

Structures of Environmental Criminal
Enforcement

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INTRODUCTION

A single question dominates the much discussed recent growth of criminal enforcement of environmental laws: Is criminal environmental law a species of environmental law or a species of criminal law? These are distinct and generally self-contained bodies of law — each has its own set of statutes, its own division in the Justice Department, and its own course in law school. Although most areas of law, from bankruptcy through corporations to tax, have “integrated” environmental law with reasonable success, the criminal law has not.¹

One might also observe that the criminal law *has* integrated other regulatory schemes more successfully than it has environmental law. Criminal enforcement of antitrust, securities, or tax laws generates far less controversy and dismay than does criminal enforcement of environmental laws.

As an historical matter, environmental criminal enforcement has developed more as a type of environmental law rather than as a type of criminal law. In general, prosecutors have not turned to environmental violations as additional crimes; rather, environmental enforcers have turned to criminal prosecutions for additional enforcement. Likewise, the criminal enforcement regime was added to supplement an existing civil enforcement regime, and criminal

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1. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2417-19 (1995).

enforcement is seen as a harsher substitute for civil enforcement.² Viewing the problem from the perspective of *environmental* enforcement, criminal sanctions are just one more, unfortunately underutilized, arrow in the enforcement quiver. But for many this attitude — and the failure to see criminal enforcement as essentially different from other enforcement tools — leads to inappropriate prosecutions.

This Article discusses structural protections against prosecutorial overreaching. It particularly focuses on the allocation of lawyering tasks, namely investigative and prosecutorial responsibility, among the Environmental Protection Agency (“EPA”), Main Justice, and the U.S. Attorneys Offices (“USAOs”). The division of labor between Main Justice and the USAO has been a source of enormous debate, notably through oversight investigations and hearings held by Representative John Dingell.³ This Article examines this division, but concentrates on the role of *EPA* lawyers in criminal prosecutions. In particular, it asks whether *EPA* should handle criminal prosecutions, without the involvement of the Department of Justice (“DOJ”). This Article concludes that it should not, because shared control is an important structural protection against prosecutorial overreaching which is accompanied by few costs.

2. See generally Daniel Riesel & Arthur Jacobson, *The Criminalization of Environmental Law*, DIRECTORS & BOARDS, Summer 1992, at 28.

3. For contrasting views of the performance of DOJ’s Environmental Crimes Section (“ECS”) and the appropriate amount of centralization of environmental prosecutions, compare STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY & COMMERCE, DAMAGING DISARRAY: ORGANIZATIONAL BREAKDOWN AND REFORM IN THE JUSTICE DEPARTMENT’S ENVIRONMENTAL CRIMES PROGRAM, 103D CONG., 2D SESS., (1994) [hereinafter DAMAGING DISARRAY] with William T. Hassler, *Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes*, 24 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,074 (Feb. 1994). The three-year controversy over the ECS and centralization of environmental prosecutions was brought to a close by: (1) the April 1994 resignation of ECS chief Neil Cartusciello, (2) an August 23, 1994 amendment to the U.S. Attorney’s Manual devolving prosecutorial decision-making back to the USAOs, and (3) the November 1994 elections. The struggle is ably detailed in Theodora Galacatos, Note, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587 (1995).

I. MINIMIZING THREATS OF PROSECUTORIAL OVERREACHING

Federal environmental statutes provide for criminal sanctions.⁴ Persons who "knowingly" violate certain provisions can be fined, imprisoned, or both.⁵ As the following table indicates, the last decade and a half has seen a striking increase in the number of criminal prosecutions.⁶

	EPA Agents	EPA Cases Init.	EPA Referrals	Indict- ments	Convic- tions	Sent -ences*	Fines**
1982			20	14	11	0	
1985				40	37	5.4	.57
1988			59		50	15.4	
1990	51	112	56	100		75.3	5.5
1991	62	150	81	104		80.3	14.1
1992	72	203	107	150		94.6	37.9
1993	110	410	140	161		74.3	29.7
1994	123	525	220	250		99.0	36.8

* Years of incarceration

** Millions of dollars

This rise in prosecution has been accompanied by growing concern over prosecutorial overreaching.

4. The focus in this Article is exclusively on federal environmental enforcement. The general themes and concerns are identical at the state level, but many of the specifics vary.

5. *E.g.*, 42 U.S.C. § 6928(d), Resource Conservation and Recovery Act § 3008(d) (1994) ("RCRA"); 33 U.S.C. § 1319(c), Clean Water Act § 309(c) (1994) ("CWA"); 42 U.S.C. § 9603(b), Comprehensive Environmental Response, Compensation and Liability Act § 103(b) (1994) ("CERCLA"); 42 U.S.C. § 7413(c), Clean Air Act § 113(c) (1994) ("CAA"). The provisions for civil liability do not require any particular state of mind. *See, e.g.*, 42 U.S.C. § 7413(b), CAA § 113(b) (1994).

6. Hard, consistent numbers are hard to come by, and the figures here are somewhat inconsistent with what can be found in other sources. This table is drawn from the following sources: David B. Spence, *Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century*, 20 COLUM. J. ENVTL. L. 145, 146 n.6 (1995); U.S. DOJ NEWS RELEASE, *Department of Justice Gets Tough on Environmental Criminals*, at 4 (Dec. 27, 1989); U.S. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT, FY 1994, at 4-3, Figure 4-2 (1995) [hereinafter 1994 EPA ENFORCEMENT REPORT].

A. *Risks of Prosecutorial Excess*

The marriage of criminal and environmental law presents three problems. First, it is a common and reasonably well-founded complaint that whether a case is brought as a civil or criminal action depends largely on happenstance and which investigator happens to get the file in the first place.⁷ Indeed, one former prosecutor has likened environmental prosecutions to criminal adultery prosecutions. They “have at least three things in common. Enforcement is selective and erratic and the consequences are often harsh.”⁸ The two other problems must be stated in the alternative: (1) there are too many criminal prosecutions,⁹ and (2) there are too few.¹⁰

7. See, e.g., 1 *LAW OF ENVIRONMENTAL PROTECTION* § 8.01[9], at 8-117 (Sheldon M. Novick et al. eds., 1995); Kevin Gaynor & Thomas R. Bartman, *Frontier Justice*, *ENVTL. F.*, Mar.-Apr. 1991, at 23, 24 (“whether a violation is treated criminally, civilly, or administratively is more a function of what type of investigator first learns of the infraction and in which judicial district it occurs, rather than its environmental severity”); 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, 913 (1991) (noting that “the way a case is handled depends on whose desk the case first arrives”).

8. Daniel Riesel, *Criminal Prosecution and Defense of Environmental Wrongs*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,065, 10,065 (Mar. 1985).

9. In the words of one former Environment Division official:

Our system for punishing criminal environmental offenses is supposed to send a deterrent message: If you do something seriously wrong, the government will impose appropriately severe penalties [However,] the deterrent message has been garbled. In a few cases, defiantly bad actors have skated free or had their wrists slapped; in too many others, prosecutors have gone scorched-earth over comparatively trivial and unintended misconduct Obviously, almost everyone tries to avoid violations of the environmental laws — at least the businesses I’ve worked with. But just as obviously, violations of one sort or another occur from time to time at most major facilities. When laws are complex and subject to varying interpretation, well-intentioned people can make mistakes.

Donald A. Carr, *Prosecutors Out of Control*, *ECO*, June 1993, at 56. See Michael B. Gerrard, *Who Goes to Jail? Understanding Criminal Liability for Wastewater Violations*, *CLEARWATERS*, Winter 1996, at 8.

10. See, e.g., *DAMAGING DISARRAY*, *supra* note 3; Marianne Lavelle & Marcia Copley, *Hill to Examine Environmental Prosecutions*, *NAT’L L.J.* June 28, 1993, at 5.

Without choosing between these two (but noting in passing that if these are the objections, the program may be doing exactly what it should be), this Article focuses on the first concern. The underlying issues here have been well-expressed by many writers, most recently and thoroughly by Richard Lazarus from the academic's perspective¹¹ and Judson Starr from the practitioner's.¹² We assume, for good reason, that criminal prosecutions have firm moral and legal underpinnings. Conduct meriting criminal prosecution is plainly illegal, morally wrong, seriously harmful, and pursued with a culpable state of mind. Yet environmental law is notoriously and increasingly complex, ambiguous, and aspirational, and it prohibits a great deal of conduct that only poses a *risk* of harm or causes no harm in itself but becomes harmful only if combined with a myriad of other similar actions. Therefore, environmental criminal prosecutions pose a particular risk of inconsistency with the normative foundations of the criminal law.¹³

The danger of inappropriate criminal prosecution that arises from the nature of the environmental regulatory regime is exacerbated by

11. See Lazarus, *supra* note 1; Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867 (1994). For an especially strong statement of the inappropriateness of criminal environmental prosecutions across the board, see Spence, *supra* note 6, at 172-81 (arguing that criminal sanctions for environmental violations are not only completely unnecessary but also badly counterproductive).

12. See, e.g., Judson Starr et al., *Prosecuting Pollution*, LEGAL TIMES, May 31, 1993, at 6; Starr, *supra* note 7; Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,096, 10,104 (Mar. 1990) ("one does not have to *be* bad to *do* bad when it comes to environmental crimes") (emphasis in original).

13. These sorts of concerns are hardly limited to environmental law. Similar hesitations have clouded criminal prosecution in other nontraditional areas. More than three decades ago Sanford Kadish sounded most of these themes in an article about the difficulties with criminal enforcement of economic regulations such as the antitrust laws. See generally Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). Kadish pointed out the problems with criminal enforcement when the underlying substantive prohibitions are extremely vague, defendants generally take the corporate form and so the traditional sanctions lack their usual efficacy, and the proscribed behavior is not generally seen as morally reprehensible. *Id.* at 427-40.

the fact that what drives criminal enforcement in the environmental arena is its powerful deterrent effect. In practice, the criminal enforcement regime in environmental law does not exist to identify and prosecute the 200 or so worst offenders each year—those who cannot be made to comply except via the harshest sanction. It is not about ensuring compliance directly. Rather, it achieves compliance indirectly via the fear of penal sanction in those who *might be* prosecuted. As the attention lavished on the still quite unusual criminal cases demonstrates, corporate managers who perceive civil penalties as a cost of doing business suddenly sit up and take notice when there is a chance they themselves might go to prison.¹⁴ As is often pointed out, prison sentences are the one sanction that cannot be passed on to consumers or shareholders.¹⁵

14. On the government's deterrent goals, see F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,478, 10,480 (Dec. 1987); *EPA's Criminal Enforcement Program: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 173 (1993) (statement of Webster L. Hubbell, Assoc. Att'y Gen.) ("Nothing works better at getting managers to pay attention to environmental compliance than the prospect of going to prison . . .") [hereinafter *1993 Dingell Hearing*].

15. Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 *LOY. L.A. L. REV.* 1133, 1158-59 (1986); James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 *GEO. WASH. L. REV.* 916, 922 (1991).

A second justification for criminal environmental prosecutions is also sometimes found in their educational or denunciatory value. See generally Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 *GEO. WASH. L. REV.* 889 (1991). The choice of the criminal sanction registers social disapproval and teaches that environmental violations are serious indeed. This rationale can be, though it is not necessarily, simply a type of deterrence argument. That is, the reason we want to denounce and teach in this way is that potential violators, having heard the denunciation and learned the lesson, will comply. "If [the denouncer] believes that the point of declaring society's non-tolerance of this or that sort of law-breaking is to strengthen people's disapproval of it, and so reduce its frequency, he is simply a reducer [i.e., a believer in deterrence] who believes in a particular technique." NIGEL WALKER, *PUNISHMENT, DANGER, AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE* 22 (1980), quoted in JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW: CASES AND MATERIALS* 43 (2d ed. 1991).

In any event, the denunciatory justification, whether it rests on an instrumental or a moral theory of punishment, is less likely to promote overprosecution

A preoccupation with the deterrent effect of harsh punishment is dangerous, because for a deterrence regime to function it is unnecessary, indeed it would be foolish, to prosecute all those who have committed equally serious violations. By definition, such evenhandedness is wasteful and duplicative. In addition, a deterrence rationale for punishment supports extraordinarily severe penalties. Thus, a single-minded concern with deterrence threatens to make prosecutors lose sight of critical constraints. To use an example my law school criminal law professor offered: If we really wanted to eliminate illegal parking, and deterrence was the only consideration, we need only cut off the hands of one illegal parker.¹⁶ We do not do so, of course, because deterrence is not the only consideration. Concern for proportionality, equal treatment, and culpability, along with a moral hesitation over such raw instrumentalism, limit the range of possible punishments.¹⁷ An exclusive focus on deterrence, unmodified by these other concerns, clearly risks excessive criminalization.

I am not convinced that the list of prosecutorial abuses is all that long. Many writers seem concerned more with the *threat* than the reality, and the number of actual prosecutions that are deemed to have been excessive is minuscule. For example, Richard Lazarus's case studies all involve decisions *not* to prosecute that on their surface appear to be spineless concessions to lawbreakers but turn

than is the justification based on the deterrent effect of severe punishment. Harsh penalties will educate up to a point, but if overdone they will simply backfire. The authorities can only get so far ahead of societal consensus. Were this the sole justification for criminal environmental prosecutions, there would be a good deal less to fear with regard to prosecutorial excess.

16. The professor was Norval Morris. Cutting off hands (or heads) can also be used as an example of an incapacitation strategy run amok. James Q. Wilson observes:

Incapacitation cannot be the sole purpose of the criminal justice system; if it were, we would put everybody who has committed one or two offenses in prison until they were too old to commit another. And if we thought prison too costly, we would simply cut off their hands or their heads. Justice, humanity, and proportionality, among other goals, must also be served by the courts.

JAMES Q. WILSON, THINKING ABOUT CRIME 145 (rev. ed. 1983).

17. See Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1435 (1995).

out to be instances where the prosecutors appropriately stayed their hands.¹⁸ These are examples that the current system works, not that there is something wrong. In December 1995, the Washington Legal Foundation ("WLF") filed a petition with EPA objecting to overzealous enforcement.¹⁹ The petition charged that "EPA is increasingly foregoing administrative and civil remedies for environmental infractions and is arbitrarily seeking felony criminal indictments for even minor offenses."²⁰ Yet the petition identified only four criminal indictments obtained by DOJ since 1989 that it alleged were inappropriate.²¹ While the WLF may not have been trying to be comprehensive, one cannot help but think that if even the WLF can find only four such cases, perhaps the problem is not so great.

Notwithstanding the foregoing, just examining actual prosecutions is probably misleading. The government may be using the *threat* of criminal prosecution to extract civil settlements from potential defendants. Even if the inappropriate prosecution is rare, the possibility of overprosecution must be taken seriously.

In addition, a few real-world developments hint that the threat is growing. First, the resources allocated to criminal prosecution have recently been significantly increased. EPA hired its first criminal investigators in 1980; by 1990 one hundred people were conducting criminal investigations, including forty-seven special agents.²² That year the Pollution Prosecution Act of 1990 mandated a four-fold increase in investigators.²³ While EPA does not quite have the full 200 criminal investigators it was supposed to have by FY 1996,²⁴ it had 150 investigators by Summer 1996, was about to hire 21 more, and hoped to have the full complement of 200 by October

18. See Lazarus, *supra* note 1, at 2409-10, 2496-507 (examining three case studies of DOJ criminal cases).

19. *WLF Says EPA Rule on Warnings Needed to Address "Overzealous" Investigators*, Daily Env't Rep. (BNA) (Dec. 22, 1995), available in LEXIS, Envirm. Library, BNAED file, (1995 DEN 246 d11).

20. *Id.*

21. *Id.*

22. Strock, *supra* note 15, at 917-19.

23. Pollution Prosecution Act of 1990, Pub. L. No. 101-593, 104 Stat. 2962 (codified at 42 U.S.C. § 4321 (1994)).

24. 1994 EPA ENFORCEMENT REPORT, *supra* note 6, at 4-2.

1996.²⁵ It is an inexorable law of bureaucracy that if large numbers of people are assigned to find something, that thing will be found, whether it is there or not. Thus, the increase in criminal investigators and prosecutors means that the government will bring more criminal prosecutions. Second, if one believes, as I do, that enhanced criminal enforcement *is* an effective deterrent, then compliance ought to be increasing. If compliance is increasing, the number of appropriate criminal prosecutions should be decreasing. Yet that is not the case. No doubt this is primarily due to the fact that criminal prosecutions were artificially low in the past, but one cannot but worry about the future.

Finally, government figures indicate that between 1992 and 1994 indictments in environmental cases increased from 150 to 250, but total prison sentences rose only from 94.6 years to 99 years, while fines fell from \$37.9 million to \$36.8 million.²⁶ Thus, punishment for each defendant has generally decreased as the number of defendants has increased. This suggests that judges and juries are less persuaded that severe wrongdoing has taken place.²⁷

Again, none of this shows that federal prosecutors are running rampant. But the underlying concern is real and likely to become more pronounced in the future. The question is how to guard against the threat of overzealousness becoming a reality.

B. Guidelines

One answer may be guidelines.²⁸ It is hard to be *against* guidelines and their promise of regularity, consistency, and the intelligent

25. *EPA to Add 21 Criminal Investigators*, 27 Env't Rep. (BNA) 579 (July 12, 1996).

26. See *supra* note 6 and accompanying table. The fines figure is somewhat misleading in that the 1992 figure includes the assessment against Exxon for the Valdez spill. 1994 EPA ENFORCEMENT REPORT, *supra* note 6, at 4-2.

27. To confirm this speculation would require, among other things, a careful examination of the role of the sentencing guidelines during the years in question.

28. Lazarus, *supra* note 1, at 2521-22. "The single most important [reform that the executive branch might undertake] is the establishment of guidelines for deciding whether a particular case warrants civil or criminal enforcement." *Id.*

exercise of discretion. However, in general, guidelines promise more than they deliver.

First, numerous guidelines channeling prosecutorial discretion in this area already exist.²⁹ These are not meaningless; no one asserts that criminal enforcement decisions have been *totally* inconsistent and ad hoc. But to the extent they have failed to date, that failure results less from defects in the particular guidelines that now exist than from the nature of guidelines.

After all, what would better guidelines look like? Two types of changes might be made. First, the guidelines could be made more specific, pinning down with precision just what renders conduct sufficiently culpable and harmful to justify criminal prosecution. EPA's most recent guideline is rather specific already,³⁰ so the

29. From EPA, these include: Memorandum from Robert Perry, General Counsel to the Regional Counsels, "Criminal Enforcement Priorities for the Environmental Protection Agency" (Oct. 12, 1982); Memorandum from T. Adams, Jr. to Assistant Administrators, "Environmental Criminal Conduct coming to the Attention of Agency Officials and Employees" (Sept. 21, 1987); Memorandum from James Strock to Deputy Regional Administrations, "Regional Enforcement Management: Enhanced Regional Case Screening" (Oct. 10, 1990); *Guidelines for Civil and Criminal Parallel Proceedings*, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 35,159 (Oct. 1987); Memorandum from Earl Devaney, Director, Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal Enforcement Program, "The Exercise of Investigative Discretion" (Jan. 12, 1994) [hereinafter Devaney Memorandum]; *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 *Fed. Reg.* 66706 (1995) (relevant portions of which discuss extent to which defendant's own investigation and candor will cause EPA to forgo criminal prosecution). From DOJ, the guidance documents include *Principles of Federal Prosecution*, in U.S. DOJ, DEPARTMENT OF JUSTICE MANUAL 9-27.000 (commonly referred to as the "United States Attorneys' Manual" or "USAM") [hereinafter USAM]; Memorandum from Henry Habicht to the Deputy Attorney General, "Appropriateness of Incarceration in Environmental Criminal Cases" (Sept. 5, 1986); *Factors in Decisions on Criminal Prosecutions in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991). See generally Joseph G. Block, *The Government's Decision to Initiate an Investigation*, in ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 21, 22-33 (Donald A. Carr ed., 1995) [hereinafter ENVIRONMENTAL CRIMINAL LIABILITY].

30. The 1994 Devaney memo identifies significant harm and culpable conduct as the touchstones of criminal liability and then identifies factors relevant to each of these considerations. Significant harm is a function of actual harm to human

idea would be to produce something extraordinarily detailed. But this approach will ultimately fail. The author of the guideline cannot think of everything. The choice between different modes of enforcement is ultimately a judgment call depending on countless variables and arising in very different circumstances. As such, it lends itself more to a sort of "common law" rather than a "statutory" approach.³¹ Consider, for example, the Sentencing Guidelines, which are surely the maximum one might expect in specificity for prosecutorial guidelines. It is a standard complaint that the Sentencing Commission overlooked many relevant factors and inappropriately limited judicial discretion.³² In trying to make sure like cases are treated alike, the Guidelines *stand in the way* of allowing unlike cases to be treated differently.

health or the environment, the seriousness of threats of such harm, failure to report an actual discharge, and any trends or common attitudes within the regulated community that suggest the need for additional deterrence. With regard to culpability, the relevant factors are a history of repeated violations, deliberate misconduct, concealment of misconduct, falsification of records, tampering with monitoring equipment, and the failure to obtain permits. For a useful sketch of the criminal investigative process and the 1994 guidance, see Steven E. Chester, *Environmental Crime and the EPA's Exercise of Criminal Investigative Discretion*, 73 MICH. BAR J. 1064 (1994).

31. The inevitable drawbacks of highly specific instructions as a substitute for good judgment in fluid and varying situations were pointed out more than a century ago by the remarkable Francis Lieber:

Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words. However minutely we may define, somewhere we needs must trust at last to common sense and good faith.

Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities*, 16 CARDOZO L. REV. 1883, 1905 (1995) (republication of 3rd ed., 1880). See also *id.* at 1997-98 (noting superiority of general instructions over detailed regulations to guide someone negotiating on one's behalf); Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107, 2122 n.68 (1995).

32. See, e.g., Charles J. Ogletree, Jr., *Commentary: The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

In short, guidelines or standards are a double-edged sword. On the one hand, they promote efficiency and consistency. Vague guidelines pose a relatively greater risk of inconsistent treatment than do clear and specific ones, while no standards pose the greatest such risk. On the other hand, while guidelines can ensure that like cases are treated alike, they can also hide relevant differences. The discretion to tailor outcomes to individual circumstances is in essence a discretion to treat dissimilar cases differently. This is just as important an equality principle.³³

The other route to improved guidelines would be to identify all the relevant factors, try to give them relative weights, and leave the prosecutor to evaluate the case in light thereof. However, experience has shown that at some point amassing ever more factors ceases to increase certainty, predictability, and consistency. To the contrary, a multitude of factors sends decision-making in the opposite direction, ultimately imposing no constraint at all because any decision is justifiable. For example, the Corps of Engineers' multi-factor public interest test suffers from this indeterminacy of comprehensiveness.³⁴

In sum, if inconsistent and overzealous prosecutorial decision-making is a problem, guidelines are unlikely to be the solution.

C. *Substantive Legal Changes*

Another alternative, beyond the scope of this article, but requiring brief mention, would be to change the underlying substantive legal standards for criminal liability. At the extreme, Congress could simply decriminalize violations of environmental laws. More modestly, the courts might construe environmental regulations narrowly under the rule of lenity.³⁵ Yet another alternative, as other pieces

33. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1730 (1993).

34. See 33 C.F.R. § 320.4(a)(1) (1995).

35. For a comprehensive definition of the rule of lenity, see *United States v. Koehler*, 973 F.2d 132, 135 (2d Cir. 1992).

By providing lenient judicial readings, aggressive criminal enforcement might prove counterproductive from the environmentalist perspective. This point is made by Ted Schneyer, *Business Lawyering and Value Creation for Clients: Fuzzy Models of the Corporate Lawyer as Environmental Compliance Counselor*,

in the present symposium book discuss, is Congressional heightening of the thresholds of criminal environmental liability.³⁶ This could be done in various ways; for example, imposing a stricter mens rea requirement, mitigating sentences, or creating an environmental audit privilege.³⁷

Although this Article does not focus on the benefits of such changes, they would not be costless.³⁸ Such changes would probably eliminate many worthwhile cases along with the few excessive ones, and are not the only means of constraining prosecutors.

D. Structural Responses — An Introduction

Prosecutorial guidelines or substantive legal changes would be direct responses to the perceived problem of excessive enthusiasm for criminal sanctions. Indirect responses, in the form of structural arrangements, would be equally, if not more, effective at minimizing abuse. In fact, a good many structural protections are in place. It is always useful to ask not “why are things so bad,” but, “why aren’t things a thousand times worse.” With regard to criminal environmental enforcement, the answer is primarily structural. The system is already set up to minimize abuses.

First, the terms of this debate seem almost to equate the decision to seek an indictment with a criminal conviction. A U.S. Attorney cannot convict. All she can do is ask a grand jury to indict (which it will, of course) and a jury to convict (which it may or may not). These are constitutional limits on how abusive the prosecutor can be. Conviction is not automatic; the prosecutor has to convince the judge and jury that a criminal offense has indeed taken place. To be sure, in the real world the prosecutor is usually able to do so; the federal government’s conviction rate is very high.³⁹ However, this

74 OR. L. REV. 99, 117 (1995).

36. For a discussion concerning mens rea and environmental crimes see Richard J. Lazarus, *Mens Rea in Environmental Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861 (1996).

37. See Linda A. Spahr, *Environmental Self-Audit Privilege: The Straw That Breaks the Back of Criminal Prosecutions*, 7 FORDHAM ENVTL. L.J. 635 (1996).

38. Lois J. Schiffer & James F. Simon, *The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus*, 83 GEO. L.J. 2531 (1995).

39. Estimates vary, and the rate changes over time, but DOJ obtains a convic-

does not mean that the jury is a meaningless rubber stamp; it means that the cases are not so extravagant after all.

Second, even if it is "too easy" to obtain a criminal conviction for an environmental offense, it is still much harder to obtain a criminal conviction than a civil penalty for the same offense — the standard of proof is higher, the investigatory and evidentiary requirements more stringent, the resources required greater. Yet the civil penalty can be a powerful sanction. Apart from prison time for individuals, financial sanctions are just as great in civil as in criminal cases.⁴⁰ Furthermore, because the government must discount the amount of the penalty by the probability of obtaining it, the expected penalty from a civil proceeding will be *higher* in precisely those borderline situations which may not be appropriate criminal prosecutions, since the chances of prevailing civilly are higher than the chances of obtaining a criminal conviction. Finally, just as EPA prefers administrative enforcement to judicial enforcement in large measure because it is quicker and easier,⁴¹ so EPA should prefer

tion about 80% or 90% of the time. Joseph G. Block & Nancy A. Voisin, *Criminal Enforcement of Environmental Laws: The Responsible Corporate Officer Doctrine — Can You Go to Jail for What You Don't Know?*, 22 *Env'tl. L.* 1347, 1348 & n.4 (1992).

40. The congruence of civil and criminal sanctions might be cause for concern that civil sanctions are too severe, but that is a topic for another day.

41. See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and their Citizens?*, 54 *MD. L. REV.* 1552, 1613-14 (1995). The other reason EPA prefers administrative to judicial enforcement is that it handles administrative cases itself, without involvement (or interference) from DOJ. From EPA's point of view, once the case has been referred to DOJ, it is out of the agency's control regardless of whether it will be pursued criminally or civilly. As discussed below, one way to reduce EPA criminal referrals and place greater emphasis on civil enforcement would probably be to ensure that EPA itself played the lead role in civil actions, at which point the natural bureaucratic urge to protect turf would discourage criminal referrals in favor of civil cases.

civil judicial enforcement to criminal judicial enforcement.⁴² Criminal prosecutions are hardly the path of least resistance.

A third aspect of the enforcement structure further protects against overreaching, namely, the division of authority between EPA, the USAOs, and Main Justice. It is to the allocation of investigative and prosecutorial responsibility among these three that the rest of this Article is devoted.

II. THE DIVISION OF LITIGATING AUTHORITY

Congress has established the Department of Justice as the litigator for the United States and its administrative agencies. Agencies may not employ outside counsel for litigation; they must refer all matters to DOJ.⁴³ DOJ then handles the litigation:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.⁴⁴

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency,

42. As then Associate Attorney General Webster Hubbell told John Dingell: Civil and administrative remedies can present a number of advantages from the government's perspective, and we have followed criminal investigations with civil cases in some situations. The burden of proof is lower, and there are fewer limits on admissibility of evidence. The penalties in civil actions can be quite substantial, with correspondingly high deterrent effect, and there is a broad range of injunctive relief available. Given the range of relief and penalties available, a decision to bring civil rather than criminal charges should not be viewed as a "weaker" enforcement approach.

1993 *Dingell Hearing*, *supra* note 14, at 186 (statement of Webster L. Hubbell, Assoc. Attorney General).

43.

Except as otherwise authorized by law, the head of an executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

5 U.S.C. § 3106 (1994).

44. 28 U.S.C. § 516 (1994).

or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.⁴⁵

With regard to criminal prosecution, DOJ's preeminence goes largely unquestioned. On the civil side, however, it is a source of continuing controversy. Congress has carved out a variety of exceptions to DOJ control, particularly among the independent agencies,⁴⁶ and periodically threatens to create more. From DOJ's perspective, it must constantly be on guard against the dilution of its proper role as lawyer for the government.⁴⁷ As for the agencies, all have chafed under the arrangement to a greater or lesser extent. Thus, in the words of one former head of DOJ's Civil Division, "[t]he warfare over litigation authority never ends"⁴⁸

A. *DOJ's Perspective on Its Control of Litigation*

DOJ has a well-rehearsed pitch for centralized litigating authority. First, it frequently asserts the absolute necessity that the government speak with one voice in the courts.⁴⁹ This idea has two

45. *Id.* § 519.

46. See generally Neal Devins, *Toward an Understanding of Legal Policy-Making at Independent Agencies*, in *GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS* 181, 182-89 (Cornell W. Clayton ed., 1995).

47. See, e.g., Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1059 (1978); *The Attorney General's Role as Chief Litigator for the United States*, 6 *Op. Off. Legal Counsel* 47 (1982).

48. Barbara Allen Babcock, *Defending the Government: Justice and the Civil Division*, 23 *JOHN MARSHALL L. REV.* 181, 186 (1990).

49. See, e.g., Summary by Department of Justice, reprinted in 118 *CONG. REC.* 21,882, 21,883 (1972) (stressing the "need for uniformity in the litigating positions of the United States"); Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 *F.R.D.* 155, 187 (1979) [hereinafter *Proceedings*] (transcript of comment of Lois Schiffer, currently the head of DOJ's Environment and Natural Resources Division) ("[Among] biggest grievances of outside regulated organizations is that the Government speaks to them in conflicting voices, . . . one of the ways that those conflicting voices can be made less conflicting is to centralize both criminal and civil enforcement authority for

components. In part, it is about consistency and uniform positions: the federal government should not argue for broad deference to agency interpretation or reliance on legislative history one day and against it the next. In addition, it is about avoiding conflict between parts of the executive branch in court. Without the need to rely on DOJ for representation, individual agencies might be facing off in court — a prospect that, depending on one's point of view, may be embarrassing, unseemly, destructive to sound policy, or unconstitutional.⁵⁰ Thus, the single voice principle seems an amalgam of different concerns: protecting turf, a quasi-aesthetic distaste for governmental inconsistency, an equal protection sort of idea about treating like cases alike, and a worry that inconsistency will make the United States a less-effective litigant.

Closely related to the "one voice" principle is a concern about authority. If the government speaks with two contradictory voices, at least one of those will not be the President's. If one begins with the premise that the executive branch is unitary and must reflect the President's views and policies, for which the President will and should be held accountable, then the system has broken down if parts of the branch are taking inconsistent positions. DOJ's Office of Legal Counsel concludes that

it is essential that the Attorney General *not* relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.⁵¹

the same statute in one place[, i.e., DOJ]. . . ."); *The Attorney General's Role as Chief Litigator for the United States*, *supra* note 47.

50. On intragovernmental litigation in general, see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

51. *The Attorney General's Role as Chief Litigator for the United States*, *supra* note 47, at 54 (emphasis in original).

Third, for DOJ, the expertise of the litigator is litigation; DOJ lawyers have courtroom skills and familiarity with recurrent non-agency-specific legal questions that agency lawyers lack.⁵² The agency itself will benefit from having top-notch litigators representing it.⁵³ DOJ does not claim the agency lawyer's detailed familiarity with the specifics of particular statutes or programs. To the contrary, it suggests that the generalist's more passing familiarity can be an advantage, since the judicial audience that must be convinced also consists of generalists. Finally, DOJ lawyers are superior at choosing cases as vehicles to advance certain policies because they are more familiar with trends within the judiciary and the tendencies of particular judges.⁵⁴

Finally, in what may be seen as a variation of the expertise argument, DOJ also stresses the fact that it is a neutral and objective evaluator of the agency's case. In the words of Edward Schmults, former Deputy Attorney General: "The Attorney General's role in providing neutral, dispassionate analysis of and advice concerning controversial issues cannot be overstated."⁵⁵ This objectivity is two-fold. First, the DOJ is not involved in the particulars of agency policymaking and its attorneys will not have their judgment skewed by a personal stake in the matter at hand. Second, it lies in the separation of the prosecutorial function from the investigatory and regulatory functions. This, asserts Schmults, "has proven to be helpful in assuring that litigation is initiated

52. *E.g.*, Babcock, *supra* note 48, at 186.

53. *See, e.g.*, *Proceedings*, *supra* note 49, at 175 (statement of Associate Attorney General Michael Egan) ("[T]he Department of Justice ideally should have the best litigators there are in the United States, and to the extent that we start defusing [sic] among agencies, litigation expertise, the whole thing will go down.").

54. DONALD L. HOROWITZ, *THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS* 130 (1976).

55. Letter from Edward C. Schmults, Deputy Attorney General, to Rep. James Florio, May 4, 1983, at 2, in *Hazardous Waste Control and Enforcement Act of 1983: Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess., 387, 388 (1983).

upon an objective, independent evaluation of the factual and legal basis of each case."⁵⁶

B. *The Agency Perspective on DOJ Control of Litigation*

The agencies are rather underwhelmed by this catalogue of benefits. In part, this is the expected personal and professional resentment that naturally results from being told to step aside by someone with greater power and prestige (who is often also younger and with less experience) just when a controversy becomes most important and most interesting.⁵⁷ In addition, from the point of view of the agency, the necessity for speaking with one voice is far less obvious than it is to DOJ, and the likelihood of it actually occurring in the large bulk of agency-specific litigation is rather remote.

Beyond simply being unconvinced by DOJ's arguments, the agencies perceive a host of difficulties resulting from centralizing litigation authority in the Department.⁵⁸ In large measure, these are intensely practical. Referring cases to DOJ and relying on it to pursue them is wasteful, time-consuming, and expensive. Cases are redundantly staffed. DOJ does not adequately consult with the agency or involve its attorneys in briefing and arguing cases. Notwithstanding their vaunted expertise in litigation, DOJ lawyers lack the technical expertise and specialized background in the particular statutory regimes of the individual agencies. The divergence here is more than one of different areas of expertise. As a generalization, there is a difference in lawyering style. DOJ has a greater tendency to rely on "technical" arguments such as sover-

56. *Id.* at 389.

57. *See, e.g.,* Wallace H. Johnson, *Our Nation's Energy and Resources—Decision Making in Conflict*, 23 JOHN MARSHALL L. REV. 197, 200 (1990) (former chief of the Lands Division observing that "client agency lawyers were often professionally unfulfilled, being limited to taking recommendations. Understandably, they wanted the power and opportunity to follow a litigation matter through to its conclusion"). On this tension, see generally JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 76-77 (1995) (noting destructive "institutional rivalry" that peaked in the late 1970s and mid to late 1980s, prompting "discord between the agency and its Justice Department attorneys [that] affected enforcement in all environmental media").

58. *See, e.g.,* H.R. REP. NO. 294, 95th Cong., 1st Sess. 332-37 (1977).

eign immunity, lack of jurisdiction, statute of limitations, and so on — defenses that win the case but do nothing to advance the agency's programmatic agenda. By the same token, agencies are somewhat more inclined to run litigation risks — willing to lose the case (which is a means, not an end) in the hope of advancing that agenda.

Furthermore, where DOJ asserts the need to reconcile different agency positions and ensure intra-executive uniformity, the agencies see only a conflict of interest. Because DOJ represents multiple federal agencies, and because different agencies' interests will not always align precisely, the current arrangement is rife with the potential for conflicts of interest that would be unacceptable in the private sector. These may be indirect, as where DOJ takes a position on behalf of one agency that is in the abstract in tension with another's agenda or goals, or, the conflict may be quite direct, where DOJ's representation of one governmental interest leads to a direct interference with another's policy program or goals.

The working relationship between DOJ and EPA is often difficult and strained. As the former head of EPA's enforcement division put it in a letter to the head of the Environment Division, a "division . . . has infused itself between our two agencies" characterized by a "'them vs. us' perception that we have long been working to overcome."⁵⁹

59. Letter from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to Vicki A. O'Meara, Acting Assistant Attorney General, Environment and Natural Resources Division, at 2 (Dec. 22, 1992), in *1993 Dingell Hearing, supra* note 14, at 420, 421. Sniping over lawyering authority in itself has costs; it is a distraction, lowers morale, and undermines effective working relationships. As a former head of the Environmental Crimes Section has written:

The environmental enforcement program is . . . plagued by constant turf fights between the DOJ and EPA over who will actually litigate the cases in court. The tension from these turf battles is always simmering, and frequently affects the relationship between the DOJ attorney and his EPA counterpart. Unfortunately, such tension is an unnecessary drain of energy that could be better spent in developing and prosecuting enforcement cases.

Judson W. Starr, *Too Many Cooks . . .*, *ENVTL. F.* (Jan./Feb. 1989) at 9, 11.

C. EPA and DOJ: Civil Judicial Enforcement

A civil judicial environmental enforcement action begins with a referral from EPA to DOJ. DOJ will not go ahead with a civil action on its own initiative; its only authority is to proceed on EPA's behalf. If DOJ does decline, EPA can in theory proceed on its own, as this Article discusses below. Declinations of EPA civil referrals are fairly rare,⁶⁰ in part because of the possibility of EPA representing itself.⁶¹

Several of the environmental statutes do contain exceptions to the Attorney General's exclusive representation. The CAA,⁶² the CWA,⁶³ and the Safe Drinking Water Act ("SDWA")⁶⁴ all provide that the Administrator shall first request the Attorney General for representation in a civil action; if the Attorney General declines, EPA attorneys shall represent the agency.⁶⁵ The Toxic

60. Exact figures on the frequency of declinations are not published. By comparing EPA's figures on referrals with DOJ's figures for cases initiated, a rough estimate can be made, however. See Hodas, *supra* note 41, at 1613-14 & n.348. By comparing EPA and DOJ figures for FY 1989 through FY 1993, Hodas comes up with an overall acceptance rate of 78% (using EPA figures) or 83% (using DOJ figures). *Id.* It is unclear whether this is limited to civil referrals or includes criminal referrals as well.

DOJ virtually never declines to *defend* EPA (or any other agency) in lawsuits brought against the government. The author is aware of only one case in which EPA defended itself in court with its own lawyers after DOJ refused to represent it. See *Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922 (D.C. Cir. 1980). The agency won.

61. It is unclear to what extent DOJ is concerned about the possibility of EPA pursuing a case without it. It has almost never happened, and so hardly seems an imminent threat. On the other hand, one reason it has never happened is surely that DOJ is unlikely to decline a case that EPA so firmly believes in that it will proceed on its own.

The reasons for the low number of declinations go beyond a simple desire to avoid EPA going into court on its own. To some extent, DOJ does see EPA as a client, and if the client wants to bring a suit, then the lawyer's job is to bring it. *Cf. supra* note 6 (higher declination rate in criminal cases). And to some extent EPA is careful about what it refers, because it does not want to be turned down.

62. 42 U.S.C. §§ 7401-7671q, CAA §§ 101-618 (1994).

63. 33 U.S.C. §§ 1251-1387, CWA §§ 101-607 (1994).

64. 42 U.S.C. §§ 300f-300j-26, Public Health Service Act §§ 1401-1464 (1994) & Pub. L. 100-572 § 4 (1988).

65. 42 U.S.C. § 7605, CAA § 305 (1994); 33 U.S.C. § 1366, CWA § 506

Substances Control Act ("TSCA")⁶⁶ allows the Administrator to use her own attorneys to bring a civil action in the case of an imminent hazard even without approaching DOJ.⁶⁷

However, EPA virtually never uses its theoretical authority to represent itself. In 1977, DOJ and EPA negotiated a Memorandum of Understanding ("MOU") concerning the handling of civil litigation in which the agency is a party.⁶⁸ The MOU remains in effect today. Under the MOU, the Attorney General ("AG") "shall have control over all cases" in which the agency is a party.⁶⁹ EPA is entitled to designate an attorney to participate in the litigation, even though that attorney "shall be subject to the supervision and control of" the AG.⁷⁰ Agency attorneys cannot make any filings without the AG's approval. They may discuss the case with DOJ attorneys, help prepare and sign papers, engage in settlement discussions, and may be allowed to argue orally. However, DOJ attorneys take the lead role; they are listed first on all filings, make ultimate decisions concerning strategy and the contents of papers submitted to the court, and make virtually all oral arguments.⁷¹ The author's review of sixty cases decided between January 1993 and October 1994, in which EPA was a party, showed that DOJ attorneys argued fifty-five, EPA attorneys two, and the agencies shared oral argument in four.

Congress has seriously considered giving EPA its own litigating authority on several occasions. The MOU was negotiated in the shadow of an explicit and apparently serious threat from Congress to give EPA authority to represent itself should it and DOJ be unable to reach an agreement.⁷² The 1984 RCRA

(1994); 42 U.S.C. § 300j-9(f), SWDA § 1450(f) (1994).

66. 15 U.S.C. §§ 2601-2692 (1994).

67. 15 U.S.C. § 2606(e), TSCA § 7(e) (1994) ("Notwithstanding any other provision of law, in any action under subsection (a) of this section [concerning imminent chemical hazards], the Administrator may direct attorneys of the [EPA] to appear and represent the Administrator in such an action.").

68. U.S. DOJ, Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48,942 (1977).

69. *Id.* at 48,943.

70. *Id.*

71. *Id.*

72. The House version of what became the 1977 Clean Air Act Amendments

Amendments almost included a provision giving EPA litigation authority.⁷³ This issue has come up on other occasions as well. In general, Congress perceives, rightly, that EPA is more committed to enforcement than DOJ. To the extent that moves to shift authority to EPA reflect a reasoned policy judgment, rather than a mere political bargaining chip or an evaluation of whom Congress can most easily control, Congress becomes interested in having EPA (or any agency) handle its own litigation when it most doubts the current administration's commitment to enforcement.

D. EPA and DOJ: The Criminal Side

To some extent, the criminal enforcement regime duplicates the civil.⁷⁴ EPA has its own criminal investigatory apparatus, and it will make an initial decision whether to pursue a case as a criminal or a civil matter. If and when it refers to DOJ, EPA will request criminal or civil prosecution. However, DOJ can bring a criminal environmental prosecution without a referral from EPA. The Federal Bureau of Investigation ("FBI") and others also undertake criminal investigations. In addition, DOJ brings a prosecution on behalf of the United States, not the Administrator. As a result, DOJ's criminal environmental enforcement program operates with greater independence from EPA than does its civil judicial enforcement program.

The decision to proceed with a criminal investigation is made by EPA's Office of Criminal Enforcement.⁷⁵ EPA's efforts are supplemented by agents from the FBI.⁷⁶ Between 1988 and

explicitly provided for EPA litigating authority. See H.R. REP. NO. 294, *supra* note 5, at 332-37. The final legislation provided that litigation should take place "in accordance with" the MOU. 42 U.S.C. § 7605(b), CAA § 305(b) (1977).

73. *Solid Waste Disposal Act Amendments: Hearing before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983).

74. For a full account of the process of criminal investigation and prosecution, see ENVIRONMENTAL CRIMINAL LIABILITY, *supra* note 29.

75. See Devaney Memorandum, *supra* note 29, at 1-2.

76. See Memorandum of Understanding between the Office of Enforcement Counsel, Environmental Protection Agency, and the Federal Bureau of Investigation (1982).

1993, for example, over 61% of criminal referrals came from EPA and 34% came from DOJ investigators, with almost all of the latter coming from the FBI.⁷⁷ Almost all of the FBI's environmental investigations are conducted in conjunction with EPA or other agencies.⁷⁸ The decision to proceed with a criminal prosecution, as opposed to a criminal investigation, is up to DOJ. However, EPA makes what is in essence a recommendation by referring a case for criminal prosecution.

The role of EPA attorneys in criminal prosecutions is less significant than in civil cases. In the latter, DOJ takes the lead, but EPA is part of the litigating team. In criminal cases, EPA truly is just a counseling agency, helping to build a case. While each EPA Region has a Regional Criminal Enforcement Counsel ("RCEC"), that office works to prepare cases, not to litigate them or present them to a grand jury. Indeed, the RCEC's status as "odd man out" in criminal prosecutions has been a source of tension between the agency and the department.⁷⁹

The one exception to this arrangement is the occasional appointment of an EPA attorney as a "Special Assistant U.S. Attorney." DOJ, however, is wary of granting such status freely. Prior to the August 1994 bluesheet, this reluctance was palpable in the U.S. Attorneys' Manual.⁸⁰ Indeed, the January 1993 revision, since withdrawn, expressly stated that only in the event that no Assistant United States Attorney ("AUSA") or ECS attorney was available would DOJ "resort to other resources, such as agency counsel."⁸¹ During preparation of the January 1993 revisions, the head of EPA's enforcement office objected to the exclusion of EPA attorneys from criminal prosecutions. The Acting Assistant AG for the Environment Division responded:

77. See 1993 Dingell Hearing, *supra* note 14, at 78 (statement of L. Nye Stevens).

78. *Id.* at n.13.

79. WILLIAM J. CORCORAN ET AL., UNITED STATES DEP'T OF JUSTICE, INTERNAL REVIEW OF THE DEPARTMENT OF JUSTICE ENVIRONMENTAL CRIMES PROGRAM 146-52 (Mar. 10, 1994) [hereinafter DOJ INTERNAL REVIEW] (noting that disputes over the proper role of RCECs is "[a]nother source of tension between the EPA and the ECS"); *id.* at 151; Letter from Earl E. Devaney, *supra* note 59.

80. USAM, *supra* note 29, § 5-11.312 (10/1/88); *id.* (1/12/93 Bluesheet).

81. *Id.* § 5-11.303(E) (1/12/93 Bluesheet).

It is always important for federal enforcement employees to work together to bring about the best possible result. This does not mean, however, that RCECs, or any Agency counsel, should prosecute environmental cases. The role of litigator is that of the Department of Justice under the overall direction of the Attorney General. It is our view that Agency counsel should only litigate a criminal case when DOJ resources are lacking or when there is a need to supplement those resources.⁸²

The current USAM simply provides that appointment of Special Assistant U.S. Attorneys shall be approved by the local U.S. Attorney and by the head of the Environment Division, who "should seek to ensure sensible and efficient use of government resources."⁸³

EPA's role in criminal cases is relatively less significant not only in the actual handling of the case but in the decision to bring it in the first place. First, in a civil case DOJ will not proceed without its "client." In the words of the USAM, "[a]s a matter of policy and practice, civil prosecutions are initiated at the request of the Administrator" of the EPA or other relevant agency head.⁸⁴ Indeed, the most plausible reading of the statutes is that DOJ *could not* proceed in a civil case without EPA even if it wanted to. Should DOJ learn of possible violations warranting investigation, it will forward the information to EPA; an actual civil prosecution will not go forward unless and until EPA refers the case to DOJ.⁸⁵ In contrast, in criminal prosecutions DOJ is permitted to, and sometimes does, proceed without an EPA referral.⁸⁶ In addition, DOJ by no means automatically pursues an EPA criminal referral; its declination rate is higher in criminal than in civil cases⁸⁷ and the recurrent tension between DOJ and

82. Letter from Vicki A. O'Meara, Acting Assistant Attorney General, to Earl E. Devaney, Director, EPA Office of Criminal Enforcement 2 (Jan. 19, 1993), reprinted in 1993 *Dingell Hearing*, *supra* note 14, at 433-34.

83. USAM, *supra*, note 29, § 5-11.110 (8/23/94 Bluesheet).

84. *Id.* § 5-12.111(A).

85. *Id.* § 5-12.111(B).

86. *Id.*

87. In the early years of the criminal enforcement program the declination rate was as high as 60%. Starr, *supra* note 7, at 907 (describing period from 1979-81).

EPA over the quality of EPA referrals is especially pronounced in the criminal setting.⁸⁸ In a criminal case, DOJ represents the United States; EPA is not its client and DOJ's decision whether to prosecute is relatively autonomous.⁸⁹

III. ALLOCATING CRIMINAL ENFORCEMENT RESPONSIBILITY

The battle over the relative roles of Main Justice and the USAOs raged without a thought given to the possible place of EPA in the overall arrangement.⁹⁰ As we have seen, however, the role of EPA lawyers in the agency's litigation is a matter of longstanding discussion and controversy.⁹¹ Although this controversy has focused on civil litigation, EPA has also sought, to a limited extent, a greater courtroom role in criminal prosecutions.⁹² Some commentators have argued EPA should possess some independent criminal enforcement authority.⁹³ This Section

88. See DOJ INTERNAL REVIEW, *supra* note 79.

89. Lazarus, *supra* note 1, at 2460.

90. A fact that did not go unnoticed by EPA and its supporters. See, e.g., Howard Berman, *Ex-EPA Staffer Says Environmental Crime Needs Open Debate*, LEGAL TIMES, Aug. 10, 1992, at 25 (letter to the editor) (stressing central but overlooked role of EPA in environmental criminal enforcement in response to DOJ's defense of the ECS's performance); Letter from John Voorhees to Janet Reno (June 23, 1993) at 3, *reprinted in 1993 Dingell Hearing, supra* note 14, at 463-65 (objecting that EPA's "career professionals were not even consulted to assist in the preparation of the guidelines," i.e. the bluesheet revision, and that DOJ's "failure . . . to contact EPA contributes to the specter of impropriety").

91. *Supra* nn. 43-59 and accompanying text.

92. See DOJ INTERNAL REVIEW, *supra* note 79, at 146-52 (noting strains between ECS and EPA and desire of many RCECs to participate in prosecutions); Letter from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to Vicki A. O'Meara, Acting Assistant Attorney General, Environment and Natural Resources Division, at 2 (Dec. 22, 1992), *reprinted in 1993 Dingell Hearing, supra* note 14, at 420-21 (objecting to bluesheet revisions that leave EPA attorneys out of the picture).

93. Writing about environmental crimes in 1991, Robert Adler and Charles Lord, of the Natural Resources Defense Council, Inc., urged that EPA be given greater independent enforcement authority. While conceding that DOJ should be "brought in for the most egregious violations that require more complex enforcement actions[.]" Adler and Lord felt that EPA should be able to act on its own for initial or less complicated violations. Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 812 (1991).

considers whether in fact EPA *should* represent the government in criminal environmental prosecutions. It concludes that it should not, because DOJ control (or, more precisely, shared control) is an important structural protection against prosecutorial overreaching with only minor costs.

A. Vigorous Enforcement

Much of the debate that has taken place about the allocation of prosecutorial authority concerns whether enforcement is sufficiently vigorous. Although prosecutorial timidity is worth worrying about, the question this Article examines is in some ways the opposite: *viz.*, what allocation of prosecutorial authority will ensure that enforcement is not *too* vigorous?

1. EPA vs. DOJ

EPA refers more cases than DOJ brings; its attorneys are generally more committed to the environmental cause.⁹⁴ The duplication of effort inherent in referral by EPA and prosecution by DOJ automatically reduces enforcement resources. In light of this, it would seem that enforcement would be enhanced by allowing EPA to bring its own prosecutions.⁹⁵ The concern, however, is with agency lawyers armed with independent criminal prosecution authority going too far.

94. Again, DOJ's common argument that the neutral, distanced perspective of the generalist is necessary to counter the tunnel vision of the agency is much less applicable in the environmental setting (or tax, antitrust, or civil rights settings, for that matter), where DOJ also has specialized attorneys whose choice of a career likely reflects some sympathy for a particular policy agenda.

95. See Adler & Lord, *supra* note 93, at 812. I would note too much can be read into these factors. In particular, the fact that EPA refers more cases than DOJ is willing to prosecute does not mean that EPA would prosecute all the cases it refers if it had the authority to do so. At present, EPA (and EPA's overseers) measure enforcement success by how many cases are referred. For the U.S. Attorney, in contrast, the measure of success is how many cases she wins, making her far more risk averse in litigation. Furthermore, EPA can refer borderline cases because it knows DOJ is there as a screen. If EPA had DOJ's job, it would behave more like DOJ.

a. Single-mindedness

Generations of administrative law scholars and DOJ attorneys have assumed that agencies have tunnel vision and are unable to perceive countervailing factors that would make a reasonable person hesitate about the agency's single-minded pursuit of its particular mission. If the problem is prosecution for morally blameless conduct that violates an incomprehensible technicality, then EPA attorneys with specialized expertise and commitment to environmental law are more likely to fall prey to such overreaching. Not only are they likely to have a commitment to environmental enforcement, but they know the statutes perhaps too well, failing to appreciate how overwhelming and confusing they are to someone whose entire job is not devoted to understanding them.

b. Lawyering styles

Certain differences in lawyering style can be identified between DOJ and EPA. These are dangerous generalizations, of course, and one can find many counterexamples. Furthermore, were EPA to be granted independent litigating authority, its lawyers' style would likely change to look more like DOJ's. Nonetheless, two general points can be made. Because DOJ lawyers are, relatively speaking, generalists without an affiliation to a particular programmatic agenda, they tend to be more interested in "technical" lawyer's arguments, and less willing to run litigation risks, than their agency counterparts. These attributes can be frustrating to agency lawyers, particularly in defensive cases, but they are important safeguards in the criminal context.

c. An example

A well-known dispute between DOJ and EPA, involving civil rather than criminal enforcement, illustrates this divergence.⁹⁶ In the mid-1970s, EPA referred cases to DOJ for judicial enforcement even where no showing of harm could be made — for example, where the violation was purely "procedural" (e.g., involving monitoring or recordkeeping requirements). DOJ often

96. The following account is taken from PETER CLEARY YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 259-63 (1991).

declined to pursue these cases. This led to a memorandum from EPA headquarters to DOJ, accusing the latter of “amending” the statute and asking DOJ to inform the U.S. Attorneys “of the correct interpretation of [EPA] statutes and the importance of prosecuting [EPA] enforcement cases without requiring proof of harm.”⁹⁷ DOJ responded that it did not endorse a flat refusal to reject referrals in cases where there was no proof of environmental harm. However, it insisted that in its experience “the only assured way of receiving meaningful relief is a showing by the Government of some adverse effect of the defendant’s pollutants, and in addition, some courts require it. This is a fact which cannot be ignored.”⁹⁸ It accordingly declined to issue any hard and fast rule to the U.S. Attorneys, leaving degree of harm as one factor relevant to the prosecutor’s discretionary decision to go ahead.

This is the sort of disagreement one would expect. EPA focuses on its statutes rather than the general principles of liability or of prosecutorial strategy. In Richard Lazarus’s terms, EPA’s position represents an overzealous failure to integrate environmental law — with its risk-based, prophylactic, complex requirements — into more general principles.⁹⁹

2. Main Justice vs. the U.S. Attorneys Offices

Representative Dingell was convinced that (at least in Republican administrations) political pressure to go easy on environmental enforcement was most effectively brought to bear on Main Justice.¹⁰⁰ In certain cases, depending on who happens to be working in a particular USAO, he is probably correct. This, how-

97. *Id.* at 261 (quoting EPA Headquarters Enforcement Memorandum, regarding correspondence between EPA and the Justice Department on problems in enforcement, Dec. 3, 1976) [hereinafter, EPA Enforcement Memorandum].

98. *Id.* at 262 (quoting EPA Enforcement Memorandum).

99. See Lazarus, *supra* note 1.

100. See 1993 *Dingell Hearing*, *supra* note 14, at 208 (statement of Rep. Dingell) (referring to the “perception,” which he evidently shared, “that centralizing decision-making on environmental cases in Washington, D.C., opens the door to special preference, influence peddling, and invites the use of pressure and special privilege . . . on behalf of the rich and powerful”).

ever, is *not* because Main Justice is accessible and partisan while the USAOs are not. On the contrary, as then Associate Attorney General Webster Hubbell responded to Dingell, "I don't know that political pressure is limited to Washington, D.C."¹⁰¹ Indeed, local susceptibility to political pressure has been a complaint of the environmental defense bar: "Th[e] growing independence [of the USAOs] presents a serious problem for many companies facing RCRA enforcement actions, as the [USAOs] are typically more political than the Environment Division at DOJ headquarters."¹⁰²

This is hardly a surprise, given that the position of U.S. Attorney is a common stepping stone to elected office — something that is completely untrue of positions with the Environment Division. There is, therefore, more reason to worry about politics, or at least political ambition, infecting prosecutorial decisions locally than in Washington. In New York, for example, Dennis Vacco, the state Attorney General, an elected official, is the former U.S. Attorney for the Western District of New York, and the Mayor of New York City, Rudolph Giuliani, is the former U.S. Attorney for the Southern District of New York. Indeed, Mayor Giuliani gained popularity by bringing a series of highly publicized, quite controversial white collar prosecutions. Many of the resulting convictions were overturned on appeal,¹⁰³ and there is a strong school of thought that holds that these prosecutions were wholly

101. *Id.* (testimony of Webster L. Hubbell, Assoc. Att'y Gen.). See also Galacatos, *supra* note 3, at 656 (suggesting that risk of partisan pressure infecting prosecutorial decisions is roughly equal in the U.S. Attorneys Offices and at Main Justice).

102. THE RCRA PRACTICE MANUAL 225 (Theodore L. Garrett ed., 1994).

103. *United States v. Regan*, 937 F.2d 823 (2d Cir. 1991), 946 F.2d 188 (2d Cir. 1991) (setting aside securities convictions of four of six defendants); *United States v. Mulheren*, 938 F.2d 364 (2d Cir. 1991) (setting aside conviction).

misguided,¹⁰⁴ nonetheless, they helped make Giuliani mayor.¹⁰⁵

This is not to say that politically ambitious U.S. Attorneys will always be aggressive environmental prosecutors. To the contrary, political responsiveness cuts both ways; prosecutors have a long tradition of winking at offenses by locally prominent figures or important corporations. In the vast majority of USAOs, no one is especially interested in or enthusiastic about environmental criminal prosecutions. In many situations, then, it seems likely that decentralization will reduce enforcement.

By comparison, ECS is more isolated and less accessible and more reliably committed to environmental prosecutions. To the extent that ECS is subject to outside pressure, it is likely to be pressured to hold off rather than pressured to pursue. Overall, the happy balance of attention to environmental crimes and overall restraint is more likely to come from ECS than local U.S. Attorneys.

3. Summary

One would expect the most vigorous broad-based environmental enforcement from EPA; the least from AUSAs (with isolated but highly visible and troubling individual counter-examples); and something in-between from ECS. The reality is probably not so different. A focus on individual instances (which may have been misinterpreted)¹⁰⁶ at the expense of what is essentially invisible

104. See generally DANIEL FISCHER, *PAYBACK: THE CONSPIRACY TO DESTROY MICHAEL MILKEN AND HIS FINANCIAL REVOLUTION* (1995). Something of the political flavor surrounding the office is discerned in the comment by Armand D'Amato, the brother of Senator Alfonse D'Amato, after his mail-fraud conviction was overturned by the Second Circuit. D'Amato called himself the victim of "a baseless prosecution comparable to the ones Rudy Giuliani brought against innocent people on Wall Street." Alison Mitchell, *The 1994 Campaign: Mayor*, N.Y. TIMES, Nov. 2, 1994, at B5.

105. See generally JAMES B. STEWART, *DEN OF THIEVES* (1991). For example, Stewart writes that, as of May 1987, "Giuliani had had a remarkable string of highly publicized successes. . . . He had reaped further praise for the Boesky plea agreement and his crackdown on Wall Street. Giuliani was on a roll, one that could easily propel him into New York City's mayoral mansion, or the state governor's mansion." *Id.* at 341.

106. See DOJ INTERNAL REVIEW, *supra* note 79; Lazarus, *supra* note 1, at

— the complete inaction in districts bringing no cases at all — is highly misleading. If one sought a structure that assured meaningful, consistent, but not unrestrained criminal enforcement, it would look much like the one we already have.

B. *Centralization and Consistency*

The familiar arguments for DOJ control of federal litigation, in general, turn largely on the benefits of centralization — of having a single, coherent decisionmaker who understands the big picture. This argument rings somewhat hollow if the theoretical centralized decisionmaker in turn delegates decision-making authority to dozens of autonomous offices around the country. Yet that is exactly the arrangement that prevails with regard to federal criminal prosecutions. In considering the structural protection offered by assigning litigation responsibility to particular attorneys, this Article considers both the relationship between DOJ and EPA *and* the relationship between Main Justice and the U.S. Attorneys offices.

In the environmental crimes setting, DOJ's one voice mantra is focused on the importance of consistency in charging decisions. According to the DOJ *Internal Review*:

[T]he federal environmental statutes pose special enforcement problems with respect to uniform application of the law. On the other hand, environmental laws, like other laws, should be interpreted and applied consistently, so that the law evolves in an orderly fashion and every citizen is subject to the same legal requirements. Thus, there is a need for some mechanism to ensure that these complex, technical, and frequently ambiguous statutes and regulations are interpreted consistently across the Nation. But on the other hand, the decision whether to prosecute a particular violation always involves an element of discretion, and the decision whether to prosecute an environmental violation may properly turn on regional or local concerns that reflect the affected community's priorities and needs.¹⁰⁷

Because the sanction is so severe and the stakes are so high, the norm of treating like cases alike is especially compelling

here. The same impulse that lies behind the creation of the sentencing guidelines, which were supposed to eliminate disparities in the sentencing of similar defendants who had committed similar crimes, of course applies to the criminal enforcement regime generally.

It is simply not tenable to deny that fairness and consistency are enhanced by centralization. This is plainly an argument for placing authority in Main Justice rather than the U.S. Attorneys offices. It is also an argument for placing authority in DOJ rather than EPA, although the matter is more complicated. The usual claim, that overall governmental consistency is served by centralizing litigation in DOJ, ought to apply here because EPA might overemphasize environmental prosecutions at the expense of other criminal enforcement priorities. One caveat is in order, however. Because DOJ has a separate environmental division, and an environmental crimes section within that division, there is some of the same risk of tunnel vision that would exist if criminal prosecution were left to EPA. This concern returns us to the relationship between Main Justice and the USAOs, as the latter may have the advantage of non-specialization over ECS.

C. Alternatives to Criminal Enforcement

It is not only important that EPA *cannot* bring judicial enforcement actions; it is also important that it *can* bring administrative enforcement actions without DOJ. Although highly visible and much discussed, criminal prosecutions remain a tiny part of overall environmental enforcement. The real environmental enforcement program takes place outside of the courts altogether; EPA's administrative enforcement efforts dwarf both civil and criminal actions. For FY 1994, the respective numbers were:

Administrative enforcements (total):	3,600
Administrative penalty actions:	1,596
Civil Referrals to DOJ:	403
Criminal Referrals to DOJ:	220 ¹⁰⁸

108. 1994 EPA ENFORCEMENT REPORT, *supra* note 6, at 4-2, 4-4, 4-8. Possible monetary penalties are comparable in all three regimes. Under the Clean Air Act, for example, civil judicial penalties and administrative penalties both have a maximum of \$25,000 per day per violation, although the latter cannot exceed a

Reliance on administrative sanctions has increased steadily over the years, in part because Congress has several times amended the relevant statutes to increase EPA's administrative enforcement authority. For example, the 1972 Clean Water Act authorized administrative penalties only for oil spills and violations of marine sanitation device requirements.¹⁰⁹ Extensive amendments in 1987 authorized EPA to assess administrative penalties for virtually any violation of the Act.¹¹⁰ Similarly, the 1970 Clean Air Act provided for administrative penalties in Section 120,¹¹¹ but the formula for actually calculating the penalties was so unwieldy and complex that this authority was little utilized.¹¹² As part of the 1990 Amendments, Congress greatly enlarged the agency's administrative enforcement authority, broadening the types of violations subject to administrative compliance orders, giving EPA authority to issue administrative penalty orders, and adding a field citation program.¹¹³

Faced with a range of enforcement options, EPA will almost always proceed administratively. As one regional attorney stated:

total of \$200,000. 42 U.S.C. §§ 7413(b)-(c), CAA §§ 113(b)-(c) (1994). In practice penalties actually imposed are, not surprisingly, smallest in administrative cases and largest in criminal cases, reflecting the fact that EPA turns to these different mechanisms according to the seriousness of the underlying violation. Thus for FY 1994 the 250 criminal defendants were assessed \$36.8 million in fines and 99 years in prison; the 166 civil defendants were assessed almost \$65.7 million in penalties; and the 1596 administrative penalty orders totalled \$48 million. 1994 EPA ENFORCEMENT REPORT, *supra* note 6, at 4-3, 4-5.

109. Hodas, *supra* note 41, at 1583 n.158.

110. See Pub. L. No. 100-4, 101 Stat. 46 (codified as Clean Water Act § 309(g), 33 U.S.C. § 1319(g) (1994)).

111. 42 U.S.C. § 7420, CAA § 120 (1994).

112. See James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 308-10 (1992).

113. 42 U.S.C. § 7413(d), CAA § 113(d) (1994). See generally Miskiewicz & Rudd, *supra* note 112, at 308-16. EPA's other statutes also provide for broad administrative enforcement authority. Indeed, TSCA and Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") provide *only* for administrative penalties; while such penalties are subject to judicial review and judicial enforcement, neither Act provides for judicially imposed fines. 7 U.S.C. § 1361(a), FIFRA § 14(a) (1994); 15 U.S.C. § 2615(a), TSCA § 16(a) (1994).

"If I have a choice I will *always* go the administrative route except with the truly recalcitrant, hard-core, repeat violator."¹¹⁴

There are many reasons for EPA's preference for administrative enforcement, including its relative informality and speed. But one significant part of the explanation is that the agency handles administrative cases entirely on its own. EPA thus avoids the headaches of working with (or for) DOJ, while ensuring that it receives full credit.¹¹⁵

Rightly or wrongly, some cases are handled administratively instead of ending up in the courts because of the division of lawyering tasks. Some commentators have objected that this undermines enforcement.¹¹⁶ However, if one is worried about

114. Interview with Walter Mugdan, Acting Regional Counsel, U.S. EPA, Region II, in New York, N.Y. (Apr. 4, 1994).

115. A criminal prosecution can be a frustrating and demoralizing experience for the agency attorney.

The agency attorneys assigned to the local federal prosecutor are usually treated as "second class" assistants. . . . [T]he agency attorneys feel that they are asked to act as "clerks" for the local prosecutor. There is a reluctance among many agency attorneys to work with a local federal prosecutor. There is not "status," no enjoyment in prosecuting a case, and certainly no "glory." When the matter is finally prosecuted, if it succeeds, the U.S. Attorney receives the glory and credit. If it fails, the agency often gets the blame.

August Bequai, *White-Collar Plea Bargaining*, TRIAL, July 1977, at 38, 41.

116. Peter Yeager ascribes inadequate Clean Water Act enforcement in part to the regulatory competition between EPA and DOJ, stating that "the agency refrains from referring some prosecutable cases because the EPA does not wish to share credit for the case with the department." Peter Cleary Yeager, *Industrial Water Pollution*, in BEYOND THE LAW: CRIME IN COMPLEX ORGANIZATIONS 97, 139 (Michael Tonry & Albert J. Reiss, Jr. eds., 1993) (vol. 18 of CRIME AND JUSTICE: A REVIEW OF RESEARCH). By "get[ting] sole enforcement credit" in this way, the agency will "have a stronger regulatory record to show its superiors and congressional oversight committees when annual budgets are requested." *Id.* Yeager quotes the Chief Assistant U.S. Attorney in Los Angeles as somewhat petulantly complaining about this phenomenon:

In fact, many cases by the noncriminal investigative agencies — by that I mean the regulatory agencies — never get presented to the U.S. Attorney's Office. A very significant reason why they don't . . . is because the agency gets no credit for a criminal prosecution. The agency gets credit for civil action . . . that it can file and that its lawyers can handle, but the agency gets no statistical credit at budget

overprosecution, the availability and, from EPA's perspective, greater attractiveness of the administrative alternative is an important safety valve that would be undercut, though not eliminated, were EPA to handle both types of enforcement itself.

D. *Expertise*

The final standard argument for DOJ litigating authority is that the agency's substantive expertise is outweighed by the department's litigation expertise. In the environmental crimes setting, Main Justice tries to have it both ways on this score. On the one hand, vis-a-vis EPA, DOJ's stance is that DOJ lawyers are experienced prosecutors whereas EPA lawyers have never seen the inside of a courtroom. But, vis-a-vis the USAOs, DOJ stands this argument on its head. The claim is now that Main Justice (in the form of the Environmental Crimes Section) must be involved in prosecutions because it *does* have specialized expertise in environmental law, whereas lawyers in the USAOs are generalists insufficiently familiar with those arcane complexities.¹¹⁷

time for a criminal case that has been prosecuted.

The best example is that for the last three years the United States Attorney in Los Angeles . . . has been trying to get the United States government more actively involved in environmental prosecutions. . . . But when the EPA takes a look at a case, very often we never even hear about it. They handle it either administratively or civilly and they will not bring the U.S. Attorney's Office into it for criminal prosecution.

Id. at 139-40 (quoting Richard E. Drooyan). Drooyan's remarks are slightly dated but not inapplicable to the present day.

117. I will stay out of the expertise battle between Main Justice and the USAOs, other than to make three short points. First, some members of the defense bar have objected that AUSAs do lack adequate familiarity with the fine points of environmental law. Theodore Garret writes:

[T]he [AUSAs] in the field often lack the RCRA expertise of their colleagues at DOJ headquarters. The combined result may be that the lead prosecutor in a particular case has an incomplete understanding of how EPA has interpreted the relevant RCRA regulations, or a lack of perspective on the significance of the alleged violations, or both.

RCRA PRACTICE MANUAL, *supra* note 102, at 225.

Whether DOJ or EPA has the relatively stronger position in the expertise debate depends on the type of case. In a petition for review of an agency regulation, the agency lawyer's familiarity with the details and history of the statute, regulation, and overall regulatory scheme are an important advantage, not much outweighed by less litigation experience. In the criminal setting, however, the situation is just the opposite. There *are* separate litigation skills, wholly independent of the particular substantive law violated, in criminal prosecutions — more so than in any other area of litigation. As many have noted, environmental attorneys learned this the hard way in the early 1980s.¹¹⁸ Technical environmental expertise is much less important. Indeed, if one really needs the highly specialized understanding of the statutes found only in EPA and not in the Environment Division or the USAO to prosecute a case effectively, it is a case that should not have been brought as a criminal prosecution in the first place. Even if one thinks, as the author does, that the chorus of complaints about inappropriate criminal prosecutions for “technical” violations is overstated, it does not sit well to insist that an effective criminal prosecution requires the extraordinary specialized expertise of an EPA attorney because it is beyond the ken of other government lawyers (and so also, presumably, generalist judges and lay juries).

Lastly, DOJ claims a sort of expertise arising from its neutrality and objectivity. As a general proposition this is a valid but limited point, much diluted by the existence of a separate Environment Division. It has some force, however, in the environmen-

Second, environmental law is extraordinarily technical and complex. *See generally* Lazarus, *supra* note 1, at 2428-38.

Third, it is impossible to generalize about this concern, because the level of familiarity with environmental law minutia varies hugely from one USAO to another.

118. *See, e.g.,* Lazarus, *supra* note 1, at 2460-61; Starr, *supra* note 7, at 907. The usual example of an EPA attorney in over his head is *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (holding that the EPA lawyer's appearance before the grand jury as both attorney and witness resulted in the dismissal of the indictment). *See* Lazarus, *supra* note 1, at 2460-61 n.240; DOJ INTERNAL REVIEW, *supra* note 79, at 57 & n.62, 152-58 [between nn. 186 & 197]; Starr, *supra* note 7, at 906.

tal crimes setting. Environmental enforcement is multi-tiered; it never begins (and should never begin) with a criminal prosecution. A matter usually only reaches the prosecution stage when the defendant is a repeat violator, or particularly recalcitrant, and administrative efforts to achieve compliance have failed.¹¹⁹ By this stage, EPA and the defendant know each other. The dispute can easily become personal. An inappropriate prosecution would be particularly likely to occur when the prosecutor is angry at the defendant and has a personal stake in the prosecution. Therefore, turning to a new attorney outside EPA is an important protection.

E. *Increasing EPA's Role to Protect Defendants*

Two possible reforms could bolster the protections provided by enforcement structures against overzealous environmental prosecutions. Both involve a greater role for EPA, but without giving it the power to bring environmental prosecutions.

First, as discussed earlier, the fact that EPA handles administrative enforcement without DOJ is one factor keeping cases out of the courts. Taking this principle a step further, one might give EPA exclusive authority to handle civil judicial enforcement, thereby creating an automatic EPA preference for civil over criminal enforcement and keeping borderline cases on the civil side.

While this change would probably have the intended effect, it would be a mistake. First, it would be incomplete, as DOJ does not depend on EPA for all its criminal referrals and DOJ could generate criminal cases on its own even if EPA referred none at all. Second, the question of whether EPA should have independent litigating authority is an enormously complex one. Its answer cannot depend on what the indirect consequences would be for criminal prosecutions; that would be the tail wagging the dog.

The second possible reform, which does make sense, is to require DOJ to present all proposed criminal prosecutions to EPA for approval or, at the very least for comment. The overall impact of this change would be slight — most criminal prosecutions begin as EPA referrals anyhow, and EPA will rarely be opposed to the prosecution of those that do not have such origins. None-

119. See Starr, *supra* note 7, at 904.

theless, the agency would catch the occasional error. For example, in *United States v. Self*²⁰ the court reversed criminal convictions on four RCRA counts on the ground that the natural gas condensate that had been disposed in violation of RCRA requirements was not in fact a hazardous waste.¹²¹ This conclusion turned on a careful reading of lengthy EPA discussions in the preambles to several different rulemakings.¹²² Because in this area the legal prohibition often turns on consideration of, and familiarity with, the details not just of a particular statute but of *EPA regulations*, EPA input into the appropriateness or validity of a criminal prosecution should always be obtained.¹²³

IV. CONCLUSION

Despite the increase in criminal environmental prosecutions over the past decade, there have been remarkably few abuses. Those concerned about overzealous, blindered prosecutors can point to only a handful of cases where things got out of hand. The potential for abuse exists, but it has gone largely unrealized. Why has this been?

The answer lies in structural protections — those of the criminal law generally and those provided by taking criminal enforcement out of the hands of the usual environmental enforcers. With one minor modification, requiring DOJ to obtain EPA approval for criminal prosecution, the current regime is essentially sound.

120. 2 F.3d 1071 (10th Cir. 1993).

121. *Id.*

122. *Id.* at 1077-82.

123. I thank Neal Cartusciello and Gary Nurkin (EPA Region II) for suggesting *Self* as an example of a failed prosecution that could have been avoided if DOJ was required to obtain EPA approval. I note that they both endorsed the idea.

Richard Lazarus also discusses *Self*; he offers it as an example of how obscure environmental law is. See Lazarus, *supra* note 1, at 2437-38. Lazarus believes that environmental law's obscurity is one of the features that make criminal prosecutions potentially so problematic: "[t]his obscurity stems from the sheer density of environmental rules and their obscure, often inaccessible source materials." *Id.* at 2436. I agree with his observations and add two points. We generally tend not to rely upon the EPA to interpret the law, thinking ourselves capable of cutting through environmental law's obscurity. To remedy this problem, the DOJ should be required to rely upon the EPA's interpretation of the law so as to ensure proper application of the law to a particular case.

DOJ should be the prosecutor, and Main Justice should oversee the USAOs. This is not because DOJ should necessarily handle all environmental litigation. To the contrary, there is room for a fuller role for EPA attorneys in other settings. It is precisely because a criminal prosecution is different that the checks and balances and the consistency provided by multi-party and ultimately centralized decision-making are especially valuable here.