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Richard J. Lazarus

ASSIMILATING ENVIRONMENTAL PROTECTION INTO LEGAL RULES AND THE PROBLEM WITH ENVIRONMENTAL CRIME

*Richard J. Lazarus**

Others in this Symposium are, quite rightly, celebrating the accomplishments of environmental law during the past twenty-five years: There is certainly much to applaud. In relatively few years this country has adopted a vast array of environmental protection programs set forth in hundreds of pages of statutes and thousands of pages of regulations. These ambitious programs have left few areas of the law untouched in their persistent effort to limit activities that damage the natural environment. Environmental lawyers must cope not only with the regulatory morass presented by the environmental protection laws themselves, but must frequently become enmeshed in issues of bankruptcy, constitutional, corporate, insurance, international trade, and securities law. Like environmental law, other areas of law have steadily evolved as public demand for increased environmental protection has required the striking of new balances between competing social policies. The resulting jungle of overlapping legal rules and contexts is enough to make environmental lawyers today nostalgic for the "wilderness of administrative law" that greeted those pioneering environmental lawyers of the early 1970s.[1]

While not wishing to detract from the deserved celebration of environmental law, the focus of this Essay is decidedly different. It seeks to understand environmental law better by examining an area of law in which the process of assimilating environmental protection values into rules of law has recently proven most difficult—criminal law. To be sure, in no area of the law has the assimilation process been easy. Legal rules, by their very nature, resist change because change itself undermines the value of having a rule in the first instance. Yet the jump from the civil to

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1. *See* David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

the criminal arena has been especially problematic for environmental protection, and promises to continue to be so.

It is, however, the very existence of such conflict that makes the topic so academically promising. This is so in two discrete ways. First, conflict is often more revealing than obscuring. Conflict exposes differences, often by their exaggeration. Hence, analysis of the causes of contentiousness that have arisen recently in environmental criminal enforcement reveals problems affecting environmental protection law relevant far beyond the peculiar issue of environmental crime. Second, conflict suggests the need for reform and therefore its careful study provides an occasion to recommend ways around the current impasse in the assimilation process.

To these ends, this Essay is divided into three parts. First, it describes the problems that currently threaten to overwhelm the federal government's environmental criminal enforcement program. Following presentation of some background material, this discussion focuses principally on investigations of recent allegations of governmental incompetence and malfeasance in the administration of its environmental criminal enforcement program. Second, it seeks to explain the causes of these problems, with a heavy emphasis on how those causes both fit into a broader historical context and relate to the sweeping way in which Congress has defined crimes in federal environmental protection laws. Finally, this Essay offers some tentative recommendations for breaking the existing impasse that plagues the environmental criminal enforcement effort.

I. THE ENVIRONMENTAL CRIMES CONTROVERSY

Until relatively recently, the enforcement of environmental protection laws meant, without more, their *civil* enforcement. Although, historically, there certainly have been instances of criminal prosecutions in which the defendant's unlawful acts included environmental pollution,[2] there was no systematic effort by either federal or state governments to

2. *See, e.g.*, United States v. Alaska S. Packing Co. (*In re* La Merced), 84 F.2d 444 (9th Cir. 1936) (allowing prosecution for water pollution from oil discharge into lake); Seacord v. Illinois, 13 N.E. 194 (Ill. 1887) (allowing prosecution for air pollution from hog rendering tanks); State v. Taylor, 29 Ind. 517 (1868) (allowing prosecution for water pollution from urinating into public spring); State v. Buckman, 8 N.H. 203 (1836) (allowing prosecution for water pollution from dumping of animal carcass into drinking well); Commonwealth v. Yost, 11 Pa. Super. 323 (1899) (allowing prosecution for water pollution from privy upstream from water company), *rev'd*, 197 Pa. 171 (1900). *See generally* CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIMES ch. 1 (1992) (discussing prosecution of pollution-related offenses in nineteenth century).

utilize criminal sanctions on behalf of environmental protection goals. Although Congress routinely included criminal sanctions in each of the major environmental laws that it has enacted since the 1970s,[3] the federal environmental criminal enforcement program remained largely moribund prior to the mid-1980s.

Federal litigation resources were principally devoted to defending the executive branch's implementation of its huge statutory responsibilities as the regulated community, affected states, and the environmental community consistently challenged agency programs in court.[4] Because of their inherently discretionary nature, enforcement efforts typically took a backseat to defensive litigation, to which the federal government had no choice but to respond. When, moreover, the federal government did initiate enforcement actions, these actions were almost exclusively civil in character.

In the mid- to late 1970s, the Department of Justice (Department) undertook a few publicized prosecutions for violations of environmental protection laws in order to establish at least the threat of criminal enforcement.[5] Several years later, the Department commenced a programmatic effort within what was then the Department's Land and Natural Resources Division, now the Environment and Natural Resources Division (Environment Division). The Department did so by creating an Environmental Crimes Unit (now a Section) within the Environment Division, which would be concerned exclusively with criminal prosecutions arising under the federal environmental protection laws.[6] The Environment Division intended lawyers within that Section to possess the expertise in environmental law necessary both to prosecute environmen-

3. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136j (1988 & Supp. IV 1992); Toxic Substances Control Act, 15 U.S.C. § 2615(b) (1988 & Supp. IV 1992); Clean Water Act of 1977, 33 U.S.C.A. § 1319(c) (West 1986 & Supp. 1993); Oil Pollution Act of 1990, 33 U.S.C. § 1321(b)(5) (Supp. IV 1993); Safe Drinking Water Act, 42 U.S.C. §§ 300h-2, 300i-1 (1988); Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6928(d)-(e) (West 1983); Clean Air Act, 42 U.S.C. § 7413(c) (Supp. III 1991); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9603(b), (d) (1988).

4. *See* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 256-76.

5. *See, e.g.*, United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974); United States v. Frezzo Bros., 461 F. Supp. 266 (E.D. Pa. 1978), *aff'd*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 464 U.S. 829 (1983); United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). *See generally* Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 905-06 (1991) (discussing prosecution of particularly egregious conduct involving discharge of pollutants in violation of Clean Water Act).

6. Joseph G. Block, *Environmental Criminal Enforcement in the 1990's*, 3 VILL. ENVTL. L.J. 33, 34 (1992); Starr, *supra* note 5, at 910.

tal cases themselves and to assist federal prosecutors in the offices of the United States Attorney interested in such cases.

At the behest of the Environmental Protection Agency (EPA) and the Department, Congress also took a series of deliberate steps designed to promote environmental criminal prosecutions. Congress added new environmental crimes to existing statutes[7] and significantly increased the criminal penalties associated with the violation of federal environmental statutes,[8] partly to send the message to the Federal Bureau of Investigation (FBI) as well as to the regulated communities that environmental crimes were now a priority for federal law enforcement. Congress also conferred new investigatory authorities on the EPA and substantially increased the EPA's related resources for the specific purpose of enhancing the federal criminal prosecution effort.[9]

There have apparently been concrete results. According to the Department, between fiscal years 1983 and 1993, the Department "has recorded environmental criminal indictments against 911 corporations and individuals, and 686 guilty pleas and convictions have been entered. A total of $212,408,903 in criminal penalties has been assessed. More than 388 years of imprisonment have been imposed of which nearly 191 years account for actual confinement."[10]

In 1983 the EPA had only twenty-three criminal investigators. By 1990 the EPA's criminal enforcement program had increased to 110 people, including forty-seven special agents.[11] Under the Pollution Prosecution Act, which Congress enacted in 1990, the number of special agents is supposed to quadruple by 1995.[12] Similar increases in personnel are

7. *See, e.g.*, Water Quality Act of 1987, § 312, Pub. L. No. 100-4, 101 Stat. 7, 42-45 (codified as amended at 33 U.S.C. § 1319 (1988)); Resource Conservation and Recovery Act of 1976, § 3007, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C.A. § 6927(b)(2) (West 1983)); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 101, 113(c)(5), 104 Stat. 2399, 2675-77 (codified at 42 U.S.C. §§ 7407(d), 7413).

8. *See, e.g.*, Water Quality Act of 1987, § 312, 101 Stat. at 42-45; The Hazardous and Solid Waste Act Amendments of 1984, § 232, Pub. L. No. 98-616, 98 Stat. 3221, 3256-57 (codified as amended at 42 U.S.C. § 6928 (1988)); Clean Air Act Amendments of 1990, §§ 101, 133(c), 104 Stat. at 2675-77.

9. *See* Pollution Prosecution Act of 1990, §§ 201-205, Pub. L. No. 101-593, 104 Stat. 2954, 2962-63 (codified at 42 U.S.C. § 4321 (Supp. IV 1992)).

10. Memorandum from Peggy Hutchins, Paralegal, U.S. Department of Justice, to Neil S. Cartusciello, Chief, Environmental Crimes Section, U.S. Department of Justice (May 27, 1992) (on file with *Loyola of Los Angeles Law Review*); *see also* OFFICE OF CRIMINAL ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FISCAL YEAR 1990, at 3-2 (1991) (offering statistics of environmental criminal enforcement for fiscal years 1982 through 1990).

11. James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 918 (1991).

12. Pollution Prosecution Act of 1990, § 202(a), 104 Stat. at 2962.

evident at the Department. There were three lawyers in the Environmental Crimes Unit when it commenced operations in 1983.[13] Currently there are approximately thirty-one lawyers in that Section, all of whom devote their time exclusively to the criminal enforcement of environmental laws.[14] Several United States Attorneys' offices across the country now also include at least one federal criminal prosecutor who spends all or a substantial portion of his or her time exclusively on environmental protection matters.[15]

Finally, the FBI has been devoting increasing resources to environmental criminal prosecutions. The number of cases on which FBI special agents worked increased from thirty-six to 450 between 1984 and 1992.[16] In 1991 FBI special agents devoted more than 143,000 work hours to environmental crimes investigations.[17]

Such statistics would appear to suggest both past achievement and future promise. The federal environmental criminal enforcement program, however, is currently in utter disarray amidst a flurry of accusations and counteraccusations between the regulated community and the Department, Congress and the Department, the Department and the EPA, the Department and United States Attorneys' offices, and attorneys within the Environmental Crimes Section itself. The accusations fall into two somewhat paradoxical categories: (1) claims that the Environmental Crimes Section has overzealously prosecuted individuals based on technical, relatively harmless violations of the law;[18] and (2) claims that the Section has failed to prosecute meritorious cases.[19]

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13. Starr, *supra* note 5, at 910.

14. Michael Isikoff, *Reno Probes Environmental Crimes Unit*, WASH. POST, June 16, 1993, at A12.

15. *See* Block, *supra* note 6, at 34.

16. HARRIS ET AL., *supra* note 2, at Int-3; *see also* Roger J. Marzulla & Brett G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201, 208 (1991) (discussing Department of Justice's high conviction rate for environmental crimes).

17. HARRIS ET AL., *supra* note 2, at Int-3.

18. *See, e.g.*, *The Ellen Pardon*, WALL ST. J., Jan. 15, 1993, at A10; *EPA's Most Wanted*, WALL ST. J., Nov. 18, 1992, at A16; H. Jane Lehman, *Trials and Tribulations of Landowners*, L.A. TIMES, Oct. 18, 1992, at K2; *Property Busters*, WALL ST. J., Jan. 11, 1990, at A14; *Wetlands Conviction Stirring Heated Debate*, WASH. POST, Feb. 20, 1993, at F6.

19. *See, e.g.*, William T. Hassler, *Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes*, 24 Envtl. L. Rptr. (Envtl. L. Inst.) 10,074, 10,075-77 (Feb. 16, 1994); John H. Cushman, Jr., *Justice Department Is Criticized Over Environmental Cases*, N.Y. TIMES, Oct. 30, 1992, at A16; Sharon LaFraniere, *EPA Officials Criticize Justice Dept.: 6 Tell House Panel Polluters Unpunished*, WASH. POST, Sept. 11, 1992, at A4; Keith Schneider, *$11.1 Million Pollution Fine Too Soft?*, N.Y. TIMES, June 3, 1993, at D22; Matthew L. Wald, *House Panel to Seek Subpoenas Over Settlement of H-Bomb Case*,

Several congressional committees and subcommittees have responded by investigating the work of the Environmental Crimes Section. A few have considered claims of overzealousness.[20] But most—led by Representatives Dingell, Schumer, and Wolpe (who has since left Congress)—have been exploring the merits of accusations that Department incompetence and malfeasance have prompted the Department in some instances to allow defendants to plead guilty to far less serious offenses than the evidence would have sustained and, in others, to decline altogether to prosecute well-documented, serious violations of environmental protection laws.[21]

These committees have held hearings that have focused on many of the same cases. The Department's handling of its prosecution of Rockwell International regarding management of the Department of Energy's Rocky Flats nuclear weapon facility is likely the most well-known. In that case the grand jury made public its affirmative desire to indict Rockwell and individual officers and employees for offenses far more serious than the five felony and five misdemeanor counts—against Rockwell alone—that the Department accepted in a plea bargain with Rockwell. The United States Attorney, at the behest of "Main Justice" officials in Washington, D.C., ultimately declined to sign the grand jury's proffered indictment.[22]

Another matter receiving widespread attention involves the Department's handling of its prosecution of PureGro Company, an agricultural chemical application and distribution company located in the state of Washington. A death allegedly resulted from PureGro's disposing of

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N.Y. TIMES, July 31, 1992, at A15; Matthew L. Wald, *Lawmakers Call Bomb Plant Prosecution Too Lenient*, N.Y. TIMES, Jan. 5, 1993, at A9.

20. *See, e.g., Status of the Nation's Wetlands and Laws Related Thereto, Hearings Before the Subcomm. of Water Resources of the House Comm. on Public Works and Transportation*, 101st Cong., 1st & 2d Sess. 930-58, 1024-41, 1094-164 (1991).

21. *See Environmental Crimes Act of 1992, Hearing Before the Subcomm. on Crimes and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 126-30 (1993) [hereinafter *Schumer Hearings*]; *EPA's Criminal Enforcement Program, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 2 (1992) [hereinafter *1992 Dingell Hearings*]; *Environmental Crimes at the Rocky Flats Nuclear Weapons Facility, Documents Before the Subcomm. on Investigations and Oversight, of the House Comm. on Science, Space, and Technology*, 102d Cong., 2d Sess. vols. I-II (1992) [hereinafter *Wolpe Hearings*]; John D. Dingell, Opening Statement Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Nov. 3, 1993) (on file with *Loyola of Los Angeles Law Review*); Jonathon Turley, The George Washington Univ. Nat'l Law Ctr., Preliminary Report on Criminal Environmental Prosecution by the United States Department of Justice, (Oct. 19, 1992) [hereinafter Turley Report] (on file with *Loyola of Los Angeles Law Review*).

22. *See* Barry Siegel, *Showdown at Rocky Flats* (pts. 1 & 2), L.A. TIMES, Aug. 8, 1993 (magazine), at 12, L.A. TIMES, Aug. 15, 1993 (magazine), at 22.

hazardous waste on land in violation of federal law. The Department permitted PureGro to plead guilty to a misdemeanor with a small fine although reportedly the defendant initially had been willing to plead guilty to a felony count.[23]

The Department, the EPA, and state government officials have testified at these congressional hearings, as have members of the public who are angry at what they perceive to be the Department's failure to seek heavy criminal sanctions for environmental violations in their communities. The EPA and state government officials have sometimes joined in criticizing Department prosecutorial decisions before Congress.[24] Accordingly, relations between the Department's Environmental Crimes Section and EPA enforcement personnel are strained (at best).[25] And relations between that Section and the United States Attorneys' offices are no better, because Assistant United States Attorneys have been complaining (apparently sometimes to Congress) that the Section's Chief and his deputies have declined to authorize their prosecution of meritorious cases.[26]

Within the Environmental Crimes Section itself, there is likewise great division and personal bitterness. Some career lawyers assert that they will no longer work on controversial environmental cases. Some staff lawyers contend that Section leadership lacks the environmental law expertise necessary to supervise and judge the merits of proposed prosecutions.[27] Those with supervisory responsibility respond that many staff lawyers lack the criminal law litigation expertise required to render that same judgment. Internal strife has persisted rather than dissipated over time, especially now that the Section is itself the subject of two focused inquiries: (1) an internal investigation being undertaken within the Department itself; and (2) Representative Dingell's continuing probe in which he is asking to interview career lawyers and, if refused, to use the congressional power of subpoena to require their testimony.[28]

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23. *See 1992 Dingell Hearings*, *supra* note 21, at 25; Turley Report, *supra* note 21, at 39-70.

24. *1992 Dingell Hearings*, *supra* note 21, at 82-198.

25. Linda Himelstein, *DOJ's Environmental Mess*, LEGAL TIMES WASH., July 20, 1992, at 1, 22-23.

26. Turley Report, *supra* note 21, at 14-16, 25-27; Himelstein, *supra* note 25, at 22-23.

27. Turley Report, *supra* note 21, at 17-21; Himelstein, *supra* note 25, at 23.

28. Isikoff, *supra* note 14, at A12; Marianne Lavelle & Marcia Copley, *Hill to Examine Environmental Prosecutions*, NAT'L L.J., June 28, 1993, at 5; *see also* Linda Himelstein, *Justice Probing Its Environmental-Crimes Chief*, LEGAL TIMES WASH., June 28, 1993, at 2 (discussing allegations of ethical breaches of Section Chief and other officials and whether congressional investigations would conflict with policy of protecting prosecutors' discretion). The Department of Justice released the results of its internal inquiry just as this Essay was going to press.

No congressional committee has yet to issue a formal committee report on the controversy, but the early returns are sharply critical of the Department. As chair of the Subcommittee on Oversight and Investigations of the House Committee on Science, Space and Technology, former Representative Wolpe studied the prosecution at Rocky Flats and, in a report released in January 1993, faulted Main Justice's conservatism in impeding the more aggressive efforts of prosecutors in the field to secure significant criminal sanctions.[29] Wolpe also identified what he perceived to be a double standard that allowed federal agency personnel to engage in unlawful activity without being subject to federal prosecution.[30]

Representative Dingell has likewise contended that there are "serious management and performance problems plaguing the criminal enforcement program."[31] In an earlier letter to the Attorney General, he asserted that his committee staff had "uncovered deeply troubling allegations suggesting that certain elements at the Environmental Crimes Section at the Department of Justice have disrupted and undermined the EPA's criminal enforcement program."[32] More particularly, Dingell has advanced several serious charges, including

> the declination of prosecution under highly questionable circumstances (including the strenuous protests of the line attorneys and case agents involved), the apparently preferential treatment of certain large and powerful corporations, the refusal to pursue the prosecution of individuals implicated in environmental crimes in cases where such individuals were

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See WILLIAM J. CORCORAN ET AL., U.S. DEP'T OF JUSTICE, INTERNAL REVIEW OF THE DEPARTMENT OF JUSTICE ENVIRONMENTAL CRIMES PROGRAM: REPORT TO THE ASSOCIATE ATTORNEY GENERAL (1994). The conclusions of this report are briefly discussed *infra* note 66.

29. Howard Wape, House Comm. on Science, Space and Technology, Report on the Prosecution of Environmental Crimes at the Department of Energy's Rocky Flats Facility, 20 (Jan. 4, 1993) [hereinafter Wolpe Report] (on file with *Loyola of Los Angeles Law Review*). In a recent article, Bill Hassler, a former Environmental Crimes Section lawyer and member of the Rocky Flats Prosecution Team, criticizes both the methods of investigation and conclusions of the congressional committees and their investigators. *See* Hassler, *supra* note 19, at 10,077-87. Hassler emphasizes the failure of congressional critics to interview all decision makers involved prior to making their allegations, the absence of evidence to support their characterizations of the prosecutorial decisions they challenge, and ironically, *their* politicization of federal criminal enforcement. *Id.*

30. Wolpe Report, *supra* note 29, at 20.

31. Memorandum from John Dingell, Chairman, Subcommittee on Oversight and Investigations, to Members, Subcommittee on Oversight and Investigations 1 (Sept. 9, 1992) [hereinafter Dingell Memorandum] (on file with *Loyola of Los Angeles Law Review*).

32. Letter from John Dingell, Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, to William P. Barr, Attorney General 2 (July 6, 1992) (on file with *Loyola of Los Angeles Law Review*).

> associated with major corporations or represented by certain well-connected attorneys, the convening at Main Justice of closed-door meetings with defense counsel without the knowledge of the EPA or the local U.S. Attorney's office, and the ready agreement to trivial financial penalties in cases involving serious and long-standing environmental violations.[33]

Finally, a preliminary report prepared for Representative Schumer is equally critical of the Department's performance. The report found evidence of the following: (1) "a pronounced failure to prosecute environmental crimes to the same degree as conventional crimes . . . [and] to prosecute individuals";[34] (2) "deep divisions and mistrust between the Environmental Crimes Section and various United States Attorneys' offices";[35] (3) "chronic case mismanagement";[36] and (4) "possible political influence in both individual cases and general policies within the Environmental Crimes Section."[37]

II. THE ROOTS OF THE ENVIRONMENTAL CRIMES CONTROVERSY

A. Déjà Vu All Over Again?

For observers of environmental policy making over the past twenty-five years, much about the environmental crimes controversy seems all too familiar. To be sure, environmental crime has not previously been the subject of such great public attention and crisis atmosphere. But this current crisis nonetheless seems to share much in common with a series of such controversies that have plagued environmental law during the past twenty years, ranging from the much publicized Kepone incident in the early 1970s to Anne Gorsuch's tenure as EPA Administrator in the early 1980s.[38]

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33. *Id.*

34. Turley Report, *supra* note 21, at 5.

35. *Id.*

36. *Id.* at 6.

37. *Id.* The General Accounting Office recently released its prepared testimony on the environmental crimes enforcement program for a hearing chaired by Representative Dingell this past November. *See* L. Nye Stevens, Environmental Crime: Issues Related to Justice's Criminal Prosecution of Environmental Offenses, Testimony before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce (Nov. 3, 1993) (on file with *Loyola of Los Angeles Law Review*).

38. *See generally* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311 (describing "pathological cycle" of public and institutional distrust of EPA that results in EPA failure and breeds further distrust); Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV. 251 (1993)

As public aspirations for environmental protection, which have been uncompromising, have collided with the public's unwillingness to pay the costs associated with that change, the various parts of the federal government associated with implementing environmental protection policy have frequently become objects of public criticism and even scorn. These include criticisms both from those who believe that the government has failed to achieve promised pollution reductions as well as from those who believe that the government is imposing unnecessarily high clean-up costs on society. Moreover, because environmental restrictions often are based on uncertain scientific information, require significant economic dislocations, and relate to highly charged public health matters, there is typically much fodder for critics from either perspective.[39]

The fragmented nature of environmental policy making provides further fuel for controversy. The executive and legislative branches of the federal government have maintained different perspectives on many of these issues, as have the EPA and the Department, the headquarters of these agencies in Washington, D.C., and their branch offices across the country. As a result, the initial source for much of the criticism launched at one part of the government is, more often than not, another part of the government.

No doubt the greatest source of friction between governmental institutions has persisted between Congress and the executive branch. The tension between the executive and legislative branches in environmental law making is longstanding. The early Nixon years established a culture of congressional suspicion regarding the willingness of the executive branch to undertake a good faith effort to implement the ambitious environmental protection laws Congress was enacting. That culture remains fairly dominant in Congress today, almost twenty-five years later, and largely explains how quickly certain congressional subcommittees hold oversight hearings to second guess executive branch motives in the formulation of environmental policy.[40]

There is, in fact, reason for congressional concern. A philosophical split has persisted between the two branches of government on environmental issues during the past twenty-five years. While Congress has enacted laws largely reflective of the nation's aspirations regarding

(describing environmental crimes controversy as expression of ongoing, albeit submerged, debate between two competing approaches to environmental policymaking).

39. *Id.* at 321-22, 347-48.

40. *See generally* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch the Watchers Themselves)?*, LAW & CONTEMP. PROBS., Autumn 1991, at 205, 214-19 (criticizing "EPA bashing" and certain congressional representatives' swift public denunciation of EPA mistakes).

environmental protection, the executive branch has been more responsive to those concerned about the economic and social costs of implementing those laws.[41]

The upshot has been a steady supply of interbranch feuding. The EPA, often prompted—or compelled—by the Office of Management and Budget (OMB), has frequently construed congressional enactments to allow for greater consideration of economic cost than the plain meaning of the statutory language would seem to suggest is permissible. Congressional critics denounce the executive branch in the press, hold oversight hearings to attract further public attention, and otherwise seek to use their considerable leverage—through confirmation authority or the budgetary process—to persuade the executive branch to reverse its position.[42]

The two branches view these disputes quite differently. The executive branch sees them largely as simple "policy disputes" and congressional criticism as simply "politics as usual." Many in Congress, however, adopt a far dimmer view. They contend that the executive branch, by not fully utilizing the reach of the law as enacted, is itself acting unlawfully.

Rarely, however, have these persistent, simmering interbranch disputes developed into full-fledged conflagrations. One reason why that likely occurred in the case of environmental crime is also why it likely occurred during the tenure of Anne Gorsuch as EPA Administrator. The executive branch must possess a certain modicum of credibility to withstand the pressures in the environmental policy arena, particularly those pressures generated by the press reporting on congressional claims of executive branch malfeasance or on disputes within the executive branch itself. Any significant corroboration of the merits of congressional or regional agency office suspicion of an executive branch "sell out" to—or "sweetheart deal" with—industry invariably unleashes an avalanche of media attention and public outcry.[43]

Administrator Gorsuch triggered just such an avalanche with a series of missteps, beginning with her close relationship with Interior Secretary James Watt, that suggested the realization of Congress's worst fears regarding industry capture of the EPA.[44] Largely because the EPA since has had a series of exceptionally respected and credible Administra-

41. *See id.* at 222-26.

42. *Id.* at 210-18.

43. Apparently in anticipation of this public perception problem, and perhaps in response to the problems currently facing the Department, EPA Administrator Carol Browner is reportedly drafting a memorandum advising all agency political appointees to avoid becoming involved in individual enforcement cases.

44. Lazarus, *supra* note 38, at 345-47.

tors—William Ruckelshaus, Lee Thomas, William Reilly—no controversies of a similarly overwhelming magnitude have plagued the EPA. Those Administrators possessed the credibility needed to respond to congressional criticism and to explain themselves and their differing perspectives even in the face of heated controversy.

The environmental crimes controversy occurred when (during the second half of the Bush Administration) and where (within the Department) it did partly because the Environment Division lacked that essential modicum of credibility.[45] It is not yet clear the extent to which the Environment Division's political leadership actually intended to signal career lawyers to scrutinize more closely recommendations to criminally prosecute the violation of federal environmental protection laws, or whether those political appointees, as some claim,[46] actively discouraged criminal investigations of environmental violations. Within a bureaucracy, however, not much is required to send a message of emphasis or deemphasis to career staff. And, when resources are stretched thin, an implicit signal of a mere shift in priorities may have a significant practical impact.

What is increasingly clear, however, is that regardless of the extent to which the environmental crimes controversy resulted from smoke rather than fire,[47] the Environment Division's corresponding lack of credibility proved dispositive. The Environment Division could not credibly refute accusations that close prosecutorial decisions resulted from undue political influence rather than from neutral decisions of career lawyers. Without the benefit of the doubt, virtually all of the Environment Division's exercise of prosecutorial discretion became tainted by claims of possible political motivation.

Unless Department officials can credibly explain the reasons for a decision not to prosecute in a particular case, the public and Congress are likely to suspect the worst. Because such credibility was lacking, suspicion instead begot further suspicion, until the entire environmental crimes program was ultimately overwhelmed by intense public scrutiny and criticism. The Bush Administration proved that it had forgotten the lesson of the Gorsuch era under Reagan, which is that Congress and the public will not tolerate executive branch efforts—or even the appearance of efforts—to undermine environmental protection programs.

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45. The principal period at issue was between the spring of 1991 and the spring of 1992, when the Acting Assistant Attorney General was Barry Hartman.

46. *See* Dingell Memorandum, *supra* note 31, at 1-2; Turley Report, *supra* note 21, at 6-25; Wolpe Report, *supra* note 29, at 12-16.

47. *See* Hassler, *supra* note 19, at 10,077-87.

What made the environmental crimes controversy perhaps even less tenable and therefore more volatile, however, was its location in the Department. A prosecutor's decision *not* to prosecute is generally assumed to be far removed, if not totally insulated, from the whims of electoral politics. History may suggest this claim to be more fictional than real. But, even if so, it is a fiction that can prove costly to those who challenge it too overtly. The environmental crimes program is now paying that high price.

B. The Problem with Environmental Crime

The lessons to be learned from the environmental crimes controversy, however, run far deeper than policy conflicts between the executive branch and Congress. Nor are they confined to the pitfalls associated with a few political appointees unwittingly fueling decades of congressional distrust of the executive branch's willingness to enforce environmental requirements. They extend instead to how Congress has defined environmental crimes in the environmental pollution control laws and the institutional collisions fostered by that legislative approach.

The argument in favor of criminal sanctions in environmental protection laws is fairly straightforward and compelling—indeed deceptively so. First, the harms that environmental laws seek to prevent can be just as significant, and sometimes even more so, than those implicated by more traditional criminal acts. For instance, pollution of a public drinking water supply can imperil the health, even with fatal results, of an entire community. Just because the wrongdoer has done so by way of an environmental medium—such as air or water—does not make that conduct any less deserving of criminal sanction.[48] Environmental law, therefore, is not simply another kind of economic regulation. It is more often akin to public health and safety law in its basic thrust.

Second, the moral culpability of those who violate environmental laws can be as great as those who commit any of the more traditional common-law-based crimes, such as murder, robbery, or assault. Individuals who violate environmental laws may do so for reasons no more justifiable and no less reprehensible than those motivating the most venal of criminals. Certainly, the fact that many violators of environmental laws do so to maximize profits does not make their conduct less culpable, nor

48. *See* KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS 477 n.1 (1990) (citing Department of Justice study finding that "public ranked knowingly polluting a city's water supply as more serious than heroin smuggling, if the pollution caused twenty people to become ill but not sick enough to require medical treatment").

does it distinguish environmental crimes from many other crimes that have long been subject to harsh criminal sanctions.

Finally, absent the possibility of criminal sanctions, particularly those directed at individuals (including corporate officers), companies may view sanctions for violating environmental laws as a mere cost of doing business. Companies can gamble that the government enforcers will not discover their violations and, even if that gamble fails, offset those costs by the excess profits they gained through past noncompliance. Depending on market conditions, companies that are sanctioned may also be able to pass through to consumers the costs of any civil penalties by charging more for their goods and services. And, when such charges cannot be passed through, the company may even choose to declare bankruptcy to gain a fresh start.

Criminal sanctions, however, do not suffer from these same limitations. The mere threat of their imposition makes corporate officers take notice. Prison sentences can apply to officers and employees in their personal capacities. They are not simply a cost of doing business—their impact can be devastating. The moral stigma associated with a criminal conviction can, standing alone, irreparably destroy not only existing and future economic relations, but social and familial relations as well.[49]

The economic effect of criminal sanctions imposed on a corporate entity rather than on an individual can likewise be more devastating than civil penalties. Business can suffer from the stigma of a conviction and there may also be collateral consequences that flow from a conviction. For instance, a conviction under many existing environmental laws subjects the defendant company to "debarment," meaning that the company is not eligible to enter into a contract with the federal government for a specified time period.[50] For large companies, the impact of such a restriction is substantial, and for smaller companies, the impact can be catastrophic.

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49. *See generally* Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889 (1991); *see also* Webster L. Hubbell, Testimony Before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce 2 (Nov. 3, 1993) (on file with *Loyola of Los Angeles Law Review*) ("Nothing works better at getting managers to pay attention to environmental compliance than the prospect of going to prison and the prospect of fines and other penalties for their companies.").

50. *See, e.g.*, Clean Water Act of 1977, 33 U.S.C.A. § 1368(a) (West 1986); Clean Air Act, 42 U.S.C. § 7606 (1988 & Supp. III 1991). *See generally* David T. Buente et al., *The "Civil" Implications of Environmental Crime*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,589, 10,598-600 (Oct. 1993) (analyzing relationship between civil and criminal enforcement of environmental laws).

Congress responded positively to these arguments in favor of criminal sanctions by including criminal sanctions in almost all of the federal environmental protection laws. The response was, however, also indiscriminate: Congress made virtually *all* "knowing" and some "negligent" violations of environmental pollution control standards, limitations, permits, and licenses subject to criminal as well as to civil sanctions. Congress made relatively little effort to define thresholds for when a defendant's conduct justified adding the possibility of criminal sanctions to civil penalties. Except for the knowing and negligent mens rea requirements, Congress just assumed that the civil and criminal thresholds should be precisely the same. The problems with such an assumption are several.

First, the environmental standards are not set based on the existence of traditional notions of criminal culpability. Violations of environmental laws may, of course, involve the most serious risks to human health and of catastrophic, irreversible environmental damage. But the standards upon which those statutory violations are in fact based do not depend on the existence of such risks or damage. They are instead set at far more precautionary, risk-averse levels of protection against risks to human health and the environment. The public—this Author included—may believe that such precautionary levels are wise and appropriate, but that presents a far different public policy issue than whether all such violations rise to a level justifying severe criminal as well as civil sanctions. By simply equating the regulatory thresholds for civil and criminal sanctions, however, Congress never directly addressed this issue.

Congress, for the most part, has not been especially discriminating in defining the mens rea requirements for environmental crimes. Instead, consistent with the rationale that criminal sanctions serve regulatory deterrent purposes, Congress sought to maximize their deterrent effect by deemphasizing mens rea elements for the imposition of criminal sanctions. Hence, although the environmental statutes generally require some mens rea for criminal prosecution—they are not simply strict liability offenses[51]—they do not require much at all in terms of the defendant's knowledge of the actual risks of his or her activity.[52] As a result,

51. Section 16 of the River and Harbor Act of 1899, however, does define a strict liability environmental criminal offense. *See* 33 U.S.C. § 411 (1988). For a thoughtful discussion of some of the problems posed by Congress's recent emphasis on strict liability crimes, and possible solutions, see Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993).

52. *See, e.g.*, M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 144-47 (1992); Kevin A. Gaynor et

although persons who violate environmental laws may possess the most venal and reprehensible of states of mind—and thus warrant the most severe criminal sanction—the environmental criminal sanctions do not require such a state of mind.[53]

What makes such an approach to mens rea particularly problematic in the environmental law context is that environmental standards, unlike most traditional crimes, present questions of degree rather than of kind. Murder, burglary, assault, and embezzlement are simply unlawful. There is no threshold level below which such conduct is acceptable. In contrast, pollution is not unlawful per se: In many circumstances, some pollution is acceptable. It is only pollution that exceeds certain prescribed levels that is unlawful. But, for that very reason, the mens rea element should arguably be a more, not less, critical element in the prosecution of an environmental offense.

Finally, Congress failed to adequately account for the fact that the civil standards are often set at an action-forcing level and are anything but static. The standards do not necessarily reflect standards of performance that are either economically or technologically feasible. They do not reflect existing conduct or long-settled cultural norms. They instead are more likely to reflect policy makers' predictions of what will be possible and the public's aspirations for a cleaner environment. The underlying science is often very uncertain, and the regulations constantly change in response to new information, court challenges, and sweeping statutory amendments.

Full compliance with all applicable environmental laws is consequently the exception rather than the norm. Just as the EPA rarely meets congressional aspirations in meeting all of the deadlines in environ-

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al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 11-21 (1992); R. Christopher Locke, *Environmental Crimes: The Absence of Intent and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311 (1991); Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100 (1991); Lisa Ann Harig, Note, *Ignorance Is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145 (1992); Michael Vitiello, Note, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. § 6928*, 6 TUL. ENVTL. L.J. 187, 214-29 (1993).

53. To be sure, many of the environmental statutes include a "knowing endangerment" offense, which imposes even greater criminal sanctions on those violators who act with knowledge of the significant risks they impose, *see, e.g.*, Clean Water Act of 1977, 33 U.S.C.A. § 1319(c)(3) (West 1986 & Supp. 1993); Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6928(e) (West 1983); Clean Air Act, 42 U.S.C. § 7413(c) (1988 & Supp. III 1992), but the problems that have developed in the prosecution of environmental crimes have generally not resulted from these more demanding provisions. They instead result from the vague delegations of prosecutorial discretion that inhere in those criminal provisions that lack such requirements. *See infra* notes 58-60 and accompanying text.

mental laws—it meets roughly fourteen percent of all congressional deadlines[54]—industry rarely meets all of those aspirations as reflected in the statutory and regulatory requirements themselves. Nor does government itself or its contractors—as in Rocky Flats—strictly comply with environmental requirements. In a recent survey, two-thirds of all corporate counsel reported that their companies have recently been in violation of applicable environmental laws.[55]

For that reason, however, there is a danger, indeed a potential impropriety, in Congress's approach to environmental criminal liability. The question whether certain conduct warrants a criminal sanction is far different than whether a civil sanction may be warranted, precisely because the latter is susceptible to being no more than an economic disincentive. Criminal liability standards should be more settled and less dynamic. They should be more reflective of what in fact can be accomplished rather than of the public's aspirations of how, if pushed, the world can change in the future.

Perhaps most importantly, criminal sanctions should also be tempered by the gravity of the decision that certain conduct warrants the most severe of sanctions. Criminal sanctions are not simply another enforcement tool in the regulator's arsenal to promote public policy objectives.[56] A criminal sanction is fundamentally different in character. The reason why criminal sanctions have greater deterrent value is also the reason why they must be used more selectively. Criminal sanctions should be reserved for the more culpable subset of offenses and not used solely for their ability to deter.

To date, Congress, however, has made no meaningful or systematic effort to consider criminal sanctions as presenting an issue distinct from that presented by civil sanctions. Congress has not tried to identify those

54. Lazarus, *supra* note 38, at 324.

55. Marianne Lavelle, *Environmental Vise: Law, Compliance*, NAT'L L.J., Aug. 30, 1993, at S1.

56. *See generally* FRANCIS A. ALLEN, INT'L INST. FOR ECONOMIC RESEARCH, THE CRIMINAL LAW AS AN INSTRUMENT OF ECONOMIC REGULATION (1976) (discussing social costs of using criminal law as instrument of economic regulation); Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1964-65) (exploring relationship between popular morality and use of criminal sanctions in regulating business practices); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (discussing institutional considerations involved at various levels of decision making in criminal law); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (outlining special characteristics of economic regulatory legislation relevant to use of criminal sanctions); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (discussing department of public welfare offenses that are punishable without any criminal intent).

circumstances in which the culpability of conduct warrants taking the next step of imposing criminal sanctions. Congress has not tried to identify those kinds of environmental standards for which criminal sanctions are more appropriate. Nor has Congress focused as carefully as it should on the mens rea issue.

Congress's failure to consider any of these issues provides the source of much of the institutional conflict underlying the environmental crimes controversy. By criminalizing far more conduct than it would expect to be the subject of criminal enforcement, Congress has, in effect, delegated all of the line-drawing issues to the executive branch without providing any guidance on how that discretion should be exercised. No doubt there are public policy areas in which such open-ended delegations are workable, probably because the legislative branch is willing to trust the executive branch's implementation and because there is otherwise some shared understanding between and within those branches regarding how that discretion should be exercised. When, however, neither such trust nor such a shared understanding exists, an open-ended delegation can be a recipe for disaster, especially when public health concerns are likely to trigger substantial public scrutiny and second guessing.

The current environmental crimes debacle demonstrates just that potential. The clear lesson of the past twenty-five years of environmental law and policy making is that trust and shared understanding is sorely lacking. Many in Congress, particularly those on the authorization committees that drafted the statutes, harbor deep suspicions of the willingness of the executive branch to fully implement those laws precisely because of the absence of shared understanding. Parts of the executive branch, particularly within the Office of Management and Budget and the White House,[57] have frequently confirmed the validity of those suspicions by expressing skepticism of the utility of literal application of environmental laws.

The executive branch, moreover, has further exacerbated the problem in the environmental criminal context. Rather than fill the vacuum left by Congress, the executive branch has failed to develop specific guidance governing the exercise of prosecutorial discretion in the environmental crimes area.[58] Nor has the executive branch otherwise made

57. *See generally* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127 (exploring tension between rule of law and politics of regulation reflected in executive branch's oversight of EPA).

58. The only forum in which some of these issues are currently being debated is before the United States Sentencing Commission, which has for several years been developing organizational sentencing guidelines for environmental crimes. The sentencing debate, of course, does

much effort to explain publicly its decision-making process in any systematic way.

Compounding matters, decision-making authority is fragmented between the EPA and the Department, and between regional and headquarters offices within both of those agencies. Those who initiate investigations do not, for that reason, necessarily apply the same criteria in evaluating a case that will ultimately be applied by those who make the final decision whether to prosecute. Such discrepancies invite misunderstandings and controversy, particularly when, as has occurred in the case of environmental crimes, those final prosecution decisions are made in a high-handed fashion, without giving those most intimately involved either the opportunity to participate or a written explanation of the final decision.

The dispute within the Environmental Crimes Section itself is a microcosm of the entire problem. Lawyers whose expertise is in environmental law bring a different perspective to their evaluation of a case than

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not concern the nature of criminal conduct, but the related, antecedent issue of how to determine the appropriate level of punishment for different kinds of environmental criminal violations. The Sentencing Commission did not originally include environmental crimes in its 1991 organizational sentencing guidelines because of the contentiousness of the issues involved. *See* Garry Sturgess, *Environmental Crime Guidelines Postponed*, LEGAL TIMES WASH., Apr. 15, 1991, at 7. The Sentencing Commission sought to break through the impasse that had impeded its work in this area by appointing an Advisory Working Group on Environmental Sanctions, comprised of individuals bringing different expertise and perspectives (government, industry, academic) to the issue. *See* Linda Himelstein, *Sentencing Guidelines: A Punishing Process*, LEGAL TIMES WASH., Dec. 21, 1992, at 1. The Advisory Working Group issued its working draft recommendations on March 5, 1993. *See* Memorandum from the Advisory Working Group on Environmental Sanctions to Interested Members of the Public (Mar. 5, 1993) (on file with *Loyola of Los Angeles Law Review*). However, those recommendations prompted an avalanche of criticism from industry as well as from government. *See, e.g.*, U.S. Dept. of Justice, Comments on Working Draft of Recommended Sentencing Guidelines for Organizations Convicted of Federal Environmental Crimes (May 10, 1993) (on file with *Loyola of Los Angeles Law Review*); Comments of Former Justice Department and EPA Officials on Draft Environmental Guidelines Prepared by Advisory Working Group on Environmental Sanctions (Apr. 16, 1993) (on file with *Loyola of Los Angeles Law Review*); *see also* Cris Carmody, *Proposed Guidelines for Environmental Crimes Irk Business*, NAT'L L.J., May 3, 1993, at 19 (criticizing sentencing guidelines for organizations convicted of environmental crimes). On November 16, 1993, the Advisory Working Group issued its revised draft recommendations, which substantially amended its earlier draft in response to those comments. The reasons for these delays and contentiousness are not unrelated to the problems currently facing the entire environmental crimes program. The gulf separating those debating the merits of criminal sanctions for environmental crimes is so great, and the consensus so thin, that agreement has been exceedingly difficult to reach. Moreover, because Congress criminalized so much potential conduct, the sentencing guidelines issues have become quite important and very heated. The issues that should have been considered at the front end of the criminal process—that is, whether specific conduct should be subject to criminal sanction in the first instance—have instead been relegated to the sentencing phase.

those whose expertise lies instead only in more traditional areas of criminal law. Environmental law experts tend to be more swayed—perhaps too much so—by the deterrent value of prosecution and therefore more willing to promote the broader liability theories. In contrast, the criminal experts tend to be more demanding—also perhaps too much so—in their search for the kind of showing of criminal culpability that they are used to having to establish in more traditional areas of criminal law.

Unfortunately, that clash of perspectives has been intensified, rather than mitigated, in the Environmental Crimes Section because there are few within the Section possessing the dual expertise required to bridge the gap. There are instead two distinct camps. Those in leadership positions possess principal expertise in criminal, not environmental, law, while the career staff tend to have the opposite emphasis. The upshot has been constant clashes of view regarding how to proceed between the two camps within the Section, with those "criminal lawyers" in leadership positions being more skeptical of some of the more aggressive enforcement theories propounded by the career "environmental lawyers."

Moreover, when Section leadership has decided not to authorize recommended prosecutions, it has lacked the credibility to have its decisions readily accepted within the government itself, let alone by interested members of the general public. Career lawyers within the Section and EPA officials in both the headquarters and the regions fault those decisions for not reflecting an accurate understanding of environmental law.

The United States Attorneys' offices do not react any more favorably when Main Justice closely scrutinizes and sometimes refuses to approve their requests to initiate an environmental crimes prosecution. The United States Attorneys and their assistants naturally resist being second guessed by Main Justice on criminal matters.[59] In most areas those government prosecutors are fairly autonomous when it comes to deciding whether to initiate a prosecution; prior approval from Main Justice is not required. Environmental crimes is one of the exceptions to that rule.[60]

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59. *See, e.g.*, Breckinridge L. Willcox, Testimony Before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce (Nov. 3, 1993) (on file with *Loyola of Los Angeles Law Review*); Robert J. Wortham, Testimony Before the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce (Nov. 3, 1993) (on file with *Loyola of Los Angeles Law Review*).

60. In his recent testimony before the House, Associate Attorney General Hubbell sought to dispel the notion that the degree of control exercised by Main Justice over environmental criminal matters was out of step with the Department's traditional approach to other areas. *See* Hubbell, *supra* note 49, at 10-14. Hubbell testified that "the U.S. Attorneys Offices have significantly broader responsibilities for environmental crimes than they have in other highly complex regulatory areas such as tax and antitrust," *id.*, and that in the civil and civil rights

The reason for that exception also supplies the reason why so much antagonism has recently resulted between Main Justice and the United States Attorneys' offices. The rationale for the preapproval requirement is that environmental law is such a new and complex area of law that it is necessary to have those who possess environmental law expertise review prosecution recommendations to ensure quality control and to avoid adverse precedent. When, however, such centralized review is conducted by those in leadership positions who do not possess such expertise, the United States Attorneys are less accepting of adverse determinations. When, moreover, the specter of improper political influence is added to the equation—as occurred during the last few years of the Bush Administration—what might have been simply "less accepting" can be quickly transformed into accusations of incompetence or even malfeasance.

III. ASSIMILATING ENVIRONMENTAL PROTECTION INTO CRIMINAL LAW

Environmental law has assimilated so poorly into criminal law because environmental policy makers have done a commensurately poor job of considering the distinct values, purposes, and limitations of criminal law. Assimilation requires give and take, as the values, purposes, and limitations of each legal context responds to the other. Bankruptcy and environmental law, for instance, have been undergoing just such a process of assimilation during the past decade;[61] the evolution of the laws of standing,[62] property,[63] equitable remedies,[64] and securities law,[65] among others, could be similarly characterized.

By contrast, criminal law has simply been seen as another way to achieve environmental policy objectives by maximizing the law's potential for deterrence. The executive and legislative branches have not been

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divisions "the approval of the relevant Assistant Attorney General is necessary in a variety of designated areas before a U.S. Attorney can take significant action in a criminal matter," *id.*

61. *See generally* Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 U. FLA. L. REV. 153 (1992) (addressing problems with environmental obligations in bankruptcy that confront courts).

62. *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2146-47 (1992) (Kennedy, J., concurring). *See generally* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992) (discussing justifiability of invalidating congressional grant of standing without investigating relevant history).

63. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring).

64. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984).

65. *See, e.g.*, United Paperworkers Int'l Union v. International Paper Co., 985 F.2d 1190 (2d Cir. 1993).

carefully considering the character of particular environmental regulations (for example, health and safety versus economic) or the distinct values, purposes, and limitations of criminal law in defining federal environmental crimes. Both branches need to revisit those issues now.

Congress needs to replace the existing indiscriminate broad-brush approach by defining environmental crimes in ways that better establish criminal culpability and better identify the kind of conduct that Congress in fact expects to be prosecuted criminally. This should allow for a more effective and fair criminal enforcement program that is better focused on those instances deserving of severe criminal sanction. The result should not be less environmental criminal prosecution, but more, because of the advantages of focusing prosecutorial resources on the biggest problem areas.

The executive branch likewise needs to reform its approach, especially given the existing vacuum of settled prosecution criteria. Working together, the Department and the EPA need to establish guidelines and formal interagency memoranda of understanding that reflect a shared understanding of when circumstances justify supplementing civil enforcement with criminal sanctions. Under the current system, those who make that initial determination do not apply the same criteria that is applied by those who make the ultimate decision whether to prosecute several years later. As a result, years of limited investigatory resources are wasted, and ultimately the goodwill of government employees is lost.

To that same end, there needs to be better coordination generally between civil and criminal enforcement efforts, consistent, of course, with grand jury secrecy limitations that apply to criminal proceedings. There are currently two parallel tracks and virtually no interaction. A decision, for instance, not to pursue a criminal prosecution does not automatically trigger an immediate inquiry whether to bring a civil enforcement action instead. The case just ends.

There is likewise little effort to involve the public in the decision-making process. Criminal prosecutors are traditionally reluctant to communicate with the public regarding prosecutorial decisions. And there are generally good reasons for that reluctance to engage in a dialogue that risks trying a case in the media rather than in a court of law. When, however, as frequently occurs with allegations of environmental crime, the public harbors significant fears about related health and safety matters, the government has an added responsibility to address those public concerns. The government cannot simply decline comment on those matters. The government must, to be sure, avoid prejudicing any pending enforcement actions. But it should be able to do so without remain-

ing completely silent about existing hazards. In addition, when the case is over, particularly when the government has decided to decline prosecution, the government must make extra efforts to explain its decision making to the public, while adhering to grand jury secrecy limitations.

Finally, the Department needs to reform the Environmental Crimes Section itself. One reason why the Section is functioning so poorly is that it stopped serving its original purpose. The justification for such a section within the Environment Division was based on the need to have a primary environmental focus. Environmental laws are complex and require expertise that the United States Attorneys do not always possess or have the time to obtain. Criminal enforcement must also be closely coordinated with civil enforcement, particularly to the extent that judicial precedent interpreting statutory language in one context necessarily affects enforcement actions in the other.

These justifications remain sound, yet the Section no longer serves those ends. Most simply put, it makes no sense to have Section leadership versed primarily in criminal and not environmental law. The Section might as well be in the Criminal Division because, as has in fact happened, the reasons for an Environmental Crimes Section are not realized. Rather than a section of environmental criminal experts, it has suffered a split between Section leadership and its career staff. In addition, the coordination between the leadership of Environmental Crimes Section and those in the Environmental Enforcement Section responsible for civil enforcement has been virtually nonexistent. Their perspectives and priorities are too different. Those in United States Attorneys' offices likewise have had little reason to defer to Section leadership and more reason to rebel at having to obtain approval from them prior to bringing a case. It is absolutely essential, therefore, that the Section be headed by those with significant environmental law and criminal law backgrounds. It is likewise essential that those heading the civil and criminal enforcement efforts in the Environment Division coordinate their approaches to statutory construction generally and to specific cases in particular.

In addition, the Department needs to recognize that as individual federal prosecutors in its regional offices gain expertise in environmental law, those prosecutors are entitled to greater autonomy in their work. The Environmental Crimes Section model presumes a lack of such expertise and, on that basis, centralizes control in Washington, D.C., much to the chagrin of those in United States Attorneys' offices. But the ultimate success of the Environmental Crimes Section depends on its imparting environmental law expertise to those United States Attorneys' offices. For that reason, when such expertise is obtained, the Section should not

resist or disparage it, but reward it on a case-by-case, or attorney-by-attorney, basis.

Presently, for instance, there are identifiable, experienced federal criminal prosecutors in the field who possess considerable knowledge of environmental law. The Section need not abandon altogether its supervisory responsibilities over the work of those prosecutors, but it can temper its supervision in recognition of their expertise. Such recognition would likely make Assistant United States Attorneys more willing to devote attention to environmental cases. In addition, the lawyers in the Section could spend less time simply supervising and more time preparing their own cases for prosecution.

IV. CONCLUSION

Environmental law has assimilated so poorly into criminal law for two reasons. First, policy makers have not yet directly faced the difficult issues presented by such an assimilation, but instead have just assumed them away by criminalizing virtually all environmental violations. Policy makers in both the legislative and executive branches need to focus more carefully on the purpose of criminal law and the design of environmental laws in defining the types of conduct warranting criminal sanctions. Moreover, without a shared definition of what constitutes such conduct, the current environmental crimes controversy will continue to plague and hinder effective enforcement. More environmental criminal enforcement is therefore needed, but more than additional resources are required to make that happen.

Second, prosecutors in leadership positions lack expertise in both environmental and criminal enforcement policy. Assimilation will only occur once individual prosecutors gain expertise in *both* areas of the law. Only then can they bridge the gap between the existing camps and promote the development of settled criteria for the exercise of prosecutorial discretion in specific cases. They also then will possess the credibility necessary to reduce the adversarial dialogue currently dominating both within the government and in the government's communication with the general public.

These are not easy tasks. But, then again, little about the evolution of environmental law and its assimilation during the past twenty-five years has been easy. The task is instead necessarily as complex and intractable as the workings of the natural environment that environmental

law is itself designed to protect. Defining environmental crimes and then establishing an effective criminal enforcement program are no different.[66]

66. Just as this Essay was going to press, the Department of Justice published the results of its internal investigation of the Environment Division's Environmental Crimes Program. *See* CORCORAN ET AL., *supra* note 28. While the report generally "found no evidence substantiating the allegations that Justice Department officials or employees relied on improper criteria in prosecuting or declining to prosecute environmental crimes cases," *id.* at 12, the report did identify several significant problems—past and present—with the program. These include, inter alia, (1) a frequent absence of teamwork and mutual respect [within the Environmental Crimes Program], which has led to accusations that prosecution decisions have been made on an improper basis, *id.* at 11-12; (2) the "problem of distrust" that has long plagued relations between the executive and legislative branches regarding environmental policy, *id.* at 94-97; (3) the failure of the Environmental Crimes Section to explain formally its reasons to decline prosecution, *id.* at 115-16; (4) the prior efforts of political appointees within the Environment Division to effectuate policy changes by becoming personally involved in individual indictment decisions on an ad hoc basis, which prompted questions of improper political motivation, rather than by issuing written policy statements that could have served as a basis for principled discussion, *id.* at 133, 188-92; (5) "an unusual level of emotion and acrimony" within the Environmental Crimes Section, *id.* at 167; *see also id.* at 281; and (6) the absence of coordination between EPA and the Justice Department, *id.* at 301-02 (describing one "personal conflict" which "led to a highly adversarial exchange" and thus "destroyed the collegial atmosphere that should exist at such meetings" and "diminished the stature of . . . the Section").