on the globe. It is very hard to get relief, to mobilize litigation strategies, because it is a long time before the result is known. Plus, we must consider all of the things that John talks about. He points out that there are complex causal links; it is not a single company that is responsible. There may be many contributors, through many chemical agents, that alter conditions in ozone or the global climate. You also have the bankruptcy problem. The financial losses are potentially so large that, even if you did find somebody who was responsible, there are still limits on the capacity to recover judgments. So, I think most of what has to be done is less sticks of traditional law, and more subsidies, more advanced land regulation. I do not think we can wait for the law—to hold its hand and then go back and try to clean up the mess.

Sax: I don't disagree with Christopher Stone. I do think it is important to keep in mind that the kinds of changes we want to bring about are going to occur as a result of the kind of negotiated
processes in which you bring all the relevant people to the table. And, I think anyone who has ever been engaged in any kind of negotiation knows that you only get people to come to the table if they think that, by not coming to the table, something worse is going to happen to them. And, in this universe that we have been talking about, the “worse” is some kind of legal constraint being imposed; you have got to keep that possibility in the background.

Lee: The last question for which we have time brings us back to the Endangered Species Act, and it is a very practical question. We have heard a variety of views about the Endangered Species Act this morning, and, of course, there are many views about the Endangered Species Act in the room. Can the panelists agree about how an improvement to the Endangered Species Act ought to be crafted? What are the elements of a better, of a worthy successor to the Endangered Species Act we have today?

Stone: Briefly, my concern is that the amount of money that has been spent enforcing the Act has almost entirely, as I understand it, gone to about five species— including eagles and higher mammals— and that most of the Clinton Administration's attention was focused on species that are highly visible and that capture the attention of the public, but that would hardly rank on a scientist's lists of the most important species to protect. John and Joe both know a lot more about this process than I do, so I will turn the question over to them.

Harte: Just one quick comment to reinforce that point: under the current Endangered Species Act, plants have a very different status than animals. Biologically, however, there is absolutely no justification for this type of differential treatment.

Lee: Joe, do you have anything to say? I'm intrigued, actually, by listening to the presentations this morning, at how much both John and Joe take comfort, in a way, in the law as it now stands. And, I guess the question I would put to all three of you is: How confident would you feel about the comforts of the Endangered Species Act under a Bush Administration, as opposed to under a Gore Administration?

Sax: I do not think you have to look forward to a Bush Administration, so to speak; you can look backward. Meaning, the Endangered Species Act was enacted in 1973 and, from, let's say, 1980 to 1992, we had a record of “nonzealous enforcement.” And, I
think, on a serious note, if you have an administration that does not have biodiversity protection as a strong priority, you can expect that the voltage powering the Act would be turned down. And then, we would find ourselves back in this sort of litigation model: that is, considering how much those interested, private, environmental organizations could, through the use of the courts, prod action. And, in my experience—I worked a lot with the Endangered Species Act when I was in the Interior Department—if you do not have an administration that has a vision of what it really wants to do and that wants to make the Act work, all the litigation in the world is not going to help you very much.

Stone: True. But, John earlier made a very good point. He reminded us that it is not just the administration, but also the public, and even the environmental groups, that you have got to ask: "What is it that leaves us with the people in charge of administering able to expend almost all their money on owls and other animals that people can very much relate to?" And, I think the answer is that biologists are not adequately informing people about the scientific realities. There is a lack of information coming in, even from environmental groups, which, sad to say, are able to raise funds by focusing on whales and tigers.