

Closing Statement

The Future of the Gorilla in the Closet



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When Bill Ruckelshaus returned to EPA in 1984, he famously said, “Unless the states have a gorilla in the closet, they can’t do their job. And the gorilla is the EPA.” In the years since, the gorilla’s presence has been palpable. But recent years have seen a steady decline in enforcement resources at EPA, including a 15 percent reduction during the Obama administration. President Trump proposes to further reduce EPA’s budget for federal enforcement by a whopping 24 percent.

The rule of law carries with it the idea that all sectors of society are accountable. Accountability under the law does not usually come easily. Indeed, inadequate enforcement is the number one reason many other countries are failing to get on top of their environmental problems. By contrast, in the United States, enforcement has played no small role in delivering the environmental quality we enjoy today.

Even so, enforcement decisions are difficult and inevitably face opposition. Within the agency, those inclined toward cooperative engagement may

resist enforcement; the government where the matter is located commonly chafes at intervention; the relevant congressional delegation frequently raises concerns; and of course the defendant hates it. Enforcement under-reach can become the default.

Enforcement can also over-reach. The prosecutorial power carries with it enormous responsibility for fairness and even-handedness in administration. While I know that the government takes this responsibility seriously, I also know that on occasion enforcers have wielded the enforcement tool like a cudgel. And sometimes responsible companies with complex operations and regulatory requirements can feel caught up in a gotcha game when they fail to produce 100 percent compliance 100 percent of the time.

But most companies also know that properly done, enforcement can support commerce. Multinational companies working in settings where enforcement is uneven or biased know well the consequences: environmental norms are disregarded by local competitors, who gain a cost or process advantage against the compliant MNCs.

At home, the picture is a little different. On the one hand, the U.S. business community has made enormous progress incorporating environmental responsibility into its core business model. On the other, consistency in regulatory expectations remains an important normalizing force in the market, particularly when new actors are always entering. And, of course, public confidence that public health guarantees are being delivered rides heavily on the perception of accountability.

Can the states more fully fill Uncle Sam’s enforcement shoes? At least in theory, yes. In the years since Ruckelshaus’s proclamation, state wherewithal to address environmental concerns has grown dramatically. And some states have such well-developed environmental compliance programs

that they may not feel the absence of the gorilla. But I fear that many states may find themselves struggling to stand firm if the threat of federal intervention begins to disappear, because the states are more vulnerable to local political pressures.

Ideally, efforts to rescale or redistribute enforcement roles would be guided by some overarching policy considerations. If the objective behind a smaller federal footprint is greater deference to state and local authorities, then the resource model should track that objective. For this reason, it was surprising to see the Trump administration propose to cut by nearly 50 percent the categorical grants EPA uses to support state enforcement activity.

Some federal authorities are non-delegable and some lack state or local counterparts. In other words, state or local enforcement is not equally available on every issue, even putting aside the question of resources. Shouldn’t a federal role be reserved when it’s the best — or even only — tool in the regulatory toolkit?

Another way to set priorities between federal and state or local enforcement is to associate the federal role with those circumstances in which interstate dimensions are particularly acute, since that is where state parochialism may produce winners and losers among states, and federal enforcement can act as a referee. By contrast, more localized environmental problems could perhaps devolve more readily to state and local governments.

Finally, it’s probably time for another conversation about alternatives to enforcement for high-performing companies that get it right most of the time, so that increasingly scarce resources can be aimed at the most recalcitrant actors. Might private governance systems offer adequate compliance assurance mechanisms in some circumstances?