NOTES

The Best and Worst Form of Environmental Enforcement: Third-Party Payments and Executive Settlement Policy

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TABLE OF CONTENTS

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INTRODUCTION

Environmental law is no longer "suddenly ablaze"[1]—even if the planet is. The "legislative burst" that channeled the major environmental statutes of the 1970s and 1980s[2] has withered to a pause.[3] Citizen suits have been stymied by a judicial nihilism in the inability of courts to address large-scale environmental harms with indirect victims and redressability problems.[4] At the same time, recent Presidents have faced flat or declining Environmental Protection Agency (EPA) budgets,[5] congressional abandonment on new legislation,[6] and wavering public

1. In the seminal *Environmental Decisionmaking and the Role of the Courts*, Judge Harold Leventhal, sitting in 1974, described environmental law as "suddenly ablaze, a development which has taken place essentially within the last five years." 122 U. PA. L. REV. 509, 509 (1974).

2. *See id.* at 510; Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 623–29 (2006).

3. *See* Lazarus, *supra* note 2, at 629–32.

4. *See* Scott Novak, Note, *The Role of Courts in Remedying Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 GEO. ENV'T L. REV. 743, 746–47 (2020).

5. *See infra* note 268 and accompanying text; OFF. OF INSPECTOR GEN., EPA, REPORT NO. 20-P-0131, EPA'S COMPLIANCE MONITORING ACTIVITIES, ENFORCEMENT ACTIONS, AND ENFORCEMENT RESULTS GENERALLY DECLINED FROM FISCAL YEARS 2006 THROUGH 2018, at 23–24 (2020), https://www.epa.gov/sites/default/files/2020-04/documents/_epaoig_20200331_20-p-0131_0.pdf [https://perma.cc/BLE8-WAK8].

6. *See infra* Section II.A.2; Lazarus, *supra* note 2, at 619.

faith in the need for environmental law itself.[7] Yet the specter of distant and not-so-distant environmental harms remains: the "super wicked" problem of climate change,[8] the "unequal distribution of environmental harms" across marginalized communities,[9] and the age-old problem of compensating dispersed victims for intangible harms that cannot be undone[10]—just to name three.

This Note describes a tool of Executive Branch backlash to the stagnation in the improvement of substantive law and a battleground between the Legislative and Executive Branches over who may wield environmental enforcement power. This tool is third-party payments: government enforcement settlement agreements that require defendants pay for environmental projects benefiting third parties. For example, in 2016—following an international "dieselgate" scandal where Volkswagen equipped diesel cars with defeat device software used to cheat emissions tests[11]—Volkswagen settled with the Department of Justice (DOJ) for $14.7 billion.[12] Alongside a stipulation that the car manufacturer would buy back affected cars, the consent decree required Volkswagen to invest $2 billion in charging infrastructure for zero-emission electric vehicles and $2.7 billion in a mitigation trust aimed at reducing diesel emissions more broadly.[13] These investments aimed to increase public education surrounding electric vehicles.[14] Notably, at the time of the settlement, legislation explicitly addressing zero-emissions electric vehicles did not exist—though the Obama Administration did raise fuel-efficiency standards through regulation[15] and announce the development of electric vehicle charging infrastructure through executive action.[16] Finally, the

7. *See* Hari M. Osofsky & Jacqueline Peel, *The Grass Is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspective*, 91 CHI.-KENT L. REV. 139, 144 (2016) (reviewing climate change politics and public support).

8. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1153 (2009).

9. Wyatt G. Sassman, *Critical Questions in Environmental Law*, 97 U. DET. MERCY L. REV. 487, 493 (2020).

10. Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 118 (2020).

11. Guilbert Gates, Jack Ewing, Karl Russell & Derek Watkins, *How Volkswagen's 'Defeat Devices' Worked*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html.

12. Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay $14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html.

13. John C. Cruden, Bethany Engel, Nigel Cooney & Joshua Van Eaton, *Dieselgate: How the Investigation, Prosecution, and Settlement of Volkswagen's Emissions Cheating Scandal Illustrates the Need for Robust Environmental Enforcement*, 36 VA. ENV'T L.J. 118, 153–55 (2018); Kakade, *supra* note 10, at 135.

14. Cruden et al., *supra* note 13.

15. Press Release, Off. of Press Sec'y, White House, Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards (Aug. 28, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard/ [https://perma.cc/BZ8B-N5AT].

16. Press Release, Off. of Press Sec'y, White House, Obama Administration Announces New Actions to Accelerate the Deployment of Electrical Vehicles and Charging Infrastructure (Nov. 3, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/11/03/obama-administration-announces-new-actions-accelerate-deployment [https://perma.cc/7YAW-TXC3].

two investment projects sought to offset the environmental harms caused by the higher polluting vehicles and purchases made by consumers tricked into buying what they thought were Volkswagen's environmentally friendly cars.[17] The idea here is the basis for many environmental remedies: while Volkswagen could buy back the cars in violation, one cannot simply pull back the excess noxious emissions in the air. And, if the defendant pays a penalty, the funds going to the U.S. Treasury do not compensate the victims of the offense.[18] Some other scheme—such as a third-party payment—is needed to actually remedy the environmental and human harms.

The Volkswagen consent decree was just one of multiple settlements during the last decade where defendants, as part of their settlement agreement,[19] were required to pay money toward outside projects that benefitted the environment.[20] Some defendants, like Volkswagen, spent money on projects in line with executive policy initiatives. Other defendants agreed to complete projects that specifically benefitted local communities. For example, in the same year as the Volkswagen settlement, the motorcycle manufacturer Harley-Davidson was also charged for selling defeat devices that allowed riders to modify the emissions control system on their bikes.[21] These "super tuners" helped riders increase engine performance but also increased air pollutants in violation of Clean Air Act emissions standards.[22] Harley-Davidson paid a $12 million penalty and agreed to stop selling and to buy back the super tuners.[23] To address the environmental damage and serious health effects caused by the excess emissions, the EPA included a settlement provision requiring Harley-Davidson pay $3 million to implement a project that would replace conventional woodstoves with cleaner-burning woodstoves in local communities.[24] These woodstoves emit similar air

17. *See* Kakade, *supra* note 10, at 135.

18. For example, criminal penalties that go to the U.S. Treasury's Crime Victims Fund are limited to victims of violent crimes. Environmental prosecutors view third-party payments as "essentially the only way" that funds go toward remedying the harm caused by the violation. *See* Deborah L. Harris, Section Chief of Env't Crimes, DOJ, *The Future of Environmental Criminal Enforcement*, Dialogue with Steven P. Solow (June 3, 2021), *in* 51 ENV'T L. REP. 10823, 10830 (2021).

19. These agreements are present in both consent decrees and settlements, as well as plea deals and other enforcement agreements. Though all different in substance, the nuances are not important for the purpose of this Note, which will refer to them all as settlements unless the distinction is important. One distinction that is important—though outside the scope set here—is that judges must approve consent decrees. *See* Dustin Plotnick, Note, *Agency Settlement Reviewability*, 82 FORDHAM L. REV. 1367, 1377 (2013).

20. Tatiana Schlossberg & Hiroko Tabuchi, *Settlements for Company Sins Can No Longer Aid Other Projects, Sessions Says*, N.Y. TIMES (June 9, 2017), https://www.nytimes.com/2017/06/09/us/politics/settlements-sessions-attorney-general.html.

21. Press Release, DOJ, Harley-Davidson to Stop Sales of Illegal Devices That Increased Air Pollution from the Company's Motorcycles (Aug. 18, 2016), https://www.justice.gov/opa/pr/harley-davidson-stop-sales-illegal-devices-increased-air-pollution-company-s-motorcycles [https://perma.cc/6G67-JDY2]; Kakade, *supra* note 10, at 148.

22. Press Release, *supra* note 21.

23. *Id.*

24. *Id.*

pollutants and cause similar health effects, and the project aimed to remediate the air quality caused by the super tuners.[25]

Unlike restitution, where defendants pay money to compensate direct harms,[26] third-party payments seek to remediate more disperse environmental harms related to defendants' misconduct. They are particularly suited for environmental settlements because the damage caused by environmental violations—whether noxious emissions or groundwater contamination—cannot be "un-emitted." Thus, third-party payments seek to remedy and offset harms that are similar to the violation at issue, such as by reducing the same harmful air emissions in another form. These projects by necessity benefit certain third-party recipients—often local communities—as well as third-party organizations that are regularly hired by corporate defendants to implement the project when the defendants do not have the expertise to do so on their own.

This aspect—that a third-party recipient or implementer, unrelated to the litigation, stands to benefit—has made third-party payments the focal point of intense debate. Academics and politicians have disputed their legality[27] and illegality,[28] and advanced various normative policy arguments. Some laud environmental projects for their ability to direct remedial relief to nameless environmental victims and restore environmental justice,[29] while others, such as one congressperson, have described them as "the Justice Department's . . . penchant for directing millions of dollars to special interest groups."[30] At the executive level, the Bush Administration was generally supportive of third-party payments and the Obama Administration settled cases with some of the largest payment agreements, while the Trump Administration was highly critical and went as far as to completely prohibit third-party payments in DOJ settlement policy.[31] And though the Biden Administration has indicated a repeal of almost all of the Trump prohibitions, the debate over these payments will remain.[32]

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25. *See id*.; Radu, *infra* note 207 (describing how mitigation projects like the woodstove project remediate damage done to the environment and public health).

26. *See Basic Information on Enforcement*, ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/C5Q-25AM] (Feb. 22, 2022); Kakade, *supra* note 10, at 138–40.

27. *See, e.g*., Thomas O. McGarity, *Supplemental Environmental Projects in Complex Environmental Litigation*, 98 TEX. L. REV. 1405 (2020).

28. *See, e.g*., Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327.

29. *See* Douglas Rubin, Comment, *How Supplemental Environmental Projects Can and Should Be Used to Advance Environmental Justice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 179 (2010).

30. Doug Collins, *Stop Settlement Slush Funds Act Helps Restore Checks and Balances*, HILL (Feb. 9, 2017, 11:05 AM), https://thehill.com/blogs/congress-blog/the-administration/318682-stop-settlement-slush-funds-act-helps-restore-checks [https://perma.cc/ZYU8-WWND].

31. *See infra* Section I.D.

32. The Biden Administration has withdrawn the Trump Administration memoranda prohibiting third-party payment practices. However, a DOJ regulation from the Trump Administration, codified in the federal register and the *Justice Manual*, remains. *See* Harris, *supra* note 18, at 10833; 28 C.F.R. § 50.28 (2021); DOJ, Just. Manual § 1-17.000 (2022). This regulation is under review. *See infra* Section I.D.

Academics have typically structured the foregoing debate in terms of a similar debate surrounding Supplemental Environmental Projects (SEPs), an EPA settlement project policy. A SEP is an agreement in an EPA enforcement settlement where the defendant "propose[s] to undertake a project to provide tangible environmental or public health benefits to the affected community or environment."[33] The debate over SEPs mirrors that over third-party payments because, in many instances, third-party payments can be SEPs: they are projects aimed at benefiting an affected community. However, third-party payments can also be much broader than SEPs—which impose limits on third-party involvement—and can occur outside EPA action and in a broader array of civil enforcement suits, citizen suits, and criminal plea agreements. Despite this breadth, academics have historically focused on SEPs, with limited focus outside of their typical civil enforcement strictures.[34] And in doing so, various scholars have proliferated a wide range of names for the enforcement provisions that include third-party payment agreements, including "Supplemental Environmental Projects," "Beneficial Environmental Projects," and "Environmentally Beneficial Expenditures."[35] Nomenclature is not important[36]—but this Note proposes that there are practical reasons for analyzing third-party payments as a standalone category of civil and criminal settlements in their own right because of the way these

33. *Supplemental Environmental Projects (SEPs)*, ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/supplemental-environmental-projects-seps [https://perma.cc/9Z88-C3JE] (July 27, 2021).

34. One helpful definition is advanced by Professor Kakade, who includes third-party payments as a type of "remedial" payment—or "payments for projects as remedies in regulatory enforcement cases." Kakade, *supra* note 10, at 119. These could include third-party payments, as defined here, as well as a larger set of settlement provisions outside a purely environmental context. Professor Kakade's formulation may be one of the best, but this Note uses the term "third-party payments" because that is what the government tends to use and for the reasons expressed in the introduction.

35. *See, e.g.*, Leslie J. Kaschak, Note, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENV'T LAW. 465, 467 n.15 (1996) (describing, in 1996, how "many different terms have been used to explain what is captured in part by the current term supplemental environmental projects (e.g., supplemental enforcement projects, alternative payments, mitigation projects, environmentally beneficial expenditures, and environmental improvement projects)."); Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217, 222 n.20 (2007).

36. Admittedly, the categorization of "third-party payments" versus other environmental project settlement provisions can be semantic and adds to the academic struggle to properly name something. For example, a Clean Air Act settlement with Toyota included a settlement provision requiring that the car company spend $20 million helping local communities by retrofitting 3,000 diesel vehicles—mostly school and municipal buses that were not manufactured by Toyota—that lacked pollution control equipment. Press Release, EPA, Toyota Motor Corporation Settlement (Mar. 7, 2003), https://www.epa.gov/enforcement/toyota-motor-corporation-settlement [https://perma.cc/AD3W-Q654]. Toyota was also required to accelerate by one year their compliance with new emissions regulations, which was expected to cost the company around $11 million. *Id.* Although the first settlement provision is a third-party payment because it benefits local communities as third parties, the primary beneficiary of the accelerated compliance is Toyota itself, or maybe the government and every taxpayer. This Note does not intend to draw a clear line. Rather, it accepts the artificial distinction and uses third-party payments as a tool for analysis for the reasons given in the following paragraph.

settlement payments crystallize larger problems of executive prosecution, prosecutorial discretion, and separation of power disputes.[37]

The practical benefits of standalone analysis are as follows. First, third-party payments are often themselves treated differently by the enforcement community. The EPA's SEP Policy and the DOJ Environmental Crimes Section's community service policy both explicitly distinguish third-party payments as their own form of settlement agreement—as a type of a SEP and as community service, respectively[38]—and private law firms mirror this distinction.[39] Second, the longstanding criticism against settlements containing environmental projects is often targeted at the third-party component of the agreement rather than the impact on defendants. There is far more criticism aimed at the idea of the DOJ directing checks to favored environmental groups than at settlements where the defendant agrees to undergo a project at their own facility or accelerate their compliance in return for a penalty mitigation. While all remedial actions suffer from similar criticisms,[40] third-party payments are particularly critiqued because of the public relations behind unelected prosecutors directing settlement funds to parties that are not direct victims, or behind a president enforcing environmental initiatives after being blocked by Congress.[41]

Finally, third-party payments are a better diagnostic tool for understanding how recent Administrations, especially under Obama, have tried to fill a vacuum in environmental lawmaking with policymaking-by-prosecution as another form of expanding executive authority. Prosecution policy is applicable outside the environmental enforcement context,[42] but the policy behind using third-party payments as a way of rectifying harms that produce indirect injury is a hallmark of environmental enforcement. Obama-Era settlements demonstrate that third-party payment provisions have the ability to enact new policy initiatives *and then pay for them* using settlement proceeds, all outside congressional barriers. As

37. One unfortunate effect of taking this position is that little analytical data exists on third-party payments as a standalone category. Thus, when yearly data is used in this Note, it often involves SEPs or other settlement forms that have been categorized.

38. *See* EPA, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 2015 UPDATE 26–28 (2015); Memorandum from Ronald J. Tenpas, Assistant Att'y Gen., DOJ, to Env't Crimes Section Att'ys, DOJ 11 (Jan. 16, 2009), https://www.justice.gov/file/1046141/download [https://perma.cc/ST3C-5Q45].

39. *See, e.g.*, Conrad Bolston, Corinne Snow, Ronald Tenpas, Patrick Traylor & George Wilkinson Jr., *Biden Administration DOJ Signals Shift in Environmental Enforcement Revoking Prior Policies*, JD SUPRA (Feb. 12, 2021), https://www.jdsupra.com/legalnews/biden-administration-doj-signals-shift-3147112/ [https://perma.cc/9SHR-W6KP]; *see also* Raymond Ludwiszewski, *EPA in the Trump Era: The DOJ's 3rd-Party Payment Policy*, LAW360 (Feb. 23, 2018, 1:55 PM), https://www.law360.com/articles/1013148/epa-in-the-trump-era-the-doj-s-3rd-party-payment-policy (describing Jeff Sessions's memorandum curtailing SEP payments, and indicating "[i]t is too early to know how this policy . . . will impact future environmental settlements."). There may be some advantage to private firms creating a distinction without a difference, especially if third-party payments are removed from DOJ policy, because of the advantages for their client in preserving environmental project settlement provisions as a part of settlement negotiations.

40. *See, e.g.*, Peterson, *supra* note 28, at 351.

41. *See* Schlossberg & Tabuchi, *supra* note 20.

42. *See infra* Section II.B.

congressional lawmaking has withered in the last few decades, executive "lawmaking" through executive orders, regulatory rulemaking, and regulatory enforcement has expanded to fill the vacuum.[43] Third-party payments represent the latest chapter in how enforcement serves executive policy goals beyond deterrence and fines for the U.S. Treasury.

This Note examines third-party payments and their role in executive policymaking in three Parts. Part I describes the historical background of third-party payments, their current forms in civil and criminal enforcement, evergreen legal and policy concerns, and their use—or non-use—by recent Administrations. Part II proposes a view of the role of third-party payments within executive power dynamics and their use as a tool of executive prosecutorial discretion. It describes the emergence of third-party payments as a consequence of tightened standing requirements and barriers to citizen suits, congressional obstruction and inaction against environmental legislation, and overall expansion in executive power as a theoretical construct. Lastly, Part III provides observations about the role of third-party payments moving forward. Ultimately, this Note presents third-party payments as a lens for executive prosecutorial discretion and as another form of executive policymaking, alongside tools like regulatory lawmaking or executive orders. It does not present third-party payments as a panacea to environmental enforcement, nor does it toss them out as an unconstitutional breach of congressional authority. As they say in Washington, "elections have consequences."[44] Settlements that direct funds to third parties may just be another consequence.

I. BACKGROUND OF THIRD-PARTY PAYMENTS

This Part describes the emergence of third-party payments in citizen suits. It sets out the history of environmental settlements in citizen suits and then summarizes the current forms of third-party payments in civil and criminal enforcement: SEPs, equitable mitigation, community service payments, and restitution. Next, it describes perennial legal concerns behind third-party payments. Finally, it completes the historical backdrop with an overview of their use in the Bush, Obama, and Trump Administrations, as well as what has started of the Biden Administration.

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43. Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369, 388 (2017) (describing how "Obama has taken unilateral actions to fill the policy vacuum created by a deadlocked Congress" in the area of climate change through executive orders). *See generally* Robert L. Glicksman, *The Constitution, the Environment, and the Prospect of Enhanced Executive Power*, 40 ENV'T L. REP. NEWS & ANALYSIS 11002 (2010) (discussing the potential expansion of executive power in the implementation of environmental legislation through the Take Care Clause and the "unitary executive" theory).

44. Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENV'T L. REV. 191, 195 (2015) (citing BOB WOODWARD, THE PRICE OF POLITICS 14 (2012)).

A. HISTORICAL BACKGROUND

Third-party payments originated alongside the rise of citizen suit provisions in environmental statutes in the 1970s.[45] Starting with the Clean Air Act, the majority of the major environmental statutes have come to include language empowering private attorneys general to enforce federal environmental laws.[46] At first, environmental groups used these powers on litigation efforts compelling regulatory agencies to act.[47] But, as EPA enforcement levels dropped in the late 1970s due to reduced staffing and agency reluctance, citizen groups shifted their focus to directly target polluters.[48] And in the resulting settlements, citizen plaintiffs started using pre-trial consent decrees to establish "environmentally beneficial expenditures": settlement terms that required the defendant donate to establish environmental organizations, agree to purchase and protect land, or establish trust funds for studies or pollution remediation.[49] The scope of many of these early settlements was directed at forming organizations for protection and cleanups, all financed by the defendant.[50]

The goal behind these initial third-party payments was to obtain damages to compensate the harms of the environmental violation at issue—an option that is not strictly permitted within most environmental statutes.[51] Typical civil penalties are inferior for many reasons. They are paid to the U.S. Treasury, which is of little value to citizen plaintiffs aside from the broader deterrence goals in enforcement.[52] They do not directly improve the environment.[53] For criminal penalties, funds stemming from criminal enforcement go to the U.S. Treasury's Crime Victims Fund, which is limited to victims of violent crimes—not environmental victims.[54] Lastly, there is a potential unfairness for typical penalties that weakens incentives for citizens to bring suit: the government receives the full benefits in

45. *See generally* David S. Mann, Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENV'T L. 175 (1991) (advocating for polluter-financed "environmentally beneficial expenditures" established through consent decrees).

46. *See* James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 1–2, 2 n.3 (2003); Katherine A. Rouse, Note, *Holding the EPA Accountable: Judicial Construction of Environmental Citizen Suit Provisions*, 93 N.Y.U. L. REV. 1271, 1276–78 (2018).

47. Quan B. Nghiem, Comment, *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. ENV'T AFFS. L. REV. 561, 567 (1997).

48. *Id.*

49. *See* Mann, *supra* note 45, at 178, 190–91. A 1988 report of 880 citizen suits filed under the Clean Water Act found that 65 ended with consent decrees that included environmentally beneficial expenditures. *Id.* at 190–91 (citing LISA JORGENSON & JEFFREY J. KIMMEL, BUREAU OF NAT'L AFFS., INC., ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION 19 (1988)).

50. *Id.* at 178.

51. *See* Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1030 (1990) (describing benefits of citizen suits under the Clean Water Act).

52. *Id.* at 1028, 1030.

53. *Id.* at 1029.

54. Harris, *supra* note 18.

an action it did not bring nor even join as a party.[55] Historically, though Congress expected that citizen suit provisions might induce government enforcers to join citizen-initiated suits, government enforcers typically do not intervene in order to save resources and instead rely on citizens to provide enforcement power.[56]

Corporate defendants also supported the rise of third-party payments—at least to the degree a defendant supports anything in an enforcement against them—and they continue to do so.[57] Some of this support is cynical: these settlements allow corporations to avoid the costs of long-running litigation[58] and generate community goodwill, termed "greenwashing," from the clean public image provided by local environmental projects.[59] However, environmental projects can also be good business decisions, with research demonstrating that defendants who agree to settlement projects become more efficient and competitive.[60] On top of this, corporations face enormous pressure to settle.[61] Proceeding to trial entails years of litigation, poor public exposure, and the risk of an unfavorable outcome—especially the career-ending indictments available in criminal cases.[62] Therefore, as a rule, most cases settle.[63] Settlement is also advantageous to the government—it saves resources and allows for better control over case outcomes[64]—and is recognized by courts as beneficial.[65]

Corporate defendants' familiarity with third-party payments from citizen suits soon translated to familiarity within the DOJ and EPA as corporate defendants began offering such payments in cases with government enforcers.[66] The EPA accepted this practice[67] and formalized environmentally beneficial expenditure settlement terms into its 1980 Penalty Policy, which allowed environmental

55. Gelpe & Barnes, *supra* note 51, at 1031.

56. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 200.

57. Harris, *supra* note 18, at 10833 (Section Chief of Environmental Crimes at DOJ discussing popularity of community service payments with corporate defendants).

58. Nghiem, *supra* note 47, at 566.

59. *See id.*; McGarity, *supra* note 27, at 1419.

60. Nghiem, *supra* note 47, at 566.

61. *See generally* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (describing the role of judges in pressuring settlements); McVean & Pidot, *supra* note 44, at 194 (demonstrating that only two percent of civil cases in 2012 went to trial).

62. Jerry W. Markham, *Regulating the "Too Big to Jail" Financial Institutions*, 83 BROOK. L. REV. 517, 568 (2018).

63. *See* Galanter & Cahill, *supra* note 61, at 1339–40.

64. *See* Kakade, *supra* note 10, at 126 & n.38.

65. *Id.* at 126 & n.39; *see, e.g.*, United States v. Ga.-Pac. Corp., 960 F. Supp. 298, 299 (N.D. Ga. 1996) ("[T]he Court recognizes the benefits of an early settlement, in particular the environmental benefits that will accrue from [Georgia–Pacific's] immediate implementation of the injunctive measures contained in the Decree . . . .").

66. Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 416 (2004).

67. *See* Mann, *supra* note 45, at 191 & n. 93 (citing cases in which the EPA accepted environmentally beneficial expenditures as terms of settlements instead of enforcement through penalty payments directly to the government).

defendants to "make expenditures for environmentally beneficial purposes above and beyond expenditures made to comply with all existing legal requirements, in lieu of paying penalties to the treasury of the enforcing government."[68] Initial support for third-party payments was not widespread, and the DOJ engaged in strong pushback.[69] The government's use and view of environmental projects then went through a "love-hate relationship."[70] Legality concerns caused the Comptroller General to issue an opinion criticizing the EPA's Penalty Policy.[71] In response, the EPA re-crafted its policies on SEPs,[72] and the Office of Legal Counsel has since found settlement projects valid.[73]

B. MODERN THIRD-PARTY PAYMENTS

Current government policy permits third-party payments on both the civil and criminal side.[74] In civil enforcement, they are structured as SEPs and equitable mitigation. The basis for third-party payments in criminal enforcement is largely the same, albeit under different nomenclature. The U.S. Sentencing Guidelines allow for restitution, which focuses on reimbursing the losses of identifiable victims, as well as community service, which is used to address harms where individual victims cannot be verified.[75] While the DOJ typically does not permit payment to indirect victims in criminal sentencing agreements, the Justice Manual explicitly excepts payment that provides restitution or "that otherwise directly remedies the harm that is sought to be redressed, including, for example,

68. Lloyd, *supra* note 66 (citation omitted); Kristl, *supra* note 35, at 222.

69. Nghiem, *supra* note 47, at 568–69.

70. *See* Kristl, *supra* note 35, at 223; *see also* Lloyd, *supra* note 66, at 422–34 (describing congressional response to SEP development by Congress and the United States Comptroller General and by the executive branch through the 1980s and 1990s).

71. *See* Decision of the Comptroller General, U.S. Gov't Accountability Off. to Hon. John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, H. Comm. on Energy & Com., B-247155, 1992 WL 726317 (Comp. Gen. July 7, 1992). For a summary, see Peterson, *supra* note 28, at 352–54.

72. The EPA began articulating a separate SEP Policy statement in the 1990s, culminating in a 1991 policy on the use of SEPs in enforcement settlements and a final SEP Policy in 1998. Kristl, *supra* note 35, at 225. These have since been revised many times. *See generally id.* at 225–41 (reviewing revision history of the SEP Policy).

73. Application of the Gov't Corp. Control Act & the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111, 120 (2006); H.R. Rep. No. 115-72, at 34. Specifically, the Miscellaneous Receipts Act is not violated by settlement payments when they are funded with money not obligated to the Treasury and the Executive Branch retains no post-settlement control of the money. Hannah Perls, *Deconstructing Environmental Deregulation Under the Trump Administration*, 45 VT. L. REV. 591, 635 (2021).

74. Third-party payments are also authorized by courts. Lloyd, *supra* note 66, at 413–14. Though full treatment of equitable relief is outside the scope of this Note, some academics have suggested that courts possess the authority to impose SEPs on their own under broad equitable discretion powers. *See* Nghiem, *supra* note 47, at 588–90. In this context, projects and payments created as court-fashioned equitable relief avoid some of the legal issues surrounding the Miscellaneous Receipts Act because they are injunctive in nature. Lloyd, *supra* note 66, at 420.

75. *See* Memorandum from Ronald J. Tenpas, *supra* note 38, at 1; U.S. SENT'G GUIDELINES MANUAL §§ 8B1.1, 8B1.3 (U.S. SENT'G COMM'N 2021).

harm to the environment."[76] Therefore, third-party payments are permitted so long as they are applied "in addition to and not in lieu . . . of fines and terms of incarceration."[77]

1. Supplemental Environmental Projects

Many civil third-party payments, if not the majority, are structured as Supplemental Environmental Projects (SEPs). The EPA's SEP Policy guides settlements where, as part of the settlement agreement, the defendant agrees to "undertake a project to provide tangible environmental or public health benefits to the affected community or environment, that is closely related to the violation being resolved, but goes beyond what is required under federal, state or local laws."[78] SEPs result in third-party payments in two instances. First, SEPs allow defendants to remedy harms to third parties by completing specific projects to benefit third-party recipients.[79] But the defendants cannot simply provide funds as a cash donation or money transfer—the defendants must themselves be responsible for completing the project.[80] Second, defendants can pay outside groups of their choosing to help implement the SEP.[81] The Policy requires that defendants "remain responsible for ensuring that a SEP is completed satisfactorily."[82] Nevertheless, defendants can use private organizations as contractors or consultants to implement a SEP or to help recommend SEPs during negotiations.[83] Some organizations specifically act as clearinghouses for projects and offer to manage funds.[84] Again, payments are permitted so long as the transaction is

76. DOJ, Just. Manual § 9-16.325 (2020).

77. Memorandum from Ronald J. Tenpas, *supra* note 38, at 2 (emphasis omitted). While this policy was revoked by the Trump Administration, it has since been restored under the Biden Administration. *See* Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., DOJ, to Deputy Assistant Att'ys Gen. & Section Chiefs, Env't & Nat. Res. Div., DOJ 7–8 (Jan. 13, 2021), https://www.justice.gov/enrd/file/1353501/download [https://perma.cc/5RGU-HHK2]; Memorandum from Jean E. Williams, Deputy Assistant Att'y Gen., DOJ, to Section Chiefs & Deputy Section Chiefs, Env't & Nat. Res. Div., DOJ 1–2 (Feb. 4, 2021), https://www.justice.gov/enrd/page/file/1364716/download [https://perma.cc/N8GW-DED5].

78. *Supplemental Environmental Projects (SEPs)*, *supra* note 33.

79. EPA, *supra* note 38, at 27–28.

80. *See id.* at 17, 26. *See also* Memorandum from John Peter Suarez, Assistant Adm'r, Off. of Enf't & Compliance Assurance, EPA, to Assistant Adm'rs, Reg'l Adm'rs, Deputy Assistant Adm'rs, Deputy Reg'l Adm'rs, Off. Enf't Compliance Assurance Staff & Reg'l Enf't Staff 2 (June 11, 2003), https://www.epa.gov/sites/default/files/2018-10/documents/seps-expandingusetab7.pdf [https://perma.cc/YYV4-XLRR] (providing guidance that "projects that are not acceptable as SEPs" include "[d]onations to third parties"); Memorandum from John Peter Suarez, Assistant Adm'r, Off. of Enf't & Compliance Assurance, EPA, to Reg'l Couns., Reg'l Enf't Managers, Reg'l Media Div. Dirs. & Reg'l Enf't Coordinators 4 (Dec. 15, 2003), https://www.epa.gov/sites/default/files/2018-10/documents/seps-thirdpartiestab11.pdf [https://perma.cc/5R4F-QEQU] [hereinafter Suarez, Dec. 2003 Memorandum] ("Defendants/respondents may not simply make a cash payment to a third party conducting a project without retaining full responsibility for the implementation or completion of the project . . . .").

81. EPA, *supra* note 38, at 26–27.

82. *Id.* at 26.

83. Suarez, Dec. 2003 Memorandum, *supra* note 80.

84. *Id.*

structured such that the implementer is a contractual service provider and not a "mere recipient[] of donated funds."[85]

Despite the stated limits, the government does have some control in the type of project because the SEP Policy only permits certain categories of projects. These eight categories cover EPA policy goals such as "public health" and "environmental restoration and protection."[86] Without data on negotiations and preferred outcomes for players on both sides, it is difficult to tell whether government enforcers can use these categories to steer defendants or narrow down—but not require—a certain project. Nevertheless, the vast amount of prosecutorial discretion already embedded in prosecutions and settlements suggests that despite policy requirements, the EPA and DOJ have the ability to emphasize certain goals.[87] For example, some categories, such as "environmental restoration and protection," specifically target broader community projects, and the "environmental compliance promotion" category targets projects that provide training and technical support to "other members of the regulated community."[88] These projects are by definition likely to result in third-party recipients.

2. Equitable Mitigation

Third-party payments can also be structured as equitable mitigation.[89] Typically, mitigation is defined as an injunctive relief obligation that is separate from continuing compliance and meant to "remedy, reduce or offset past (and in some cases ongoing) harm caused by the alleged violations."[90] Although SEPs are negotiated, equitable mitigation requires judicial oversight, is based on the likelihood of a need to address harms, and is meant to restore the status quo.[91] These obligations require a stronger nexus, and an agreement to perform mitigation

85. *Id*.

86. EPA, *supra* note 38, at 11–17.

87. *See infra* Part II.

88. EPA, *supra* note 38, at 13, 16 (emphasis omitted).

89. Recent administrations, including the Trump Administration, have had the same understanding. Under Trump, the DOJ held that general, statutory authorizations for equitable mitigation—such as a provision of the Clean Air Act, which allows the government to "require compliance" and "award any other appropriate relief," 42 U.S.C. § 7413(b)—allow for both prospective relief and injunctive relief to remedy past violations. *See* Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., DOJ, to Deputy Assistant Att'ys Gen. & Section Chiefs, Env't & Nat. Res. Div., DOJ 2 (Jan. 12, 2021), https://www.justice.gov/enrd/file/1352946/download [https://perma.cc/F9LG-2ZVB]. Though statutory authorizations, such as the Clean Air Act provision, only speak of prospective relief, both forms of relief are permitted because equitable mitigation is granted under a district court's equitable powers—that is, they are not ratifying a DOJ or EPA settlement. *Id*. at 3. Thus, carefully tailored relief structured only to remedy past violations—and "not a blank check"—was found permissible. *Id*. at 4. SEPs, which do not remedy specific past harms, are by definition not mitigation. *Id*. at 5. While this distinction covers most third-party payments for environmental projects covering indirect harms, it does not per se prohibit third-party payments that directly remedy past harms.

90. Memorandum from Susan Shinkman, Dir., Off. of Civ. Enf't, EPA, to Reg'l Counsels, Reg'l Enf't Div. Dirs., Reg'l Enf't Coordinators & Off. of Civ. Enf't Div. Dirs. 2 (Nov. 14, 2012), https://www.epa.gov/sites/default/files/2016-08/documents/2ndeditionsecuringmitigationemo.pdf [https://perma.cc/66PE-RKFC].

91. *Id*. at 3–4.

does not entitle a defendant to any civil penalty reduction.[92] In some cases, however, the government has recognized that "the same type of activity could constitute mitigation in one case and a SEP in another."[93]

3. Community Service

For criminal prosecution, the U.S. Sentencing Guidelines allow third-party payments in the form of community service or restitution. Community service is a sentencing option that remedies "the harmful effects of the crime of conviction itself, not effects that may be indirectly related to the type of crime committed."[94] This includes third-party payments to directly remedy the harm.[95] While narrow in definition, the DOJ has interpreted indirect harms to include payments that address harms even several years after the crime was committed when "the offense conduct still can be identified" and the project can "reasonably offset that harm," even if individual victims are not identifiable.[96] Under this interpretation —and similar to SEPs—the Criminal Division permits community service payments to implementers to carry out remedial work and to recipients as beneficiaries of the project.[97] Also like SEPs, the government cannot retain control or manage the community service project funds.[98] The Guidelines do not allow community service payments unrelated to the purposes of sentencing, prohibiting, for example, "[r]equiring a defendant to endow a chair at a university or to contribute to a local charity" unless "such community service provided a means for preventative or corrective action directly related to the offense."[99] Overall, the

92. *Id*. at 4.

93. *Id*.

94. Memorandum from Ronald J. Tenpas, *supra* note 38, at 3; *see, e.g*., Stop Settlement Slush Funds Act of 2016: Hearing on H.R. 5063 Before the Subcomm. on Regul. Reform, Com., & Antitrust L. of the H. Comm. on the Judiciary, 114th Cong. 45–53 (2016) (statement of David M. Uhlmann, Professor, University of Michigan) (calling third-party payments "community service payments"). The DOJ has also called these payments "donations." Paul J. Larkin Jr., *The Justice Department's Third-Party Payment Practice, the Antideficiency Act, and Legal Ethics*, 17 FEDERALIST SOC'Y REV. 28, 29 (2016).

95. Harris, *supra* note 18. Deborah Harris, Section Chief of Environmental Crimes at DOJ, described using community service payments in every plea agreement "that we could rationally fit it in . . . when we had a pre-agreement with a business organization or corporation, so that we could directly remedy the harm that had been caused by the violation." *Id*.

96. Memorandum from Ronald J. Tenpas, *supra* note 38, at 5.

97. *Id*. at 5–6. The Memorandum finds that while the Guidelines' "commentary speaks of the violator's taking a direct hand in the work involved, it also contemplates the defendant's paying others to do the work." *Id*. at 3.

98. *Id*. at 9–10.

99. U.S. SENT'G GUIDELINES MANUAL § 8B1.3 (U.S. SENT'G COMM'N 2021). The larger text of § 8B1.3 states:

> An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

Id. The comments provide the exception for "preventive or corrective action." *Id*.

Division has interpreted this as a nexus requirement, which it borrows in part from the EPA SEP Policy.[100]

4. Restitution

Unlike community service, the DOJ has been more dismissive of restitution serving as grounds for third-party payments in criminal prosecution. Restitution is seen as intended to reimburse losses to "specifically identifiable victims."[101] Victims are defined as people "directly and proximately harmed" as a result of the offense,[102] making this a condition that is "difficult" to satisfy in environmental cases.[103] Two other complicating factors are that restitution is granted discretionarily by courts as a condition of probation and that, at times, courts have concluded that the government may be broadly defined as a victim.[104] Generally, the DOJ has prioritized restitution when there are identifiable victims, but more often looks to community service for sentencing because of indirect victims.[105]

Some academics have labeled third-party payments in criminal agreements as "extraordinary restitution"[106] because, while typical restitution is intended to repay losses to direct victims, third-party payments can be construed as repaying losses to a less-than-directly harmed larger community. Proponents of the "extraordinary restitution" label borrow this term from its other use as a departure from the Sentencing Guidelines for a defendant that pays restitution but does not otherwise receive a credit in entering a plea.[107] One researcher theorizes that

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100. *See* Memorandum from Ronald J. Tenpas, *supra* note 38, at 8 & n.23. The memorandum notes:

> In sum, the practice of environmental crimes prosecutors allowing defendants to pay for remedial work that has a geographical and medium nexus to the crime at issue is consistent with the purpose of [the Sentencing Guidelines at] 18 U.S.C. § 3563(b)(12). That provision . . . does not appear to preclude a somewhat broader interpretation than the Sentencing Commission's focus only upon the harm caused by the crime of conviction.

Id. at 6.

101. *Id*. at 1.

102. 18 U.S.C. § 3663(a)(2).

103. Memorandum from Ronald J. Tenpas, *supra* note 38, at 3.

104. *Id*. at 2–3.

105. Despite this, some academics have argued that environmental projects like SEPs can be imposed as restitution or monetary fines combined with the requirement that the defendant undertake an environmentally beneficial project. *See* Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENV'T L.J. 243, 248 (1995). Professor Harrell argues that payments requiring a defendant to reimburse a third party for cleaning up environmental damage, as well as broader actions such as restoring damaged wetlands, can be grounded on the basis of restitution. *Id*. at 267–68. In this context, the "victim" is the environment or public at large. *Id*. at 268. This view of the criminal guidelines is less accepted in the enforcement community. *See* EPA, *supra* note 26, at 3, 5. Professor Harrell also grounds third-party payments and SEPs more broadly in the community service provision but does not take the broader reading of community service extending to indirect victims later taken by the DOJ in the Tenpas memorandum. *See* Harrell, *supra*, at 270.

106. Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1, 8 (2013).

107. *See* CATHARINE M. GOODWIN, *§ 13:5 Departure for Extraordinary Restitution*, *in* FEDERAL CRIMINAL RESTITUTION (2021); Aliza Hochman Bloom, *Harsher Penalties for the Poor: Constitutional*

extraordinary restitution in environmental cases might be justified because environmental harms are too diffuse to justify separate proceedings and compensation for each victim, yet is troubled by the understanding that these payments do not qualify as permissible fines, criminal restitution, or community service.[108] And in some cases, these extraordinary restitution payments are particularly colorful: one settlement required a defendant to endow the chair of business ethics at Seton Hall Law School, the alma mater of Christopher Christie, the U.S. Attorney who was supervising the case.[109]

Third-party payments in the context of environmental projects, however, are different from the traditional understanding of extraordinary restitution, which includes plea agreement terms that require the defendant to pay funds to third parties even where the services do not redress harms caused by the defendant's conduct, whether direct or indirect.[110] This latter form of payments is specifically excluded by the Guidelines,[111] which names agreements to endow a chair as an example.[112] Extraordinary restitution settlement terms were also further restricted by the DOJ in a 2008 memorandum, but this memorandum did not "restrict the use of community service as a condition of probation for environmental prosecutions."[113]

C. CRITICISM

Since the formulation of settlement project policies and the first use of third-party payments, critics have raised various legal and policy concerns related to their use. Constitutionally, critics of third-party payments highlight that using settlement proceeds—which the government receives in exchange for a reduction in the monetary fine—circumvents the Treasury and Congress's constitutional appropriations power.[114] Article I requires, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[115] By decreasing the applicable penalty destined for Treasury coffers, third-party

Considerations of a Defendant's Ability to Pay Restitution in Sentencing, 16 CONN. PUB. INT. L.J. 209, 216–17 (2017).

108. *See* Larkin, Jr., *supra* note 106, at 35–37.

109. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 202 n.37, 213–14 (2016); *see* Deferred Prosecution Agreement at ¶ 20, SEC v. Bristol-Myers Squibb, Co., Civ. Action No. 04-3680 (D.N.J. 2005), https://www.sec.gov/Archives/edgar/data/14272/000119312505125970/dex992.htm [https://perma.cc/BU9D-RSK5].

110. Memorandum from Mark Filip, Deputy Att'y Gen., DOJ, to Holders of the U.S. Att'ys Manual 1 (May 14, 2008), https://perma.cc/7QUC-SMZZ.

111. *See supra* note 99 and accompanying text.

112. U.S. SENT'G GUIDELINES MANUAL § 8B1.3 (U.S. SENT'G COMM'N 2021).

113. Memorandum from Mark Filip, *supra* note 110, at 2.

114. *See* Peterson, *supra* note 28, at 347–48 (noting how the DOJ can "leverage its enforcement litigation authority to obtain settlements" that, among other things, "effectively augment the appropriations of the executive branch without running afoul of the technical requirements of the Miscellaneous Receipts Act—although creating an unconstitutional interference with Congress's appropriations power").

115. U.S. CONST. art. I, § 9, cl. 7.

payments ostensibly encroach on constitutional separation of powers.[116]

1. Statutory Criticism

Two statutes further support the critics' position. First, the Antideficiency Act prevents federal agencies from making contracts without authorization by statute or appropriation.[117] Second, the Miscellaneous Receipts Act (MRA) prevents agencies from circumventing congressional appropriations by requiring that any "official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury . . . ."[118] In effect, these statutes require that monetary fines be deposited in the Treasury and prevent these fines from either serving the purposes of the DOJ prosecutors leading the settlement or augmenting projects within the scope of the EPA's duties.[119] The Antideficiency Act also sought to prevent another "augmentation problem," where settlement project funds are used to target EPA goals, which opens up additional funds appropriated by Congress for another purpose.[120] This workaround of the MRA avoids the statute's technical requirements because the third-party payments never actually pass through the government—they are between one party and another and are only facilitated by government action.[121] On top of this, penalties are not government-owned until a final settlement is reached, so third-party payments are never designated as statutory "receipts."[122] Nevertheless, this method—according to critics—violates the spirit of the MRA and is an unconstitutional breach of the congressional appropriations power.[123]

In the early 1990s, legality concerns caused the Comptroller General to issue an opinion criticizing the EPA's Penalty Policy.[124] In response, the EPA re-crafted its policies on SEPs[125] to include a nexus requirement, which is an obligation that the environmental project relate to the underlying violation in the settlement and be

116. Some scholars note that this contrasts with a president's Article II powers to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, which grants a president broad authority over settlement agreements. McGarity, *supra* note 27, at 1419–20.

117. 31 U.S.C. § 1341(a)(1)(B); *see* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 923 (codified as amended at 31 U.S.C. §§ 1341–51). *See generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1370–72 (1988) ("The anti-deficiency rule thus prevents unfunded monetary liabilities beyond the amounts Congress has appropriated.").

118. 31 U.S.C. § 3302(b); *see* Act of Mar. 3, 1849, ch. 110, 9 Stat. 398. *See generally* Stith, *supra* note 117, at 1364–65 (explaining the necessity of depositing funds to be "received 'for the use of the United States' or 'for the Government'" to the federal Treasury under the Miscellaneous Receipts statute).

119. Peterson, *supra* note 28, at 352.

120. *Id.*

121. Perls, *supra* note 73.

122. *Id.* The DOJ Office of Legal Counsel agrees with this position. *See infra* text accompanying note 129.

123. Peterson, *supra* note 28, at 348.

124. *See* sources cited *supra* note 71.

125. The EPA began articulating a separate SEP Policy statement in the 1990s, culminating in a 1991 policy on the use of SEPs in enforcement settlements and a final SEP Policy in 1998. Kristl, *supra* note 35, at 225. These have since been revised many times. *See generally* Peterson, *supra* note 28, at 354–57 (describing the five requirements that were promulgated under the final 1998 SEP policy).

consistent with at least one objective of the environmental statute that serves as the basis for the enforcement action.[126] And to avoid augmentation concerns, the policy prohibited the government from playing a role in managing or controlling the funds for the project or directing which third party implements the project or benefits from it.[127] Additionally, the EPA policy prevented projects used to support, satisfy, or perform particular activities within the EPA's obligations or to provide financial assistance to a recipient that receives federal funds for the same activity.[128] Altogether, these changes aimed to address many of the primary legal concerns. The Office of Legal Counsel has since agreed that ensuring against government control of the settlement and requiring that the settlement is executed "before an admission or finding of liability" prevents problems with augmentation or the statutory requirements under the MRA.[129] Nexus requirements have since traveled to non-SEP settlement policies and criminal agreements[130] and survived changes to the SEP Policy.[131]

2. Policy Criticism

Alongside constitutional and statutory concerns, commentators have denounced third-party payments on policy concerns, namely the unsightliness of prosecutors funneling money to favored nonprofits and external organizations that are not the victims of a federal environmental offense.[132] Though this concern about prosecutor pet projects has typically been leveled by conservative commentators opposed to payments to traditionally liberal groups like environmental nonprofits, these commentators have also turned the tables to hypothesize that a settlement provision could be used to provide project funding to the National Rifle Association[133] or "to the imaginary 'make everybody show a driver's license foundation' based in, oh I don't know, Georgia, Michigan, Pennsylvania and

126. EPA, *supra* note 38, at 7–8.

127. *Id*. at 8–9.

128. *Id*. at 9–10; *see* Memorandum from Ronald J. Tenpas, *supra* note 38, at 8–9.

129. Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., DOJ to Deputy Assistant Att'y Gens. & Section Chiefs, Env't & Nat. Res. Div. 2 n.2 (Mar. 12, 2020), https://www.justice.gov/enrd/file/1257901/download [https://perma.cc/AXW5-P8HF]; *see supra* note 73 and accompanying text.

130. Memorandum from Ronald J. Tenpas, *supra* note 38, at 5–6, 8, 20 n.23.

131. McGarity, *supra* note 27, at 1408; EPA, *supra* note 38, at 7.

132. *See, e.g.*, JOHN H. BEISNER, GEOFFREY M. WYATT, JORDAN M. SCHWARTZ, ANDREW J. PINCUS & SEAN P. MCDONNELL, U.S. CHAMBER INST. FOR LEGAL REFORM, ENFORCEMENT SLUSH FUNDS: FUNDING FEDERAL AND STATE AGENCIES WITH ENFORCEMENT PROCEEDS 16–17 (2015), https://instituteforlegalreform.com/research/enforcement-slush-funds-funding-federal-and-state-agencies-with-enforcement-proceeds/ [https://perma.cc/WC49-ZRYZ].

133. JOHN ALLISON, JAMES CONDE, CHARLES COOPER, ELLIOT GAISER, C. BOYDEN GRAY, ADAM GUSTAFSON, JASON JOHNSTON, CLETA MITCHELL, JOHN SHU, ANNIE DONALDSON TALLEY & GEORGE TERWILLIGER, REGUL. TRANSPARENCY PROJECT, IMPROPER THIRD-PARTY PAYMENTS IN U.S. GOVERNMENT LITIGATION SETTLEMENTS 1 (2021), https://regproject.org/wp-content/uploads/RTP-Enforcement-and-Agency-Coercion-Working-Group-Paper-Improper-Third-Party-Payments-In-US-Government-Litigation-Settlements.pdf [https://perma.cc/7PAE-AMY9] (describing this hypothetical in the context of a "'Democratic Socialist' administration" sending funds to the Earth Liberation Front and a Republican Administration sending funds to the National Rifle Association).

Wisconsin."[134] Of course, this position assumes that a donation to the National Rifle Association or imaginary voter identification group could meet settlement project requirements and reasonably offset the harm of an environmental violation or "provide tangible environmental or public health benefits to the affected community or environment" in a way that is closely related to the environmental violation at issue.[135]

Another policy concern is "greenwashing," a term that describes violators' practice of utilizing grand, public environmental projects as a method of cleaning up their worsening reputation—as caused by the violation.[136] Environmental settlement projects are a result of violations; they are not intended as opportunities to garner goodwill. This "good press," plus the enhanced relationship with the EPA, may actually serve to economically benefit the violator when combined with the expected savings of a reduced fine.[137] To mitigate this concern, the 2015 EPA SEP Policy Update requires that violators publicly disclose that the projects are part of an enforcement action.[138]

Critics from the environmental justice movement highlight that third-party payments reflect the result of negotiation by government officials and not the community at large—the indirect victims that the third-party payment system is intended to benefit.[139] While defendants can reach out to community members for information, the public is only informed after the settlement is set.[140] And, the EPA only solicits public comments for settlement projects that have already been negotiated.[141] These policy concerns have not yet been addressed, but no presidential Administration until Biden's has had a strong focus on environmental justice and community outreach.[142]

Lastly,[143] critics of third-party payments highlight that a primary purpose of enforcement penalties is to deter noncompliance, and that deterrence is not successful when a settlement project lowers the overall cost of noncompliance,

134. Jacqueline Thomsen, *A Return to Third-Party Settlement Payments at the Biden DOJ? Conservatives Are Wary*, NAT'L L.J. (Apr. 14, 2021), https://www.law.com/nationallawjournal/2021/04/14/a-return-to-third-party-settlement-payments-at-the-biden-doj-conservatives-are-wary/.

135. *Supplemental Environmental Projects (SEPs)*, *supra* note 33.

136. McGarity, *supra* note 27, at 1423.

137. Laurie Droughton, Note, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENV'T L. REV. 789, 809–10 (1995).

138. EPA, *supra* note 38, at 26; *see also* McGarity, *supra* note 27, at 1423.

139. *See* McGarity, *supra* note 27, at 1423–24; Eric Anthony DeBellis, *Implementing Supplemental Environmental Project Policies to Promote Restorative Justice*, ECOLOGY L.Q. (Mar. 11, 2016), https://www.ecologylawquarterly.org/currents/implementing-supplemental-environmental-project-policies-to-promote-restorative-justice/ [https://perma.cc/KV62-WGWQ]. *See generally* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1491 (2017) ("Some settlements involve parallel negotiation and settlement of actions by civil, criminal, and private litigants.").

140. DeBellis, *supra* note 139.

141. *Id.*

142. *See infra* Section I.D.

143. There are many more substantive policy critiques of third-party payments. These recurring concerns are a general backdrop. *See, e.g.*, McGarity, *supra* note 27, at 1419; BEISNER ET AL., *supra* note 132, at 9 (critiquing agencies using settlement proceeds as discretionary "slush funds").

grants benefits in the form of greenwashing, and reduces litigation costs associated with an easier settlement.[144] For some, the best evidence of reduced deterrence is that corporate defendants themselves prefer settlement projects.[145] However, some scholars on the other side argue that settlement projects are *too* tailored to punishment rather than remedying the harm and benefiting the public.[146]

Overall, a number of legal and policy criticisms have surfaced since the inception of third-party payments. Some, like greenwashing concerns, have been mollified through policy updates, while others remain evergreen issues to critics. Despite these ongoing concerns, multiple presidential Administrations—up to the Trump Administration—have permitted third-party payments and expanded their use in recent decades.

D. THIRD-PARTY PAYMENTS IN THE TWENTY-FIRST CENTURY EXECUTIVE BRANCH

1. Bush Administration

By the start of the second Bush Administration, third-party payments had survived three policy updates under the EPA's SEP Policy[147] and were established within criminal prosecution settlement policy.[148] Despite Bush's mixed record on environmental enforcement,[149] the number of EPA enforcement actions with a monetary value, which had been rising slowly since the early 1980s, peaked in 2006, during the second Bush Administration.[150] The use of EPA SEPs also hit a high in 2006 in terms of their number (243 in the year) and total value (around $90 million).[151]

The Bush Administration had a particular focus on using SEPs in litigation with coal power plants to force them to close or work on clean energy projects.[152] Terms of various settlements started by his administration included requirements that one power company spend $14.4 million on alternative power, namely wind

144. *See* McGarity, *supra* note 27, at 1407, 1425–28.

145. *See e.g.*, EPA, *supra* note 38, at 23–24.

146. *See* Kakade, *supra* note 10, at 136.

147. The SEP Policy was formalized in 1991 and substantially revised in 1995 and 1998. *See* McGarity, *supra* note 27, at 1408.

148. 18 U.S.C. § 3563(b)(12), which allows for "work in community service," was part of the Sentencing Reform Act of 1984. *See generally* Harrell, *supra* note 105 (discussing the impact of broader sentencing authority on enforcement of environmental law). The U.S. Sentencing Guidelines, which provided guidance on "community service" became effective in 1991. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 8D1.3(b) (U.S. SENT'G COMM'N 2021) (giving community service as one alternative for courts to impose where an organization has been sentenced with probation for a felony).

149. *See* David M. Uhlmann, *Strange Bedfellows*, 25 ENV'T F. 40, 40 (2008). However, total yearly enforcement numbers during the Obama Administration were actually less than the average yearly enforcement levels in Bush's second term, in part because of a decline in EPA resources. *See* David M. Uhlmann, *New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration* 2 (Univ. of Mich. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 685, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710109 [hereinafter Uhlmann, *New Environmental Crimes*].

150. OFF. OF INSPECTOR GEN., *supra* note 5, at 5.

151. *Id.* at 16, 28.

152. *See* McGarity, *supra* note 27, at 1410–11.

or landfill gas; $215,000 on projects for the National Park Service; and $400,000 for solar power for local municipal buildings.[153] Another settlement with Wisconsin Light and Power required that the company spend more than $250,000 each on projects for the U.S. Forest Service and National Park Service, and almost $7.5 million on various restoration and clean energy projects.[154]

These coal plant settlement projects were not all purely third-party payments in form. Many included hundred-million-dollar retrofits to the defendant or mandated retirement of old energy generation units—actions that primarily benefitted the settling defendant or the federal government at large.[155] But many also included third-party provisions with a focus on restorative justice. Alcoa, an aluminum producer, agreed to spend $2.5 million on projects, including retrofitting local school buses with pollution control devices and maintaining public lands for wildlife habitat through a nonprofit.[156] Overall, the value of mitigation projects—third-party and not—averaged $6.1 million over twenty-two Clean Air Act settlements with coal-fired plants.[157] Fourteen of these settlements during the Bush Administration included $202 million total on environmental projects and over $10 billion in agreements to install pollution control equipment or to change coal-fired plants to natural gas.[158]

2. Obama Administration

The Obama Administration continued using third-party payments and—for some commentators—expanded the size and scope of the projects being paid for. First, both the civil SEP Policy and criminal community service policy were updated into their modern forms during Obama's tenure.[159] Opponents remained (and remain) on both sides: a host of scholarship exists even after these policy updates arguing, for example, that MRA and augmentation problems still persist[160] or that the nexus requirement is overly restrictive in permitting valuable

153. Press Release, EPA, Ohio Edison Company, W.H. Sammis Power Station, Clean Air Act - 2005 Settlement and 2009 Modified Settlement (Aug. 11, 2009), https://www.epa.gov/enforcement/ohio-edison-company-wh-sammis-power-station-clean-air-act-2005-settlement-and-2009#main-content [https://perma.cc/KYX8-TYUZ]; McGarity, *supra* note 27, at 1410–11.

154. Press Release, DOJ, Clean Air Act Settlement with Wisconsin Utilities to Reduce Emissions by More Than 50,000 Tons Annually (Apr. 22, 2013), https://www.justice.gov/opa/pr/clean-air-act-settlement-wisconsin-utilities-reduce-emissions-more-50000-tons-annually [https://perma.cc/26B3-9UQE].

155. *See* Michael L. Rustad, Thomas H. Koenig & Erica R. Ferreira, *Restorative Justice to Supplement Deterrence-Based Punishment: An Empirical Study and Theoretical Reconceptualization of the EPA's Power Plant Enforcement Initiative, 2000-2011*, 65 OKLA. L. REV. 427, 443–51 (2013).

156. Press Release, EPA, Alcoa, Inc. Clean Air Act Settlement (Apr. 9, 2003) https://www.epa.gov/enforcement/alcoa-inc-clean-air-act-settlement [https://perma.cc/4DAL-LCAN].

157. Rustad et al., *supra* note 155, at 448.

158. McGarity, *supra* note 27, at 1411.

159. *See supra* Section I.B.

160. Some critics argue that, even if the money never passes through the government, it can be viewed as a constructive receipt of funds that still circumvents Congress's appropriations power. *See* Peterson, *supra* note 28, at 331; *see also* McGarity, *supra* note 27, at 1421 ("[M]onies spent to implement SEPs never reach federal officials in the first place. Critics argue that there may still be a 'constructive receipt' of funds . . . ."); Michael Patrick Wilt, *Evaluating "Consumer Relief" Payments in Recent Bank Settlement Agreements*, 17 J. BUS. & SEC. L. 253, 287–89 (2017) (arguing that third-party

projects.[161] New for Obama, however, was increased critique of the political dimensions of payments, such as the rebranding of EPA enforcement against coal plants as "Obama's war on coal,"[162] even though the process was started in the early 2000s.

In terms of total settlement projects and total environmental enforcement actions, activities by the Obama Administration leveled off or dropped precipitously.[163] The number and value of SEPs followed the same trend, dropping off from their peak in 2006, though some of this is attributable to a similar drop in the EPA budget and enforcement workforce.[164] However, the number of high-value enforcement actions—those with penalties of more than $1 million—increased by one-third, and the average value of high-value enforcement actions increased by fifteen times.[165] This is partly because for two different years the EPA topped a billion dollars in enforcement penalties.[166]

While the data on settlement projects demonstrates an overall decrease from Bush to Obama, aside from high-value enforcement penalties, the publicity and panache of these agreements seemed to increase, and third-party payments took a front seat in high-profile cases. While many Bush-Era settlement agreements were labeled as "mitigation projects"—that is, projects that sought to restore the status quo ante—Obama-Era settlements targeted forward-looking obligations to remediate environmental harms.[167] For example, Volkswagen's defeat device settlement required that the car company come into Clean Air Act compliance in a

payments violate the MRA and Antideficiency Act). *See generally* Larkin, *supra* note 94, at 33 (arguing that "[s]everal different sources of law" point to the illegality of third-party payments); BEISNER ET AL., *supra* note 132, at 18 (arguing that third-party payments are not authorized by statute).

161. *See* Kristl, *supra* note 35, at 220; Brooke E. Robertson, Note, *Expanding the Use of Supplemental Environmental Projects*, 86 WASH. U. L. REV. 1025, 1040 (2009); *cf.* Elizabeth R. Thagard, Note, *The Rule That Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENV'T L. REV. 507, 507 (1992) ("The purpose of the Clean Water Act . . . is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters;' it is not to supplement the country's admittedly depleted coffers with relatively paltry sums garnered as fines from polluters." (footnotes omitted) (citing 33 U.S.C. § 1251(a))). *See generally* McGarity, *supra* note 27 (discussing SEPs and arguing they are beneficial); Rubin, *supra* note 29 (same); David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181 (discussing SEPs and arguing they may generate and exacerbate underdeterrence of environmental law violations); Andrew J. Currie, Comment, *The Use of Environmentally Beneficial Expenditures in Lieu of Penalties As Settlement of Citizen Lawsuits: A "Win-Win" Solution?*, 1996 DET. COLL. L. REV. 653 (discussing "environmentally beneficial expenditures" established through consent decrees and arguing they can be a useful tool to address pollution); Mann, *supra* note 45 (same).

162. Rustad et. al., *supra* note 155, at 429 & n.6; Michael Grunwald, *New Carbon Rules the Next Step in Obama's War on Coal*, TIME (June 1, 2014, 6:00 PM), https://time.com/2806697/obama-epa-coal-carbon/.

163. *See* OFF. OF INSPECTOR GEN., *supra* note 5, at 5–13.

164. *See id.* at 16, 22–24, 28; *EPA's Budget and Spending*, ENV'T PROT. AGENCY, https://www.epa.gov/planandbudget/budget [https://perma.cc/8X4L-5DUK] (July 30, 2021).

165. OFF. OF INSPECTOR GEN., *supra* note 5, at 1, 15.

166. *Id.*

167. *See* Kakade, *supra* note 10, at 133–34. Kakade describes how mitigation projects, which sometimes can constitute SEPs under the EPA policy but not always, took a "sharp turn" with the Volkswagen settlement. *Id.* at 134.

prospective manner as well as establish a mitigation trust to educate consumers and support zero-emissions charging infrastructure.[168] Other settlements were similar. Duke Energy settled Clean Air Act violations by agreeing to spend $4.4 million on environmental mitigation projects that included $175,000 payments to the U.S. Forest Service and National Park Service for soil restoration to mitigate acid deposition on plants and animals caused by coal power plants found in violation, as well as a project to install "advanced truck stop electrification" equipment.[169] And like Harley-Davidson, Duke was required to sponsor a wood-burning appliance replacement and retrofit program to be implemented by a third party.[170]

The Duke settlement projects, as well as similar projects in another Clean Air Act action against Dominion Energy,[171] were classified in the consent decree as "environmental mitigation projects."[172] As the EPA has explained, "the same type of activity could constitute mitigation in one case and a SEP in another," so a diesel school bus retrofit or truck stop electrification would be permitted as a mitigation action when the violation at issue relates to excess emissions that would be reduced by such a retrofit.[173]

However, the Volkswagen settlement was not a SEP,[174] and although parts of it were labeled as a "mitigation trust fund,"[175] the potential reach of its relief goes beyond the EPA's standard definition of mitigation, which aims "to, as nearly as possible, restore the *status quo ante*."[176] The settlement payments to invest in zero-emission vehicle charging infrastructure were not classified as mitigation at all.[177] And under the Volkswagen settlement, any remaining funds in the mitigation trust at the end of the life of the trust must go to federal agencies to pay for

168. *Id*. at 134–35; Cruden et. al., *supra* note 13, at 153–56.

169. Press Release, EPA, Duke Energy Corporation Clean Air Act (CAA) Settlement (Sept. 10, 2015), https://www.epa.gov/enforcement/duke-energy-corporation-clean-air-act-caa-settlement [https://perma.cc/C8B8-AJGM]. Notably, Professor Kakade, *supra* note 10, seems to have worked on this case for the EPA.

170. *Id*.; Consent Decree at 66, United States v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. Aug. 26, 2003) (No. 1:00 cv 1262). Similar to Duke, Dominion Energy agreed to a host of mitigation and environmental projects in a Clean Air Act action against their coal-fired power plants. Press Release, EPA, *Dominion Energy, Inc*., (Apr. 1, 2013), https://www.epa.gov/enforcement/dominion-energy-inc [https://perma.cc/4K26-47QA]. These projects included payments to the U.S. Forest Service and National Park Service to mitigate acid deposition on surrounding lands—the same as Duke—as well as more than $2 million for wood-burning appliance programs, $400,000 for the installation of electrical infrastructure to reduce idling at rail yards, and up to $1 million for the retrofit or replacement of old diesel buses and other vehicles. *Id*.

171. Consent Decree at 32, app., United States v. Dominion Energy, Inc., No. 13-cv-03086 (C.D. Ill. July 18, 2013), https://www.epa.gov/sites/default/files/documents/dominionenergy-cd.pdf [https://perma.cc/QCL9-TSMM].

172. Press Release, *supra* note 169.

173. Memorandum from Susan Shinkman, *supra* note 90, at 4.

174. *See* Kakade, *supra* note 10, at 135.

175. *Volkswagen Clean Air Act Civil Settlement*, ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement [https://perma.cc/ZY6H-4LEQ] (last visited Oct. 19, 2021).

176. Memorandum from Susan Shinkman, *supra* note 90, at 4.

177. *See Volkswagen Clean Air Act Civil Settlement*, *supra* note 175.

diesel emissions reduction projects and can be spent on any national federal lands impacted by emissions.[178] This has an expansive reach and demonstrates the ways in which settlement projects can be manipulated to fit policy goals.

The Obama Administration also entered what was at the time the largest environmental settlement ever—a $20.8 billion settlement with BP following the Deepwater Horizon Oil Spill.[179] The settlement included natural resource damage payments under the Oil Pollution Act of up to $8.8 billion, which were structured to fund natural resource restoration projects.[180] It also included funding to the congressionally chartered National Fish and Wildlife Foundation.[181] One of the owners of the well at issue in the Deepwater Horizon case was required to spend $20 million in a SEP to purchase land for habitat protection.[182] Some of this land could then be transferred to Gulf states or nonprofit groups with various protections, such as conservation easements.[183]

Lastly, the most controversial third-party payment did not involve environmental crime. Though third-party payments are characteristically featured in environmental enforcement, where the lack of direct victims makes typical penalties unsuitable for remedying the harm caused by the violation, their ability to grant relief over a wider net of affected parties makes them suitable for enforcement matters with a national scale.[184] In enforcement actions following the 2008 financial crisis,[185] the Obama Administration settled with nine banks and a credit rating agency for terms that included nearly $36 billion in what were labeled "consumer relief" payments.[186] These payments included money allocated for community investments, demolition or remediation of abandoned properties, donations of mortgages and bank-owned properties to cities, contributions to nonprofits, and, for Bank of America, at least $30 million in donations to state bar associations, "to be used for foreclosure prevention legal assistance and

178. Kakade, *supra* note 10, at 145.

179. Press Release, DOJ, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2015), https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater [https://perma.cc/7H6Z-GFC4].

180. *Id.*; DOJ, FACT SHEET: PROPOSED CONSENT DECREE WITH BP FOR THE DEEPWATER HORIZON/MACONDO WELL OIL SPILL, https://www.justice.gov/opa/file/780696/download [https://perma.cc/VYV3-YR3A] (last visited Feb. 26, 2022).

181. *See* DEEPWATER HORIZON NAT. RES. DAMAGE ASSESSMENT TRS., DEEPWATER HORIZON OIL SPILL: FINAL PROGRAMMATIC DAMAGE ASSESSMENT AND RESTORATION PLAN AND FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 1-23 (2016), https://www.gulfspillrestoration.noaa.gov/sites/default/files/wp-content/uploads/Front-Matter-and-Chapter-1_Introduction-and-Executive-Summary_508.pdf [https://perma.cc/EZL4-7QWB].

182. Press Release, EPA, MOEX Offshore 2007 LLC Settlement (Feb. 17, 2012), https://www.epa.gov/enforcement/moex-offshore-2007-llc-settlement [https://perma.cc/62VC-64C6].

183. *Id.*

184. *See supra* note 18; *supra* Section I.A.

185. These included the 2012 National Mortgage Servicing Settlement Agreement, as well as settlements between 2013 and 2016 with Bank of America, Citigroup, Goldman Sachs, HSBC, JP Morgan Chase, Morgan Stanley, SunTrust, Standard and Poor's, and Wells Fargo. Wilt, *supra* note 160, at 261.

186. *Id.* at 264.

community redevelopment legal assistance."[187] Banks received credits on their settlements for every dollar used for categories such as low-to-moderate income lending, losses related to affordable rental housing, and donations to counseling agencies, lawyer trust accounts, or various community development organizations.[188] Among the DOJ's goals for these settlements was to "rectify the harm caused" to "homeowners, borrowers and communities" by risky banking practices related to underwriting and originating home mortgage loans and to "benefit hundreds of thousands of Americans still struggling to pull themselves out from under the weight of the financial crisis."[189] Like Volkswagen's noxious emissions, risky mortgage practices by financial institutions had an expansive effect that went beyond homeowners who sought a mortgage loan from defendants.

Critics fumed that the bank payments granted windfalls to organizations favored by prosecutors.[190] A prominent *Wall Street Journal* op-ed asked readers to "[i]magine if the president of the United States forced America's biggest banks to funnel hundreds of millions—and potentially billions—of dollars to the corporations and lobbyists who supported his agenda."[191] Groups such as La Raza and the National Urban League—which are aligned with the Democratic Party—received more than $1 million each from Bank of America alone.[192] Furthermore, House Judiciary Committee hearings purportedly revealed that a deputy of an Associate Attorney General asked colleagues how to best allocate money to "an

187. *Id*. at 267–68 (quoting Annex 2 - Consumer Relief to Settlement Agreement, DOJ with Att'ys Gen. of Cal., Del., Ill., Md., N.Y. & Ky. and Bank of Am. 7 (Aug. 21, 2014), https://www.justice.gov/iso/opa/resources/849201482914123996796 1.pdf [https://perma.cc/8Z2B-2KX2]). Bank of America's payments could also be donated to Interest on Lawyer Trust Account organizations. *Id*. at 268.

188. *Id*. at 266–69.

189. Press Release, DOJ, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading [https://perma.cc/JC2L-9NCP] (first quoting Attorney General Eric Holder; and then quoting Associate Attorney General Tony West); *see also* Press Release, DOJ, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement [https://perma.cc/473T-FTJW] ("'Through this $13 billion resolution, we are demanding accountability and requiring remediation from those who helped create a financial storm that devastated millions of Americans,' said Associate Attorney General Tony West. 'The conduct JPMorgan has acknowledged . . . contributed to the wreckage of the financial crisis.'"); Press Release, DOJ, Justice Department Reaches $470 Million Joint State-Federal Settlement with HSBC to Address Mortgage Loan Origination, Servicing and Foreclosure Abuses (Feb. 5, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-470-million-joint-state-federal-settlement-hsbc-address-mortgage [https://perma.cc/67T7-9BEF] (quoting Benjamin C. Mizer, head of the DOJ's Civil Division: "The agreement is part of our ongoing effort to address root causes of the financial crisis.").

190. Wilt, *supra* note 160, at 280.

191. Andy Koenig, Opinion, *Look Who's Getting That Bank Settlement Cash*, WALL ST. J. (Aug. 28, 2016, 5:53 PM), https://www.wsj.com/articles/look-whos-getting-that-bank-settlement-cash-1472421204.

192. *See id*.

organization of our choosing" and avoid conservative nonprofits.[193] The findings pushed Republicans in Congress to introduce the Stop Settlement Slush Funds Act,[194] which sought to ban the use of third-party settlement agreements and limit settlement projects to those based on restitution to direct victims.[195] The bill faced a veto threat and was not reported out of committee until the Trump Administration.[196] It passed the House but was never taken up by the Senate.[197]

3. Trump Administration

Criticism of third-party payments reached fever pitch during the Trump Administration. Though Congress never passed the Stop Settlement Slush Funds Act, the core tenets of the Act became official DOJ policy over various internal policy updates. Starting in 2017, Attorney General Jeff Sessions prohibited the DOJ from entering into any settlement agreements that included third-party payments unless the payment provided restitution to a direct victim or directly remedied the harm sought to be addressed.[198] The DOJ soon expanded on Sessions's new nexus requirement by requiring all environmental projects to directly remedy the harm being redressed.[199]

The subsequent environmental enforcement head at DOJ further restricted settlement practices in two memoranda near the end of the Trump Administration.[200] First, the new DOJ policy concluded that all SEPs—not just those with third-party payment provisions—violated the law and would no longer be used.[201] It held that "[i]t does not matter whether the SEPs provide for direct monetary payments to a third-party or indirect payments to a third-party through in-kind contributions of

193. Jessica Karmasek, *Judiciary Chair Claims Internal Docs Reveal Obama DOJ 'Slush Fund*,' FORBES (Oct. 24, 2017, 7:03 PM), https://www.forbes.com/sites/legalnewsline/2017/10/24/a-smoking-gun-internal-docs-reveal-obama-dojs-slush-fund-judiciary-chair-says/?sh=4bb79b97cb88. During the Committee hearings, emails between senior DOJ officials revealed communications where prosecutors sought to re-word settlement payment provisions, *id*., and others where officials noted they were requiring Citibank, one of the banks under investigation, to "change its behavior and at the very least, choose actions we prefer among various options . . . . [W]e are pushing them to focus their activities on . . . areas of relief of most concern to us . . . ." ALLISON ET AL., *supra* note 133, at 6 (quoting an email sent by DOJ official Maame Frimpong).

194. Stop Settlement Slush Funds Act of 2016, H.R. 5063, 114th Cong. (2016).

195. Stop Settlement Slush Funds Act of 2016, H.R. 732, 115th Cong. (2017).

196. *Id*.; McGarity, *supra* note 27, at 1412.

197. McGarity, *supra* note 27, at 1413; Stop Settlement Slush Funds Act of 2016, H.R. 732, 115th Cong. (2017).

198. Memorandum from Jeff Sessions, Att'y Gen., DOJ to All Component Heads & U.S. States Att'ys 1 (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download [https://perma.cc/EAG4-399Z]. This policy governed payments to "any non-governmental person or entity that is not a party to the dispute." *Id*.

199. *See* Memorandum from Jeffrey H. Wood, Acting Assistant Att'y Gen., DOJ to Section Chiefs & Deputy Section Chiefs, Env't & Nat. Res. Div. 3 (Mar. 12, 2018), https://www.justice.gov/enrd/file/1043731/download [https://perma.cc/299W-CUT6]. Relatedly, this policy also held that mitigation "is not a penalty" and "must not be used as an additional means of penalizing a defendant." *Id*.

200. Memorandum from Jeffrey Bossert Clark, *supra* note 129, at 18 ("[T]his Memorandum together with my August 21, 2019 Memorandum provide *two sets of grounds* barring . . . SEPS in consent decrees with state and local governments.").

201. *See id*. at 9–11.

goods and services. Using SEPs in settlements in either situation is inconsistent with the spirit and letter of the law as well as DOJ policy and therefore must cease . . . ."[202] Next, the subsequent Attorney General, William Barr, revised DOJ regulations.[203] The change held third-party payments to indirect victims were "generally not appropriate" and that "in no case shall any such agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects."[204] In essence, this regulation prohibits all payments to nongovernmental third parties.[205] A final DOJ policy memorandum clarified that the restrictions on third-party payments could not be circumvented through in-kind transfers and that the new regulation applied to both civil *and* criminal settlements.[206]

All told, the Trump Administration temporarily ended third-party payments as a tool and then went further to modify ongoing enforcement actions. For example, the Harley-Davidson consent decree, which had negotiations start during Obama's tenure, was resubmitted without the wood-burning appliance replacement program but with the same overall monetary fine.[207] New settlements only included projects that were directed at the defendant solely,[208] and throughout the DOJ and EPA, environmental enforcement was undermined and slowed.[209]

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202. *Id*. at 11.

203. *See* 28 C.F.R. § 50.28.

204. *Id*.; *see* Memorandum from Jeffrey Bossert Clark, *supra* note 77, at 1–2.

205. Harris, *supra* note 18, at 10833.

206. *See* Memorandum from Jeffrey Bossert Clark, *supra* note 77, at 2–3, 7–8.

207. *See* Kakade, *supra* note 10, at 148–50; Sintia Radu, *Trump DOJ Gives Harley-Davidson $3 Million Discount on Obama-Era Pollution Fine*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/20/trump-doj-gives-harley-davidson-3-million-discount-on-obama-era-pollution-fine/.

208. New settlements still included SEPs, but projects seem to be limited to work at the defendant's facility, such as retrofitting. *See, e.g*., Press Release, EPA, Fiat Chrysler Automobiles Clean Air Act Civil Settlement Information Sheet (Jan. 10, 2019), https://www.epa.gov/enforcement/fiat-chrysler-automobiles-clean-air-act-civil-settlement-information-sheet#mitigation [https://perma.cc/8SSH-4R76] (describing a 2019 mitigation project to improve efficiency of catalytic converters sold); *Civil Enforcement Case Report: Toledo Refining Company, LLC*, ENV'T PROT. AGENCY, https://echo.epa.gov/enforcement-case-report?id=05-2014-5017 [https://perma.cc/YDE4-CZJ4] (last visited Feb. 24, 2022) (describing a 2019 agreement to plant $150,000 worth of trees around a refinery); Press Release, EPA, Alon USA, LP Clean Air Act Settlement (Apr. 19, 2017), https://www.epa.gov/enforcement/alon-usa-lp-clean-air-act-settlement#sep [https://perma.cc/AV2A-N55V] (describing a 2017 $1.5 million SEP agreement to retrofit refinery heaters); *Civil Enforcement Case Report: E.* & J. Gallo Winery, ENV'T PROT. AGENCY, https://echo.epa.gov/enforcement-case-report?id=09-2019-0024 [https://perma.cc/V8XX-QYS9] (last visited Feb. 24, 2022) (describing a 2019 agreement to install emergency-preparedness remote-shutoff controls for facility). Some settlements did include third-party payments, but it is unclear whether these were agreed to before policies were finalized or if there are other explanations. *See, e.g*., *Civil Enforcement Case Report*: *Indiana Harbor Coke at ArcelorMittal*, ENV'T PROT. AGENCY, https://echo.epa.gov/enforcement-case-report?id=05-2010-6654 [https://perma.cc/3SRE-MJS8] (last visited Feb. 24, 2022) (describing a 2018 SEP agreement to implement lead-removal projects at local schools and day-care centers). As noted elsewhere, there is no comprehensive database of third-party payments, so implementation of settlement policy on specific settlements is not quantifiable.

209. *See* Perls, *supra* note 73, at 593 (describing how the Trump Administration engaged in various strategies of a "deregulatory toolbox" to weaken EPA capacity); Uhlmann, *New Environmental Crimes*, *supra* note 149, at 2–3 (demonstrating a drastic drop in pollution prosecution and criminal enforcement through the first two years of the Trump Administration).

In 2020, Congress signaled that it did not agree with the new restrictions imposed by the Trump DOJ—even despite the 2017 push for the Stop Settlement Slush Funds Act. That year, Congress amended the Act that established the National Fish and Wildlife Foundation to allow the Foundation to receive and administer third-party payments.[210] Though a congressionally chartered governmental organization, the National Fish and Wildlife Foundation is treated as nongovernmental for third-party payment settlements and is a prominent recipient in many environmental project settlements.[211] The 2020 Amendment, therefore, built a structure for environmental settlement projects directly into the statute.[212]

4. Biden Administration

Weeks into the Biden Administration, a new DOJ head of environmental prosecution withdrew all Trump-Era guidance restricting third-party payments and SEPs.[213] The DOJ ended policy memoranda setting out enforcement principles; limiting enforcement discretion for settlements; and restricting SEPs, third-party payments, and equitable mitigation.[214] The DOJ regulation promulgated by Attorney General Barr remains, but the initial Biden Administration policy and further DOJ memoranda have indicated that the Barr regulation is "under review."[215] It is still yet unclear whether or how the third-party payment policy may change in the long term under the Biden Administration, though a return to the Obama-Era policies is more likely.

What is clear under the Biden Administration is the driving force behind the use of third-party payments: using settlement payments as tools for environmental justice. In the first six months of the Biden Administration, multiple policy memoranda have advocated for SEPs and third-party payments—among other policies—in civil,[216] criminal,[217] and cleanup enforcement[218] in order to protect

210. *See* 16 U.S.C. § 3703(c)(1)(K) (allowing the National Fish and Wildlife Foundation "to receive and administer restitution and community service payments, amounts for mitigation of impacts to natural resources, and other amounts arising from legal, regulatory, or administrative proceedings, subject to the condition that the amounts are received or administered for purposes that further the conservation and management of fish, wildlife, plants, and other natural resources"); *see also* Harris, *supra* note 18, at 10833.

211. *See* Harris, *supra* note 18, at 10833.

212. *See supra* notes 179–83 and accompanying text (discussing Deepwater Horizon settlement).

213. *See* Memorandum from Jean E. Williams, *supra* note 77, at 1–2.

214. *See id*.

215. Memorandum from Lawrence E. Starfield, Acting Assistant Adm'r, EPA to Reg'l Couns. & Deputies, Enf't & Compliance Assurance Div. Dirs. & Deputies, Off. of Enf't & Compliance Assurance Off. Dirs. & Deputies, 3 n.3 (Apr. 26, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctivereliefttoolsincivilenforcementsettlement0426.pdf [https://perma.cc/V4QW-MRC7]; *see* Memorandum from Jean E. Williams, *supra* note 77, at 2.

216. *See* Memorandum from Lawrence E. Starfield, *supra* note 215, at 1.

217. Memorandum from Lawrence E. Starfield, Acting Assistant Adm'r, EPA to Senior Managers & Special Agents, Off. of Crim. Enf't, Forensics & Training, Reg'l Crim. Enf't Couns., Offs. of Reg'l Couns. 1 (June 21, 2021), https://www.epa.gov/system/files/documents/2021-07/strengtheningejthroughcriminal062121.pdf [https://perma.cc/8PTN-RV93].

218. Memorandum from Lawrence E. Starfield, Acting Assistant. Adm'r, EPA to Off. of Site Remediation Enf't Managers, Reg'l Superfund Div. Dirs. & Deputies, Reg'l Couns. & Deputies (July 1, 2021), https://www.

communities that face a disproportionate impact of environmental violations and "advance . . . environmental justice (EJ) goals."[219] Though these memoranda note the current limitations on settlement payments due to the Barr DOJ regulation, they nevertheless advocate for settlement projects and ask prosecutors to "ensure restitution, community service payments, and other court-ordered projects supporting overburdened communities are considered in all cases identified as having EJ concerns."[220] More explicitly, the EPA explained that a "critical goal of the civil enforcement program is to obtain injunctive relief that remediates the pollution and addresses past harms to communities."[221] And for criminal enforcement: restitution or community service "should be standard components of a criminal sentence where defendants have sufficient financial means."[222] This language indicates a shift in why and how third-party payments may be of use in the coming years.

II. RISE OF THIRD-PARTY PAYMENTS AS EXECUTIVE POLICYMAKING VIA PROSECUTION

Despite the controversial history of third-party payments and the Trump Administration's recent rejection of them, nearly four decades' worth of administrations have put them into use. As the Obama Administration demonstrated with the Volkswagen settlement—which directed funds to electric vehicle infrastructure, a priority of his Administration[223]—third-party payments play an important role in policymaking. The same year as the Volkswagen settlement, Obama signed an executive order establishing national electric vehicle charging corridors,[224] which ostensibly could benefit from the charging infrastructure Volkswagen agreed to. In this way, the critique that third-party payments represent the DOJ directing funds to special policy interests has some truth to it. But those critiques assume that such executive directing is, by nature, a bad thing. This Part of the Note argues that though there are inherent problems with executive policymaking-by-prosecution, it is a natural step in the modern evolution of executive power and perhaps an understandable reaction to the current politicization of environmental law.

epa.gov/ystem/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf [https://perma.cc/CZ24-A7MS].

219. Memorandum from Lawrence E. Starfield, Acting Assistant Adm'r, EPA to Off. of Enf't & Compliance Assurance Off. Dirs. & Deputies, Enf't & Compliance Assurance Dirs. & Deputies, Reg'l Couns. & Deputies 1 (Apr. 30, 2021), https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswithejconcerns.pdf [https://perma.cc/K6QE-DQJF]. This includes the initial memorandum from Deputy Assistant Attorney General Jean E. Williams withdrawing the prior Trump Administration memorandums. *See* Memorandum from Jean E. Williams, *supra* note 77, at 1–2.

220. Memorandum from Lawrence E. Starfield, *supra* note 217, at 3; *see also* Memorandum from Lawrence E. Starfield, *supra* note 215, at 2–3.

221. Memorandum from Lawrence E. Starfield, *supra* note 219, at 2.

222. Memorandum from Lawrence E. Starfield, *supra* note 217, at 3.

223. *See* Press Release, *supra* note 16.

224. *See id*.

First, this Part walks through the three forces that have combined to create executive adoption of third-party payments. Next, it describes third-party payments as a form of executive policymaking via prosecution akin to other forms of executive "lawmaking." Rather than justify—or critique—these payments within legal bounds, this Part describes them from a functional standpoint in serving executive policy goals.

A. CREATING THE VACUUM FOR THIRD-PARTY PAYMENTS

Third-party payments only entered the scene of environmental litigation with the permittance of citizen suit provisions in environmental statutes in the 1970s and 1980s.[225] For nearly two decades, citizen suits made heavy use of third-party payments,[226] and citizen suits on their own dominated environmental cases.[227] Though third-party payments were first formulated into the EPA's Penalty Policy in 1980,[228] the government was not the hotbed of creative environmental project settlements. Three significant shifts have happened since this time, which explain the current state of policy-driven third-party payments by the Executive Branch. Citizen suits, a nongovernmental form of environmental enforcement, have lost power. In addition, while public interest in tackling environmental violations and larger problems of climate change has increased, legislation in this area has slowed to a near halt. Finally, the Executive Branch has grown—in theory and practice—amidst congressional inaction.

1. Citizen Suits Constrained

First, citizen enforcement has become increasingly difficult. Starting with *Lujan v. Defenders of Wildlife* in 1992, the Supreme Court took a "slash-and-burn expedition through the law of environmental standing."[229] Standing went from liberal[230] to incredibly restrictive.[231] Many scholars bemoan this change, and recent Court decisions have done little to resurrect standing in the face of climate change harms.[232] Alongside standing requirements, other justiciability concerns related to political questions,[233] as well as constitutional defenses such as the Eleventh Amendment, have presented a barrier to citizen standing.[234] On top of

225. *See supra* Section I.A.

226. *See* Mann, *supra* note 45, at 178, 190–91.

227. *See* Carol E. Dinkins, George O. Wilkinson, Margaret E. Peloso & Thomas S. Meriwether, *The Role of Public and Private Litigants in Promoting Environmental Corporate Social Responsibility*, 21 FORDHAM ENV'T L. REV. 123, 143 (2010); May, *supra* note 46, at 8.

228. *See* Kristl, *supra* note 35, at 222.

229. Lujan v. Defs. of Wildlife, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting).

230. Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENV'T L. 359, 376 (2004).

231. Scott W. Stern, *Standing for Everyone*: Sierra Club v. Morton*, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENV'T L. REV. 21, 26 (2019).

232. *See, e.g.*, Stern, *supra* note 231, at 83–84.

233. *See* Novak, *supra* note 4, at 759–61.

234. *See* May, *supra* note 46, at 10–11, 22. *See generally* Hope Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!*, 10 WIDENER L.

this, citizen litigants face increasing expenses in protracted and difficult litigation and an increasingly hostile judiciary.[235] As one scholar describes, "[c]itizen litigators must navigate the perilous shoals of, *inter alia*, jurisdiction, notice, standing, mootness, preclusion, limited remedies, and foregone or forgiven attorney fees."[236] Thus, despite increased citizen litigation in overall numbers, there has been an overall decline since 1995 in citizen "legal events"—or reported decisions and actions like complaints or judicial consent orders.[237]

This decline created a gap for the Executive Branch to fill. By the 1990s, the DOJ and EPA increasingly recognized and approved citizen suits' use of third-party payments and began using them in their own settlements.[238] And, over the decades, the decline in citizen suits has been somewhat counteracted by an expansion in government-led enforcement. Expansion to Executive Branch support can be natural in a constrained environment, and Presidents "push the envelope" because of expectations: "When only the presidency is able to take major governmental action, the expectation becomes that the executive is the appropriate branch to take major government action."[239] Above all, "power abhors a vacuum."[240]

Ironically, the doctrinal justification for centralizing enforcement of environmental statutes in the Executive Branch derives directly from Justice Scalia's opinion in *Lujan*. In it, he advances the argument that the Take Care Clause vests plenary enforcement power directly in the Executive Branch and that "[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[241] For Justice Scalia, the requirement of a concrete injury suffered by an individual was a principle of separation of powers, without which citizens could take power from the Legislative and Executive Branches.[242] Accordingly, the

REV. 205, 205 (2003) ("This trend in the Court's application of the Eleventh Amendment to shield states from injured private citizens has potentially ominous implications for citizens seeking to enforce federal environmental laws . . . .").

235. *See* May, *supra* note 46, at 9–14; Thompson, Jr., *supra* note 56, at 214 (noting increased judicial retrenchment, with "little enthusiasm" from Congress in responding to these restrictions); Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENV'T L. & POL'Y F. 119, 120 (2001) (describing Justice Scalia's vision of standing as "an undisguised hostility toward the purposes of the environmental laws").

236. May, *supra* note 46, at 9 (footnote omitted).

237. *Id*. at 4, 9; *see also* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1562 (1995) (indicating that citizen suits accounted for more judicial actions than actions brought by the EPA in 1995).

238. Smith, *supra* note 230, at 378; Lloyd, *supra* note 66; Mann, *supra* note 45, at 191.

239. William P. Marshall, *The Limits on Congress's Power to Do Nothing: A Preliminary Inquiry*, 93 IND. L.J. 159, 160–61 (2018).

240. *Id*. at 160.

241. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

242. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891–92 (1983); *see* Stern, *supra* note 231, at 79.

Lujan opinion is "best understood as requiring that only a limited subset of citizens be allowed to supplant (or perhaps more accurately, complement) the executive branch's enforcement role."[243] This understanding naturally follows to the Executive Branch's role in settlement and the President's arguable role as chief prosecutor; settlement is merely a subspecies of enforcement.[244]

The 1990s shift to Executive-Branch centralization of environmental enforcement was aided by the loads of discretion embedded into the process. And, today, third-party payments are powerful policymaking tools—yet are also derided because of that same discretion. First, prosecutors have broad discretion to bring a case as either criminal or civil.[245] Many environmental statutes allow for both criminal and civil penalties[246] though the statutes make little distinction between each.[247] What constitutes an act for a criminal prosecution often "involves the same conduct that could give rise to civil or administrative enforcement,"[248] though criminal statutes often involve "deceptive or misleading conduct"[249] and implicate moral odium.[250] Second, unlike criminal prosecution of corporate crime in other areas—where the DOJ has increasingly relied on deferred prosecution agreements and non-prosecution agreements—the DOJ continues to prosecute environmental corporate crime.[251] This trend has negated the potential loss of

243. William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENV'T L. & POL'Y F. 247, 284 (2001).

244. The President's precise role in prosecutorial decisionmaking is heavily debated, and this Note does not argue for an increased role. However, it is undisputed that the Take Care Clause and executive actions demonstrate the heavy hand of the President—as a leader in policy for the Executive Branch—in broad prosecutorial policy. *See* Henry L. Chambers, Jr., *The President, Prosecutorial Discretion, Obstruction of Justice, and Congress*, 52 U. RICH. L. REV. 609, 614–22 (2018).

245. David St. John, Clifton Brannan, Hannah Beiderwieden, Julia Fountain, Matthew Larson, Jacqueline Lydic & Luke Stegman, *Environmental Crimes*, 57 AM. CRIM. L. REV. 657, 676–77 (2020). Broad prosecutorial discretion to bring a case is not unique to environmental enforcement. *See* David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1243–44.

246. St. John et al., *supra* note 245, at 660.

247. David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159, 172 (2014).

248. Uhlmann, *supra* note 245, at 1225; *see, e.g.*, 33 U.S.C. § 1319(a)–(c) (allowing the government to pursue administrative, civil, or criminal enforcement for violations of the Clean Water Act).

249. Uhlmann, *supra* note 245, at 1226, 1248; *see also* David A. Barker, Note, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1389 (2002) (indicating that knowing violations of most environmental statutes are criminally enforceable).

250. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2442–44 (1995). Professor Lazarus has described environmental criminal law as particularly problematic and unintegrated relative to other legal doctrines. *Id.* at 2445 ("Criminal law requires more demanding proof to convict, but environmental-law makes such a showing problematic because of scientific uncertainties and fragmented decisionmaking authority. Criminal law emphasizes settled norms, while environmental law constantly changes and aspires for fundamental and dramatic change. And, although criminal law requires clear, determinate, and readily accessible legal standards, familiar to the general public, environmental law is replete with obscure, indeterminate, and highly technical standards, the meaning of which few can claim genuine mastery.").

251. *See* David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1237–39 (2016). Environmental corporate crimes, alongside

settlement agreements due to avoided prosecutions. Finally, the vertical relationship between the DOJ and EPA often results in a shift in the prosecution's mindset. The EPA has complete autonomy over imposing civil administrative sanctions, but it lacks the power to litigate and must formally refer most cases to the DOJ.[252] And once it takes the case, the DOJ "generally takes the view that its decision whether to prosecute is far more autonomous in a criminal case, in which it is representing the United States, than in an ordinary civil enforcement action, in which EPA is its client agency."[253] Combined, federal enforcers are able to decide the charges, manner, and settlement structure of each case, with little to no oversight. As citizen suits declined and the Executive Branch became more willing to engage in creative settlement structures, this arrangement of top-down policy combined with independent discretion took up the mantle.

2. Congressional Inaction and Obstruction

Second, alongside the constriction of citizen enforcement, Congress has engaged in two actions that have further opened up space for executive action. For one, Congress has *not* acted, especially in environmental legislation and in the face of the fatalistic absolutism that is global climate disaster. Formal environmental legislation is "effectively moribund."[254] Since 1990, Congress has not significantly amended any of the most significant environmental statutes that were passed, implemented, given extensive oversight, and amended in the 1970s and 1980s.[255] While the scientific landscape, especially in regard to air quality, has shifted considerably in the past decades, the most recent significant changes to the Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and Resource Conservation and Recovery Act (RCRA) all occurred in or before 1990.[256] And despite a serious need to address carbon dioxide emissions in regard to climate change, Congress has not passed any new legislation.[257] Much the same way that Congress left the delineation between civil and

antitrust, also dominate as the subject matter among all corporate prosecutions of foreign firms. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1873–74 (2011).

252. Lazarus, *supra* note 250, at 2460.

253. *Id*. For more on the decision to prosecute, see generally Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENV'T L.J. 679 (1996) (discussing structural protections against prosecutorial discretion in environmental enforcement). For a review of what factors the DOJ uses to establish a criminal case, see generally Barker, *supra* note 249, at 1406–11.

254. Lazarus, *supra* note 2, at 619.

255. *See id*. at 623–32.

256. *See id*. at 629–32; *see also* Gerald S. Dickinson & Sheila R. Foster, Foreword, *Stasis and Change in Environmental Law: The Past, Present and Future of the Fordham Environmental Law Review*, 24 FORDHAM ENV'T L. REV. 1, 3–4 (2013) (observing that, even in the face of climate change, Congress has not made significant changes to the "iconic statutes" ostensibly capable of "tackling our most pressing environmental problems"); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 131 (2013) ("The period of statutory inaction (1991–2012) now exceeds the period of statutory growth (1970–1990).").

257. Lazarus, *supra* note 2, at 630; *see also* Eric Anthony DeBellis, *In Defense of the Clean Power Plan: Why Greenhouse Gas Regulation Under Clean Air Act Section 111(d) Need Not, and Should Not, Stop at the Fenceline*, 42 ECOLOGY L.Q. 235, 240–42 (2015) (describing the Clean Power Plan in

criminal violations in environmental law to courts and the Executive Branch, it has seemingly delegated the substantive policy questions of enforcement as well, no matter how ill-equipped the other branches are.[258] It has been left to the Executive, through prosecutorial discretion, to address environmental violations in a changing environment.[259] Though this congressional inaction is not a purely environmental phenomenon,[260] it is particularly bleak in regard to environmental law. Even attempts to oppose environmental regulation are emaciated.[261] While partisan division and public popularity on environmental legislation—and particularly climate change action[262]—have gone up and down, public popularity for action has stabilized at a high.[263] Moreover, Congress does not require broad public support to act in the nation's best interests.

Next, when Congress has acted, it has done so primarily to create obstacles to effective administrative action. Congressional environmental lawmaking has been left to appropriations law,[264] which has been routinely cut in regard to environmental enforcement.[265] Recent Congresses have attempted to block clean air regulations under the Obama Administration[266] and voiced the need to cut EPA funding.[267] EPA budgets have remained static or slightly decreased relative to inflation,[268] but the EPA's enforcement funding and enforcement workforce have

relation to a void of federal legislation addressing climate change). *See generally* Osofsky & Peel, *supra* note 7 (describing congressional gridlock on climate change).

258. *See* Lazarus, *supra* note 250, at 2454–55 ("Congress left [the meaning of *mens rea* requirements in environmental law], in effect, to the other two branches of government to resolve: first, to the executive branch, through the exercise of prosecutorial discretion; and second, to the courts, through the application of canons of statutory construction. Both of these branches, however, are ill-equipped to resolve these issues and have done so in a way that can generously be described as haphazard and exacerbating." (footnote omitted)).

259. *Id.*

260. Congress has done less in many areas. From the heyday of legislative activity in the 1960s and 1970s to 2014, the number of bills introduced, bills passed, and total time in session in terms of days have all fallen in the House and the Senate. BROOKINGS, *Legislative Productivity in Congress and Workload*, *in* VITAL STATISTICS ON CONGRESS, (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf [https://perma.cc/MRJ3-SNX4]. What has not fallen is the number of hours per day in session. *Id.*

261. *See* Osofsky & Peel, *supra* note 7, at 140 (describing Congress's inability to pass the Ratepayer Protection Act, which sought to undermine the Clean Power Plan regulations).

262. *See* Richard J. Lazarus, *Presidential Combat Against Climate Change*, 126 HARV. L. REV. F. 152, 152 (2013) (describing climate change as "the political equivalent of Harry Potter's Lord Voldemort: the crisis that dared not be named").

263. *See* Osofsky & Peel, *supra* note 7, at 144–45.

264. Lazarus, *supra* note 2, at 632.

265. OFF. OF INSPECTOR GEN., *supra* note 5, at 22–24, 26–27.

266. *See, e.g.*, Osofsky & Peel, *supra* note 7, at 140.

267. Jonathan Remy Nash, J.B. Ruhl & James Salzman, *The Production Function of the Regulatory State: How Much Do Agency Budgets Matter?*, 102 MINN. L. REV. 695, 696–97 (2017) (describing proposed EPA budget cuts).

268. Adjusted for inflation, EPA's budget has remained flat in recent decades. *EPA's Budget and Spending*, *supra* note 164; Shawn Regan, *EPA Budget Cuts: Reducing Bureaucracy, Not Environmental Quality*, PROP. & ENV'T RSCH. CTR. (July 13, 2011), https://www.perc.org/2011/07/13/epa-budget-cuts-reducing-bureaucracy-not-environmental-quality/ [https://perma.cc/DZC9-LJFX] (indicating EPA budget

decreased from 2006 to 2018, as have compliance inspections, case initiations, and cases concluded.[269] Obama, whose DOJ took the largest strides in environmental regulatory action, saw the EPA budget drop ten to twenty percent below that of prior administrations.[270]

In the face of inaction and obstruction, Presidents often push the envelope and find ways to move forward on policy goals without congressional authorization.[271] Importantly, third-party payments are not the only way the Executive Branch has shifted priorities when facing gridlock or new political terrain. During the renomination fight of Federal Reserve (Fed) Chairman Jerome Powell, some progressives argued against Powell's renomination on the basis that the Fed could take more action on climate change risks.[272] The Fed is not typically seen as a center of climate change policy, but gridlock motivates parties to find other avenues to achieve a result. This reconceptualization of the Fed sprung from the same forces—especially a lack of congressional action—as third-party payments.

3. Unitary Executive Theory

Third, unitary executive theory has emerged from the backdrop to a dominant governing position since the end of the Reagan Administration.[273] Though this theory speaks primarily to the role of executive power *within* the Executive Branch and against incursions by other branches, the solidification of this doctrine has matched a similar solidification of the theoretical unilateral presidency, where Congress must funnel all authority through the President.[274] Both of these theories speak to high-level generality movement in the modern role of the Executive Branch in the face of increased political polarization and congressional inaction.[275] These theories have propelled scholars in primarily conservative

from 1980 to 2010 has remained flat adjusted for inflation); Nash et al., *supra* note 267, at 697 (describing EPA's "generally static or slightly falling level of total resources from 1990 through 2013"); James Salzman, J.B. Ruhl & Jonathan Remy Nash, *Environmental Law in Austerity*, 32 PACE ENV'T L. REV. 481, 482–83 (2015) ("Overall, EPA has faced a static or slightly declining level of total resources.").

269. OFF. OF INSPECTOR GEN., *supra* note 5, at 23–24, 26–27.

270. *See* Coral Davenport, *E.P.A. Faces Bigger Tasks, Smaller Budgets and Louder Critics*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/us/politics/epa-faces-bigger-tasks-smaller-budgets-and-louder-critics.html. Moreover, the number of employees at the EPA in 2016, Obama's final year, was the fewest since 1989. *See id.*

271. Marshall, *supra* note 239, at 160, 169–70, 175 (noting "Obama was not the first in this respect, and he undoubtedly will not be the last").

272. *See, e.g.*, Victoria Guida, *AOC, Tlaib, Pressley Call on Biden to Dump Powell as Fed Chair*, POLITICO (Aug. 30, 2021, 6:23 PM), https://www.politico.com/news/2021/08/30/aoc-tlaib-pressley-biden-powell-fed-507673 [https://perma.cc/N6AJ-9Z5E]; Robinson Meyer, *The Planet Needs Jerome Powell*, ATLANTIC (Sept. 1, 2021), https://www.theatlantic.com/science/archive/2021/09/climate-case-for-jerome-powell/619944/.

273. *See* Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 227 (2011).

274. *See* Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 525 (2008); *see also* Glicksman, *supra* note 43, at 11005 (2010) (defining unitary executive theory).

275. *See generally* Carmines & Fowler, *supra* note 43 (arguing that the recent expansion of executive power is attributable to the increasing ideological polarization of Congress); Harold Hongju Koh, *A Law unto Itself?*, 115 YALE L.J. POCKET PART 79 (2006) (noting that certain justifications for unilateral

circles to push executive power into their favored corner of policy, such as war powers and foreign affairs[276] or wiretapping.[277] Some unitary executive fans have even espoused that the President has "complete authority to start or stop a law enforcement proceeding."[278] This dynamic of conservative support for unitary executive theory and unilateral action clashes with the conservative hostility to third-party payments. Yet, *Lujan* again should provide a doctrinal underpinning if needed: the Take Care Clause vests plenary enforcement power in the Executive Branch.[279] If this authority includes the power to start or stop a prosecution, it should reasonably include the lesser power to be involved in settlement.[280] Naturally, scholars on the left in favor of increased executive enforcement, especially when tied to environmental and climate change regulation, have taken this point up as their mantle and urged that the President take additional executive measures.[281]

Unitary executive theory may only be a doctrinal description of how recent administrations have justified an expansive Executive. Alternatively, the rationale for unitary executive theory may itself create the legal justification for unilateral executive action.[282] At the least, it presents a temptation that, in the face of declining legislation and congressional stonewalling, Presidents fill the gap demanded by the moment.[283] Obama, for example, waved the banner of "We Can't Wait"[284] and moved forward without congressional approval in a host of areas, including increased environmental regulations on greenhouses emissions, education reform overhauls using state waivers, and updated deportation

executive actions may derive from uncertainty around congressional endorsement of and acquiescence to said actions).

276. *See generally* David M. Driesen, *Duty's Promise and the Unitary Executive's Terror*, 37 SYRACUSE J. INT'L L. & COM. 7 (2009) (explaining how the Bush Administration used the unitary executive theory to justify its war on terror).

277. *See* Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 383–84 (2008) (describing the Bush Administration's justification for its NSA wiretapping program).

278. Jack Goldsmith, *A Qualified Defense of the Barr Memo: Part I*, LAWFARE (Jan. 4, 2019, 9:20 AM), https://www.lawfareblog.com/qualified-defense-barr-memo-part-i [https://perma.cc/CQE4-V9R3]; *see also* David Rohde, *William Barr, Trump's Sword and Shield*, NEW YORKER (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield (explaining how Attorney General Barr's theory of executive power would give President Trump the "right[] to oversee an investigation into his own misconduct").

279. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (citing U.S. CONST. art. II, § 3).

280. Alternatively, congressional power over the national treasury might mean monetary settlement terms are set by legislation.

281. *See* Joshua K. Westmoreland, *Global Warming and Originalism: The Role of the EPA in the Obama Administration*, 37 B.C. ENV'T AFFS. L. REV. 225, 227, 253–55 (2010) (arguing that Obama should sign executive orders targeting emission standards for automobiles and other policies under the regulatory process).

282. Koh, *supra* note 275, at 79.

283. *See* Carmines & Fowler, *supra* note 43, at 371–73.

284. *We Can't Wait*, WHITE HOUSE, https://obamawhitehouse.archives.gov/economy/jobs/we-cant-wait [https://perma.cc/Q62X-7U84] (last visited Feb. 24, 2022).

policy.[285] And, as this Note has described, he utilized third-party payments to prop up environmental policy.[286]

B. PROSECUTION AS POLICY

The three foregoing trends—fewer citizen suits, congressional inaction on environmental statutes, and doctrinal support for increased executive power—have resulted in the rise and use of third-party payments over the past four decades, the shift in use of these payments from citizen suits to executive enforcement, and the high-profile settlements with corporate defendants.[287] This Section describes how third-party payments can be viewed as a policy mechanism under the backdrop of broad policy goals set by the Executive Branch. Comparisons are made to analogous lawmaking mechanisms, such as executive authority to implement *non*enforcement of a legislative scheme and settlements related to agency rulemaking and process. First, this Section describes settlement policy within traditional prosecutorial powers.

1. Executive Prosecution Power

Third-party payment settlements as a form of prosecution-as-policy manifests within the limits of typical executive-level prosecutorial discretion. Executive policymaking through enforcement or nonenforcement has occurred in multiple administrations and across differing policy priorities. Obama pulled back on prosecution of federal drug offenses for marijuana in states where possession is legal and declined to seek removal of cases against certain undocumented immigrants.[288] Bush engaged in "deregulation through nonenforcement," where he used informal enforcement policies, industry-wide consent agreements, and "case-by-case nonenforcement" to pursue larger deregulatory goals.[289] Early Presidents even routinely directed district attorneys to go after specific

285. *See* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), https://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html.

286. Judicial review of separations of powers—in a *Youngstown* sense—and the appropriateness of unitary executive action is beyond the scope of this Note. For more on these topics, see generally Matthew Baker, Comment, *The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power*, 2009 BYU L. REV. 225 (arguing that inconsistent judicial review of congressional silence has contributed to the distorted balance of power between Congress and the Executive Branch); Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211 (2013) (arguing that reliance on congressional silence as a rationale in separation of powers litigation is improper). At this point, the legality or illegality of third-party payments is less relevant. Congress had the chance to end their use during the Trump Administration, but rather than pass the Stop Settlement Slush Funds Act, Trump adopted the rule administratively. McGarity, *supra* note 27, at 1413.

287. A weakness of this analysis is that not all SEPs are third-party payments. The work of slicing third-party payments from the larger subset of environmental enforcement actions is left for future research.

288. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014).

289. *See* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 798, 807 (2010).

violators.[290] Today, discretionary enforcement and settlement power is housed in the Attorney General.[291] It is well-recognized that the Executive Branch has exclusive authority to decide whether to prosecute a case[292] and whether an agency has authority to settle an enforcement action.[293] This discretion flows naturally to overarching policy and settlement decisions about broad-based enforcement practices, such as the policy that federal prosecutors employ their discretion in a manner consistent with the federal government's enforcement priorities, as well as the subsequent Administration's decision to withdraw that policy.[294]

This picture of prosecutorial discretion in policy-minded settlements may cause concerns about augmentation and legality under the MRA. But there is nothing different about the settlement discretion at issue in third-party payment settlements compared to other forms of prosecutorial discretion. Both involve legislative oversight and political critique. As described by Professor Lazarus in regard to environmental criminal prosecution more broadly,

> Congress must expect that to occur if it delegates to the executive branch such sweeping discretionary authority. But, for that same reason, there is not necessarily anything illegitimate or improper about Congress criticizing the policies reflected in the executive branch's exercise of prosecutorial discretion. This is the price the executive branch must pay for having such expansive authority in the first instance.[295]

Justice Scalia's concern in *Lujan* was that judicial permission for citizen enforcers to sue without concrete injury would violate established separation-of-powers principles and powers traditionally delegated to the Executive and Legislative Branches.[296] Assuming that this judicial historical analysis is correct,[297] then it should be expected that Congress and the President butt heads at

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290. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 553–60 (2005) (describing orders by George Washington and John Adams to target specific individuals).

291. *See* Simon Brewer, Note, *The Attorney General's Settlement Authority and the Separation of Powers*, 130 YALE L.J. 174, 181–90 (2020).

292. United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .").

293. Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."); Oil, Chem. & Atomic Workers Int'l Union v. Occupational Safety & Health Rev. Comm'n, 671 F.2d 643, 650 (D.C. Cir. 1982) (per curiam) ("Necessarily included within the prosecutorial power is the discretion to withdraw or settle . . . .").

294. *See, e.g.*, Chambers, Jr., *supra* note 244, at 618–19.

295. Lazarus, *supra* note 250, at 2493–94.

296. *See* Stern, *supra* note 231, at 81 (describing Justice Scalia's opinion in *Lujan* as based on "concern about separation of powers"); *see also supra* notes 241–42 and accompanying text.

297. Many commentators have demonstrated that Justice Scalia's historical research was incorrect. *See* Stern, *supra* note 231, at 27–28, 81–82 (describing Justice Scalia's opinion as "rewrit[ing] the history of standing in the 1990s"); Jeremy Patrick, *A Polemic Against the Standing Requirement in Constitutional Cases*, 41 CAP. U. L. REV. 603, 622 (2013) (describing the idea that the Supreme Court has always required strict compliance with its jurisdictional standing requirement as "revisionist history

the exercise of prosecutorial discretion. Connected to Justice Scalia's view of standing is another view of his: a "unitary executive" free from interference.[298] Following *Lujan*, discretionary authority that leans toward the Executive should be the norm. And if the history described in *Lujan* is inaccurate and there is no reason to prevent uninjured parties from standing in for the public,[299] then the doctrinal underpinning for third-party payments may be shaky—but so, too, is standing doctrine. This is all to say that, on balance, current use of third-party payments may reflect an Executive response to judicial and legislative actions, doctrinally sound or not.

There are legitimate concerns with prosecutorial decisions that go to insider favorites.[300] It is troubling that prosecutors in the financial crisis settlements sought to allocate money to organizations of their choosing[301] or that U.S. Attorneys have used settlements to drive donations to their alma maters.[302] But Congress's unearthing of these problems and attempts to constrain them highlights that the adversarial balance of separation of powers continues to function. To go a step further and argue that these prosecutorial indiscretions reflect that third-party payments as a whole usurp congressional power is doctrinally begging the question. No serious commentator would sit contently with the Administration of their disliked party funneling settlement payments to pet projects.[303] But that does not mean that environmental settlement projects that seek to remedy disperse environmental harms—benefitting some local communities over others—are per se unconstitutional.

2. Comparable Prosecution-as-Policy

The decision to settle is only part of the enforcement decision, and policy over prosecution has historically been used to hit various Executive Branch policy goals. Take, for example, presidential discretion in *non*enforcement of a legislative scheme. Bush primarily chose underenforcement of environmental laws but only faced pushback from environmentalists.[304] On the other hand, Obama faced particular controversy over the Deferred Action for Childhood Arrivals (DACA) nonenforcement policy, which he pursued due to ongoing immigration issues

worthy of *1984*" and "bad history or a blatant lie"). *See generally* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (discussing the historical evolution of standing doctrine from founding-era America through *Lujan*).

298. Sunstein, *supra* note 297, at 211–12.

299. *See* Stern, *supra* note 231, at 27–28.

300. This argument does not disagree with Robert Jackson's warning that "[i]f the prosecutor is obliged to choose his cases, it follows that he can choose his defendants." Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *in* 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940). Third-party payments arguably target relief—leaving the ultimate decision to the defendant—not the defendant themselves.

301. *See* Karmasek, *supra* note 193.

302. *See* Arlen, *supra* note 109, at 213.

303. *See* ALLISON ET AL., *supra* note 133.

304. *See* Daniel Stepanicich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. PA. J. CONST. L. 1507, 1545 (2016).

left unresolved by congressional legislation.[305] DACA's nonenforcement was controversial and ultimately was held as going beyond nonenforcement, but it reinvigorated the line surrounding a President's discretionary authority imposed by the Supreme Court following *Heckler v. Chaney*, which recognized that Congress can restrict executive discretion by passing statutory guidelines.[306] Otherwise, a Congress that is unwilling to pass legislation and check the President or unable to pass legislation fulfilling *Chaney*'s commands is left with little recourse.[307]

Similar discretion concerns were vocalized in the context of the Trump Administration policy of neutering the EPA and reducing it to "little tidbits."[308] In the same way that increasing prosecutions or targeting prosecutions to specific substantive goals is an executive-level enforcement policy,[309] decreasing the level of environmental enforcement is a policy choice—and this is exactly what the Trump Administration did in practice.[310] Under Trump, Clean Water Act criminal prosecutions decreased by seventy percent, Clean Air Act criminal prosecutions decreased by fifty percent, and there was an overall decrease in the total number of defendants and cases.[311] The same shift occurred in civil enforcement.[312] Although environmentalists lambasted the damage and questioned the Administration,[313] there was no serious suggestion that these policy choices were outside the Trump DOJ's discretion—Take Care Clause interpretations aside—or, better yet, an abrogation of congressional authority to enforce environmental statutes. Yet, academics, commentators, and congresspersons shudder at the thought that guidance for *how* to settle is impermissible because of the lack of accountability and constitutional concerns.[314]

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305. *See id.* at 1542–45.

306. *Id.* at 1530–35, 1545; *see* Heckler v. Chaney, 470 U.S. 821, 838 (1985); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 665–69 (1985). In *Department of Homeland Security v. Regents of the University of California*, Chief Justice Roberts held that "DACA is not simply a non-enforcement policy" because it created "a program for conferring affirmative immigration relief." 140 S. Ct. 1891, 1906 (2020). The case did not change *Heckler* or the notion that prosecutorial decisions within an agency's discretion are presumptively unreviewable. *See id.*

307. Stepanicich, *supra* note 304, at 1545–46.

308. Davenport, *supra* note 270.

309. *See, e.g.*, Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., DOJ to Section Chiefs & Deputy Section Chiefs, Env't & Nat. Res. Div. (Jan. 14, 2021), https://www.justice.gov/enrd/file/1355081/download [https://perma.cc/HG3R-JUYG]. In this memorandum, Assistant Attorney General Clark included two principles evidencing this policy, including "Enforcement Actions Should Not Improperly Single Out Any Particular Person, Industry, Group, or Interest—For Liability or Remedy" and "Focus on Achieving Tangible Results, Such as Clean Water, Clean Air, and Clean Land." *Id.* at 6, 16.

310. *See* Uhlmann, *New Environmental Crimes*, *supra* note 149.

311. *Id.* at 1.

312. *See* Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html.

313. *See* John Schwartz, *Under Trump, Criminal Prosecutions for Pollution Dropped Sharply*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/climate/pollution-lawsuits-trump-environment.html.

314. Notably, the same Trump prosecutors who had constitutional concerns about third-party payments voiced few concerns that neutering EPA enforcement would violate the Take Care Clause. However, others have criticized Administrations regarding nonenforcement. *See* Robert J. Delahunty &

Another form of prosecution-as-policy similar to nonenforcement is the subject of agency settlements going to agency process or what has been termed "sue-and-settle" practices. Like concerns over third-party payments, sue-and-settle settlements invoke separation of powers concerns because they permit agencies to make political decisions that counter Congress and bind future Administrations.[315] They also avoid public participation requirements and prevent input from affected parties in settlement negotiations, which insulates the decisionmaking.[316] However, the problems of this practice are not inconsistent with administrative law principles and are simply a job of an executive agency.[317] The criticism sue-and-settle practices face, like that of third-party payments, should be recognized "as pure politics rather than a diagnosis of a legal infirmity."[318]

Simply put, third-party payments are just another form of executive "lawmaking."[319] Similar to regulatory rulemaking or adjudication, executive enforcement and the decision of how to settle is another policy choice. And unlike other forms of regulatory lawmaking,[320] the discretion over prosecutions and settlements allows for policy influence further away from judicial and congressional oversight. Though prosecutors point to the apolitical nature of their decisionmaking, enforcement policy decisions—including the legality of payments, criteria for appropriate projects, and the decision to accept a settlement or consent decree—are not made in a political vacuum.[321] Federal enforcers are aware of the political leaders above them on the organizational chart and in Congress, and mindful of the benefits of a positive public image.[322] These pressures are only further exacerbated by constrained budgets.[323] Although they may track the policy preferences of the sitting President, this is a natural result and "the job of administrative agencies"—not a flaw in design.[324] The terms of sue-and-settle practices and the

John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

315. *See* McVean & Pidot, *supra* note 44, at 208–09.

316. *Id.* at 209.

317. *Id.* at 195.

318. *Id.* at 196.

319. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994) ("Of course we don't call the President's power 'lawmaking.' We have euphemisms—we call this power 'regulatory,' or 'interpretative,' or 'gap-filling.' But as we know from cases such as *Chevron* . . . the delegation from Congress is often vague or silent on a key issue, and the resulting rule—from either rulemaking or adjudication—is a policy choice in much the same way that statutes are policy choices." (footnote omitted)).

320. *See id.*

321. Lazarus, *supra* note 250, at 2458.

322. *Id.*

323. *Id.* at 2457 ("Resource allocation determinations are inevitably the product of political judgments. Scarce resources require the executive branch to make decisions about priorities, which, in turn, necessarily reflect significant value judgments regarding social policy. Political considerations motivate both enforcement decisions regarding particular regulations, as well as the substance of the regulation to be enforced.").

324. McVean & Pidot, *supra* note 44.

nonenforcement of certain substantive areas are highly critiqued[325]—but they are just the consequence of each election.[326] The terms of third-party payments should be seen in the same light.

In this way, third-party payments represent just another way the Executive Branch has responded to congressional inaction. Additional pressures in the world of environmental law, including larger public concerns about climate harms and the inability to effectively utilize citizen suits, have combined to permit a governing philosophy that accepts the level of risk inherent in environmental projects driven by federal enforcement.

III. OBSERVATIONS FOR THE FUTURE

While this Note has mostly tried to avoid normative arguments about whether third-party payments are themselves good policy for the goals of civil and criminal law, it does assume that, broadly speaking, the goals of *environmental statutes* are better served with a structure that creates some remedy for environmental harm rather than the money going into the public treasury. The ongoing debate on the permissibility of third-party payments under Article I and the Miscellaneous Receipts and Antideficiency Acts—while legally relevant—tosses these statutes around without recognizing that third-party payments arose out of some need and not just to spite Treasury Department officials or provide law school hypotheticals. As one district court asked to rule on a consent decree noted, "[t]he purpose of the Clean Water Act is to improve water quality, not endow the Treasury. What better use of the penalty type payments in an action like this than to facilitate water quality improvements to the affected watershed in ways which could not be required under law."[327] And, with recognition that third-party payments may stand on weaker legal and policy grounds, this Note acknowledges the wide popularity and success of third-party payments in achieving the aims of environmental statutes.

Therefore, this Note tentatively accepts third-party payments as an imperfect but reasonable solution to addressing environmental harms. They are rife with problems such as prosecutorial discretion, potentially excessive executive oversight, constitutional concerns, separation of powers imbalances, and the manner in which they shutter society-at-large problems to private agreement with little

325. Another comparison is a president issuing executive actions. A flurry of new actions—some repealing the prior Administration's policies—follow each new Administration. *See, e.g.*, Ed. Bd., Opinion, *Ease Up on the Executive Actions, Joe*, N.Y. TIMES (Jan. 27, 2021), https://www.nytimes.com/2021/01/27/opinion/biden-executive-orders.html; Jacqueline Alemany & Jessica Wolfrom, *Power Up: Biden's Biggest Controversy So Far Is How Fast He's Issuing Executive Orders*, WASH. POST (Jan. 29, 2021, 6:51 AM), https://www.washingtonpost.com/politics/2021/01/29/power-up-biden-biggest-controversy-so-far-is-how-fast-he-issuing-executive-orders.

326. McVean & Pidot, *supra* note 44.

327. Nw. Env't Def. Ctr. v. Unified Sewerage Agency of Wash. Cnty., No. Civ. 88-1128, 1990 WL 191827, at *1 (D. Or. July 27, 1990); *see* Rubin, *supra* note 29, at 193.

public input. Yet, like democracy,[328] it may be better than any other form of environmental redress available to the Executive Branch.

This Part makes a few observations on the future of third-party payments in a Biden Administration and beyond. First, it looks at the potential of third-party payments in relation to the climate change crisis that is providing an end date on global society as we know it. Next, it highlights the role of third-party payments in the growing environmental justice movement. Lastly, it questions how theoretical shifts in corporate purpose and the regulated community may impact settlement projects. Two of these areas—climate change and environmental justice—are key targets for the Biden Administration and likely pressure points on the Executive Branch from the public's perception. These are just three of many areas where third-party payments are relevant, with much of their future relevancy riding on their treatment by the DOJ and the Executive Branch in setting policy in the coming years.[329]

A. CLIMATE CHANGE

While environmentalists and parts of the enforcement community may rejoice that the Biden Administration has brought these policies back, it is unlikely that third-party payments are a panacea. This Note has tried to paint third-party payments as a natural outgrowth of executive power, not suggest the idea that third-party payments—whether under the current model or even under a beefed-up version where the DOJ and EPA ramp up prosecution—could be used to "solve" issues related to climate change or environmental harms more generally. Cost alone is prohibitive. Even at their recent peak, SEPs—not all of which include third-party payments as defined in this Note—only accounted for $90 million in one year.[330] At most, enforcement actions have racked up penalties of $6 billion in one year; and that year, 2016, included the BP settlement and dwarfed prior years.[331] Average assessed penalties per year have been $855 million.[332] While these numbers might rectify diminutive levels of pollution by a violator (another

328. *See* Carmel McCoubrey, Opinion, *Don't Quote Them on It*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/opinion/dont-quote-them-on-it.html (discussing the famous quotation commonly attributed to Winston Churchill: "Democracy is the worst form of government except for all those other forms that have been tried."); *The Worst Form of Government*, INT'L CHURCHILL SOC'Y (Feb. 25, 2016), https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/ [https://perma.cc/93WE-CN7B] ("[D]emocracy is the worst form of Government except for all those other forms that have been tried from time to time . . . .").

329. Additional observations can be made about the relevance of third-party payments to future citizen suits, *see supra* Section II.A, in state trusts, *see, e.g.*, Charles H.W. Foster & Frances H. Foster, *The Massachusetts Environmental Trust*, 41 ECOLOGY L.Q. 751, 760, 816–17 (2014), and in the relationship between state and federal enforcement actions, *see, e.g.*, Christine Y. LeBel, *Cooperative Federalism and Environmental Enforcement*, 33 NAT. RES. & ENV'T 55, 56 (2018) (discussing federal and state enforcement variances); Alex P. Abrams, *Why "Underfiling" by States Can and Should Be Used to Enforce Environmental Regulations*, 31 B.C. ENV'T AFFS. L. REV. 403, 403–05 (2004) (discussing broad strategy on state environmental enforcement).

330. OFF. OF THE INSPECTOR GEN., *supra* note 5, at 28.

331. *Id.* at 13–14.

332. *Id.* at 11, 13.

requirement), recent studies on the costs of climate change price it at $224 billon per year just for the United States,[333] and past studies have priced it at $1.9 trillion per year.[334] Third-party payments may present themselves as another tool to better redress broad environmental harms,[335] but they are only a small drop in the bucket and a method to better, but not perfectly, remediate the effects of a violator's conduct.

Nevertheless, a President bent on addressing climate change could use third-party payments, such as other forms of executive action, in a manner that binds future Administrations. Consider again sue-and-settle agreements: conservatives critiqued the Obama Administration's EPA settlements that resulted in regulatory rule setting for fossil-fuel power plants, partly on grounds that the settlements would bind future Oval Office occupants.[336] Some level of policy entrenchment may be inherent in the Executive Branch and a means of protecting future Presidents.[337] Therefore, despite a general rule against entrenchment,[338] executive policymaking favors first-movers.[339] First-movers also receive an informal, structural advantage because private industry will adjust and adapt to the higher baseline of requirements in future planning. That is, if alternating Administrations adopt higher fuel standards, remove those standards, re-adopt them, and re-remove them,[340] automakers are better off preparing for the higher standards,[341] which entrenches the first Administration's move.

Third-party payments may benefit from the same incumbency advantages, though they are more limited because they are private settlements. But a number of long-term settlement projects—BP's Deepwater Horizon payments are

333. An EPA analysis found that the impact of missing the target set under the Paris climate agreement would cost the United States $224 billion more per year compared to hitting the lower warming target, which would still entail costs. Dana Nuccitelli, *Climate Change Could Cost U.S. Economy Billions*, YALE CLIMATE CONNECTIONS (Apr. 29, 2019), https://yaleclimateconnections.org/2019/04/climate-change-could-cost-u-s-economy-billions/ [https://perma.cc/9C79-3BV4]; *see also* Jeremy Martinich & Allison Crimmins, *Climate Damages and Adaptation Potential Across Diverse Sectors of the United States*, 9 NATURE CLIMATE CHANGE 397, 397–404 (2019).

334. FRANK ACKERMAN & ELIZABETH A. STANTON, NAT. RES. DEF. COUNCIL, THE COST OF CLIMATE CHANGE: WHAT WE'LL PAY IF GLOBAL WARMING CONTINUES UNCHECKED iv (2008), https://www.nrdc.org/sites/default/files/cost.pdf [https://perma.cc/3XHF-HRHV].

335. *See, e.g.*, Robertson, *supra* note 161, at 1025 n.7 (proposing increased use of SEPs in settlements); Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENV'T L. 259, 330–31, 331 n.509 (2015) (proposing settlement projects as an analogy to finance atmospheric recovery).

336. *See* Brewer, *supra* note 291, at 190–91.

337. *Id.* at 197.

338. McVean & Pidot, *supra* note 44, at 213–14.

339. Brewer, *supra* note 291, at 197. Moreover, agency settlement is needed to pursue the policy decisions delegated to the agency by Congress. McVean & Pidot, *supra* note 44, at 214. Though executive, they also serve a role created by Congress's own policy. *See id.*

340. *See, e.g.*, Kalea Hall & Riley Beggin, *Biden to Tell U.S. Agencies to Review Fuel Efficiency Standards, Overturning Trump*, DET. NEWS (Jan. 20, 2021, 5:06 PM), https://www.detroitnews.com/story/business/autos/2021/01/20/biden-tells-agencies-review-fuel-standards/4230766001/.

341. *See, e.g.*, Coral Davenport, *More Automakers Drop Their Support of Trump-Era Fuel Economy Standards*, N.Y. TIMES (Feb. 2, 2021), https://www.nytimes.com/2021/02/02/business/more-automakers-drop-their-support-of-trump-era-fuel-economy-standards.html.

scheduled over sixteen years[342]—creates both industry and public entrenchment. If prosecutions for Clean Air Act offenses increase, third-party payments may play a larger role in shifting the industry and surrounding communities to better prepare for a move toward renewable energy. More so, established settlement practices may bind more recalcitrant future Administrations. As the power plant settlements through the Bush and Obama terms demonstrate, decades-long enforcement policies can survive changes in the Oval Office.

B. ENVIRONMENTAL JUSTICE

Presidents,[343] defendants,[344] and many scholars[345] have pursued an expanded role for third-party payments for environmental justice initiatives. Since President Clinton issued an executive order in 1994, federal agencies have considered environmental justice as part of their mission.[346] Yet, the long history[347] of environmental violations falling mainly on the shoulders of low-income and minority communities has not turned a corner[348]—and the burdens of environmental harms are expected to increase. For this reason, third-party payments that benefit low-income and minority communities ostensibly address nexus concerns because the beneficiaries are less of an indirect victim than the taxpayer-at-large.

The most recent SEP Policy explicitly names environmental justice as a key consideration in proposing an environmental project and as one of the factors in evaluating a SEP proposal.[349] Environmental justice also serves as an exception to the general rule that projects that are legally required of any party are not permitted as SEPs.[350] For example, projects to reduce pollutants from entering a waste stream would not be permitted if already a legal requirement under the EPA. However, SEPs are permitted where the project benefits residents of a community with environmental justice concerns, such as "maintaining or establishing connection to a sewer lateral line" or for chemical clean-out projects at schools.[351] Much like the implementation of cleaner burning woodstoves in the Harley-

342. DOJ, *supra* note 180.

343. Both Clinton and Obama explicitly named environmental justice goals. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1994); Rubin, *supra* note 29, at 182 (discussing the Clinton Administration); McGarity, *supra* note 27, at 1438 (discussing the Obama Administration).

344. SEPs that provide environmental justice benefits may exceed the typical mitigation cap of eighty percent, meaning additional cost savings for defendants. EPA, *supra* note 38, at 24.

345. *See, e.g.*, McGarity, *supra* note 27, at 1417. *See generally* Rubin, *supra* note 29 (describing how SEPs should be used to advance environmental justice); DeBellis, *supra* note 139 (describing how SEPs should be used to promote restorative justice).

346. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1994).

347. *See generally* Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991) (detailing a history of "environmental racism" in the placement of waste management sites).

348. *See* Rubin, *supra* note 29, at 183–86 (describing how the current environmental justice movement has not succeeded).

349. EPA, *supra* note 38, at 3–4 ("Defendants are encouraged to consider SEPs in communities where there are EJ concerns.").

350. *Id.* at 31.

351. *Id.* The Policy also requires that the residents are financially unable to comply with the legal requirements and that the SEP provides public health or environmental benefits. *Id.*

Davidson settlement, third-party payments could be used to address various environmental-justice-minded projects.[352]

When the Biden Administration revoked Trump's ban on third-party payments, it specifically cited the need to prioritize environmental justice.[353] The expanded use of third-party payments to benefit low-income and minority communities is possible. If anything, the Biden Administration may face criticism from its own side of the aisle over the ability to develop third-party projects that better incorporate affected communities into settlement discussions—a perennial SEP concern[354]—in a manner that still comports with the legal nexus and augmentation requirements. And use of third-party payments in a manner that supports environmental justice goals may also benefit the EPA and DOJ by increasing popular support for their environmental enforcement programs.[355]

C. DEFENDANTS & PRIVATE ENFORCERS

Something only touched on in this Note is that the regulated community—the corporate defendants required to pay for environmental projects—tends to support third-party payments, primarily because settlements that include projects are eligible for a penalty mitigation under the SEP Policy.[356] Additionally, corporations are more likely to preference the ability to pay third-party implementers over self-initiated projects because of the lack of internal capability.[357] Other academics point to "greenwashing," or the ability for a company to use favorable projects to mollify their public image,[358] reduce litigation costs, and ease into facilitating a settlement as reasons for defendant support.[359]

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352. For example, in Lowndes County, Alabama, inadequate septic and sewer systems have caused groundwater contamination affecting 340,000 people, many of whom are unable to meet the high costs of new septic systems and face criminal sanctions. *See* Inga T. Winkler & Catherine Coleman Flowers, *"America's Dirty Secret": The Human Right to Sanitation in Alabama's Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181, 190–92 (2017); *see also* Alexis Okeowo, *The Heavy Toll of the Black Belt's Wastewater Crisis*, NEW YORKER (Nov. 23, 2020), https://www.newyorker.com/magazine/2020/11/30/the-heavy-toll-of-the-black-belts-wastewater-crisis (discussing the nature of the sewage problems in Lowndes County, Alabama).

353. Memorandum from Jean E. Williams, *supra* note 77, at 1; *see also* Memorandum from Lawrence E. Starfield, *supra* note 219 (explaining that the Biden Administration was reviewing a regulation that limited the use of SEPs in settlements). Then-candidate Biden had also announced a plan to establish an Environmental and Climate Justice Division at the DOJ. *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, JOE BIDEN FOR PRESIDENT, https://joebiden.com/environmental-justice-plan/ [https://perma.cc/M9L3-PU3X] (last visited Feb. 27, 2022); *see also supra* Section I.D.4.

354. *See, e.g.*, McGarity, *supra* note 27, at 1423–24; DeBellis, *supra* note 139.

355. McGarity, *supra* note 27, at 1419.

356. EPA, *supra* note 38, at 23–24; *see also* Harris, *supra* note 18, at 10833 (Section Chief of Environmental Crimes at DOJ discussing popularity of community service payments with corporate defendants).

357. Paying third-party implementers also entails administrative hassles and additional settlement negotiation. *See* Kakade, *supra* note 10, at 137.

358. *See id.*; McGarity, *supra* note 27, at 1419, 1423.

359. *See* McGarity, *supra* note 27, at 1413–14.

On top of this, prominent corporations have increasingly advocated for environmentally sustainable investment and development,[360] and corporate purpose is experiencing a structural shift from shareholder value to corporate social responsibility.[361] This shift may be more public relations and greenwashing than fundamental change.[362] Nevertheless, considering third-party payments fit so well into this model, there may be increasing pressure from *defendants* in using these settlement project provisions, which could complicate the role of these provisions as a penalty deterrent.[363]

There is also a recent trend of private firms acting as the policemen of public enforcement, with research describing how large corporations are used and prosecuted as corporate gatekeepers.[364] For example, Facebook was fined by the Federal Trade Commission for its inability to restrain third-party subsidiaries and control app developers within their network.[365] This trend has caused proactive corporate policing, too. After EPA findings that Exxon routinely violated the Clean Air Act at various refineries, Exxon agreed to annually review its contractors for environmental compliance.[366] Corporate policing of subsidiaries under public enforcement models places additional legal duties on the corporate entity and complicates prosecution. Moreover, if this trend continues, settlement for these types of enforcement actions may drive larger businesses to engage in the compliance, remediation, and project phases of environmental enforcement, even when the activity occurs within a contractor or third-party subsidiary. Combined with growing green public-relations campaigns, whether cynical or not, third-party payments may continue even in the face of declining executive appetite because of support and better settlement offers from corporate defendants.

CONCLUSION

This Note has presented third-party payments as a lens for understanding another way that presidential Administrations can engage in "lawmaking." They are an imperfect approach to settlement policy that reflects weakened citizen suits and an Executive Branch striving against congressional inaction in substantive

360. *See, e.g.*, Larry Fink, *2021 Letter to CEOs*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter [https://perma.cc/NXF4-S7AB] (last visited Feb. 26, 2022).

361. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*,' BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/4MVH-23AP]; *see also* E. Christopher Johnson, Jr., John H. Stout & Ashley C. Walter, *Profound Change: The Evolution of ESG*, 75 BUS. LAW. 2567, 2568 (2020) (discussing the convergence of environmental sustainability and business sustainability).

362. *See* Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change?*, N.Y. TIMES (May 12, 2021), https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html.

363. For more on deterrence, see Section I.C.

364. *See* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 509–22 (2020).

365. *Id.* at 468–69.

366. *Id.* at 491.

lawmaking. They are used despite a variety of inherent risks, including prosecutorial indiscretion and separation-of-powers fights over intended beneficiaries. The accepted trade-off, however, recognizes the imperfect nature of environmental law itself and an approach that may prove useful when coming to grips with looming problems of environmental change: in the face of harm, some form of redress may be better than nothing.