TESTIMONY OF

DAVID M. UHLMANN

JEFFREY F. LISS PROFESSOR FROM PRACTICE
DIRECTOR, ENVIRONMENTAL LAW AND POLICY PROGRAM
UNIVERSITY OF MICHIGAN LAW SCHOOL

BEFORE THE

UNITED STATES SENATE COMMITTEE ON
HEALTH, EDUCATION, LABOR AND PENSIONS

"THE PROSECUTION OF WORKER ENDANGERMENT CASES AND THE NEED FOR STRONGER CRIMINAL PROVISIONS OF THE WORKER SAFETY LAWS TO PROTECT AMERICA'S WORKERS"

APRIL 29, 2008

Thank you Chairman Kennedy, Senator Enzi, and Members of the Committee for holding today's hearing and for giving me the opportunity to testify before you.

My name is David Uhlmann. I am the Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. Prior to joining the Michigan faculty in July 2007, I served for 17 years in the United States Department of Justice, the last seven as Chief of the Environmental Crimes Section.

During my tenure at the Justice Department, we prosecuted a number of environmental criminal cases involving worker injuries and deaths. Based on those successful prosecutions, we developed a worker endangerment initiative to highlight the fact that environmental crimes frequently place America's workers at risk of death or serious bodily injury – and to prosecute companies that systematically violate both the environmental laws and our worker safety laws.

The Justice Department's worker endangerment initiative has produced a number of high-profile prosecutions involving companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace & Co. The worker endangerment initiative has focused on companies where profits have taken precedence over compliance with the law and workers have been treated as if they were expendable. Criminal prosecution of those companies protects American workers, upholds the rule of law, and ensures that corporate outlaws do not have a competitive advantage over companies that make compliance a priority.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the woeful inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by my former colleagues charged violations of the endangerment provisions of

the environmental protection statutes[1] and Title 18 of the United States Code, which makes it a crime to make false statements,[2] obstruct justice,[3] and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.[4] Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for some forms of obstruction of justice. The endangerment provisions of the environmental laws and Title 18 also cover a wide range of misconduct in the workplace.

Only one case brought to date under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant, has utilized the criminal provisions of the Occupational, Safety, and Health Act (the "OSH Act").[5] Prosecution under the OSH Act is extremely limited, because the OSH Act only covers (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation occurs that results in death, the crime is only a Class B misdemeanor, with a maximum sentence of six months in jail.

The criminal provisions of our worker safety laws are so weak that they do little to protect America's workers. Limiting prosecution to willful violations makes ignorance of the law a defense, contrary to the time-honored maximum of American jurisprudence that ignorance of the law is not a defense. Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also may warrant criminal remedies. Misdemeanor violations provide little deterrence and minimal incentive for prosecutors and law enforcement personnel, who reserve their limited resources for the crimes that Congress has deemed most egregious by making them felonies (with significant maximum penalties). Finally, only "employers" can be prosecuted for criminal violations of the OSH Act, which means that the mid-level managers who have the greatest day-to-day responsibility for unsafe working conditions often are immune from criminal prosecution under the OSH Act.

In my testimony today, I will explain why Congress should strengthen the criminal provisions of our worker safety laws by enacting the Protecting America's Workers Act.

First, I will describe one of the cases that I prosecuted at the Justice Department that helped lead to our worker endangerment initiative and exposed the inadequacy of the criminal provisions of our worker safety laws. Second, I will explain why a stronger criminal program under the OSH Act would promote greater compliance with our worker safety laws. Third, I will

---

[1] *See, e.g.,* 42 U.S.C. § 7413(c)(4) (negligent endangerment under the Clean Air Act) and 42 U.S.C. 7413(c)(5) (knowing endangerment under the Clean Air Act).

[2] 18 U.S.C. § 1001.

[3] 18 U.S.C. §§ 1503, 1505, 1512, and 1519.

[4] 18 U.S.C. § 371.

[5] 29 U.S.C. § 666(e).

suggest possible changes to the OSH Act and the Protecting America's Workers Act to provide a more effective criminal enforcement scheme and ensure compliance with our worker safety laws.

The Cyanide Canary[6]

In August 1996, Scott Dominguez collapsed and nearly died inside a 35,000 gallon steel storage tank while working at Evergreen Resources, a fertilizer manufacturing facility in Soda Springs, Idaho. The owner of Evergreen Resources was Allan Elias, a Wharton graduate and attorney who had a long history of environmental and worker safety violations. Elias previously used the 35,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form deadly hydrogen cyanide gas; expert testimony at trial established that there was enough cyanide in the storage tank to kill thousands of people.

Elias nonetheless ordered Dominguez and his co-workers to clean out the tank and dump the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers for safety equipment and for tests to determine whether it was safe to go inside the tank. Elias refused to prepare the required "confined space entry permit" detailing the steps that were being taken to protect the workers and enable them to be rescued if someone was injured inside the tank. Elias did so even though he had been warned for years by the Occupational Safety and Health Administration ("OSHA") about the dangers of sending workers into confined spaces like the tank without safety equipment and appropriate testing. When the workers complained of sore throats and difficulty breathing, Elias told them to finish the job or find work somewhere else.

Dominguez, a recent high school graduate without significant work experience, felt like he did not have any choice. So, on August 27, 1996, wearing just jeans and a t-shirt, Dominguez descended into the tank on a ladder, a 20-year old with his whole life ahead of him. Two hours later, covered in sludge and barely breathing, Dominguez emerged from the tank on a stretcher, his life shattered by Elias's blatant disregard for the health and safety of his workers.

In the frantic minutes before paramedics rescued Dominguez, firefighters asked Elias whether there was anything in the tank that could explain what had happened to Dominguez or put the rescuers at risk. Elias lied and said there was nothing but mud inside the tank.

After the ambulance rushed Dominguez to the hospital, the emergency room doctor, John Wayne Obray, called Elias twice to ask what was inside the tank. On the second call, Dr. Obray asked Elias whether there was any possibility that cyanide was in the tank. Elias lied and said no.

---

[6] JOSEPH HILLDORFER AND ROBERT DUGONI, THE CYANIDE CANARY: A STORY OF INJUSTICE (2004). Former EPA Special Agent Hilldorfer and co-author Dugoni provide a first-hand account of the prosecution of *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), for environmental crimes that left the victim permanently brain-damaged. Multiple worker safety violations occurred, but no worker safety crime, because of the deficiencies of the OSH Act.

The next day OSHA inspectors interviewed Elias, who lied again and said that he had a confined space entry permit for the tank cleaning operation. Later that morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and borrowed a safety manual, which included instructions about how to prepare a confined space entry permit. He then prepared and backdated a confined space entry permit for the tank cleaning operation and submitted the false permit to OSHA, claiming it had been prepared before Dominguez was hurt.

The United States charged Elias with three felony counts under the environmental laws, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, the United States charged Elias with one felony count under Title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.[7] During the 3½-week trial, Dominguez testified that he did not know there was cyanide in the tank, and that he entered the tank without safety equipment because "I really, really, really did, really did trust Allan."[8]

After less than six hours of deliberations, the jury convicted Elias on all counts on May 7, 1999. United States District Court Judge B. Lynn Winmill sentenced Elias to 17 years in prison, which until recently was the longest sentence ever imposed for environmental crime.

The Justice Department hailed the Elias conviction and the resulting sentence, because it demonstrated that "environmental crimes are real crimes, and those who flout our environmental laws will go to prison for a long time."[9] The proof of knowing endangerment in the Elias case, however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the accompanying unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the Elias case was as much a worker safety case as it was an environmental case under the federal pollution prevention laws.

Yet Elias did not commit a criminal violation of the worker safety laws.

---

[7] The United States charged the falsified permit as a violation of 18 U.S.C. § 1001, instead of the OSH Act's false statement provision, 29 U.S.C. § 666(g), because a false statement under Title 18 is a felony, punishable by up to five years in jail. A false statement under the OSH Act is a Class B misdemeanor, punishable by up to six months in jail. Elias was convicted and sentenced to the statutory maximum penalty of five years in jail on the Title 18 false statement charge.

[8] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 3499 (Testimony of Scott Dominguez, May 3, 1999).

[9] "Idaho Man Given Longest-Ever Sentence for Environmental Crime," *United States Department of Justice Office of Public Affairs Press Release* (Statement of Assistant Attorney General Lois J. Schiffer, April 29, 2000).

Elias did not commit a worker safety crime, even though OSHA cited Elias for willful violations of worker safety regulations. Elias did not commit a worker safety crime, even though the jury found unanimously that Elias knew he was placing his workers in imminent danger of death or serious bodily injury. Elias did not commit a worker safety crime, even though he was convicted of multiple environmental felonies, including knowingly endangering his workers.

Allan Elias did not commit a worker safety crime, because Scott Dominguez did not die.

Elias committed egregious crimes and deserved the 17-year prison sentence imposed by Judge Winmill. The Elias case provides a stark contrast, however, between the strength of the criminal provisions of the environmental laws and the weakness of the criminal provisions of the worker safety laws. It is appropriate that endangering workers during a hazardous waste violation carries a 15 year maximum sentence per count; it is illogical that the same conduct during a worker safety violation is not a crime unless a worker dies – and even then only is a six-month misdemeanor per count (which, in all likelihood, means six months per worker death).

The criminal provisions of the environmental laws are not an effective antidote for the weakness of the criminal provisions of the worker safety laws. Most environmental crime occurs in a workplace setting and involves the mishandling of hazardous substances or pollutants, which can place workers at risk. However, many cases involving danger to workers cannot be prosecuted under the environmental laws, because they do not involve mishandling of hazardous wastes, or unlawful releases of hazardous air pollutants into the ambient air, or illegal discharges of pollutants into waters of the United States. Relying on the environmental laws to protect America's workers means that, in many cases, America's workers will be left unprotected.

Moreover, even when environmental laws apply, their enforcement can raise complicated regulatory issues. Elias challenged his convictions on the grounds that the applicable definition of hazardous waste was too vague to be criminally enforced. While the Ninth Circuit did not agree with Elias, his ability to make such an argument shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases.

In sum, while the Elias prosecution was successful, and the worker endangerment initiative has excelled because of the extraordinary efforts of career prosecutors at the Justice Department, criminal investigators at the United States Environmental Protection Agency ("EPA"), and oft-maligned compliance officers within OSHA, the environmental laws cannot make up for the inherent weaknesses of the criminal provisions of our worker safety laws.

The Need for a Strong Criminal Program

Most companies in the United States comply with the law and care about protecting their workers. For those companies, worker safety is more than a legal requirement; it is a moral and ethical obligation. But experience teaches that there always will be companies that take a different approach, companies with owners like Allan Elias who think that the law does not apply to them or that, if they get caught, they can either avoid penalties or simply pay a modest fine.

Sadly, under the existing OSH Act, the companies that think there are not significant penalties for violating OSHA regulations probably are correct. Willful or repeated violations carry a statutory maximum of $70,000 per violation,[10] a number which has not been increased in decades and pales in comparison to the cost of an effective corporate compliance program.

Criminal penalties can be much higher than administrative penalties under the OSH Act, because Title 18 sets a maximum penalty of $500,000 for misdemeanors that are committed by organizational defendants and result in death[11] or twice the gain or loss associated with the offense[12] (whichever is greater). As discussed above, however, criminal violations only apply if a willful violation results in worker death. Even if the criminal provisions apply, most United States Attorney's Offices – faced with the challenge of prosecuting cases across a wide range of federal regulatory programs, in addition to drug and gun crimes – focus on felony cases and are unable to devote limited prosecutorial resources to misdemeanor cases for regulatory crime.

The net result is a worker safety program where most violators – even willful violators – will face only administrative violations and relatively modest penalties if they are cited. That makes it easy for companies to put profits before compliance and to view any penalties that may result as a "cost of doing business." A company that epitomized that approach is McWane.

McWane is a privately owned company that operates pipe manufacturing facilities across the United States. Although pipe manufacturing is inherently dangerous, McWane facilities were particularly hazardous places to work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants,[13] giving McWane one of the worst safety records in the United States.

Yet, despite McWane's alarming record of worker injuries and deaths, the company's only criminal conviction prior to 2005 was a single misdemeanor count in July 2002 under the OSH Act for willful violations of the worker safety laws that resulted in a worker being crushed to death at McWane's Tyler Pipe facility in Tyler, Texas. McWane paid a fine of $250,000.

In January 2003, as a pilot project for the worker endangerment initiative, the Justice Department and EPA began a criminal investigation of environmental and worker safety violations at five McWane facilities: Atlantic States Cast Iron Pipe Company in New Jersey; McWane Cast Iron Pipe Company in Alabama; Pacific States Cast Iron Pipe Company in Utah; Tyler Pipe in Texas; and Union Foundry in Alabama. The investigations revealed a company that was a persistent violator of worker safety and environmental laws, and which made it a

---

[10] 29 U.S.C. § 666(a).

[11] 18 U.S.C. § 3571(c)(4).

[12] 18 U.S.C. § 3571(d).

[13] David Barstow and Lowell Bergman, "A Dangerous Business: At a Texas Foundry, an Indifference to Life" (*N.Y. Times*, January 8, 2003).

practice to lie to and deceive OSHA inspectors and federal and state environmental officials to conceal its illegal activity.

McWane eventually pleaded guilty in September 2005 to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of $4.25 million. McWane also pleaded guilty to Clean Air Act crimes at Pacific States, with a criminal sentence of $3 million, and at Tyler Pipe, with a criminal sentence of $4.5 million. McWane chose to stand trial for the violations committed at its Atlantic States and McWane Cast Iron Pipe facilities, where multiple McWane officials were charged. After lengthy trials, however, McWane and most of the individual defendants were convicted, although final sentences have not been imposed.[14]

While the criminal cases against McWane have not ended, the multi-million dollar criminal fines imposed against McWane and the years of adverse publicity resulting from the criminal investigations and prosecutions may have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,[15] *Frontline* interviewed dozens of McWane employees who describe a "new McWane" where worker safety and environmental compliance are now a priority. Former OSHA Administrators and senior Justice Department officials now advise McWane about its regulatory compliance programs.

Only time will tell whether there is a new corporate attitude at McWane. It is revealing, however, that the company ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction). McWane only began to make changes when the United States launched a concerted, national investigation and prosecution effort, with multiple indictments for felony violations and multi-million dollar criminal penalties for those crimes. The McWane prosecutions therefore speak volumes about the role of a strong criminal program in promoting worker safety and compliance.

A strong criminal program, particularly one where individual corporate officials may face significant jail time if they commit criminal violations, sends a message to the regulatory community about the need to make compliance with worker safety laws a priority. Companies that do not care about worker safety for its own sake will pay far more attention to worker protection if they fear criminal sanctions and possible jail time for corporate officials who put workers at risk.

---

[14] Sentencing in the Atlantic States case has not occurred more than two years after the trial ended (which lasted seven months and was the longest environmental crimes trial ever in the United States). A new trial may be necessary in the McWane Cast Iron Pipe case after the United States Court of Appeals for the Eleventh Circuit reversed the convictions on Clean Water Act jurisdictional grounds, *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g en banc denied* (2008), unless the United States seeks and obtains Supreme Court review of the case.

[15] "A Dangerous Business Revisited," *Frontline* (February 5, 2008).

Criminal enforcement also provides benefits beyond punishment and deterrence of criminal activity. In regulatory programs where there is a credible criminal enforcement threat, companies are quicker to resolve administrative penalty actions and respond more productively to regulatory inspections. The OSHA inspectors trained as part of the Justice Department's worker endangerment initiative describe many companies that are indifferent or hostile to OSHA compliance officers. That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

Finally, companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Stronger criminal provisions would not be used to criminalize accidents, which sometimes happen despite the best efforts of employers and employees. Criminal enforcement only would occur in situations where there was a knowing violation of a worker safety requirement. Only companies that routinely violate our worker safety laws would be at risk. Those companies should not have a competitive advantage over companies that devote the necessary resources to worker safety, and we want companies that are chronic violators to be worried about criminal prosecution, so that they will comply with the law.

The Protecting America's Workers Act

The criminal provisions of the Protecting America's Workers Act would be a substantial improvement over existing law. First, the Protecting America's Workers Act makes most criminal violations of the OSH Act felonies, which is consistent both with the Act's emphasis on public health and safety as well as the approach taken in most other federal regulatory programs. Second, the Protecting America's Workers Act expands the criminal provisions to reach violations that cause serious bodily injury but not death. In this regard, the Protecting America's Workers Act acknowledges the devastation and suffering that can result from serious injuries.

There is no question that criminal violations of the OSH Act should be felonies. It is a felony to commit criminal violations of the environmental laws; it is a felony to commit criminal violations of our hazardous transportation laws and many wildlife laws. Insider trading, customs violations, tax crimes, antitrust violations, food and drug violations, and transportation of stolen vehicles are felonies. False statements, mail and wire fraud, obstruction of justice, perjury, false declarations, and conspiracy in violation of Title 18 all are felonies. The list goes on and on, but the point is simple: when criminal worker safety violations occur, they should be a felonies too. Otherwise, the message that is sent is that the United States does not care about worker safety.

Upgrading OSH Act violations to felony status also is essential if Congress wants to see meaningful criminal enforcement of our worker safety laws. From 2003 to 2007, only eight criminal cases were brought for violations of the OSH Act. Absent action by Congress, criminal cases will remain infrequent because federal prosecutors will not devote significant resources to cases that Congress relegates to misdemeanor status. Prosecutors occasionally will accept plea agreements to lesser included misdemeanor charges, but they rarely will initiate complex investigations and prosecutions if the most serious, readily provable offense is a misdemeanor.

There also is no question that criminal prosecution under the OSH Act should be possible even in cases where death does not occur. The Elias case is a classic example of a situation where death did not occur but a criminal prosecution under the OSH Act should have been possible. The fact that the emergency room doctors were able to save Scott Dominguez's life had no bearing on the extent to which Elias violated the worker safety laws or his mental state when he committed those violations. While the fact that a worker dies may be relevant to the sentence that is imposed, it should have no effect on whether a criminal violation has occurred.

The Protecting America's Workers Act could be improved, however, by criminalizing endangerment and knowing violations of the worker safety laws, and by addressing the role of individual liability. The Act also should address resources for criminal investigations.

Worker Endangerment: The Protecting America's Workers Act would promote worker safety more effectively, if it were expanded to cover violations that endanger workers. As noted above, there is no difference in the nature of the violation committed by a defendant or the defendant's mental state if a particular outcome occurs, whether that outcome is death, serious bodily injury, or the intervention of some good fortune that prevents any harm. Criminal culpability should be determined based on the risk associated with a defendant's misconduct and the degree to which the defendant is aware of that risk, not whether the risk becomes a reality.

The environmental laws again are instructive, since they make knowing endangerment a crime whenever a defendant commits a Clean Water Act, RCRA, or Clean Air Act violation and "knows at the time that he [or she] thereby places another person in imminent danger of death or serious bodily injury."[16] If a similar provision were added to the Protecting America's Workers Act, the new law would do more to prevent violations that put American workers at risk.

Knowing Violations: The Protecting America's Workers Act also would provide greater protection for workers if "knowing" violations of the worker safety laws that endangered workers (or caused serious bodily injury or death) were covered. Most federal environmental crimes and most federal regulatory crime address knowing violations of the law, which require that the defendants knowingly engage in the conduct that is prescribed.[17] In other words, knowledge of the facts is required (e.g., that a confined space entry is occurring without a confined space entry permit, appropriate testing, and/or safety equipment), but knowledge of the law is not (e.g., that OSHA rules require a confined space entry permit, appropriate testing, and safety equipment).

The problem with the current version of the OSH Act and the Protecting America's Workers Act is that both are limited to "willful" violations. The use of willfulness places the

[16] 33 U.S.C. § 1319(c)(3)(A) (the Clean Water Act); 42 U.S.C. § 6928(e) (RCRA); and 42 U.S.C. § 7413(c)(5)(A) (the Clean Air Act). The Clean Air Act also contains a negligent endangerment provision. 42 U.S.C. § 7413(c)(4).

[17] *Bryan v. United States*, 524 U.S. 184, 191-199 (1998).

worker safety laws outside the mainstream of federal criminal law. More importantly, by requiring willfulness, the OSH Act and the Protecting America's Workers Act make ignorance of the law a defense. It is a long-standing principle of American jurisprudence that ignorance of the law is not a defense, and ignorance of the law should not be a defense where the health and safety of America's workers are involved. Employers who are covered by the OSH Act have a duty to know the law. They should not be able to escape criminal liability for knowing violations that place workers at risk by claiming that they did not know that safety measures were required.

Individual Liability: The Protecting America's Workers Act also should address the scope of individual liability for criminal violations of our worker safety laws. As noted above, individual liability plays a central role in any criminal enforcement scheme, since the threat of jail time is arguably the single greatest deterrent provided by the criminal law. Unfortunately, the current version of the OSH Act applies only to "employers," which are defined under the Act as "a person engaged in a business affecting commerce who has employees. . . ."[18] The limited definition of employers absolves most, if not all, mid-level managers of criminal responsibility, even though they are likely to be the individuals with knowledge of worker safety violations.

A better approach to individual liability would be to impose criminal responsibility on all supervisory personnel who are responsible for the violations, which can occur in two ways. First, supervisors who are directly involved or order that the misconduct occur should be criminally liable, which is standard in federal criminal cases. Second, supervisors who (1) know that the conduct is occurring; (2) have the authority to prevent the conduct from occurring; and (3) fail to prevent the conduct should be held responsible under the "responsible corporate officer" doctrine (although its scope extends beyond individuals with corporate titles to include all persons who meet the three elements of the doctrine). The responsible corporate officer doctrine also is used in criminal prosecutions under the environmental laws.[19]

Investigative Resources: A final issue for the Protecting America's Workers Act is the need for law enforcement resources to investigate worker safety crimes. OSHA compliance officers do an outstanding job investigating worker safety violations. They are not criminal investigators, however, and Fourth Amendment concerns would be raised if they obtained evidence for purposes of a criminal investigation. Moreover, once a criminal investigation begins, witnesses must be interviewed, evidence reviewed, subpoenas issued, and, in some cases, search warrants executed, all of which must be done by law enforcement officials.

---

[18] 29 U.S.C. § 652(5).

[19] The "responsible corporate office" doctrine originated in a Supreme Court case interpreting the Federal Food, Drug, and Cosmetic Act. *United States v. Dotterweich*, 320 U.S. 277 (1943). Its use in the environmental crimes context has been considered by a number of courts, most notably in *United States v. Iverson*, 162 F.3d 1015, 1022-25 (9th Cir. 1998).

During the Justice Department's worker endangerment initiative, we relied upon EPA's criminal investigators to provide law enforcement support. In cases that are not environmental crimes, however, federal prosecutors would require another source of investigative support. There are two alternatives: first, the Federal Bureau of Investigation ("FBI") could provide agent support; and, second, a criminal investigation division could be established within OSHA. Unfortunately, the FBI has few resources today for crimes other than counterterrorism, and hiring criminal investigators at OSHA would take time and political will that may be lacking. At some point, however, the need for investigative resources for OSH Act violations must be addressed.

Conclusion

The criminal provisions of the environmental laws and the OSH Act were enacted during the 1970's when much of the modern regulatory state was created. Within a decade, Congress had changed the environmental laws – which also began as misdemeanor violations – because federal prosecution resources are generally reserved for felony cases, and Congress recognized that the benefits of a strong environmental crimes program would be lost without felonies.

It has been 20 years since Congress amended the environmental laws, and it is long past the time for Congress to take the same approach to our worker safety laws. Some workers do not have a choice about where they work, either because jobs are scarce in their communities or they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But all of us deserve a safe place to work and the ability to come home to our families in good health each night. We can do more to protect our workers and ensure that all companies in the United States honor our best traditions of caring for our workers, neighbors, and friends.

By passing the Protecting America's Workers Act, with the improvements suggested during my testimony today, we can make good on the promise of a safe workplace made 30 years ago when Congress first enacted the Occupational Safety and Health Act.

Thank you again for the opportunity to testify before you today.