

2008

Strange Bedfellows

David M. Uhlmann

University of Michigan Law School, duhlmann@umich.edu

Available at: <https://repository.law.umich.edu/articles/1682>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Administrative Law Commons](#), [Criminal Law Commons](#), [Environmental Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Uhlmann, David M. "Strange Bedfellows." *Envtl. F.* 25, no. 3 (2008): 40-4.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Strange Bedfellows

Environmental protection has not been a priority for the Bush administration, but, contrary to popular perception, criminal prosecution of companies and officials accused of breaking environmental laws has flourished

David M. Uhlmann



David M. Uhlmann is the Jeffrey F. Liss Professor from Practice and the inaugural Director of the Environmental Law and Policy Program at the University of Michigan Law School. He served as Chief of the Environmental Crimes Section at the Department of Justice from 2000–2007.

Not much good can be said about the environmental record of the Bush administration. After insisting that he would support carbon dioxide reductions during the 2000 presidential campaign, President George W. Bush walked away from the Kyoto Protocol and refused to implement any mandatory program to address global climate change. While continuing the Clinton administration's New Source Review enforcement effort under the Clean Air Act, the administration sought to rewrite the underlying regulations in a way that would preclude future cases. Most recently, the Environmental Protection Agency denied the state of California's request for a waiver under the Clean Air Act that would have allowed the state to implement more stringent motor vehicle emission standards. In these and other ways, the White House has shown a consistent contempt for environmental protection and natural resource stewardship.

Given the Bush administration's environmental record, it was no surprise when the *Washington Post* reported in a front-page story on September 30, 2007, that the "pursuit of criminal cases against polluters has dropped off sharply during the Bush administration" and that the "slower pace of enforcement mirrors a decline in resources for pursuing environmental wrongdoing." Yet the article brought a sense of déjà vu: similar news reports about a decline in criminal prosecutions ran during the first Bush administration and the Clinton administration.

Indeed, rumors of the demise of the environmental crimes program have been greatly exaggerated. While environmental protection generally suffered under Bush II, the environmental crimes program has thrived. Today, the Justice Department's Environmental Crimes Section, or ECS, has more prosecutors than any time in its 20-year history. The career prosecutors and their law enforcement partners at the EPA, with varying degrees of support from political appointees, have produced record fines and precedent-setting prosecutions.

The success of the environmental crimes program is hard to reconcile with the administration's environmental record. How could a president who is hostile to environmental protection preside over an expansion of the program? Part of the answer may be that Republican administrations historically have supported prosecution of environmental crimes, notwithstanding conventional wisdom to the contrary.

The Justice Department created the ECS in April 1987, during the final years of the Reagan Admin-

istration, as part of a reorganization approved by Attorney General Edwin Meese. The program continued to grow under President George H. W. Bush, despite concerns that political appointees were undermining some cases and controversy over the perennial issue of the balance of power between Main Justice and the U.S. attorney's offices. When environmental prosecutors met in New Orleans during January 1991 for a national conference, Attorney General Richard Thornburgh addressed them and spoke eloquently about our "blue planet" and the need for a strong environmental crimes program.

In some respects, the most challenging years for the program occurred under President Bill Clinton, although not because it lacked support. Attorney General Janet Reno and Assistant Attorney General Lois Schiffer, who oversaw the Environment and Natural Resources Division, or ENRD, during the Clinton administration, both strongly supported vigorous prosecution of environmental crimes. But the program struggled, first under the weight of a multi-year investigation of alleged politicization of prosecutorial decisions led by Representative John Dingell (D-Michigan), which began during Bush I, and then as the Republican Congress cut funding for environmental protection. ENRD saw its budget frozen during the second half of the 1990s and, as a result, the section dropped from a peak level of 35 prosecutors in 1995 to just 29 prosecutors by 2002.

Under Bush II, neither Attorney General John Ashcroft nor Attorney General Alberto Gonzales made environmental crimes a priority. Ashcroft twice appeared at press conferences to extol the administration's environmental enforcement record, but his tenure was distinguished by a single-minded focus on counterterrorism, and he never demonstrated the personal commitment to environmental issues shown by his predecessors. Gonzales was even less engaged. He did not meet with the career leadership at ENRD until just before he resigned in 2007, and then only as part of a futile effort to revive his tenure by reaching out to career attorneys in the Justice Department.

The lack of support for the program from the top

levels of the Bush administration hampered prosecutions in some parts of the country. Like all federal criminal enforcement efforts, the environmental crimes program depends upon the participation of U.S. attorney's offices. While many of the Bush administration's U.S. attorneys supported a strong program and served on the Environmental Issues Subcommittee of the Attorney General's Advisory Committee, an equal number were either indifferent or unsupportive of enforcement efforts.

But while environmental prosecutions were not a priority for the senior leadership of the Justice Department, the environmental crimes program excelled, in part because the politically appointed assistant attorneys general who supervised ENRD were supportive of the career prosecutors in the ECS. Their motivations included traditional Republican emphasis

on law enforcement programs, a concern about "leveling the playing field" so that companies who complied with the law were not at a competitive disadvantage with facilities that violated the law, and, perhaps, the desire for some affirmative environmental accomplishments.

The most influential of the assistant attorneys general was Tom Sansonetti, who led ENRD during most of Bush's first term. Sansonetti, the former head of the Wyoming Republican Party, an ally of Vice President Dick Cheney, and a staunch conservative on natural resource issues, was perhaps an unlikely supporter of criminal

enforcement, but he quickly became an advocate for the program. He managed to restore many of the budget cuts that had hindered ENRD under Clinton, and he used some of the additional funding to add new positions to the ECS. As a result of those new positions, and a reorganization of ENRD that moved wildlife prosecutors to the ECS, the section grew to 40 prosecutors by the end of Sansonetti's tenure and remained at that record level throughout Bush's second term.

In addition, Sansonetti spearheaded efforts to de-



Environmental protection may have suffered under Bush, but the environmental crimes program has thrived

velop a hazardous materials transportation initiative with the Department of Transportation. He supported career prosecutors who wanted to focus on environmental crimes in the workplace, even when that effort encountered resistance at the White House and the Department of Labor, where some political appointees were concerned about alienating corporate supporters.

The hazardous materials transportation initiative, which had strong backing from the Bush administration because of its homeland security implications, began in September 2003, with the high profile prosecution of Emery Worldwide Airlines for shipping hazardous materials without proper labeling and notification to pilots. Emery's guilty plea, and a record \$6 million criminal fine for hazardous materials transportation violations, was announced by Ashcroft and Secretary of Transportation Norman Minetta. Notwithstanding that political backing, the hazardous materials transportation initiative had little success after the Emery prosecution, as long-standing bureaucratic resistance to criminal prosecution within the Department of Transportation stymied the Justice Department's efforts to bring more cases.

The opposite scenario unfolded with the worker endangerment initiative, which had little political support at the Department of Labor, but was welcomed by career officials at the Occupational Safety and Health Administration — and quickly became a success. In March 2005, Motiva Enterprises, LLC, pleaded guilty to negligent endangerment and felony Clean Water Act charges and paid a \$10 million criminal fine for a refinery explosion that led to a worker death and massive sulfuric acid spill into the Delaware River. After a *New York Times* and *Frontline* exposé about environmental and worker safety violations at McWane Inc. pipe manufacturing facilities across the United States, the Justice Department and EPA began a nationwide investigation that resulted in convictions of McWane and several senior corporate officials for environmental crimes and worker safety violations at five facilities in four states. Perhaps most significantly, in one of the most far-reaching environmental criminal cases ever brought, a federal grand jury indicted W. R. Grace & Co. and its senior officials for knowingly endangering Grace employees and residents of the town of Libby, Montana, where scores of people have died from asbestos-related illnesses.

The Justice Department's worker endangerment initiative continued after Sansonetti's tenure as assistant attorney general. Most recently, in October 2007, the Justice Department announced a landmark plea agreement with BP Products North America for a re-

finery explosion in Texas that resulted in 15 worker deaths and for a pipeline rupture in Alaska. Many of the victims' families have claimed that the \$50 million fine recommended by prosecutors in the Texas case was too lenient, but it was the third largest penalty ever imposed for an environmental crime. The prosecution of BP in Texas was the first case ever brought under the accident prevention and risk management provisions of the Clean Air Act, which sets a valuable precedent for future criminal cases under the statute, despite concerns about the fine recommendation.

Nor has the success of the environmental crimes program during the Bush administration been limited to the worker endangerment initiative. Many of the most significant cases during the last several years have grown out of a vessel pollution enforcement initiative begun during the Clinton administration. During April 2005, Evergreen International, S.A., paid a then-record \$25 million criminal penalty for concealing information about inoperable pollution control equipment aboard its ships. Approximately two years later, Overseas Shipholding Group, Inc., agreed to pay a \$37 million criminal penalty for violations on 12 ships in six American ports, setting a still higher bar for the largest criminal penalty imposed for deliberate vessel pollution. In addition, in one of its most significant criminal wetlands prosecutions, the Justice Department prosecuted Robert Lucas, a Mississippi developer who filled wetlands near the Gulf of Mexico and defrauded low income homeowners. Lucas was found guilty of 40 felony counts and sentenced to nine years in jail; his company, Big Hill Acres, Inc., was ordered to pay a \$4.8 million fine; and his co-defendants were sentenced to over seven years in jail.

At EPA, Granta Nakayama, the assistant administrator for the Office of Enforcement and Compliance Assurance during much of the second term of the Bush presidency, made criminal enforcement his top priority. Nakayama emphasized criminal enforcement in speeches to the American Bar Association and industry groups and pushed investigators to focus on larger, more complex cases that will contribute to the EPA's broader pollution prevention goals. EPA's focus on cases that reflect the agency's priorities is laudable from a policy standpoint, but may be partially responsible for the decline in overall numbers reported by the *Washington Post*. Larger cases require longer investigations and more agent resources, which, in turn, depletes case numbers.

It is too soon to know whether EPA will succeed in its

effort to utilize the criminal program to advance its national enforcement initiatives. The initial results, however, have been positive: the Justice Department and EPA secured convictions of Citgo Petroleum Corporation after a lengthy trial for Clean Air Act violations at a refinery in Texas and entered a landmark plea agreement, including over \$100 million in remedial projects, in the prosecution of the Puerto Rico Aqueduct and Sewer Authority for 25 years of Clean Water Act violations. Moreover, Nakayama's outspokenness helped restore morale among EPA's criminal investigators, who were dispirited by the diversion of agent resources to homeland security efforts in the months and years after September 11 (including the use of agents as a security detail for the EPA administrator).

There are limits to how much credit the Bush administration deserves for the accomplishments of the environmental crimes program over the last several years. Much of the program's success reflects the efforts of career prosecutors at the Justice Department and criminal attorneys and investigators at EPA, as well as the institutional resiliency that enables law enforcement programs to thrive across administrations. During the Clinton administration, Assistant Attorney General Schiffer eliminated approval requirements adopted by her Republican predecessors and delegated authority over indictments and plea agreements to the chief of the ECS, who is a career Senior Executive Service official and reports to a career deputy assistant attorney general. Schiffer's efforts ensured that charging decisions are made by career prosecutors, which enhanced the professionalism of the criminal program and limited the potential for political interference in prosecutorial decision-making.

Moreover, while the Bush administration has not impeded criminal enforcement efforts, the administration enacted new rules under the Clean

Air Act and the Clean Water Act which benefitted industry at the expense of the environment. Critics therefore might argue that the administration's criminal enforcement efforts provided cover for its more far-reaching efforts to undermine environmental protection through regulatory changes. Whether that is true or not, there is no doubt that regulations enacted by the Bush administration, if upheld by the courts, may undermine future enforcement efforts, as demonstrated by the administration's regulatory attack on the New Source Review program.

A related critique is that the White House wanted a strong environmental crimes program because the administration was badly in need of at least some positive environmental news. There is merit to that view: the Justice Department and EPA have been aggressive in their efforts to highlight criminal prosecutions in the news media. Yet, even if the administration's motives were not pure, the environment benefits when there is publicity for prosecution efforts. The goals of the program extend beyond punishment of offenders. A major reason to prosecute environmental crimes vigorously is to promote greater compliance with the law — and the deterrent effect of criminal prosecutions is lost if there is not sufficient publicity for the government's enforcement efforts.

The environmental crimes program faces significant challenges in the years ahead. While prosecutorial resources grew during the Bush administration, recent Supreme Court cases present obstacles for the prosecution of environmental crimes. Historically, Clean Water Act cases have been the heart of the criminal enforcement program, but the jurisdictional reach of the statute is in doubt after the Supreme Court's 4-1-4 decision in *United States v. Rapanos*. While the Supreme Court may have intended the decision to affect only wetlands cases, *Rapanos* calls into question protection for much of the tributary system, because the definition of "waters of the United States" that was at issue in the case is the same for both the National Pollutant Discharge Elimination System program and the wetlands program. As a result, in cases involving discharges without an NPDES permit or in violation of an NPDES permit, prosecutors now must prove, beyond a reasonable doubt, "relatively permanent" hydrological connections or a "significant nexus" to navigable-in-fact waters that may be 30 or 40 miles (or more) downstream.

Even more problematic for the program is the Supreme Court's decision in *United States v. Booker*, which

struck down mandatory federal sentencing guidelines that were widely viewed as responsible for the imposition of prison sentences for environmental crimes. Subsequent Supreme Court cases have stressed the advisory nature of the sentencing guidelines and thus limited their influence in federal sentencing. While some district court judges still impose jail time for environmental crimes, a number of significant cases, including the McWane prosecutions in Alabama, did not result in incarceration, even for defendants who were convicted of multiple felonies. With defendants no longer needing sentencing concessions from the government to avoid prison, fewer cases are pleading and more cases are going to trial, which ties up agent and prosecutorial resources and means there are still fewer resources available for new cases. In addition, with more sentences of probation, the deterrent effect of prosecutions is diminished, which hurts regulatory compliance.

Most disconcerting of all, the environmental crimes program remains extraordinarily small, even with the increased number of prosecutors in the ECS. The biggest problem is the limited number of criminal investigators at EPA. EPA's Criminal Investigation Division has fewer than 200 investigators nationwide. Many states have no resident EPA criminal investigators, which means that the nearest EPA special agent may be several hundred miles (and several states) away. To put those numbers in context, the Federal Bureau of Investigation has more than 10,000 agents, and multiple offices in every state. The Fish and Wildlife Service has nearly twice as many investigators as EPA, even though it typically does not investigate complex corporate crime. More resources will be required to develop a truly national environmental crimes program in the years ahead, which will require a commitment by Congress that will be difficult at a time of soaring budget deficits and a looming recession.

Despite the challenges it faces, the environmental crimes program is more firmly entrenched as a federal law enforcement program than ever before, at the end of an administration when many would have expected it to falter. Regardless of their motivations, political appointees within the Bush administration supported the efforts of the career prosecutors and investigators who are the heart of the program. The administration's environmental crimes record may be evidence that there is now bipartisan agreement that the most egregious violations warrant criminal prosecution. A better view is that the program has developed to the point that it is non-partisan, which means that criminal enforcement efforts should receive the support they deserve regardless of the party of future administrations. •