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SEParating Litigation: How SEPs Demonstrate the Need for Centralized Environmental Civil Litigation

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SEPARATING LITIGATION: HOW SEPS DEMONSTRATE THE NEED FOR CENTRALIZED ENVIRONMENTAL CIVIL LITIGATION

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INTRODUCTION

Since the Environmental Protection Agency's ("EPA") origin in 1970 under President Richard Nixon,[1] the EPA has been tasked with protecting the quality of the United States' environment and promulgating and enforcing environmental regulations.[2] However, unlike executive departments like the Department of Labor,[3] or independent agencies like the Federal Trade Commission ("FTC"),[4] the EPA does not have sole independent litigation authority to enforce environmental regulations.[5]

Under the current structure of the EPA and environmental statutes codified by Congress, the EPA has the power to enforce administrative violations and impose penalties on wrongdoers up to a certain monetary amount.[6] For example, under the Clean Air Act, EPA administrative penalties cannot exceed a maximum of $200,000.[7] If the EPA wishes to impose higher penalties that are beyond their statutory authority to enforce, the EPA must "refer" the case to the Department of Justice ("DOJ"), which ultimately controls the fate of whether legal action proceeds.[8]

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[1] Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1350 (2000).

[2] *The Origins of the EPA*, EPA (June 24, 2022), https://www.epa.gov/history/origins-epa [https://perma.cc/YGU5-PKWG].

[3] *About*, U.S. DEP'T OF LABOR, OFF. OF THE SOLIC., https://www.dol.gov/agencies/sol/about [https://perma.cc/YGU5-PKWG] (last visited Jan. 16, 2023).

[4] Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 271 (1994).

[5] 42 U.S.C. § 7605 (a)–(b); U.S. Dep't of Just., Att'ys' Manual § 5-1.200 to 5-1.300 (1977).

[6] *See, e.g.*, 42 U.S.C. § 7524.

[7] Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 565 n.33 (2003).

[8] *See* U.S. Dep't of Just., *supra* note 5, § 5-12.530; *see, e.g.*, OFF. OF ENF'T & COMPLIANCE

When the EPA decides to refer a case to the DOJ, it essentially gives up its regulatory power and enters an advisory role because the DOJ decides (1) whether to take a case to court and (2) how to litigate or settle a case.[9] In theory, the DOJ and EPA litigation arrangement would not be problematic if the EPA and DOJ consistently agreed on how violations should be handled—but that is not always the reality. Disagreement arises between the EPA and DOJ when an "us versus them" division infuses itself between the two agencies.[10] This division can be prompted by the political goals of the controlling administration's political agenda or the experiential difference between the civil servants at the EPA and the attorneys at the DOJ.[11] As noted by Professors Neal Devins and Michael Herz, "the amount of resentment and animosity toward DOJ from agency lawyers ebbs and flows, dependent on particular individuals and their personalities and varying from both administration to administration and agency to agency. But the issue never disappears."[12]

Due to the EPA's unique structure as an independent agency within the executive branch,[13] deregulation under administrations like President Reagan's and President Trump's has raised questions about whether the EPA is sufficiently independent from the politics of the presidency to consistently promote and enforce scientifically sound and expert-based environmental policy.[14] Because the DOJ may approach a case differently (or flatly refuse to pursue a case referred by the EPA),[15] the EPA—dependent upon its relationship with the DOJ—may be forced to use administrative penalties to enforce environmental regulations instead of civil penalties, which could provide more of a deterrent effect.[16]

Due to the relationship between the executive branch and the EPA, proponents of EPA independence have called for congressional

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ASSURANCE, CIVIL PENALTY POLICY FOR SECTION 311(B)(3) AND SECTION 311(J) OF THE CLEAN WATER ACT 4 (1998).

[9] Devins & Herz, *supra* note 7, at 563.

[10] *Id.* at 569.

[11] *See also id.*

[12] *Id.*

[13] *Environmental Protection Agency*, FED. REG., https://www.federalregister.gov/agencies/environmental-protection-agency [https://perma.cc/3E9Q-6M5F] (last visited Jan. 16, 2023).

[14] *See also* Leif Fredrickson, Christopher Sellers, Lindsey Dillon, Jennifer Liss Ohayon, Nicholas Shapiro, Marianne Sullivan, Stephen Bocking, Phil Brown, Vanessa de la Rosa, Jill Harrison, Sara Johns, Katherine Kulik, Rebecca Lave, Michelle Murphy, Liza Piper, Lauren Richter & Sara Wylie, *History of US Presidential Assaults on Modern Environmental Health Protection*, 108 AM. J. PUB. HEALTH 95, 95 (2018).

[15] Herz & Devins, *supra* note 1, at 1365–66.

[16] *See also id.* at 1368.

reorganization of the EPA to make it a truly independent agency that operates autonomously from the president.[17] In 1982 and 1983, legislation was introduced in the House and Senate to make "the EPA an independent regulatory commission and thereby free it from White House control."[18] Although there have been attempts to make the EPA a traditional independent agency, based on the current case law and legal scholarship regarding independent agencies' constitutional status,[19] this Note argues that Congress does not have to alter the structure of the EPA to achieve uniform administrative and civil enforcement of environmental regulations.[20] Statutorily granting the EPA independent litigation authority would allow a single entity to cohesively enforce civil environmental regulations and promote both the deterrence and compliance goals that environmental regulations were designed to achieve.[21] Unlike a change of agency status, reallocating litigation authority would not trigger any constitutional separation of powers concerns.[22] As opposed to calling for increased independence from the executive branch, centralizing litigation authority would promote consistent enforcement of environmental regulations in both case litigation and settlements.[23]

This Note will proceed in four parts to examine why enabling EPA litigation autonomy over reestablishing the EPA as a traditional independent agency is a better way of achieving uniform enforcement of environmental policy and regulations. Part I will address the history of independent agencies. Part II will briefly overview the arguments for and against independent agencies and discuss how Supreme Court precedent affects independent agency status. Part III will focus on whether the EPA would benefit from independent agency status. Lastly, Part IV will focus on

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[17] *See id.* at 1355.
[18] *Id.* at 1355–56.
[19] *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191–92 (2020); Neal Devins & Dave Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. (forthcoming 2023).
[20] *See* Devins, *supra* note 4, at 264 (highlighting legislative grants of litigation control).
[21] *See* Herz & Devins, *supra* note 1, at 1369. It is important to note that there are benefits to the DOJ maintaining litigation control over environmental criminal prosecutions.
[22] *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 650 (2010).
[23] *See* Devan Cole, *DOJ Announces New Office To Enforce Laws Around Climate Crisis, Toxic Pollution*, CNN (May 5, 2022, 1:58 PM), https://www.cnn.com/2022/05/05/politics/doj-office-of-environmental-justice-announcement/index.html [https://perma.cc/5HUP-NSY2]. As of May 5, 2022, the Biden DOJ was still working to restore its ability to use SEPs in civil settlements. *Id.* The dichotomy that existed between the DOJ and the EPA's capacity to implement SEPs effected the EPA's ability to request SEPs as part of referred civil cases, despite the DOJ favoring their use. *Id.*

the use of Supplemental Environmental Projects ("SEPs") in settlement agreements and how the DOJ's actions can affect EPA enforcement and the promotion of environmental justice in adversely affected communities.

I. THE HISTORICAL EMERGENCE OF INDEPENDENT AGENCIES

Before discussing the effect of the DOJ on the EPA's litigation authority, it is necessary to discuss the history of independent agencies and the constitutional uncertainty attached to them. Understanding the origin and evolution of independent agencies allows this Note to demonstrate why independent agency status would not lead to more cohesive environmental enforcement by the EPA.[24] Regardless of political ideology, the legal questions surrounding the EPA's use of SEPs demonstrate how the DOJ and EPA can asymmetrically enforce environmental regulations.[25]

As discussed below, independent agencies do not perform exactly as they were theoretically intended.[26] As opposed to being apolitical bodies, independent agencies are amenable to political forces.[27] Undoubtedly, new administrations will have an effect on environmental policies and regulations, but the career attorneys at the EPA have a greater ability to uniformly enforce environmental regulations that are on the books if they do not have to operate under the shadow of the DOJ.[28]

A. Reform from the Gilded Age's Spoils System

The emergence of independent agencies in the United States is directly tied to the emergence of the Progressive Era from the Gilded Age.[29] Understanding the background of the Gilded Age after the Civil War

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[24] *See* Devins & Lewis, *supra* note 19, at 5.

[25] *See, e.g.*, Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., on Supplemental Environmental Projects ("SEPs") in Civil Settlements with Private Defendants to ENRD Deputy Assistant Attorney Generals and Section Chiefs (Mar. 12, 2020) [hereinafter Clark Memo]; Memorandum from Cynthia Giles, EPA Assistant Adm'r, on Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy to Regional Administrators [hereinafter 2015 SEP Policy Update].

[26] *See, e.g.*, Devins & Lewis, *supra* note 19, at 5.

[27] *See* Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1567 (2011).

[28] *See* Herz & Devins, *supra* note 1, at 1375 (noting that "DOJ lawyers lack: expertise in a particular substantive area, intense familiarity with the details of a regulatory program, and enthusiasm for the agency's actions"—it is important to note that DOJ lawyers possess litigation expertise).

[29] Stephen Skowronek & Stephen M. Engel, *Introduction*, *in* THE PROGRESSIVES' CENTURY:

provides a foundational framework for understanding why Progressive practitioners like Theodore Roosevelt and Woodrow Wilson[30] began to rely on and embrace independent agencies as a means of formulating and implementing scientifically sound public policy.[31] During the Gilded Age, polarization and partisanship were at heightened levels post-Reconstruction.[32] However, as opposed to today's ideological landscape, political parties during the Gilded Age "were largely tribal—vast patronage networks" that were competing for the spoils of holding office.[33] With the spoils system intensifying the partisan divide and preventing bipartisan cooperation, and the industrial revolution introducing new social and economic problems, it became clear that Gilded Age politics and the spoils system were preventing the implementation of technically sound public policy that was needed to address pertinent societal issues.[34]

Ultimately, the scale of corruption in post–Civil War America laid the groundwork for a reform movement that would look to rely on apolitical expertise as a vehicle to formulate effective policy regulation.[35] During the Gilded Age, "a rapidly industrializing society, private capital, in league with venal politicians, ran roughshod over a national state apparatus incapable of responding to the emerging social and economic needs of the day."[36] At the center of the national, political, and financial corruption was the railroad corporations—which frequently looked to influence or bribe those in office who could quietly control legislation and administration.[37] Both the Democratic and Republican parties opposed corruption for their own political reasons—which is why, despite the polarized divide, Congress was able to pass the Pendleton Act (which was designed to create

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POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 3 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

[30] *See, e.g.*, John Milton Cooper, *From Promoting to Ending Big Government: 1912 and the Progressives' Century*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 157 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

[31] *See generally id.*; Marver H. Bernstein, *The Scope of Public Administration*, 5 W. POL. Q. 124, 126 (1952).

[32] ROBERT D. PUTNAM, THE UPSWING 14 (Shaylyn R. Garret ed., 2020).

[33] *Id.*

[34] Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1386 (2010). *See* Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies*, 31 J.L. & POL. 139, 143, 148 (2015).

[35] *See* Richard White, *Information, Markets and Corruption: Transcontinental Railroads in the Gilded Age*, 90 J. AM. HIST. 21, 31 (2003).

[36] Mashaw, *supra* note 34, at 1362.

[37] White, *supra* note 35, at 31.

an apolitical civil service) and the Interstate Commerce Act (which created the Interstate Commerce Commission ("ICC") as the first independent agency) in the 1880s.[38] The passage of the Interstate Commerce Act of 1887 was described as "the culmination of a twenty-year struggle for legislation during which more than 150 bills were introduced in Congress providing for some variety of federal control over rail-roads."[39] Congressional reform of the spoils system in the 1880s, combined with the emerging theory of public administration, would drive the Progressive's use of independent agencies to achieve apolitical and expert policymaking.[40]

B. Progressive Expectations and New Deal Expansion

With the theory of public administration surfacing around 1887, in an article published by then–political scientist Woodrow Wilson, Wilson introduced the idea that public policy was a field that could be separated from the political landscape.[41] Wilson described the field of administration as "a field of business . . . removed from the hurry and strife of politics."[42] With the Gilded Age in the rearview mirror, progressives like Wilson believed that apolitical public administration was the best way to achieve progress for the "collective human condition."[43]

Progressive reformers desired to implement a new system of governance that used the power of the federal government to solve the social and economic changes sparked by industrialization.[44] Progressive presidents saw big government as the answer to various societal problems.[45] Progressives committed the nation to a particular conception of government and a new way of governing. They did not just install policies ad hoc—they reorganized in light of the need for individualized expert policymaking bodies and prepared society for programmatic government.[46] Progressives

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[38] *See* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 22 (1955).
[39] *Id.* (citing ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 40–41 (1941)).
[40] *See* Shugerman, *supra* note 34, at 143; Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 209 (1887).
[41] Wilson, *supra* note 40, at 209.
[42] *Id.*
[43] Larry Walker, *Woodrow Wilson, Progressive Reform, and Public Administration*, 104 POL. SCI. Q. 509, 512 (1989).
[44] *See* Cooper, *supra* note 30, at 158, 160.
[45] *Id.* at 158.
[46] *See* Skowronek & Engel, *supra* note 29, at 10.

believed that independent agencies were the answer to the nation's problems.[47]

With respect to the notion of independence, the history leading to the creation of early independent agencies like the ICC and FTC suggests that Congress did not initially intend for the independent agency model to create "independence" from the executive branch.[48] Independence at this time appears to have likely meant bipartisanship or neutrality instead of independence from a specific political branch of government.[49] Thus, the progressive independent agency model was contingent upon the assumption that the president and Congress would cooperate to promote the functionality of independent agencies.[50]

Under the presidency of Franklin Delano Roosevelt ("FDR"), the implementation of independent agencies expanded during the New Deal, and the agencies grew and began to regulate in more areas.[51] As independent agencies expanded, the Progressive assumption that congressional and executive cooperation could promote expertise proved to be fallible and became amenable to constitutional challenge.[52] Regulatory efficiency of the administrative state became a prominent concern during the New Deal, separation of power arguments began to emerge, and independent agency design began to be framed as a way in which Congress promoted agency independence from the executive branch.[53]

Given the context of World War II, the emergence of totalitarianism in Europe, and the New Deal moving power to the center of the federal government (which FDR was attempting to control), FDR was "branded a dictator, taking the country toward, variously, communism or fascism."[54] During the New Deal, Democratic congressmen prioritized Congress's institutional power over party allegiance and were unwilling to cede much control to FDR, as they were worried about the President's determination

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[47] *See id.* at 9.
[48] Walker, *supra* note 43, at 513; ROBERT E. CUSHMAN, INDEPENDENT REGULATORY COMMISSIONS 63 (1941).
[49] *Id.* at 63.
[50] Tushnet, *supra* note 27, at 1580.
[51] *See* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 337 (2013) (finding that "independent agencies were a hallmark of the New Deal effort to build an efficient bureaucracy").
[52] Aaron L. Nielson, *Deconstruction (Not Destruction)*, 150 DAEDELUS, J. AM. ACAD. ARTS & SCIS. 143, 147 (2021).
[53] Gadinis, *supra* note 51, at 337.
[54] PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE 29 (2018).

to control the administrative state.[55] Congress's attitude, combined with the Supreme Court's ruling in *Humphrey's Executor v. United States*, cemented the notion that the structural design of independent agencies was meant to create independence from the executive branch.[56]

C. Separation of Powers and Constitutional Limitations on Independent Agencies

Since the Supreme Court's constitutional embrace of independent agencies in *Humphrey's Executor*,[57] the questions of the executive branch's ability to remove and nominate agency members have frequently raised constitutional separation of powers questions.[58] Although *Humphrey's Executor* has not been formally overturned by the Supreme Court, the constitutional scope of independent agencies has been narrowed, and the Roberts Court may have the opportunity to re-examine or overturn *Humphrey's Executor*'s precedent.[59]

Recently, the Supreme Court has restricted the scope of *Humphrey's Executor*. In 2020 and 2021, the Court held in *Seila Law v. Consumer Financial Protection Bureau* and *Collins v. Yellen* that single-headed independent agencies could not be insulated by Congress to prevent the president from using his or her removal power to remove an agency head.[60] The Court held that the restriction of the president's removal powers was a separation of powers violation and Justice Thomas, in his concurrence in *Collins*, argued that the removal restrictions inhibited the president's ability to fulfill his or her responsibilities under the Take Care Clause of the Constitution.[61] Since the Court's ruling in *Humphrey's Executor*, Democrats and Republicans have continuously ended up in court to battle over the constitutional status of independent agencies.[62] The battle over the constitutional status of independent agencies within

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[55] Joanna Grisinger, *The (Long) Administrative Century: Progressive Models of Governance*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 360, 367 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).
[56] *See* 295 U.S. 602, 623 (1935).
[57] *See id.*
[58] *See* Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 650 (2017).
[59] *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).
[60] *Id.* at 2197; Collins v. Yellen, 141 S. Ct. 1761, 1778 (2021).
[61] *Collins*, 141 S. Ct. at 1789–95 (Thomas, J., concurring).
[62] *See, e.g.*, *Seila L. LLC*, 140 S. Ct. at 2205; *Collins*, 141 S. Ct. at 1778.

the administrative state is far from over and is still subject to future Supreme Court treatment.[63] Currently, *Seila Law* and *Collins* have limited the scope of *Humphrey's Executor* with respect to single-headed independent agencies.[64] Both case holdings make it impermissible for Congress to insulate a single-headed independent agency head through removal protections if it performs an executive function. On the other hand, *Humphrey's Executor* still allows multi-member agencies to be protected through removal protections.[65]

II. OVERVIEW OF ARGUMENTS FOR AND AGAINST INDEPENDENT AGENCIES

Currently, "independent agencies are the 'final frontier' in the raging, partisan battle over presidential control over the administrative state."[66] Generally, members of the Democratic party support the independent agency model and have been proponents of big government as the solution to societal issues.[67] Defending independent agencies, Democrats fervently argue "that the 'diverse problems of government demand diverse solutions,' that the 'institutional design' of government agencies 'is one for the political branches' to figure out, and that the courts should not impose 'rigid rules' limiting experimentation."[68]

In *Seila Law*, current and former Democratic congressional members filed amicus briefs supporting the constitutionality of independent agencies.[69] In these amicus briefs, congressional Democrats argued that

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[63] *See* Devins & Lewis, *supra* note 19, at 2.
[64] *See Seila L. LLC*, 140 S. Ct. at 2205; *Collins*, 141 S. Ct. at 1778.
[65] However, multi-member agencies can be hamstrung by partisan politics. *See* Devins & Lewis, *supra* note 19, at 9 (noting that "the multi-member commission model worked well for a Congress concerned with patronage, not ideology").
[66] *Id.* at 2 (citing STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC 160 (2021)).
[67] *Id.*
[68] *Id.*
[69] *See* Devins & Lewis, *supra* note 19, at 2 n.2; Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance at 4, 1A–3A, *Seila L. LLC*, 140 S. Ct. 2183 (No. 19-7) [hereinafter Brief of Current and Former Members of Congress]; Brief of Amici Curiae U.S. Senators Sheldon Whitehouse, Richard Blumenthal & Mazie Hirono in Support of Court-Appointed Amicus Curiae at 1–2, *Seila L. LLC*, 140 S. Ct. 2183 (No. 19-7) [hereinafter Brief of Amici Curiae U.S. Senators]; Brief for Amicus Curiae the United States House of Representatives in Support of the Judgment Below at 5, *Seila L. LLC*, 140 S. Ct. 2183 (No. 19-7) [hereinafter Brief for Amicus Curiae the United States House of Representatives].

(1) the removal protections for single-headed agencies were constitutional, (2) the attack on the single-headed agency lacked merit, (3) the single-headed agency design was properly created to achieve presidential oversight and allow the president to fulfill his or her duties under the Take Care Clause, and (4) the nation has a long tradition of utilizing independent regulatory agencies.[70]

As articulated in these Democratic amicus briefs, supporters of independent agencies adhere to the progressive notion that independent agencies are meant to be used as a form of governance that can solve complex problems through the formation of apolitical and expert policy.[71] Congressional Democrats have consistently argued that "the Necessary and Proper Clause gives Congress 'broad' authority to create and structure administrative agencies."[72] From the creation of the ICC to curb the abuses of the railroads, the Federal Reserve Board to regulate the nation's growing economy, and the host of other independent agencies generated to cope with the Great Depression, independent agency supporters argue that it is Congress's prerogative to continue to promulgate independent agencies "across a wide range of policy fields."[73]

In *Seila Law*, congressional Democrats argued that the Consumer Finance Protection Bureau's ("CFPB") removal protections did not inhibit the president from fulfilling his constitutional duty.[74] In fact, "Democrats think it appropriate to constrain an otherwise too powerful executive in order to put in place the Progressive vision of politically insulated fact-based agency decision-making."[75] On the other hand, congressional Republicans support the notion that independent agencies are the headless fourth branch of the state.[76] In *Seila Law*, congressional Republicans emphasized that the CFPB and the independent agency model were flagrant separation of powers violations.[77] Specifically, congressional

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[70] *See, e.g.*, Brief of Current and Former Members of Congress, *supra* note 69, at 5, 22; Brief of Amici Curiae U.S. Senators, *supra* note 69, at 1–2; Brief for Amicus Curiae the United States House of Representatives, *supra* note 69, at 13.
[71] *See* Devins & Lewis, *supra* note 19, at 2.
[72] Brief for Amicus Curiae the United States House of Representatives, *supra* note 69, at 14 (quoting Buckley v. Valeo, 424 U.S. 1, 134 (1976)).
[73] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27 (2010).
[74] *See* Brief for Amicus Curiae the United States House of Representatives, *supra* note 69, at 1.
[75] Devins & Lewis, *supra* note 19, at 2.
[76] *See* Grisinger, *supra* note 55, at 367.
[77] *See* Brief Amici Curiae of Twenty-Seven Members of the U.S. House of Representatives

Republicans claimed that autonomous independent agencies directly affected and infringed on the president's constitutional powers under the Take Care Clause.[78]

Embracing the unitary executive theory, Republicans embrace "hierarchical presidential control as both a bulwark against the deep state and a pathway to making agencies 'more accountable to the people, Republicans envision a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.'"[79] As stated by Justice Scalia in his dissent in *Morrison v. Olson*, the Take Care clause does not grant the president "some of the executive power but all of the executive power."[80] Under the unitary executive theory, any constraint on the president's ability to control the implementation of policy is viewed as unconstitutional.[81]

III. WOULD THE EPA BENEFIT FROM INDEPENDENT AGENCY STATUS?

With arguments for and against the independent agency model,[82] it is useful to see how the EPA would be affected if it were changed to an independent agency—as was suggested by Congress in 1982 during the Reagan administration.[83] During the Reagan presidency, congressional members were unhappy with the function of the EPA and sought to change the agency's status in an attempt to isolate it from executive control.[84] However, it remains in question whether changing the EPA to an independent agency would have had the impacts Congress sought. As a sense of uncertainty hangs over the constitutional status of independent agencies due to partisan disagreement and Supreme Court precedent, the most efficient way for the EPA to enforce environmental regulations consistently and uniformly is if Congress grants the EPA autonomous litigation power.

In a forthcoming article, Professors Neal Devins and David Lewis argue that both arguments for and against independent agencies are

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in Support of Petitioner at 11, Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020) (No. 19-7) [hereinafter Brief Amici Curiae of Twenty-Seven Members].

[78] *See id.*

[79] Devins & Lewis, *supra* note 19, at 2.

[80] Brief Amici Curiae of Twenty-Seven Members, *supra* note 77, at 4.

[81] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4 (2008).

[82] *See* Devins & Lewis, *supra* note 19, at 2–3.

[83] Herz & Devins, *supra* note 1, at 1355–56.

[84] *See id.*

misunderstood and fielded by partisan messaging.[85] Devins and Lewis emphasize that what unites Democrats and Republicans is their reliance on party cliches and that they ignore the truth that the independent agency model (1) no longer works and (2) does not overtly constrain presidential power.[86] "In short, Republicans and Democrats largely have it backwards. Republicans need to understand that presidents wield enormous power over independent agencies. Democrats likewise need to see how the independence model invites its own mischief and Democratic policy goals may be better achieved through the unitariness model."[87]

With respect to the EPA, changing the agency to an independent agency—be it a single-headed or multi-member agency—would not provide any prospect of achieving more uniform environmental enforcement.[88] Currently, the EPA is operated by a single Administrator who is nominated by the president and confirmed by the Senate.[89] The agency's current structure closely resembles a single-headed agency (like the CFPB in *Seila Law*). However, as a cabinet-level political appointee,[90] the EPA Administrator undoubtedly performs a primarily executive function.[91] Under *Seila Law* and *Collins*, if Congress decided to codify the EPA as a single-headed agency, it would not provide any advantage to the EPA's ability to uniformly enforce environmental regulations.[92] As a traditional single-headed agency, the EPA would still operate under the direct control of the executive branch and be subject to DOJ oversight with respect to litigation.[93] At the end of the day, EPA regulation enforcement would be undermined by any disparities that exist between the agencies and DOJ's approach to litigation enforcement.

Additionally, although multi-member agencies are still constitutionally permissible under *Humphrey's Executor*, partisan fighting often affects the independence and functionality of independent agencies.[94] During the New Deal, progressives intended to use structural mechanisms such as partisan balancing requirements and quorum requirements to

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[85] *See* Devins & Lewis, *supra* note 19, at 4.
[86] *Id.*
[87] *Id.*
[88] *See id.*
[89] *EPA's Administrators*, EPA, https://www.epa.gov/history/epas-administrators [https://perma.cc/4LAK-EG8B] (June 3, 2022).
[90] *Id.*
[91] *See id.*
[92] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2198 (2020).
[93] *See id.*
[94] *See* Devins & Lewis, *supra* note 19, at 5.

insulate independent agencies from the political nature of the executive branch.[95] Although these structural mechanisms were intended to promote apolitical expertise, their design structure was largely dependent upon the assumption that the president, Congress, and respective political parties would cooperate to promote the independent model.[96] This has not been the case.[97]

Over time, the structural design of independent agencies has morphed.[98] After *Humphrey's Executor*, statutory design mechanisms have largely been viewed by political actors through a constitutional separation of powers lens.[99] Multi-member independent agencies have taken on the role of limiting executive power. Due to this, the independent agency model has become mailable to partisan gamesmanship.[100] Design mechanisms like partisan balancing requirements and quorum requirements have been manipulated by politicians to promote and advance political agendas.[101]

As Devins and Lewis emphasize, "structural protections . . . neither facilitate nonpartisan expertise nor shield independent agencies from presidential control."[102] Over time, the relationship between presidential appointment powers and independent agency quorum requirements has been used in a political manner to stall agency rule-making and regulations.[103] A prime example of a structural mechanism being used to subvert agency independence was seen in 2012, when Senate Republicans refused to confirm President Obama's National Labor Relations Board ("NLRB") Commissioner nomination.[104] Since the president's appointment powers are effectuated by Senate confirmation, Senate Republicans were

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[95] *See* Mashaw, *supra* note 34, at 1386.
[96] *See* Nielson, *supra* note 52, at 147.
[97] *See, e.g.*, Devins & Lewis, *supra* note 19, at 4–5.
[98] *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 602 (1935); *Seila L. LLC*, 140 S. Ct. at 2183.
[99] *See, e.g.*, Brief of Current and Former Members of Congress, *supra* note 69, at 5, 22; Brief Amici Curiae of Twenty-Seven Members, *supra* note 77, at 4, 13.
[100] *See* Devins & Lewis, *supra* note 19, at 54 ("Since 2000, at least 10 different commissions have lost a quorum for a period of at least 30 days, leaving them unable to perform key adjudicatory and regulatory functions.").
[101] *See* Brad Plumer, *A Court Just Struck Down Obama's Labor Board. Here's Why It Matters.*, WASH. POST (Jan. 25, 2013, 3:16 PM), https://www.washingtonpost.com/news/wonk/wp/2013/01/25/obamas-labor-board-has-been-ruled-unconstitutional-heres-why-that-matters/ [https://perma.cc/R4XB-LL9S]; Devins & Lewis, *supra* note 19, at 33.
[102] *Id.* at 1.
[103] *See* Plumer, *supra* note 101.
[104] *Id.*; Devins & Lewis, *supra* note 19, at 53.

able to exercise significant power over the NLRB and effectively thwart NLRB policymaking under the Obama administration. By refusing to confirm President Obama's nomination, Senate Republicans prevented the NLRB from having the required quorum to operate.[105]

Due to the political malleability of independent agency design, it would be counterintuitive to change the EPA's structure to a multi-member agency. Even if Congress drastically overhauled the EPA's design structure to create independence—similar to the single-headed agency model—there would still be the issue of dichotomous litigation between the EPA and DOJ.

IV. SEP CASE STUDY: HOW DIVIDED LITIGATION AFFECTS EPA ENFORCEMENT

As a key component of the EPA's environmental justice enforcement, SEPs have been upended by the DOJ's overarching control of civil environmental litigation during the Trump administration. SEPs were frequently sought by the EPA in administrative and judicially referred case settlements.[106] SEP programs are included in settlements and are provisions that require wrongdoers to complete projects that will address or mitigate environmental issues—usually within directly affected communities.[107] SEPs are a way for the EPA to directly promote environmental justice projects while quickly enforcing environmental punishments through case settlements.[108]

The effect that the Trump DOJ had on the inclusion of SEPs as part of civil suit settlements emphasizes the disconnect that can exist

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[105] Devins & Lewis, *supra* note 19, at 53. President Obama relied on recess appointments to get his NLRB nominations through. *Id.* However, the Supreme Court held that this was unconstitutional, and that the NLRB had been operating without a quorum. *Id.* As a result, the Supreme Court struck down over 700 NLRB decisions that had been effectuated without a proper quorum. *Id.*

[106] *See* Kathleen Boergers, *The EPA's Supplemental Environmental Projects Policy*, 26 ECOLOGY L.Q. 777, 788 (1999).

[107] *See* Laurie Droughton, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 PACE ENV'T L. REV. 789, 807 (1995); Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 ENV'T L. REP. NEWS & ANALYSIS 10,511, 10,511, 10,524 (2017); Miranda Green, *Trump Admin Erases Key Environmental Enforcement Tool*, HILL (Aug. 21, 2019, 5:01 PM), https://thehill.com/policy/energy-environment/458317-trump-admin-erases-key-environmental-enforcement-tool/ [https://perma.cc/44GL-SRMR].

[108] Joel Smith, *Supplemental Environmental Projects' Wild Ride Is a Call for Legislative Action to Protect a Valuable Negotiation Tool*, 2021 J. DISP. RESOL. 369, 380 (2021).

between the DOJ and EPA with respect to environmental enforcement.[109] SEPs are intentionally used to encourage and "obtain environmental and public health protections and improvements that may not otherwise have occurred without the settlement incentives . . . ."[110] However, despite the environmental justice purpose and historical inclusion of SEPs in administrative and civil settlements, the use of SEPs by the DOJ in civil case settlements was methodically discontinued by the Trump administration in 2017, 2018, and 2020.[111] The Trump administration's reading of SEP policies stated that SEPs were unconstitutional because they violated the Miscellaneous Receipts Act and circumvented Congress's appropriations authority.[112] Although the Trump administration's treatment of SEPs procedurally applied to the DOJ, it created uncertainty regarding how or if the EPA was able to use SEPs as an enforcement tool.

A. Legal Overview of Supplemental Environmental Projects

Over the years, the SEP policies of the DOJ and EPA have been modified by respective administrations, but generally, most administrations have supported the use of SEPs in settlement agreements. SEPs have allowed for the EPA and DOJ to encourage violators to work to offset the negative environmental consequences that their conduct has produced.[113] SEPs have been used by numerous administrations because they benefit the environment and industry by allowing violators to avoid harsh monetary penalties while presenting an "environmentally friendly face to the community."[114]

In 2015, under the Obama administration, the DOJ updated its SEP policy, hoping to "enable case teams to more efficiently and effectively

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[109] *Compare* Clark Memo, *supra* note 25, *with* 2015 SEP Policy Update, *supra* note 25.
[110] Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24796, 24796 (Apr. 10, 1998).
[111] *See* Hana Vizcarra & Laura Bloomer, *DOJ Phases Out Supplemental Environmental Projects in Environmental Enforcement*, ENV'T & ENERGY L. PROGRAM (Aug. 6, 2020), https://eelp.law.harvard.edu/2020/08/doj-phases-out-supplemental-environmental-projects-in-environmental-enforcement/ [https://perma.cc/FU8R-QLUK].
[112] *See* Clark Memo, *supra* note 25.
[113] Michael A. Chernekoff & Elise M. Henry, *Reversal of Trump-Era Policies May Resurrect SEPs*, NAT'L. L. REV. (Mar. 10, 2021), https://www.natlawreview.com/article/reversal-trump-era-policies-may-resurrect-seps [https://perma.cc/D5ZU-QFUC].
[114] Joel A. Mintz, *EPA Needs to Reinstate a Critical Environmental Tool Scrapped by Trump*, HILL (Feb. 2, 2022, 6:00 PM), https://thehill.com/opinion/energy-environment/595569-epa-needs-to-reinstate-a-critical-environmental-tool-scrapped-by [https://perma.cc/JS5X-DNQV].

include SEPs in settlement of civil enforcement cases" and encourage the consideration of SEPs "wherever they may be appropriate."[115] Since SEPs are not considered penalties, SEP programs must be initiated by the violator.[116] After receiving a SEP proposal, the EPA or DOJ can accept it as part of the settlement and reduce proposed penalties based on the violator's proposed environmental projects.[117] In practice, SEP policies have encouraged violators to undertake projects that benefit adversely affected communities.[118] For example, SEPs can lead a violator to "reconstruct a wetland, support green community job training programs, or even purchase emergency response equipment for a local fire department."[119] As a whole, SEPs have been generally favored by both industry and government actors alike.[120]

For decades, under both Republican and Democratic administrations, SEPs have been used to help affected communities achieve significant environmental benefits.[121] For example, in 2005, the Bush administration realized the importance of SEPs when the DOJ agreed to a settlement with DuPont over chemical releases of perfluorooctanoic acid.[122] The Bush DOJ settlement with DuPont proposed six million dollars in SEPs, and included one million dollars for education programs in West Virginia.[123] Additionally, the Bush administration agreed to the use of SEPs in a settlement with Cargill for air pollution violations.[124] In exchange for decreased civil penalties, Cargill agreed to implement three and a half million dollars' worth of SEPs that were geared toward wetland restoration projects in Iowa and Nebraska.[125] Overall, under the Bush administration

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[115] 2015 SEP Policy Update, *supra* note 25.
[116] Memorandum from Lawrence E. Starfield, EPA Acting Assistant Adm'r, on Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements to Regional Counsels and Deputies, Enforcement and Compliance Assurance Division Directors and Deputies, OECA Office Directors and Deputies (Apr. 26, 2021).
[117] *See* Smith, *supra* note 108, at 370.
[118] *See* Nadira Clarke, Alexandra Dapolito Dunn & Lily Chinn, *Surge in Environmental Justice Enforcement Prompts Intensified Corporate Attention to Community*, REUTERS (July 28, 2021, 11:13 AM), https://www.reuters.com/legal/legalindustry/surge-environmental-justice-enforcement-prompts-intensified-corporate-attention-2021-07-28/ [https://perma.cc/CM7E-2UL2].
[119] *Id.*
[120] Chernekoff & Henry, *supra* note 113.
[121] *See* Vizcarra & Bloomer, *supra* note 111.
[122] Eileen D. Millett, *A Step Too Far from a "SEP" in the Right Direction*, 33 PRAC. REAL EST. L. 5, 7 (2017).
[123] *Id.*
[124] *Id.*
[125] *Id.*

in 2006, the EPA settled 220 cases that required defendants to implement SEPs.[126] The value of the SEPs included in these 220 cases resulted in over seventy-eight million dollars being put to use to promote the environment and public health.[127]

Although the EPA and DOJ have continuously used SEPs as voluntary options that violators can propose in exchange for decreased penalties, SEPs can run into an augmentation issue if they are not narrowly construed.[128] For instance, in 1991, the Comptroller General determined that the EPA's SEP policy circumvented Congress's appropriations power.[129] The Comptroller General's conclusion was based on the fact that the EPA was augmenting its congressionally appropriated funds by utilizing SEPs to allow violators, in exchange for reduced civil penalties, to fund public awareness campaigns relating to pollution.[130]

Following the Comptroller General's conclusion, supplemental projects that went beyond remedying violations and sought to carry out other agency statutory directives were not permitted under the Miscellaneous Receipts Act.[131] However, after negotiation, an updated SEP policy was crafted in 1998, and was designed to "respect the appropriations power of Congress and avoid clashes with the Miscellaneous Receipts Act and the anti-augmentation principle of the Constitution."[132] The DOJ and EPA sought to keep utilizing SEPs[133] because SEPs were largely "viewed as a win-win-win for government, industry and the public."[134]

The 1998 SEP policy respected Congress's appropriations power and avoided an augmentation issue by establishing numerous legal guidelines.[135] First, a proposed supplemental environmental project cannot be inconsistent with the underlying statute at issue.[136] Second, "all projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate

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[126] Mintz, *supra* note 114.
[127] *Id.*
[128] For an in-depth discussion on augmentation, see Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 352 (2009).
[129] *Id.* at 354.
[130] *Id.* at 352–53.
[131] *Id.* at 352.
[132] *Id.* at 354.
[133] *See* Mintz, *supra* note 114.
[134] *Id.*
[135] Peterson, *supra* note 128, at 354–55.
[136] *Id.*

nexus."[137] The 1998 policy established that a nexus relationship is satisfied if: (1) the proposed SEP was designed to reduce the probability of a similar future violation from occurring,[138] (2) the proposed SEP reduces the violation's adverse impact on the environment or public health,[139] or (3) the SEP reduces the violation's overall risk to public health or the environment.[140]

Since the implementation of the 1998 policy, the DOJ and EPA have continued to allocate resources to environmentally impacted areas and communities by allowing proposed SEPs to be included in settlement agreements.[141] Although the EPA and DOJ's SEP policies have changed over time, they still adhere to the narrowing principles introduced by the 1998 policy.[142] For instance, in 2015, the Obama administration updated the SEP policy to focus on promoting environmental justice.[143] Cognizant of the augmentation problem and the Miscellaneous Receipts Act, the 2015 SEP policy changed the guidelines for determining whether a proposed SEP qualified to be included in a settlement.[144] The 2015 policy stipulated that proposed SEPs must: (1) be an action the facility is not legally required to perform; (2) improve, protect, or reduce risks to the public health or the environment; (3) benefit the community affected by the alleged violations; and (4) have a nexus to the alleged violation and specific human or environmental health concerns at issue.[145]

Similar to the 1998 policy, the Obama administration's promulgation of the 2015 SEP policy preserved the nexus requirement.[146] The nexus requirement is a crucial element to SEP legality because the nexus requirement "ensures that the EPA and the [DOJ] may not use a potential enforcement action to induce the defendant to engage in remediation activities that have no connection to the underlying violation."[147] Additionally, the voluntary nature of SEPs makes them legally permissible and allows the EPA and DOJ to indirectly implement more expansive environmental projects than the courts would be able to order if environmental

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[137] *Id.* at 354.
[138] *Id.*
[139] *Id.* at 355.
[140] *Id.*
[141] *See* Millett, *supra* note 122, at 6.
[142] *See* 2015 SEP Policy Update, *supra* note 25, at 8.
[143] *See id.* at 3.
[144] *See id.* at 8.
[145] *See id.* at 6–7.
[146] *See id.* at 8.
[147] Peterson, *supra* note 128, at 355.

suits went to trial.[148] Although the breadth of SEPs is legally restricted by augmentation problems and congressional appropriations powers, violators are apt to impose SEPs because they are usually cheaper and provide a positive public relations spin.[149]

In an effort to promote environmental justice, SEPs can have a major impact in adversely affected communities and can result in faster mitigation and prevention of adverse environmental consequences.[150] Over the past four decades, the federal courts, the EPA, and the DOJ have approved hundreds of SEPs that have resulted in tangible benefits for many communities.[151] Although SEP policies have been refined to promote environmental benefits while operating under the law, the recent suspension of SEPs under the Trump administration emphasized the profound effect that the existing DOJ and EPA litigation arrangement can have on environmental regulations.[152]

B. The Trump DOJ's Reversal on SEP Programs and What It Says About EPA Autonomy

Beginning on June 5, 2017, the DOJ under President Trump started analyzing the legality of SEPs through the lens of third-party payments.[153] Under Attorney General Jeff Sessions, DOJ attorneys were prohibited from entering into any agreement "in settlement of federal claims or charges, including agreements settling civil litigation . . . that directs or supports a payment or loan to any non-governmental person or entity that is not a party to the dispute."[154] By prohibiting settlements that "direct" payments to a third party, the DOJ restricted the applicability of SEPs in certain circumstances.[155] Following Attorney General Sessions's June 5 memorandum prohibiting third-party payments, the DOJ explicitly articulated that "in no case shall any settlement agreement

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[148] Smith, *supra* note 108, at 370.
[149] *See* Seema M. Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 131 (2020); Clarke et al., *supra* note 118.
[150] Complaint at 15, Conservation L. Found., Inc. v. Barr, No. 1:20-cv-11827 (D. Mass. filed Oct. 8, 2020).
[151] *Id.* at 1.
[152] Vizcarra & Bloomer, *supra* note 111.
[153] *See* Memorandum from Jeff Sessions, Att'y Gen., on Prohibition on Settlement Payments to Third Parties to All Component Heads and United States Attorneys (June 5, 2017) [hereinafter Sessions Memo].
[154] *See id.*
[155] *See id.*

require defendants in environmental cases . . . to expend funds to provide goods or services to third parties for Supplemental Environmental Projects."[156] In 2018, Assistant Acting Attorney General for the Environment and Natural Resources Division ("ENRD"), Jeffrey Wood, issued a guidance memo for ENRD lawyers instructing them on how to comply with Attorney General Sessions's 2017 memo in environmental cases.[157] Wood's guidance memo further narrowed the required nexus between a proposed SEP and the alleged harm.[158] The guidance memos mandated a specific showing that a proposed SEP would directly remedy the harm at issue.[159]

Expanding the Sessions and Wood SEP memos, Assistant Attorney General for ENRD, Jeffery Clark, issued a memo banning the use of SEP policies in civil settlements.[160] In his memo, Clark stated that multiple 2019 executive orders pertaining to "predicating adjudications on proper authority" and "transparency and clarity in administrative adjudications" motivated him to look into the validity of SEPs.[161] Although President Trump's executive orders did not directly apply to the EPA's SEP policy, Clark determined that "by EPA's own definition, SEPs are projects agreed to in settlements that go beyond what is required under federal, state, or local laws."[162] Since the EPA's 2015 policy allows SEPs to possibly reduce civil penalties by 80%,[163] Clark concluded that SEPs violate Congress's appropriations powers and the Miscellaneous Receipts Act.[164]

With the Clark Memo prohibiting ENRD attorneys from using SEPs in civil and criminal enforcement cases,[165] the EPA was placed in an uncertain position regarding how to treat the status of SEPs. A day after the Clark memo was released, the EPA acknowledged the memo and stated that it would comply with the memo's new legal conclusions with respect to civil settlements.[166] However, the EPA was still free to use SEPs in

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[156] Prohibition on Settlement Payments to Non-Governmental Third Parties, 85 Fed. Reg. 81409, 81410 (Dec. 16, 2020) (to be codified at 28 C.F.R pt. 50).
[157] Vizcarra & Bloomer, *supra* note 111.
[158] *Id.*
[159] *Id.*
[160] *See* Clark Memo, *supra* note 25, at 9, 11.
[161] *Id.* at 10.
[162] *Id.* at 9.
[163] AKIN GUMP STRAUSS HAUER & FELD LLP, SEPARATING FROM TRADITION: JUSTICE DEPARTMENT PROHIBITS USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS TO RESOLVE CIVIL ENFORCEMENT ACTIONS AND EYES ADDITIONAL POLICY CHANGE 2 (2020).
[164] *Id.*
[165] Clark Memo, *supra* note 25, at 11.
[166] Dawn Reeves, *Despite EPA, Industry Support, DOJ Eliminates 'Problematic' SEPs*,

administrative settlements.[167] Due to the fact that the DOJ represents the EPA in referred civil cases, the EPA was powerless to challenge the Clark Memo.[168] The Clark Memo emphasized that differences between DOJ and EPA interagency policy can fundamentally divide how each agency enforces and addresses environmental violations.[169]

Although the EPA could not directly challenge the conclusion of the Clark Memo, the Conservation Law Foundation filed a complaint against Attorney General William Barr, EPA Administrator Andrew Wheeler, and Jeffery Clark in their official capacities.[170] The Conservation Law Foundation sought declaratory and injunctive relief against the Clark Memo's prohibition on SEPs in civil cases.[171] Understanding that the EPA would not be able to employ meaningful SEPs in response to environmental violations, the Conservation Law Foundation asserted in its complaint that "[t]he Clark Memorandum will have significant real-world effects on communities that would otherwise benefit from SEPs, particularly poor and low-income communities."[172] Ultimately, the case was voluntarily dismissed by the Conservation Law Foundation[173] after the Biden DOJ absolved the Clark Memo.[174] Under the Biden administration, the EPA and DOJ appear to be on the same page regarding the validity of SEPs.[175] However, the brief effect of the Clark Memo emphasized the impact that DOJ's litigation control can have on the EPA's strategic efforts to enforce environmental regulations.[176]

C. Administrative or Judicial Enforcement . . . A Calculated Decision?

With the relationship between the EPA and the DOJ being fluid from administration to administration, the DOJ does not always embrace

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INSIDEEPA.COM (Mar. 13, 2020), https://insideepa.com/daily-news/despite-epa-industry-support-doj-eliminates-problematic-seps [https://perma.cc/FX43-CZJV].

[167] *See id.*

[168] Complaint, *supra* note 150, at 6.

[169] *Compare* Clark Memo, *supra* note 25, *with* 2015 SEP Policy Update, *supra* note 25.

[170] Complaint, *supra* note 150, at 1.

[171] *See id.*

[172] *Id.* at 2.

[173] Notice of Voluntary Dismissal, Conservation L. Found. v. U.S. Dep't of Just., No. 1:20-cv-11827 (D. Mass. filed Feb. 5, 2021).

[174] Memorandum from Jean E. Williams, Assistant Att'y Gen., on Withdrawal of Memoranda and Policy Documents to ENRD Section Chiefs and Deputy Section Chiefs, at 2 (2021).

[175] *See id.*

[176] *See* AKIN GUMP STRAUSS HAUER & FELD LLP, *supra* note 163, at 2.

EPA case referrals.[177] However, due to the EPA's ability to administratively enforce environmental violations and control settlement options, the EPA likely calculates when to refer cases to the DOJ.[178] Despite a memorandum of understanding between the EPA and DOJ which allows the EPA to represent itself in certain situations, the DOJ still exercises a significant amount of control over civil cases.[179] Although it is true that the DOJ should not accept all referred cases, the drastic difference between the EPA's and DOJ's approaches to SEPs under the Trump administration highlights the possibility for inconsistent enforcement of environmental regulations for serious civil offenses that the EPA cannot enforce on its own.[180]

Although a majority of the EPA's environmental enforcement is conducted administratively,[181] the Trump administration's treatment of SEPs had a chilling effect on the EPA's internal operations.[182] In response to the Clark Memo, an employee in the EPA's Office of Enforcement stated, "over many years there have been a lot of good projects in communities that benefit the environment beyond putting money in the Treasury. And right now there's a real chill."[183] Despite the Clark Memo only being operational for less than a year, the memo raised questions on the possible long-term effects a directive like this could have on the EPA's and DOJ's regulatory relationship.

Despite ENRD's prohibition on SEPs in civil cases, the EPA under the Trump administration never banned SEPs in administrative cases.[184] Under the Trump administration, EPA Administrator Andrew Wheeler and leadership in the EPA Office of Enforcement vocalized their preference for "pollution mitigation efforts over direct enforcement."[185] From 2016 to 2020, the EPA favored the use of SEPs.[186] Following Attorney General Sessions's restriction of SEPs, in relation to third-party payments, in

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[177] *See* Devins & Herz, *supra* note 7, at 569.
[178] *See* Herz & Devins, *supra* note 1, at 1368.
[179] The memorandum of understanding establishes that the Attorney General will control cases to which the EPA is a party but allows for the EPA to represent itself if the DOJ does not act on the agency's referral within 150 days. *Id.* at 1354.
[180] *See id.* at 1357, 1365–66.
[181] *Id.* at 1368.
[182] Green, *supra* note 107.
[183] *Id.*
[184] Reed W. Neuman & Edward Roggenkamp, *DOJ-ENRD Issues Policy Memorandum Ending Use of SEPs in Environmental Settlements*, NOSSAMAN (Mar. 27, 2020), https://www.nossaman.com/newsroom-insights-doj-enrd-issues-policy-memorandum-ending-use-of-seps-in-environmental-settlements [https://perma.cc/UC7Q-VUTJ].
[185] Green, *supra* note 107.
[186] *See id.*; Neuman & Roggenkamp, *supra* note 184.

2017, the EPA initiated fewer civil cases in 2018 than it had in the past thirty-five years.[187] Hypothetically, had the DOJ's restrictions on SEPs been in place in 2016 and 2017, the EPA's ability to enforce environmental regulations in response to some of the largest environmental violations would have been severely undermined and would have placed the EPA in a lose-lose position.[188]

In response to the DOJ restrictions on SEPs (particularly the Clark Memo), the EPA would have an additional variable added to its calculus of when to refer cases to the DOJ.[189] On the one hand, the EPA may want to enforce violations administratively so that it could include SEPs and indirectly mitigate violations and provide resources to affected communities. On the other hand, if a violation is more serious, the EPA would presumably wish to pursue the case civilly to increase the authorized penalty amount. However, following ENRD's prohibition on SEPs, the EPA was unable to request the inclusion of SEPs (as an indirect enforcement tool) to provide resources directly to affected communities.[190]

For example, in 2016, before the enactment of the Clark Memo, the EPA (through DOJ representation) was able to use SEPs in a civil enforcement action against Volkswagen and Chevron.[191] In the multibillion-dollar settlement with Volkswagen, a key provision "was a SEP in the form of a multi-billion dollar mitigation fund that allocated money to states, the District of Columbia, and other jurisdictions to be used for projects that reduced the type of pollutants emitted by Volkswagen's diesel engines."[192] Furthermore, in 2018, the EPA was able to obtain SEPs in a settlement with Chevron.[193] Valued at ten million dollars, the Chevron SEPs supplied emergency response equipment to local jurisdictions surrounding the target Chevron refineries.[194] Although SEPs are not facially unconstitutional, had the Volkswagen and Chevron enforcement actions

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[187] Sessions Memo, *supra* note 153; Leif Fredrikson, *EPA Initiated Fewer Civil Cases in 2018 than It Has in over 35 Years (and Other Red Flags of Weak Enforcement)*, ENV'T DATA & GOVERNANCE INITIATIVE (Feb. 14, 2019), https://envirodatagov.org/epa-initiated-fewer-civil-cases-in-2018-than-it-has-in-over-35-years-and-other-red-flags-of-weak-enforcement/ [https://perma.cc/JX7U-2WZ9].

[188] *See, e.g.*, Neuman & Roggenkamp, *supra* note 184.

[189] *See* Herz & Devins, *supra* note 1, at 1368.

[190] *See also* Clark Memo, *supra* note 25, at 8, 11, 15.

[191] Neuman & Roggenkamp, *supra* note 184; Green, *supra* note 107; *Chevron Settlement Information Sheet*, EPA (Apr. 25, 2022), https://www.epa.gov/enforcement/chevron-settlement-information-sheet#seps [https://perma.cc/Q5TX-TSPT].

[192] Neuman & Roggenkamp, *supra* note 184.

[193] *Chevron Settlement Information Sheet*, *supra* note 191.

[194] *Id.*

taken place after the production of the Clark Memo, EPA's enforcement options would have been confined solely by policy differences with the DOJ. The Volkswagen and Chevron cases were both too serious to be enforced administratively, and the Clark Memo would have prohibited any community-based SEPs—despite the EPA favoring indirect enforcement mechanisms.[195]

Combined with the possibility of EPA and DOJ policy differences, agency lawyers generally possess an increased "expertise in a particular substantive area, intense familiarity with the details of a regulatory program, and enthusiasm for the agency's actions."[196] While the EPA's mission is focused on environmental protection, the DOJ is guided by larger policy considerations that are not motivated solely by environmental protection.[197]

As illustrated by the drastic difference in treatment of SEPs by the DOJ and EPA, Congress should grant the EPA autonomous litigation authority in order to promote uniform enforcement of environmental regulations. Although the Clark Memo was short-lived, it emphasized the divergent dispositions that can exist between the EPA's and DOJ's enforcement policies.[198] Although the EPA and DOJ may be on the same page under different administrations, autonomous litigation control would allow the EPA to consistently enforce its mission.

As seen in the cases of the Department of Labor ("DOL"), FTC, and Federal Election Commission, Congress has the constitutional authority to reallocate litigation authority to administrative agencies.[199] Doing so would allow the EPA to equally apply enforcement strategies to punish, deter, and mitigate environmental harms in both smaller administrative violations and more serious civil cases.

While the DOJ does screen cases referred by the EPA to make sure they warrant agency civil action, it is possible for the EPA (while using its environmental expertise) to implement an effective screening process.[200] In fact, to some degree, an effective screening process already exists within the EPA that can be applied holistically to agency litigation if the EPA were reallocated litigation control.[201] A former head of the EPA's Enforcement

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[195] *See also* Clark Memo, *supra* note 25.
[196] Herz & Devins, *supra* note 1, at 1375. It is important to note that the DOJ does possess litigation expertise.
[197] *See* Devins & Herz, *supra* note 7, at 569–70.
[198] *See* Clark Memo, *supra* note 25, at 4 n.7, 17.
[199] *See* Herz & Devins, *supra* note 1, at 1367 n.78.
[200] *See id.* (discussing DOL's implemented screening process as an example).
[201] *See id.*

Compliance Monitoring Office stated that the EPA's own internal screening process effectively "weeded out poor quality referrals from the regional program office enforcement personnel and Regional Counsels."[202] For example, historically, the EPA has returned 10–15% of civil referrals to the originating regional office because they were legally insufficient.[203]

As discussed in Part II, Democrats and Republicans have vocalized their expectations and concerns of independent agencies.[204] Despite historical calls by members of Congress to make the EPA an independent agency, simply reallocating litigation control to the EPA would promote the Democrats' expectations of agency expertise while keeping the EPA under executive control, thus satisfying Republicans.[205] Although the EPA is the "client" of the DOJ, the EPA lacks the ability to obtain alternative representation if its goals are not vindicated by the DOJ.[206] In certain circumstances, the DOJ's prosecutorial discretion may undermine the EPA's expertise.[207] Although the DOJ attempts to balance the EPA's goals with alternative policy considerations, its overall decisions (which are not always motivated by environmental protection) have large consequences on environmental litigation.[208]

If Congress granted the EPA litigation autonomy, litigation would largely be motivated by the EPA's environmental protection mission and its attorneys focused and practical understanding of environmental issues.[209] Furthermore, the DOJ's ability to refuse referred cases can directly affect the EPA's ability to deter environmental harms.[210] Allowing the EPA to control environmental litigation would thus promote an even application of both compliance and deterrence regulations in both civil and administrative enforcement actions.[211] Unlike changing the EPA's agency status, reallocating litigation authority to the EPA would benefit environmental enforcement while still allowing for the president to guide the EPA in accordance with the Take Care Clause of the Constitution.

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[202] *Id.*
[203] *See id.*
[204] *See supra* Part II.
[205] *See* Devins & Herz, *supra* note 7, at 585.
[206] Hannah Story Brown, *Where the Government's Environmental Lawyers Stand*, AM. PROSPECT (Mar. 15, 2022), https://prospect.org/environment/where-governments-environmental-lawyers-stand-justice-department/ [https://perma.cc/YM67-HGXW].
[207] *See id.*
[208] *See id.*
[209] *See* Herz & Devins, *supra* note 1, at 1369.
[210] *See id.*
[211] *See id.*

CONCLUSION

Despite historical calls to isolate the EPA from partisan politics by making it a truly independent agency, Congress should reallocate civil litigation authority from the DOJ to the EPA to achieve uniform environmental enforcement.[212] Although Democratic lawmakers embrace independent agencies to promote expert-based policy, independent agencies have become the target of constitutional attacks.[213] Due to partisan fighting between Democrats and Republicans, cooperation to promote the independent agency model has been insufficient.[214]

Since independent agencies are no more expert than executive agencies, Congress should reallocate litigation authority to promote both Democratic and Republican views of how the administrative state should function.

As emphasized by the Trump administration's treatment of SEPs, policy differences between the EPA and DOJ can result in asymmetrical enforcement of environmental regulations.[215] When it comes to more serious civil violations, the EPA is dependent upon the DOJ to vindicate its goals and promote its mission.[216] Although the EPA's relationship with the DOJ changes from administration to administration, the EPA's and DOJ's brief divergent treatments of SEPs under the Trump administration emphasize the possibility that the DOJ will refuse to handle cases how the EPA would like.[217]

On a more extreme note, if policy differences between the EPA and DOJ arise, the DOJ may simply refuse to take civil cases referred by the EPA.[218] If a situation like this occurs, the EPA's deterrence system would be undermined by the DOJ's approach to environmental litigation.[219] To achieve uniform enforcement of environmental regulations, Congress should authorize the EPA to handle administrative and civil enforcement actions.

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[212] *See* Devins & Herz, *supra* note 7, at 585.
[213] *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).
[214] *See* Devins & Lewis, *supra* note 19, at 53–54.
[215] *Compare* Clark Memo, *supra* note 25, *with* 2015 SEP Policy Update, *supra* note 25.
[216] *See* U.S. Dep't of Just., *supra* note 5.
[217] *See* Herz & Devins, *supra* note 1, at 1353.
[218] *See id.* at 1361.
[219] *See id.* at 1368–69.