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A Wrong Turn on the Road to Effecctive Enforcement: A Critical Analysis of the Environmental Crimes Act of 1990

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"How did it come to be that placing topsoil and sand on your property without a permit is punished more harshly than arson, defrauding the public of $2 million, or running a crack house?"[1]

INTRODUCTION

There can be little doubt that the environment is currently enjoying an unprecedented position of prominence on the nation's agenda. From the White House in Washington to Governors' mansions across the country environmental protection has become a point of central importance. Federal and State agencies have promulgated a multitude of complex and interdependent regulations designed to protect our nation's environment. Courts on the federal level as well as their counterparts in the states have been called upon to interpret a variety of laws and regulations all aimed at environmental protection. Congress and the state legislatures alike have crafted new laws and amended and reauthorized old ones with that same goal.

Whether this movement is a political "bandwagon" or an authentic and sincere effort to deal with a problem of immensely burdensome proportions only time will tell. But for the moment at least one thing is immediately apparent; enforcement is getting better and the risks are getting higher! The last few years have ushered in a host of legislation increasing the "costs" of dealing with hazardous waste.

This article will address one such piece of legislation, H.R. 3641; The Environmental Crimes Act of 1990. It will begin by giving some brief statistics by which the reader can gauge the effectiveness of the federal government's recent and present enforcement efforts. The article will then offer three recent decisions which provide insight into some of the key issues which arise in the prosecution of federal environmental laws. It will then explain the bill and demonstrate the mechanics of its application. It will identify particular areas of concern in the bill and in so doing discuss reactions to the bill in both the enforcement and compliance community. Finally, it will conclude by briefly suggesting why the bill is an inappropriate measure and should not be enacted into law.

PRESENT ATMOSPHERE

As one commentator noted in 1972, "[t]en years ago, when the dire implications of pollution were not as apparent, environmental offenses could be accurately placed in the same *malum prohibitum* category as antitrust and housing code violations...".[2] But the times have changed greatly and so have our society's perceptions about the wisdom of polluting the environment in which we must live. In fact, even as long ago as 1972 attitudes had begun to change so much in just ten years that the same commentator continued, "[t]oday pollution can almost be classified as *malum in se,* something wrong in and of itself like robbery, assault or murder."[3]

In the decade that followed those words environmental protection became an even more significant pursuit of the federal government. So significant that in 1982 a special Environmental Crimes Unit was established within the Department of Justice.[4] Some brief statistics may help to show just how effective the Environmental Crimes Unit has become. Since it's creation in 1982 the unit has tallied 447 convictions and guilty pleas from 569 indictments of both individuals and organizations.[5] It has collected over $26 million in fines and obtained 271 years in prison sentences.[6] In 1983 fines for environmental offenses totaled $341,100 but by 1989 that figure had risen to $12,750,330.[7] During that same time period jail terms increased from 11 years to more than 50.[8] Tough federal enforcement has shown no signs of abating as of late. In fact, in fiscal year 1989 alone the Environmental Crimes Unit netted $13 million in fines and obtained 107 convictions and guilty pleas.[9] These figures are even more impressive when one considers

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that they represent an increase over 1988 figures by 70% and 80% respectively.[10] As of December, 1989 the unit had achieved an astonishing 91% conviction rate.[11]

As these statistics demonstrate, the federal government is quite serious about protecting our nation's environment. It is hoped that heightened criminal enforcement will deter future violations. This is an admirable goal but one largely unachievable without the assistance of the courts. Vigilant enforcement practices would prove largely ineffective if those charged and convicted are dealt with lightly by the judiciary. It does not appear, however, that this will present a problem. An examination of several recent decisions reveals that courts are quite willing to do their part to make the government's vigorous efforts effective.

RECENT DECISIONS

In *United States v. Protex Industries, Inc.*, the Court of Appeals for the Tenth Circuit affirmed the defendant corporation's conviction arising out of activity at its drum-recycling facility in Colorado.[12] In that case the defendant operated a facility where it cleaned and repainted fifty-five gallon drums, many of which had at one time contained toxic chemicals.[13] After reconditioning, the drums were used to ship and store other products manufactured by the defendant.[14] The Colorado Department of Health, acting on behalf of the Environmental Protection Agency [hereinafter E.P.A.], conducted its annual inspection of Protex's facility.[15] Following a second inspection, E.P.A. investigators, together with agents of the Federal Bureau of Investigation, executed a search warrant at the defendant's Colorado site.[16] A nineteen count indictment was later returned by a federal grand jury and Protex was convicted in district court on sixteen of them.[17]

The Protex decision marked the first criminal conviction obtained under the recently enacted "knowing endangerment" provision of the Resource Conservation and Recovery Act. [hereinafter RCRA].[18] That provision states in pertinent part "[a]ny person who *knowingly* transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under [R.C.R.A.], who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, [shall be guilty of an offense against the United States]." (emphasis added).[19] The term "serious bodily injury" is defined by the Act as: "(a) bodily injury which involves a substantial risk of death; (b) unconsciousness; (c) extreme physical pain; (d) protracted and obvious disfigurement; (e) protracted loss or impairment of the function of a bodily member, organ or mental faculty."[20] Protex challenged its conviction on grounds that the term "serious bodily injury" was expanded by the trial court to the point of being unconstitutionally vague.[21] Protex argued that the increased risk of contracting "some indeterminate type of cancer at some unspecified time in the future" was insufficient to constitute a "serious bodily injury ".[22] The court rejected this argument by carefully pointing out that the defendant's employees were not only subjected to a risk of "serious bodily injury" but did, in fact, actually suffer such an injury.[23]

In *United States v. Ashland Oil*[24], the district court fined defendant Ashland $2,250,000 for environmental infractions stemming from the collapse of a storage tank in Pittsburgh and the resulting spill of diesel oil.[25] Ashland was convicted for violations of both the Clean Water Act[26] and the Refuse Act of 1899[27].[28] The court ruled that Ashland's possession of a permit for construction of the tank did not negate criminal responsibility for its negligence in the construction, inspection and testing of the tank.[29]

Finally, in September of 1990 the Court of Appeals for the Fourth Circuit, in *United States v. William Dee,* et al.,[30] removed whatever doubt remained as to the sincerity of the government's commitment to enforcing federal environmental laws and the federal judiciary's commitment to punishing violations of the same.[29] For those dealing with hazardous waste, the *Dee* decision is perhaps one of the most alarming rulings to be handed down in recent memory and has signaled a call-to-arms for many organizations. The defendants in this case were three high level civilian engineers/managers of an Army research center at Aberdeen Proving Ground in Maryland.[31] All three were likewise involved in the development of chemical warfare systems.[32]

There were many important rulings to come out of this decision including a finding that individual government employees are not protected by sovereign immunity and hence, are not immune from prosecution for criminal violations of environmental laws.[33] The defendants argued that as federal employees working at a federal facility they were immune from the criminal provisions of RCRA.[34] Defendants

relied upon the language of a particular provision which defined those liable as "any *person* who knowingly [violates the provisions of RCRA]." (emphasis added)[35] Dee and his co-defendants asserted that because neither the United States nor any agency thereof is defined as a "person", they themselves cannot be "person[s]" as contemplated by this particular provision and are therefore protected by the doctrine of sovereign immunity.[36] The court rejected this argument by pointing out that the defendants "were indicted, tried and convicted as individuals not as agents of the government."[37]

The *Dee* defendants second line of defense and the court's rejection thereof are equally important for present considerations. The defendants challenged their convictions on grounds that they did not "knowingly" commit the crimes of which they were convicted.[38] As referred to earlier, RCRA provides criminal penalties for one who "knowingly" commits any violations of that Act.[39] It was defendants' contention that; (1) the evidence was insufficient to demonstrate that they knew violating the provisions of R.C.R.A. was a crime; and (2) that they were not aware of the fact that the chemicals they were dealing with were hazardous wastes.[40] The court began its rejection of these arguments by reciting the oft repeated principle that "ignorance of the law is no excuse" and stating that this "time-honored" principle does indeed apply to criminal prosecutions under RCRA.[41] The opinion went on citing *United States v. International Minerals* where the Supreme Court stated "where as here...dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulations."[42] Therefore, the *Dee* court reasoned, it was not necessary that the government prove that the defendants knew violation of RCRA was a crime.[43] Nor was it necessary that the government establish the existence of regulations listing and identifying the chemicals in question as hazardous wastes under RCRA.[44] The Court of Appeals affirmed the convictions and the defendants were subsequently sentenced to three years probation and 1000 hours of community service.[45]

The three cases just mentioned are of course just several of many which are germane to a discussion of the federal government's environmental enforcement efforts. Nevertheless, the aforementioned cases make it abundantly clear that federal courts are inclined to construe the often ambiguous provisions of environmental statutes in a light most favorable to the government. Moreover, these cases clearly signal that the judiciary will not hesitate to impose substantial penalties upon both organizations and individuals often leaving the latter with permanent and stigmatizing criminal records.

In short, it would seem that enforcement of environmental laws at the federal level is proceeding quite well. In fact, as the statistics presented earlier herein indicate, the federal government has actually been increasing its criminal enforcement efforts in recent years and has met with tremendous success. In recent testimony before Congress, the Department of Justice (hereinafter DOJ), in referring to those statistics, stated that "these overall figures include a steep escalation in recent years."[46] The DOJ witness went on to say, "we have made criminal prosecution a potent weapon in our environmental enforcement arsenal..."[47]

Not everyone, however, is so pleased with the government's newfound zeal in attacking those who deal with hazardous waste. Individual property owners, as well as world-wide organizations operating in the hazardous waste industry, are unlikely to feel welcome in this new high-risk terrain. In fact, most never even suspect that they have entered such terrain. "The potential defendant frequently has no criminal record and believes that he or she is an upstanding citizen. The concept of being a criminal is extremely difficult to accept, particularly since the conduct at issue usually involves an act or omission that was part of a job-related decision."[48] Yet another commentator has cautioned that, "[g]overnment prosecutors working in the environmental area have little conception or appreciation of the difficulties of running a business."[49] The winds of conflict have begun to blow and the Environmental Crimes Act of 1990[50] is not going to calm the storm.

THE ENVIRONMENTAL CRIMES ACT OF 1990

H.R. 3641; The Environmental Crimes Act of 1990 is a bill to amend Title 18 of the United States Code by inserting: "Chapter 34 Environmental Crimes".[51] The bill was introduced by Representative Charles Schumer (D-N.Y.), Chairman of the Subcommittee on Criminal

Justice of the House Judiciary Committee and co-sponsored by Representative George W. Gekas (R-Pa).[52]

The legislation proposes a comprehensive, across the board approach to enhancing the penalties currently imposed under some twenty-four existing environmental offenses, without respect to the level of penalty currently provided (if Congress has provided a penalty at all) under each offense.[53] H.R. 3641 does not provide criminal liability in and of itself. Rather, it serves to enhance the possible penalties to which a convicted individual or corporation may be subject.[54] The government must first prove the necessary elements of the predicate "environmental offense" and only then does the defendant become subject to the enhanced penalties proposed by this bill.[55] For example, an individual defendant convicted of violating 16 U.S.C. § 707(a) of the Migratory Bird Treaty Act would ordinarily be guilty of a misdemeanor and sentenced to a possible six months and/or $500 fine.[56] But, under H.R. 3641, if, as a result of that violation, the defendant creates a "substantial risk of (1) death of a human being; (2) serious bodily injury to a human being; or (3) environmental catastrophe" then he could face fifteen years imprisonment and/or a $25,000 fine.[57]

For all its good intentions, the Environmental Crimes Act of 1990 suffers from many problems. A close analysis of the bill reveals troubling questions as to both practicability of enforcement and constitutionality of design.

To begin with, serious questions have been raised as to the wisdom of the bill's comprehensive nature. This across the board approach to penalty enhancement is in direct contrast to the statute-by-statute approach traditionally employed by Congress. Essentially, the problem with the suggested approach is one of proportionality. Comprehensively enhancing the penalties under all twenty-four predicate offenses is certain to result in many "petty offenses" being raised to the level of felonies carrying a lengthy prison sentence. This problem was recognized by DOJ when it noted that "[t]o engage in wholesale, across-the-board upgrading of what are often minor misdemeanor offenses to enhanced felonies would likely have precisely the opposite of the desired effect and make convictions more difficult."[58] Citing the Endangered Species Act[59] as an example, DOJ continued, "We have considerable doubt as to the prosecutive merits of charging the 'taking' of a threatened species of fish, currently a petty offense, as an enhanced felony subject to a ten year jail term and a $25,000 fine, as H.R. 3641 would provide."[60] The American Civil Liberties Union (hereinafter A.C.L.U.) also recognized the potential proportionality problem stating that "under this amendment [to title 18], an additional across-the-board penalty could be applied for acts as disparate as kicking a burro, and polluting the drinking water of New York City."[61]

Another facet of this legislation which has generated great concern is the bill's ability to impose severe liability upon a defendant who has done nothing more than create a risk.[62] The bill provides, in pertinent part, that "one who commits an environmental offense[63], and thereby knowingly or recklessly[64] [or negligently[65]] causes a substantial risk of (1) death of a human being; (2) serious bodily injury to a human being; or (3) environmental catastrophe; shall be punished as set forth [in this Act]."[66]

"Serious bodily injury"[67] is defined to include the "substantially increased *risk* of cancer or other chronic ailment."[68] (emphasis added) Thus, under this Act a defendant can be guilty of an enhanced felony even absent a showing of any actual injury. Culpability, rather, would be based on the tenuous notion that the defendant created the *risk* of a *risk!* So, while the convicted defendant will be subjected to an unprecedented degree of punishment, the government will not be required to demonstrate actual injury.

> Not a single bird or fish was harmed. No loss of wildlife habitat was claimed. No degradation of water quality was determined, the stream adjacent to the property runs clearer after [the defendant] removed the junk from it. Yet the prosecutor... urged the court to impose the maximum sentence to 'send a message' to 'all land owners, the corporations, the developers of this country' that probation and fines are a thing of the past and jail terms will be the norm.[69]

A practice of imposing liability in the absence of actual injury walks a fine line and raises serious questions of fundamental fairness. Indeed, "[t]he threat of severe criminal sanctions in circumstances where there is so much uncertainty in the minds of experts, raises serious constitutional and due process concerns

and is bound to result in lengthy court challenges to the proposed statute."[70] The A.C.L.U. echoed this warning when it stated, "even where the risk of harm is great, there is a serious proportionality concern with sending someone to jail for only creating a risk."[71]

"Environmental catastrophe" is an equally vague and ambiguous term which also has given rise to concerns with this bill.[72] The drafters attempted to alleviate that problem by offering phrases such as, "serious disruption of an ecosystem or food chain"[73], "environmental contamination..."[74], "serious genetic or toxicological effects"[75], and "serious disruption or alteration of local, regional or global climate".[76] These phrases are simply too unclear themselves to establish a workable and enforceable definition of a term as open ended as "environmental catastrophe".[77]

The Assistant Administrator of the E.P.A., James Strock, recognized these problems when he noted that "[e]stablishing at trial that there has been a serious 'alteration of local, regional, or global climate' and that such an alteration is attributable to a defendant's environmental misconduct would likely become an inconclusive battle of experts."[78] Strock went on to conclude that such problems "appear to make the [environmental catastrophe] provision... criminally unenforceable."[79] The Department of Justice found these problems of proportionality and vagueness so burdensome that it was forced to "question the propriety of providing felony liability on such a broad and ill-defined scale."[80]

The business and industry community has also recognized the problems which are created by this bill's reliance upon risk based felony liability and ambiguous statutory language. One prominent member of the Pennsylvania industrial sector concluded that the proposed statute is one that "can be misused as a basis for bringing what many would consider frivolous lawsuits and judicial grandstanding at the expense of sound environmental policy."[81]

While the aforementioned concerns all represent viable reasons to seriously reconsider this proposed legislation, it is the "environmental audit" provision[82] which raises the most legitimate constitutional concerns. That section provides for the court to appoint an independent expert to conduct an "environmental audit" as part of the defendant's sentence and for the court to order the implementation of the auditors recommendation.[83]

These audit provisions are aimed at tailoring the defendant's sentence so as to guarantee future compliance and to ensure that the factors which formed the basis of the present conviction have been eliminated or corrected.[84] This innovative aspect of the sentence, with all of its good intentions, may very well violate the Constitution of the United States by conferring extensive sentencing powers on an auditor whose decisions are not subject to full review by an Art. III[85] court. In *Ex Parte United States,* the Supreme Court addressed just such a problem and in so doing stated, "[i]ndisputably under our constitutional system, the right to try offenses against the criminal laws and upon conviction impose the punishment provided by law is judicial..."[86] Thus, it can no longer be questioned that the imposition of punishment is a duty belonging to the Art. III judiciary and as such, one which should not be vested in some quasi-judicial body as the Environmental Crimes Act proposes.[87]

Under this legislation, the auditor's functions are quite similar to those of a United States Magistrate in so much as the latter also makes findings of fact and recommendations in the context of a criminal trial.[88] The use of magistrates to perform such functions has been approved by the U.S. Supreme Court but only where "the authority and the responsibility to make an informed, final determination... remains with the judge."[89] In *U.S. v. Raddatz,* the Supreme Court again recognized that a statute which permits the district court to give the magistrate's proposed findings of fact and recommendations such weight as the court deems appropriate, "does not violate Art.III so long as the ultimate decision is made by the district court" upon a de novo review.[90] In short, the magistrate's determinations and recommendations are subject to a complete de novo review by the Art. III district court which retains total supervisory control.

This bill, on the other hand, attributes nearly conclusive weight to the sentencing recommendations of the auditor, and in so doing, insulates them from review by the Art. III judiciary. As DOJ has recognized, such a scheme suggests that Art. III of the Constitution is violated.[91]

Finally, H.R. 3641 is, to a large extent, an unnecessary piece of legislation. Where enhanced penalties for environmental crimes have been required to make enforcement effective, Congress has responded via its statute-by-statute approach. The Clean Water Act[92] provides

a good example of this Congressional response. When that Act was first passed into law, it provided only misdemeanor penalties for violations of its provisions.[93] However, when it was reauthorized in 1987, it raised penalties for knowing violations to basic felonies and also added a felony provision for "knowing endangerment".[94]

RCRA also provides felony sanctions for knowing endangerment violations.[95] The Administration supports this same approach for violations of the Federal Insecticide Fungicide and Rodenticide Act[96] and the Clean Air Act[97] (for certain "Air-toxic" violations) both of which are listed as predicate offenses under The Environmental Crimes Act. Through this statute-by-statute approach Congress is better able to determine "the proper degrees of criminality to attach to environmentally damaging conduct..."[98]

CONCLUSION

That effective enforcement of federal environmental laws requires the deterrent effect provided by certain and severe punishment is too sound a proposition to be questioned. The government, the judiciary, and agencies of the United States have signalled to the community their solid commitment to tackling the environmental concerns which threaten the quality of life, if not life itself, in this nation. Those bodies have made great progress on the road to effective enforcement of our environmental laws.

To enact the Environmental Crimes Act, however, would be to take a wrong turn on that road. For if punishment is to yield deterrence, prohibitions must be clearly, and unambiguously defined and must not transgress the boundaries established by the charter of this nation's existence. If the citizens are to comply with the laws, they must believe them to be legitimate and the penalties provided for violations just and proportional to the crime.

The Environmental Crimes Act of 1990 is a reactionary measure produced by political pressure without respect for specific needs. The environmental problems we face require better. They require an approach deliberately designed to fill voids when and where they are found, rather than one that merely blankets the field generically. Our many environmental problems are complex and unique and they can be alleviated only by adopting measures which acknowledge such characteristics.

Author's Note

Just prior to sending this article to press in August of 1991, I spoke with several people on Capitol Hill regarding the current status of the Environmental Crimes Act. It would appear that Representative Gekas, a graduate of the Dickinson School of Law, now finds the bill quite troublesome. The Congressman's office has indicated that it does not intend to continue its support of this legislation. While acknowledging the bill's good intentions, Representative Gekas has come to believe that the Environmental Crimes Act is simply unworkable in its present form.

Representative Schumer, on the other hand, has not abandoned the legislation. Schumer, who now chairs the consolidated Crime and Criminal Justice Subcommittee, has indicated that he intends to continue working with the bill in an effort to create a law acceptable to both proponents and critics of the former H.R. 3641.

It should also be noted that a similar piece of legislation was recently introduced in the Senate. S. 1605 "The Environmental Crimes Act" was introduced by Senator Wofford (D-PA). The drafters of this bill seem to have taken into account some of the criticisms aimed at H.R. 3641. Nevertheless, both S. 1605 and any offspring of H.R. 3641 which might be introduced in the House, must be carefully evaluated in light of the numerous shortcomings of the original bill.

EWB

1. Kamenar, *Environmental Protection or Enforcement Overkill?*
The Environmental Forum, Vol. 7, May 1990. This article was one of four contained in the May issue entitled, Doing Time For Environmental Crime. [hereinafter *Forum*]

2. The Environmental Crimes Act of 1990 : Hearings on H.R. 3641 Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 101st Cong., 1st Sess. 3 (1989) [hereinafter *Hearings*] (testimony of George W. Van Cleve, Deputy Assistant Attorney General).
Mala Prohibita is defined as " prohibited wrongs or offenses..."
BLACK'S LAW DICTIONARY 492 (Abridged 5th Edition).

3. *Id.* at 3.
Mala in se acts are defined as "wrongs in themselves ..."
BLACK'S LAW DICTIONARY 492 (Abridged 5th Edition).

4. *Id.* at 4.
The Environmental Crimes Unit has since been elevated to "Section Status" *see Forum, Supra* note 1, at 26.

5. *Id.*

6. *Id.*

7. *Forum, Supra* note 1, at 26.

8. *Id.*

9. *Hearings, Supra* note 2, at 4.

10. Remarks at " A Day With Justice " briefing, June 6, 1990. *

11. *Hearings, Supra* note 2, at 4.

12. United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989).

13. *Id.* at 741.

14. *Id.*

15. *Id.* Annual inspections are conducted in accordance with the provisions of the RCRA which mandate that each state " compile, publish and submit to the Administrator [of the E.P.A.] an inventory describing the location of each site within such state at which hazardous waste has at any time been stored or disposed of." *see* 42 U.S.C § 6933.

16. *Id.* at 742.

17. *Id.* Protex was found guilty of one count of conspiring to violate the RCRA and the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and conspiring to make false statements, in violation of 18 U.S.C., to federal and state environmental and health agencies; five counts of illegal transportation and disposal of hazardous wastes in violation of the RCRA; one count of illegal storage of hazardous wastes; one count of illegal treatment and storage of hazardous wastes; and one count of violating the Clean Water Act. *see* Protex, 874 F.2d at 741 note 1.

18. The Resource Conservation and Recovery Act, 42 U.S.C § 6928(e) (1988) (hereinafter RCRA).

19. *Id.*

20. 42 U.S.C. § 6928(f)(6) (1988)

21. Protex, 874 F.2d at 743.

22. *Id.*

23. *Id.*

24. United States v. Ashland Oil Inc., 705 F. Supp. 270 (W.D. Pa. 1989).

25. *Hearings, Supra* note 2, at 5.

26. 33 U.S.C. § 1319(c)(1) (1988)
This section provides:

> Any person who-
>
> (A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title, or any permit condition or limitation implementing any such sections in a permit issued under section 1342 of this title by the Administrator or by a state or any requirement imposed in a pretreatment program approved under section 1344 of this title by the Secretary of the Army or by a state; or
>
> (B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable federal, state or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a state ;
>
> Shall be punished by a fine of not less than $2,500 nor more than $ 25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

27. 33 U.S.C. § 411 (1988).
This section provides:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction therefore shall be punished by a fine not exceeding $ 2,500 nor less than $ 500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

28. Ashland, 705 F.Supp. at 276.

29. *Id.* at 276.

30. United States v. William Dee, et al, 912 F.2d 741 (4th Cir. 1990).
Two other civilian engineers were also charged, tried and convicted. They were Robert Lentz and Carl Gepp.

31. *Hearings, Supra* note 2, at 5.

32. Dee, et al, 912 F.2d at 743.

33. *Id.* at 744.

34. *Id.*

35. *RCRA, Supra* note 18, § 6928(d).
This section of the Act provides for the penalties which are to be imposed for violations of the Act.

36. Dee, et al, 912 F.2d at 744.

37. *Id.*

38. *Id.* at 745.

39. *RCRA, Supra* note 35, § 6928(d).

40. Dee, et al, 912 F.2d at 745.

41. *Id.* [quoting United States v. International Minerals and Chemicals Corp. 402 U.S. 558 (1971)].

42. United States v. International Minerals and Chemicals Corp., 402 U.S. 558, 565 (1971).

43. Dee, et al, 912 F.2d at 745.

44. *Id.*

45. *Hearings, Supra* note 2, at 5.

46. *Id.* at 4.

47. *Id.*

48. Gaynor, *A system spinning out of Control Forum, supra* note 1, at 29.

49. *Id.*

50. H.R. 3641, 101st Cong., 2nd Sess. (1990) (hereinafter *H.R. 3641).*

51. *Id.*

52. *Id.*
See also Congressional Index, Vol.1, (1989-1990).

53. H.R. 3641, Supra note 50, § 734(1).
This section provides:

> [T]he term 'environmental offense' means a criminal violation of –
> (A) the federal Water Pollution Control Act;
> (B) the Clean Air Act;
> (C) the Emergency Planning and Community Right to know Act of 1986;
> (D) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980;
> (E) the Deepwater Port Act of 1974;
> (F) the Endangered Species Act of 1973;
> (G) the federal Insecticide, Fungicide, and Rodenticide Act;
> (H) Migratory Bird Treaty Act;
> (J) the Marine Mammal Protection Act of 1972;
> (K) the Marine Protection, Research, and Sanctuaries Act of 1972;
> (L) the Noise Control Act of 1972;
> (M) the Outer Continental Shelf Lands Act;
> (N) the Ports and Waterways Safety Act of 1972;
> (O) the Solid Waste Disposal Act [this Act is construed to include RCRA in so much as it is simply an amendment to it.];
> (P) the Act of March 3, 1899, commonly known as the Rivers and Harbors Appropriation Act of 1899;
> (Q) title xiv of the Public Health Service Act (commonly known as the Safe Drinking Water Act);
> (R) the Surface Mining Control and Reclamation Act of 1977;
> (S) the Toxic Substances Control Act;
> (T) the Wild Free-Roaming Horses and Burros Act;
> (U) the Bald and Golden Eagle Act;
> (V) the Hazardous Materials Transportation Act;
> (W) the Lacey Act Amendments of 1981; or
> (X) the Magnuson Fishery Conservation and Management Act;

54. *H.R. 3641, Supra* note 50, § 731(a).

55. *Id.*

56. 16 U.S.C. § 707(a) (1988).
This section provides:

"except as otherwise provided in this section, any person, association, partnership, or corporation who shall any provisions of said conventions [§ 703] or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both."

57. *H.R. 3641, Supra* note 50, § 731(a) and (b).

58. *Hearings, Supra* note 2, at 8.

59. 16 U.S.C. § 1540 (1988).

60. *Hearings, Supra* note 2, at 8.

61. Memorandum From The American Civil Liberties Union to Interested Persons (July 16, 1990) (Re: Judiciary Committee Consideration of the Environmental Crimes Act of 1990) (hereinafter *A.C.L.U.)* "kicking a burro" refers to the Wild Free Roaming Horses and Burros Act, § 1338(a)(3), 16 U.S.C. § 1331 (1988) which, in making such conduct illegal provides:

"Any person who–
(1)–
(2)–
(3) maliciously causes the death or harassment of any wild free-roaming horse or burro; shall be subject to a fine of not more than $2,000 or imprisonment for not more than one year, or both..." "polluting the drinking water of New York City" refers the prohibition against such an action contained in the Clean Water Act, 33 U.S.C.§ 1311 (1988). That Act provides in pertinent part:

"(a) illegality of pollutant discharges except in compliance with the law. Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

62. *H.R. 3641, Supra* note 50,§ 731 and § 732.

63. *Id.* at § 734(1).

64. *Id.* at § 731(a).

65. *Id.* at § 732.

66. H.R. 3641, supra note 50, § 731(a), § 732.

67. *Id.* at § 734(4).
This section of the bill provides;

" the term 'serious bodily injury' means bodily injury that involves–
(A) unconsciousness;
(B) extreme physical pain;
(C) protracted and obvious disfigurement;
(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;
(E) reproductive or genetic damage;
(F) substantially increased risk of cancer or other chronic ailment."

68. *Id.* at § 734(4)(f).

69. *Forum, Supra* note 1, at 30.

70. Letter From Caren A. Wilcox, Director, Government Relations, Hershey Foods to The Honorable George W. Gekas, United States House of Representatives (July 9,1990) (hereinafter *Hershey).*

71. *A.C.L.U., Supra* note 61, at 2.

72. *H.R. 3641, Supra* note 50, § 734(5).

73. *Id.* at § 734(5)(c)(i).

74. *Id.* at § 734(5)(c)(ii).

75. *Id.* at § 734(5)(c)(iii).

76. *Id.* at § 734(5)(c)(iv).

77. *Id.* at § 731, § 732.

78. Letter From James M. Strock, Assistant Administrator, Environmental Protection Agency to The Honorable George W. Gekas, United States House of Representatives (May 23, 1990).

79. *Id.*

80. *Hearings, Supra* note 2, at 17.

81. *Hershey, Supra* note 70, at 2.

82. *H.R. 3641, Supra* note 50, § 733.

83. *Id.* at § 733(b), (d).

84. *Id.* at § 733(c).

85. U.S. Const. art. III, § 2.

86. Ex Parte United States 242 U.S. 27, 41-42 (1916).

87. It should be noted that the Supreme Court in Mistretta v. U.S, __US.__, 109 S.Ct. 647 (1989) indicated that sentencing a criminal defendant is a power not necessarily confined to the judiciary. In that case, the Court upheld the validity of Sentencing Guidelines. It recognized that Congress may enact legislation establishing maximum, minimum or mandatory sentences for various crimes. Nevertheless, this shared-sentencing authority must be seen as consistent with the rule of Ex Parte U.S., which the Court in *Mistretta* cited with approval.

88. *Hearings, Supra* note 2, at 13.

89. Matthews v. Weber, 423 U.S. 261, 268, 271 (1976).

90. United States v. Raddatz 447 U.S. 667, 683 (1980).

91. *Hearings, Supra* note 2.

92. 33 U.S.C. § 1331 (1988).

93. *Id.*

94. *Id.*

95. *RCRA, Supra* note 18, § 6928(e).

96. 7 U.S.C. § 136 (1988).

97. 42 U.S.C. § 7401 (1988).

98. *Hearings, Supra* note 2, at 7.