

CRIMES ON THE GULF

By David M. Uhlmann

Editor's Note: This article is an expanded version of Professor Uhlmann's op-ed, "Prosecuting Crimes Against the Earth" (New York Times, June 4, 2010).



The explosion that rocked the Deepwater Horizon oil rig on April 20, 2010, killed 11 workers and triggered the worst environmental disaster in U.S. history. After six weeks of failed efforts to stop the gushing oil and protect the fragile ecosystem of the Gulf of Mexico and the communities along its shores, President Obama pledged on June 1 that "if our laws were broken . . . we will bring those responsible to justice."

President Obama's words may have been political damage control; efforts to contain the spill could not have been going worse. Behind the scenes, however, federal prosecutors had been working since the first days of the spill to determine whether BP (the owner of the well), Transocean (the owner of the Deepwater Horizon rig), and Halliburton (the company that did the cementing job on the deep-ocean well) should be charged with crimes.

The Justice Department's investigation is focusing on criminal charges under the Clean Water Act and the Migratory Bird Treaty Act, two of the environmental crimes charged in the Exxon Valdez case. The Clean Water Act requires the government to show negligence, but the Migratory Bird Treaty Act is a strict liability offense that was committed as soon as oil coated migratory birds. The Justice Department also is weighing charges under the Marine Mammal Protection Act, the Endangered Species Act, and the Outer Continental Shelf Lands Act, to highlight the oil spill's effect on aquatic life and the role of offshore drilling, and may pursue charges under the Seaman's Manslaughter Statute to address the worker deaths. Finally, if evidence develops that corporate officials misled the government about the integrity of the well or the amount of oil spewing into the Gulf of Mexico, the Justice Department will bring obstruction of justice and false statement charges.

Some may question whether criminal prosecution is appropriate based on the Gulf tragedy. Soon after the spill began, Texas Governor Rick Perry called the explosion "an act of God." Tea Party activist and U.S. Senate candidate Rand Paul argued that we should avoid the blame game in the Gulf because "accidents happen." After President Obama convinced BP to establish a \$20 billion escrow fund for victims of the spill—which could become a restitution fund if a criminal prosecution occurs—U.S. Representative Joe Barton called the agreement a "Chicago-style shakedown" and apologized to BP.

If the Gulf oil spill had resulted from an act of God, such as a hurricane or a lightning strike, it might be appropriate to seek only civil penalties. If the spill occurred due to an unavoidable accident—an unanticipated or unpreventable equipment failure—we might prefer that the government decline criminal charges. Criminal prosecution should be reserved for cases where there is evidence of wrongdoing, which is why prosecutors avoid strict liability charges like the Migratory Bird Treaty Act except in cases of negligence. Fairness demands that we resist opportunistic criminal prosecutions: We should not prosecute criminally simply because a tragedy has occurred, even one as awful as the Gulf oil spill.

It appears nearly certain, however, that there was negligence and perhaps worse in the events leading to the Gulf oil spill. Congressional hearings and news reports have

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identified numerous warning signs that went unheeded and deviations from standard industry practice that occurred before the explosion on Deepwater Horizon. Gas was seeping into the well. The blowout preventer was leaking. Concerns were raised about the well casing. There were signs of trouble with the cement in the well. Less than one-third of the necessary stabilizing rods were used. Mud circulation was limited. A final concrete plug was not installed properly. And when disaster struck, the blowout preventer failed.

Prosecutors must examine all witness statements, internal documents, and any physical evidence that remains after the explosion. Their decisions must be based on the sufficiency of the evidence to prove guilt beyond a reasonable doubt, which is a more demanding standard than applies to Congress and the media. But if the negligence claims prove accurate, the Justice Department should bring criminal charges against BP, and possibly Transocean and Halliburton, and the fines should be in the billions of dollars, far more than the criminal fine of \$125 million paid by Exxon for the 1989 Valdez oil spill (until now the largest for environmental crime).

The more difficult question for the Justice Department will be whether there is sufficient evidence to charge felonies, which the public will expect. All of the environmental laws that may have been broken in the Gulf oil spill provide for criminal penalties, but only the Clean Water Act includes felony charges. For the government to prove a felony violation of the Clean Water Act, it must prove the defendant acted knowingly, which means the defendant must have known at the time of the illegal act that a pollutant would be discharged into protected waters. A knowing violation may be easy to prove when a business intentionally dumps waste into a river, but it is much harder in the case of an oil spill.

No one thinks BP, Transocean, or Halliburton intended to spill oil into the Gulf. The government may argue, however, that the companies deviated so much from standard industry practice that they knew a blowout could happen. Or the government could argue that, even if the initial discharge involved only negligence (a misdemeanor under the Clean Water Act), each additional day of discharge represented a knowing violation. The first approach would track more closely our traditional understanding of knowledge requirements but might be difficult to sustain factually, particularly since the Minerals Management Service approved many of BP's decisions. The second approach might be easier to prove—BP and the other companies have known since the early days of the spill that more oil would be discharged with each passing day—but would be a tenuous legal theory, since it would decouple knowledge from the act (the blowout) that caused the discharges to occur.

Another difficult question for the Justice Department will be whether individuals should be charged based on the Gulf oil spill, leading to jail time, which might inspire more careful drilling in the future. Prosecutors prefer to charge individuals in corporate cases because the deterrent value of a prosecution is greatest when corporate officials

face incarceration. Absent false statements or obstruction of justice, however, the Justice Department may struggle to identify culpable individuals with sufficient management authority in the Gulf oil spill case. Only those directly involved in misconduct can be charged with crimes, and it is likely that executives of BP, Transocean, and Halliburton played no such personal role in the disaster. Stated differently, it may be difficult to identify individuals with enough supervisory responsibility and personal involvement to be blamed for the Gulf tragedy, particularly if the most culpable decisions were made by relatively low-level officials stationed

on the drilling rig.

Whether to charge BP, however, will not be a tough issue. BP has a history of criminal violations, offering evidence of a culture that puts profits before the environment and worker safety. After a 2005 explosion at its Texas City refinery, which killed 15 workers, BP pleaded guilty to violating the Clean Air Act by failing to maintain a safe facility. It also pleaded guilty to violating the Clean Water Act by having corroded pipelines that caused oil spills in Alaska's Prudhoe Bay in 2006. BP will argue that those convictions involved different BP subsidiaries, but they raise questions about the effectiveness of its commitment to safe drilling.

Nor will it be difficult for the Justice Department to conclude that the Gulf oil spill warrants both criminal and civil enforcement. In most cases, the government chooses between criminal and civil penalties depending upon the seriousness of the violation, the complexity of the underlying law, and the exercise of prosecutorial discretion. Electing remedies promotes principles of fairness (a defendant generally should not face criminal and civil sanctions for the same conduct) and serves the public interest in deterring violations (the government can address more violations if it does not dedicate criminal and civil personnel to the same case). But the Justice Department has a long-standing policy of seeking both criminal and civil penalties in the most egregious cases, and the Gulf oil spill easily meets that test.

The Justice Department can and should seek record criminal and civil penalties for the Gulf oil spill. The goal should not be to put BP and the other companies out of business; they need to remain viable to pay the claims against them, and we should not lose sight of the fact that their risky drilling occurred with our acquiescence, a high-wire effort to quench our insatiable thirst for more oil. But the fines should hurt, disgorging an amount that approximates the aggregate costs to the ecosystem and the economy, in addition to the compensation that BP and the other companies involved pay to the government and the victims of their crimes for cleanup costs, natural resource damages, and economic losses.

Criminal prosecution cannot restore the Gulf or end the suffering of the people who live along its shores. But a criminal penalty would ensure just punishment—and criminal prosecution would send a clear message that an environmental disaster of this magnitude cannot be allowed to happen again. **Q**