

The Persistence of Vision

The Trump administration succeeded in reducing environmental criminal enforcement. Given decades of partisan infighting and under-investment, it could have been worse had not dedicated staff maintained organizational responsibilities and professional duties



Joshua Ozymy is an associate professor of political science at the University of Tennessee at Chattanooga. He focuses on criminal enforcement of environmental law in the United States and has a book forthcoming on the subject from ELI Press.

WITH such vitriol directed toward stricter environmental regulation and enforcement from the American Right, it may seem implausible that, at one historical juncture, the idea that the United States needed to criminally punish the worst violators of environmental laws enjoyed a bipartisan consensus—in fact, most of it during the anti-government 1980s. Back then, the jailing or fining of criminals of all sorts received first billing among many in Congress and the White House. And this trend extended to environmental law, with federal resources to police and prosecute environmental criminals institutionalized under Ronald Reagan. The new administration created EPA's Office of Criminal Enforcement in 1981 and the next year expanded the Department of Justice's Environment and Natural Resources Division by adding an Environmental Crimes Section. Full-time criminal investigators were hired in 1982, and sworn in as special deputy U.S. marshals from 1984 until 1988, when Congress granted them full law enforcement authority. The first felony environmental statutes came into play in 1984, with the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, followed by an upgrade of misdemeanor statutes in the Clean Water Act in 1987 and the Clean Air Act in 1990. Also in 1990, Congress acted to bolster environmental law enforcement authority with the Pol-

lution Prosecution Act, which set a goal of hiring 200 criminal investigators. Additional prosecutors and staff were hired to specialize in environmental crimes.

But then the Reinventing Government era—characterized by fears that administrative agencies were too bureaucratic, recalcitrant, and change-averse—swept up EPA during the Clinton administration. Many attempts were made to augment traditional methods of controlling environmental crime, transitioning from command-and-control and deterrence-based methods, to more incentive-based approaches. An Innovations Task Force was convened and its report, “Aiming for Excellence,” charted a new course centered on “flexible” strategies, such as incentives for pollution reduction, streamlined permitting, and performance tracks for good behavior. Despite the adoption of many of the reinventing movement's policies, EPA continued its traditional organizational mission, improving its policing abilities, hiring more professional staff, and pursuing an increased number of criminal investigations.

Criminal provisions were also expanded in major federal environmental laws through the early 1990s, giving enforcers an enhanced tool-belt to pursue increasingly complex and high-profile corporate environmental crime prosecutions. These factors resulted in a marked increase in the volume of EPA criminal investigations and related prosecutions, and in the ability of staff lawyers to win significant penalties against high-profile corporate

environmental criminals. The federal apparatus to police and prosecute environmental crimes had grown, professionalized, and institutionalized itself—but these factors helped to sour many Republicans on the value of strong criminal enforcement. There was little any agency could do, as the feeling was widespread across the party. From the Republicans' mid-1990s takeover of the House and Senate under the Contract With America to the anti-regulatory George W. Bush administration of the 2000s, the GOP began to renounce the idea of reinventing environmental enforcement, seeking instead to hobble government by relaxing vigilance against polluters.

THESE moves foreshadowed the Trump era, when traditional methods to control these agencies quickly devolved into a nasty, public street fight. Trump launched a bombastic assault on key environmental regulatory agencies tasked with enforcement, particularly EPA and the Department of Justice. Guaranteeing he would reduce EPA to “little tidbits,” he handed down budget cuts, appointed a climate change denier to lead the agency, failed to fill key posts, and banished key experts from EPA advisory boards. His administration also rolled back environmental safeguards and Obama-era climate change provisions in a concerted effort to reduce the agency’s power and enforcement reach, causing some 700 staff to depart. We now have damning evidence gathered by the House Oversight and Reform Committee that the institutional dysfunction inside DOJ was so severe

that Trump pressed officials, including Jeffrey Clark, then head of ENRD, to aid him in pressuring DOJ leadership to assist in Trump’s efforts to overturn the results of the 2020 election.

During his term, Trump acted to limit the enforcement capabilities of these key agencies. Trump instituted limitations on environmental permits and clean water rules, and implemented other regulatory mechanisms that hampered the agency. DOJ was stymied with restrictions on traditional prosecutorial tools, such as negotiated environmental

mitigation plans, supplemental environmental projects, the ability to fine companies previously fined by state enforcement agencies, and other enforcement mechanisms that were long-standing practice within ENRD. The consequences of these actions became obvious fairly quickly, where by 2018, EPA obtained the lowest level of injunctive relief in over 15 years. In that same year, the number of DOJ environmental crime prosecutions adjudicated that stemmed from EPA criminal investigations reached its lowest level since 2002.

While Trump quickly moved to dismantle the ability of key agencies to enforce the law, his efforts ran up against the limitations of the checks and balances inherent in the U.S. political system. Presidential power, no matter how effectively wielded, is ultimately conditioned on many factors, including the inertia of cases that are already in the pipeline, the professional autonomy afforded and continually secured by prosecutors and EPA investigative staff, and the power of the courts to act on their own as an equal branch of government. Authority is also affected by the politics of the budgetary process, coalitional support afforded to environmental agencies in Congress, and the backing from interest groups and environmental organizations and the political advocacy community. These factors buffered—but did not completely blunt—the administration’s efforts. Buffering happened in myriad ways, such as lawsuits brought by environmental groups that overturned many of the Trump DOJ’s legal actions, the refusal of Congress to approve a proposed 31 percent budget cut for EPA, the courts overturning efforts by administrators Scott Pruitt and Andrew Wheeler to replace scientists on key advisory boards with industry sympathizers, and legal action by California and 22 other states to prevent the Trump administration from disallowing them from setting stricter vehicle emissions rules.

All these factors are important for explaining why a president, no matter how determined, is rarely in a position to completely torpedo environmental enforcement. But one of the most important and overlooked is the role of the conscientious civil servant. Careerists secure power and autonomy by understanding how to navigate the political system—sometimes better than presidential appointees—often biding time to carry out organizational responsibilities when propitious. Because criminal investigators and prosecutors require professional discretion to perform technically complex jobs,

Continued on page 30

Trump launched a bombastic assault on key environmental regulatory agencies tasked with enforcement, particularly EPA and the Department of Justice

Look at Resources, Not Case Numbers

In evaluating environmental criminal enforcement, the popular approach is to focus on numbers of cases brought and fines and other sanctions imposed. This might not be the best way to assess efforts to address criminal violations of environmental law. Here, the case numbers have long been small, making it statistically risky to attribute meaning to data variations from year to year.

Focusing on the number of cases and related information also tempts one to attribute ups and down to changes in the White House. However, investigating and prosecuting environmental crimes is largely apolitical work, carried out by career employees.

But there is one important thing the overall case numbers do reveal: for decades, the resources for federal environmental criminal enforcement have been more or less static—as well as woefully insufficient.

The number of prosecutors in the Justice Department’s Environmental Crimes Section has remained about the same since 1991. Yet the workload has expanded substantially over the years, with significant statutory areas of responsibility added in 2004 (wildlife), 2014 (animal cruelty), and 2015 (workplace safety). In 1997, when I was chief of ECS, EPA had 200 criminal investigators. Today, there are 160. In contrast, the Netherlands—a nation of roughly 17.5 million people—has some 500 investigators devoted to environmental criminal enforcement.

This situation does not serve anyone well—not enforcers, not the regulated community, and, ultimately, not the public. It means that the federal government’s very limited resources are spent reacting to whatever comes in the door. And a focus on numbers can create pressure to take what has come in and



Steven P. Solow
Partner
Baker Botts LLP

“Chronic resource constraints make it nearly impossible for the government to be anything more than a case processor. This precludes the important role of the government as a problem solver”

pursue it, even if resources might be better spent elsewhere.

Some in the regulated community might be concerned about increasing the federal government’s enforcement resources. But doing so could benefit regulated parties, by speeding up the resolution of investigations.

In 1997, talented paralegals could organize the review and analysis of a typical investigation’s documents. Today, an average case may involve millions of documents. The government does not have the resources to promptly review such information. This not only limits the government’s ability to handle sophisticated cases, but it also means that investigations that result in declinations can still be costly multi-year quagmires for the government and regulated entities alike.

Chronic resource constraints make it nearly impossible for the government to be anything more than a case processor. This precludes the important role of the government as a problem solver.

To be a problem solver, the government needs to identify the root causes of crime. Why are some environmental programs subject to repeated criminal violations? Are there reforms that could help reduce the susceptibility of certain environmen-

tal regulations to criminal misconduct? The government lacks the resources to unpack the impact of enforcement cases on compliance, or the lessons these cases might hold for regulators and regulated parties alike.

Doing so could illuminate how to design the government’s efforts (including laws, regulations, guidance, and inspections) to support compliance and better insulate environmental laws and rules from criminal misconduct. It could also inform regulated parties how to structure their internal compliance programs to better prevent, detect, and respond to criminal misconduct.

Unfortunately, focusing on case numbers or penalty amounts to assess the rigor or effectiveness of federal enforcement programs will remain a popular exercise. Those who care about the end goals of criminal enforcement—such as deterring intentional violations, creating a level playing field to benefit organizations that have invested in compliance, and guiding the development of sustainable compliance programs—should attempt to see past those numbers to the underlying problem: more than three decades of resource constraints continue to limit the value of this important work.

EPA and DOJ retain a high degree of freedom compared to other agencies, say the Social Security Administration, whose statutory obligations and path to meeting them are more straightforward. A comprehensive account of adherence to the law in all its dimensions must consider how agencies are obligated to carry out statutory commands and duties and abide by their own long-established procedures and carefully reasoned policies—practices which business depends on for regulatory certainty over time.

There have been numerous academic studies that point to civil servants conscientiously following the mission of their agencies and the mandates and restrictions of relevant statutes, regulations, and executive orders and similar instruments—while at the same time responding to agency leadership’s policies on implementing and enforcing the laws and the president’s policies. According to 5 U.S. Code

Section 3331, all civil servants take an oath when sworn into duty that reads in part: “I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic.” The interplay of these priorities within the broader context of various political principals, such as the president, Congress, and the courts, all competing to influence agency outcomes, helps to explain how and why EPA and DOJ have maintained a commitment to criminal enforcement across administrations. In the case of the Trump-era enforcement rollbacks, long-standing agency responsibility to stringently enforce federal law came into conflict with the administration and resulted in a careful subversion of the president’s agenda on many fronts, most saliently when DOJ attorneys refused to follow Trump’s directives to overturn the presidential election. Similarly, Trump’s assault on enforcement could have been substantially worse had it not been for the professionalism of career civil servants within EPA and DOJ to uphold their respective organizational missions and statutory responsibilities, despite overwhelming pressure from the administration. Unlike in the Clinton era, it was much tougher to maintain these prerogatives, as Trump sought not a reinvention of the way these agencies work, but acted to effectively delegitimize and gut them.

Section 3331, all civil servants take an oath when sworn into duty that reads in part: “I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic.” The interplay of these priorities within the broader context of various political principals, such as the president, Congress, and the courts, all competing to influence agency outcomes, helps to explain how and why EPA and DOJ have maintained a commitment to criminal enforcement across administrations. In the case of the Trump-era enforcement rollbacks, long-standing agency responsibility to stringently enforce federal law came into conflict with the administration and resulted in a careful subversion of the president’s agenda on many fronts, most saliently when DOJ attorneys refused to follow Trump’s directives to overturn the presidential election. Similarly, Trump’s assault on enforcement could have been substantially worse had it not been for the professionalism of career civil servants within EPA and DOJ to uphold their respective organizational missions and statutory responsibilities, despite overwhelming pressure from the administration. Unlike in the Clinton era, it was much tougher to maintain these prerogatives, as Trump sought not a reinvention of the way these agencies work, but acted to effectively delegitimize and gut them.

ENVIRONMENTAL crime investigations and prosecutions can take many years and span multiple presidential administrations, meaning career staff must persevere in seeing cases through, under varied levels of presidential and congressional support. In this context, perhaps the most politically challenging action EPA and DOJ can take is to pursue charges against well-resourced corporate environmental criminals. A few high-profile prosecutions that took place over a lengthy time period help to illustrate these points, including the prosecutions of United Industries, Monsanto, and Volkswagen AG, and serve well to show career staff’s persistence of vision.

On December 8, 2017, United Industries pleaded guilty to dumping parts into the Port of Long Beach to conceal fraudulent overcharges for repairs that were never undertaken. The company admitted to fraudulently replacing parts on railcars that needed no repairs, making random repairs without proper inspections, and dumping parts into the navigable waters of the United States, earning the firm at least \$5 million in illegal profits. The company pleaded guilty to depositing refuse in the navigable waters of the United States in violation of the Rivers and Harbors Act and was sentenced to a \$5 million criminal fine and \$20 million in restitution. In this particular case, the illegal activity commenced between 2008-14 during the Obama administration, and the prosecution carried over with sentencing occurring under Trump.

During the Obama administration, the Monsanto Company was prosecuted for spraying a pesticide called PennCap-M, prohibited after 2013, to its fields in Maui in 2014. The company also put its workers at risk by illegally directing them to re-enter the affected areas seven days later, knowing they should have been prohibited from reentry for at least 30 days. The company pleaded guilty to violations of the Federal Insecticide, Fungicide, and Rodenticide Act and entered into a deferred prosecution agreement for illegally storing banned pesticides in violation of RCRA. While Trump was in his last weeks in office, the company paid a total of \$10.2 million in fines and community service payments.

On March 10, 2017, Volkswagen AG pleaded guilty to conspiracy to defraud the United States, wire fraud, obstruction, importation of merchandise by means of false statements, and violations of the Clean Air Act in relation to its roughly ten-year conspiracy to import diesel vehicles into the United States with software enabled to cheat emissions-testing equipment. The

Continued on page 32

Environmental crime investigations and prosecutions can take many years and span multiple presidential administrations, meaning career staff must persevere in seeing cases through

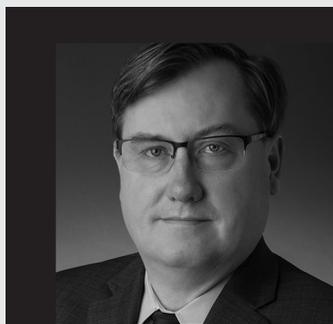
Where Are Resources to Enforce Law?

WHEN Joe Biden came into office, he promised to make EPA enforcement a priority, particularly criminal enforcement. Over the last year, the agency and the Justice Department have made a series of high-profile announcements, ranging from a heightened focus on prosecuting individuals to “proactive” investigations in environmental justice communities to prevent crimes. This aggressive posture masks a deeper reality: the Biden EPA has yet to seek significantly more resources for criminal environmental enforcement.

The issue is important not only for the environment, but for the regulated community. Robust environmental enforcement creates a level playing field for companies that invest billions in compliance and a cleaner environment. Law enforcement protects against unfair competitive advantages captured by that small group of companies and individuals tempted to cheat and circumvent environmental laws to gain profits, customers, and market share. The role of appropriate law enforcement guardrails becomes even more important in protecting the compliance investments of companies that do the right thing.

Law enforcement oversight requires significant resources. To prosecute environmental crimes, the Justice Department generally depends on EPA for referrals. Referrals require investigations that can be time consuming and labor intensive. Agents, analysts, and staff collect and analyze documents and data, interview witnesses, and take other investigative steps. The charging theories for environmental crimes can also be quite complex under the federal environmental statutes and Title 18, creating a layer of legal analysis and review that might be unnecessary in prosecuting other federal crimes.

Despite the tough talk on en-



Justin A. Savage

Global Co-Leader
Environmental Practice
Sidley Austin LLP

“To date, it is clear that the Biden administration has not made it a priority to increase the enforcement of environmental law”

forcement, the Biden administration’s budgetary requests suggest that policy and rulemaking, rather than enforcement, are the key priorities. Consider EPA’s requested budgets for criminal enforcement staff. The agency’s FY 2022 budget request proposed an increase of 32 fulltime equivalents for criminal enforcement while requesting 121 new FTEs for the Office of Policy, which addresses significant issues including climate change and environmental justice. But is policy four times more important than prosecuting criminal violations of environmental law?

The final appropriated budgets from Congress are even more telling. EPA’s overall criminal enforcement budget remains flat. Congress appropriated \$51.3 million in FY 2021 and the FY 2022 continuing resolution, an increase of just 2 percent.

One of the strategies developed for diminished resources under President Obama’s administration was to argue that more could be accomplished with less resources by using what it labeled Next Generation Compliance. That term refers to a set of principles that rely on clarity in regulations, gathering electronic compliance data, and third-party checks on compliance such as audits. While well-intended, Next Generation was not applicable to criminal

enforcement. Criminal actors will violate a regulation no matter how clear. Those operating outside of the regulatory system do not gather or report compliance data. Next Generation Compliance’s focus on the civil enforcement program left criminal enforcement with no strategy and no management attention.

EPA’s case statistics thus far in the Biden administration show a marked decline in enforcement. In FY 2021, EPA-opened criminal investigations declined about 50 percent from the 247 in FY 2020. The agency’s criminal investigators remained in the field during the Covid-19 pandemic, so that cannot explain the drop. Criminal fines and restitution went down over the same period, from \$46.2 million to \$25.2 million.

Of course, other factors play a role in enforcement. Biden’s nominee for the agency’s Office of Enforcement and Compliance Assurance, David Uhlmann, has not yet been confirmed by the Senate, depriving EPA enforcement of political leadership and policy direction.

It is fair to ask about the alignment between ambitious rhetoric and enforcement resources. Budget is policy. To date, it is clear that the Biden administration has not made it a priority to increase the enforcement of environmental law.

company agreed to pay a \$2.8 billion criminal penalty. In a related case, federal prosecutors obtained a \$35 million criminal penalty against IAV GmbH, the company that designed and engineered the emissions-cheating systems. A variety of executives involved in the conspiracy remain fugitives of justice in the United States and appear on EPA's Fugitives List.

While Volkswagen was sentenced under Trump, the investigation and prosecution reach back to 2015, when the Obama EPA issued a notice of violation of the CAA. The next year, DOJ filed a complaint against the company on behalf of EPA, and on June 28, 2016, the company entered into a settlement to partially resolve these claims, pleading guilty and paying the multi-billion-dollar penalty the following year.

The procession of these cases shows the consistent work of EPA criminal investigators and DOJ prosecutors, collaborating and working through the courts to achieve organizational goals across very different presidential administrations. It is not so much the case that a positive outcome at sentencing should automatically garner any particular president full credit for that outcome per se, as much as it shows how diligent staff work through the process to accomplish their organizational prerogatives and meet their statutory obligations and responsibilities.

Looking at outcomes in environmental investigations and prosecutions undertaken by EPA and DOJ during the Trump era, we can see environmental criminal enforcement agencies withering but not breaking under the impact of the president's anti-environmental agenda, thereby achieving institutional goals grounded in law and long-standing practices that businesses depend on for regulatory certainty. EPA's Summary of Criminal Prosecutions Database shows that an average of 457 environmental prosecutions per term were adjudicated while Obama was in office. Under Trump, one can see prosecutions adjudicated slide fairly rapidly, with a total of only 282 over his single term.

Looking at sentencing patterns, under Obama, prosecutors averaged 1,268 years probation assessed at sentencing per term. During Trump's term, approximately 700 years of probation were assessed to defendants at sentencing. Under Obama, prosecutors obtained an average of 420 years of incarceration per term. Under Trump, prosecutors obtained 289

years at sentencing. The total of monetary penalties at first glance seems to show an opposite trend. While Obama was in the White House, prosecutors secured an average per term of about \$256 million in monetary penalties against individual defendants and over \$561 million per term against companies at sentencing. It is important to note that the prosecution of BP for the Deepwater Horizon disaster resulted in \$4 billion in criminal fines. Including this in the figure raises monetary penalties under Obama significantly, in excess of \$5.6 billion.

Under Trump, \$2.97 billion in monetary penalties, including fines, assessments, community service payments, and restitution, were assessed at sentencing against companies, and \$186 million against individuals. However, of Trump's total monetary penalties, \$2.8 billion came from the Volkswagen AG prosecution, which began under Obama—underscoring the lesson that career staff are able to carry over complex cases across presidential administrations. And outcomes may have been significantly worse had career civil servants not diligently pursued criminal investigations and prosecutions in this less-than-favorable atmosphere.

WHAT can be gleaned from these data is that criminal prosecution hardly thrived under Trump, but it could have been much worse had career civil servants completely succumbed to the weight of the administration's pressure. Their ability to carry out and see investigations and prosecutions to fruition shows their ability to persist and maintain important work across presidential regimes, no matter how hostile—to follow the Constitution and law and regulation duly enacted under the federal charter, as they swear upon entry into service. The vast majority of these actions flew under the radar, but we have seen other examples of open resistance, rare for current federal employees. For example, in 2017, outgoing Obama EPA head Gina McCarthy told staff to prepare and plan for the onslaught from the incoming Trump administration. Thomas Sinks, director of EPA's Office of the Science Advisor, issued a rare and public dissenting scientific opinion. EPA staff openly prepared to fast track the undoing of many Trump-era policies

Criminal prosecution hardly thrived under Trump, but it could have been much worse had career civil servants completely succumbed to the weight of the administration's pressure

and rules as soon as Biden took the oath of office. And early on, hundreds hit the streets of Chicago to protest Scott Pruitt's confirmation, including many current EPA workers—a protest organized by the American Federation of Government Employees, which also helped create a Save the U.S. EPA campaign. Retired and former EPA employees also pitched in by creating Save EPA, an organization founded to resist Trump's agenda.

When looking at longer-term trends of disinvestment in environmental criminal enforcement, it appears to be an achievement that these agencies remain functional at this juncture. At the same time, we can recognize that it has been some time since any president has made significant, long-term investments in criminal enforcement of environmental laws. Environmental prosecutors and enforcement staff have been conditioned for decades to work under stagnant resources and inconsistent political support, if not outright animus at times. To put it plainly, the apparatus to police and prosecute environmental crimes has been underfunded for decades, under both Democratic and Republican presidents. While the long-term support for these agencies seems demoralizing, the lack thereof has the effect of hardening career staff to political opposition, which helps them persist under duress.

Budget and staffing numbers further reveal the sad picture of structural under-investment, corroding an important governmental function. Taking inflation into account, EPA's overall budget is significantly worse than it was in 1980. Despite growing responsibilities, the agency's workforce has declined over the years to about the level of the late 1980s. This movement of personnel illuminates a longer-term trend of declining investment, understaffing, and low morale.

THESSE considerations place the Trump administration's record in a broader picture of the failure of Congress and the White House for almost three decades to consistently take the criminal enforcement of federal environmental law seriously. To do so would require updating most major statutes and tailoring them to consider new technologies. Policymakers must also look to how major

statutes might be improved and implemented more systematically to address climate change and environmental justice. Felony provisions should also be revisited, in light of strong incentives for powerful corporate actors to resist and undermine regulation, both formally and through technical and practical enforcement loopholes that have become chronic and pervasive.

Once in office, the Biden EPA moved swiftly to dismantle many of Trump's actions, including working to remove the limitations on environmental permitting, clean water rules, and other restrictions, while

DOJ managed to reinvigorate the use of supplementary environmental projects, environmental mitigation plans, and other prosecutorial tools. Biden's 2022 budget proposal of \$11.2 billion and 15,324 staff for EPA represents the most significant increases in over a decade, while ENRD's budget would prospectively rise over 20 percent and exceed \$133 million. The rhetoric of criminal enforcement is also changing in line with the traditional organizational missions of these agencies, as evidenced by statements given by Assistant Attorney General for

ENRD Todd Kim, and ECS chief Deborah Harris, who have publicly used language to describe their approach to include vigorous enforcement, more sticks and fewer carrots, and the need for criminal prosecution as a powerful deterrent to potential environmental offenders.

Congress will have to significantly enhance the meager criminal enforcement budgets at EPA and DOJ if it is to expect environmental law to have any teeth in the future. Dedicated civil servants managed to persist through the Trump administration, but years of understaffing, low budgets, and political infighting have reduced morale. How these agencies and their staff will move ahead depends on whether the Biden administration can boost confidence through budgetary and staffing increases and a strong show of political support. It does not seem realistic that Congress will ever return to enough of a consensus to find common ground and bipartisan backing for environmental law enforcement, as it did in the past, but the contra argument is these agencies have become accustomed to this political and administrative legal environment and will find ways to manage their responsibilities accordingly. **TEF**

Congress will have to significantly enhance the meager criminal enforcement budgets at the Environmental Protection Agency and Justice Department if it is to expect environmental law to have any teeth