

D I A L O G U E

Sustainability in the Trump Era: Corporate, Global, and Enforcement Perspectives

Summary

To commemorate Earth Day, Paul Hastings LLP hosted a panel discussion on April 18, 2017, featuring three prominent attorneys with extensive and diverse experience in environmental counseling and litigation. The panelists reflected on the transition to the Trump Administration, and what it might mean for long-standing issues of federalism, globalization, private environmental governance, and enforcement and compliance. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Tom Munteer (moderator) is a Partner in the Environmental and Energy Practice at Paul Hastings LLP.

John Cruden was the Assistant Attorney General for the Environment and Natural Resources Division at the U.S. Department of Justice.

Charles Di Leva was Chief Counsel of the Environmental and International Law Unit at the World Bank.

Martha Rees was Vice President and Assistant General Counsel and Chief Environment Counsel at the DuPont Company.

Tom Munteer: I want to start by saying there's a new sheriff in town. Over the past few months, we've seen a new administration start to implement its vision of what environmental protection should look like. For my 30 years in environmental law, it's probably the most abrupt transition, policy-wise, I have ever witnessed. We make incremental changes, but this seems like a wholesale repudiation of what went before.

Today, our focus is on the global, corporate, and enforcement perspectives on what we might expect under this new administration. Maybe we will unveil a deep-seated environmentalism that might persist, that might mean that all of these regulatory changes don't disrupt things as much as we might otherwise think.

Let me start with introductions. Representing the corporate perspective is Martha Rees. Martha had a 42-year career at DuPont. She started as a research engineer and

moved into the legal department, where she had a variety of assignments including as a commercial attorney representing the pharmaceutical and agricultural products business, as a corporate and securities lawyer, and as a federal lobbyist. For the last nine years of her DuPont career, she served as Vice President and Assistant General Counsel.

Unlike that steady career path, Charles Di Leva has had quite a different career trajectory. In December, Chuck ended a 25-year career at the World Bank. His last position was as chief counsel for the Environmental and International Law Unit. Before that, Chuck spent three years in private practice in Washington, D.C.; a year with the United Nations Environment Programme in Nairobi; five years with the Department of Environmental Management in Rhode Island; and four years as a trial attorney with the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ).

John Cruden was, until the transition, the nation's leading environmental enforcement official, serving as the assistant attorney general for the Environment and Natural Resources Division. John has had a long and distinguished career in public service with the federal government. Prior to serving as the assistant attorney general, he served for 20 years in the Division, first as chief of the Environmental Enforcement Section, then as a career deputy assistant attorney general. John was the first government lawyer to serve as president of the D.C. Bar, as well as the first government attorney to be elected chairman of the American Bar Association Section of Environment, Energy, and Resources. And I'd be remiss not to mention John's presidency at the Environmental Law Institute for a spell.

Federalism and Regulatory Burden

Tom Munteer: I thought from the corporate perspective, we might start talking about two dominant themes that seem to be emerging. One being the philosophical disposition that environmental regulation should be done at the state level rather than federal level. And the second theme, that environmental regulations are unduly burdensome and don't bring about the benefits that we intend them to bring about.

So oddly enough, John, I'd like to start with you and talk about this whole notion of cooperative federalism,

which is something we've subscribed to environmentally for a generation. Then, lead into a discussion of how U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt might see cooperative federalism differently from what we're accustomed to.

John Cruden: It's interesting to talk about the meaning of cooperative federalism. First of all, the joining of the two words. We all know "federalism," but this is not just federalism—it is theoretically more, it is "cooperative." Since I was on the receiving end of many state lawsuits, I sometimes wondered whether or not it was really cooperative. Although it's not limited to environmental issues, let's discuss cooperative federalism in the environmental area.

The concept is quite straightforward: the federal government sets uniform standards that apply to all states. The states get some freedom in that regard to do more, but they will need to implement the program. So there is, in virtually all environmental law, a place for both the federal government and the states in the creation and implementation of the governing standards.

Most federal environmental law is actually administered by states, not by the federal government. The Clean Water Act (CWA)¹ permits and Clean Air Act (CAA)² permits are predominantly accomplished by states, as it should be. The state with the polluting source has the people who care the most; therefore, this should be a state issue.

What you hear in the hue and cry about state-federal disagreement is often the federal regulations. Those disputes are not limited to the administration that I served in, but all others. Complaints about regulations are common, often leading to litigation.

What's frequently missing from the debate is that those regulations are not just made up. Virtually every regulation that I've seen is required or established by law somewhere. A statutory requirement to create the regulation doesn't tell you necessarily what's going to be in that regulation, but it often sets forth binding deadlines. And so a lot of times where you hear politicians say, "We're going to get rid of this regulation"—their only timely alternative is a legislative repeal or veto.³ They might be able to get rid of the terms of that particular regulation, but then they'll be sued again.

Most of the environmental regulations that were promulgated when I was assistant attorney general were issued because we had a consent decree with a group of petitioners—sometimes an environmental group, sometimes industry—that set forth a time line to prepare a regulation mandated by a statute. My point is that most regulations have a clear and defined statutory basis.

However, a new administration has other options. They can issue their own policies and regulations. They can have new actions, but they still have to deal with the previous administration. Their final regulations are law. You can't

just snap your fingers and undo prior regulations. More specifically, you can't just have an executive order that rescinds a regulation. There is clear law on this: the only way you get rid of a regulation is the same way it was promulgated. The administration must follow the Administrative Procedure Act,⁴ which includes notice and comment. A final decision eliminating or changing a regulation can be litigated as well. Some of that you've already seen during this administration, because of the immigration executive orders, but the same is true with other regulations.

So right now, we are at the opening moments of the Donald Trump Administration. And if you consider what has happened, no regulation yet has been overturned, other than by the U.S. Congress. But there's an executive order that requires the examination of past environmental regulations. And DOJ has asked some courts to "hold in abeyance" litigation concerning particular regulations. By the way, they did that at the U.S. Supreme Court for the Clean Water Rule and the Supreme Court decided to hear the case anyway. So, just asking a court to delay doesn't mean it will happen.

Tom Munteer: We're going to come back around for the notice-and-comment rulemaking and judicial review under an "arbitrary and capricious" standard, because I think that's a very good point.

Martha, back when I was a young environmental lawyer doing trade association work, the big corporations who did work globally, like DuPont, were very concerned about varying interpretations of the same standard. They wanted federal uniformity. Does the notion of devolving authority down to the states give you any pause from a company that might have facilities in 30 different states?

Martha Rees: Yes and no, and it depends. As I think about cooperative federalism, a key question is what might be opportunities or key drivers from a business perspective. At the top of the list is efficiency. To the extent that we continue to drive toward the same environmental goals, which have been set by Congress and addressed by federal regulations, are there some opportunities to achieve those goals more efficiently through cooperative federalism? This is one facet of John's point about the states being closer to where the action is.

That said, there is an issue and challenge for corporations that operate in several states—and a whole other level of challenge operating internationally—in developing compliance programs that address differing regulations or differing interpretations around enforcement that we might see from state to state or country to country. And there is another issue that's very important to business—a level playing field. This is where the rule of law is critical. I know we've heard EPA Administrator Pruitt talk a lot about the rule of law. What does he mean? It depends on the context.

1. 33 U.S.C. §§1251-1387; ELR STAT. FWPCA §§101-607.

2. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.

3. 5 U.S.C. §§801-808.

4. 5 U.S.C. §§500-559.

Being subject to requirements that vary by jurisdiction makes it more difficult for a corporation to comply, and also raises some competitive issues that may fuel a “race to the bottom.” Additionally, there is the conventional wisdom that business doesn’t like uncertainty. So, we put all that together and it becomes a really interesting time for businesses to try to figure out where this is going to end up.

Tom Munteer: As I say, it’s a pretty abrupt break with the last administration. And probably nowhere more abrupt than in the climate change area, where the March 28 Executive Order⁵ seemed like a blanket repudiation of the work that John was supporting as an assistant attorney general. There’ve been some other headline-grabbing reversals, like the Stream Protection Rule. I was surprised that Administrator Pruitt told oil and gas producers they didn’t need to respond to the information collection request on methane, because I believe that to make good policy, you need sound data. But that’s what he did.

Let me throw out a couple ideas and get your reactions. One, does American industry feel so overburdened by environmental regulations? Does DuPont feel overburdened? Did it perhaps give them a competitive advantage because they have the wherewithal to comply with them? Does industry feel that the environmental benefits don’t match up with the burden? And then I want to go back to the notice-and-comment rulemaking; if we’re unhappy with the output of the notice-and-comment rulemaking subject to judicial review as being arbitrary and capricious, how would we get to a different compromise when we issue these regulations in the first place?

Martha Rees: I think, broadly speaking, that industry supports the high-level goals that Congress has set. The arguments tend to be, in large part, about how we get there. And so in terms of being overburdened, I think many of the arguments have been and will continue to be more about how prescriptive the regulations should be on how we get to the environmental goals.

So, if there are any opportunities for more efficient implementation with the new administration, either at the federal level or whatever this rebalance is going to be in the relationship with the states, that might be a good thing. But you also made a point about there being some competitive advantage in terms of regulation. Where I think about pesticide regulations, for example, it’s surely an excellent thing that we have a federal system. I can’t imagine having to deal with pesticide regulation primarily at the state level.

But to your point, there can also be a competitive advantage to operating in a regulated industry because a company needs to have a fairly sophisticated team of experts, not just on the legal side, but certainly on the science side, to pull together the data packages that the government demands in order to approve the new products the company wants

to bring to market. There is a competitive advantage for companies with world-class organizations that focus on product registration.

John Cruden: Tom, two of the most well-known accomplishments that came out of the Obama Administration were, first, the new Corporate Average Fuel Economy (CAFE) standards.⁶ These are miles-per-gallon standards that reduce carbon and other emissions for cars now on the road and provide future requirements. And second was the Clean Power Plan,⁷ which requires new and existing power plants to reduce carbon emissions. Those are two signature events, and both were litigated.

In the first one, the auto industry testified and, in fact, litigated with the government supporting the standards. On the second one, the Clean Power Plan, there were states suing, but there were also states defending. There was industry challenging, but there was also industry defending the Clean Power Plan. And so, industry was not all in one place. In a lot of these signature events, including those that are the most controversial right now, there were then and there are now substantial parts of industry in favor because they see many benefits to them. But I don’t think it’s one-size-fits-all.

Globalization and Private Governance

Tom Munteer: Let’s try to get the global perspective, Chuck. I’d like to start again on the philosophical level. You have a unique perspective from all those years in a multinational lending organization. Talk a little bit about American leadership and how important that is. Will these trends, will environmentalism, persist despite our retreating? And feel free to address the Paris Agreement.

Charles Di Leva: One of the interesting things sometimes overlooked about multilateral institutions is that they work to address some of the same interests Martha and John have mentioned about stability, rule of law, and upward harmonization that can give responsible industry some confidence in investing in developing countries. When I transitioned from DOJ to the World Bank, one of our colleagues from a major multinational corporation told me the following: one of the main challenges for the World Bank is to help develop a consistent rule of law for multinationals that are operating at high standards around the world. They want a level playing field. And that’s something that a global institution like the World Bank or other United Nations agencies can help contribute.

In addition, especially as issues of international crime became more evident—in my area of addressing wildlife crime, but also drug crime and other kinds of crime in illegal trade—we started to see an interest from the U.S.

6. National Highway Traffic Safety Administration, *Corporate Average Fuel Economy*, <https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy>.

7. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

Department of Defense in what the World Bank was doing. And when I think of a General H.R. McMaster or General James Mattis, I'm sure that they would recognize that organizations like the World Bank help provide stability in some of the most difficult conflict zones in the world, whether it's Afghanistan or Somalia or other parts of Central Africa, where you want development institutions providing some stability and capital to go along with a more stable world.

That links also to the Paris Agreement, which I think at its adoption in December 2015 was recognized as creating a global cooperative approach. We have been talking about a federal cooperative approach here today. A global cooperative approach on climate has been part of the U.S. demands, going back to the Byrd-Hagel Resolution⁸ many years ago, that developing countries join with the developed world to approach this issue. At Paris, this demand was finally recognized. It's got tremendous momentum. I think it was very interesting to see that Exxon wrote a letter indicating that the company thought the United States should stay in the Paris Agreement.

So, U.S. leadership remains critical. And once you start thinking through the interests for the United States, be it supporting the rule of law, combatting wildlife crime, protecting the environment, or stabilizing fragile and conflict zones, I think you see that there's actually much more of a growing need for a shared partnership.

Tom Munteer: I want to pick up on one of the major developments during your tenure at the World Bank, and that was your environmental social framework. One of our partners in our New York office tied the markets in our Latin American practice groups, and she has a question for you.

Audience Member: In our group, we do a lot of lending work both representing financial institutions and borrowers. And there's a lot of talk about the Equator Principles.⁹ Most major financial institutions are signatories. I must say that, in practice, this isn't really what we see very much in terms of companies saying, "oh, we better clean this up. We better do a better job with that." And part of the issue, I think, is certainly in Latin America, where there is some political will or at least political talk about adhering to these principles. But then there is the reality on the ground, which is problems with judiciaries in many countries, and no private right-of-action. Can you comment on that?

Charles Di Leva: I think there's a progressive approach to enhancing the judicial system in many of the developing countries in which we're working. When I started, India did not have a Green Tribunal. You're starting to see these environmental tribunals develop in many places around the world. I also think that civil society has done

a great job of shining a light on projects where accountability is missing.

So today, for example, China's Asian Infrastructure Investment Bank is putting in place an accountability mechanism. Their membership is growing. It will be probably 70 countries soon. There's also the New Development Bank of the so-called BRICS [Brazil, Russia, India, China, and South Africa], major middle-income countries, and it is also setting up an accountability mechanism.

Thus, the financial institutions are harmonizing their approach to accountability and compliance. On the commercial private-sector side, there are the private banks that have signed on to the Equator Principles; I'm sure a number of your clients are involved with some of the banks that use the Equator Principles. These private banks represent almost 90 institutions around the world that provide approximately 70% of overseas development project finance.

The Equator Principles are sometimes criticized because they don't include a compliance mechanism. And perhaps civil society is going to start looking at the big banks and ask what are you doing to be sure that you are complying with these standards? I know if you're working on project finance deals, you're probably incorporating these principles into your loan agreement. And then your value question is: but how do you enforce them? You're starting to see civil society groups filing locally or trying to bring innovative cases in U.S. district courts, to try to insist on compliance with these kinds of principles.

Tom Munteer: I want to follow up on that and I want to draw Martha into this as well. You have a nice way of expressing it: civil society shining a light. The negative expression might be "reputational risk." That's kind of the question. Let me give you an example of the application of the Equator Principles. One of the banks lending to the Dakota Access Pipeline in the United States came to us and said, "Well, we've done everything right. We've applied the Equator Principles. We made the right choice." And yet you can still be engaged in public shaming, right? The city of Seattle can withdraw the money on deposit at Wells Fargo. Or Mayor de Blasio of New York can send out a public shaming letter. So I guess, in all of that, reputational risk has to factor in as well as adherence to the Equator Principles or your own bank's framework.

Charles Di Leva: Right. I think it's the notion of reputational harm that led to this at its inception. I think it goes back to the days leading to the World Summit on Sustainable Development, when the *New York Times* had full-page ads taken out by environmental advocates complaining that the foreign investments of big banks such as Citigroup were causing deforestation. A story that made its way to the World Bank, perhaps apocryphal, was that the children of the head of Citigroup asked their dad if the ads were true. He is said to have asked the World Bank president to help provide sound environmental and social standards

8. S. Res. 98, 105th Cong. (1997).

9. THE EQUATOR PRINCIPLES (2013), available at http://equator-principles.com/resources/equator_principles_III.pdf.

that Citigroup could adopt for their overseas development finance. This led to major multinational banks—JP Morgan, Citibank, Bank of America—adopting the Equator Principles to help protect them against this notion that they're not looking at compliance. The Equator Principles reiterate those of the World Bank's private-sector arm. But reputational issues will continue to evolve and so is the question of, well, are you actually fulfilling what you're supposed to do?

Martha Rees: Reputation issues are very important. Tom, you wondered at the beginning of our conversation today whether there may be a deep-seated environmentalism that will persist, no matter what happens with this administration. I think the answer is absolutely yes and this will drive the continued importance of corporate reputational issues, with the general public, with investors, with employees, and with customers. There are very important reputation issues in the value chain both with the customers of individual companies and back up the value chain with their suppliers. These reputation issues up and down the value chain have been an effective and efficient driver of "private regulation," which has really taken off in the past 10 years or so.

Tom Munteer: You mean corporate social responsibility, carbon footprint?

Martha Rees: I'll call it the "Walmart effect." When a company like Walmart says they will not buy products to sell to consumers that contain certain substances, or sets out other sustainability requirements for their suppliers, that has a very powerful effect all the way back up the value chain. And why is Walmart doing that? There are several reasons, but a lot of private regulation is driven by their customers and others in communities where they operate. I think that at this point, there is a deep-seated cultural value in the United States and elsewhere around sustainability and protection of the environment, and I think that will continue to drive us forward.

John Cruden: On the international side, I want to add one observation. We didn't invent much law in the United States. Our law came from Britain or Rome. We did, however, invent environmental law. We even have a birthday for it—Earth Day. And then we exported our laws, so everywhere we go internationally, you see vestiges of U.S. law. Most of our law was born of tragedy: *Exxon Valdez* or the Santa Barbara oil spill or Love Canal.

In the past year, I was briefed in two countries: Brazil, because of a huge dam spill, and Vietnam, because of a massive toxic spill right off the coast. In both cases, it was the local people rising up, angry, incredibly angry. When I visited Beijing, I talked to their environmental officials about how they were doing. This was at a time when the U.S. embassy was publishing the amount of air pollution in the air every day. And I saw numerous people on the

streets wearing masks. That's how a lot of our laws came about. They came from people getting involved. They arose after Earth Day in 1970. Now, 192 countries celebrate Earth Day.

Enforcement and Compliance

Tom Munteer: We just said there's a sustaining corporate ethic out there that is going to withstand regulatory change. Let me turn it around and start the enforcement discussion by focusing on how we motivate the behavior we want, and how we discourage the behavior we don't want. Essentially, the question is, to what degree do you think a vigorous enforcement component is necessary to bring about the desired outcomes?

Let me start with a couple statistics. The general statistics on federal criminal enforcement show that there had been fewer than 90 criminal prosecutions in 2016, and that's down 20% from the prior year and down more than one-half from 2011.¹⁰ With respect to some headline-grabbing cases, with the BP *Deepwater Horizon* explosion, only five employees were charged with a crime. No one in BP's onshore chain of command was charged. The highest-charged executive was acquitted. The three who pleaded guilty did so to a single misdemeanor. No one went to jail, much like our financial crisis of 2008.

On January 11, 2017, John, you announced the indictment of six high-ranking executives in the Volkswagen device-defeating scandal.¹¹ One of those executives was unfortunate enough to be in Miami at the time, so he was arrested. I understand there's something in the German Constitution about extraditing to non-European Union nations.

Share some perspectives on how important it is to have a viable threat of criminal enforcement. And then more so, weigh in on to what degree your colleagues had in the back of their minds, "I get punished if I do wrong, so I'm going to do right."

John Cruden: When I supervised the Environment and Natural Resources Division, we had the Environmental Enforcement Section that did civil cases and the Environmental Crimes Section on the criminal prosecution side. As new cases arose, decisions were made as to whether a criminal or civil enforcement action was legally and factually warranted.

I believe strongly, and maybe the Equator Principles are a good example, that enforcement drives compliance. People look over their shoulder to see if something bad is going to happen if they violate the law. Enforcement is also extremely important because in my own experience, most corporations are trying to follow the law. They hire experts and spend money to be in compliance. But if their com-

10. *EPA Criminal Prosecutions Down by Half in Five Years*, TRAC REPORTS (Oct. 24, 2016), <http://trac.syr.edu/tracreports/crim/443/>.

11. See Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 ELR 10564 (July 2016).

petitors are not doing that, they actually get a competitive advantage, a financial advantage, by not doing what good companies do.

The DOJ criminal program was more than EPA cases. EPA should have 200 criminal investigators. The number fluctuates as the budget goes down, but that was only about one-third of our criminal program. Approximately another one-third was with the U.S. Coast Guard concerning vessel pollution, particularly vessels coming into the East and West Coasts. Before these vessels came into our territorial seas, they were dumping used oil and other pollutants, a clear violation of the law. We were doing numerous vessel prosecutions, which were complicated because, when a ship arrives in port, the Coast Guard has very little time to act and may have to seize the ship. And they're foreign-flagged vessels, with a crew who does not speak English. Witnesses have to be held for trial and evidence maintained.

Another one-third of the criminal docket was illegal wildlife trafficking. If you look at what's significant right now in illegal imports and exports in the United States—drugs, obviously, number one; guns, number two; illegal wildlife, number three, a \$10-billion industry. Criminal investigators from the U.S. Fish and Wildlife Service are the investigators for illegal wildlife trafficking. These were the three component parts of the environmental criminal docket: illegal pollution, vessel pollution, and wildlife trafficking.

In turning to the most famous recent environmental actions of the past few years, clearly, I would say on enforcement, the highlights were *Deepwater Horizon* and Volkswagen. We didn't finish the Volkswagen consent decree and plea agreement until the last week of the Obama Administration. And DOJ is still working hard on that case. Both these mega-cases were multidistrict with many parties involved. Five states were key actors in *Deepwater Horizon*, the Gulf states. In Volkswagen, every state was involved as well as the District of Columbia. Both cases had civil and criminal components. The cases also had real victims with numerous claim actions that were also resolved.

Volkswagen is still going on, with seven officials indicted, two of which are under the control of the United States right now. And the judge is still considering the consent decree and class action settlements in the diesel SUVs. If approved, the cost of the settlement will exceed \$21 billion. And so that's another reason I'm confident, Tom, that if you talk to the people I negotiated with—and I was negotiating with the senior leadership of Volkswagen—they would tell you that they wished they complied with the law at the beginning.

Tom Munteer: Martha, you have been across the table from John. To what degree does that fear factor alter your colleagues' behavior?

Martha Rees: I think it is critical that enforcement be focused on individuals as well as corporations. Noncompliant acts as a practical matter, but not a legal matter,

aren't committed by intangible corporations. Noncompliant acts are committed by human beings. So, the only way to have effective compliance in the long run is to focus a good deal of enforcement on individual human beings to drive deterrence.

While I'm not saying there shouldn't also be enforcement against corporations, I think it's really important to look at the individuals. Because ultimately, what are we trying to do? We're trying to drive compliance. And so you need to get individuals' attention that, yes, enforcement can come back to them, not just the corporation, to help keep them focused.

John commented that corporations hire people who want to comply with the law. I think, by and large, they want to do the right thing. Will there be a bad apple or two along the way? Sadly, yes. But my experience has been when someone didn't do the right thing, they were often taking a shortcut for some rationalized reason. We have to get people focused on never taking the shortcuts.

But there are so many competing demands through the day, how do you keep compliance top of mind? It starts with the leadership of the corporation, because there's no substitute for tone at the top. It matters that you have the right tone at the top, helped along with a clear understanding that people can go to jail if they don't do the right thing, plus a pretty strong compliance program that provides clarity on exactly what it takes to comply. You put those things together and I think we'll get to where we all want to be, which is compliance.

Tom Munteer: We want to make sure you focus on that because we have lots of white-collar defense lawyers in this room who will know all about the Yates Memorandum,¹² the most recent iteration of what it takes for a corporation to get cooperation credit in a federal prosecution.

John Cruden: Sally Yates was a longtime U.S. attorney in Atlanta. After Eric Holder left, Loretta Lynch became Attorney General. Then Sally became Deputy Attorney General, and became well-known after President Trump fired her when she became the Acting Attorney General. But she's also famous for having created something called the Yates Memo, which kind of makes Martha's point that, in fact, when we or DOJ are considering corporate crime, there should be a focus on individuals, as well as corporate misconduct. There is still the notion that Martha was talking about that if you're trying to deter a crime, you have to actually go after the individuals.

There's another aspect, what do you do with corporations? You can't put them in jail, but there are things you can do to them to prevent reoccurring problems. BP was on probation for five years. A significant part of the consent decree with BP requires third-party audits, special masters, and public reports. With Volkswagen, there are

12. Memorandum from Sally Yates on Individual Accountability for Corporate Wrongdoing, to U.S. Attorneys (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.

many pages of information in the third consent decree that talk about all the changes Volkswagen must make in corporate policy and testing. And there's a special master that makes sure that's going to happen, there are positive parts of enforcement that really do help and inform the public.

Martha Rees: I think John is absolutely spot on.

Charles Di Leva: Along this line of governance, an issue we have found in some of the large infrastructure projects that have caused us the most trouble is where you have contractors and a series of subcontractors. In these cases, it can become very difficult to have clear lines of responsibility. This is what John and, I think, Martha were saying. And since we're not going to get away from the fact that the world is globalizing, no matter what anybody says, increasingly, you're going to face the growing complexity that comes from having different companies and different nationalities working with other diverse kinds of companies and nationalities.

For lawyers, it's very important for them to help their client understand where those lines of responsibility are. We had one case of a major contractor for Asia that had a series of several subcontractors from Africa. When things went wrong, it was very difficult to identify where the buck stopped. So, I think that's one area of contract law that's worth exploring.

Audience Member: I'm a partner here in D.C., and I focus on white-collar crime. I was a prosecutor at DOJ for 10 years, in the Criminal Division, Fraud Section. So, I did both fraud prosecution and Foreign Corrupt Practices Act¹³ prosecution.

One of the things, which goes exactly to the point of it, it's incredibly important to enforce against individuals as part of the Yates Memorandum. But the challenge in all of that is the resources for the government. I found in the fraud world and in the foreign bribery world, at times, the way to spread those resources was to take advantage of the companies' compliance programs. That's now a lot of what we do on the defense side to understand the particular cues that the government is giving.

But in a world where there is a lot more crime than there is enforcement capability, how do you suggest companies wake up to the risks that are there when there is not an enforcement specter looming over their shoulder? Because as enforcement budgets are dropping, I think companies are saying it may be a competitive advantage to not invest as much in compliance. How do we, in the environmental world or in many aspects, convince them that even though there is not an investigation right over their shoulder, they should nevertheless invest in compliance in trying to prevent some of the misconduct that can occur?

John Cruden: I have some concern right now in where we're heading in the United States with regard to timely

and effective enforcement. And I do believe everyone should support enforcement. I was approached by any number of companies when I was at DOJ who encouraged us in that regard. I can remember at one stage we were enforcing CAA violations in the refinery industry. We had about 80% of the industry under consent decrees. A coalition came to me with a clear message: keep enforcing. A company complying with the law wants to make certain all of their competitors are doing the same.

I'm concerned now. As you hear, EPA's budget is going down. By the way, that affects states. Probably about one-third of EPA's budget goes to states in terms of grants. Some of that goes to enforcement, which could suffer a lack of resources.

I wish I could have sitting right here the CEO of BP and the CEO of Volkswagen who would tell you the importance of complying with the law. When we sued Volkswagen, they were the leader in the U.S. diesel car market. Now, they have pulled out. Illegal activity impacts shareholders, stock prices, bond ratings, and reputation. Enforcement should drive a cost-benefit analysis. If you are a CEO of a corporation, investing money in an environmental management system is sound business.¹⁴ Hiring good people who are going to promote environmental compliance saves money. And by the way, there is a product advantage in advertising green compliance. Countless companies, DuPont being one of them, received a product advantage by advertising their environmental ethos.

Martha Rees: The other thing that I would add is that no company should let its commitment to compliance drift off course because of what they hope might be a period of lighter enforcement in the current administration. That's going to turn around someday. And if you plant some ugly seeds of noncompliance now, noncompliance may be in full bloom under future administrations, which may have a more intense focus on enforcement.

And there is the significance of company culture, its core values. You don't want any company to drift off course and say, "Well, compliance with the law doesn't have to be a priority right now. We'll get back to compliance if in the next administration enforcement seems to be more of a focus." That's a mindset that is really hard to turn around once you let it develop.

Audience Member: I'm going to take it back for just a moment and note that this issue of corporate compliance versus individual compliance in the way a corporation enforces these issues is a very long-standing problem. I remember a long time ago when I was in law school, the Buffalo Creek disaster¹⁵ had just happened, and the whole issue of corporate responsibility for those kinds of disasters

13. 15 U.S.C. §§78dd-1 et seq.

14. PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT (11th ed. 2011), available at https://www.eli.org/sites/default/files/book_pdfs/practical_guide_env_mgmt_11th_toc.pdf.

15. Buffalo Creek, WEST VIRGINIA DIVISION OF CULTURE AND HISTORY, <http://www.wvculture.org/history/buffcreek/bctitle.html>.

was coming to the forefront. Same with the circumstances in Bhopal, India, with Union Carbide.¹⁶

These are ongoing issues. I think John is right, we haven't quite figured out how to make it work. But the point that you made about the length of the chain between the top decisionmakers and the environmental and health and safety compliance people, but also the degree to which people elsewhere in the organization don't feel the need to be responsive to it, I think, is a concern.

In my experience, when you go after senior executives, that certainly focuses attention at the board level and senior executive level. It doesn't necessarily work its way down to the operators in the field, to the people with their hands on the controls, to the people who are looking at the dials and the numbers and saying, "oh, I don't have to worry about that when it's just going to be a small spill." And I think that's a significant issue because they add up over time.

John Cruden: That goes back to my point that one-third of the criminal cases were vessel pollution cases. For one of them, when I did the press conference in Miami, we showed the so-called magic pipe. The magic pipe bypassed the oil collector, and dumped into the water. If you're a prosecutor, that's clear evidence of wrongdoing. That was a very intentional act in the case. But who do you prosecute at that stage? We have prosecuted the people on the vessel who did the illegal act; we also prosecuted employees on land who had participated in the illegal act. But that's hard to do because you need specific evidence of wrongdoing.

How do you get evidence? When reviewing corporate misconduct, evidence often comes from paper records, because sometimes people send incriminating e-mail to each other. We also consider Facebook comments and record books. But largely, the key evidence comes from individuals with factual knowledge. Everybody wants DOJ to go after the CEO or someone high in the chain, but you need evidence to be able to do that. I still think your point about the individuals is extremely important.

By the way, one other thing: tell your clients, whatever you do, not to lie during the investigation. I can show you countless examples where at the end of the day, we did not prosecute individuals for any substantive wrongdoing. We prosecuted them for lying. We always brought that case. The integrity of the investigation demands truth by all participants.

Tom Munteer: Proving the adage that it's the cover-up more often than the crime that trips people up.

Questions and Answers

Audience Member: John, you mentioned the Clean Power Plan. We have clients who support the plan. We have clients who vehemently oppose it. So, what is your view on this, your take, and talk about the legal process you men-

tioned before, that you can't just revoke the rules, you have to go through rulemaking.

John Cruden: It's sort of amazing; the Clean Power Plan litigation is an amazing saga. To start, the case went directly en banc before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. We thought it was going to a panel, and had already started practicing, but the court, on its own, sua sponte, went en banc. We had 7.5 hours of argument before the D.C. Circuit in September. It was amazing. Of the 10 judges, eight asked detailed questions. The judges were very well-prepared, extremely knowledgeable. There must have been 15 or 16 lawyers arguing during the hearing; however, they have not ruled. I'm not surprised, because it's really complicated. And we do know the Trump Administration opposes the plan.

What the Executive Order did, among other things, was to tell EPA to rewrite or rescind the applicable regulations. Despite the fact that some attorneys general wrote President Trump on January 20th and said he ought to rescind it on his first day, he could not, as that would have been illegal. The Administration must follow the Administrative Procedure Act.

The Executive Order requires a reexamination even while the litigation is ongoing. DOJ has advised the court and asked that the litigation be held in abeyance. I expect the court will do as DOJ requests, but set dates by which EPA has to report what they are doing in their review.¹⁷

Audience Member: You've touched a little bit on reputational risk. I wanted to know what you think in terms of whether enforcement is going to continue. Is environmentalism going to continue despite what the Administration may do? There's a generation of people who would wield their voice. They know their voice. And they are engaged with environmental issues. They're going to raise their children to be engaged with environmental issues.

I sort of feel like we're past the point where environmentalism is a side issue. It's a mainstream issue. Do you think that companies are going to need to focus more on their public relations? Putting forth that they're environmentally engaged and making good choices?

Charles Di Leva: I think one issue that troubles me in this area goes back to the earlier mention of private environmental governance. John and I went to a conference where it was reported that the CEO of Walmart says that they support good corporate social responsibility (CSR) when they can also make a profit. So, for example, they started recycling once they could make a profit.

In other words, consumer preference is there, but there's still that aspect of the fiduciary obligation to couple CSR with profit. And given the global competition that's taking place right now, the intense competition that, I think,

16. *Bhopal Gas Tragedy Information*, UNION CARBIDE, <http://www.bhopal.com/>.

17. *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (order granting a 60-day abeyance and requiring EPA to file status reports at 30-day intervals).

is driving this “America First” philosophy, I’m afraid that drive could interfere with some of this basic longer-term vision of what it takes to have a good approach toward our environment. Because if we only approach it from a perspective of “well, does it make good business sense?” I don’t know that we get to the point of long-term consideration where our children would want us to go. I feel that this next generation is going to be a very anxious generation of concerned youth, given what scientists are telling us, such as irreversible damage upon carbon dioxide reaching 450 parts per million.

And given this generation’s ability to reach out with technology or other ways, as Michael Moore is teaching people how to protest, I’m afraid we’re going to get into increasingly confrontational circumstances about the environment and social issues—unless we can find a way to transcend what would have been an earlier vision of corporate responsibility with the future vision of it.

Audience Member: When we were talking about the Equator Principles, Chuck, you mentioned that they don’t really push compliance that much. But I do find in a lot of the projects I work on that most of the banks are also requiring compliance with the International Finance Corporation (IFC) Performance Standards,¹⁸ that do have a compliance aspect and push that down onto contractors and subcontractors.

Do you think since most of the banks are requiring these standards that it’s kind of filling the gap on the Equator Principles? And beyond projects, is there a mechanism similar to that which is being pushed out onto companies operating in foreign countries outside of the project’s realm?

Charles Di Leva: If IFC or any of the multilateral development banks is also financing the project, there is a place IFC offers where an individual who claims they have been injured can go for accountability concerning IFC’s compliance with its standards. So, you can have a compliance test. My point is that in the Equator Principles, to my knowledge, the “Equator Banks” did not put in place an accountability mechanism that, like those of the World Bank Group, can include the ability to address project compliance by the financial institution with its applicable environmental and social standards. So, if you only have “Equator Finance” in a project, you most likely do not have a compliance mechanism such as those in the World Bank Group.

Now, maybe at the project level, if you’re a lawyer advising a client, you may want to say: you should at least put in place some project-level grievance mechanism so that rather than have this blow up into big reputational issues, you’ve got an established mechanism for a concerned community to utilize. We know that in the past, the establishment of these project-level grievance mechanisms were sometimes only paper exercises and that when we went to projects that had problems, like some big hydro projects that we did in Latin America and Asia, the mechanism had never been put in place by the borrower. So, somebody down the line was not ensuring that requirement was being fulfilled even though it was a requirement of the loan agreement.

So, I think that at least some degree of accountability can be a relatively easy thing to arrange if you just follow through. The mechanisms are well-known. And that’s something you can try to do with the Equator lending going forward. At this point, for example, when it comes to issues of transparency, if you go on the Equator Principles website, you can look to see how up-to-date they are in reporting what they’re doing. You might find that to be an interesting exercise.

Audience Member: The other aspect of it was, is there a mechanism out there, or being thought about, to kind of push the concepts of IFC performance standards outside of the IFC funding so that those concepts are more generally adopted?

Charles Di Leva: This whole issue of accountability on international finance began with protests against the World Bank. After a while, civil society realized it’s not just needed at the World Bank. We’ve got to go after the private side. So, then they went to IFC. And IFC put in place a similar mechanism to the World Bank and adopted environmental and social performance standards. Then, civil society started to go after other organizations to adopt a similar approach, such as the Export-Import Bank of the United States and the Organization of the Petroleum Exporting Countries. But I know that there’s been concern about what’s happening with private banks, and I just don’t know that they have put accountability mechanisms in place the same way that the multilateral banks have done.

Tom Munteer: Thanks to all our panelists for participating in this commemoration of Earth Day 2017.

18. INTERNATIONAL FINANCE CORPORATION (IFC), PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012), *available at* http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.