

Testimony of
Professor Joel A. Mintz
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My name is Joel A. Mintz. I am a Professor of Law at Nova Southeastern University Law in Fort Lauderdale, Florida. Since 1983, a major focus of my academic research and writing has been the enforcement work of the EPA. I have written three books and a number of book chapters and law review articles that touch on EPA enforcement. My most recent book, *Enforcement at the EPA: High Stakes and Hard Choices* (revised edition) was published in April by the University of Texas Press. That work—based on 190 personal interviews with government enforcement officials as well as extensive documentary research—recounts the history of EPA’s enforcement program from its beginnings in the early 1970s through January, 2009. Since 2009, I have also conducted a number of informal telephone interviews with enforcement personnel at EPA and the Department of Justice to get a continuing sense of the major developments and trends during the Obama administration.

My testimony before you today is intended to put the enforcement work of EPA during the Obama administration to date into context and historical perspective. My main point is simple and straightforward: for the past three and a half years, EPA’s approach to enforcement has employed the same overall philosophy and strategy that have characterized EPA enforcement since the early 1970s. Rather than being uniquely overzealous or draconian, EPA enforcement in the Obama years has followed longstanding patterns, established at EPA well before 2009.

From the Agency’s beginnings in the Nixon administration to the present day, EPA enforcement (with only a few, quite brief periods of exception) has been based on a theory of deterrence. Under this theory—which is scarcely unique to EPA—violations of the law are to be detected promptly, and fairly and appropriately punished, as a way of deterring the individual violator and others similarly situated from violating the law in the future. The theory assumes that individuals and firms are rational economic actors, who will comply with the law when the probability of detection is great enough, and the penalties are high enough, that it becomes economically irrational for them to violate the law. Of course, the

constitutional rights of all citizens must be strictly protected during this process—both because it is the right thing to do and because enforcement cases will not succeed in the courts where citizens' rights are violated.

Throughout EPA's history, with only minor exceptions, decisions regarding which industries and companies should be the focus of enforcement actions—and whether those actions should be administrative, civil judicial, or criminal in nature—have been made by career enforcement professionals, and not by political appointees. From the George H.W. Bush administration through the Obama administration to date, for approximately 1/3 of its enforcement work, EPA's enforcement staff has relied on a national priority approach that targets particular industries and national or international firms for intensive, comprehensive enforcement actions. This targeting approach is a neutral, non-political procedure that employs statistical analysis of data to give enforcement priority to industries and firms which have the worst compliance records, and whose environmental releases do the most harm to the health of Americans.

EPA's own annual enforcement reports provide statistical evidence that EPA enforcement under Obama has not been uniquely harsh. They reveal, for example, that during the eight years of the George W. Bush administration, the civil penalties assessed against environmental law violators averaged \$117 million per year. In contrast, during the first three years of the Obama administration, EPA enforcement resulted in the assessment of a lower amount of civil penalties: \$115 million per year. Similarly, EPA enforcement actions against the oil and gas industry declined during the Obama presidency, as compared with the preceding administration. EPA brought only 87 enforcement actions against this industry in 2011, while it initiated 224 such actions in 2002. Although there may well be good explanations for these declines, they do support the overall conclusions of my historical research: EPA's enforcement work during the Obama period has been similar in nature to its work in nearly every administration since the Agency was established, regardless of the party affiliation of the president.