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Dr. Joshua Ozymy

Dr. Melissa Jarrell Ozymy

Dr. Danielle McGurrin

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## THE POLITICS OF THE CRIMINAL ENFORCEMENT OF THE U.S. CLEAN WATER ACT, 1983-2021

DR. JOSHUA OZMY\*  
DR. MELISSA JARRELL OZMY\*\*  
DR. DANIELLE MCGURRIN\*\*\*

### ABSTRACT

*Water pollution crimes involving significant harm or culpable conduct are remedied via criminal prosecution. Democratic and Republican presidents offer varied commitments to enforcing the U.S. Clean Water Act, but little is known about the prosecution of water pollution crimes generally or how such prosecutions vary across presidential administrations. This article explores these questions by utilizing a content analysis of 2,728 criminal prosecutions stemming from U.S. EPA criminal investigations from 1983 through 2021, selecting prosecutions occurring under the U.S. Clean Water Act. The findings show that courts adjudicated 853 prosecutions during this period. These adjudications involved 1,528 defendants, who received over \$1.27 billion in monetary penalties, 2,949 years of probation, and 446 years of incarceration. Prosecutions and penalties are greater under Democrats, but by a smaller margin than expected. Prosecution trends over the past two decades indicate financial underinvestment across political parties and primarily stagnating outcomes.*

### I. INTRODUCTION

Notable environmental disasters, such as the Santa Barbara Oil Spill and the Cuyahoga River Fire in 1969, prompted Congress to move forward with a variety of new laws to protect the environ-

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\* Associate Professor of Political Science, Department of Political Science and Public Service, University of Tennessee at Chattanooga.

\*\* Professor of Criminal Justice, Head of the Department of Social, Cultural, and Justice Studies, University of Tennessee at Chattanooga.

\*\*\* Associate Professor of Criminology, Portland State University.

ment.<sup>1</sup> For instance, the passage of the National Environmental Policy Act (NEPA),<sup>2</sup> creation of the U.S. Environmental Protection Agency (EPA), and The Federal Water Pollution Control Act Amendments of 1972 that comprise the modern U.S. Clean Water Act (CWA) are different examples of Congress's response to environmental disasters.<sup>3</sup> The CWA empowers the EPA to regulate discharges into the navigable waters of the United States and establishes the National Pollution Discharge Elimination System (NPDES), the permitting system to regulate discharges from point sources.<sup>4</sup> The EPA also regulates nonpoint sources, defined as

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1. *Santa Barbara Well Blowout; Santa Barbara, California*, INCIDENTNEWS, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA), <https://incidentnews.noaa.gov/incident/6206> (last updated May 27, 2022) (providing detailed information regarding blowout). The Cuyahoga River caught on fire numerous times, dating back to the 19th century, but the 1969 fire received significant media attention as the national focus on environmental problems grew. *See Cuyahoga River Fire*, OHIO HIST. CONNECTION, [https://ohiohistorycentral.org/w/Cuyahoga\\_River\\_Fire](https://ohiohistorycentral.org/w/Cuyahoga_River_Fire) (last visited Oct. 9, 2022) (describing details of Cuyahoga River Fire).

2. National Environmental Policy Act, 42 U.S.C. § 4321 (establishing broad national framework promoting enhancement of environment).

3. *See* Clean Water Act, 33 U.S.C. ch. 23, § 1151 (instituting basic structure for regulating pollutant discharge into waters of United States); *see also* Edward Muskie, *The Meaning of the 1977 Clean Water Act*, EPA J. (July/Aug. 1978), <https://archive.epa.gov/epa/aboutepa/meaning-1977-clean-water-act.html> (stating need for Clean Water Act). The CWA has numerous important amendments. *See, e.g.*, Clean Water Act of 1977, 33 U.S.C. § 1251 (strengthening EPA); Water Quality Act of 1987, Pub. L. No. 100-4 (requiring states to establish criteria for toxic pollutants); *see also* Lawrence R. Liebesman & Elliott P. Laws, *The Water Quality Act of 1987: A Major Step in Assuring the Quality of the Nation's Waters*, 17 ENV'T L. REP. 377, 382-83 (1987) (highlighting provisions of Water Quality Act of 1987). The America's Water Infrastructure Act of 2018 is a recent addition. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 8351, 5 Stat. 619 (2018) (providing for water infrastructure improvements); *see also* *America's Water Infrastructure Act of 2018 (AWIA)*, EPA, <https://www.epa.gov/ground-water-and-drinking-water/americas-water-infrastructure-act-2018-awia> (last updated Sept. 29, 2022) (summarizing EPA's actions regarding water infrastructure).

4. *Summary of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated July 6, 2022) (summarizing Clean Water Act). The EPA does not regulate drinking water under the CWA but has authority under the Safe Drinking Water Act to create acceptable thresholds for microorganisms, organic and inorganic chemicals, disinfectants, and other substances for the roughly 170,000 public water systems throughout the country. Safe Drinking Water Act, Pub. L. No. 93-523, § 300, 88 Stat. 1660-94 (1974); *see also* *Understanding the Safe Drinking Water Act*, EPA (June 2004), <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf> (presenting key points of Safe Drinking Water Act). The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," which can include powerplants, refineries, manufacturing facilities and the like. 33 U.S.C. § 1362(14) (defining point source). Permitting can work effectively for point sources because facilities can be mandated to

sources of water pollution that do not meet the legal definition of “point source” in § 502(14) of the CWA.<sup>5</sup> Outside the creation of the NPDES program, perhaps the greatest accomplishment of the EPA under the CWA was the vast construction of public wastewater facilities throughout the country that funded up to seventy-five percent of the construction cost for building the facilities in exchange for technical guidance and acceptance of rules and regulations for their operation.<sup>6</sup>

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adopt pretreatment standards prior to discharging to stormwater systems and other situations that result in discharges to the navigable waters of the United States. *Pretreatment Standards and Requirements - General and Specific Prohibitions*, EPA, <https://www.epa.gov/npdes/pretreatment-standards-and-requirements-general-and-specific-prohibitions> (last updated Oct. 3, 2022) (providing general and specific regulatory prohibitions); see *National Pollutant Discharge Elimination System (NPDES)*, EPA, <https://www.epa.gov/npdes> (last updated Sept. 30, 2022) (summarizing NPDES program).

5. *Basic Information about Nonpoint Source (NPS) Pollution*, EPA, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last updated July 7, 2022) (providing examples of nonpoint solution). While the NPDES system has been successful in managing a series of problems related to point source pollution, the EPA has been less successful at managing the more diffuse sources of nonpoint source pollution, such as seepage, snowmelt, run-off, and other sources. See, e.g., Joseph Manning, *Running Clean: Discharges to Groundwater Hydrologically Connected to Navigable Waters as a Means for Asserted Clean Water Act Jurisdiction*, 61 B.C. L. REV. E. SUPP. 1, 13-17 (2020) (arguing Sixth Circuit decision runs counter to CWA’s purpose); Justin Rheingold, *Digging Deep: The Clean Water Act’s Applicability to Groundwater Discharges*, 60 B.C. L. REV. 311, 324-30 (2019) (asserting Fourth Circuit decision adheres to CWA’s broad purpose); Katherine Klaus, *The Conduit Theory: Protecting Navigable Waters from Discharges to Tributary Groundwater*, 43 VT L. REV. 871, 889-98 (2018-2019) (evaluating conduit theory of CWA jurisdiction over discharges to tributary groundwater). See generally *Economic Incentives*, EPA, <https://www.epa.gov/environmental-economics/economic-incentives> (last updated Sept. 8, 2022) (exploring environmental and economic incentives for changing consumption and production habits in society); *319 Grant Program for States and Territories*, EPA, <https://www.epa.gov/nps/319-grant-program-states-and-territories> (last updated July 18, 2022) (stating Section 319 provides states, territories, and tribes grant money supporting activities such as technical assistance, financial assistance, education, training, technology transfer, demonstration projects, and monitoring to assess success of specific nonpoint source implementation projects).

6. Jonathan L. Ramseur & Mary Tiemann, CONG. RSCH. SERV., 96-647, *Water Infrastructure Financing: History of EPA Appropriations* 1 (Apr. 10, 2019), <https://fas.org/sgp/crs/misc/96-647.pdf> (summarizing history of water infrastructure financing in U.S.). The development, funding, and regulation of Publicly Owned Treatment Works (POTWs) is often overlooked today but was a major accomplishment. Congress allocated approximately forty-one billion dollars towards POTWs, making it the second largest public infrastructure project in U.S. history at the time, outside of the development of the Interstate Highway System. See *id.* (stating Congressional appropriations for program in 1984). When the CWA was amended in 1987, the Clean Water State Revolving Fund (CWSRF) replaced the grant-based program with a loan-based program. See *Clean Water State Revolving Fund (CWSRF)*, EPA, <https://www.epa.gov/cwsrf> (last updated May 13, 2022) (providing information and resources regarding CWSRF); Jonathan L. Ramseur & Mary Tiemann, CONG. RSCH. SERV., R43871, *Funding for EPA Water Infrastructure: A Fact*

A robust system of oversight and enforcement is necessary to keep the regulated community in compliance with water pollution laws.<sup>7</sup> Violations are generally managed via civil remedies that offer

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*Sheet* (Mar. 6, 2019), <https://fas.org/sgp/crs/misc/R43871.pdf> (presenting president's budget request and total EPA water infrastructure appropriations for fiscal years 1973-2019).

7. See e.g., *Clean Water Act (CWA) Compliance Monitoring*, EPA, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (last updated June 29, 2022) (discussing mechanisms used in coordination with federal, states, and tribal regulatory partners to protect human health and environment). The EPA has created a compliance monitoring strategy for violations of the CWA, focused on wastewater management, the alteration of waterways, and spill prevention. *Id.* (stating major compliance monitoring strategies); see generally *National Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System (NPDES) Permits*, EPA, <https://www.epa.gov/enforcement/national-compliance-initiative-reducing-significant-non-compliance-national-pollutant> (last updated Apr. 13, 2022) (addressing initiative to improve surface water quality by assuring all NPDES permitting are compliant with permits); see e.g., *NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations*, EPA, <https://www.epa.gov/npdes/npdes-permit-writers-manual-concentrated-animal-feeding-operations> (last updated Nov. 22, 2021) (producing manual for NPDES requirements for concentrated animal feeding operations); *Federal Enforcement for the Section 404 Program of the Clean Water Act*, EPA, <https://www.epa.gov/cwa-404/federal-enforcement-section-404-program-clean-water-act> (last updated Dec. 6, 2021) (establishing police and procedures regulating dredged and fill material permit requirements). Wastewater management includes regulation of POTWs, pretreatment and stormwater violations, biosolids, and Concentrated Animal Feeding Operations (CAFOs). *Clean Water Act (CWA) Compliance Monitoring*, EPA, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (last updated June 29, 2022) (detailing wastewater management strategies under CWA). Alteration of waterways includes a focus on managing Section 404 Permits that are required to dredge, fill, or otherwise alter waterways without a permit and are issued in conjunction with the Army Corp of Engineers. *Id.* (explaining goal of Section 404 is to avoid and minimize losses to wetlands and other waters and to compensate for unavoidable loss through mitigation and restoration). Spill prevention strategies center on oil spills and the discharge of hazardous substances. *Id.* (noting CWA prohibits discharge of oil or hazardous substances to waters of U.S. or adjoining shorelines in quantities harmful to public health or environmental welfare). The EPA prohibits discharging oil and hazardous substances without a permit. Likewise, the EPA has the authority to inspect vessels and non-transportation facilities that manage these substances under the Spill Prevention Control and Countermeasures (SPCC) Plan and require Facility Response Plans (FRP). See *Spill Prevention, Control, and Countermeasure (SPCC) for the Upstream (Oil Exploration and Production) Sector*, EPA, <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/spill-prevention-control-and-countermeasure-19> (last updated Mar. 9, 2022) (stating purpose of SPCC is to prevent discharge of oil into navigable waters or adjoining shorelines). Owners and operators of relevant facilities must create an SPCC Plan if the facility: stores, transports, or consumes oil or oil products; stores more than 1,320 U.S. gallons in above-ground containers or stores more than 42,000 gallons below ground; or could be reasonably expected to discharge into the navigable waters of the United States. *Id.* (listing characteristics of SPCC qualified facilities). The Oil Pollution Act amended the CWA to manage problems associated with oil pollution incidents in the navigable waters of the United States, and in the case of FRPs notes that an operator of a "substantial harm" facility is required to both develop and implement an FRP. See Oil Pollution Act, Pub. L. No. 101-380, § 2701, 104 Stat. 484 (1990) (amending CWA); see also

a range of options to bring violators into compliance, including civil or judicial actions, fines, mitigation plans, Administrative Orders of Consent, Supplemental Environmental Projects (SEPs), and other tools.<sup>8</sup> In addition to civil actions, the EPA may address more serious violations by opening a criminal investigation and pursuing criminal prosecution with assistance from the U.S. Department of Justice (DOJ).<sup>9</sup> Current research insufficiently explores the criminal enforcement of the CWA. Some limited research on the subject suggests that slightly less than 3,000 environmental criminal prosecutions have taken place since the early 1980s.<sup>10</sup> An effective CWA requires a substantive criminal enforcement apparatus, and further investigation into past environmental enforcement is needed to strengthen the enforcement of environmental laws and regulations in the future.<sup>11</sup> In particular, increased politicization and polarization of environmental enforcement over the past five decades calls

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*Facility Response Planning*, EPA (2014), at 4 <https://www.epa.gov/sites/production/files/2014-04/documents/frpguide.pdf> (listing requirements of EPA's FRP rule). A "substantial harm" facility is "a facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on navigable waters or adjoining shorelines." *Id.* (defining substantial harm facility).

8. *Basic Information on Enforcement*, EPA, <https://www.epa.gov/enforcement/basic-information-enforcement> (last updated Feb. 22, 2022) (discussing legal standard, burden of proof, and results for civil or criminal enforcement action against environmental law violators); *see also* Michael J. Lynch, Kimberly L. Barrett, Paul B. Stretesky, & Michael Long, *The Weak Probability of Punishment for Environmental Offenses and Deterrence of Environmental Offenders: A Discussion Based on USEPA Criminal Cases, 1983-2013*, 37 *DEVIANT BEHAV.* 1095, 1096-97 (May 19, 2016) (analyzing environmental crime deterrence effects); Michael J. Lynch, *The Sentencing/Punishment of Federal Environmental/Green Offenders, 2000-2013*, 38 *DEVIANT BEHAV.* 991, 991-92 (Oct. 31, 2016) (examining sentencing in environmental cases).

9. Earl E. Devaney, *The Exercise of Investigative Discretion*, 3-4 (Jan. 12, 1994), <https://www.epa.gov/sites/production/files/documents/exercise.pdf> (providing factors distinguishing cases meriting criminal investigation).

10. *See, e.g.*, Joshua Ozmy & Melissa L. Jarrell, *Illegal Discharge: Exploring the History of the Criminal Enforcement of the U.S. Clean Water Act*, 32 *FORDHAM ENVTL. L. REV.* 195, 209-28 (2021) (using content analysis to analyze federal criminal prosecution case summaries); Joshua Ozmy & Melissa L. Jarrell, *Sub-Optimal Deterrence and Criminal Sanctioning under The U.S. Clean Water Act*, 24 *U. DENV. WATER L. REV.* 159, 170-80 (employing content analysis to explore all criminal prosecutions resulting from EPA criminal investigations from 1983-2019). *See generally* Kathleen F. Brickley, *ENVIRONMENTAL CRIME: LAW, POLICY, PROSECUTION* 9 (New York: Aspen Publishers) (2008) (providing broad overview of criminal enforcement).

11. *Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-resource-conservation-and-recovery-act-rcra> (last updated Mar. 20, 2022) (summarizing criminal provisions for RCRA).

for increased research into how enforcement is affected by presidential policy and the broader political environment.<sup>12</sup>

The institutionalization of federal resources to police and prosecute water pollution crimes began in the 1980s. At that time, adequate bi-partisan consensus existed beneath the broader banner of developing stiffer penalties for a range of federal crimes. This development persisted through the 1990s, when the EPA hired criminal enforcement agents and the DOJ hired additional prosecutors. The fragile cross-party consensus began to fray during the Clinton Administration, and environmental criminal enforcement, like many other areas of public policy, became increasingly politicized.<sup>13</sup>

Democratic presidents are historically more supportive than Republicans when it comes to enhancing environmental enforcement; therefore, it is reasonable to expect significant penalties and criminal enforcement actions under Democratic presidents.<sup>14</sup> One must consider the role of environmental law enforcement agencies,

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12. Joshua Ozymy, Bryan Menard, & Melissa L. Jarrell, *Persistence or Partisanship: Exploring the Relationship between Presidential Administrations and Criminal Enforcement by the U.S. Environmental Protection Agency, 1983-2019*, 81 PUB. ADMIN. REV. 1, 49-63 (Aug. 21, 2020) (providing broad overview of outcome process under Democratic and Republican presidential administrations).

13. See generally Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remain*, 59 GEO. WASH. L. REV. 4, 900-02 (1991) (scrutinizing development of federal environmental crimes program); Theodora Galactos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 590 (1995) (exploring tensions and tradeoffs inherent in administration of environmental crimes section). Environmental crime enforcement was caught up in the government's broader movement to be tough on crime and enhance sentencing across various crimes during the War on Drugs in the 1980s. *Id.* at 598 (discussing Federal Sentencing Guidelines' longer mandatory sentences for perpetrators of environmental crimes). As prosecutors applied statutes and enforcement agents built more complex cases, many Republicans in both the Executive and Legislative branches began to sour on the idea of environmental enforcement. *Id.* at 607 (noting politically sensitive issues create high stakes and engender deep partisan differences). Republican presidents, such as Teddy Roosevelt, George H.W. Bush, and Richard Nixon, passed important environmental laws even though they did not advocate for federal intervention in the economy on behalf of public and environmental health. *Republican Presidents on Environment*, NAT'L PUB. RADIO (June 3, 2007, 4:34 PM), <https://www.npr.org/templates/story/story.php?storyId=10687339> (discussing historical importance Republican presidents played in promoting environmental causes).

14. Jessica Hejny, *The Trump Administration and Environmental Policy: Regan Redux?*, 8 J. OF ENV'T STUD. AND SCI. 197, 197-211 (2018) (probing historical resonance between presidential attacks on environmental policy); see generally Joel A. Mintz, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES*, (Austin: University of Texas Press 2012) (examining EPA enforcement during Clinton and Bush administrations).

their ability to persist and maintain organizational prerogatives towards stronger enforcement, and deterrence across partisan regimes despite financial disinvestment in enforcement that has occurred.<sup>15</sup> We address these issues in our analysis, analyzing all CWA criminal prosecutions resulting from EPA criminal investigations from 1983-2021, parceled out by each president to examine trends across time and the changing political landscape.

## II. THE POLITICS OF CWA CRIMINAL ENFORCEMENT

The Rivers and Harbors Act (1899) and Lacey Act (1900) established legal and administrative frameworks to begin prosecuting criminal violations of federal environmental law in the United States.<sup>16</sup> The Public Lands Division was organized within the Department of Justice in 1909 to oversee environmental issues and later evolved into the Environment and Natural Resources Division (ENRD).<sup>17</sup> The 1970s was a watershed era that saw the development and passage of an array of wide-reaching environmental laws including the CWA, Clean Air Act (CAA), Resource Conservation and Recovery Act (RCRA), Toxic Substances Control Act (TSCA), Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the creation of the EPA to oversee the evolving regulation of these areas under the relevant statutes.<sup>18</sup> As the enforcement of these laws progressed through the 1970s, it became clear that treating all

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15. Joel A. Mintz, *Neither the Best of Times Nor the Worst of Times: EPA Enforcement During the Clinton Administration*, 35 ENV'T L. REP., 10390, 10390 (June 2005) (examining enforcement efforts at EPA during Clinton administration). Adjusted for inflation, the EPA and ENRD budgets have been relatively stagnant for many years. See generally *Budget and Performance Summary*, DOJ, <https://www.justice.gov/doj/budget-and-performance> (last updated July 1, 2022) (reporting various year's budget and performance summaries); *EPA's Budget and Spending*, EPA, <https://www.epa.gov/planandbudget/budget> (last updated May 16, 2022) (disclosing fiscal year budget and workforce for year's 1970-2022).

16. Rivers and Harbors Act, 33 U.S.C. 403 (1899) (regulating the obstruction, alteration, or other such changes to the waters of the United States); Lacey Act, 16 U.S.C. § 3371 (1900) (banning unpermitted, interstate trade in wildlife in U.S.).

17. *History*, DOJ-ENRD, <https://www.justice.gov/enrd/history> (last updated May 18, 2021) (providing history of ENRD); see also *Historical Development of Environmental Criminal Law*, DOJ-ENRD, <https://www.justice.gov/enrd/about-division/historical-development-environmental-criminal-law> (last updated May 13, 2015) (summarizing historical development of U.S. environmental criminal law).

18. See, e.g., Clean Air Act, 42 U.S.C. § 7401 (1970) (regulating United States' air emissions); U.S. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1976) (governing disposal of solid and hazardous waste in United States); Toxic Substances Control Act, 53 U.S.C. § 2601 (1976) (regulating production, importation, use, and disposal of specific chemicals); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1972) (providing for federal regulation of pesticide distribution, sale, and use).



violations as misdemeanors or civil offenses would be insufficient to deter chronic, willful, and serious environmental law violations. Subsequently, the idea of and structure for a criminal enforcement regime evolved towards the end of the decade.<sup>19</sup> By the 1980s, environmental criminal enforcement significantly evolved as Congress increased support for the prosecution of environmental crimes through the “tough on crime” movement.<sup>20</sup> Congress added criminal provisions to the RCRA in 1984, the CWA in 1987, and the CAA in 1990, making the provisions common across statutes.<sup>21</sup> In 1981, Congress appropriated policing resources for environmental criminal investigations within the EPA’s Office of Enforcement, now referred to as the Office of Compliance Assurance (OECA).<sup>22</sup> In 1982, Congress hired criminal investigators and subsequently granted them permanent police authority in 1988.<sup>23</sup> Now, the EPA’s Criminal Investigation Division (EPA-CID) employs roughly 145 investigators, known as Special Agents, to investigate environmental crimes.<sup>24</sup> Similarly, the Environmental Crimes Section (DOJ-ECS) was organized in 1982 to specialize in the prosecution of environmental crimes and became its own organizational unit

19. See, e.g., David T. Barton, *Corporate Officer Liability Under RCRA: Stringent but not Strict*, 1991 BYU L. REV. 1547, 1548-50 (1991) (demonstrating how holding corporate officers liable for crimes committed in official capacity was difficult under RCRA prior to changes in law).

20. See Michael R. Pendleton, *Beyond the Threshold: The Criminalization of Logging*, 10 SOC’Y & NAT. RES. 181, 191-93 (1997) (depicting how U.S. case was part of broader world movement to adequately punish serious environmental crimes).

21. *Historical Development of Environmental Criminal Law*, *supra* note 17 (explaining progression of environmental criminal laws); see *Criminal Provisions of the Resource Conservation and Recovery Act (RCRA)*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-resource-conservation-and-recovery-act-rcra> (last updated Mar. 20, 2022) (listing RCRA provisions); *Criminal Provisions of the Clean Air Act*, EPA, <https://www.epa.gov/enforcement/criminal-provisions-clean-air-act> (last updated Mar. 30, 2022) (providing relevant CAA provisions).

22. *About the Office of Enforcement and Compliance Assurance (OECA)*, EPA, <https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca> (last updated Sept. 21, 2022) (explaining OECA’s role).

23. John Peter Suarez, *Management Review of the Office of Criminal Enforcement, Forensics and Training*, EPA (Dec. 15, 2003), <https://www.epa.gov/sites/production/files/documents/ocft-review03.pdf> (recommending improvements of Office of Criminal Enforcement, Forensics and Training).

24. *U.S. Environmental Protection Agency Criminal Enforcement Program: America’s Environmental Crime Fighters*, EPA, <https://www.epa.gov/sites/production/files/documents/ocftbrochure.pdf> (last visited Oct. 9, 2022) (describing EPA’s criminal enforcement program). The number of special agents varies by source, depending in part on whether one measures solely by the number of agents in the field or include those with administrative and other duties. See, e.g., *EPA CID Agent Count*, PUB. EMP. FOR ENV’T RESP. (PEER) (Nov. 21, 2019), [https://www.peer.org/wp-content/uploads/2019/11/11\\_21\\_19-Federal\\_Pollution\\_EPA\\_CID\\_Agent\\_Count.pdf](https://www.peer.org/wp-content/uploads/2019/11/11_21_19-Federal_Pollution_EPA_CID_Agent_Count.pdf) (stating number of agents).

within the ENRD by 1987, employing forty-three attorneys and a dozen staff dedicated to prosecuting environmental crimes.<sup>25</sup>

Criminal enforcement is a collaborative endeavor between EPA-CID agents, who investigate environmental crimes and build cases against potential offenders, and attorneys within the ENRD or The Offices of the United States Attorneys, who prosecute crimes.<sup>26</sup> Additionally, other relevant local, state, and federal law enforcement agents play a role in forming taskforces on more complex cases that often begin from civil inspections, formal reports and required regulatory filings, or disgruntled employees or whistleblowers.<sup>27</sup> EPA-CID special agents have a high level of autonomy when pursuing cases and work within a decentralized structure of field offices. Agents typically connect with prosecutors and other law enforcement agents by approaching the U.S. Attorneys or DOJ-ECS when the agent feels there is sufficient evidence to pursue a criminal case, ultimately convening a grand jury or having attorneys file a criminal information in district court.<sup>28</sup>

During the 1970s and 1980s, bipartisan support for enhanced environmental enforcement waned in Congress and the White House, and by the early 1990s, any remaining consensus was extremely fragile. During his tenure in the early 1970s, Nixon opposed strong environmental regulation.<sup>29</sup> In the 1980s, Congress passed new criminal enforcement resources, which came into effect under Reagan.<sup>30</sup> Like Nixon, Reagan was hostile towards strong regulation and enforcement, moving to appoint Anne Gorsuch to

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25. *About the Office of Enforcement and Compliance Assurance (OECA)*, EPA, <https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca> (last updated Sept. 21, 2022) (detailing OECA's responsibilities); *Environmental Enforcement Section (EES): An Overview of Our Practice*, DOJ, <https://www.justice.gov/enrd/overview-our-practice> (last updated May 14, 2015) (describing Environmental Enforcement Section of the DOJ); *Historical Development of Environmental Criminal Law*, *supra* note 17 (analyzing history of environmental criminal law); *see, e.g., Environmental Crimes Section*, DOJ, <https://www.justice.gov/enrd/environmental-crimes-section> (last updated July 2, 2021) (identifying Environmental Crime Section staff organization).

26. Joel A. Mintz, *'Treading Water': A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENV'T L. REP. 10912, 10914-28 (Oct. 2004) (examining EPA enforcement record during President G.W. Bush's presidency).

27. *Id.* (reporting findings from EPA enforcement records).

28. Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement*, 36 ENV'T L. REP. 10495, 10495-503 (2006) (comparing parties involved in enforcement of environmental criminal laws).

29. *See* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 648-51 (Univ. of Texas Press, Rev. ed., 2012) (illustrating EPA progress).

30. *Id.* (highlighting new initiatives from federal government).

run and downsize the EPA.<sup>31</sup> As Administrator, Gorsuch acted quickly to cut spending and enforcement actions, ultimately affecting staff morale.<sup>32</sup> In 1983, Gorsuch resigned from the EPA in response to allegations of mismanaging funds.<sup>33</sup> Reagan reinstated former EPA Administrator William Ruckelshaus, who helped to restore morale and rebuild the enforcement regime.<sup>34</sup> During the mid to late 1980s, criminal provisions came into law for the RCRA, CAA, CWA, and other federal environmental laws, bolstering the efforts of prosecutors to expand the reach of criminal prosecution.

The Pollution Prosecution Act of 1990 enhanced policing resources by setting a higher minimum threshold of special agents at the EPA.<sup>35</sup> While the federal government passed important amendments to the CAA and though other wins for environmental law that occurred under George H. W. Bush, enforcement progressed under Clinton. Clinton focused on flexible regulation, moving beyond deterrence. By Clinton's second term, the promises of significant financial support declined as Republicans became more intransigent at what they saw as government overreach.<sup>36</sup> The

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31. Cally Carswell, *How Reagan's EPA Chief Paved the Way for Trump's Assault on the Agency*, THE NEW REPUBLIC (Mar. 21, 2017), <https://newrepublic.com/article/141471/reagans-epa-chief-paved-way-trumps-assault-agency> (describing EPA leadership's impact). Criminal enforcement was dismantled under Gorsuch, but the functions were distributed across EPA until later being restored. See Suarez, *supra* note 23, at 5-7 (reporting data from OCEFT review); see also, David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1242-52 (2009) (analyzing environmental criminal enforcement).

32. Carswell, *supra* note 31 (summarizing Gorsuch's actions as Administrator).

33. *Id.* (describing Gorsuch's resignation).

34. See *id.* (analyzing leadership of EPA under Ruckelshaus). Ruckelshaus was the first Administrator of the EPA from 1970-73; his reappointment lasted from 1983-85.

35. See Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L. RE. 867, 867-70 (1994) (illustrating obstacles for environmental criminal enforcement). The push to apply and expand criminal statutes concerned Republicans in Congress, as well as some legal scholars. *Id.* (describing political polarization). The Pollution Prosecution Act of 1990 required a statutory minimum of 200 investigative staff for EPA-CID, which were hired in subsequent years. Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 4321, 104 Stat. 2962 (setting statutory minimum); see also *Environmental Protection Agency Criminal Enforcement Policies*, WASH. LEGAL FUND, at 2 <https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/Chapter2EPA.pdf> (last visited Oct. 9, 2022) (detailing EPA criminal enforcement policies).

36. *Neither the Best of Times Nor the Worst of Times: EPA Enforcement During the Clinton Administration*, *supra* note 15, at 10390 (providing analysis of environmental law during Clinton Administration). A good example of flexible regulation is EPA's "Aiming for Excellence" initiative. See *Aiming for Excellence*, EPA (July 1999), <https://archive.epa.gov/performance-track/web/pdf/report99.pdf> (outlining "Aiming for Excellence" initiative).

George W. Bush Administration focused on returning enforcement power to the states and appointed political insiders instead of careerists to run environmental agencies.<sup>37</sup> Some research shows that enforcement suffered under George W. Bush.<sup>38</sup> The Obama Administration, however, had ambitious goals for combatting climate change and other environmental initiatives, but failed to significantly enhance the budget for staffing and enforcement, with research even suggesting enforcement outcomes were stronger under George W. Bush (G.W. Bush).<sup>39</sup>

By the time Trump took office, many Republicans were openly hostile to environmental regulation; the president made numerous campaign promises excoriating the EPA in public and promised to reduce its budget significantly, causing some seven hundred staff to depart the agency and organize political action.<sup>40</sup> Trump kept these promises by appointing a climate change denier to run the EPA, removing scientists from key advisory committees, pushing for significant budget reductions, and undermining key parts of nu-

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37. See *'Treading Water': A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, *supra* note 26, at 10914, 10929-30 (explaining issues relating to EPA's losing "experienced career staff members" and balance of federal and state enforcement).

38. Joel A. Mintz, *EPA Enforcement of CERCLA: Historical Overview and Recent Trends*, 41 SW. L. REV. 645, 646-59 (2012) (summarizing CERCLA development). Research shows a blunting of enforcement under Bush, but not a complete retreat. *See id.* at 656-59 (illustrating President's impact on CERCLA).

39. Joshua K. Westmoreland, *Global Warming and Originalism: The Role of the EPA in the Obama Administration*, 37 B.C. ENV'T. AFF. L. REV. 225, 251-56 (2010) (addressing potential environmental law impacts from Obama Administration); David M. Uhlmann, *Strange Bedfellows*, 25 ENV'T L. F. 40, 40-44 (2008) (explaining environmental criminal prosecutions during Bush Administration); Joshua Ozmy & Melissa L. Jarrell, *Wielding the Green Stick: An Examination of Criminal Enforcement at the EPA under the Bush and Obama Administrations*, 24 ENV'T POL. 38, 50-56 (2015) (examining criminal enforcement of environmental laws).

40. Elgie Holstein, *The Severe, Real-World Casualties of Trump's EPA Budget Cuts*, ENV'T DEF. FUND (Mar. 3, 2017), <https://www.edf.org/blog/2017/03/03/severe-real-world-casualties-trumps-epa-budget-cuts> (exemplifying environmental changes under Trump Administration); Jay Michaelson, *The Ten Worst Things Scott Pruitt's EPA Has Already Done*, THE DAILY BEAST (Dec. 29, 2017), <https://www.thedailybeast.com/the-ten-worst-things-scott-pruitts-epa-has-already-done> (addressing EPA leadership influence on EPA structure under Trump Administration); Valerie Volcovici, *U.S. EPA Employees Protest Trump's Pick to Run Agency*, REUTERS (Feb. 6, 2017), <https://www.reuters.com/article/usa-epa-pruitt-idUSL1N1FR1NZ> (summarizing EPA staff reaction to Trump Administration); Emily Ryan, *AFGE EPA Council Launches "Save the Environment" Campaign*, AFGE (Aug. 5, 2011), <https://www.afge.org/publication/afge-epa-council-launches-save-the-environment-campaign/> (reporting EPA staff response to budget cuts under Trump Administration); Yaron Steinbuch, *Inside the Mass Exodus at the EPA*, N.Y. POST (Dec. 22, 2017), <https://nypost.com/2017/12/22/hundreds-have-quit-the-epa-since-trump-took-office/> (describing number of EPA staff leaving due to Trump Administration's environmental policies).

merous environmental laws, particularly the CWA.<sup>41</sup> Beyond anything his predecessors concocted, Trump went so far as to pressure Jeffrey Clark, then head of the ENRD, to assist him in persuading DOJ leadership to help overturn the results of the 2020 Presidential Election.<sup>42</sup> Unsurprisingly, research shows decreased enforcement, regulatory rollbacks, limits on prosecutorial tools and other mechanisms to punish offenders, and the lowest level of injunctive relief in fifteen years during the Trump presidency.<sup>43</sup>

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41. See Eric L. Christensen, *Supreme Court Wades Into Troubled Waters, Brings Trump Administration State Water Quality Certification Rule Back to Life*, NAT'L L. REV. (Apr. 12, 2022), <https://www.natlawreview.com/article/supreme-court-wades-troubled-waters-brings-trump-administration-state-water-quality> (discussing emergency order's effect on Clean Water Act). The Trump Administration focused efforts on rolling back many important provisions of the CWA, particularly Section 401 permits that had been denied by many states. *Id.* (detailing impact of Trump Administration's environmental policies); see also Peter Kalicki, *Section 401 of the Clean Water Act from Trump to Biden*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Jan. 25, 2021), <https://eelp.law.harvard.edu/about-the-eelp/> (analyzing the Certification Rule under the Trump Administration); *Trump's War on the Environment*, ENV'T INTEGRITY PROJECT, <https://environmentalintegrity.org/trump-watch-epa/> (last visited Oct. 9, 2022) (predicting impact on future environmental policies).

42. Katie Benner & Charlie Savage, *Jeffrey Clark was Considered Unassuming. Then He Plotted with Trump*, N.Y. TIMES, <https://www.nytimes.com/2021/01/24/us/politics/jeffrey-clark-trump-election.html> (last updated July 12, 2022) (reporting reaction to personnel working with Trump Administration).

43. Robert D. Boley & J. Michael Showalter, *Three Strikes and the EPA's Scientist Advisory Committees Directive May be Out*, NAT'L L. REV. (Apr. 9, 2020), <https://www.natlawreview.com/article/three-strikes-and-epa-s-scientist-advisory-committees-directive-may-be-out> (describing court decisions which challenged Trump Administration's environmental policies and decisions); Ellen M. Gilmer, *DOJ's Rapid Rollback of Trump Policies Marks Environmental Reset*, BLOOMBERG L. (Feb. 5, 2021), <https://news.bloomberglaw.com/business-and-practice/dojs-rapid-rollback-of-trump-policies-marks-environmental-reset?context=Article-related> (detailing elimination of Trump-era environmental policies); aron McCade, *EPA Takes Steps to Undo Trump-Era Rollback of Protections Under Clean Water Act*, NEWSWEEK (Nov. 18, 2021, 10:35 PM), <https://www.newsweek.com/epa-takes-steps-undo-trump-era-rollback-protections-under-clean-water-act-1651054> (reporting Biden Administration's rollback of Trump-era environmental policies); Kathlene Butler, Kathryn Hess, Peter Otness, Danielle Tesch & Charles Triebwasser, *EPA's Compliance Monitoring Activities, Enforcement Actions, and Enforcement Results Generally Declined from Fiscal Years 2006 through 2018*, EPA (Mar. 31, 2020), [https://www.epa.gov/sites/production/files/2020-04/documents/\\_epa\\_oig\\_20200331\\_20-p-0131\\_0.pdf](https://www.epa.gov/sites/production/files/2020-04/documents/_epa_oig_20200331_20-p-0131_0.pdf) (recounting enforcement data); Hana Vizcarra & Lauren Bloomer, *DOJ Phases Out Supplemental Environmental Projects in Environmental Enforcement*, HARV. ENV'T & ENERGY L. PROGRAM (Aug. 6, 2020), <https://eelp.law.harvard.edu/2020/08/doj-phases-out-supplemental-environmental-projects-in-environmental-enforcement/> (analyzing inclusion of environmentally beneficial projects on settlements); David M. Uhlmann, *New Environmental Crimes Project Data Shows that Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration*, 2 U OF MICH. PUB. L., RSCH. PAPER NO. 685, 1, 13-15 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3710109#maincontent](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710109#maincontent) (describing data from Environmental Crimes Project); Evan Lehmann & Emily Holden, *Trump Budget Cuts Funds for EPA by 31 Percent*, SCI. AM. (Mar. 16, 2017), <https://www.scientificamerican.com/arti>

Research and history ultimately suggest enforcement outcomes will be diminished under Republican presidents and at least somewhat enhanced under Democrats, considering the disparity in partisan support. Environmental agencies have attempted to achieve their organizational mission despite inconsistent political support and stagnant resources across presidential regimes.<sup>44</sup> We explore these patterns below from the Reagan Administration to the current Biden Administration.

### III. DATA

We collected our data from the EPA's Summary of Criminal Prosecutions Database, which provides the EPA-CID's criminal investigations resulting in prosecution since 1983.<sup>45</sup> We searched by fiscal year (FY) from the very first case in the database until April 30, 2022, giving us an entire trajectory of criminal enforcement from Reagan through Trump, with limited data from the Biden Administration.<sup>46</sup> Each case summary provides detail on a specific criminal investigation, the geographic area, year, types of crimes, penalties, and sentencing data. Of the 2,728 prosecutions we coded for our database, we selected cases prosecuted under the CWA, giving us 853 prosecutions for the analysis.

We coded the following information from each case: a narrative summary of the prosecution; docket number; identifier for the state the case took place; FY; number of defendants; presence of any companies as named defendants in the case; and all sentencing data, including total probation (months), incarceration (months), and monetary penalties including fines, special assessments, restitution, and other financial penalties assessed to individuals and companies in each case, if applicable. Our data comes exclusively from the database. If the EPA did not include a case for any reason, it

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cle/trump-budget-cuts-funds-for-epa-by-31-percent/ (quantifying budget cuts' influence on EPA).

44. See Joshua Ozmy & Melissa Jarrell, *Why do Regulatory Agencies Punish? The Impact of Political Principals, Agency Culture, and Transaction Costs in Predicting Environmental Criminal Prosecution Outcomes in the United States*, 33 REV. OF POL'Y RSCH. 71, 71-89 (2016) (examining EPA's criminal investigations and prosecutions); *Wielding the Green Stick: An Examination of Criminal Enforcement at the EPA under the Bush and Obama Administrations*, *supra* note 39, at 38-56 (suggesting Presidential Administrations impact EPA enforcement and prosecutions).

45. *Summary of Criminal Prosecutions*, EPA, <https://www.epa.gov/enforcement/summary-criminal-prosecutions> (last updated July 5, 2022) (exhibiting data from criminal prosecutions for environmental crimes).

46. As of this writing, there have been few prosecutions adjudicated under Biden. Therefore, we generally do not display them in the analysis below because they heavily skew the charts, instead choosing to discuss them only when germane.

will not be included in the analysis.<sup>47</sup> An analytical strategy of content analysis is employed by using two coders gathering data independently of one another. After a four-week pilot period, we began seeing patterns in the data and comprehending issues that may arise, which led us to commence coding. Finally, we reviewed cases for discrepancies by one of the authors and met to find consensus on any differences in coding. Inter-coder reliability was roughly 95 percent for our analysis.<sup>48</sup>

#### IV. RESULTS

In Figure 1, we explore prosecutions adjudicated under Republican presidents since 1983. In 1983, we find that four prosecutions are adjudicated during the first year in the analysis. This number grows to ten adjudicated in 1986. By the time George H.W. Bush takes office, 18 prosecutions are adjudicated in 1989 and peaks in 1991 with 21 prosecutions adjudicated. We find 94 prosecutions adjudicated under Reagan/Bush. Under G.W. Bush, prosecutions rise from 36 in 2001 to a high of 42 in 2006, with 230 prosecutions adjudicated during the G.W. Bush Administration. These numbers drop dramatically under Trump, from 24 prosecutions in 2017, the first year he takes office, to 13 by 2020. In our data, we catalog a grand total of 392 prosecutions adjudicated across all these Republican presidents.

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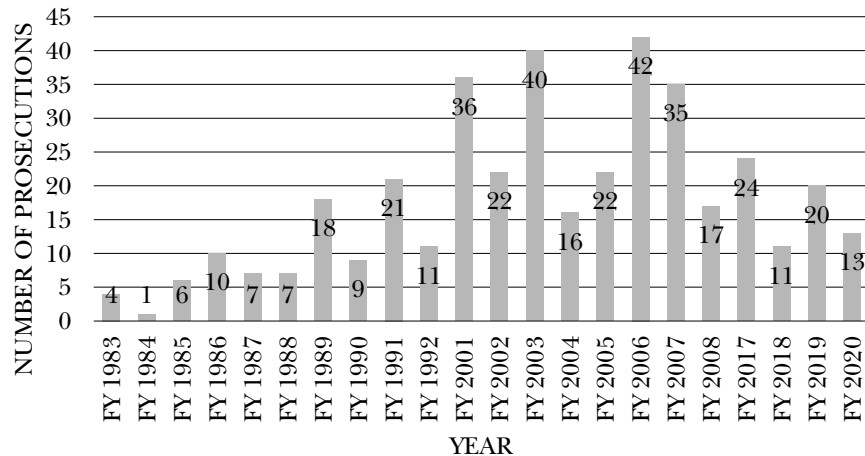
47. For unknown reasons, the database does not include the prosecution of British Petroleum (BP) for its role in the Deepwater Horizon disaster, but information on the prosecution can be found by searching for the docket number independently through web search: (BP, PLC: E.D. Louisiana 2:12-CR-00292-DEK, 2013). Given it is not found by searching the database using the same logic as the other cases, it is excluded from the analysis. The four billion dollar fine assessed for criminal violations, including CWA violations, is the largest fine by far ever assessed under the CWA and would skew the data if it were included.

48. *See*, OLE R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES 140 (Longman Higher Ed., 1969) (explaining content analysis models). The agreed upon items are divided by non-agreed items. *Id.* (guiding reader through content analysis models).

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FIGURE 1. ANNUAL CWA PROSECUTIONS ADJUDICATED UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



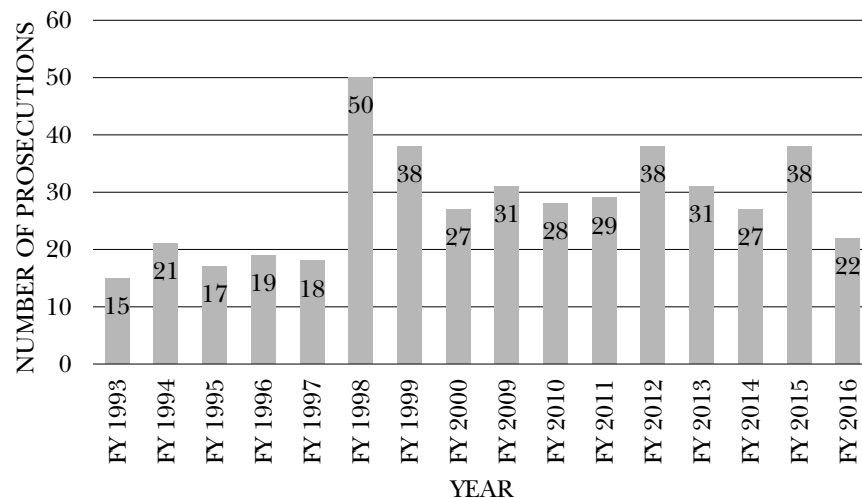
Source: *EPA Summary of Criminal Prosecutions Database*.

Figure 2 examines annual CWA prosecutions adjudicated under Democratic presidents. The Clinton presidency shows a total of 205 prosecutions, which is significantly higher than under his Republican predecessors Reagan and Bush. Prosecutions rose annually from 15 in 1993 to a high of 50 in 1998, averaging almost 26 prosecutions per term. While prosecutions continued to rise in the aggregate under G.W. Bush, surpassing Clinton's numbers by 25 in our data, the Obama Administration's efforts proved more fruitful with 244 prosecutions adjudicated during his two terms in office. CWA prosecutions reached a peak, albeit a modest increase from G.W. Bush, averaging over 30 prosecutions annually. At the time of writing, 12 prosecutions were adjudicated during the Biden Administration.

Comparing Figures 1 and 2, 392 CWA prosecutions were adjudicated under Republican presidents, averaging almost 18 prosecutions annually. These numbers were achieved over 22 years in office from Reagan to Trump, including the early stages of institutionalization and the Covid-19 pandemic. Under Democrats, we count 16 years if we exclude the limited data from Biden, and show that 449 prosecutions were adjudicated, or an average of about 28 annually.



FIGURE 2. ANNUAL CWA PROSECUTIONS ADJUDICATED UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: *EPA Summary of Criminal Prosecutions Database*.

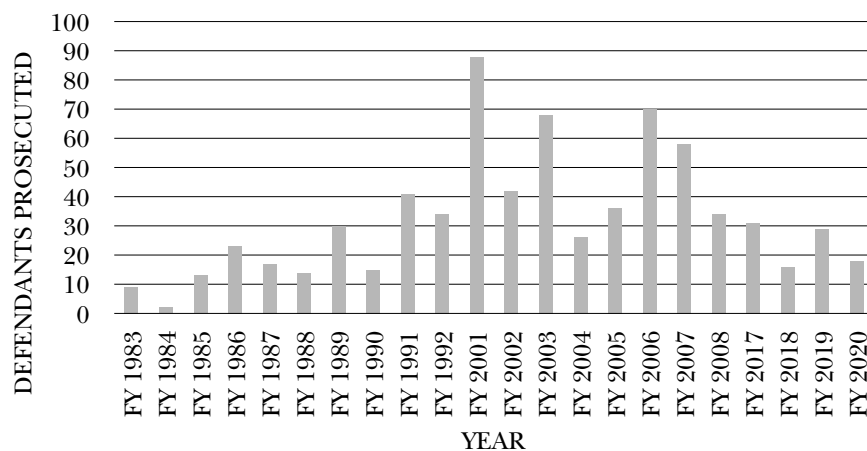
While more cases were adjudicated both annually and in total under Democrats, we now turn to analyze the number of defendants prosecuted under Republican presidents in Figure 3. We find 198 defendants prosecuted as the result of EPA-CID criminal investigations during the Reagan/Bush years, with a high point of 41 in 1991 and an average of about 20 prosecutions annually during this period.

Prosecutions increased significantly under G.W. Bush, totaling 422 during his two terms in office, with an annual average of about 53, and a high point of 88 in 2001. During the Trump Administration, the average drops to about 24 prosecutions per year, totaling 94 prosecutions. By our estimates, 714 named defendants were prosecuted due to EPA-CID criminal investigations under Republican presidents, averaging slightly over 32 annually.

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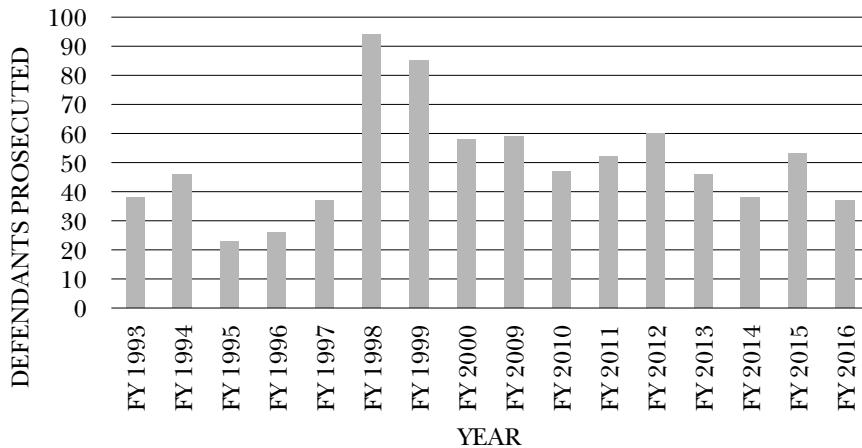
FIGURE 3. TOTAL CWA DEFENDANTS PROSECUTED UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

In Figure 4, we compare the number of defendants prosecuted under Democratic presidents since Clinton. During the Clinton era, about 407 defendants were prosecuted, more than twice the number under Reagan/Bush, with an average annual number of about 51. The number of defendants prosecuted declines slightly under Obama, totaling 392 during his presidency, as does the average of 49 annually. At the time of writing, we find 15 defendants prosecuted during the Biden Administration. A grand total of 799 defendants were prosecuted under Democrats, about a nine percent increase over the 714 defendants prosecuted under Republicans. As with the number of prosecutions adjudicated, a greater number of defendants were prosecuted under Democrats than Republicans, with an overall annual average of about 50 prosecutions under Democrats and 33 under Republicans.

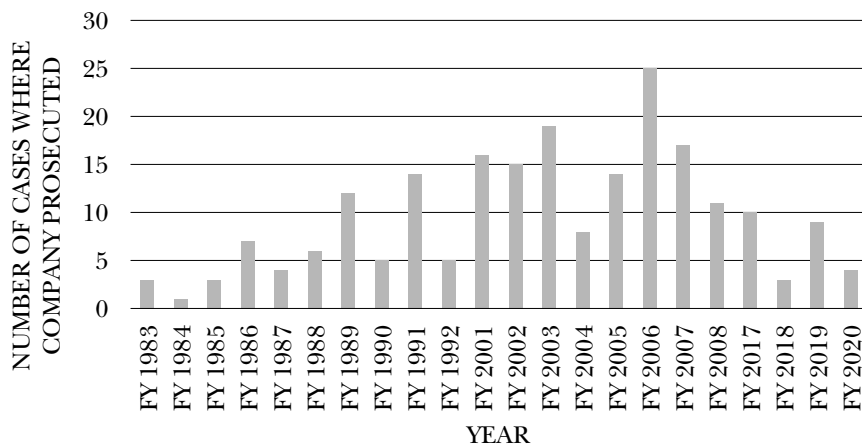
FIGURE 4. TOTAL CWA DEFENDANTS PROSECUTED UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

In Figure 5, we examine the number of prosecutions annually occurring under Republican presidents that involve at least one company as a named defendant. Under Reagan/Bush, few prosecutions of companies occurred; we find evidence that a company was a named defendant in only 60 cases during that era. Under G.W. Bush, this number increases dramatically to 125 cases. Trump’s presidency is a low point, with only 26 such cases in our data.

FIGURE 5. TOTAL CWA PROSECUTIONS INVOLVING COMPANIES UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



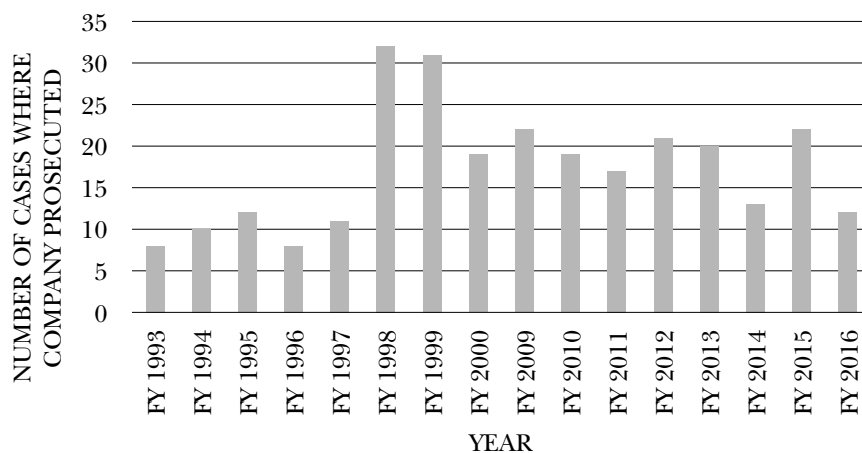
Source: EPA Summary of Criminal Prosecutions Database.

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In Figure 6, we examine the number of CWA prosecutions under Democrat presidents where at least one company was a named defendant. The Clinton Administration's figures increase significantly compared to Reagan/Bush, with 131 total cases and a high point of 32 in 1998. Under Obama, these numbers increase again compared to Clinton and G.W. Bush, totaling 146 cases across his administration, with an annual high of 22 in 2009 and 2015. We find six cases thus far during the Biden Administration. Under Republican presidents, there are 211 prosecutions with a company as a named defendant, with an annual average of a little under ten since Reagan. Under Democrats, our data shows a grand total of 277 prosecutions, with an annual average of 17.3.

FIGURE 6. TOTAL CWA PROSECUTIONS INVOLVING COMPANIES UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.

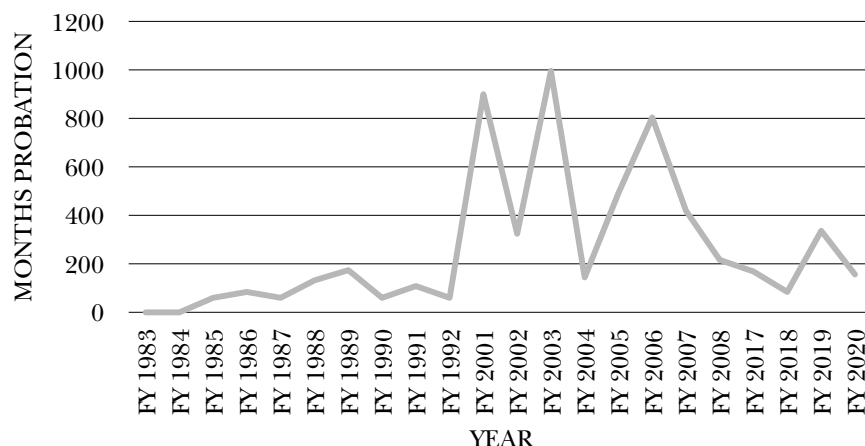


Source: EPA Summary of Criminal Prosecutions Database.

In Figure 7, we explore the total probation time in months assessed for all companies in our data under Republican presidents. Total probation time in the Reagan/Bush era was 738 months, with an annual average of almost 74 months. Probation skyrockets under G.W. Bush, totaling 4,295 months during his two terms in office, with an average of almost 537 months annually. These numbers dip across Trump's term in office, dropping to 744 months, or an annual average of 186 months.<sup>49</sup>

49. The largest corporate probation penalty occurred in the case of Glenn Kelly Johnson (E.D. Louisiana 98-276, 2001) and several companies, including C.J. Cox Construction, Jonson Properties, and Seashore Utilities. The defendants conspired to violate the CWA and obstruct justice by offering money to a former employee to lie to federal investigators regarding falsified discharge monitoring

FIGURE 7. TOTAL PROBATION TIME (IN MONTHS) ASSESSED TO COMPANIES IN CWA PROSECUTIONS UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



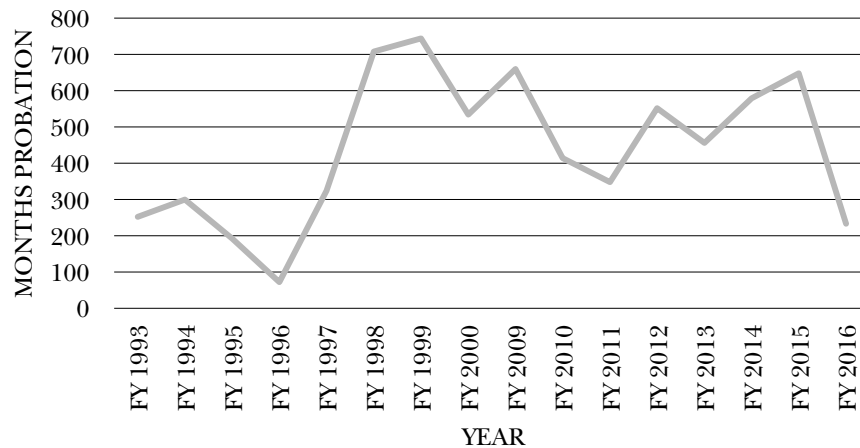
Source: EPA Summary of Criminal Prosecutions Database.

Comparing Democrats in Figure 8, we find the Clinton era again represents an increase over his Republican predecessors, with a total of 3,126 months of probation time assessed to companies during his term in office, averaging about 391 months annually. Obama's Administration shows a robust increase to 3,890 months or an average of slightly over 486 months during his presidency. We catalog 156 months assessed to companies thus far under Biden. Overall, probation assessed to companies totaled 5,777 months under Republican presidents, averaging 263. Across Democrats, companies were assessed 7,016 months of probation, averaging about 439 months annually.

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reports, diverting customer fees for personal use, and failing to maintain water treatment plants. Companies were collectively sentenced to a 360-month probation; *Discharge Monitoring Report-Quality Assurance Study Program*, EPA (Apr. 25, 2022), <https://www.epa.gov/compliance/discharge-monitoring-report-quality-assurance-study-program> (explaining Monitoring Report-Quality Assurance study). Discharge monitoring reports are periodic, water pollution reports required by permittees under the NPDES. See *id.* (illustrating reporting requirements).

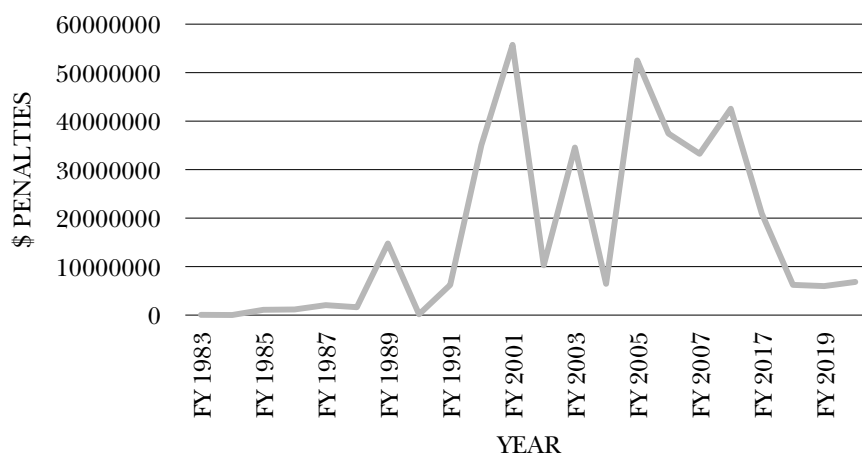
FIGURE 8. TOTAL PROBATION TIME (IN MONTHS) ASSESSED TO COMPANIES IN CWA PROSECUTIONS UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

Figure 9 examines the total monetary penalties assessed to companies under Republican presidents. Total monetary penalties assessed to companies totaled over \$62 million under Reagan/Bush, with an annual average of \$6.2 million in penalties. Penalties increased significantly under G.W. Bush, with a total exceeding \$272 million and an average exceeding \$34 million. Under Trump, penalties exceeded \$40 million and averaged annually about \$10 million, representing a significant decrease from Bush.

FIGURE 9. TOTAL MONETARY PENALTIES ASSESSED TO COMPANIES IN CWA PROSECUTIONS UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.

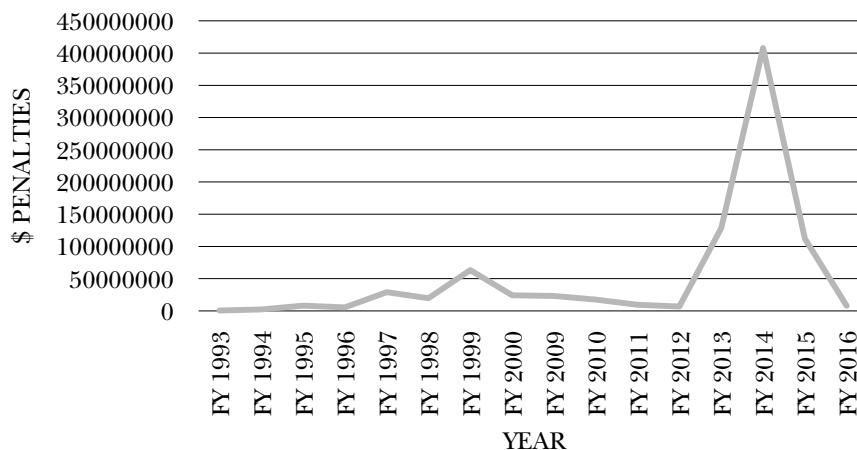


Source: EPA Summary of Criminal Prosecutions Database.

Under Democratic presidents, we see sizable increases under Clinton compared to his Republican predecessors in Figure 10. Total penalties during the Clinton era exceeded \$153 million, with an average of \$19 million per year. Total penalties increase again under Obama, exceeding \$713 million, with an average of over \$89 million per year. Under Biden, we find over \$1.3 million in penalties assessed at the time of writing. Prosecutors secured over \$375 million in monetary penalties against companies under Republicans, averaging \$17 million per year. Under Democrats, over \$866 million in penalties against companies were obtained, averaging \$54 million annually. Overall, prosecutors secured 2.3 times as many monetary penalties against companies under Democratic, as opposed to Republican, presidents.<sup>50</sup>

50. Figure 10 is skewed by the largest corporate penalty assessed for CWA violations to Transocean LTC (E.D. Louisiana 2:13-CR-00001-JTM-SS, 2014) for its role in the Deepwater Horizon disaster, where it was sentenced to pay \$400 million in criminal penalties, along with five years of probation.

FIGURE 10. TOTAL MONETARY PENALTIES ASSESSED TO COMPANIES IN CWA PROSECUTIONS UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.

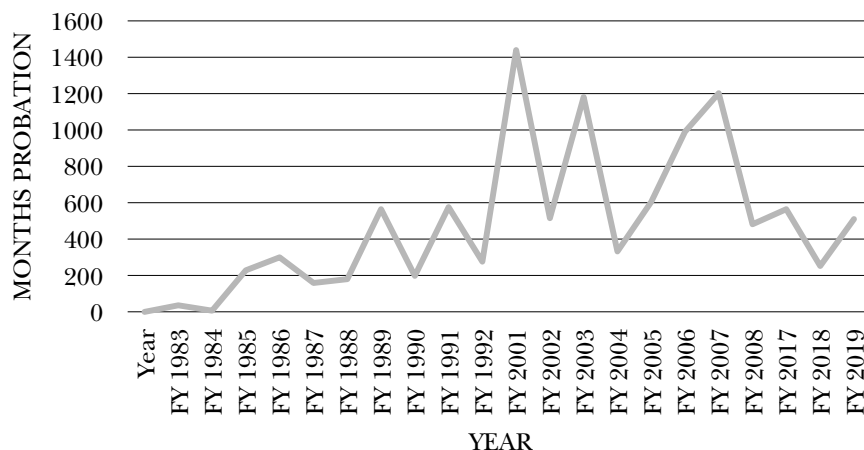


Source: EPA Summary of Criminal Prosecutions Database.

In Figure 11, we explore total probation in months assessed to all individual defendants in CWA prosecutions under Republican presidents. In the Reagan/Bush era, 2,523 months of probation were assessed to defendants, averaging 252 months per year. Under G.W. Bush, we find 6,748 months of probation assessed, averaging 843.5 months annually. These numbers drop under Trump to 1,586 months or about 397 annually. We find that 10,857 total months of probation were assessed to all individual defendants across Republican presidents, with a yearly average of about 494.



FIGURE 11. TOTAL PROBATION (IN MONTHS) ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



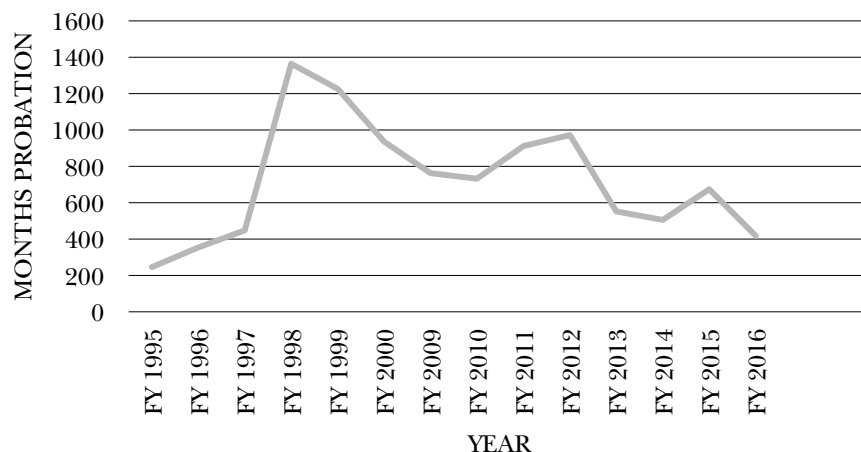
Source: EPA Summary of Criminal Prosecutions Database.

Figure 12 compares months of probation assessed under Democrat presidents. We find that the Clinton era was another sizable increase over Reagan/Bush, increasing total probation time to 5,838 months during his time in office, with an annual average of about 730 months. During the Obama presidency, we find probation stagnates and declines from the G.W. Bush years to 5,528 months of probation, with an annual average of 691 months. We find 216 months assessed so far during the Biden Administration. Democrats logged a grand total of 11,366 months of probation, with an annual average of about 710 months of probation. We find 10,857 months of probation assessed under Republicans, averaging about 494, an average much lower under Republicans even though the overall number of months was similar across parties.

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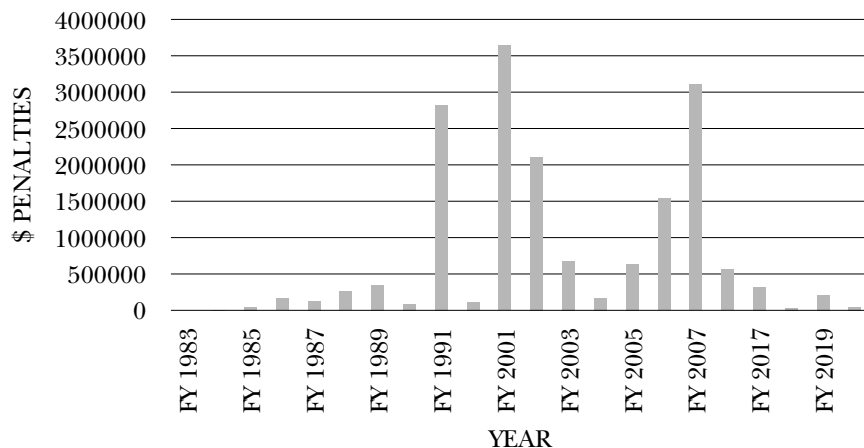
FIGURE 12. TOTAL PROBATION (IN MONTHS) ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

In Figure 13, we examine monetary penalties assessed to all individual defendants under Republican presidents since Reagan. We find that over \$3.9 million in penalties were assessed to defendants during this era. Penalties dip under G.W. Bush to below \$13 million, with an annual average of about \$1.56 million. Under Trump, penalties drop significantly under \$1 million for his term in office. Overall, individual defendants were assessed over \$17 million in penalties under Republican presidents in our data, averaging about \$774,000 per year.

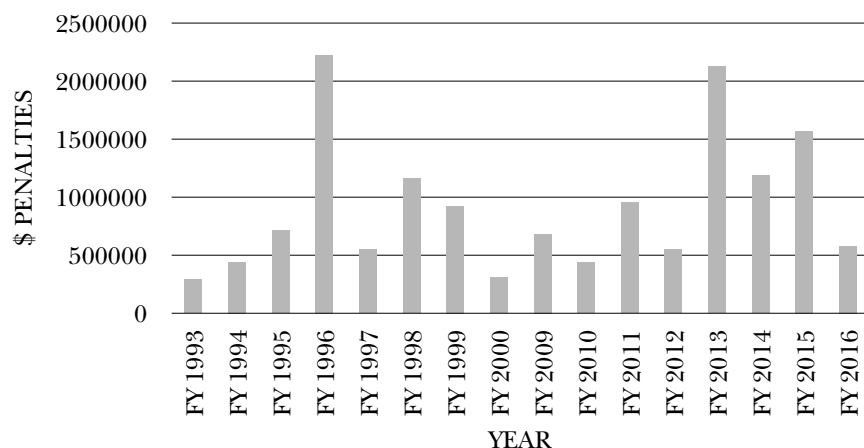
FIGURE 13. TOTAL MONETARY PENALTIES ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

In Figure 14, we explore monetary penalties assessed to all individual defendants under Democratic presidents. Under Clinton, about \$6.6 million in penalties were assessed, averaging about \$827,000 per year during his presidency. Under Obama, penalties increase to over \$8 million, averaging over \$1 million per year. We count \$53,500 in penalties assessed to individuals under the Biden Administration.

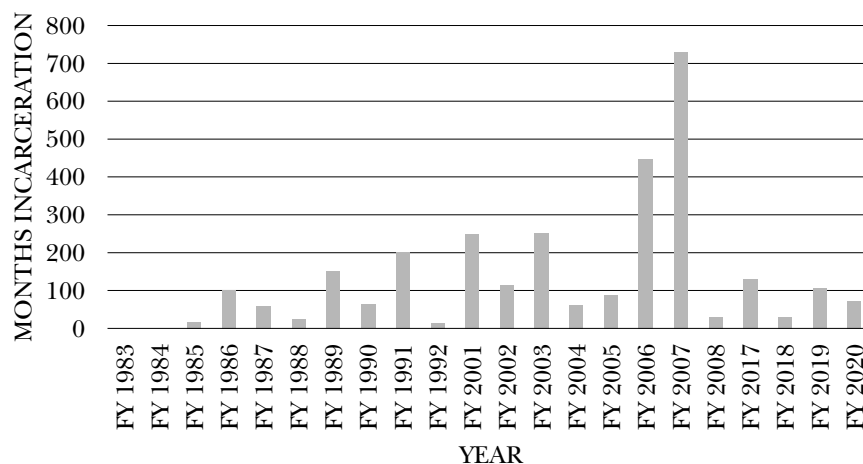
FIGURE 14. TOTAL MONETARY PENALTIES ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

In Figure 15, we examine total incarceration in CWA prosecutions under Republican presidents. In the Reagan/Bush era, we find 631 months of incarceration assessed to individual defendants. This total increases significantly under G.W. Bush, where 1,973 months of incarceration were assessed to defendants, averaging almost 247 months annually. The total months of incarceration under Trump dropped to 338 months during his one term in office, averaging about 85 months annually. Defendants received 2,942 months of incarceration under Republican presidents, averaging almost 134 months annually.<sup>51</sup>

FIGURE 15. TOTAL INCARCERATION (IN MONTHS) ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER REPUBLICAN PRESIDENTS BY FISCAL YEAR.



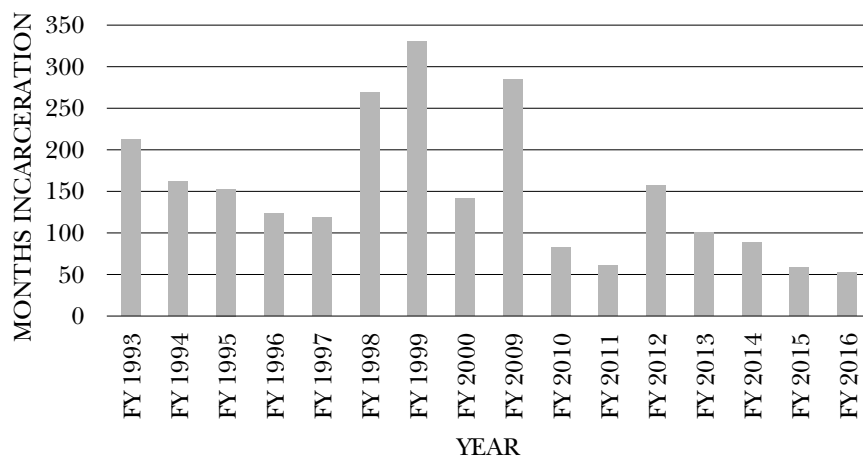
Source: EPA Summary of Criminal Prosecutions Database.

In Figure 16, we analyze total incarceration in months assessed to individual defendants in CWA criminal prosecutions under Democratic presidents. Under Clinton, incarceration time increased significantly from the Reagan/Bush years totaling 1,512 months, with an annual average of 189 months. This total drops significantly under Obama to 886, with an annual average of about 111

51. The prosecution of David Eugene Turner (M.D. Florida 3:05-CR-00159-TJC-MMH, 2007) and seven other co-defendants in 2007 represents the largest incarceration penalty in our data. The defendants ran a forced labor camp near Jacksonville, Florida, where they paid laborers in crack cocaine and untaxed beer and cigarettes, while discharging raw sewage into a creek without a permit. Among other penalties, the defendants were cumulatively sentenced to serve 626 months incarceration.

months per year. Under Biden, we catalog 15 months of incarceration assessed to defendants at the time of writing.

FIGURE 16. TOTAL INCARCERATION (IN MONTHS) ASSESSED TO INDIVIDUALS IN CWA PROSECUTIONS UNDER DEMOCRATIC PRESIDENTS BY FISCAL YEAR.



Source: EPA Summary of Criminal Prosecutions Database.

## V. CONCLUSION

Given the firmer political and public support offered to environmental enforcement agencies by Democratic presidents, one can justifiably expect penalties in environmental crime prosecutions to increase relative to Republicans that have become increasingly hostile to stronger enforcement. Utilizing data on CWA criminal prosecutions stemming from EPA-CID criminal investigations since 1983, we show that prosecutions and penalties do increase under Democratic presidents. Additionally, the data shows the structure of these changes and how they have evolved since the institutionalization of a criminal environmental enforcement process.

We see penalties steadily rising through Reagan and George H.W. Bush, as one would likely expect as criminal enforcement agents are hired, prosecutors trained, and criminal provisions come into law to enhance and codify penalties. The Clinton era has the most significant progress as these factors evolved in a more favorable political climate, and prosecutions adjudicated more than doubled in less time than the Reagan/Bush era. Further, the data shows more than twice the number of defendants prosecuted, pros-

ecutions with at least one company as a named defendant, probation time assessed to individual defendants, incarceration time, monetary fines levied against companies, and a quadrupling of probation time assessed to companies. Based on the data, the Clinton era seems like a time of great promise for criminal enforcement, benefitting from increased resources, statutory penalties, and time for these processes to develop, although as other assessments have noted, it was really neither the “best [n]or worst of times in terms of funding and political support.”<sup>52</sup>

In many respects, the G.W. Bush era continued these trends in CWA criminal prosecutions. Prosecutions increased slightly, as did the number of defendants prosecuted. Probation time assessed to companies increased measurably, as did probation assessed to individual defendants, incarceration time, and monetary fines assessed to companies and individuals. Some assessments, however, have noted that the G.W. Bush era was difficult for the EPA because the agency spent most of this time keeping its head above water.<sup>53</sup> The EPA’s enforcement actions during the Administration were largely successful despite the Administration’s antipathy towards enforcement.<sup>54</sup> The overall metrics in our data illustrate that the EPA maintained its organizational prerogatives through the G.W. Bush Administration at least with CWA prosecutions.

Was the Obama Administration able to build upon the good work of investigators and prosecutors under previous administrations? We find that on some metrics, career staff was able to persevere. Prosecutions increased, albeit only slightly from previous administrations, but the number of overall defendants prosecuted actually declined from the G.W. Bush era. The number of cases where at least one company was a named defendant and prosecuted for an environmental crime increased slightly from G.W. Bush but declined slightly from Clinton. Other metrics dipped from the G.W. Bush era, including probation time assessed to companies and individual defendants, incarceration time, and monetary penalties assessed to individual defendants. The high point for the prosecution of CWA crimes during the administration was a slight increase in the number of prosecutions involving companies and the ability to win significant penalties against large corpora-

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52. See *Treading Water: A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, *supra* note 26, at 10913-14 (analyzing criminal enforcement under Clinton Administration).

53. See *id.* at 10912 (noting EPA’s difficulties under G.W. Bush Administration).

54. *Id.* (qualifying EPA’s limited successes under G.W. Bush Administration).

tions that greatly increased total monetary penalties assessed to companies under Obama compared to his predecessors. Even though investigators and prosecutors were able to secure some \$40 million in monetary penalties against companies during the Trump Administration, the number of penalties and prosecutions declined.

Prosecutions rose through the 1980s and 1990s and persisted through G.W. Bush and Obama — but did not significantly increase on most metrics from the Clinton era — and began to dip under Trump. Examining the history of CWA prosecutions in this manner shows that while prosecutors secured greater penalties under Democratic presidents, prosecutors still managed to maintain their organizational prerogatives successfully across Republican presidents, at least through the G.W. Bush Administration. The EPA's overall output in CWA prosecutions, in terms of the number of prosecutions, defendants prosecuted, and the range of penalties we explored show such output to be arguably stagnating since the Clinton era on most of these metrics, with the exception of a few large-penalty corporate prosecutions.<sup>55</sup>

This stagnation may be attributed to the difficulties of carrying out complex tasks while faced with increased Republican hostility and insufficient support from Democrats. Another explanation might be the lack of increased resources, a problem that persisted under all presidents for a significant period of years. The EPA's budget, adjusted for inflation, is stagnant or declining, marking the high point of its finances in the 1980s. As an example, in FY 1980, the EPA's nominal budget was about \$4.6 billion dollars; adjusted for inflation, the budget would equal \$16 billion in today's dollars (FY 2022).<sup>56</sup> While the Biden Administration increased the agency's budget to \$9.5 billion, the increased budget does not come close to keeping up with inflation.<sup>57</sup> While the EPA budget was slashed from \$5 billion to \$3 billion in FY 1981, it slowly

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55. As previously noted, our analysis excludes the four-billion-dollar judgment against BP (BP, PLC: E.D. Louisiana 2:12-CR-00292-DEK, 2013) for its role in the Deepwater Horizon disaster. The Transocean prosecution (E.D. Louisiana 2:13-CR-00001-JTM-SS, 2014) was the second largest penalty included in our data with a four-hundred-million-dollar penalty, though both of these large-scale cases are anomalies when observing the greater patterns that persisted over many decades. We do not, though, attempt to diminish the importance of these cases in framing the work of environmental enforcement agencies working across partisan regimes.

56. U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/> (last visited Oct. 9, 2022) (providing calculations for inflation).

57. EPA's *Budget and Spending*, EPA, <https://www.epa.gov/planandbudget/budget> (last updated May 16, 2022) (listing EPA budget and spending by Fiscal Year).

climbed or dropped in nominal terms. The EPA budget received its largest bump under the Obama Administration, increasing from \$7.6 billion in FY 2009 to \$10.2 billion in FY 2010. Staffing hit its zenith at 18,110 in FY 1999 and declined most years afterward, reaching a low point of 14,172 under Trump, and only moderately increasing to 14,581 under Biden.

Given the greatly increased responsibility of the EPA over time, if funding and staffing are strong indicators of political support, such support has been mostly stagnant and declining for two decades. The budget for the ENRD has also been essentially stagnant when adjusted for inflation.<sup>58</sup> To reverse this course, the Biden Administration must overcome Republican hostility towards environmental regulation, invest heavily and consistently in criminal enforcement, support the difficult and important work done by the EPA-CID and the ENRD to deter and punish the worst environmental offenders, and bring substance to the nation's environmental laws.<sup>59</sup>

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58. *Budget and Performance*, DOJ, <https://www.justice.gov/doj/budget-and-performance> (last updated July 1, 2022) (outlining budget and performance data). The ENRD's budget is found by searching the DOJ's Budget and Performance Summary searching for the ENRD's budget. *See id.* (providing ENRD's budget data). Prior years to 2015 can be found in the Archives. *See id.* (listing financial reports). The budget for ENRD was \$132 million in FY 2012, so even a proposed increase to \$133 million does little to offset this stagnation. *See FY 2023 Performance Budget Justification*, DOJ-ENRD, at 15 <https://www.justice.gov/jmd/page/file/1491706/download> (last visited Oct. 9, 2022) (describing 2023 environmental policies and strategies).

59. *See* Todd Kim, *Assistant Attorney General Todd Kim Delivers Remarks to the American Bar Association's National Environmental Enforcement Conference's Section on Environment, Energy and Resources*, DOJ (Dec. 14, 2021), <https://www.justice.gov/opa/speech/assistant-attorney-general-todd-kim-delivers-remarks-american-bar-association-s-national> (addressing ENRD's progress and discussing policies). As a start, the administration should show more vocal support for stronger enforcement. *See id.* (supporting ENRD and introducing future policies).