Public Comment

Proposed Amendments

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WASHINGTON LEGAL FOUNDATION
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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these general comments to the Commission in response to the proposed guidelines of the Commission's Advisory Working Group on Environmental Sanctions as well as in response to the Commission's request in its latest proposed amendments of the guidelines that it is seeking "comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment." 58 Fed. Reg. 67522 (Dec. 21, 1993).

As the Commission is well aware, our Foundation has objected to the proposed guidelines issued by the Commission's Advisory Working Group on Environmental Sanctions for organizations, as well as the secret manner in which they were formulated. The final proposal, issued on or about November 16, 1993, is fundamentally flawed as was the first draft issued in March 1993. In some respects, the final proposed guidelines are worse than the original draft because they purport to key the various fine levels with the individual guidelines under Part Q.

The individual guidelines, in effect since 1987 and never revised, have been universally recognized as being arbitrary and fundamentally flawed. Those guidelines impermissibly "double count" several offense conduct factors, and result in draconian prison terms of 21-27 months for a first-time offender found guilty, for example, of placing topsoil and clean building sand on private property which the Environmental Protection Agency deems to contain wetlands. These harsh sentences for minor regulatory infractions are greater than the average sentence imposed under the guidelines for clearly more serious offenses such as arson, car theft, forgery, and many drug offenses. We refer the Commission to our numerous prior submissions on this subject over the last several years for fuller discussion of this subject.

It thus comes as no surprise, that under the proposed

guidelines by the Advisory Working Group, maximum fines would be imposed in almost every environmental case. As I stated in my testimony before the Working Group last May, the original draft (and now the final draft) would require a court to impose a minimum fine of $350,000 on an entity found guilty of placing a load of clean fill on a so-called wetland. Attached hereto for the Commission's information is a WLF Counsel's Advisory "Proposed Environmental Guidelines Would Require Courts To Impose Maximum Fines On Business" by Benjamin S. Sharp, Esq., that also reiterates these critical observations.

The fundamental flaw with the proposed environmental guidelines is that they appear to have been drafted without a proper study of the empirical data to determine whether there is a problem with the current sentencing practice in this area, and if so, whether the proposed sharp departure from the current practice makes any sense under a rational punishment theory, considering the complexity of the subject matter. We are well aware that some members of the Advisory Working Group, such as Professor Jonathan Turley (the Committee's Reporter and a primary author of the proposed guidelines) are so extreme in their views about the proper response to environmental infractions that they seem to believe that infractions of environmental laws and regulations, regardless of the actual harm to the environmental or criminal intent, are "environmental felons" of the first order who deserve to be imprisoned two or three years for a first offense.

Professor Turley and his Environmental Crimes Project at George Washington University Law School have issued reports and provided testimony for Congressmen Charles Schumer and John Dingell concerning the alleged lack of environmental enforcement by the Department of Justice. These and similar Congressional reports by Congressman Dingell have been characterized as "methodologically flawed and replete with factual errors." See William T. Hassler, "Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes," 24 ELR 10074 (Feb. 1994)(copy enclosed). Mr. Hassler states that the investigations that produced these reports "took on the worst aspects of partisan politics, unmitigated by adversarial balance, and replete with simplistic characterizations of complex issues." 24 ELR at 10077. See also U.S. Dep't of Justice, "Internal Review of the Department of Justice Environmental Crimes Program: Report to the Associate Attorney General" (March 10, 1994).

As I noted in my testimony before the Working Group last May, Professor Turley incorrectly stated in his Congressional testimony that our client, John Pozsgai, had created a dump; in fact, he had cleaned up a dumpsite by removing thousands of old tires and rusted automobile parts before allowing clean (non-toxic, non-hazardous) fill to be placed on a small portion of the property to build his garage. Accordingly, the public is justifiably suspect about a

work product of a committee that refuses to release the empirical data it may have relied upon and the methodology of its decisionmaking.

We note that Messrs. Lloyd S. Guerci of Mayer, Brown & Platt, and Meredith Hemphill, Jr. of Bethelem Steel Corporation, two members of the Advisory Working Group, issued a stinging 21-page critique of the committee's proposed guidelines on December 8, 1993. We heartily agree with their conclusion that the proposed guidelines should be rejected.

Before taking any further action with respect to organizational guidelines, we strongly urge the Commission to revise its flawed individual guidelines that produce draconian and disparate sentences. We find it quite remarkable that the Commission is so concerned about sentencing fairness for drug offenders, for example, that it is inviting comment on such issues as whether "male [marijuana] plants should be treated differently or excluded because male plants have a comparatively low THC content. . . or whether a definition of marihuana plant should be adopted that would distinguish among plants at different levels of maturity or would exclude plants below a certain level of maturity." 58 Fed. Reg. 67545. Other proposed amendments also show how the Commission is attempting to sharply refine various offense and offender characteristics. And yet under the environmental guidelines, Sections 2Q1.2 and 2Q1.3, lengthy prison sentences for placing clean building sand on one's own property can be, and have been, imposed, and are greater than prison sentences for dumping harmful and toxic wastes into a public waterway. Where is the Commission's concern with the fairness of that situation?

Accordingly, we again urge the Commission to get on with the sorely needed business of revising the individual environmental guidelines, and to reject, or postpone consideration of, the proposed environmental guidelines for organizations.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

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WASHINGTON LEGAL FOUNDATION

Counsel's Advisory

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PROPOSED ENVIRONMENTAL GUIDELINES WOULD REQUIRE COURTS TO IMPOSE MAXIMUM FINES ON BUSINESS

by
Benjamin S. Sharp

On November 16, 1993, the U.S. Sentencing Commission's Advisory Working Group on Environmental Sanctions submitted to the Commission its final proposed guidelines on sentencing corporations and businesses convicted of violating federal environmental laws and regulations. The final draft, like the earlier draft released in March 1993 for public comment, does not provide any explanation or rationale for the proposal. The earlier draft was universally criticized by the corporate community for being unduly complicated in computing the fine to be imposed in a particular case as well as resulting in fines that would be significantly greater than those currently imposed. The final draft, while modified somewhat, will similarly require courts to impose substantial fines that would in many cases be the statutory maximum. The draft guidelines, denominated as a new Chapter 9 in the Guidelines Manual, will also allow courts to impose probation that would include monitoring the company through unannounced visits and audits of the company's financial records. § 9F1.1.

The major difference between the two drafts is the method used to arrive at the base fine. The earlier draft had a range of seven levels of percentages of the maximum fine based upon the nature of the underlying conduct. A typical violation involving a release of any pollutant set the base fine of 60-90 percent of the statutory maximum. The base fine would then be increased based upon aggravating factors such as prior violations, and then adjusted downward based upon mitigating factors such as having an effective environmental compliance program; however, no fine can be reduced below 50 percent of the maximum statutory fine.

The final draft computes the base fine by referencing the base offense levels from the current sentencing guidelines used to impose prison sentences on individuals under Part Q, which already allows for double-counting of aggravating factors. If the company did not have an adequate compliance or audit program, five more points are added to the offense level. The resultant offense level number is then associated with a percentage figure ranging from 10 percent to 100 percent of the statutory maximum fine. In many cases, a level 24 will easily be reached which requires a 100 percent fine. As with the earlier draft, the statutory maximum is *not* the fine listed in the particular environmental statute in question; the statutory maximum references the Alternative Fines Act in 18 U.S.C. § 3571(c), namely, a minimum of $500,000 for any felony. In addition, the proposal requires that no fine shall be lower than the economic gain to the company realized by not complying with the applicable environmental law. § 9E1.2(c).

Because of the Advisory Group's delay in drafting this final proposal, the Commission will be unable to even begin considering it until 1994. The corporate community will thus have ample time to comment on the provisions should the Commission make an announcement that it intends to adopt any of them.

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ELR
NEWS & ANALYSIS

Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes

by William T. Hassler

Editors' Summary: Since late 1992, two congressional committees and an academic group working for a member of a third committee have issued reports severely criticizing the Environmental Crimes Section (ECS) of the U.S. Department of Justice (DOJ). The reports focus on alleged deep divisions among the three units of the federal government responsible for the prosecution of environmental crimes: the ECS, local U.S. Attorneys' Offices, and EPA's Office of Criminal Enforcement. They claim that the ECS lacks prosecutorial zeal and suffers from morale, management, and competency problems.

The author, a former attorney with the ECS and a former Associate Counsel on the staff of Independent Counsel Lawrence Walsh, argues that the reports are methodologically flawed and replete with factual errors. He charges that the congressional investigators conducted unbalanced factual inquiries, adopted unrealistic and inconsistent standards for evaluating prosecutorial decisions, and ignored protections traditionally afforded subjects of criminal investigations and indictments. The author notes that despite the reports' conclusions, DOJ prosecutions of environmental crimes increased dramatically during the 1980s and that DOJ efforts resulted in multimillion dollar criminal fines. He concludes that the reports fail to provide a meaningful basis for addressing important questions about how the government's criminal enforcement powers can best promote environmental protection.

The Environmental Crimes Section (ECS) of the U.S. Department of Justice (DOJ) is a relatively small part of the DOJ's Environment and Natural Resources (ENR) Division,[1] with a modest professional staff of approximately 30 attorneys. Since late 1992, however, the ECS has received a degree of scrutiny disproportionate to its size. Since then, two congressional committees have focused independent investigations on the ECS, and an academic group has prepared a report for a member of still a third congressional committee. No other component of the ENR Division has received such exposure in recent years.

The congressional investigators[2] have reached startlingly negative conclusions. They describe the ECS as suffering from "extreme conservatism and lack of aggressiveness,"[3] a "failure to pursue aggressively a number of significant environmental cases,"[4] and "chronic case mismanagement."[5] By early 1993, *Time* magazine characterized the "cleanup" of the ECS as a "high priority" for the Clinton transition team.[6]

In fact, the ECS' record has been systematically mis-

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Although a number of individuals provided information as part of the preparation of this Dialogue, the views stated are solely Mr. Hassler's, and in no way are intended to represent the opinions of current or former officials of the DOJ, or of any private individuals interviewed.

1. The ENR Division's responsibilities include a wide variety of civil and criminal environmental litigation.

2. For purposes of simplicity, the term "congressional investigators" is used in this Dialogue to refer to the members of the Environmental Crimes Project of the National Law Center at George Washington University (whose work was conducted at the request of Rep. Schumer), as well as to investigators for the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, chaired by Rep. John Dingell (D-MI) and the Subcommittee on Oversight and Investigations of the House Committee on Science, Space, and Technology, chaired by Rep. Howard Wolpe (D-MI).

3. SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT OF THE HOUSE COMM. ON SCIENCE, SPACE, AND TECHNOLOGY, REPORT ON THE PROSECUTION OF ENVIRONMENTAL CRIMES AT THE DEPARTMENT OF ENERGY'S ROCKY FLATS FACILITY, 102d Cong., 2d Sess. 12 (1993) [hereinafter WOLPE REPORT].

4. Memorandum from Rep. John Dingell to Members of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, SUMMARY REPORT ON THE DEPARTMENT OF JUSTICE UNDERCUTTING THE ENVIRONMENTAL PROTECTION AGENCY'S CRIMINAL ENFORCEMENT PROGRAM, 102d Cong., 2d Sess. (Sept. 9, 1992), [hereinafter DINGELL REPORT], *reprinted in* EPA'S CRIMINAL ENFORCEMENT PROGRAM: HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, 102d Cong., 2d Sess. 9-55 (Sept. 10, 1992) [hereinafter DINGELL HEARING].

5. Letter from Rep. Charles E. Schumer to William P. Barr, U.S. Attorney General (Oct. 29, 1993).

6. Michael S. Serrill, *Law and Disorder: Clinton Urgently Needs a New Attorney General to Handle the Monumental Task of Revamping the Government's Most Troubled Department*, TIME, Feb. 15, 1993, at 31.

characterized. The congressional investigators, in their zeal to pressure the DOJ to increase the number of environmental prosecutions across the board, have failed to treat the subjects of their inquiries with the fairness to which any subject of investigation (whether criminal or congressional) is entitled.[7]

This Dialogue is not intended to suggest that the ECS or its attorneys should be above criticism or congressional review. They are, and should be, subject to both. But oversight of the ECS' work should encourage fair and predictable enforcement of the nation's environmental laws, consistent with the standards of prosecution recently announced by Attorney General Janet Reno.[8] Achievement of this goal requires a balanced examination of available evidence, realistic standards for evaluating prosecutorial decisions, and respect for traditional protections afforded individuals subject to criminal investigation or indictment. This Dialogue demonstrates that ECS' critics, to date, have fallen woefully short of this standard.

The Critics and Their Charges

The Dingell Report

As the 1992 presidential race heated up, the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigations (the Dingell Committee), chaired by Rep. John Dingell (D-MI), focused its investigative resources on the ECS and DOJ headquarters. Press reports at the time focused on alleged "sweetheart plea agreements," "secret meetings with defense counsel," and "political favoritism."[9] The report which the Committee ultimately issued in September 1992 (the Dingell Report) does not, however, allege improper political influence.[10] Instead, the Report explores allegedly deep rifts among the three principal bureaucracies charged with enforcing environmental criminal statutes: "local" prosecutors in various U.S. Attorneys' Offices, "main" DOJ prosecutors employed by the ECS (and supervised by political appointees at DOJ headquarters), and the U.S. Environmental Protection Agency's (EPA's) Office of Criminal Enforcement.[11]

The Committee's staff conducted extensive interviews with EPA investigators, and presented selected agents in public hearings. These hearings and the Committee's subsequent Report generated a full-blown controversy over the handling of six cases.[12] Notably, the Committee did not allow testimony at the hearings by witnesses offered by the DOJ.[13]

7. Government prosecutors have not been the only victims of the congressional inquiries' fundamental unfairness. The congressional investigators have generally portrayed the subjects of the underlying criminal investigations as plainly guilty of criminal acts, regardless of whether they have been convicted or, in some cases, even formally charged. As discussed below, these subjects, many of whom are private citizens, have been provided no opportunity to defend their reputations or to present any defenses that they may have. *See infra* notes 20, 128 and accompanying text.

8. *See* Jim McGee, *Justice Department Sets Changes on Discipline: Prosecutors' Conduct Had Led to Complaints*, WASH. POST, Dec. 14, 1993, at A1. *See also A Reno Reform*, WASH. POST, Dec. 20, 1993, at A24; Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers: Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1 (first of six part series).

9. *See* Linda Himmelstein, *DOJ's Environmental Mess*, LEGAL TIMES, July 20, 1992, at 1, 22-23.

10. *See* DINGELL REPORT, *supra* note 4, at 1-3.

11. Primary responsibility for federal criminal prosecution lies with the 94 U.S. Attorneys' Offices nationwide. The U.S. Attorney that heads each office is a presidential appointee. The ECS, which is located in Washington, D.C., has authority to litigate specified criminal offenses generally relating to violations of environmental statutes. The ECS is headed by a Section Chief, who reports to the Assistant Attorney General for the Environment and Natural Resources Division (also a presidential appointee). The U.S. Attorneys' Offices as a whole employ approximately 3,900 attorneys (most of whom work on matters other than environmental criminal matters). The ECS employed 31 attorneys as of 1993. *See* ENVIRONMENTAL CRIME: ISSUES RELATED TO JUSTICE'S CRIMINAL PROSECUTION OF ENVIRONMENTAL OFFENSES; HEARING BEFORE THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 102d Cong., 2d Sess. 7 (1993) (statement of L. Nye Stevens, Director, Planning and Reporting General Government Division) [hereinafter GAO STUDY]. The ECS and the U.S. Attorneys' Offices generally share authority to prosecute criminal environmental matters, and frequently prosecute cases jointly. *See id.* at 1, 8-12.

EPA's Office of Criminal Enforcement employs approximately 70 criminal investigators to investigate suspected violations of environmental statutes, and is headed by a Director, who reports to EPA's Assistant Administrator for Enforcement and Compliance Assurance. EPA is currently in the midst of reorganizing its enforcement programs. *See* Memorandum from Steven A. Herman, Ass't Administrator for Enforcement, to Assistant Administrators et al. (Nov. 30, 1993), *reprinted in* DAILY ENV'T REP. (BNA), Dec. 1, 1993, at E-1.

12. These cases or investigations have generally been labeled using the names of the entities that were the subject of investigation, even though in several cases the subjects themselves have not ever formally been charged with wrongdoing. To avoid ambiguity, this Dialogue will refer to the investigations using the terminology found in the congressional reports. This usage should not be construed to suggest that the subjects of investigation were in fact guilty of the allegations discussed.

The Dingell Report focused on:

1. *United States v. PureGro et al.*, CR90-228AAM to -323AAM (E.D. Wash.), in which a corporate defendant (PureGro) and several individual employees were originally indicted for alleged felony violations related to the application of pesticides in Washington State. PureGro eventually pleaded guilty to a misdemeanor, and reportedly paid a fine of $15,000. Charges against individuals were dismissed.

2. *United States v. Weyerhauser*, in which EPA investigated Weyerhauser for violations of the Clean Water Act. Weyerhauser eventually pleaded guilty to five misdemeanor counts, and paid a fine of $125,000.

3. *Thermex Energy Corporation (Thermex)*, in which EPA investigated a company operating in Wyoming concerning alleged mishandling of hazardous waste. No indictment resulted. The company under investigation (Thermex) is now bankrupt.

4. *Chemical Waste Management*, in which the corporation was investigated for alleged mishandling of hazardous wastes in Alabama. A separate case in Louisiana resulted in convictions of individuals. The Dingell Report focused on the Alabama case, which resulted in no indictments.

5. *Hawaiian Western Steel*, in which EPA investigated a corporation for alleged Clean Air Act violations. No indictments resulted. The company under investigation (Hawaiian Western Steel) is now in Chapter 11 bankruptcy proceedings.

6. *Van Leuzen*, in which EPA investigated alleged illegal filling of wetlands by Marius Van Leuzen, an individual. No indictment resulted.

13. According to former DOJ officials, the DOJ offered to allow senior managers, including career prosecutors within ECS management, to address the charges made by EPA agents. The Dingell Committee declined this offer for its September 1992 hearings. *See* DINGELL HEARING, *supra* note 4, at 3 (statement of Rep. Dingell) (stating that the DOJ "is now requesting to be heard and has submitted testimony," that testimony will not be received at September 10, 1992, hearing, but that future opportunity to testify will be provided). The Committee also refused to make part of the hearing record a written statement prepared by the DOJ responding to the Commit-

The GW Report

At roughly the same time that the Dingell Committee conducted its hearings, the Environmental Crimes Project of the National Law Center at George Washington University (the GW Law Center) prepared a separate report (the GW Report) for Rep. Charles Schumer (D-NY)[14], who released a "preliminary" version[15] on October 29, 1992, only days before the national presidential election. The GW Report reaches largely the same conclusions as the Dingell Report.[16] This similarity, however, is not surprising, because the analysis in the GW Report covers largely the same ground as the Dingell Report.[17]

The Wolpe Report

While Reps. Dingell and Schumer were considering the ECS' overall record, another House subcommittee (the Wolpe Committee),[18] chaired by Rep. Howard Wolpe (D-MI), began proceedings focused solely on the recently concluded prosecution of Rockwell International Corporation (Rockwell) for its conduct of operations at the U.S. Department of Energy's (DOE's) Rocky Flats nuclear weapons facility near Denver, Colorado (Rocky Flats).[19] The Committee's investigation was apparently fueled in part by statements from members of a grand jury that heard evidence during the government's investigation of Rocky Flats. Members of the grand jury charged that the government had reached a "sweetheart" deal with Rockwell, and that individuals suspected of serious wrongdoing had gone free.[20] The Committee issued a report[21] (the

tee's inquiries, and removed the written statement from the hearing room when DOJ officials placed it in an area with written statements provided by witnesses at the hearing. Interview with Roger Clegg (Dec. 23, 1993).

In connection with this Dialogue, the author attempted to contact staff counsel for the Dingell Committee to obtain the Committee's position on its choice of witnesses and the restrictions on DOJ participation in its 1992 hearing. The counsel in question did not respond either to repeated telephone calls or a written request for an interview.

14. Rep. Schumer was, at the time the Report was released, Chairman of the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary. The letter from Rep. Schumer to Attorney General Barr forwarding the Report does not appear to have been written on behalf of the subcommittee.

15. ENVIRONMENTAL CRIMES PROJECT, NATIONAL LAW CENTER OF GEORGE WASHINGTON UNIVERSITY, PRELIMINARY REPORT ON CRIMINAL ENVIRONMENTAL PROSECUTION BY THE U.S. DEPARTMENT OF JUSTICE (1992) [hereinafter GW REPORT].

The Project Director for the GW Report, Prof. Jonathan Turley, stressed in an interview for this Dialogue that the GW Report is, as its title indicates, "preliminary." Interview with Prof. Jonathan Turley, George Washington University, GW Law Center, Washington, D.C. (Nov. 23, 1993). Although Prof. Turley stated that it is his consistent practice to note the preliminary nature of the GW Report in interviews with reporters, a search of the NEXIS library of the LEXIS database failed to locate any articles in which reporters quoted him as having qualified his criticisms of the ECS or of named ECS attorneys based on the "preliminary" nature of the report. Search of LEXIS-NEXIS Library (Dec. 21, 1993). (In one article, out of dozens quoting or citing Prof. Turley, the Report itself is described as "preliminary"; Prof. Turley himself describes the Report as preliminary in a letter to the editor in a second publication.)

As of November 1993, Prof. Turley stated that the Project's "final" Report remained unfinished, and that it might, but would not necessarily, be released by the end of 1993. *Id.*

16. Both reports found a failure to prosecute environmental crimes aggressively, poor relations between the ECS and U.S. Attorneys' Offices and EPA, mismanagement of the ECS, and barriers to wetlands prosecutions. *See* GW REPORT, *supra* note 15, at 5-6; DINGELL REPORT, *supra* note 4, at 2-3, 38-39.

17. The GW Report itself states that students involved in writing the Report conducted interviews, in addition to "evaluat[ing] [c]ritical testimony given before various congressional committees [presumably during the hearings conducted by the Dingell Committee]." GW REPORT, *supra* note 15, at 4. The amount of independent investigation done in compiling the GW Report is difficult to determine, because the Report does not reveal the identities of its sources. (As discussed below, the GW Report bases its criticism of the ECS on anonymous sources. *See* notes 31 and 65 *infra*, and accompanying text.) The Report's principal author was unwilling, in response to inquiries made in connection with this Dialogue, to disclose any specific information about other sources that the Report may have relied on. He stated that the Report, as released in 1992, included substantial investigation independent of that found in the Dingell Report, although a substantial portion of the GW Report (approximately 130 out of the Report's 162 pages) was intentionally devoted to detailed analyses of the six case studies that were the focus of the Dingell Report. *See* GW REPORT, *supra* note 15, at 34-161. The initial 32 pages of the GW Report criticize, at least in passing, the handling of five additional cases that generally were not the focus of the Dingell Report.

In general, the Dingell Report appears to have been based heavily on testimony by EPA agents and their supervisors. Statements in the GW Report concerning internal ECS personnel matters suggest that its preparers had access to Assistant U.S. Attorneys and ECS attorneys as well. This Dialogue has made no attempt to identify any individual sources who supplied information used in the GW Report.

18. The Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology.

19. The Rocky Flats facility had long been the center of local environmental controversies, as have many other U.S. Department of Energy (DOE) nuclear weapons plants. The *Rocky Flats* investigation gained national prominence when in June 1989, EPA and FBI agents "raided" the plant to search for evidence of criminal wrongdoing. The investigation of the plant concluded in March 1992, when Rockwell agreed to plead guilty and to pay a fine of $18.5 million for admitted violations.

The DOJ hailed the Rockwell plea agreement as a record fine under the Resource Conservation and Recovery Act (RCRA) (in fact, the fine exceeded any other criminal penalty assessed under *any* environmental statute with the exception of the fine paid by Exxon Corporation in connection with the *Exxon Valdez* spill in Prince William Sound, Alaska).

Readers should be aware that the author of this Dialogue worked on the *Rocky Flats* investigation during 1990 and 1991. The discussion of *Rocky Flats* in this Dialogue is limited to publicly available materials and interviews conducted since the author left the DOJ.

20. *See, e.g.*, Bryan Abbas, *The Secret Story of the* Rocky Flats *Grand Jury*, DENV. WESTWORD, Sept. 30 - Oct. 6, 1992. The grand jury's unusual public disclosures remain a topic of controversy, and the DOJ's handling of the grand jury received an entire section in the Wolpe Report. WOLPE REPORT, *supra* note 3, at 121-40. As of December 1993, there were no public reports that the grand jurors had provided information to any of the congressional subcommittees at issue.

On January 26, 1993, the U.S. District Court for the District of Colorado released the grand jury report in redacted form, together with a lengthy 124-page response of prosecutors addressing the charges contained in the grand jury report. *In Re Grand Jury Proceedings, Special Grand Jury 89-2 (Rocky Flats Grand Jury)*, Order Regarding Release of Grand Jury Documents (Civ. Action No. 92-Y-180, Jan. 26 1993). The Court reaffirmed prior decisions not to release the report in its entirety because the report

> accused individuals identifiable by name or position . . . ; dealt in rumor and conjecture; engaged in social and even legal argument; dealt with political and social issues outside the province of the special grand jury's duty of investigating crime; contained charges not based upon a preponderance of the evidence; and followed a serious breach of grand jury secrecy.

Id. at 2.

21. *See* note 3, *supra*. The timing of the Wolpe Report, which was issued in January 1993, is a tribute to the Committee staff's perseverance: by the time the Report was issued Bill Clinton was President-elect, and Rep. Wolpe was preparing to leave Congress.

Wolpe Report) containing scathing criticism of the ECS based on the Committee's review of this high-profile case. The Report highlights apparent "cultural" deficiencies at the ECS, which, according to the Committee, led to a lack of aggressiveness.[22]

Dingell II and the GAO Report

Notwithstanding the election of a Democratic President in November 1992, the Dingell Committee remained interested in the controversy over the ECS. In 1993, it renewed its request, previously denied by the Bush Administration, to interview line attorneys about specific prosecutions. In June, the Clinton Administration granted the request,[23] and in November 1993, the Dingell Committee reopened its hearings.

The 1993 hearings continued the attack on the ECS and its top managers, but no longer focused solely on anecdotal evidence relating to the six cases scrutinized in 1992. Instead, the Committee presented a statistical analysis prepared by the General Accounting Office (GAO) comparing the ECS prosecutions to prosecutions by U.S. Attorneys' Offices.[24] As an added twist, three former U.S. Attorneys (all Republican appointees) testified to criticize what they view as a trend toward excessive headquarters (i.e., ECS) oversight of U.S. Attorneys' Offices. The issue of headquarters authority centers largely on an administrative rule issued by Attorney General William Barr in the final days of the Bush Administration, under which the ECS retains an effective veto over certain types of prosecutions.[25] On November 4, 1993, the Clinton Administration announced that it did not intend to repeal the rule in question.[26]

Summary of the Charges

The collective criticisms of the various congressional investigators can be summarized generally as concluding, to use a borrowed phrase, that the ECS was a hotbed of cold feet. More specifically, the congressional investigators concluded that ECS attorneys showed a lack of proper prosecutorial zeal, revealed by:

1. an alleged hostility to wetlands prosecutions developed by EPA and local U.S. Attorneys' Offices;
2. an alleged weakness for "corporate only" pleas, in which (allegedly guilty) corporate employees and managers escaped indictment;
3. a clear tendency to undervalue and "underprosecute" environmental violations relative to prosecutors in U.S. Attorneys' Offices; and
4. serious problems of morale, management, and overall competency.[27]

Evaluating the Critics' Methods

The Dingell, GW, and Wolpe Reports are neither fair nor accurate.[28] Regrettably, the investigations that produced them took on the worst aspects of partisan politics, unmitigated by adversarial balance and replete with simplistic characterizations of complex issues.

Failure to Interview the Reports' Subjects

In the case of the Dingell and GW Reports, the congressional investigators generally did not speak with the attorneys criticized.[29] Instead, these investigators relied almost exclusively on information gathered from law enforcement agents, and, in some cases, other prosecutors.[30] In the case of the GW Report, the witnesses remain entirely anonymous, but clearly did not include the main subjects of the Report's criticisms.[31] In addition, before publishing their

22. *See, e.g.*, WOLPE REPORT, *supra* note 3, at 12, 21-33.

23. *See* Michael Isikoff, *Reno Probes Environmental Crimes Unit*, WASH. POST, June 16, 1993, at A12. The Dingell Committee's request generated its own controversy, in which former Attorney General Benjamin Civiletti emerged as a leading critic of efforts to question line prosecutors. *See* Benjamin R. Civiletti, *Justice Unbalanced: Congress and Prosecutorial Discretion* (address to Heritage Foundation, Washington, DC) (Aug. 19, 1993) (on file with author). The new Clinton DOJ eventually elected to make prosecutors available.

24. *See* GAO STUDY, *supra* note 11.

25. U.S. Attorneys' Manual §5-11.302-303 (revised Jan. 12, 1993), *reprinted in* DAILY ENV'T REP. (BNA), Jan. 19, 1993, at E-1.

26. Statement of Webster L. Hubbell (Associate Attorney General) Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce 14-16 (Nov. 3, 1993) (on file with author).

27. *See* GW REPORT, *supra* note 15, at 5-6; DINGELL REPORT, *supra* note 4, at 1-2; WOLPE REPORT, *supra* note 3, at 12.

28. The same cannot be said, however, of the Dingell Committee's decision to commission the 1993 GAO study cited in note 11 above. There, for the first time, one of the congressional committees sought a serious, objective review of possible differences between the ECS and U.S. Attorneys' Offices prosecutions, without resort to the *ad hominem* and misleading anecdotal evidence relied on in the 1992 congressional studies.

In general, the GAO study showed that the ECS and U.S. Attorneys' Offices prosecutions tended to be statistically indistinguishable in terms of conviction rate, likelihood of indictment, type of disposition (declination, plea, etc.), and type of sentence (fine, probation, imprisonment, etc.). *See* GAO STUDY, *supra* note 11, at 31-34. In fact, 35 percent of all federal criminal environmental cases opened during the period 1988-92 were handled by the ECS and U.S. Attorney's Offices jointly. *Id.* at 15. The GAO reported that U.S. Attorneys' Offices opened 50 percent of all environmental cases in the same time period, and the ECS 14 percent. Performance by various U.S. Attorneys' Offices reportedly varied widely. According to testimony given at the 1993 Hearing (attended by the author), 17 of the 94 U.S. Attorneys' Offices accounted for over 50 percent of prosecutions opened by U.S. Attorneys' Offices.

29. The Wolpe Committee, in contrast to the other investigations, interviewed prosecutors (including prosecutors with whom it disagreed) as well as investigators. The author of this Dialogue was interviewed by the Wolpe staff.

30. The Dingell Committee's task was complicated by the DOJ's refusal in 1992, to allow interviews of line attorneys. Nevertheless, the Committee apparently refused the DOJ's offer to provide testimony by career ECS managers, including those criticized directly by the Committee. *See* DINGELL HEARING, *supra* note 4, at 3 (Sept. 10, 1993). Similarly, the Committee print in which the September 10 proceedings are published does not contain a copy of written comments submitted by the DOJ. (Due to the Committee's refusal to respond to inquiries, it is not possible to determine the reason for this omission.) With the cooperation of the Clinton DOJ, the Committee is now interviewing line attorneys who were publicly criticized 14 months earlier. The DOJ is also reportedly preparing its own study of its attorneys' conduct. Isikoff, *supra* note 23.

31. The GW Project Director explained the failure to provide these subjects an opportunity to defend themselves by noting that some (but not all) victims of the Report's criticism were in (mostly career) management positions. According to the Project Director, he feared that the managers in question would retaliate against his sources if they were allowed to respond to the sources' (anonymous) criticisms. Accordingly, he did not confront these career employees with the charges made against them prior to publication of the Report. Interview with Prof. Jonathan Turley (Nov. 23, 1993); *see also DOJ Disputes Report Alleging Failure to Prosecute Environmental Crimes*, DAILY REP. FOR EXEC. (BNA), Nov. 2, 1992, at 212 (quoting Prof. Turley as stating that "[a]ny effort to notify upper

results,[32] *none* of the congressional investigators contacted defense counsel about substantive matters in any of the cases studied.[33] There does not appear to be any good reason for this failure.[34] For example, counsel for the Wolpe Committee failed to take advantage of an offer by counsel for Rockwell in the *Rocky Flats* case to discuss the case with the Wolpe Committee staff.[35]

With respect to the GW Report, the Project Director stated in an interview for this Dialogue that the initial Report was not designed to include interviews with defense counsel in an effort to provide the Report to then Attorney General Barr as quickly as possible.[36] The 1992 "preliminary" GW Report, however, contains no such qualification in its statement of methodology. (As of December 23, 1993, the GW Law Center has not released a "final" report.[37]) The Report itself states that "staff investigators were instructed to gather information from *every possible avenue* and to interview *every critical party* in federal prosecutions."[38] According to the Project Director, the quoted description of the Report's scope was a mistake that should not have been included in the preliminary Report.[39] In any event, interviews with individuals criticized and representatives of the defendants in cases under study should have been among the highest priorities in any balanced inquiry.

In researching this Dialogue, the author called counsel for the defendants (or subjects of investigation) in five of the six cases considered by the Dingell and GW Reports, as well as lead counsel for the defendant in the *Rocky Flats* investigation.[40] The author reached counsel for at least some defendants in all the cases within one week.[41] Many counsel reported what they considered to be serious factual errors in the Dingell and GW Reports. One reported supplying DOJ attorneys with an affidavit contradicting the charges made in a case studied by the Dingell Committee.[42]

Perhaps because of the GW Law Center's failure to interview defense counsel, the GW Report largely ignores the possibility that the accused might defend themselves in the cases studied. Although the GW Report sets forth in great detail charges for which (in some cases) no defendant had been indicted, it does not analyze any of the corresponding defenses that might be raised.[43] The defense counsel contacted in connection with this Dialogue generally presented coherent theories of potential defenses.[44] The fact

level DOJ officials about interviews (of sources) would have jeopardized the jobs of staff members . . . interviewed").

This explanation seems inadequate. First, several of the career employees criticized are not ECS or DOJ "managers," but were nevertheless not interviewed. Second, the charges made in the Report were obviously not kept secret from the public at large regardless of whether sources would be jeopardized. *See* John H. Cushman Jr., *Justice Department Is Criticized Over Environmental Cases*, N.Y. TIMES, Oct. 30, 1992, at A16; Sharon LaFraniere, *Report Criticizes Justice Department's Pursuit of Environmental Crimes*, WASH. POST, Oct. 30, 1992, at A3. Allowing the subjects of the Report's criticisms—whether or not they worked in "managerial" positions—to address charges that Rep. Schumer was about to make public would not have exposed the Report's sources to a higher risk of retaliation than the direct release of the Report itself.

32. Some counsel contacted or spoke with the GW Project Director after publication of the GW Report. *See, e.g.*, Letter from David V. Marshall, counsel for individual defendant, to Prof. Jonathan Turley (Apr. 11, 1993) (on file with author). In addition, since the release of the Report, the GW Project Director has contacted counsel in some of the six cases studied by the Dingell Committee, although the utility of such interviews seems questionable in light of the fact that the Project has already reported its "preliminary" results.

33. Rep. Wolpe sought documents from Rockwell attorneys. *See infra* note 35.

34. The failure of the congressional investigators to contact defense counsel cannot be explained by any deficiencies in the backgrounds of the defense counsel themselves. Not only were all counsel experienced criminal lawyers, but several had strong backgrounds in environmental criminal defense. One defense counsel, for example, was a former chief of the ECS; a second served as Regional Counsel to an EPA regional office; a third had been part of an environmental enforcement unit in a U.S. Attorney's Office; and still another had experience in successfully defending against federal environmental prosecutions in the past and is now a state judge.

35. Interview with Bryan Morgan, Rockwell defense counsel (Haddon, Morgan & Foreman) (Nov. 1993). The former Staff Counsel of the Wolpe Committee acknowledges that the offer was made after the Committee contacted Rockwell's counsel to obtain documents, but provided several reasons for not accepting. Interview with Edith Holleman (Nov. 11, 1993).

First, the Counsel stated that the Committee did not wish to litigate with Rockwell over attorney-client issues. *Id.* It is unclear why litigation would have been necessary, however, given the company's offer of voluntary cooperation.

Second, the Counsel stated that because the Committee had focused on the conduct of a DOJ investigation, there was no need to obtain information from non-DOJ witnesses such as Rockwell. The Director admitted, however, that the Committee did seek information from other third parties, including the Sierra Club, the Environmental Defense Fund, local environmental activists living near the Rocky Flats plant, the Colorado Department of Health (CDH), and EPA civil agents. *Id.* Rockwell appears to have been one of the few third parties with knowledge of the case that the Committee chose not to interview.

Finally, the Counsel stated that Rockwell had not been interviewed at least in part because it was unlikely to offer information critical of the DOJ's settlement. *Id.*

36. Interview with Prof. Jonathan Turley (Nov. 23, 1993). Prof. Turley also expressed a concern that interviews of defense counsel would have compromised the GW Law Center's on-going interviews. As discussed in note 31, *supra*, it is unclear how interviews with counsel would have compromised the investigation of claims made in a publicly released Report.

37. *See* note 15, *supra*.

38. *See* GW REPORT, *supra* note 15, at 4 (emphasis added).

39. Interview with Prof. Jonathan Turley (Nov. 23, 1993).

40. No attempt was made to contact Mr. Van Leuzen, who did not have counsel.

41. In cases with multiple defendants, contacts were generally limited to counsel for the lead defendant or defendants.

42. Interview with Michael Rosenthal, counsel for Thermex (Dec. 20, 1993). In *Thermex*, EPA agents alleged that an ECS attorney stated that the defendant had offered to plead guilty to charges of improper handling of hazardous waste. According to the agents, the ECS' attorney nevertheless declined to prosecute the case. *See* DINGELL HEARING, *supra* note 4, at 79 (EPA Report of Investigation). Rosenthal states that he provided DOJ attorneys with an affidavit stating that he had never offered any plea on behalf of his client.

43. The Dingell and Wolpe Reports, to their credit, devote some analysis to discussing possible defenses, although the dismissive presentation of the defenses is hardly neutral. *See, e.g.*, DINGELL REPORT, *supra* note 4, at 36-37 (in the *Hawaiian Steel* matter, possible defenses mentioned by prosecutors were "weak at best" or in some cases "absurd[]"); and at 45 (stating that in the *Van Leuzen* case, unspecified prosecutors asked "numerous questions," many of which "made little sense").

44. *See, e.g.*, Letter from James R. Moore, counsel for Weyerhaeuser, to Helen Brunner, Asst. U.S. Attorney, Western Dist. of Washington, (Aug. 31, 1990) (on file with author); letter from David V. Marshall, counsel for individual PureGro employee, to Prof. Jonathan Turley, GW Project Director (Apr. 11, 1993) (on file with author); Statement on Plea, *United States v. PureGro et al.*, CR-90-228-AAM to 232 (E.D. Wash. Sept. 16, 1991) (on file with author).

Several cases at issue involved conduct about which defendants had sought advice of counsel, or had retained independent consultants in an effort to comply with applicable regulations. In one case, defense counsel stated that EPA was specifically informed of, and endorsed, conduct that criminal agents and prosecutors later alleged to be criminal.

that defense counsel allege that defenses exist does not mean, of course, that the defenses are sustainable (just as the fact that an agent alleges that sufficient evidence exists to convict a potential defendant does not mean that the potential defendant is guilty or will be convicted). But attempting to assess any case without a careful review of the concerns of the prosecutors involved, or of potential defenses, is no more valid than trying to pick the winner of the Super Bowl by reviewing one team's highlight films.

The GW Report's "Experience" Test

The GW Report typically describes as "veteran,"[45] "seasoned,"[46] "experienced,"[47] or possessing a "reputation for zealous prosecution"[48] prosecutors who apparently share the GW Law Center's view regarding the ECS' record. In contrast, the GW Report disparagingly refers to the prosecutors it criticizes as "new . . . to the Section,"[49] "disinclin[ed] to prosecute environmental cases,"[50] having "less environmental criminal experience,"[51] or having "limited or controversial records."[52] Such *ad hominem* attacks do nothing to promote an objective evaluation of the cases that the GW Law Center considered. In fact, the GW Law Center's "experience" test systematically disregards prosecutorial experience in nonenvironmental cases.[53]

Consider just one example of the GW Report's characterizations—the *Van Leuzen* case.[54] Floyd Clardy, who supervised *Van Leuzen* for the ECS, is characterized by the GW Law Center simply as a supervisor "new" to the ECS in 1989,[55] as "never having tried an environmental case," and as having exhibited a "noted disinclination" to prosecute environmental crimes.[56] Clardy was not interviewed by the GW Law Center, despite the highly personal nature of these charges.[57]

Clardy's actual experience is much greater than suggested by the GW Law Center. Clardy has been a federal prosecutor for over 15 years, and has tried dozens of cases. He has won awards for his prosecutions. His background includes politically unpopular prosecutions of police officers and prison guards on charges of violating suspects' or inmates' rights, including cases involving racial violence.[58]

Before the GW Law Center released its report, Clardy (now an Assistant U.S. Attorney in Dallas, Texas) and Bonnie LePard of the ECS (dismissed by the GW Law Center as a "less experienced" prosecutor)[59] had obtained an indictment against Robert Brittingham, arguably the most prominent individual ever indicted for an environmental felony.[60] Clardy subsequently received an award for his work in the Brittingham case.[61] The GW Law Center's "investigation" omits any mention of these facts, notwithstanding its reported concern about a claimed lack of indictments of individuals rather than corporations.[62]

Whatever one thinks of the GW Report's "experience" test for evaluating a prosecutor's worth, the Report itself does not apply the test uniformly. At least a partial source for the GW Law Center's criticism of Clardy appears to be EPA agents and supervisors unhappy with a decision (originally made by the Houston, Texas, U.S. Attorney's Office) to decline to prosecute the *Van Leuzen* matter.[63] The Report does not, however, document the number of criminal (or criminal environmental) cases previously taken to trial by EPA agents or EPA attorneys who supported prosecution. Nor does it consider the criminal experience of the members of the prosecution review committee in the Houston U.S. Attorney's Office who, as noted below, unanimously recommended against prosecution of Van Leuzen.[64]

Based on the recommendations of agents with unspecified criminal experience, supported by EPA supervisors with unspecified criminal experience,[65] the GW Law Cen-

45. GW REPORT, *supra* note 15, at 5.

46. *Id.* at 18 ("seasoned prosecutors were overlooked or demoted").

47. *See id.* at 15.

48. *Id.* at 16.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 18.

53. One of the tenets of the GW Report, as well as of other congressional investigations, is that environmental crimes should be treated no differently from any other federal crimes. *See id.* at 6-13 (criticizing "sharp differences in the methods and standards applied in environmental criminal cases as compared to those applied in conventional criminal cases"). *Id.* at 6. Given this tenet, it is ironic that the congressional investigators seem to disregard completely prosecutorial experience of ECS prosecutors fighting "other" federal crimes.

54. *See* note 12 (describing generally the *Van Leuzen* case), *supra*; *see also* notes 77-80 (describing *Van Leuzen* case), *infra* and accompanying text.

55. GW REPORT, *supra* note 15, at 16.

56. *Id.*

57. When asked to describe what measures the GW Project had used to confirm the allegations of its anonymous sources, which characterized Clardy as hostile to environmental prosecution, the Project Director stated that "independent" methods of confirmation had been employed, but declined to elaborate further in order not to "jeopardize" the Report's sources. Interview with Prof. Jonathan Turley (Nov. 23, 1993). Without commenting on the use of such secret methodology, it is apparent that the "independent" means failed to reveal relevant information regarding Clardy's background that would have been readily available if the GW Law Center had simply spoken with Clardy.

At the time the GW Report was released, Clardy was an Assistant U.S. Attorney in Dallas, Texas, and no longer had supervisory authority over any of the GW Project's confidential ECS sources. *See* GW REPORT, *supra* note 15, at 16.

58. Interview with Floyd Clardy, Ass't U.S. Attorney for the Northern District of Texas (Dec. 1993).

59. GW REPORT, *supra* note 15, at 16.

60. *United States v. Brittingham*, No. 3-92-032-R (N.D. Tex.). Brittingham's net worth has been reported to be in excess of $350 million. R.R. Hunt et al., *The Texas 100*, TEX. MONTHLY, Sept. 1993, at 129-30 (reporting Brittingham to be one of the 100 richest men in Texas).

Clardy, working with Peter Murtha (another ECS attorney mentioned by the GW Report in an unfavorable context), convicted Brittingham in March 1993 (following the release of the GW Report), after overcoming a well-funded defense team.

Brittingham was fined $4 million and sentenced to community service. His co-defendant (another individual) was fined $2 million and also sentenced to community service. The two individuals were ordered to pay an additional $6 million to fund a lead abatement trust. *$12 Million Penalty for Two in Environmental Case*, MEALEY'S LITIG. REPS./D&O LIABILITY 8-9 (June 2, 1993).

61. Interview with Floyd Clardy (Dec. 1993).

62. *See* GW REPORT, *supra* note 15, at 10 ("[t]here has been a notable paucity of individual indictments in past cases").

63. *See* notes 78-79, *infra* and accompanying text.

64. *Id.*

65. The GW Report also cites unnamed ECS attorneys ("some ECS members") who reportedly "supported prosecution." GW REPORT, *supra* note 15, at 9. Absent further identifying information, it is impossible to evaluate the position taken by the anonymous attorneys with no known official role in the case.

ter concludes that a "new" ECS attorney who had "never" tried an environmental case (but who in fact was a decorated 15-year prosecutor) rejected an "airtight"[66] case for reasons that the GW Law Center cannot fathom, other than his "noted disinclination"[67] to prosecute environmental cases (notwithstanding the *Brittingham* matter and notwithstanding the unanimous recommendation of local prosecutors to decline the case for reasons set forth in the Dingell Report). This example does not promote confidence in the objectivity of the GW Report's other examples of environmental "underprosecution."[68]

Evaluating the Critics' Conclusions

Perhaps as a consequence of their methodology, including the GW Report's extensive reliance on anonymous sources, the three reports contain numerous factual errors.

Wetlands

As regulatory protections for wetlands increased during the 1980s, prosecutions for violations of wetlands regulations increased. The GW Report finds, however, that "internal policies of the Department of Justice . . . severely hamper prosecution in the wetlands area,"[69] and refers to a reported ECS "policy" not to prosecute wetlands cases.[70] Similarly, the Dingell Report states that "[w]etlands enforcement seems to be emerging as an area in which the ECS believes that the best enforcement is no enforcement."[71]

The Dingell and GW Reports support this charge by analyzing two wetlands cases considered for prosecution during the Bush Administration. In the first case, (commonly known as *Tudor Farms*),[72] the local U.S. Attorney's Office in Baltimore, Maryland, supported prosecution (and an eventual plea bargain), and the DOJ concurred. According to the GW Report, however, the Assistant Attorney General for the DOJ's ENR Division, Barry Hartman, "opposed criminal prosecution generally and felony indictments specifically."[73] Hartman, whom the GW Law Center did not interview, states that he in fact approved the prosecution.[74] The former U.S. Attorney for the district in question, whom the GW Law Center did not interview, generally supports this account.[75] According to the U.S. Attorney, all prosecutors involved in the case recommended acceptance of a plea agreement in which the company in question agreed to preserve permanently thousands of acres of wetlands.[76]

In a second wetlands case, *Van Leuzen*, the local U.S. Attorney's Office in Houston, Texas, opposed prosecution, and the DOJ again concurred (although EPA objected). The Dingell and GW Reports, however, claim that the local Assistant U.S. Attorney's "attitude" regarding the *Van Leuzen* prosecution changed after a particular ECS attorney (Floyd Clardy) took responsibility for the case. This suggestion, which the Dingell Committee neatly places in the mouths of EPA agents testifying before it,[77] is contradicted by a letter written by the U.S. Attorney to EPA in 1990. In his letter, the U.S. Attorney stated that after an "exhaustive" review, *local prosecutors* had "unanimously" recommended *declining* prosecution.[78] According to the U.S. Attorney whose office rejected the case, experienced prosecutors in that office cited four "infirmities and problems" that led to rejection of the case:

> (1) the availability of alternative civil remedies to accomplish restoration, (2) a lack of jury appeal, (3) the anticipated inadmissibility of certain evidence, and (4)

66. *Id.* at 7, 30.

67. *Id.* at 16.

68. The Dingell Report resorts to similar distortions. *See, e.g.*, DINGELL REPORT, *supra* note 4, at 45 (describing Clardy as a recent arrival from the Civil Rights Section who had never tried an environmental case).

69. GW REPORT, *supra* note 15, at 6.

70. *Id.* at 22.

71. DINGELL REPORT, *supra* note 4, at 39.

72. *See United States v. Ellen*, 961 F.2d 462, 22 ELR 21282 (4th Cir. 1991) (affirming conviction of individual defendant).

73. GW REPORT, *supra* note 15, at 23.

74. Interview with Barry Hartman, former Ass't Attorney General, ENR Division, Dep't of Justice (Nov. 1993).

75. Interview with Breckinridge Wilcox (Attorney, Arent, Fox, Kintner, Plotkin & Kahn) (Nov. 12, 1993). The former U.S. Attorney stated that prior to acceptance of the plea, Mr. Hartman expressed reservations about the sufficiency of the evidence to sustain felony charges against one individual in the case. These reservations became moot when the plea agreement (which was reportedly supported by the U.S. Attorney and the Assistant U.S. Attorney principally responsible for the case) was reached. The U.S. Attorney agreed that the case against the individual in question was the weakest of the three cases at issue, although the U.S. Attorney himself believed that evidence sufficient to convict was available. *Id.* The individual in question pleaded guilty to a misdemeanor charge as part of the overall settlement.

It should be noted that the U.S. Attorney in question (Breckinridge Wilcox) has not shied away from criticizing the ECS in other instances. For example, Mr. Wilcox testified against greater involvement by main DOJ in environmental cases at the 1993 hearings held by the Dingell Committee. *See* Statement of Breckinridge Wilcox (Arent, Fox, Kintner, Plotkin & Kahn) Before the Subcomm. on Oversight and Investigations, House of Representatives, Comm. on Energy and Commerce (Nov. 3, 1993) (on file with author).

76. Interview with Breckinridge Wilcox (Nov. 12, 1993).

77.

> Q: Did [the Assistant U.S. Attorney] prepare a draft prosecution memo supporting your case?
> A: Yes, she did.
> Q: Did [the Assistant U.S. Attorney] seem initially interested or enthusiastic even on pursuit of this case?
> A: Yes.
> Q: And did that change?
> A: Yes, it did.
> Q: Now, was there any coincidence on this change in [the Assistant U.S. Attorney's] belief that occurred around the same time when the Environmental Crimes Section at the main Justice Department became involved?
> A: Yes, that was general same time [sic].
> Q: It is a remarkable coincidence.

DINGELL HEARING, *supra* note 4, at 187 (testimony of Thomas Kohl, Special Agent-in-Charge, EPA, Dallas, Texas).

78. The letter from the U.S. Attorney states in relevant part:

> I am advised by the Chief of the Criminal Division, [of the U.S. Attorney's Office] . . . that the case review committee, after a rather exhaustive review of the *Van Leuzen* matter, is unanimously recommending a declination for criminal prosecution. Accordingly, and with the benefit of a comprehensive briefing by [the Chief of the Houston Criminal Division], I regretfully inform you that this office will not pursue the *Van Leuzen* referral criminally.

Letter from Henry K. Oncken, U.S. Attorney, to Katherine Savers McGovern, Deputy Regional Counsel, EPA, Region VI (June 1, 1990), *reprinted in* DINGELL HEARING, *supra* note 4, at 192.

problems with sufficiency of proof relating to criminal intent.[79]

What the Dingell and GW Reports uncover in this case is an event commonplace in prosecutors' offices—a prosecutor's rejection of a case referred for prosecution by enthusiastic investigating agents. What is out of the ordinary is not the ultimate disposition of the case, but that congressional investigators would fault DOJ headquarters for concurring in the rejection of a case that a review committee convened by the local U.S. Attorney's Office had previously rejected unanimously.[80]

The fact that the U.S. Attorney's Office believed that the case had problems does not, of course, necessarily mean that EPA's more bullish views on the case, expressed at the September 1992 Dingell hearing, were wrong.[81] Clearly, however, facts do not support the congressional investigators' claims that the ECS, rather than the U.S. Attorney's Office, was the source of the case's rejection, or that this case illustrates a schism between main DOJ and a U.S. Attorney's Office.

ChemWaste

The Dingell and GW Reports express concern over the handling of an investigation involving Chemical Waste Management in Louisiana and Alabama (*ChemWaste*). In that matter, prosecutions were successfully pursued in Louisiana but declined in Alabama.

The Dingell Report criticized the decision, allegedly made by the ECS Section Chief, to decline prosecution of the Alabama case.[82] But the ECS' Section Chief was not alone in opposing prosecution. According to the testimony of the EPA attorney who supervised the case (and who favored prosecution), the local U.S. Attorney independently concluded that the case was unwinnable.[83] Although line attorneys from both the ECS and the U.S. Attorney's Office reportedly disagreed, the senior attorneys from both the ECS and the U.S. Attorney's Office appear to have agreed to decline the case.[84]

In the GW Report, however, the GW Law Center claims to have "discovered" activity relevant to the ECS' decision not to prosecute. The GW Report stated:

> *The [GW Law Center] project discovered that Mr. Cartusciello [chief of the ECS] met with Joan Z. (Jodie) [Bernstein,]*[85] a Waste Management Inc. Vice President and former General Counsel for EPA who was accompanied by Judson W. Starr, the first chief of the Environmental Crimes Unit [ECS' forerunner]. After a long meeting, Mr. Cartusciello decided the case should be re-examined. Shortly thereafter, Mr. Cartusciello told the U.S. Attorney that ChemWaste was a meritless case . . . .[86]

It is unclear what, if anything, would be improper about a senior prosecutor meeting with defense counsel as part of a decision whether to prosecute a case. In any event, according to Mr. Starr (whom the GW Law Center did not interview prior to the GW Report's publication)[87] and a spokesperson for Ms. Bernstein (whom the GW Law Center also did not interview) no such meeting ever took place.[88] (The GW Law Center also did not interview Cartusciello, who was one of the principal targets of the Report's criticism.)

79. *Id.*
Notwithstanding the quoted letter, the GW Report repeatedly characterizes the case against Mr. Van Leuzen as "airtight." GW REPORT at 7, 30. According to the GW Report, "the Project . . . attempted to find some basis for the decision not to prosecute Van Leuzen." *Id.* at 8. The Report does not, however, even mention the letter quoted or local prosecutors' concerns about the adequacy of the case presented by investigators.

80. *Cf.* GW REPORT, *supra* note 15, at 15 ("The tension between the Environmental Crimes Section and the AUSAs [Assistant U.S. Attorneys] is most apparent in cases like . . . *Van Leuzen*").
The Dingell Report concluded that *Van Leuzen* provided an example of

> the inappropriate centralization and micromanagement in Washington of even fairly minor environmental cases, with the prosecutorial decision on a small and straightforward one-defendant case being made at the Assistant Attorney General level.

DINGELL REPORT, *supra* note 4, at 38. The involvement of the Assistant Attorney General (Barry Hartman) appears, however, to have resulted from EPA's request that the ECS reconsider the Houston prosecutors' decision to decline the case, rather than an attempt by the DOJ to interfere in a small, local matter. The record from the Committee hearings lacks any statement regarding who requested the meeting with Hartman. *See* DINGELL HEARING, *supra* note 4, at 188-89, 193-95.

81. *See* DINGELL HEARING, *supra* note 4, at 183-91 (testimony of Kathleen A. Hughes, Fred L. Burnside, and Thomas Kohl).

82. DINGELL REPORT, *supra* note 4, at 5-6, 24-31.

83. The EPA attorney testified as follows:

> Mr. Dingell: In the meetings or discussions which occurred, the only fellow that you are aware of that wanted the case dismissed was again [the ECS Section Chief]; is that right?
>
> Ms. Hughes: In the final prosecution meeting in Alabama, the U.S. Attorney reacted to [the Section Chief's] statement that he didn't think that it ought to be prosecuted by saying that he didn't think that we could win it in front of a jury, but that he didn't agree with [the Section Chief]'s statement that all these people were innocent.
>
> Mr. Dingell: He said that you could win it before a jury?
>
> Ms. Hughes: No. The U.S. Attorney said he didn't think we could win it before a jury. *That was his position after listening to everything.*

DINGELL HEARING, *supra* note 4, at 167 (testimony of Kathleen A. Hughes, emphasis added).

84. *Id.* at 167.

85. The GW Report, apparently as the result of a typographical error, omitted Ms. Bernstein's last name. Given the other particulars provided (Jodie Bernstein, for example, is a former General Counsel of EPA and current officer of Chemical Waste Management's parent company), there can be no question that the reference is to her.

86. GW REPORT, *supra* note 15, at 114 (emphasis added).

87. In an interview conducted in connection with this Dialogue, Mr. Starr stated that he was interviewed by a representative of the GW Project following the public release of the GW Report.

88. According to witnesses who testified before the Dingell Committee, a meeting took place that was attended by Mr. Cartusciello, three other ECS attorneys (including at least one who favored prosecution of the case), an attorney from the Birmingham U.S. Attorney's Office, an EPA attorney, and an EPA agent. Mr. Starr and two other lawyers for Chemical Waste Management (*not* including Ms. Bernstein) were reportedly present at this meeting. *See* DINGELL HEARING, *supra* note 4, at 162 (testimony of Thomas Kohl, Special Agent-in-Charge, Environmental Protection Agency, Dallas, Texas EPA).
There is nothing in the record to suggest that this meeting was anything other than routine. It is unclear whether the GW Report's "discovery" inaccurately identifies the participants in this meeting, or refers to some other meeting that did not take place.

Rocky Flats

☐ *The* Rocky Flats *Fine.* The Wolpe Committee closely analyzed the plea negotiations in the *Rocky Flats* case, in part through analysis of memoranda written by prosecutors. From the materials released by the Committee, it is clear that the prosecutors in question disagreed frequently over a variety of issues, including the strength of the charges and merits of the case. Prosecution, of course, is a subjective art, and such disagreements normally would not excite much comment. The Committee, however, makes the disagreements into the subject of one of its central findings: that main DOJ and ECS prosecutors, who placed "little value on environmental crimes," undercut attempts by attorneys from the Office of the U.S. Attorney for the District of Colorado (based in Denver) to gain an even larger fine from Rockwell.[89] The Committee states, for example:

> Main Justice attorneys were willing to settle for $1-$6 million. One actually said that the government should pay Rockwell .... [T]he lead attorney in Denver [was] pushing for a larger settlement—on the order of $20 million to $30 million ....[90]

Although this account of the "facts" suggests that ECS attorneys valued the case less than the Denver-based attorneys did, it is based on what is either a critical distortion or a sloppy error: *the Committee misidentifies a Denver-based Assistant U.S. Attorney as an ECS employee.*[91] Once this misstatement is corrected, the Committee's conclusion collapses.

For a significant part of the investigation, the *Rocky Flats* case was assigned to four line prosecutors, two each from the ECS and the U.S. Attorney's Office. Although each individual attorney's opinions of the case's strength varied from time to time, the Committee was fair in stating that one of the Denver-based attorneys was consistently the most optimistic about the case. What the Committee overlooks is that the other Denver-based attorney was generally the most *pessimistic* about the case. The Committee's conclusion that ECS attorneys were most bearish about the case is simply wrong: the opinions of ECS attorneys (who frequently disagreed with each other) generally fell between those of the two Denver-based attorneys.

A corrected version of the facts would have stated that the line attorneys from the ECS sought fines in the range of $4-6 million,[92] while the line attorneys from the Denver office split sharply, one favoring a settlement (as of January 1991) of $20 million, and one favoring a settlement (as of January 1991) of $1 million.[93] Moreover, the latter attorney, from the U.S. Attorney's Office in Denver, is specifically identified (by, among others, the U.S. Attorney for the District of Colorado)[94] as the attorney whom the Wolpe Committee reports as remarking that a fairer settlement would pay Rockwell money.[95]

Even aside from the error noted above, the Wolpe Committee greatly overestimates the significance of a disagreement between prosecutors over the appropriate size of a fine. Selection of fines is not a science, and reasonable prosecutors may differ reasonably over a case's strengths and weaknesses. Moreover, for all of the Committee time spent on the genesis of the $18.5 million fine,[96] the Wolpe Report never even attempts to evaluate the fine according to standards of fairness.

The congressional investigators suggest that the success of a prosecution is directly proportional to the size of the fine obtained, regardless of the underlying case's merits. Under this theory of prosecution, government attorneys should act as advocates without any broader sense of fairness. According to the logic of the Wolpe Committee, if the government had the leverage to force Rockwell to pay a larger settlement, no lesser settlement was adequate.[97]

The Committee's view differs markedly from traditional views of the principles that should guide a prosecutor, under which a prosecutor remains an advocate, but is guided by

89. *See* WOLPE REPORT at 12, 102-07.

90. *Id.* at 22. *See also id.* at 105 (identifying specific attorneys and amounts proposed by each at the settlement conference).

91. In its table of key participants, the Report contradictorily lists the attorney in question as an employee of "Justice Department (Headquarters)" while giving his title as "Assistant U.S. Attorney, Colorado." WOLPE REPORT, *supra* note 3, at 6. The text of the Report, however, clearly assumes that the attorney in question was an ECS, rather that U.S. Attorney's Office, attorney. *See id.* at 21-22, 103.

The Denver-based U.S. Attorney clearly identified the prosecutor in question as being a member of the U.S. Attorney's Office. *See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility,* STAFF INTERVIEWS CONDUCTED BY THE SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT, Transmitted to the Comm. on Science, Space, and Technology, 103d Cong., 1st Sess., Serial F at 320 (Sept. 1993) [hereinafter WOLPE TESTIMONY] ("[the attorney in question] ...—an assistant in my office— ... had an extremely low value of the case").

The Staff Counsel of the Wolpe Committee stated in an interview conducted in connection with this Dialogue that she had not written the section of the Report in question and had no knowledge of the source of the mistake. Interview with Edith Holleman (Nov. 11, 1993). The Wolpe Committee staff member responsible for writing the section of the Wolpe Report in which the misidentification occurs declined to comment regarding the error.

92. Their boss, the Section Chief of the ECS, reportedly sought a higher fine. *See* WOLPE REPORT, *supra* note 3, at 103.

93. The following table summarizes settlement positions of various attorneys involved, as reported by the Wolpe Committee ("AUSA" stands for Assistant U.S. Attorney):

Attorney	Proposed Final Settlement Goal
Denver-based AUSA 1	$21 - $28 million
ECS Line Attorney 1	$6 million
ECS Line Attorney 2	$4 million
Denver-based AUSA 2	$1 million

See WOLPE REPORT, *supra* note 3, at 102-07.

The Denver-based U.S. Attorney and the Section Chief of the ECS in 1990-91 are generally reported to have taken negotiating positions between Denver-based AUSA 1 and ECS Line Attorney 1. *Id.* at 103. As the Report notes, the Denver-based U.S. Attorney (and not the ECS) initially agreed to settle the matter for $15.5 million, which would have roughly split the difference between the proposals of Denver-based AUSA 1 and ECS Line Attorney 1. The final settlement of $18.5 million provided $16.5 million to the federal government and an additional $2 million to the state of Colorado. Plaintiff's Sentencing Memorandum at 112, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992).

94. *See* WOLPE TESTIMONY, *supra* note 91, at 320.

95. WOLPE TESTIMONY, *supra* note 91, at 206. The Wolpe Report also omits to note that the statement in question, in the words of the prosecutor who reported it, was probably made "somewhat jokingly."

96. *See* WOLPE REPORT, *supra* note 3, at 12-13, 20-27, and 102-07.

97. *See, e.g., id.* at 35 ("millions of dollars in potential additional criminal and civil penalties on the listed—and easily provable—violations were given away"); and at 107 ("we may never know how much more the government could have won if they had pushed Rockwell harder").

a sense of fairness that would not necessarily bind a private attorney. As the U.S. Supreme Court has long held,

> [s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[98]

It is beyond the scope of this Dialogue to address whether the amount prosecutors obtained in this case was in fact fair to the government, to the public, or to Rockwell. But it is worth remembering that in addition to the size of any fine, the "success" of a prosecution should also be judged by its overall fairness in light of the charges in question. The Wolpe Committee, however, fails to acknowledge that fairness is a goal that may legitimately influence prosecutors' recommendations.

The Committee magnifies and distorts the disagreements among line prosecutors over particular issues. In fact, Denver-based attorneys in the U.S. Attorney's Office did not report the alleged ECS interference in their investigation that the Committee claimed to find.[99] There was no testimony, for example, that any senior ECS or main DOJ official attempted to discourage the U.S. Attorney's Office from seeking a fine it considered appropriate.[100] The U.S. Attorney for the District of Colorado, whose office directed the case, testified as follows:

> Q: Did you ever have any differences of opinion or disagree with anyone in main Justice regarding positions on major issues in this case?
>
> A: Not that I recall. . . . [A]s to litigative direction, I can't recall any major disagreements where we didn't prevail. And I can't even recall any major disagreements.[101]

The wide range of opinions among different prosecutors might suggest that the case was controversial and legitimately difficult to value.[102] While such a conclusion does not lend itself to spectacular committee reports, it may be closer to the truth than the Committee's actual conclusions.[103]

☐ *Accomplishments at Rocky Flats.* The Wolpe Committee's evaluation of the prosecutors' performance in the *Rocky Flats* case overlooks many accomplishments achieved by the Denver-based U.S. Attorney's Office and the ECS jointly. The execution of a federal search warrant in June 1989, which *both* the Denver-based U.S. Attorney and the ECS approved, was one of the most aggressive acts in the entire prosecution. The Wolpe Committee, however, ignores the ECS' cooperative role in preparation of the warrant and the approvals received from all levels of the DOJ prior to its execution. Similarly, the Wolpe Committee hardly notes the significant prosecutorial and investigative resources that *both* the ECS and the Denver-based U.S. Attorney's Office expended on the case for over three years. At the most basic level, such expenditures seem to evidence an intent to prosecute the investigation aggressively, not to block it.

The Wolpe Report also ignores the relative lack of prior enforcement history at the Rocky Flats plant in particular, and DOE facilities in general. The Rocky Flats plant, for example, had not previously been the focus of any significant civil enforcement action by state or federal environmental regulators.[104] Similarly, no other U.S. Attorney's Office has ever initiated comparable enforcement activity against another DOE facility that engaged in conduct similar to the conduct that allegedly occurred at Rocky Flats. As one prosecutor told the Wolpe Committee,

> There are 16 other DOE facilities around this country, at least two of which in my personal opinion are worse than Rocky Flats. . . . And there are attorneys in those districts—and I don't want to get into trouble for criticizing a colleague in the Department, but all I know is that Mike Norton [the Denver-based U.S. Attorney who supported the Rocky Flats prosecution] is the only one who had the intestinal fortitude to stand up and say, "We'll take this on."[105]

Even if prosecutors had settled for one of the allegedly low-ball DOJ fines (of approximately $5 million), they would have exceeded any previous fine at Rocky Flats or

98. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.")

99. *See* WOLPE REPORT, *supra* note 3, at 12.

100. The lead Denver-based prosecutor stated:

> [M]y sense is . . . that Mr. Hartman [Assistant Attorney General, DOJ] largely gave Mr. Norton [the Denver-based U.S. Attorney] a free rein. And in terms of these numbers . . . he kind of said what his bottom line was and pretty much gave Mr. Norton free rein to do better than that if he could.

WOLPE TESTIMONY, *supra* note 91, at 212.

101. *Id.* at 320.

102. The Denver-based head of the prosecution team (who generally was the most bullish member of the team) testified as follows:

> From our perspective, one of the problems I have personally with some of the judgments that have been made about the case—and I'm not just talking about the subcommittee—you know, the media and the press, the other constituents—is that there seems to be an impression that this was absolutely a hands-down killer case, and why would we give up such a great case that ultimately, clearly a lot of people would have been convicted and a lot of people would have gone to jail. How could you give that up? This is just a fundamental misconception. This was an extremely difficult, very problematic case.

Id. at 196. *Compare* WOLPE REPORT, *supra* note 3, at 36 (violations were "easily provable").

103. For an excellent discussion on the general difficulties in applying EPA regulations to criminal cases, *see* Judson W. Starr et al., *Prosecuting Pollution*, LEGAL TIMES (SUPP.), May 31, 1993.

104. Prior to execution of the 1989 federal warrant, Rockwell reportedly paid EPA $47,500 in civil penalties in 1987, for improper handling of transformers containing PCBs. *See Rockwell Agrees to Pay EPA*, ASSOCIATED PRESS, Dec. 21, 1988; *see also* Plaintiff's Sentencing Memorandum at 118, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992); Plaintiff's Supplemental Sentencing Memorandum at 18, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed May 28, 1992).

In addition, Rockwell paid the state of Colorado approximately $100,000 in 1989, in response to civil charges brought by the state *after* execution of the federal search warrant. *See* Plaintiff's Sentencing Memorandum at 118, *supra* note 104. Two citizen enforcement actions, brought by the Sierra Club, were underway at the time the search warrant was executed. *See Sierra Club v. U.S. Dept. of Energy [DOE]*, 770 F. Supp. 578, 22 ELR 20072 (D. Colo. 1991) *Sierra Club v. DOE*, 22 ELR 20076 (D. Colo. 1991); *Sierra Club v. DOE*, 734 F. Supp. 946, 20 ELR 21044 (D. Colo. 1990).

105. WOLPE TESTIMONY, *supra* note 91, at 216.

any other DOE facility by $4.9 million. It is difficult to understand logically how the criminal prosecutors, two of whom devoted more than three years to the investigation, are the subjects of such severe criticism, when other regulators, who had responsibility for this and other DOE facilities long before execution of the search warrant, largely escape comment.

☐ *Midnight Burning at Rocky Flats.* In the *Rocky Flats* investigation, one of the more spectacular allegations of misconduct investigated by the government related to charges of so-called midnight burning: incineration of mixed hazardous and nuclear wastes that was allegedly concealed from the public. If these charges had been true, such actions would have constituted knowing violations of DOE policy with potentially serious effects on nearby urban and suburban populations. After years of investigation, however, the prosecution team reported: "the UNITED STATES has concluded that the Building 771 incinerator was not operated contrary to the DOE ordered shutdown."[106]

Congressional investigators publicly disagreed with the prosecutions' conclusions that no incineration occurred after the DOE ordered the incinerators shutdown in December 1988.[107] According to the Wolpe Committee, there *was* evidence that secret midnight burning had occurred as part of a phased shutdown. One would expect a congressional committee to document such a serious charge carefully. The Committee's Report, however, cites no significant supporting evidence.

The Committee bolsters its allegations by citing testimony of the lead FBI agent in the case.[108] The basis for the agent's opinion, however, is not supplied.[109] Moreover, if the Committee had attempted to confirm the agent's uncorroborated charges, it would have reported that *none* of the other principal members of the prosecution team in the case (including the lead Denver-based prosecutor, whom the Committee generally praised for his aggressiveness, the lead ECS attorney, and the lead EPA agent) agree with the lead FBI agent's conclusion that the secret incineration had occurred.[110] Thus, the Committee's conclusion about midnight burning flies in the face of the available evidence.

"Political" Interference

Within the context of the congressional oversight investigations, concern over "political" interference has generally taken the form of inquiries into possible attempts by political appointees at the DOJ to influence investigations of the Bush Administration's political allies. The Dingell and Wolpe Reports do not find that any fixing of cases occurred. Indeed, one of their criticisms of the ECS generally is that *career* ECS prosecutors (and in some cases, assistant U.S. Attorneys) *concurred* with decisions not to prosecute, or to accepts pleas, that the congressional investigators believed to be too lenient.[111] The GW Report, consistent with its general methodology, repeats rumors of "possible" political influence voiced by the Report's (anonymous) sources, but itself actually makes no "finding" of political influence.[112]

"Political" pressure, however, takes many forms. Congressional oversight of prosecutors is inherently political. Poorly or unfairly conducted oversight itself can become a threat to the orderly administration of justice. Rather than evaluating each case on its merits, prosecutors may be tempted to seek what they believe will be politically acceptable results. Counsel for an individual against whom charges were dismissed in the *PureGro* matter[113] de-

106. Plaintiff's Sentencing Memorandum at 106-16, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992) (footnote omitted). The omitted footnote states that prior to the shutdown (and presumably outside the relevant statute of limitation), the DOE had authorized use of this incinerator for incineration of hazardous waste, even though the incinerator lacked a permit. The DOE had previously acknowledged these prior uses of the incinerator, which were not part of the "midnight burning" controversy.

Prosecutors also concluded that an incinerator in another building (number 776) "was not used to treat or dispose of hazardous or mixed waste." *Id.* at 107.

107. *See* WOLPE REPORT, *supra* note 3, at 91 and notes 108-09, *infra*.

108. The Committee also cites the existence of certain documents whose significance is unclear. WOLPE REPORT, *supra* note 3, at 93-94.

109. The Committee largely bases its charge on the following exchange, as reported by the Committee:

> Ms. Holleman: Did you have any evidence that DOE had specifically ordered the incinerator to run during this time [after December 1988]?
>
> Mr. Lipsky [The lead FBI agent in the case]: The answer to that question would require me to provide grand jury information protected by Rule 6(e) of the Federal Rules of Criminal Procedure.
>
> Ms. Holleman: Do you know who in DOE, let's say, modified the shutdown order and told Rockwell, yes, you can shut down in this orderly fashion?
>
> Mr. Lipsky: The answer to that question would require me to provide grand jury information protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

WOLPE REPORT, *supra* note 3, at 93. Fed. R. Crim. P. 6(e) prohibits a government agent from publicly disclosing matters occurring before a grand jury.

110. The views of the members of the prosecution team were obtained during interviews with the author of this Dialogue in November 1993.

111. In addition, the Dingell and Wolpe Reports were highly critical of individual decisions made by political appointees, but did not generally attribute the mistakes alleged to overtly "political" causes.

112. According to the Report:

> While this Report makes no direct findings of political interference in individual ECS cases, federal prosecutors and investigators have given the Project detailed allegations of such conduct.

GW REPORT, *supra* note 15, at 31.

The GW Report declines to repeat these unproven allegations in more detail, reportedly so that the specific officials accused could be given an opportunity to respond. *Id.* at 31. In June 1993, the GW Project Director nevertheless stated in an article for the *Washington Post*:

> Environmental crimes is the most visible example of a section compromised by political operatives. People were promoted within the environmental crimes section because of their willingness to carry the water for the Bush White House and political appointees.

Isikoff, *supra* note 23.

Similarly, in September 1993 the GW Director charged that "[n]ever before [have] line prosecutors faced such political interference in handling individual cases," and that "career prosecutors . . . were forced to drop charges against criminals due to political interference from Reagan and Bush administration officials." *Civil-eat Speech to Heritage Foundation Raises a Ruckus*," CORP. CRIME REP., Sept. 6, 1993, at 1.

113. *United States v. PureGro et al.*, CR90-228AAM to -323AAM (E.D. Wash.). In *PureGro*, the corporation and four employees were initially indicted for alleged felonies relating to the handling of pesticides. The government subsequently dismissed charges against all individuals.

scribed the issue this way in a letter to the GW Project Director:

> Although your article suggests you think the government decisions made in *PureGro* were political ones, the opposite is true. It would have been politically expedient to maintain the charges in the case as they were originally filed. EPA headquarters and local investigating staff, including those who testified before [Rep.] Dingell last fall, would have been happier. The Washington State Attorney General's Office would have been happier. The government would have been seen as aggressively prosecuting environmental crime. Instead, the Department of Justice did what it is supposed to do, decide cases based on the facts and the interests of justice.[114]

Based on the record to date, the congressional investigators have made no attempt to limit the "political" impact of their own investigations to legitimate areas of policy. They have instead personalized the debate, going so far as to characterize exercises of prosecutorial discretion as actions taken by political "hack[s]."[115]

Environmental Criminal Prosecution During the 1980s

Whatever one believes about former President Bush's claim to be the "environmental President," environmental criminal prosecution flourished under the Reagan and Bush Administrations. The ECS was established in 1983.[116] Since then, it has grown from 5 to approximately 30 attorneys. Its total budget increased dramatically over the same period. Prosecutions have increased from 40 in fiscal year 1983, to 125 in fiscal year 1991.[117] Multimillion dollar criminal fines like those assessed in recent years against large companies such as Exxon, Rockwell, and United Technologies Corporation do not in themselves evidence a cozy attitude toward industry. Even if, as the GAO's latest statistics show, the majority of prosecutions have been led by local U.S. Attorneys' Offices,[118] those offices were generally headed by political appointees.

In the face of these statistics, the Dingell and GW Reports make the bald assertion that however much federal prosecutions increased during the 1980s, they should have increased more.[119] According to the GW Report, the DOJ's average of 100-120 environmental prosecutions per year "is surprisingly low."[120]

Although the Reports' assertion is an arguable hypothesis, neither Report offers any objective evidence to support this theory in the face of the apparent pattern of enforcement noted above. Both Reports ignore or avoid any of a number of benchmarks they might have used. Did, for example, the relative number of state criminal prosecutions dramatically outstrip federal prosecutions over the relevant time period? How did federal and state prosecutions from the same states compare? What was the trend in federal *civil* enforcement statistics over this period?[121] Are civil and administrative cases ahead or behind of the criminal trend? Do differences in cases brought in different geographical regions overshadow differences between the ECS and certain U.S. Attorneys' Offices?

The only objective benchmark suggested by the GW Report to support its claims appear to be an expected level of prosecutions "given the size of industrial production in this country."[122] It is unclear, however, how one can estimate the likely number of environmental crimes (and the desired number of environmental prosecutions) based solely on the nation's gross domestic product. Reliance on the size of the nation's economy alone to estimate optimal levels of criminal enforcement ignores numerous other relevant sources of data. For example, American companies spend billions every year for pollution control.[123] Partly as a result of these expenditures, air and water pollutants from industrial sources like those targeted by the GW Report have generally *decreased* since 1970 (not increased as the Report's theory would suggest).[124] Ambient concentrations have similarly shown a general decrease.[125] Moreover, although the U.S. economy generates enormous amounts of pollutants, much of this pollution is generated quite legally, and should not affect the optimal level of environmental prosecution.

This is not to say that environmental progress has been made independent of environmental enforcement—the two obviously go hand-in-hand. Nor is this argument intended to suggest that the current system of enforcement could not be improved. Nevertheless, the strong upward trend in

114. Letter from David V. Marshall, counsel for individual defendant, to Jonathan Turley 5-6 (Apr. 11, 1993) (on file with author). The letter was written in the context of an article published by the Project Director in the *Wall Street Journal* discussing, among other matters, the *PureGro* case.

115. *See* GW REPORT, *supra* note 25, at 29 (description of former Assistant Attorney General Hartman as "political hack" is, according to the GW Project's sources, "understated"). The GW Law Center did not interview Mr. Hartman before publication of this charge.

116. For a concise history of the ECS, *see* 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. 900-15 (1991).

117. *See* Department of Justice Press Release (May 8, 1992) (as measured by annual number of indictments). The same statistics on the increase in indictments can be found in the GW Report itself. *See* GW REPORT, *supra* note 15, at 7. Since fiscal year 1987, the annual number of indictments has generally been between 100 and 135.

The cited DOJ Release is relatively imprecise in defining the data upon which it is based. The GAO STUDY, *supra* note 11, provides a more detailed statistical analysis of federal environmental prosecutions generally for the fiscal years 1988 to 1993.

118. *See* GAO STUDY, *supra* note 11, at 27.

119. *See* DINGELL REPORT, *supra* note 4, at 2 (DOJ enforcement figures "do not indicate how much more could have been achieved but for the actions of the ECS"); GW REPORT, *supra* note 15, at 13.

120. GW REPORT, *supra* note 15, at 13.

121. Although the GW Report vaguely refers to the absolute number of civil cases, it cites no statistics. *Id.* at 13.

122. *Id.* at 13.

123. The U.S. Department of Commerce estimates that private businesses in the United States spent between $30 and $50 billion a year each year between 1972 and 1990 (in 1987 dollars). *See* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 23RD ANNUAL REPORT 283 (1993).

124. *See, e.g., Id.* at 8, 326 (reporting decreased emissions of air pollutants, including particulates, sulfur oxides, nitrogen oxides, volatile organic compounds, carbon monoxide, and lead since 1970).

125. *See Id.* at 321 (modest decline in ambient concentrations of selected water pollutants), *Id.* at 329 (general decline in concentration of air pollutants including particulates, sulfur oxides, nitrogen dioxide, ozone, carbon monoxide, and lead). Water statistics should be used with some caution due to the relatively small percentage of pollutant loadings attributable to industrial sources that are the typical targets of environmental prosecutions.

criminal prosecutions during the 1980s, appears to support a conclusion other than that suggested by the GW and Dingell Reports.

Proposed Rules of Principled Congressional Oversight

From the foregoing discussion, it is apparent the Dingell, GW, and Wolpe Reports all are seriously flawed. How, though, should congressional investigations be conducted? This Dialogue proposes certain basic principles, as set forth below.

The first rule of principled oversight (or of journalism or scholarship) involving criminal matters should be the recognition of the adversarial balance that lies at the base of our criminal justice system. Investigators should examine, equally and fairly, opposing positions on a particular issue. This does not mean that every congressional hearing or report must be a full-blown criminal trial. But where evidence of the guilt or innocence of individuals is the subject of a congressional hearing, congressional investigators should recognize the misleading and unfair effect that any oversight may have if it is limited solely to one side or the other.

The second rule of principled oversight should be fair standards of judgment regarding prosecutorial conduct. Prosecution is not a science, and reasonable prosecutors and agents may disagree reasonably over the merits of a particular case. Sophisticated congressional oversight should recognize this fact, rather than harp on everyday differences in evaluating particular cases. Similarly, a prosecutor should be able to conclude that the proof in a particular case may not be adequate to sustain a conviction of a particular crime without being subject to charges that he or she is sympathetic to the type of crime in question. It is unfair to label a specific prosecutor "soft" on crime based on his or her evaluation of a single case.

As corollary to this second rule, congressional oversight should also have the sophistication to distinguish between advocacy positions taken for purposes of bargaining, and positions resulting from the practical difficulties in proving even the strongest criminal cases. While it may always be possible to argue that a compromise may have resulted in less than the maximum possible penalty, Congress should not routinely criticize criminal pleas unless it is prepared to live with losses by the government in marginal or risky cases.

Third, congressional investigators should be mindful of the inherent difficulties of staging a "balanced" congressional hearing where key factual issues are hotly disputed. Recent history offers classic examples of how normal partisan politics can hamper balanced proceedings where Congress itself attempts to act as a neutral fact finder and weigh guilt or innocence in individual cases.[126]

Certain types of oversight are inherently difficult to perform fairly in the naturally political forum of a congressional hearing. As a practical matter, which political party is genuinely likely to provide balance by speaking on behalf of those accused of crimes against society, whether environmental or other? The temptations of demagoguery in this area must be consciously anticipated and avoided. As a result, congressional investigators should be especially sensitive to the particular difficulty, and in some cases the improbability, of attaining a fair balance in overseeing individual criminal investigations.[127]

Fourth, investigators should respect the elaborate system of protections that the U.S. Constitution,[128] courts, and legislature have established for protecting the rights of those under criminal investigation or indictment. Congressional hearings should not, for example, be an excuse for allowing government agents (or members of Congress) to avoid the burden of proof that the government would normally bear in asserting that unindicted suspects are guilty of criminal activity. Nor should congressional investigations be a back door for waiving protections of unindicted individuals normally provided by rules of grand jury secrecy. If a prosecutor or other government agent engaged in such conduct directly, he or she would probably be subject to disciplinary action. Congressional investigators should not effectively negate such standards in the name of oversight without a clear and convincing reason for waiving the normal rules.

Conclusion

As a result of their flawed methodology, the Dingell, GW, and Wolpe Reports paint an erroneous and misleading picture. In the world of the congressional critics, prosecutors walk away from "airtight" cases without explanation, and attorneys who have chosen environmental prosecution as their specialty exhibit an irrational and possibly subversive hostility to their work. In this world, certain cases cannot be lost, even though seemingly strong cases are lost in the real world every day:[129] to be accused is to be convicted, and for a prosecutor to fail to seek an indictment in any case presented by an investigating agent evidences a lack of environmental purpose.

The Dingell, GW, and Wolpe Reports ignore the essential

126. Relevant examples range from the Iran/Contra matter to the nomination of Justice Clarence Thomas.

127. In this context, it is notable that neither the House nor Senate Judiciary Committees as such have played any role in the current dispute. (Rep. Schumer serves on the Judiciary Committee, but appears to have been acting in his capacity as an individual representative with respect to the GW Report.) The most active committee to date, Rep. Dingell's, generally has responsibility for EPA, and not the DOJ.

128. Former Attorney General Benjamin Civiletti has taken the position that Congress' recent threat to issue subpoenas to career prosecutors to obtain testimony regarding specific prosecutions undermines the executive branch's constitutional authority and exceeds Congress' legitimate oversight authority. *See* Civiletti, *supra* note 23. Congressional representatives have contested Civiletti's claims. *See, e.g.*, Reid P.F. Stuntz, Remarks at the American Law Institute-American Bar Association Course of Study: Criminal Enforcement of Environmental Law (Oct. 7, 1993) (on file with author) (current congressional efforts at oversight are necessary for Congress to fulfill its legislative functions).

From a more academic point of view, Prof. Kenneth Culp Davis has long advocated increased scrutiny of prosecutorial discretion. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 188-90, 224-25 (1971).

129. At least one member of the Dingell Committee exhibited a more realistic view of the inherently tenuous nature of even seemingly straightforward prosecutions. *See* DINGELL HEARING, *supra* note 4, at 198 (statement of Rep. Eckart regarding his own humbling experiences as a prosecutor):

> I lost my first seven trials that I prosecuted. I lost—a guy had had his driving license suspended but for work privileges. He left work at 2:30 in the afternoon and was found inebriated, relieving himself in a beer joint parking lot at 1:30 in the morning, totally inebriated, and I tried to prosecute him because he [obviously] was not . . . driving home from work. I lost that one.

role of the prosecutor as a seeker of justice. It is in all citizens' interest that a prosecutor be able, in good faith, to decline a case against a particular suspect without being accused of endorsing the underlying crime.[130] The congressional attacks on career attorneys who have declined to prosecute cases that the attorneys believed to be unsupported by the evidence, if allowed to stand unchallenged, will have the opposite effect.

Notwithstanding the enormous resources devoted to them, the Dingell, GW, and Wolpe Reports fail to provide a meaningful basis for addressing important questions about the future of the ECS. For example, would environmental prosecution be more effectively handled by main DOJ or by local U.S. Attorneys? Bureaucratic struggles between main DOJ attorneys and U.S. Attorneys' Offices have existed for many years. Some types of cases (such as tax and antitrust prosecutions) have been effectively handled by centralized prosecution, while most others have been delegated to local U.S. Attorneys. Are environmental criminal violations, like tax violations, so different from typical white-collar matters that they would benefit from a specialized office to prosecute them? Even if the answer to this question is "yes," is the benefit of such specialization lost when the appointed central authority must try to manage criminal cases from a long distance (as ECS attorneys typically do)? Would the ECS be more effective if joined to the DOJ's Criminal Division? Would the benefits of specialization remain without the concomitant difficulties if the typical ECS attorney were a legal specialist or advisor, rather than a trial attorney as is now in theory the case? What is the likelihood that local U.S. Attorneys in some regions of the country would tend to minimize environmental prosecutions against local companies?[131]

Rep. Dingell's GAO study is a step in the right direction. Its careful statistical approach is far more important than the superficial inquiries about organizational "cultures" that have dominated the congressional studies to date. We should look forward to the day when congressional committees devote less effort to shallow sermonizing, and more to serious study of the difficulties of environmental criminal prosecution, and how the government's criminal enforcement powers can best promote a sound system for regulating industrial pollution.

130. In several well-known recent cases, overly aggressive prosecutions have led to undesirable results. In *Demjanjuk v. Petrovsky*, 1993 U.S. App. LEXIS 29694 (Nov. 17, 1993), the Circuit of Appeals for the Sixth Circuit held that DOJ attorneys engaged in misconduct by failing to disclose exculpatory evidence in litigation that led to the extradition of a subject of investigation (an alleged Nazi concentration camp guard) and the subject's trial on capital charges in the State of Israel. *Id.* at 3. In *Jacobson v. United States*, __U.S.__, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), the Supreme Court held that government investigators had entrapped a defendant convicted of receiving child pornography. In a third, widely publicized case, the DOJ voluntarily dismissed charges originally brought against James Beggs in connection with a fraud investigation in the defense industry. *See U.S. Admits Error in Fraud Case*, CHICAGO TRIBUNE, June 23, 1987, at A13 ("The government is standing up and saying we were wrong."). Prior to dismissal of the case, Beggs was forced to resign from his position as administrator of the National Aeronautics and Space Administration.

In light of the ultimate disposition of these cases, a decision to decline prosecution in any of the cases should not have been interpreted to mean that the prosecutors in question generally opposed prosecution of crimes related to the Holocaust (in the case of *Demjanjuk*), or child pornography (in the case of *Jacobson*), or defense fraud (in the case of Beggs). The congressional investigations that form the subject of this Dialogue, however, uniformly attribute such improper motives to the prosecutors they investigated. *See, e.g.*, GW REPORT, *supra* note 15, at 16 (characterizing named prosecutors as exhibiting "a noted disinclination to prosecute environmental cases"); DINGELL REPORT, *supra* note 4, at 36-37, 45 (characterizing prosecutors' concerns about the validity of contemplated charges as "weak," "absurd," and "ma[king] little sense"); WOLPE REPORT, *supra* note 3, at 12 (DOJ officials "appeared to place little value on environmental crimes").

131. The tendency of environmental cases to result in Balkanized decisionmaking has long been noted. *See generally* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

GENCORP
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William R. Phillips
Vice President, Law

March 1, 1994

Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Environmental Sentencing Guidelines

Dear Mr. Wilkins:

I am writing to express Aerojet's serious concerns with the proposed environmental sentencing guidelines issued by the Advisory Working Group on November 16, 1993, and our strong belief that further review and drafting work, with the active participation of corporate experts, is necessary.

Aerojet is the aerospace segment of GenCorp, engaged primarily in propulsion, electronics and ordnance work for DoD and NASA programs.

In general, we agree with the dissenting views of Messrs. Guerci and Hemphill of the Advisory Working Group submitted on December 8, 1993. We also endorse the comments of Don Fuqua, President of the Aerospace Industries Association, in his letter to you of February 28, 1994. Following are some of our principal concerns:

- We question at the outset whether environmental offenses should be the subject of a separate set of sentencing guidelines. This question is all the more pressing because the basic thrust of the proposed guidelines is to elevate penalties for environmental violations well above those for

other types of corporate crimes -- as though environmental crimes were inherently more serious and culpable than, say, fraud or antitrust offenses. In fact, it is commonly understood that environmental violations most often occur without deliberation or bad intent and sometimes even without knowledge on the part of the corporate managers involved. Strict liability is the order of the day in the environmental arena, even in criminal enforcement, where the element of criminal intent is often set aside on the basis that environmental violations are "health and welfare offenses." Thus, the entire concept of special, more onerous sentencing for environmental crimes runs counter to common sense and fairness.

- Most of the "Specific Offense Characteristics" used to increase fines from the "Base Offense Level" relate to the environmental effects of the violation and have nothing to do with what should be the principal factor in determining a sentence: the state of mind (or relative culpability) imputed to the corporation from the intentions and actions of its managers and employees.
- The draft guidelines provide that in no event shall a fine be less than the "economic gain" of the offender plus costs directly attributable to the offense. The "economic gain" is to include all cost savings the offender realized by avoiding or delaying compliance. However, such costs obviously cannot be established on any factual basis and would have to be addressed by hindsight and speculation. And how can an "economic gain" be established at all when, as is very often the case, the environmental incident could not reasonably be foreseen? (For

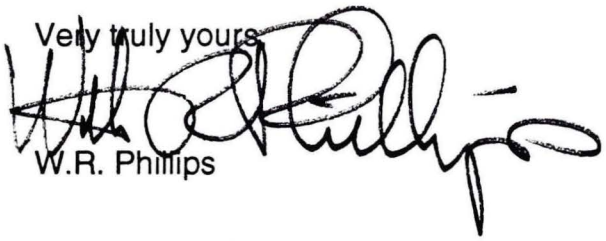
example, even a well designed and maintained waste facility may malfunction under circumstances that subject the company to liability.) By definition, "economic gain" presumes conscious avoidance or delay by company managers, which may not be factually true at all, even in a criminal proceeding.

- In these and other ways, the guidelines are structured to raise penalties to the upper end of the statutory sentencing range, so that the minimum and maximum fines stated in the statute have no real meaning. The McKenna & Cuneo law firm, in a letter of December 23, 1993, estimated that "the average penalty under the guidelines would increase almost 70% over the penalties presently being imposed for the same violations."
- As has been pointed out by other commenters, the compliance program set out in the guidelines is too extensive and too rigid to function as a true lever for compliance, or as an equitable base for mitigation of penalties. To require the local auto repair shop and General Motors to meet the same compliance criteria is inherently unfair. Even more unfair is the requirement that <u>every</u> criterion be met as a condition to sentencing relief. The old-fashioned virtues of "trying hard" and "substantial compliance" should have some place in environmental sentencing.
- The draft guidelines embrace the idea of court-managed probation of corporate environmental offenders, despite the generally negative record of corporate probation in other areas, and despite the courts' obvious lack of expertise in environmental technology and management.

Probation may be necessary to bring a real corporate outlaw into compliance, but should be reserved for the extreme situation.

Thank you for your attention to these comments.

Very truly yours,



W.R. Phillips

cc: Don Fuqua

Aerospace
Industries
Association

Don Fuqua
President

February 28, 1994

Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On November 16, 1993, the Advisory Working Group on Environmental Sanctions submitted its revised draft environmental sentencing guidelines to the Commission. On December 16, 1993, the commission published a notice requesting public comments on the Advisory Working Group's proposal. We are pleased to respond to your request for comments.

The Aerospace Industries Association (AIA) is the non-profit trade association representing the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

AIA has closely followed the activities of the commission during the past several years. To the extent possible, we have also tried to monitor the activities and progress of the Advisory Working Group in drafting its proposed environmental sentencing guidelines. We carefully reviewed the Advisory Working Group's March 1993 draft guidelines, and submitted comments to the commission on May 13, 1993 (Copy attached).

However, in reviewing the Advisory Group's November 1993 draft, it is obvious that none of our earlier comments have been adopted by the Advisory Group. In addition, this later draft creates new issues that have not been the subject of public comment, but should be. In light of the number of deficiencies that we see in the Advisory Group's draft, we urge the commission to reject the revised guidelines -- at least until there has been an opportunity for the commission to obtain both oral and written comments from interested parties. AIA would be pleased to participate by providing detailed comments.

With respect to the November draft, we are particularly concerned about several key approaches which provide the foundation for the entire draft guidelines. These include:

-- the radical departure from the use of dollar amounts to the use of percentages of the maximum statutory fine and the use of standards unique to this section;

-- the unprecedented establishment of a minimum fine that could obviate the important mitigation factors of the guidelines, such as those for effective compliance programs, voluntary clean-up, or cooperation with administrative agencies;

-- the mandate that organizations establish a separate and distinct environmental compliance program divorced from a company's other compliance programs, and

-- a mandate for a standardized, inflexible environmental compliance program that ignores an organization's size, contact with hazardous substances, or past compliance.

Any of these issues should be enough for the commission to withhold approval of the Advisory Working Group's recommendations until the implications of its suggestions have been carefully reviewed. Taken together, we believe the case is compelling for outright rejection, or at least delay.

We would welcome the opportunity to submit more detailed comments to the commission during a public notice and comment period. In the interim, if AIA can provide you or your staff with any additional information, please do not hesitate to contact Patrick Sullivan of my staff at (202) 371-8522.

Sincerely,

Don Fuqua

Enclosure

DF:pds

Aerospace Industries Association

LeRoy J. Haugh
Vice President
Procurement and Finance
(202) 371-8520

May 14, 1993

Advisory Working Group on Environmental Sanctions
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Sir or Madam:

In response to your request for comments on the working draft of recommended environmental sentencing guidelines, some of our member companies have provided their comments directly to your office. However, we as an association have not previously responded and would like to do so at this time. Our preliminary study of the draft guidelines gives us several concerns which are discussed below. The Aerospace Industries Association (AIA) is the nonprofit trade association representing the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

We believe that the draft guidelines would severely punish even corporations that had taken all appropriate preventive actions. One way the draft guidelines accomplish this result is by limiting mitigation credit to 50% of the base fine. By contrast, under the Organizational Guidelines, a fine range between 5% and 20% of the base fine is theoretically possible.

A somewhat related matter is the aggravating factor for prior history which does not consider the "quality" of that history. A corporation that had prior convictions or adjudications in spite of vigorous compliance efforts would have its sentence aggravated to the same extent as an environmental scofflaw. Considering the quality of the prior offense would be consistent with the provision for mitigation credit for offenses involving a lack of scienter. If prior convictions or judgments were based on strict liability or collective knowledge standards, then the "aggravation" caused by such prior history should be reduced as well.

The description of a compliance program necessary to satisfy the mitigating factor of "Commitment to Environment Compliance" goes into excessive detail. A more general, and shorter, description with some discretion left to the judge would be more appropriate.

While in general the efforts of the Sentencing Commission are aimed at limiting the discretion available to sentencing judges, the area of environmental enforcement is one that calls for more discretion than represented either in the current draft or in the prior guidelines issued by the Commission. Discretion is particularly appropriate because much of the conduct now being dealt with via criminal enforcement occurred at a time when such conduct was being regulated administratively, civilly or not at all. While government can certainly change its enforcement priorities to respond to increasing public sensitivity to environmental issues, the ability to soften the impact of unexpected changes in government priorities should reside with the courts. The very high fine levels and low standards of culpability also call for the availability of greater discretion.

The aggravating factor of "concealment" does not recognize that in many instances so-called corporate crime involves employees violating company policy as well as the law. Nevertheless, the aggravating factor applies even if the employee attempted to conceal information from his employer as well as the government. This aggravating factor should be limited to actions of certain employees and should exclude actions intended to deceive the organizational defendant as well.

The aggravating factor of "lack of a permit" seems redundant since some conduct is illegal only because of the absence of a permit. This aggravating factor should be eliminated, or at least limited to cases where the absence of a permit is not a necessary element of the offense.

We are also concerned that if the government contests the adequacy of a compliance program, the defendant could be required to fund the dispute. The guidelines authorize the court to hire experts, at the defendant's expense, to evaluate the compliance program. Since the costs to the government to challenge a program would therefore be minimal, such government contentions are certain to be a regular feature of every sentencing under these guidelines. A far preferable approach would leave discretion to the judge to determine appropriate methods for testing the adequacy of a program should he or she determine it to be necessary.

Conspicuous by their absence are discussions of deviations from the guidelines. The organizational guidelines set out circumstances when a court may make a "departure" from the guidelines, such as for extremely low or high culpability. The environmental draft has no such provisions.

Finally, the base fine table "re-legislates" decisions already made by Congress. By using percentages of the maximum fine which vary based on the extent to which the conduct harms or jeopardizes people or the environment, the guidelines do what Congress has already done. The Clean Water Act for example provides for criminal fines between $25,000 and $250,000 per day determined by the same sort of factors.

We understand the difficulty in developing a set of guidelines for such a complex area. However, the draft as presently written falls far short of being an acceptable solution. We recommend, if the Commission is unable to arrive at a workable and fair set of guidelines, that no guidelines be issued. Causing industry to litigate the inequities in any set of guidelines rather than addressing the issues directly is not a solution. Rather the Commission would be better served by issuing a set of broad principles for sentencing and abandoning the development of a detailed set of flawed guidelines.

If we can be of further assistance, please do not hesitate to contact the undersigned at (202) 371-8520.

Sincerely,

LeRoy J. Haugh

LJH/pds

ASSOCIATION
OF AMERICAN
RAILROADS

James C. Schultz
General Solicitor

February 24, 1994

HAND DELIVERY

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Staff Director

Re: Sentencing Guidelines for United States Courts

Dear Sir or Madam:

Enclosed are the original and five copies of Comments of the Association of American Railroads on the Draft Sentencing Guidelines for Environmental Crimes proposed by the Advisory Working Group on Environmental Offenses.

Please date-stamp the extra copy of this letter and return to me in the enclosed stamped, self-addressed envelope.

Respectfully submitted,

James C Schultz

Enclosures

Law Department, 50 F Street, N.W., Washington, D.C. 20001 (202) 639-2506 FAX: (202) 639-2868

BEFORE THE
UNITED STATES SENTENCING COMMISSION

THE ADVISORY WORKING GROUP ON ENVIRONMENTAL OFFENSES:
DRAFT SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR),[1] on behalf of its member railroads, submits the following comments on the Draft Sentencing Guidelines for Environmental Crimes (Draft Guidelines) proposed by the Advisory Working Group on Environmental Offenses. See 58 Fed. Reg. 65764 (December 16, 1993).

AAR shares the concern underlying the Draft Guidelines, that environmental laws be fairly and effectively enforced and that compliance be encouraged for all business organizations. However, AAR opposes the adoption of the Draft Guidelines in their current form on several grounds, discussed fully below. Chief among these objections are the elimination of organizational culpability as an important factor and the limitation of judicial discretion in inappropriate ways. Adoption of this proposal will lead to the imposition of unconscionably severe penalties for minor environmental violations, as well as a confusing and inconsistent method of dealing with organizations as criminal defendants.

The Draft Guidelines, without any articulable rationale for doing so, would impose sentences which are different and more stringent than those for other organizational crimes. There is no reason to believe that criminal violations of environmental laws impose unique or more severe consequences upon society than other types of organizational crimes; certainly there is no compelling reason for instituting an entirely different and complex sentencing scheme. The available evidence indicates that very few environmental crimes result in identifiable harm; the spectacular oil spill or dumping of toxic chemicals into a water supply is by far the exception and not the rule. Rather, most environmental crimes involve violations of paperwork requirements, reporting requirements, permit conditions or other technical regulations. These regulatory offenses are not significantly different from those which are not "environmental" and thus remain under U.S.S.G. Chapter 8.

The Draft Guidelines assess the seriousness of a violation in an overly simplistic way and thus exclude highly relevant considerations. The

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[1]AAR is a trade association whose member railroads operate 75 percent of the line-haul mileage, employ 89 percent of the workers, account for 91 percent of the freight revenue of all railroads in the United States, and operate almost all of the nation's inter-city passenger trains.

Guidelines inappropriately group all "hazardous or toxic substances" together; in fact, materials categorized as hazardous or toxic differ widely in their toxicity and the degree to which they pose a threat to human health or the environment. Sentences for environmental crimes involving a toxic or hazardous substance should, in many cases, reflect the relative toxicity, quantity, and concentration of the material, as well as the circumstances of its release. Similarly, the Guidelines err in treating all permit violations the same. As a consequence of these problems, the numerical system set out in the Guidelines for ranking offenses does not reflect all the factors relevant to determining the seriousness of any given violation.

The Draft Guidelines are also seriously flawed because they fail to account for culpability as the primary factor in sentencing, including issues of intent, knowledge, and ability to control. It is important to remember that an organization, which is only vicariously liable, is not identical to an individual, who is personally liable. The degree of knowledge and control by the corporation in the misdeeds of its employees should be a highly relevant factor in the establishment of an appropriate penalty, yet the Guidelines give no weight to this factor at all. For instance, a company may itself be found criminally liable even when the employee actually committing the criminal act does so in violation of company policy and against instructions and then conceals his activity from company management. This may not be an unusual situation for a large company with many employees, some of whom may save themselves time and effort by engaging in activities which they know to be forbidden. Such a situation is obviously relevant to the question of culpability and can occur regardless of the sophistication and thoroughness of the type of compliance program described in the Guidelines. The existence of an audit and compliance program is thus not instructive on the question of whether, in a specific instance, the corporation knew of or exercised control over the commission of a particular violation. This critical question is entirely absent from consideration under the draft.

The failure to consider corporate culpability is especially damaging when one considers the hundreds of thousands of environmental regulatory provisions of which one can unwittingly run afoul. Under these circumstances, even the most sophisticated, well-intentioned, and well-informed environmental professional may fail to note or may misinterpret a regulatory provision. Although such inadvertent behavior may be sufficient to support liability in some cases, it does not justify imposition of a harsh penalty under the sentencing scheme. Heavily regulated industries such as railroads must operate within a maze of federal regulations of all kinds and thus inadvertent violations are not unlikely.

The credit for corporate compliance programs provided for in the Draft Guidelines does not alleviate the failure of the Guidelines to consider culpability. As a practical matter, very few organizations will be able to achieve a compliance program meeting the Guidelines' requirements. It is unrealistic to demand that every aspect of a corporate compliance program conform to the detailed guidelines for such programs;

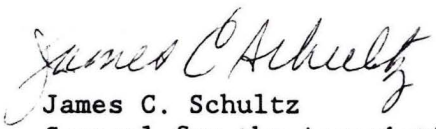
even for a corporation with a good program and a solid commitment, this kind of perfection is unlikely to be achievable.

Even if a corporation's compliance plan were to meet the Guidelines' extremely high standards, the degree of mitigation offered for this factor is severely limited and much too low; in all probability, even a corporation minimally culpable would pay an excessive penalty. Given the difficulty of complying with the Guidelines' requirements for compliance plans and the lack of sufficient rewards for doing so, the Guidelines provide little incentive to engage in the strenuous and expensive exercise of designing a "Cadillac" compliance plan.

The Guidelines also fail to take into account the numerous and varied other methods by which a violator is made to pay for its errors. Civil administrative and judicial penalties are available to punish non-compliance, as well as injunctive relief to force companies to take often expensive corrective measures to achieve compliance. Any environmental damage which may have resulted from the violation is compensable through suits by governments for natural resource damage and by individuals for tort damages. Corporations which do business with the government are potentially subject to debarment from government contracts, a result which can have disastrous consequences for some companies. None of these factors, which may have a significant economic impact on a corporate violator, is considered in determining an appropriate criminal fine under this proposed sentencing scheme.

It is undisputed that the environmental criminal laws should be vigorously, fairly and effectively enforced. Because they do not account for all the relevant considerations that should be taken into account in imposing sentences, the proposed Guidelines do not accomplish this objective. Therefore, AAR urges the Commission to reject these proposals and adopt standards which more fully reflect the true range of factors which should be considered by the courts in exercising informed sentencing discretion.

Respectfully submitted,



James C. Schultz
Counsel for the Association
of American Railroads
50 F St., N.W.
Washington, D.C. 20001
(202) 639-2503

February 24, 1994

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February 23, 1994

The Honorable William H. Wilkins, Jr., Chairman
Julie E. Carnes, Michael S. Gelacak,
A. David Mazzone, and Ilene H. Nagel,
Commissioners
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Simulations of Fines Under Work Group's Proposed Sentencing Guidelines for Environmental Crimes

Dear Chairman and Commissioners:

This letter addresses the simulations transmitted by the government to Commissioners Nagel and Gelacak on January 24, 1994. I believe that the preparation of fines simulations is a valuable and important exercise. However, because of the numerous problems with these simulations, I believe that they do not support the proposition that the work group proposal is sound.

First, the data set is too small. The simulations addressed only ten cases. Based upon the Environmental Protection Agency's printout sent to me on June 30, 1993, and thereafter circulated to the work group, there are far more cases. These should have been evaluated.

Second, the factual circumstances of the cases are not stated. It is not possible to determine whether the fine fit the crime. Also, the complete story is not presented. For example, the presence or absence of fines imposed on individuals is not stated. This may be part of an overall plea.

Third, nine of the ten cases involved pleas. In these pleas, it is reasonable to assume that an agreement was reached on the number of counts to be charged. Therefore, these simulations do not support the author's conclusion that the multiple violations provisions of the work group's proposal is reasonable. In fact, the ninth example (Ocean Spray), demonstrates that through multiple counts, very large fines are generated under the proposal.

Fourth, these simulations do not support the view of some members of the work group that the fine should be at least as large as the clean up costs or natural resources damages. In one case, Ashland Oil, oil cleanup costs exceeded the fine. In another case, Bristol-Myers Squibb, there is no basis for equating the restitution to natural resources damages.

Sincerely,

Lloyd S. Guerci

LSG:mcr

cc: Raymond Mushal, Esq.

General Electric Company
1331 Pennsylvania Ave. N.W.
Washington, DC 20004-1703

February 23, 1994

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Preliminary Comments of the General Electric Company Concerning Further Development of Organizational Sentencing Guidelines for Environmental Offenses

Dear Commissioners:

I am writing in response to your December 16, 1993 notice indicating the availability of the final recommendations of the Advisory Working Group on Environmental Sanctions.

Last Spring, GE, along with Johnson Controls, Inc. and IMCERA Group provided written comments to the Advisory Group concerning its preliminary draft. I subsequently testified at the public hearing held by the Advisory Group and, at the Group's request, provided supplemental comments relating to that testimony. My commentary was based upon my experience over the last four years as GE's vice-president in charge of environmental matters company-wide and, before that, my experience both in the federal government and in private law practice with the enforcement of the federal civil and criminal laws. Having learned that the Commission will be meeting with the Advisory Group later this week, I offer the following brief remarks concerning the Group's final work product.

The Advisory Group still has not provided advice on the fundamental threshold question whether such guidelines are necessary and whether the Group's final recommendations truly reflect empirical reality. The Group has likewise failed to discuss the conceptual underpinnings and provide reasoned justification for its choices. This is unfortunate, as the continued lack of supporting analysis makes rigorous assessment of the Group's work quite difficult.

Generally, however, while the final recommendations have moved in a positive direction, the movement is fairly incremental. Significant structural and substantive problems remain. GE's principal concerns are reflected in the attached article which should be published soon in the Environmental Law Institute's policy journal, The Environmental Forum. These views are more fully explained in my supplemental comments (also attached) concerning the Advisory Group's draft which, unfortunately, remain equally relevant to the final proposal.

GE would be happy to provide more extensive comments at a later date. Before the Commission takes further action on the Advisory Group proposal, we would urge the Commission to have staff explore the proposal's conceptual underpinnings and provide the results of its analysis to the public. In addition, it is our hope that the Commission will undertake an empirical analysis of existing sentencing practice and make that information publicly available as well. These analyses are critical to producing a principled approach to sentencing organizational offenders that is realistic, workable, and fair.

Thank you for your consideration of our views.

Very truly yours,

Stephen D. Ramsey

Stephen D. Ramsey

SUBMISSION TO THE ENVIRONMENTAL FORUM

BY STEPHEN D. RAMSEY
VICE PRESIDENT FOR CORPORATE ENVIRONMENTAL PROGRAMS

FEBRUARY 14, 1994

I've contemplated the issue of criminal enforcement from many sides, none of them theoretical. This is not an encomium against criminal enforcement of environmental laws. Criminal sanctions are appropriate for willful violations of the environmental laws that will lead to demonstrable harm. Guidelines that assure that similarly situated defendants are sentenced similarly and in proportion to the offense are appropriate. This is, rather, the view of a potential end user of the advisory group's product and a plea (no pun intended) for a moment of perspective in which we ask: what should the criminal sentencing guidelines accomplish and are we there yet? Hopefully guidelines will encourage corporate self-policing, differentiate between technical and more egregious acts and be creative and flexible in encouraging good behavior and deterring bad behavior. Despite a lot of hard work over a long period of time, the sentencing guidelines proposed by the Advisory Group on organizational environmental crimes do not, in my view, accomplish that goal. In short, we are not "there" yet.

The first step is to focus on what the criminal laws and criminal sentence are supposed to achieve. It's pretty simple: bad behavior should be punished and deterred and good behavior should be encouraged. Bad behavior is doing what reasonable people know will harm or injure people or the environment and taking that action willfully and knowingly. It should not be criminal bad behavior to store your hazardous waste more than 90 days when it presents no serious or realistic risk to anyone. It is not criminal behavior to discharge oil to a lake as the result of an accident rather than a deliberate act. Foreseeable harm and culpability should be the benchmarks for criminal charges and criminal sentencing.

Good behavior for a corporation in this context is integrating into the company's culture lawful behavior and self-policing mechanisms that assure that active compliance with the law is part of the corporation's automatic response to every situation. The quality of the effort as well as the end result should be important factors in evaluating corporate behavior and considering punishment for it.

These basic propositions do not set environmental crime apart from other crimes. At bottom the environmental criminal system is an integral part of the criminal law generally.

The point at which environmental crime most differs from the general criminal law is the indistinct border between civil and criminal offenses. In particular it is difficult to articulate by reference to jury instructions the difference in knowledge and willfulness that turns a civil offense into a crime.

The Advisory Group failed to exploit the opportunity to help clarify the structure and content of environmental criminal law. That is a misfortune for everyone in the environmental profession. Neither culpability nor foreseeable harm is illuminated as the central focus of charging or sentencing environmental crimes. Most importantly, there is virtually no effort at capturing the varying mental states that should be the basis of much of the variation in environmental criminal sentencing. There are degrees of bad behavior. Sentencing guidelines should reflect that clearly and effectively and make use of them.

The Advisory Group's encouragement of good behavior is also flawed. The blue print for corporate compliance is a straitjacket. It should be obvious to those with experience in environmental enforcement or environmental management that techniques and standards for compliance programs have evolved rapidly over many years responding to new ideas ranging from TQM to waste minimization. That change has been for the good. Creativity and change need flexibility to flourish. It should be encouraged by guidelines which emphasize principles but allow them to be expressed in new and better ways. The last word on how to structure corporate environmental compliance will not be spoken in 1993.

There was another opportunity to encourage good behavior that was missed. For a long time environmental enforcement has included remedies which benefit the environment generally. The concept of restitution through environmentally beneficial projects has a long history of success and both

community and judicial acceptance. The Advisory Group's limitation on mitigation to 50% of the fine is neither explained nor warranted.

The Advisory Group has not clearly articulated the basis and explanation for their proposals. The instructions on corporate compliance are provided in rigid detail and designed to make sure they are followed without question or dissent. The bases for determining the fine amount appears designed to assure that fines are high -- very high. This rips environmental sentencing for organizations out of the context of organizational sentencing generally. It is a hallmark of the Sentencing Commission's guidelines for organizations that they recognize the vicarious nature of organizational crime and accordingly allow for a wide range of fine results depending on how the organization has measured up to broad principles of internal governance. Not only is that system sound for environmental offenses, it is particularly appropriate in the environmental context when the distinction between civil and criminal misconduct is so difficult to articulate and define.

I hope the Sentencing Commission rejects the Advisory Group's work product. We should not be dealing with basics after fifteen years of federal environmental criminal enforcement nor legislating in the guise of sentencing guidelines. To get beyond basics the Sentencing Commission has to construct a sentencing system that fully and persuasively explicates the range of culpability and foreseeable harm that make up the bad behavior the sentences should deter; firmly places environmental offenses in the context of general criminal law principles; and explicates the good behavior that is to be encouraged while leaving the room for flexibility and creativity which will provide the opportunities for companies to devise systems which make sense for their situation and, yes, actually work. There is still a lot of work for the Commission to do.

Stephen D. Ramsey, GE Co.
2/14/94
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Stephen D. Ramsey
Vice President Corporate Environmental Programs

July 7, 1993

Advisory Working Group on
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United States Sentencing Commission
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Members of the Advisory Working Group:

At the public hearing on May 10, 1993, I spoke on behalf of the General Electric concerning the Advisory Group's draft of proposed sentencing guidelines for organizational offenses. In response to the Advisory Group's request at that hearing, I enclose supplemental comments which address questions raised at the hearing and incorporate the major points of my testimony.

If you have any questions or would like additional information, I would be to pleased to respond further. Thank you for your consideration.

Very truly yours,

Stephen D. Ramsey

Enclosure