TESTIMONY OF

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BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR

"KEEPING AMERICA'S PROMISE OF A SAFE WORK PLACE:
THE NEED FOR STRONGER CRIMINAL PENALTIES TO DETER
VIOLATIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT"

Thank you Chairman Miller, Congressman McKeon, 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 at the United States Department of Justice, the last seven as Chief of the Environmental Crimes Section.

One year ago, I testified before the United States Senate Committee on Health, Education, Labor and Pensions about the need for stronger criminal penalties for violations of the Occupational Safety and Health Act (the "OSH Act"). If history is a guide, nearly 6000 workers died on the job in the United States since that time.[1] Another 6000 workers will die in the year ahead, and 6000 more workers will perish every future year if we keep the status quo.

On average, every day in our country, more than 16 people go to work in the morning and never come home again. Hundreds more go to work healthy and come home injured.

We can do better in the United States of America. Nearly 40 years after Congress enacted the OSH Act to provide "every working man and woman in the Nation safe and healthful working conditions,"[2] it is time that we delivered on our promise to America's workers.

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[1] From 1992 to 2007, approximately 6000 workers were killed on the job each year in the United States. Workplace deaths ranged from a high of 6,632 in 1994 to a low of 5,534 in 2002. During 2007, the last year for which data currently is available, 5,657 work-related fatalities were reported to the U.S. Department of Labor. U.S. Department of Labor, Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Charts, 1992-2006*, (revised 2009).

[2] 29 U.S.C § 651(b).

The United States has comprehensive worker safety regulations. We impose more rigorous requirements on American businesses than many (if not most) other countries. As a result, while our worker safety regulations could be stronger, the primary flaw in our worker safety laws is not the rules we impose but the lack of consequences for breaking those rules.

In recent years, most of the criminal prosecutions for worker safety violations have been brought by the Justice Department's Environmental Crimes Section, which began a worker endangerment initiative in 2005 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 the worker safety laws.[3]

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. Just last week, in one of the most significant cases brought under the initiative, four managers from Atlantic States Cast Iron Pipe Company, a division of McWane, were sentenced to jail terms for their part in a conspiracy to violate environmental and worker safety laws, and the company was sentenced to a $8 million fine.

The success of the Justice Department's worker endangerment initiative, however, has highlighted the inadequacy of the criminal provisions of our worker safety laws. Most of the cases brought by the Environmental Crimes Section charged violations of the endangerment provisions of the environmental protection statutes[4] and the general criminal provisions of Title 18 of the United States Code, which makes it a crime to make false statements, obstruct justice, and commit conspiracy to defraud the United States by impeding the effective implementation of government regulatory programs.[5] Typically, the crimes charged were felonies, punishable by up to 15 years in jail for knowing endangerment and 20 years in jail for obstruction of justice.

Only two cases brought under the worker endangerment initiative, the prosecution of McWane for a worker death at its Union Foundry plant in Alabama and the prosecution of Tyson Foods for a worker death at its River Valley Animal Foods plant in Arkansas, have charged

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[3] David Barstow and Lowell Bergman, *With Little Fanfare, a New Effort to Prosecute Employers That Flout Safety Laws*, N.Y. TIMES, May 2, 2005.

[4] *See, e.g.,* 33 U.S.C. § 1319(c)(3) (knowing endangerment under the Clean Water Act); 42 U.S.C. § 6928(e) (knowing endangerment under the Resource Conservation and Recovery Act); 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).

[5] 18 U.S.C. § 1001 (false statements); 18 U.S.C. §§ 1503, 1505, 1512, and 1519 (obstruction of justice); and 18 U.S.C. § 371 (conspiracy to defraud the United States).

violations of the OSH Act.[6] Prosecution under the OSH Act is rare, because the only substantive criminal provision of the OSH Act covers (1) willful violations of worker safety regulations that (2) result in worker death. Even if a willful violation causes death, the crime is only a Class B misdemeanor, with a maximum sentence of six months in jail.[7]

The criminal provisions of the OSH Act are so weak that they do little to protect America's workers. 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. Focusing exclusively on violations involving worker deaths ignores the pain and anguish that results from serious injuries, which also warrant criminal remedies if they occur because of egregious violations.

In addition, limiting prosecution to willful violations may make ignorance of the law a defense, contrary to the time-honored maximum of American jurisprudence that ignorance of the law is not a defense. 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 Act.

In each of the last three Congresses, the Protecting America's Workers Act has been introduced, which would expand the coverage of the OSH Act and strengthen the penalties for violators. The legislation has never made it out of committee. Last week, the legislation was introduced in the House for a fourth time; this year the Protecting America's Worker Act should be enacted by Congress.

In my testimony today, I will focus on the need for stronger criminal penalties for violations of the OSH Act and how more vigorous enforcement will protect America's workers.

First, I will describe one of the cases that I prosecuted at the Justice Department that exposed the inadequacy of the criminal provisions of the OSH Act and helped lead to our worker endangerment initiative. Second, I will explain why a stronger criminal program under the OSH Act would deter violations of the Act and promote greater compliance with our worker safety laws. Third, I will identify the shortcomings of the OSH Act and the ways that Congress can address those problems when it considers enactment of the Protecting America's Workers Act.

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[6] 29 U.S.C. § 666(e). McWane pleaded guilty in September 2005 and agreed to pay a $4.25 million fine; Tyson pleaded guilty in January 2009 and agreed to pay a $500,000 fine.

[7] The OSH Act also makes it a crime to give advanced notice of an inspection and to make false statement in records or documents required under the Act. *See* 29 U.S.C. § 666(f) (advanced notice of inspections); 29 U.S.C. § 666(g) (false statements). Both are Class B misdemeanors.

The Cyanide Canary[8]

In August 1996, Scott Dominguez collapsed and nearly died inside a 25,000 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, who was a Wharton graduate, a lawyer, and one of most notorious violators of environmental and worker safety laws in the state. Elias had used the 25,000 gallon tank for a cyanide leaching operation and to store phosphoric acid. Cyanide and phosphoric acid react to form hydrogen cyanide gas; expert trial testimony established that there was enough cyanide in the tank to kill thousands of people.[9]

Elias nonetheless ordered Dominguez and his co-workers to clean out the cyanide-laced sludge from the bottom of the tank. Elias ignored the pleas of his workers to test the waste. Elias refused to prepare a "confined space entry permit" that was required under OSH Act regulations,[10] even though he had been warned for years by the Occupational Safety and Health Administration ("OSHA") about the dangers of confined space entries. When the workers said that they had sore throats and difficulty breathing, Elias told them they needed to finish the job.

Dominguez, a recent high school graduate without significant work experience, feared that he would lose his job if he did not clean out the tank. Wearing just jeans and a t-shirt, he descended into the tank on a ladder, a 20-year-old with his whole life ahead of him. Less than two hours later, covered in sludge and barely breathing, Dominguez was removed from the tank on a stretcher, his life destroyed by a ruthless employer who later would blame his "stupid and lazy" employees for the tragedy. Today, Dominguez has severe and permanent brain damage.

In the frantic minutes before Dominguez was rescued, firefighters repeatedly asked Elias what was in the tank. 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 again and said no.

The next day OSHA inspectors interviewed Elias, who falsely claimed that he had prepared a confined space entry permit prior to the tank cleaning operation. Later that morning, Elias went to a neighboring facility operated by Kerr McGee Chemical Corporation and

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[8] 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.

[9] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 3320 (Testimony of Dr. Joe Lowry, May 3, 1999).

[10] 29 C.F.R. § 1910.146. A confined space entry permit would have detailed the steps that were being taken to protect the workers and enable them to be rescued if someone were injured.

borrowed a safety manual, which included a sample confined space entry permit. He then prepared and backdated a confined space entry permit and submitted the false permit to OSHA.

The Justice Department began a criminal investigation soon after Dominguez was injured. I was one of the lead prosecutors. We quickly discovered that Elias did not commit a violation of the OSH Act when he sent Dominguez into the tank, even though OSHA eventually cited Elias for willful violations, and Dominguez suffered severe and permanent brain damage.

Elias did not commit a violation of the OSH Act, because Dominguez did not die.

We were shocked to learn that an employer who willfully violates the OSH Act commits a crime only if a worker dies (and even then only a six-month misdemeanor). We ended up prosecuting Elias for environmental crimes, including knowing endangerment under the Resource Conservation and Recovery Act ("RCRA"), which carries a maximum penalty of 15 years in prison. In addition, we charged Elias with one felony count under Title 18 of the United States Code for submitting the fabricated confined space entry permit to OSHA.[11]

During the 3½-week trial, expert witnesses testified that Elias committed egregious violations of the OSH Act and that his actions placed Dominguez and others in imminent danger of death or serious bodily injury.[12] OSHA inspectors testified about earlier inspections and how they had warned Elias about the dangers associated with confined space entries.[13]

On May 7, 1999, after less than six hours of deliberations, the jury convicted Elias on all counts. 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."[14] The proof of knowing endangerment in the Elias case,

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[11] 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. Elias was convicted and sentenced to the statutory maximum penalty of five years in jail on the Title 18 false statement charge.

[12] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 2353-2354, 2360 (Testimony of Gregory Boothe, April 27, 1999) and 3522-3523 (Testimony of Dr. Daniel Teitelbaum, May 4, 1999).

[13] *United States v. Allan Elias* (D. Idaho, CR No. 98-00070-E-BLW), Trial Transcript at 2012-2034 (Testimony of David Mahlum, April. 26, 1999).

[14] United States Department of Justice, Office of Pubic Affairs, *Idaho Man Given Longest-Ever Sentence for Environmental Crime*, PRESS RELEASE, Apr. 29, 2000 (Statement of Assistant Attorney General for the Environment and Natural Resources Division Lois J. Schiffer).

however, was based as much upon evidence that Elias violated OSHA regulations governing confined space entries as it was on the unpermitted disposal of hazardous waste in violation of RCRA. Indeed, the case was a worker safety case as much as it was an environmental case.

The Elias prosecution provides a stark contrast between the strength of the criminal provisions of the environmental laws and the weakness 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 makes no sense that the same conduct during a worker safety violation is not a crime unless a worker dies – with a maximum penalty of six months in prison.

Nor are the criminal provisions of the environmental laws an antidote for the weakness of the worker safety laws. Only nine percent of workplace fatalities during 2007 involved exposure to harmful substances or environments.[15] As a result, most worker safety cases cannot be prosecuted criminally 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 most cases, America's workers will be 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. He also raised jurisdictional issues post-trial that nearly resulted in the dismissal of several of the charges. While the Ninth Circuit did not agree with Elias, his ability to make such arguments shows the limits of environmental criminal enforcement as the primary method of addressing worker endangerment cases, and why meaningful criminal enforcement of worker safety violations requires changes to the OSH Act.

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 obligation. Law-abiding companies also devote significant resources to their compliance programs. They should not be at a competitive disadvantage against companies who flout the rules and have lower costs because they do not make any financial commitment to compliance.

But experience teaches us that there always will be companies that do not care about their workers, 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

[15] U.S. Department of Labor, Bureau of Labor Statistics (2009).

carry a statutory maximum of $70,000 per violation, a number which has not been increased in nearly two decades[16] and pales in comparison to the cost of an effective 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 or twice the gain or loss associated with the offense[17] (whichever is greater). As discussed above, however, the substantive criminal provisions of the OSH Act only apply when a willful violation results in a worker death.

Moreover, 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 do not devote limited prosecutorial resources to misdemeanor cases involving regulatory crime. In the 39 years since Congress enacted the Occupational Safety and Health Act, only 71 criminal cases have been prosecuted, or less than two per year, with defendants serving a total of just 42 months in jail. During that same time period, approximately 350,000 people died at work.[18]

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. While OSHA has sought large penalties in high-profile cases like BP Texas City and Imperial Sugar, a Senate report last year found that the median penalty imposed by OSHA for fatality cases was $3,675 during fiscal year 2007.[19] Such small penalties makes it easy for companies to put profits before compliance and to view any penalties that may result as a "cost of doing business."

One of the best examples of how strong criminal penalties are an essential component of an effective enforcement scheme is the prosecution of McWane, a privately-owned corporation that is one of the largest pipe manufacturing companies in the world. Although pipe manufacturing is inherently dangerous, McWane facilities were particularly hazardous places to

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[16] 29 U.S.C. § 666(a). The penalty for willful violations was increased from $10,000 to $70,000 in 1990. Pub. L. 101-508, 104 Stat.1388.

[17] 18 U.S.C. § 3571(c)(4), 18 U.S.C. § 3571(d).

[18] *See* David M. Uhlmann, *The Working Wounded*, N.Y. TIMES, May 27, 2008; *see also* Testimony of Peg Seminario, Director of Safety and Health, AFL-CIO, before the Senate Committee on Health, Education, Labor and Pensions, Apr. 29, 2008 at 8 (reporting 68 cases and 341,000 deaths; numbers cited above are revised to reflect data from calendar year 2008).

[19] Majority Staff of the United States Senate Committee on Health, Education, Labor and Pensions, *Discounting Death: OSHA's Failure to Punish Safety Violations That Kill Workers* at 5, Apr. 29, 2008.

work. From 1995 to 2003, at least 4,600 workers were injured at McWane plants across the United States, giving McWane one of the worst safety records in the country.[20]

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 the United States Environmental Protection Agency ("EPA") began a criminal investigation of environmental and worker safety violations at five McWane plants: 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 that McWane and its senior managers were persistent violators of worker safety and environmental laws and made it a practice to lie to OSHA inspectors and federal and state environmental officials to conceal their illegal activity.

From a worker safety perspective, the worst of the McWane facilities may have been Atlantic States. The United States charged the company and top management at Atlantic States in a 35-count indictment that alleged a wide-ranging conspiracy within the company to violate worker safety and environmental laws. One worker death and multiple worker injuries were concealed as part of the conspiracy. After a seven month trial – the longest trial ever for environmental crime in the United States – McWane and four individual defendants were convicted of felony charges under Title 18 of the United States Code and the environmental laws. But there were no criminal charges brought under the OSH Act, because there were no felony charges available, and the one possible misdemeanor count (for the worker death) would have lengthened the trial and distracted from the more serious felony charges.

As noted above, McWane was sentenced to a fine of $8 million for its crimes at the Atlantic States facility, and all four individual defendants received jail sentences ranging from more than 5 years to six months. Previously, McWane pleaded guilty to criminal charges under the OSH Act at its Union Foundry facility, and received a criminal sentence of $4.25 million.[21] McWane also pleaded guilty to Clean Air Act crimes at Pacific States in Utah, with a criminal sentence of $3 million, and at Tyler Pipe in Texas, with a criminal sentence of $4.5 million. McWane challenged the charges for violations committed at its flagship McWane Cast Iron Pipe

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[20] David Barstow and Lowell Bergman, *A Dangerous Business: At a Texas Foundry, an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003.

[21] The federal district court imposed a substantial fine in the Union Foundry case, because McWane agreed to be sentenced under the loss-doubling provisions of the Alternative Fines Act, 18 U.S.C. § 3571(d), with the fine calculated based on what a wrongful death award might have been in a civil case. In a contested sentencing proceeding, however, that approach might not be successful, which underscores the need for the OSH Act to provide larger criminal penalties.

facility in Alabama, and again the company and its senior management were found guilty, although that case will be retried later this year because of jurisdictional issues.[22]

Only time will tell whether there is a new corporate attitude at McWane, but it appears that years of adverse publicity resulting from the criminal prosecutions and multi-million fines have changed McWane's approach to worker safety. In a follow-up piece to the exposé that launched the McWane investigations,[23] *Frontline* interviewed dozens of McWane employees who described a "new McWane" where worker safety and environmental compliance are now a priority. The company has made a significant financial commitment to regulatory compliance, and former OSHA Administrators and senior Justice Department officials now advise McWane.

It is revealing, however, that McWane ignored worker safety in the face of years of worker injuries and deaths, and accompanying administrative penalty actions (and a single criminal conviction with a modest fine). 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 speak volumes about the role of a strong criminal program in promoting worker safety. A strong criminal program, particularly one where corporate officials may go to jail 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.

Criminal enforcement also provides benefits beyond deterrence and punishment. 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.[24] That would not be the case if the OSHA enforcement scheme included a more significant criminal enforcement threat than the current OSH Act provides.

At a time when our economy is in turmoil, and many businesses are under siege, there may be opponents of enhanced penalties for OSH Act violations. However, companies that make worker safety a priority should not feel threatened by a stronger criminal enforcement program. Criminal enforcement only would occur in situations where there was a knowing

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[22] 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).

[23] *A Dangerous Business Revisited,* FRONTLINE, Feb. 5, 2008.

[24] *See generally* Barstow and Bergman, *supra* note 3 (describing OSHA training sessions and "enthusiasm . . . in the trenches of OSHA . . . [as] agency compliance officers grasp the chance at last to seek significant criminal penalties against defiant employers").

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 comply with the law.

Strengthening the Criminal Provisions of the OSH Act

The criminal provisions of the OSH Act should be strengthened to reflect the Act's emphasis on public health and safety, to provide the credible criminal deterrent that is needed to ensure greater compliance with worker safety laws, and to provide consistency with other federal regulatory crimes. New legislation should (1) make criminal violations of the Act felonies and provide enhanced penalties for violators; (2) expand the criminal provisions to include cases involving serious bodily injury and knowing endangerment; (3) modify the mental state requirements so that ignorance of the law is not a defense; (4) expand the scope of individual liability to include supervisors who knowingly expose their workers to unsafe conditions; and (5) provide resources to investigate and prosecute criminal violations of the OSH Act effectively.

The Protecting America's Workers Act would address many of the shortcomings of the OSH Act. Under the bill introduced last week by Congresswoman Woolsey, criminal violations of the OSH Act would become felonies, and the maximum penalty for a willful violation that results in a worker death would increase from six months to 10 years (and would increase from one year to 20 years in the event of a second conviction for the same offense). The criminal provisions would reach violations that cause serious bodily injury but not death. Responsible corporate officers would be included in the definition of "employer" covered by the Act.

The Protecting America's Workers Act would be a substantial improvement over existing law, and I fully support its enactment. In some respects, however, the legislation does not go far enough. The Protecting America's Workers Act would be even stronger if it addressed knowing endangerment, mental state, supervisor liability, and law enforcement resources. Those issues are discussed below (along with the other shortcomings of the current OSH Act).

Felonies and Enhanced Penalties: Criminal violations of the OSH Act should be felonies. It is a felony to commit most criminal violations of the environmental laws, hazardous materials transportation laws, and many wildlife protection 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, which may cause even greater harm to crime victims, they too should be eligible for felony prosecution.

Upgrading OSH Act violations to felony status also is essential for meaningful criminal enforcement to occur. From 2003 to 2008, only ten criminal cases were brought for violations of the OSH Act, despite the fact that OSHA conducted 9,838 fatality investigations during that time

period,[25] and thousands of workers died on the job each year. 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 prosecutions if the most serious, readily provable offense is a misdemeanor.

Enhanced penalties also are necessary to ensure adequate punishment for criminal violations of the OSH Act and to provide meaningful deterrence against future violations. When a worker dies because of a knowing violation of the worker safety laws, the maximum sentence should be measured in years, not months. Anything less sends the wrong message about the value of a worker's life. The environmental laws carry maximum penalties of three to five years per substantive count – and 15 years for crimes involving knowing endangerment (regardless of whether any injury occurs). The OSH Act should be amended to provide similar penalties.

Serious Bodily Injury and Knowing Endangerment: The criminal provisions of the OSH Act should be expanded to reach violations that cause serious bodily injury but not death. Serious bodily injury includes injuries that involve "a substantial risk of death, or protracted unconsciousness, protracted and obvious physical disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."[26] Given the devastation and suffering that can result from serious injuries, criminal prosecution under the OSH Act should be possible even in cases where death does not occur.

The Elias case is an 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 saved 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 a worker dying may be relevant to the maximum sentence, it should not determine whether the violation is criminal.

The OSH Act also 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 his or her 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.

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

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[25] Majority Staff Report of the United States Senate Committee on Health, Education, Labor and Pensions, *supra* note 19 at 10.

[26] *See, e.g.,* 33 U.S.C. § (c)(3)(B)(iv) (Clean Water Act definition of "serious bodily injury"); 42 U.S.C. § 6928(f)(6) (RCRA definition); 42 U.S.C. § 7413(c)(5(F) (Clean Air Act definition).

serious bodily injury."[27] If a similar provision were added to the OSH Act, the law would do more to prevent violations that put American workers at risk of death or serious bodily injury.

Mental State Requirements: The OSH Act also would provide greater protection for workers if the Act criminalized "knowing" violations of the worker safety laws that caused death or serious bodily injury or endangered workers. Most federal environmental crimes and other regulatory crimes address knowing violations of the law, which require that the defendants knowingly engage in the conduct that is proscribed. 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 current version of the OSH Act is limited to "willful" violations. In criminal cases, willfulness requires proof "that the defendant acted with knowledge that his conduct was unlawful."[28] Because the government must show that the defendant knew his or her conduct was unlawful, ignorance of the law could be a defense to a willful violation charge. Yet, it is a long-standing principle of American jurisprudence that ignorance of the law is not a defense,[29] 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. Employers should not be able to escape criminal liability for knowing violations that harm workers or place workers at risk by claiming that they did not know what the law required.

There may be concern about changing the mental state requirements for criminal cases to "knowing" violations, because the OSH Act reserves its most severe administrative sanctions for "willful" violations. Arguably, the use of a "knowing" standard for criminal cases would impose a less stringent mental state requirement in criminal cases. It merits emphasis, however, that guilt in a criminal case must be proven beyond a reasonable doubt, not simply by the preponderance of the evidence standard required in administrative cases, so it would be wrong to say that it would be easier to prove a knowing criminal violation than a willful civil violation.

Moreover, a willful violation under the OSH Act is committed if the evidence shows either an intentional violation of the Act or plain indifference to its requirements.[30] Plain indifference includes situations where "[a]n employer representative was not aware of any legal

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[27] 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).

[28] *Bryan v. United States*, 524 U.S. 184, 192 (1998) (quotation omitted).

[29] *United States v. International Minerals and Chem. Corp.*, 402 U.S. 558, 563 (1971).

[30] *United States v. Dye Construction,* 510 F.2d 78 (10th Cir. 1975) (criminal violation); *see also Valdak Corp. v. OSHRC,* 73 F.3d 1466 (8th Cir. 1996); *Ensign Beckford Co., v. OSHRC,* 717 F.2d 1419, 1422 (D.C Cir. 1983), *cert. denied*, 104 S. Ct 1909 (1984) (administrative violations).

requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or take corrective action."[31] In other words, the administrative definition of willfulness is more like the criminal law's definition of "knowing" (knowledge of the facts) than the criminal law's definition of "willful" (knowledge that the conduct was unlawful). At a minimum, therefore, Congress should define willful for OSH Act prosecutions to make clear that the OSHA administrative definition of willful applies in criminal cases and ignorance of the law is not a defense.

Individual Liability: The scope of individual liability for criminal violations of the OSH Act should be clarified to promote greater compliance and provide better deterrence. 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. . . ."[32] The OSH Act's definition of employers may absolve most mid-level managers of criminal responsibility, even though they have the greatest knowledge of worker safety violations.[33]

A better approach to individual liability would be to impose criminal responsibility on all supervisors who are responsible for the violations, which can occur in two ways. First, supervisors who are directly involved or order that 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 widely used in federal criminal prosecutions, including cases under the environmental laws.[34]

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[31] OSHA Field Inspection Reference Manual, Chapter III, Section C.2.d.(1)(b)3, available on-line at http://www.osha.gov/Firm_osha_data/100007.html. (last visited April 24, 2009). The OSHA website indicates that the field inspection manual is an archived document and no longer represents OSHA policy, but the definition of willfulness in the manual is consistent with the few judicial interpretations in OSHA administrative actions. *See, e.g., Georgia Electric Co. v. Marshall*, 595 F.2d 309, 319-320 (5th Cir. 1979) (indifference to employee safety generally); *United States v. Dye Construction Co.,* 510 F.2d at 82 (gross indifference to safety hazard).

[32] 29 U.S.C. § 652(5).

[33] *See* Lynn K. Rhinehart, *Would Workers Be Better Protected If They Were Declared An Endangered Species? A Comparison of Criminal Enforcement Under the Federal Workplace Safety and Environmental Protection Laws*, 31 AMER. CRIM. L. REV. 351, 358 n.38 (citing cases) (1994); *see also* Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide,* 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 781-82 (1987).

[34] 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.

Individual liability can be extended to responsible supervisory personnel by changing the scope of the OSH Act's criminal provision to reach "any person" rather than limiting its scope to employers and by including "responsible corporate officers" in the definition of persons. While there may be concern about the possibility that low-level supervisory personnel could be charged under an "any person" approach, we should rely on prosecutors, judges, and juries to make appropriate distinctions about which individuals are most culpable, as they do in criminal cases under the environmental laws and other federal regulatory programs.

Law Enforcement Resources: A final issue with the criminal provisions of the OSH Act is the need for law enforcement resources to investigate and prosecute worker safety crimes. Most OSHA compliance officers do an excellent 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.

During the Justice Department's worker endangerment initiative, criminal investigators from the EPA and prosecutors from the Department's Environmental Crimes Section handled the cases. As noted above, however, only nine percent of worker deaths in 2007 resulted from exposure to environmental hazards. Therefore, in the majority of worker safety cases, other investigators and prosecutors would be necessary. Prosecutorial resources could be provided by United States Attorney's Offices, although they have significant demands on their budgets and may not have the expertise to handle worker safety prosecutions. Investigative resources could be provided by the Federal Bureau of Investigation ("FBI") or a criminal investigation division could be established within OSHA. While the FBI has few resources for crimes other than counter terrorism – and hiring criminal investigators at OSHA would take time and political will that may be lacking – law enforcement resources for OSH Act prosecutions must be provided for meaningful criminal enforcement under the OSH Act to occur.

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 or they have not had the educational opportunities that would enable them to seek higher-paying and safer jobs. But everyone deserves a safe place to work and the ability to come home in good health each night.

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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).

We can do more to protect our workers and ensure that all companies in the United States honor our best traditions of caring for America's workers. By strengthening the criminal provisions of the worker safety laws, we can make good on the promise of a safe workplace made nearly 40 years ago when Congress enacted the Occupational Safety and Health Act.