The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion

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NOTES

THE UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENTAL CRIMES SECTION: A CASE
STUDY OF INTER- AND INTRABRANCH CONFLICT
OVER CONGRESSIONAL OVERSIGHT AND THE
EXERCISE OF PROSECUTORIAL DISCRETION

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INTRODUCTION

From 1992 to 1994, internal discord and scathing public criticism derailed the federal environmental criminal enforcement program and rendered it in "utter disarray."\(^1\) During this period, the Department

\(^1\) Richard J. Lazarus, Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime, 27 Loy. L.A. L. Rev. 867, 871 (1994) [hereinafter Lazarus, Problem with Environmental Crime]; see also id. at 875-91 (reviewing the recent history of the federal enforcement efforts for protection of the environment and arguing that implementing federal criminal sanctions into a system of civil and administrative regulations presents significant challenges).
of Justice ("DOJ") Environmental Crimes Section ("ECS" or "Section")\(^2\) was embroiled in a high profile controversy regarding its enforcement of federal environmental criminal law. Some critics charged that, under the Bush administration, the ECS became "a politically 'compromised' section with easy access for industry and political figures."\(^3\) A number of congressional committees held hearings to investigate the Section,\(^4\) and the national media covered the issue extensively.\(^5\) In addition, several ECS prosecutors, who opposed the Section's leadership and policies, divulged internal case-specific information to non-DOJ individuals.\(^6\) Finally, the ECS imbroglio came to

2. According to the *United States Attorneys' Manual*, the DOJ established the Environmental Crimes Unit ("Unit") to enforce federal environmental crimes in 1982. The Department upgraded the Unit on April 24, 1987, to the Environmental Crimes Section. United States Department of Justice, 4 Department of Justice Manual (P-H) § 5-11.001 (Supp. 1990) (commonly referred to as the United States Attorneys' Manual or USAM) [hereinafter USAM]. The Section is comprised of a staff of specialized attorneys. Its mandate charges it with carrying out the enforcement of federal criminal laws for the protection of the environment. *Id.* § 5-11.002. See discussion *infra* part I (providing a fuller description of the Section's history and mandate).


plague the Clinton administration and Attorney General Janet Reno as well.\(^7\)

The ECS dispute presents issues of prosecutorial and environmental policy.\(^8\) The controversy also implicates federal governance concerns.

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The controversy between congressional subcommittees and the Section continued into the new administration. *See id.* This account reported low morale and flagging efforts to improve management within the Section. *See id.* (describing the relations between DOJ and local United States Attorneys Offices as impaired by "bad blood"); *see also Reno Blindsided by Angry ECS Line Attorneys*, 4 DOJ Alert (P-H) No. 9, at 6 (May 16, 1994) (describing acrimonious and tense meeting between Attorney General Reno and ECS prosecutors, particularly members of a faction loyal to the last ECS director under the Bush administration).

8. Regarding prosecutorial policy in the environmental arena, for example, the controversy raises two types of questions about charging decisions: (1) substantively, which legal doctrines shape the criteria that govern decisions to prosecute federal environmental crimes; and (2) procedurally, how prosecutorial discretion gets allocated within the DOJ. This Note examines the latter concern only and considers how the prosecutive decision-making process regarding federal environmental crimes may be improved. (The Note uses the terms "prosecutorial" and "prosecutive" synonymously, *See Webster's Third New International Dictionary 1820 (1986) (defining "prosecutive" as "of or relating to prosecution").) The substantive and procedural concerns implicated by the ECS controversy, however, present inextricably intertwined issues, which can not easily be disentangled or analyzed separately. Moreover, the fact that the field of environmental law is a quarter of a century old—and, thus, newly emerging and constantly evolving—informs any analysis of the substantive and procedural issues related to the ECS's exercise of prosecutorial discretion. *See Lazarus, Problem with Environmental Crime*, supra note 1, at 890-91.

Regarding substantive legal issues, for example, Congress passed the first federal environmental laws in the 1970s. *Id.* at 875-77. Criminal sanctions became part of the federal government's overall environmental protection strategy to protect the environment as recently as the mid-1980s. *See infra* notes 26-30 and accompanying text. As a result of the environmental law's recent development, courts are still grappling with key environmental legal doctrines. *See, e.g.*, Brenda S. Hustis & John Y. Gottanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L.J. 169 (1994).

For example, as described below, the ECS affair precipitated an inter-
branch conflict between the legislative and executive branches over
the enforcement of federal environmental crimes. The ECS matter
also sparked a controversy, within the DOJ and between the executive
and legislative branches, over the exercise of prosecutorial authority
in this area.

First, this case study examines the interbranch conflict that arose
when Congress sought—and the DOJ resisted—investigation into the
ECS’s enforcement record. In particular, three representatives ex-
amined allegations that ECS improperly declined to prosecute federal
environmental crimes.9 In March 1994, congressional oversight of
ECS culminated in a highly unusual development: a subcommittee
tried to compel ECS prosecutors to be interviewed regarding specific
decisional decisions10 and subpoenaed internal DOJ documents.11
Commentators criticized such congressional information gathering as
improperly intrusive. These observers argued that the Constitution’s
separation of powers limits the manner in which Congress may moni-
tor executive branch departments—in particular a law enforcement
entity such as the ECS.12 In addition, the American Bar Association
(“ABA”) Criminal Justice Section drafted a resolution calling for re-

9. The representatives include former Rep. Howard Wolpe, a Democrat from
Michigan, see Sharon LaFraniere, Crimes at Nuclear Plant “Downplayed”: Hill Report
Assails Justice Department Failure to Indict Rocky Flats Workers, Wash. Post, Jan.
5, 1993, at A5; Rep. Charles Schumer, a Democrat from New York, see Enforcement:
Report Alleges Justice Department Failure to Prosecute Environmental Crimes Vigor-
ously, supra note 3, at 1710; and Rep. John D. Dingell, a Democrat from Michigan,
see McGee, Environmental Crimes Controversy Lingers, supra note 5, at A25.
10. The term “decisional decision” refers to a decision by a prosecutor to forgo
criminal prosecution of a target. See Webster’s Third New International Dictionary,
supra note 8, at 586 (defining “decision” as a “formal refusal” or
“nonacceptance”).
11. H. Josef Hebert, House Panel Subpoenas Documents from Justice Department,
AP, Mar. 11, 1994, available in WESTLAW, 1994 WL 10145262, at *1; Jim McGee,
House Panel Subpoenas Justice: Documents Sought on Environmental Crimes Cases,
Subpoenas Justice]; see infra notes 58-59 and accompanying text.
(maintaining that the DOJ enjoys a constitutional privilege with regard to its
prosecutorial deliberations); General Dingell, supra note 5, at A12 (arguing that ref-
sual to turn over DOJ materials to congressional committee was proper and “rooted
in the Constitution’s separation of powers”); Stuart Gerson, The Legislative Politiciza-
tion of the U.S. Department of Justice, Legal Backgrounder, Nov. 18, 1994, at 1 (stating
that “[t]hese efforts [by congressional oversight committees] pose a long-term consti-
tutional threat by impinging upon the core, judicially-unreviewable, [e]xecutive
[b]ranch function of rendering independent [prosecutorial] decisions”); Hansen, supra
note 5, at A21 (characterizing Rep. Dingell’s criticism of the ECS as a “fine display of
modern-day McCarthyism,” which has “breached the wall between branches of gov-
ernment”). But see Abas, supra note 5, at A15 (suggesting the challenge of carrying
out properly the difficult but necessary obligation of congressional oversight with re-
spect to the DOJ).
The ECS affair, thus, gave rise to an extended dispute between congressional oversight committees and the DOJ.

Second, this Note examines an intrabranch concern: the case study considers DOJ's interest in allocating prosecutorial decision making between Main Justice and local United States Attorneys Offices ("USAOs"). Centralization of prosecutive authority over federal environmental crimes generated extensive controversy within the DOJ and in Congress as well. This Note explores the contrasting perspectives held within the DOJ and Congress regarding the assignment of prosecutorial decision-making authority over environmental crimes in Main Justice. In addition, this Note contends that such centralization affects the efficiency and effectiveness of the nation's environmental enforcement efforts.

Finally, this Note posits that the threat of improper partisanship constituted a critical element of the ECS affair. Political tensions underlay the interbranch conflict over congressional investigation into federal environmental prosecutions. Similarly, fear of partisan influence fueled the controversy over the exercise of the ECS's

13. ABA to Weigh Congressional Oversight Limits, 4 DOJ Alert (P-H) No. 13, at 4 (July 18, 1994). The ABA, however, eventually bowed to pressure from five House committee chairmen and withdrew its proposal to limit Congress's power to question prosecutors. Congressional Witnesses, 4 DOJ Alert (P-H) No. 15, at 10 (Aug. 15, 1994).

14. This Note uses the term "Main Justice" to refer to the DOJ's six major litigation divisions, which are comprised of sections and are located in Washington, D.C. Corcoran, Internal Review, supra note 6, at 30 & n.10 (stating that the Antitrust, Civil, Civil Rights, Criminal, Environmental and Natural Resources, and Tax Divisions (under the supervision of the assistant attorneys general) comprise the Department along with the offices of the deputy attorney general, the associate attorney general, and the solicitor general). By contrast, the U.S. Attorneys—located in the U.S. Attorneys Offices—assume "'front-line' responsibility for conducting" the federal government's litigation. Id. at 33 (asserting that the U.S. attorneys "serve[] as the chief law enforcement officer in [their] judicial district[s] and [are] responsible for coordinating federal agency investigations within [those] district[s]").

15. Policies and procedures related to prosecutorial authority reflect the aims and strategies of the federal government's environmental protection program. For example, centralizing prosecutorial discretion presents advantages and drawbacks that differ from those created by decentralizing prosecutorial decision making. See Hebert, supra note 11, at *2; Jim McGee, Environmental Prosecutions Decentralized, Wash. Post, Aug. 26, 1994, at A23. See discussion infra part IV.B (detailing congressional and executive branch preferences regarding the centralization of prosecutorial authority over federal environmental crimes). In addition, whether the agency develops prosecutorial guidelines and, if so, whether it decides to publish them further affects federal environmental protection efforts. See Lazarus, Problem with Environmental Crime, supra note 1, at 884 (asserting that a vacuum of settled prosecution criteria hamper enforcement of environmental crimes and that the DOJ should establish prosecutorial guidelines). But see William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 Ohio St. L.J. 1325, 1363-73 (1993) (analyzing the controls exerted on prosecutorial discretion and detailing the disadvantages posed by making public prosecutorial guidelines).
prosecutorial authority. This Note asserts that partisanship—and the inefficiencies it spawns in federal governance—can best be checked through the principled self-restraint of executive and legislative officials. The Note is comprised of five parts. The first part provides an overview of the history of the Section and of federal environmental enforcement efforts. It describes the backdrop to the ECS controversy, especially the Section’s relationship with such key players as Congress, the Environmental Protection Agency (the “EPA”), and local USAOs. Part II chronicles the details and timeline of the ECS conflict. Parts III and IV analyze the two tensions inherent in the dispute: first, interbranch disagreements over information sharing, in particular regarding law enforcement matters; and, second, intra- and interbranch differences over the degree to which prosecutorial decision-making authority over federal environmental crimes ought to be either centralized in Main Justice or decentralized and meted out to the USAOs. Part V evaluates four alternative models of intrabranch and interbranch oversight of prosecutorial discretion in the federal criminal environmental program.

This Note concludes first that Congress can legitimately oversee how the DOJ allocates prosecutorial power and the extent to which it maintains control over federal enforcement of environmental crimes. Congressional investigations into individual prosecutive decisions, however, should occur only when ample evidence reveals egregious breaches of prosecutorial ethics on the part of federal prosecutors. Only self-disciplined congressional oversight of prosecutorial discretion will effectively ensure that the DOJ carries out its legislative mandate in the environmental arena. This Note reaches a second conclusion that, as environmental doctrines become settled law and USAOs gain expertise in successfully enforcing federal environmental laws, the DOJ should decentralize prosecutive decision making. The DOJ, however, should not seek blanket and immediate decentralization of prosecutorial discretion from Main Justice to USAOs. The degree and rate of decentralization of prosecutive decision making requires a sophisticated analysis of regional needs, local USAOs’ capabilities, and federal policy concerns, all of which the DOJ should continually reassess. Finally, this Note offers an analytic model for evaluating how restricted versus liberal congressional oversight over the ECS combines with centralized versus decentralized prosecutorial authority over federal environmental crimes to affect the nation’s environmental program. The framework explores the tensions and trade-offs inherent in the administration of the ECS’s mandate—between accountability and autonomy, and among effectiveness, efficiency, and equity. Striking a correct balance will permit the ECS to accomplish its central responsibility: enforcing the nation’s environmental laws as fairly and successfully as possible.
I. HISTORY AND BACKGROUND OF THE ENVIRONMENTAL CRIMES SECTION

An understanding of the ECS dispute requires an overview of the nation's criminal environmental protection program and, in particular, Congress's role in monitoring progress in this area. To that end, this part summarizes federal environmental protection efforts, which historically have been hampered by bureaucratic barriers and the difficulties inherent in integrating environmental criminal sanctions into a system of predominantly civil and administrative penalties. Deep partisan and philosophic differences over goals and policy—within Congress and between Congress and executive agencies—have further stymied the environmental protection program. This part concludes by examining the continually expanding congressional oversight of federal environmental policy in light of Congress's often adversarial relationship with the EPA and the ECS.

A. Overview of ECS History and the Enforcement of Federal Environmental Crimes

The ECS is a subdivision within the Environment and Natural Resources Division ("Environment Division") of the DOJ. According to the United States Attorneys' Manual ("USAM"), the purpose of the ECS is to "provide a specialized legal staff capable of carrying out the effective enforcement of federal criminal laws relating to protection of the environment." Some of the duties of ECS attorneys include conducting all phases of criminal litigation when the ECS has lead responsibility for a case, cooperating with United States attorneys when USAOs have lead responsibility for a case, and monitoring all prosecutions of federal environmental crimes to assure consistency of statutory interpretation and enforcement policy. Congress has

16. See Lazarus, Problems with Environmental Crime, supra note 1, at 876 (suggesting that Congress and executive agencies have exhibited "philosophic" differences over their views on environmental policy); see also Christopher H. Schroeder, Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law, 35 Wm. & Mary L. Rev. 251, 252-53 (1993) (describing the radically different approaches to federal environmental criminal law that have emerged).

17. USAM, supra note 2, § 5-1.00. Congress created the Division in 1909 to represent the federal government in cases involving environmental quality, public lands and natural resources, Indian lands and native claims, and wildlife and fishery resources. The Division's mandate calls for enforcement of criminal and civil regulations. In addition, the Division litigates all cases investigated by the EPA. Id. §§ 5-1.00 to 5-1.200.


authorized the ECS to initiate criminal cases pursuant to seventeen federal statutes. The Section, however, initiates the majority of environmental criminal cases under four of the seventeen federal statutes: the Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Clean Air Act.

The 1980s comprised a decade of explosive growth in federal enforcement of criminal environmental laws. During this watershed period, Congress intensified federal enforcement efforts directed at environmental crimes. The subparts below summarize how Congress enacted stiffer penalties for environmental violations, authorized the prosecution of individual corporate officers responsible for such wrongs, and broadened the type and severity of sanctions that courts can impose on felons.

1. Increased Criminalization of Environmental Violations

In the mid-1980s, Congress enhanced federal protection of the environment by reclassifying violations of numerous environmental regu-

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20. Memorandum from Attorney General Janet Reno to Holders of United States Attorneys' Manual Title 5, at 9-10 (Aug. 23, 1994) [hereinafter Revised Bluesheet] (on file with the Fordham Law Review). Congress first enacted federal pollution control statutes after World War II, and expanded these laws dramatically after 1970. Corcoran, Internal Review, supra note 6, at 7. The federal and state governments jointly administer the extensive regulatory scheme, which has evolved since the 1970s. Id. Due to their complexity, federal environmental laws present significant enforcement difficulties, especially with regard to uniform interpretation and application. Id. The legal standard set out by federal environmental criminal laws defines criminal culpability as "knowingly endangering persons from pollution discharges" or as knowingly violating "statutory or regulatory requirements." Id.

21. See John S. Simmons et al., Federal Environmental Crimes, 4 S.C. Law. 11, *1 (June 1993) (stating that the "primary environmental criminal statutes" enforced by the ECS include RCRA, CERCLA, the Clean Water Act, and the Clean Air Act).


latory provisions as felonies.\textsuperscript{27} In particular, Congress added criminal sanctions, such as fines and incarceration, to the four most frequently enforced environmental statutes: RCRA, CERCLA, the Clean Water Act, and the Clean Air Act.\textsuperscript{28} These legislative changes, along with slowly expanding appropriations, resulted in dramatic increases in the number of prosecutions for environmental crimes.\textsuperscript{29} As criminal environmental enforcement expanded during the decade, so too did the Section’s resources and scope of authority.\textsuperscript{30}

2. Intensified Targeting of Individual Corporate Officers Who Violate Environmental Laws

In 1980, former Attorney General Benjamin R. Civiletti announced plans to emphasize individual accountability in the enforcement of environmental crimes.\textsuperscript{31} This new strategy shifted the ECS’s focus: in addition to the prosecution of corporations, the ECS would now target high-level corporate officers involved in criminal wrongdoing as well.\textsuperscript{32} Reformers believed that corporate liability alone failed to de-


\textsuperscript{28} Kelly & Voisin, supra note 26, at 24; Simmons, supra note 21, at *1-3.

\textsuperscript{29} Lazarus, Problem with Environmental Crime, supra note 1, at 870. For example, between fiscal years 1983 and 1993, DOJ indicted 911 corporations and individuals for environmental crimes; convicted 686 violators; and assessed over $212 million in criminal fines. Id.

\textsuperscript{30} The federal government established the ECS as a three-attorney Unit in 1982, and upgraded it to a Section in 1987. See supra note 2. By 1992, the ECS employed 28 attorneys. Kelly & Voisin, supra note 26, at 24. In 1994, the Clinton administration asked Congress for a 15% increase in funding for the Environmental Division that will add at least nine attorneys to the ECS, and increase its staff productivity levels to a projected 33 workyears in 1995. 1995 DOJ Budget: Across-the-Board Hikes Expected at ENR, 4 DOJ Alert (P-H) No. 6, at 8 (Apr. 4, 1994).

\textsuperscript{31} Judson W. Starr, Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains, 59 Geo. Wash. L. Rev. 900, 904 (1991). Mr. Starr served as Director of the Unit starting in October, 1982. Corcoran, Internal Review, supra note 6, at 60. Following Attorney General Edwin Meese’s decision to upgrade the Unit to a Section in April, 1987, Mr. Starr served as Chief of the ECS until his resignation in September, 1988. Id. at 65, 69.

\textsuperscript{32} Simmons, supra note 21, at *4 (stating that the DOJ’s “[p]riority rests in identifying and charging the individuals responsible for the offense rather than simply prosecuting the entity involved”); see also USAM § 5-11.311 (Supp. 1988) [hereinafter USAM 1988] (stating that “Congress has demonstrated its intent that individuals, as well as corporations, should be criminally prosecuted for violations of federal environmental laws” and “[t]hat Congressional intent should be given serious consideration in the development of prosecutions for violations of federal criminal statutes”)(on file with the Fordham Law Review). In order to effect this policy shift, former
ter environmental crimes sufficiently, but that the threat of incarceration of individual offenders would compel compliance more effectively.  

3. Additional Sanctions Imposed Against Federal Environmental Law Violators

In addition to targeting responsible corporate officers, Congress also made available a number of other sanctions to make the sting of conviction more painful. Penalties today include "listing," which involves banning companies convicted of violations from contracting with the government until they comply with federal standards, as well as imposing stiffer fines. Additionally, the new Federal Sentencing Guidelines ("Guidelines"), adopted in November 1987, make longer sentences mandatory for perpetrators of environmental crimes. The Guidelines also abolish parole, strongly disfavor suspended sentences, and require judges to adhere to strict minimum sentencing schedules.

In sum, federal prosecution of environmental crimes has gained momentum since the mid-1980s. The DOJ prosecutes all offenders more aggressively—individual corporate officers as well as corporations. In

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Block, *Environmental Criminal Enforcement*, supra note 26, at 35; Starr, supra note 31, at 901.

33. Block, *Environmental Criminal Enforcement*, supra note 26, at 35; Starr, supra note 31, at 904. Mr. Civiletti charged the first, the Environmental Enforcement Section ("EES"), with bringing suits to enforce environmental laws and the second, the Environmental Defense Section ("EDS"), with defending suits brought against the federal government under environmental statutes. Corcoran, *Internal Review*, supra note 6, at 58-59 (discussing both EES and EDS); Starr, supra note 31, at 904 (discussing only EES).

34. The EPA frequently resorts to the sanction of "listing." Kelly & Voisin, supra note 26, at 34. For example, under the Clean Water Act and the Clean Air Act, the EPA automatically "lists" violators convicted of environmental crimes. Block, *Environmental Criminal Enforcement*, supra note 26, at 38. As a general rule, the EPA limits sanctions to facilities (within a particular company) guilty of environmental offenses. Kelly & Voisin, supra note 26, at 35. The EPA, however, can suspend or bar entire companies, found to be in violation of federal environmental laws, from government contracting. *Id.*


37. *Id.* at 28.
addition, the number of investigations and convictions continue to climb as Congress devotes ever greater resources to the EPA and the ECS. Finally, federal environmental laws punish criminal violators with harsher penalties than ever before. Nonetheless, as the subpart below notes, numerous obstacles have hindered federal efforts to bolster and expand the environmental protection program.

B. Difficulty of Enforcing Environmental Laws

Commentators have noted that, despite gains, federal environmental protection efforts have encountered multiple barriers to implementation, and have almost always fallen short of congressional mandates. This subpart first describes briefly the scope and nature of prosecutorial discretion and, secondly, explains some of the challenges prosecutors typically confront when enforcing federal environmental laws.

1. Background on Prosecutive Authority

The United States system affords prosecutors broad prosecutorial discretion because, prior to trial, the prosecutor must decide: (1) which crimes to prosecute and against which groups or individuals; (2) when to investigate; (3) whether to charge; (4) whether to divert the potential defendant from the criminal system to civil proceedings; and (5) whether to plea bargain or dismiss charges. Prosecutors consider a wide variety of factors when making charging determinations.

38. Starr, supra note 31, at 901-02.
40. Leland E. Beck, The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy, 27 Am. U. L. Rev. 310, 317 (1978); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1523 (1981). Prosecutorial discretion can also be viewed as entailing three analyses: (1) what evidentiary standard should be met in order to institute criminal charges; (2) what non-evidentiary considerations may justify a negative charging decision; and, (3) if a positive charging decision is made, what charges should be filed. Norm Maleng, Charging and Sentencing, 1987 A.B.A. Sec. Crim. Just. 42.
41. One commentator enumerated the following list of factors that federal prosecuting attorneys tend to consider: (1) is there sufficient evidence proving the defendant’s guilt beyond a reasonable doubt; (2) did the defendant demonstrate criminal intent; (3) what course of action does the investigating agency recommend; (4) how strongly does the victim agency support criminal prosecution; (5) what loss did the defendant’s violation inflict on the victim agency; (6) does the case present novel issues of law; (7) does the public strongly desire an airing of the charges; (8) what is the risk that there will be an acquittal; (9) does prosecuting the defendant have deterrence value; (10) will the judge deem the defendant’s actions egregious; (11) what punishment is likely to be imposed; (12) will civil proceedings suffice; (13) does the case present opportunities for criminal forfeitures; (14) has the court ever considered a similar case; (15) is a congressional committee interested in this case; (16) does the case present substantial public interest concerns; (17) does the defendant have a tenable defense; (18) is the defendant in a position to further the overall investigation; and (19) is the defendant in a position to assist in another more serious matter. Edward
doubtedly, the decision whether to charge at all has the most serious consequences, as it affects prospective defendants in substantial ways. While the prosecutor enjoys broad powers, she does not exercise completely unfettered discretion. Courts review prosecutorial decisions that implicate constitutional rights. The most common cases reviewed include selective prosecution, which denies equal protection under the law, and vindictive prosecution, which violates due process guarantees. Courts, however, cannot review decisions not to prosecute; thus, prosecutors possess ultimate discretion with respect to declination decisions.

The exercise of prosecutorial authority, thus, demands that prosecutors undertake a sophisticated analysis, whereby they weigh multiple factors. As indicated below, however, environmental law, due to its complexity and recent development, presents an even greater challenge to federal prosecutors.

2. Background on Challenges of Prosecuting Environmental Crimes

Enforcement of federal criminal environmental laws provides a wide array of challenges to DOJ prosecutors at Main Justice and USAOs as well as EPA personnel. First, federal enforcement of environmental crimes involves a number of agencies, including at a minimum the EPA, the DOJ, both at Main Justice and at USAOs, as well as state and local environmental protection agencies and prosecuting

S.G. Dennis, Jr., Prosecutorial Discretion: The Federal Government's Charging Decision, 463, 468 (Jan. 1994); see also Maleng, supra note 40, at 42 (describing factors that prosecutors consider in making charging decisions).

Beck, supra note 40, at 318; Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 3 (1969); Vorenberg, supra note 40, at 1525-26. For example, charging decisions will impose a hardship of anxiety, cost and embarrassment on the potential defendant. Vorenberg, supra note 40, at 1525.


Id. at 774; Maleng, supra note 40, at 8.

See, e.g., Heckler v. Chaney, 470 U.S. 821, 831. The Supreme Court stated that:

[It] 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. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

Id. (citations omitted).

See, e.g., Lazarus, Problem with Environmental Crime, supra note 1, at 884 (stating that the executive branch has failed to provide "specific guidance governing the exercise of prosecutorial discretion in the environmental crimes area"); see also id. at 888 (discussing the "existing vacuum of settled prosecution criteria").
Second, long-standing strained relations characterize the institutional links among many of the agencies involved in environmental criminal enforcement. Tensions persist between the DOJ and the EPA, among the DOJ, Main Justice and local USAOs, within the DOJ, and between central and regional EPA offices. The prosecutorial function of the DOJ and the investigatory role of the EPA result in a high degree of interdependence that creates friction when the two agencies differ regarding their enforcement agendas. The relationship between the DOJ and the EPA thus raises a particularly important concern.

Third, the federal environmental protection program initially involved almost exclusively civil and administrative sanctions. Federal efforts to introduce criminal sanctions into the existing noncriminal regulatory scheme have encountered significant impediments. Staffing patterns have prevented a smooth assimilation of the criminal enforcement program into the preexisting system. For example, one commentator has noted that the EPA’s legal and scientific staff rarely have the training necessary to develop criminal cases effectively. As a result, the EPA staff has a history of making premature referrals to the DOJ of prospective criminal cases. The DOJ, in turn, has re-

47. Corcoran, Internal Review, supra note 6, at 6. In addition, regarding the federal environmental protection program, Congress has empowered the DOJ to enforce both federal civil and criminal environmental provisions. Id. at 32-33.
48. See, e.g., id. at 11-17; Lazarus, Problems With Environmental Crime, supra note 1, at 876-77; Starr, supra note 31, at 902. Historically, since the inception of environmental law during the early 1970s, the fragmented nature of environmental policy as well as sustained partisan differences over policy goals have fueled interbranch feuding, especially between the DOJ and the EPA. Lazarus, Problems With Environmental Crime, supra note 1, at 876. For example, environmental law presents a regulatory quagmire for practitioners, EPA investigators, and DOJ enforcers, and also frequently implicates constitutional, corporate, insurance, and securities law issues. Id. at 867.

During the 1980s, several factors reinforced intrabranch tensions. First, when the DOJ stepped up its enforcement of environmental crimes, it failed to clarify the respective roles of the USAOs and Main Justice. This oversight led to inevitable clashes as the Main Justice’s Environment Division had grown accustomed to exercising broad control over environmental cases and the USAOs had grown accustomed to exercising broad discretion over criminal cases. Corcoran, Internal Review, supra note 6, at 96. Second, the Environment Division’s top officials set policy, not by developing general principles, but by becoming personally involved with individual cases. Id. at 96-97. Finally, the Section, USAOs, and the EPA “all lacked experience in investigating and prosecuting environmental crimes.” Id. at 97. This inexperience frequently engendered opposing views on the manner and types of cases to pursue. Id.

More recently, between 1987 and 1989, changes in the Land Division’s leadership and ever shifting supervisory personnel in the ECS further exacerbated tensions within the Section, as well as between the ECS and USAOs and between the ECS and the EPA. Id. at 66-67.
49. Starr, supra note 31, at 904-05. Historically, EPA officials have faulted the DOJ for not aggressively prosecuting violators. See id. at 905.
50. Lazarus, Problem with Environmental Crime, supra note 1, at 867-68.
51. Starr, supra note 32, at 907.
sponded with a remarkably high rate of declination decisions. This pattern has reinforced criticisms by some commentators, as well as EPA personnel, that the DOJ has failed to prosecute vigorously federal environmental crimes.

In addition, one commentator has identified stark differences in approach between "environmental" versus "criminal" government lawyers that may further exacerbate tensions between the two groups. For example, at the EPA, a broad array of staff comprised of scientists, administrators, and attorneys help resolve primarily scientific disputes. By contrast, criminal prosecutions demand a limited number of decision makers to determine whether the available evidence sufficiently exceeds the legal "reasonable doubt" standard and warrants conviction.

C. Backdrop to the Relationship Between Congress and the Executive Branch Concerning Environmental Policy

A critical facet to the ECS debacle involved the protracted struggle between the executive and legislative branches over ECS's enforcement of environmental crimes. The ECS dispute reveals long-standing and recurring differences between Congress and the executive branch regarding their obligations to share information with one another. In the ECS dispute, Congress requested two types of infor-

52. Id. The fact that the EPA pressures investigators to refer as many cases as possible also contributes to the poor quality of EPA criminal referrals to the DOJ. Corcoran, Internal Review, supra note 6, at 148. The development of new investigative guidelines, which the EPA issued on January 12, 1994, as well as efforts to provide training for and upgrade the skills of EPA investigators will hopefully lead to better criminal referrals and improve coordination between the DOJ and the EPA. Id. at 150.

53. See, e.g., Lazarus, Problem with Environmental Crime, supra note 1, at 874-75, 885 (noting that fragmented decision-making authority between the EPA and the DOJ, and between investigators and prosecutors, invites disagreements and controversy); Turley, Preliminary Report, supra note 3, at 5 (referring to ECS's "pronounced failure to prosecute environmental crimes to the same degree as conventional crimes"). For example, 60% of the EPA's criminal referrals to the DOJ during fiscal years 1979 through 1981 were declined. Starr, supra note 31, at 907 (citing EPA's Law Enforcement Authority, 1983: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 92 (1983) (testimony of F. Henry Habicht, II, Ass't Att'y Gen., Lands Division, U.S. Dep't of Justice)).

54. See Starr, supra note 31, at 914.

55. Id.

56. Id.

mation. Representative John Dingell subpoenaed memoranda from staff attorneys to politically appointed high ranking officials for use in the subcommittee's investigation of the ECS. In addition, Representative Dingell sought to interview career government attorneys regarding ECS declination decisions.

Historically, the executive branch has resisted intrusive congressional oversight by invoking a general executive privilege. Similarly, under the Bush administration, the DOJ opposed subcommittee investigations into its operations on the grounds that prosecutorial decisions ought not to be influenced by political considerations. After the presidential election, however, the Clinton administration agreed

EPA); Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 Admin. L. Rev. 197 (1992) [hereinafter Shane, Negotiating for Knowledge] (reviewing tensions between Congress and the executive branch regarding the former's demands for information); Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1 (1994) (advocating for a reduction in secrecy and micromanagement by the legislative and executive branches in connection with the oversight of regulatory policy).

58. McGee, House Panel Subpoenas Justice, supra note 11, at A4 (stating that Rep. Dingell's House subcommittee served subpoenas on the DOJ for "internal documents . . . concerning six cases . . . [that are the] subject of extensive investigation" and "documents relating to a change of policy in the [USAM]").

59. Corcoran, Internal Review, supra note 6, at 90. The Internal Review recounted this request as follows:


Id. Associate Attorney General Hubbell expressed concern about intrusive oversight of prosecutors when he testified before the Energy and Commerce Committee. Mr. Hubbell stated that, when warranted, line attorneys ought to make declination decisions freely without having to "worry about . . . explain[ing] the reasons." Hearing 1993, supra note 4, at 212.

60. Shane, Negotiating for Knowledge, supra note 57, at 226-27. Cf. supra note 59 (testimony of former Assoc. Att'y Gen. Hubbell expressing concern regarding congressional oversight of the DOJ); infra note 61 (noting comments by former ECS Chief Cartusciello expressing similar concerns).

61. Text of Interview with Clegg and Cartusciello, 2 DOJ Alert (P-H) No. 10, at 6, *9 (Oct. 1992). In an interview, ECS Chief Cartusciello explained the rationale behind opposing aggressive congressional oversight of the DOJ: "[P]eople will be afraid to state their views because they will be called in front of Congress, and pilloried in a hearing in which they have no opportunity to respond. That's why we don't want to discuss internal deliberations." Id.
to allow the congressional subcommittee to interview line attorneys and review internal documents. This subpart analyzes an important aspect of the ECS controversy: the confrontation between congressional action (e.g., requests for information) and asserted executive privilege. More specifically, the subpart will examine (1) the scope of congressional investigative power into actions taken by the executive branch, (2) that power's vehicle, the congressional subcommittee system, and (3) congressional oversight of the federal environmental protection program.

1. Congressional Investigatory Prerogatives Versus Executive Privilege of Confidentiality

Congressional oversight of the executive branch serves important political and constitutional purposes. Investigation furthers such legislative ends as enacting laws, monitoring the administration of programs, informing the public, and safeguarding Congress's institutional integrity, reputation, and privileges. By evaluating the effectiveness of federal legislation and the need for remedial action on a continuous basis, Congress ensures greater accountability to its constituents. Moreover, congressional oversight may curb unbridled executive power. Executive privilege, however, provides a countermeasure that protects against excessive congressional oversight. The Supreme Court has recognized as constitutionally based the invocation of both legislative investigatory authority and executive privilege to maintain the confidentiality of intrabranch communications.

The Supreme Court, in 1927, first addressed the constitutionality of Congress's investigative power in *McGrain v. Daugherty*. There, the

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62. See infra note 211 and accompanying text. The term "line attorneys" refers to front-line prosecutors who try cases for the DOJ.
63. See infra note 210 and accompanying text.
65. See Claveloux, supra note 64, at 1339.
66. Id.
68. 273 U.S. 135, 174 (1927); see also Legislative Research Bureau Report, supra note 64, at *2.
Supreme Court found information gathering to be incidental to the legislative function and held Congress's subpoena power over individuals to be constitutional. The case involved Attorney General Harry M. Daugherty's refusal to appear before the Senate. The Senate was investigating allegations that the Attorney General failed to enforce federal antitrust statutes and prosecute suspected violators properly. The McGraw Court recognized Congress's power to compel testimony of private individuals before a committee, and concluded that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." Elsewhere, the Supreme Court has characterized congressional oversight authority as "broad" and has suggested, in dicta, that congressional oversight authority extends to monitoring of the executive branch.

70. Id. at 180 (concluding that "the witness wrongfully refused to appear and testify before the [Senate] committee...[and] that the Senate [was] entitled to have him give testimony pertinent to the inquiry").
71. Id. at 152-53.
72. Id. at 151-52. The Court stated that the Senate sought to investigate:
the alleged failure of [Mr. Daugherty] to prosecute properly violators of the Sherman Anti-trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of [Mr. Daugherty] to arrest and prosecute [suspected violators] and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal statutes, and his alleged failure to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant.

Id. (referring to the Senate's resolution authorizing an investigative committee).
73. Id. 160-61 (stating that "power to secure needed information by [subpoena] has long been treated as an attribute of the power to legislate").
74. Id. at 174.
75. Watkins v. United States, 354 U.S. 178, 187 (1957) (["The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad."]) .
76. Id. The Supreme Court described Congress's authority to investigate as follows:
It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Id. (emphasis added). Lower federal courts have also, on occasion, opined on Congress's constitutional grant of authority to investigate and, especially, on the committee system it has spawned. City of Alexandria v. United States, 737 F.2d 1022, 1026 (Fed. Cir. 1984) (["Our separation of powers makes...informal cooperation [between the executive branch and congressional committees] much more necessary than it would be in a pure system of parliamentary government."]). The Federal Circuit noted that congressional oversight distinguishes our federal government:
We take notice that since early in the 19th Century there have been marked differences between the United States Congress and other parliamentary bodies. One is the greater development of the committee system here...
Moreover, commentators theorize that congressional investigations enjoy a strong presumption of valid legislative purpose.\textsuperscript{77} Individuals' constitutional rights\textsuperscript{78} and concerns about separation of powers,\textsuperscript{79} however, narrow the scope of Congress's investigative authority. In particular, the executive privilege limits Congress's power to monitor the executive branch.\textsuperscript{80} The Supreme Court first recognized a presumptive, but not absolute, executive privilege in 1974 in \textit{United States v. Nixon}.\textsuperscript{81} The \textit{Nixon} Court, however, expressly declined to address the question of whether executive privilege supersedes congressional investigative prerogative.\textsuperscript{82}

Officials in the executive branch have to take these committees into account and keep them informed [and] respond to their inquiries. \textit{Id.} at 1025-26.

\textsuperscript{77} Legislative Research Bureau Report, supra note 64, at *4 (explaining that "[t]he presumption is based on the theory that Congress generally acts within its powers"). So long as the committee has jurisdiction over a subject matter, the courts will deem the inquiry to be part of the legislative process and presume a legitimate purpose—regardless of the motives of individual committee members. \textit{Id.} at *5.

\textsuperscript{78} \textit{Watkins}, 354 U.S. at 187. The \textit{Watkins} Court cautioned that:

There is no [congressional] general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible. \textit{Id.} at 187; \textit{see also} \textit{Barenblatt v. United States}, 360 U.S. 109, 112 (1959) ("[T]he Congress . . . must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly . . . the . . . limitations of the Bill of Rights.").

\textsuperscript{79} \textit{Barenblatt}, 360 U.S. at 111-12. In this instance the Supreme Court wrote:

Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . [I]t cannot supplant the Executive in what exclusively belongs to the Executive. \textit{Id.}

\textsuperscript{80} \textit{Claveloux}, supra note 64, at 1342-43.

\textsuperscript{81} 418 U.S. 683, 708 (1974) (recognizing a "presumptive privilege for Presidential communications"). The \textit{Nixon} Court explained that "[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." \textit{Id.} The Court, however, then held that the specific need for evidence in a pending criminal trial trumped the generalized assertion of presidential privilege. \textit{Id.} at 713.

\textsuperscript{82} 418 U.S. at 712 n.19 (stating that "[w]e are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information"); \textit{see also} Peter M. Shane, \textit{Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress}, 71 Minn. L. Rev. 461, 471 (1987) [hereinafter Shane, \textit{Executive Privilege Claims Against Congress}] (stating that the Supreme Court has not yet adjudicated an executive privilege dispute involving Congress). \textit{But see} \textit{Nixon v. Administrator of Gen. Services}, 433 U.S. 425, 454 (1977) (stating that "claims of Presidential privilege clearly must yield to the important congressional purposes of preserving [executive branch] materials and maintaining access to them").
Disputes between the legislative and executive branches over information tend to be rare but dramatic. Such controversies ignite in the midst of long-standing, smoldering interbranch tensions. The politically sensitive issues that frequently underlie these explosive controversies create high stakes and engender deep partisan differences.Political observers and academics have both described and despaired at interbranch tensions and the committee system they have spawned. For example, as part of the "Contract with America," Speaker of the House Newt Gingrich, along with the Republican class of 1994, pledged to overhaul the congressional committee system, which critics consider to be unwieldy. Although previous Congresses sought similar institutional improvements, none made significant progress.

Reform of congressional committees will require striking an appropriate balance of power among the branches, in particular between executive privilege and congressional oversight. Thus, realignment of congressional oversight authority presents a formidable task and raises serious policy and constitutional concerns. The subparts be-

83. Stanley M. Brand & Sean Connelly, Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials, 36 Cath. U. L. Rev. 71, 78 (1986) (characterizing, for example, the interbranch confrontation during EPA Administrator Gorsuch Burford's tenure as "dramatic"); Shane, Executive Privilege Claims Against Congress, supra note 82, at 463 (describing interbranch confrontations as infrequent).

84. Claveloux, supra note 64, at 1334 (noting "the historical tension between congressional oversight and executive privilege").

85. Shane, Executive Privilege Claims Against Congress, supra note 82, at 463 (maintaining that "executive privilege disputes are most likely to occur over matters that involve especially significant subjects of governmental decision making, or matters that are especially sensitive politically, or both").

86. See, e.g., Lazarus, Neglected Question, supra note 57, at 226-31 (theorizing that excessive congressional oversight highlights agency shortcomings unfairly and erodes public confidence, hampers Congress's ability to make timely amendments and adjustments to environmental laws, chills agency innovation, and drives up the costs of government); Shapiro, supra note 57, at 1-2 (arguing that intensified oversight by the legislative and executive branches has reduced political accountability and implicitly suggesting that this development has augmented the agency costs associated with regulatory agency administration).

87. First, Congress, heal thyself, Miami Herald, Jan. 4, 1995, at 16A (stating that "[o]f the many promises that new House Speaker Newt Gingrich has made, the most sensible is his pledge to change the way the House conducts its business[]" in particular by advocating for the "reduction in the number of House subcommittees"); see supra note 86 and accompanying text.

88. Lazarus, Neglected Question, supra note 57, at 236.

89. See, e.g., Shane, Executive Privilege Claims Against Congress, supra note 82, at 541-42 (concluding that "both Congress and the executive branch should be encouraged to crystallize their respective understandings of the scope of executive privilege into what each branch will regard as controlling legal doctrine within that branch").

90. Shane, Negotiating for Knowledge, supra note 57, at 235-36.

91. Id.
low describe the congressional oversight system and focus, in particular, on congressional oversight of federal environmental policy.

2. Description of Committee Oversight System

Congressional oversight first became significant earlier in the twentieth century with the advent of large federal agencies.92 Congressional committees formally assumed the responsibility to ensure federal agency compliance with statutory mandates under the Legislative Reorganization Act of 1946.93 In the 1970s, Congress reinforced the committee system by authorizing increases in congressional committee staff, and directing committees to issue reports on their oversight activities.94

Congress has historically employed a “fire alarm” approach to monitoring executive branch operations; by contrast, the White House has pursued a more systematic “police patrol” of its agencies.95 The former depends on third parties to call attention to issues such as institutional shortfalls, program defects, and political scandal; the latter requires methodical audits, investigations, reporting, and other forms of direct oversight.96 The “police patrol,” while an effective strategy

92. Lazarus, Neglected Question, supra note 57, at 207. Of course, the DOJ predated the emergence of federal agencies. Congress, however, did not formally establish the DOJ until 1870, although it created the positions of attorney general and the equivalent of the U.S. attorneys (called “district attorneys”) in 1789. Corcoran, Internal Review, supra note 6, at 27-29. Moreover, Congress did not initially vest the attorney general with supervisory power over the district attorneys. Id. at 27. In fact, the supervisory structure over the district attorneys remained uncertain until 1870 with the passage of the so-called Department of Justice Act. Id. at 29; see also Susan Low Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism, 1989 Duke L.J. 561, 566-90, 571 (providing a history of the office of the attorney general, which reveals that “[it] was... less closely aligned with the [p]resident than it is today’’); Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers’ Intent, 99 Yale L.J. 1069, 1071-75, 1082-88, 1088 (1990) (marshalling evidence showing that the “Framers intended that Congress would influence, but not conduct, prosecution” and that “the Framers did not view prosecution as a core executive, or presidential, function’’).


94. Id. at 208. Congressional committee oversight grew markedly during the decade from a total of 9.1% of days devoted to hearings and meetings in 1971 to 25.2% in 1983. Id.

95. Shapiro, supra note 57, at 9-10. Under the “fire alarm” method, once monitors become aware of problems, they often flare into full-fledged crises that attract media coverage and call for immediate responses. By contrast, the “police patrol” approach entails systematic monitoring that seeks to identify nascent problems at all levels of government prior to escalating into a scandal. See id. at 7, 9 & n.59 (citing Joel Aberbach, Keeping a Watchful Eye: The Politics of Congressional Oversight 132 (1990) and Matthew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165 (1984)); see also Lazarus, Neglected Question, supra note 57, at 220-21 (discussing the role of the media in congressional oversight of federal agencies).

96. Shapiro, supra note 57, at 7.
for gathering information, requires the control of agency administration possessed by the president.\textsuperscript{97} Congress, thus, has lacked the institutional advantages available to the executive branch to engage in extensive "police patrol" of executive agencies.\textsuperscript{98} Instead, Congress supplements its necessarily limited "police patrol" oversight with the "fire alarm" response, which, while less labor-intensive, provides ample political pay-offs.\textsuperscript{99} As with the ECS dispute, members of the media, interest groups, and even disgruntled officials within government\textsuperscript{100} bring allegations of agency misfeasance and nonfeasance to the attention of congressional committees, whose members benefit from press coverage of their efforts to investigate the claims.\textsuperscript{101}

3. Congressional Committee Oversight of Federal Environmental Policy: The Gorsuch Burford Case

Executive agencies routinely satisfy congressional requests for information.\textsuperscript{102} Instances of interbranch strife most commonly arise over topics rife with political tensions and partisan differences, such as environmental policy.\textsuperscript{103} Since its inception, the EPA has clashed bitterly with congressional committees over demands for documents and testimony.\textsuperscript{104}

\textsuperscript{97} Id. at 5 (stating that, despite congressional expansion of oversight mechanisms, the president continues to hold important advantages over Congress in this area).

\textsuperscript{98} Id. at 5-6; see also Lazarus, \textit{Neglected Question, supra} note 57, at 221 n.88 (stating that "committees are increasingly relying on police patrol oversight" as they acquire the expanded staff necessary for this "resource-intensive endeavor").

\textsuperscript{99} Lazarus, \textit{Neglected Question, supra} note 57, at 221; Shapiro, \textit{supra} note 57, at 9-10.

\textsuperscript{100} Lazarus, \textit{Neglected Question, supra} note 57, at 220-21; see also Corcoran, \textit{Internal Review, supra} note 6, at 95-96 & n.133 (discussing, for example, an anonymous memorandum written apparently by a government attorney, which expressed highly critical views of Main Justice's environmental enforcement policies); Turley, \textit{Preliminary Report, supra} note 3, at 3, 5 (noting that the Report, which was commissioned by a congressional subcommittee, interviewed ECS and EPA personnel and Assistant United States Attorneys ("AUSAs") on a confidential basis).

\textsuperscript{101} Lazarus, \textit{Neglected Question, supra} note 57, at 221.

\textsuperscript{102} Shane, \textit{Negotiating for Knowledge, supra} note 57, at 200.

\textsuperscript{103} Id. at 221.

\textsuperscript{104} See Lazarus, \textit{Neglected Question, supra} note 57, at 214, 217 n.65. During the first decades of the EPA, Congress condemned the EPA for both neglect and over-reaching, and criticized the agency's record on a wide variety of legislative goals. \textit{Id.} at 216.

According to Professor Lazarus, Congress has subjected the EPA to more intensive and intrusive oversight than any other agency. \textit{Id.} at 206. Professor Lazarus also hypothesized that because the scope of EPA's environmental protection agenda encompasses a wide variety of interest groups, the demand for congressional oversight has grown dramatically. \textit{Id.} at 211. In 1991, approximately 20 standing congressional committees and almost 100 of their subcommittees shared jurisdiction over the EPA. \textit{Id.} The EPA testified before Congress more times, between 1971 and 1988, than any other federal agency. \textit{Id.} at 212. Interestingly, Professor Lazarus's study of the EPA and Congress reveals that the House Committee on Energy and Commerce has requested that the EPA present testimony more frequently than any other House Committee. \textit{See id.} at 213.
Probably the most notorious controversy between the EPA and Congress involved EPA Administrator Anne Gorsuch Burford during the first term of the Reagan presidency in 1982.\textsuperscript{105} Like the recent ECS dispute, the Gorsuch Burford scandal put Representative Dingell and congressional oversight committees on center stage.\textsuperscript{106} The conflict erupted when Gorsuch Burford refused to turn over documents related to the EPA's administration of the Superfund program, which sought to clean up abandoned hazardous waste sites.\textsuperscript{107} In the fall of 1982, two subcommittees served subpoenas on Gorsuch Burford demanding both testimony and documents.\textsuperscript{108} The two subcommittees were investigating allegations of impropriety, including lax enforcement of federal environmental laws\textsuperscript{109} and the influence of political considerations in the administration of programs.\textsuperscript{110}

The Reagan administration reacted strongly and strenuously resisted the production of the requested materials.\textsuperscript{111} Executive branch officials contested the congressional subpoenas on the grounds that they constituted an improper congressional encroachment on core executive law enforcement functions.\textsuperscript{112} Both the EPA and the DOJ argued that compliance with Representative Dingell's subpoenas would make sensitive law enforcement documents public, thereby handicapping law enforcement efforts.\textsuperscript{113} Executive branch officials particularly feared disclosure of files pertaining to open cases.\textsuperscript{114} These

\textsuperscript{105} See Brand & Connelly, supra note 83, at 77-78; Claveloux, supra note 64, at 1333-34; Shane, Negotiating for Knowledge, supra note 57, at 205.

\textsuperscript{106} See Shane, Negotiating for Knowledge, supra note 57, at 207. The controversy began on March 10, 1982 when the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation held hearings to investigate the EPA's enforcement of federal environmental statutes—specifically CERCLA, also commonly referred to as the Superfund Act. Brand & Connelly, supra note 83, at 78.

\textsuperscript{107} Shane, Negotiating for Knowledge, supra note 57, at 207. Congress first enacted CERCLA in 1980. CERCLA empowered the EPA to direct the clean up of hazardous waste sites when a responsible party cannot be either feasibly identified or forced to act. Id.

\textsuperscript{108} Id. at 208, 210.

\textsuperscript{109} Claveloux, supra note 64, at 1335-36. Critics charged that under Gorsuch Burford's direction the EPA struck several "sweetheart" deals with violators of hazardous waste disposal laws. Schroeder, supra note 16, at 261 & n.38 (citing newspaper accounts detailing negotiations between agency officials and chemical industry representatives, which allegedly lead to lenient settlements of Superfund claims).

\textsuperscript{110} Lazarus, Neglected Question, supra note 57, at 217; see also id. at 217 n.63 (citing sources that discussed the political influence on administrative programs). For example, EPA officials charged that the clean up of California sites had been held up in order to damage the Democratic senatorial campaign of then-Governor Edmund G. Brown, Jr. Claveloux, supra note 64, at 1341 & n.58.

\textsuperscript{111} Shane, Negotiating for Knowledge, supra note 57, at 208-09.

\textsuperscript{112} Claveloux, supra note 64, at 1342, 1348-49.

\textsuperscript{113} Shane, Negotiating for Knowledge, supra note 57, at 208-09.

\textsuperscript{114} Brand & Connelly, supra note 83, at 78; Claveloux, supra note 64, at 1348. Executive branch officials feared that targets would be prematurely forewarned about criminal investigations and that disclosure would weaken the EPA's bargaining posi-
concerns led DOJ officials to recommend that President Reagan invoke executive privilege. As a result, on November 30, 1982, President Reagan directed Gorsuch Burford to refrain from releasing documents from "open law enforcement files, [which] are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues [that] may be raised in enforcement actions." Ultimately, the legislative and executive branches resolved the dispute through political compromise: Gorsuch Burford resigned (as a result of the broader controversy over her leadership of the EPA) and executive officials turned over the subpoenaed documents on the condition of confidentiality.

The Gorsuch Burford controversy thus illustrates several key aspects of clashes involving congressional oversight and executive privilege. First, the dispute pitted two valid, constitutional interests against one another: the congressional prerogative to investigate claims of executive malfeasance and/or nonfeasance versus the executive privilege to protect sensitive intrabranch communications, especially as they relate to law enforcement. Second, such disputes typically involve highly politicized issues and partisan interests. Third, negotiations between executive and legislative branch officials often escalate and take on institutional dimensions, which lead to interbranch polari-

115. Shane, Negotiating for Knowledge, supra note 57, at 212.
116. Id. at 208-09 (first alteration in original) (citing letter from Att'y Gen. William French Smith to Rep. Dingell, dated November 30, 1982 and reprinted in H.R. Rep. No. 968, 97th Cong., 2d Sess. 37 (1982)). Notably, in the Gorsuch Burford affair, the subcommittee's suspicions of improper conduct were subsequently confirmed by evidence that showed that political considerations did, in fact, influence the EPA's enforcement decisions. Id. at 211-12.
117. Brand & Connelly, supra note 83, at 81; Claveloux, supra note 64, at 1337-38.
118. Shane, Executive Privilege Claims Against Congress, supra note 82, at 508-14 (describing congressional grounds for the investigation of the EPA as well as the EPA's "legitimate" basis for resisting oversight); Claveloux, supra note 64, at 1349 (stating that "both the subcommittee and the EPA had valid claims to the documents").
zation. Finally, the branches frequently resort to political compromise in resolving the dispute. As the next part describes, the ECS controversy shared these characteristics with the Gorsuch Burford incident.

II. OVERVIEW OF THE ECS CONTROVERSY

Simmering discontent among EPA personnel, federal prosecutors, and the legislative and executive branches have long dogged the environmental protection program; criticism by members of Congress, however, sparked the ECS controversy. The 1992 presidential election further fueled and politicized the feud.

This part describes the major aspects of the dispute. Arguably, the genesis of the controversy stemmed from a study commissioned by a congressional subcommittee. This study charged the ECS with lax enforcement of federal environmental laws, detailed alleged improprieties in six case studies, and described an apparent trend of marked centralization of prosecutorial authority. Commentaries and reports referred to this centralization debate as the Bluesheet Controversy ("Bluesheet Controversy"). The report spawned a series of congressional hearings that focused on the ECS, its enforcement program, and its record. These hearings, in turn, led to congressional subpoenas of documents and requests for testimony by ECS line attorneys, both of which the DOJ vehemently resisted. The hearings focused on two distinct issues. The first concerned the clash between congressional investigatory powers and executive confidentiality privileges, while the second related to the degree to which prosecutorial decision-making authority should be centralized at Main Justice.

119. See, e.g., Shane, Executive Privilege Claims Against Congress, supra note 82, at 501, 516 (describing interbranch clashes as involving "intransigent 'positional' bargaining" and "antagonism").
120. See supra notes 47-57 and accompanying text.
121. See Lazarus, Neglected Question, supra note 57, at 210-18.
122. See McGee, Environmental Crimes Controversy Lingers, supra note 5, at A25 (stating that "[s]hortly before the 1992 presidential election, the Clinton-Gore campaign climbed on the ECS-bashing bandwagon"); Text of Interview with Clegg and Caruscello, supra note 61, at 6 (Clegg commenting that election year politics drove the manner in which Rep. Dingell's subcommittee investigated the ECS).
123. Turley, Preliminary Report, supra note 3. Professor Turley directs The Environmental Crimes Project at the George Washington University. Id. at 3.
124. See discussion infra parts II.A, II.D. The term "Bluesheet Controversy" refers to the an important chapter in the ECS dispute. Specifically, the term alludes to the disagreement that arose among DOJ personnel—and, over time, among commentators—regarding case management and decision-making procedures, and the manner in which Main Justice supervised local USAOs in their prosecution of environmental cases. See discussion infra part II.D.
125. See discussion infra part II.B.
126. See supra notes 58-59, 61 and accompanying text and discussion infra part III.A.1.
127. See discussion supra part I.C.3 and infra part II.B.
The executive branch responded by claiming executive privilege regarding the disputed documents and by commissioning its own internal investigation of the ECS. Ultimately, compromise and accommodation overcame both institutional polarization and partisan politics to bring about a resolution. The Clinton administration granted greater prosecutorial decision-making authority to USAOs. As with the Gorsuch Burford affair, a top official resigned. Finally, the executive branch acquiesced to congressional investigatory demands. The subparts that follow detail each of these developments in turn.


The ECS scandal stemmed, in great part, from a report by Professor Jonathan Turley for Representative Charles E. Schumer in October 19, 1992, entitled Preliminary Report on Criminal Environmental Prosecution by the United States Department of Justice ("Turley Preliminary Report" or "Report"). The Turley Preliminary Report relied on confidential interviews conducted by the Report's staff and investigators and on public congressional records. The Report summarized its findings regarding the overall policies and performance of the Section and highlighted instances of alleged prosecutorial wrongdoing in six case studies. In particular, the Report charged that...
"[b]oth prosecutors and EPA investigators describe[d] the ECS as a politically 'compromised' section with easy access for industry and political figures."\(^{135}\) Turley's group further concluded it had uncovered evidence offering a "sufficient and compelling basis for congressional inquiry into political influence in the prosecution of environmental crimes by the [DOJ]."\(^{136}\) The Report contained two sections, the main conclusions of which the following two subparts summarize. The first section presented six case studies illustrative of the criticisms leveled against ECS by its critics, and the second analyzed the Section's administration of the federal criminal enforcement program.

1. The Turley Preliminary Report's Conclusions Regarding its Six Case Studies

The six case studies charged the Section with prosecutorial improprieties and mismanagement. The Report asserted that all six cases involved unwarranted leniency by the ECS towards targets of criminal investigations.\(^{137}\) Despite "solid support" and "overwhelming evidence" favoring prosecution,\(^{138}\) the authors charged that ECS personnel (usually in opposition to local USAOs, the EPA, and state officials involved in the cases\(^{139}\)) either sought plea bargains for lesser

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\(^{135}\) Turley, Preliminary Report, supra note 3, at 30. The Turley Preliminary Report qualified its allegation, however, by further noting that "[w]hile this Report makes no direct findings of political interference in individual ECS cases, federal prosecutors and investigators have given the Project detailed allegations of such conduct." \(^{136}\) Id. at 32.  
**Note:** This Note does not attempt to determine whether, in fact, political considerations did influence prosecutorial decisionmaking in those six instances. The most readily available (and informative) public documents all reflect undeniable institutional biases, including, for example, the Turley Preliminary Report commissioned by Rep. Schumer, congressional subcommittee hearing transcripts, and the independent Internal Review commissioned by the DOJ in response to congressional criticisms. Such an examination would also involve a substantive determination about the application of environmental legal doctrines to facts that, in hindsight, cannot be ascertained accurately. These documents, however, do shed light on such process-oriented issues as the DOJ's case oversight and its relationship to Congress, subject matters on which this Note ultimately focuses.

**Footnotes:**

135. \textit{Id.} at 30. The \textit{Turley Preliminary Report} qualified its allegation, however, by further noting that "[w]hile this Report makes no direct findings of political interference in individual ECS cases, federal prosecutors and investigators have given the Project detailed allegations of such conduct." \textit{Id.} at 31.  
136. \textit{Id.} at 32.  
138. \textit{Id.} at 34, 36.  
139. \textit{Id.} at 34-38.
charges or declined prosecution altogether. Moreover, the authors argued that the Section favored "organizational rather than individual indictments." Finally, the Report also asserted improper meddling by top DOJ officials in prosecutive decision making and even undue influence by outside political pressure. For example, the authors maintained that, in two instances, top ECS officials met with representatives of targets at Main Justice in the absence of EPA officials and AUSAs from local USAOs involved in the case. In short, the Turley Preliminary Report argued that "[i]n case after case, the Environmental Crimes Section ha[d] overridden AUSA recommendations of prosecution on the basis of evidentiary questions commonly left to the discretion of the local federal prosecutors." Additionally, the authors wrote that, in one instance, ECS line attorneys believed political pressure from the White House and lobbyists resulted in a decision not to prosecute.

140. Id. at 34-35 (describing plea bargains for misdemeanors rather than prosecution of felonies in the PureGro and Weyerhaeuser cases). In particular, the Turley Preliminary Report criticized plea agreements involving large corporate targets when compared to prosecution of smaller companies and single defendants. Id. at 11-12. According to the Report, settlements involving plea bargains and fines leveled against corporations damaged the credibility of the DOJ by suggesting that corporate "officers can 'buy out' of personal accountability for their misconduct" and that corporate officers will escape prosecution. Id. at 12.

141. Turley, Preliminary Report, supra note 3, at 35-38 (summarizing the Section's decision to decline prosecution in the Van Leuzen, ChemWaste, Thermex, and Hawaiian Western Steel cases).

142. Id. at 10.

143. Id. at 46. One such instance involved the PureGro case. The Report maintained that top DOJ officials held several meetings with the defense counsel at Main Justice, which excluded the EPA and even the lead ECS line attorney assigned to the case. Id. at 46-47. The DOJ denied this allegation and claimed that the EPA and the lead prosecutor attended all meetings at which the defense counsel was present. Id. at 46 n.14.

The Report cited Weyerhaeuser as another example involving unusual meetings between top DOJ officials and defense counsel. Id. at 82. In that instance, a deputy assistant attorney general met with counsel for Weyerhaeuser prior to the execution of the plea bargain. Id.; see also id. at 20 (stating that "[p]rosecutors and EPA staff have complained to the [authors] that they are often left out of critical meetings and consulted only after the ECS has made a decision on the case . . . [and] specifically objected to meetings with defense counsel that exclude line prosecutors or EPA representatives").

144. Id. at 7.

145. Turley, Preliminary Report, supra note 3, at 106 (stating for example that "[ECS prosecutors] felt that the [Van Leuzen] case was killed due to . . . the political pressures placed on DOJ by the White House and outside groups"); see also id. at 30 (alleging that various special interest organizations, including the Washington Legal Foundation, had lobbied against wetlands prosecution).
2. The Turley Preliminary Report's Conclusions Regarding ECS Management and Administration of the Environmental Criminal Enforcement Program

In addition to its critical treatment of the six case studies, the Turley Preliminary Report found fault with the ECS's management and administration. The authors first highlighted the strained relations between the EPA and the DOJ and between the USAOs and the DOJ. According to the Report, AUSAs complained that Main Justice imposed more stringent criteria for prosecution in the environmental area than those which applied to other DOJ sections. Additionally, Turley's group alleged chronic case mismanagement by the ECS.

More importantly, the Turley Preliminary Report also emphasized changes in the procedures applicable to environmental criminal cases under the Bush administration, which antagonized both prosecutors in ECS and at USAOs. The changes included extending the period of time Main Justice could review proposed indictments prior to prosecution from 48 hours to two weeks, as well as giving Main Justice veto power over local USAOs' decisions in certain instances. According to the authors, prosecutors perceived these changes as efforts by Main Justice to further rein in prosecutorial authority at the local level and to centralize enforcement in this sensitive area in Washington.

3. Responses to the Turley Preliminary Report

The DOJ leadership responded with an emphatic denial of the claims outlined in the Turley Preliminary Report. Following its re-

146. Id. at 14.
147. Id. at 15; see also id. at 19 ("The internal problems at the ECS clearly evidence a fundamental division over standards and the rate of environmental prosecution.").
148. Id. at 17. According to the Turley Preliminary Report, specific complaints include[d]:
[(1)] long delays in ECS case management after the EPA had completed its field investigation and proposed federal action;
[(2)] poor coordination with other agencies, particularly the EPA, in managing cases under review;
[(3)] failure to inform the EPA in a timely manner of decisions to drop prosecutions or the basis for such decisions;
[(4)] selection of ECS unit chiefs or regional supervisors with little environmental experience or with demonstrated reluctance in the prosecution of environmental cases; and
[(5)] poor coordination with U.S. Attorneys in case management.

150. Id. at 26. See infra note 190 and accompanying text.
151. See infra note 192 and accompanying text.
152. Turley, Preliminary Report, supra note 3, at 26-27 (stating that "[p]rosecutors in the ECS and U.S. Attorney's offices have suggested that this 'micromanagement' was meant to control AUSAs in this sensitive area and discourage independent pursuit of environmental criminals").
lease, Deputy Assistant Attorney General Roger Clegg characterized the case studies in the Report as examples of "good faith disagreement[s] between career prosecutors and career investigators over whether there was sufficient evidence to bring a particular criminal charge in [a] case."^{153} Then ECS Chief Neil Cartusciello categorically denied that political considerations influenced prosecutive decision making.^{154}

As noted previously, the ECS controversy sprang from the Turley Preliminary Report. The charges outlined in the report elicited strong denials from the executive branch and prompted an intensified investigation by Congress. The subpart below describes the content and outcome of the congressional subcommittee hearings.

### B. 1992-93: The Congressional Subcommittee Hearings

In late 1992 and early 1993, Representative Dingell, Chair of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, held a series of subcommittee hearings, which focused on the enforcement of federal environmental statutes.\(^\text{155}\) During his terms in Congress, Representative Dingell made the federal environmental protection program a priority, investigating the EPA on numerous occasions between the early 1970s and 1993.\(^\text{156}\)

On September 10, 1992, Representative Dingell held a subcommittee hearing "to examine, in detail, disturbing allegations that [the EPA's criminal enforcement program was] being undermined by a

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153. Text of Interview with Clegg and Cartusciello, supra note 61, at *1. Clegg, however, also denounced the Turley Preliminary Report as a "political hatchet job," commissioned by a Democratic congressman . . . to make the Bush administration look bad days before the 1992 election." Enforcement: Report Allege Justice Department Failure to Prosecute Environmental Crimes Vigorously, supra note 3, at 1711.

154. Text of Interview with Clegg and Cartusciello, supra note 61, at *3. Mr. Cartusciello stated in an interview:

As far as political pressure, there wasn't a bit of political pressure. I know that better than anybody because I was the fellow who was called upon to make some of these decisions. . . . [A]nybody who knows me knows what my reaction would have been had there been the slightest hint of political pressure.

Id.

155. See supra note 4 and accompanying text. The onset of Rep. Dingell's involvement with the ECS dispute began in the Fall of 1992. On September 10, 1992, prior to the release of Professor Turley's Preliminary Report, Rep. Dingell issued a statement that the ECS failed "to pursue aggressively a number of significant environmental cases," that the ECS supervisors manifested "a lack of environmental law expertise," and that the ECS suffered from "serious morale problems." McGee, Environmental Crimes Controversy Lingers, supra note 5, at A25.

156. Lazarus, Neglected Question, supra note 57, at 214-15 (noting that Rep. Dingell's persistent criticism of the EPA dated back to the 1970s). The House Energy and Commerce Committee has stood out as especially tenacious in its oversight of the EPA. For example, between 1984 and 1986, the Committee held more hearings at which it requested the EPA to present formal testimony than any other House committee. Id. at 213.
pattern of bizarre and misguided decisions by supervisory personnel at the Environmental Crimes Section at the Department of Justice."

On January 4, 1993, Representative Dingell's subcommittee publicly criticized the DOJ's handling of a criminal investigation at the Rocky Flats, Colorado, nuclear weapons facility.

On November 3, 1993, Representative Dingell held a second House Energy and Commerce subcommittee hearing on the ECS. He charged that ECS policies exerted "a stranglehold on the majority of Federal environmental crimes prosecution in Washington, rather than in the field." As a remedy, Representative Dingell recommended that the DOJ adopt a decentralized model of prosecutorial decision making that would shift greater authority to the USAOs.

Representative Dingell further demanded that the DOJ turn over docu-

159. Hearing 1993, supra note 4, at 2 (statement of Rep. John D. Dingell). In response to the changes under the Bush administration, which critics perceived as efforts to gain control of federal environmental enforcement, Rep. Dingell wrote: This Subcommittee's investigation to date has revealed that the implementation of the [changes in case procedures as outlined in the] 1993 Bluesheet (or any other similar centralized review mechanism) is likely to impede environmental prosecutions through cumbersome procedures and micromanagement.
160. Id. at 3. According to Rep. Dingell, prosecutors feared that centralization and increased oversight by Main Justice would stymie enforcement efforts of environmental crimes nationwide. Id. (stating that "[s]erious concerns have been expressed by numerous former U.S. Attorneys and experienced Assistant U.S. Attorneys about the adverse impact of the Bluesheet on joint state-local-federal task force efforts [and] the diversion of productive prosecutive resources into unnecessary paperwork and bureaucratic reviews").

Notably, Rep. Dingell suggested that centralization of prosecutive authority increased the risk of improper political pressures influencing decision making. Id. (cautioning against "the mischief which may ensue from the open invitation in the Bluesheet to Washington lawyers and lobbyists to seek meetings with officials at Justice Department Headquarters concerning environmental prosecutions").

160. Id. at 3 (statement of Rep. John D. Dingell). Representative Dingell stated that he supported decentralization because it "energize[s] government to do everything smarter, better, faster, and cheaper" without "undercut[ting] consistency and fairness." Id. at 3-4 (quoting the National Performance Review).
ments, reports, and memos relating to approximately twenty cases as well as allow subcommittee investigators to interview Section prosecutors. The subpart below describes how the *Turley Preliminary Report* and continued congressional pressure forced the executive branch to focus attention on the ECS.

C. 1993-94: The Department of Justice Internal Report

Following the presidential election in November 1992, Attorney General Janet Reno responded to the *Turley Preliminary Report* and sustained congressional scrutiny by ordering an independent internal investigation of the Section by four government lawyers. The DOJ intended a comprehensive review of the federal environmental criminal enforcement effort, and former Associate Attorney General Hubbell testified before the Oversight and Investigation Subcommittee that the DOJ would "not restrict[ ] [the Internal Review's] scope in any way." Nine months later, on March 10, 1994, the four career government lawyers appointed to conduct the investigation issued a 325-page report ("Internal Review" or "Review"). Not surprisingly, this report drew a different conclusion from the *Turley Preliminary Report*.

The *Internal Review* largely exonerated the Section and its leadership of the charge of improper or politically influenced declination practices. The authors, however, faulted the lackluster leadership of the federal environmental crimes program and criticized the man-

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Career government attorneys William J. Corcoran, Daniel S. Seikaly, Mary Incontro, and Jeffrey P. Minear prepared the report. See Corcoran, *Internal Review*, supra note 6. The four authors each came to the project after long careers as prosecutors. At the time of the report, after twenty years experience as a prosecutor, Mr. Corcoran was serving as Senior Counsel of the Criminal Division, which was assigned to the Task Force investigating the U.S. House of Representatives banking facility. *Id.* app. A. Mr. Seikaly was the Chief of the Transnational and Major Crimes Section as well as the Environmental Coordinator of the U.S. Attorney's Office for the District of Columbia, and had fourteen years experience as a prosecutor. *Id.* Ms. Incontro came to Committee, after ten years experience as a prosecutor, having served as the Deputy Chief of the Terrorism and Violent Crime Section within the Justice Department's Criminal Division. *Id.* Finally, at the time of the *Internal Review*, Mr. Minear held the position of Assistant to the Solicitor General at the DOJ and had previously served as a Trial Attorney in the DOJ's Land and Natural Resources Division. *Id.*

163. *Hearing 1993*, supra note 4, at 200. The DOJ mandated the four prosecutors in charge of the investigation to examine case oversight, the Section, and the six cases (which the Turley Report analyzed). See *id.* at 200-02.


165. The authors of the *Internal Review* stated:
ner in which Congress dealt with the Section. Not surprisingly, Representative Dingell defended the work of the subcommittee and dismissed the DOJ report. As the following section briefly describes, the committee, which prepared the Internal Review, conducted a comprehensive analysis of the ECS and presented recommendations for improving the Section.

1. Summary of Internal Review’s Overview of ECS’s Program

The independent investigators concluded that “pervasive distrust ... at every level” frustrated the federal environmental enforcement program. The Review cited disjointed oversight by Main Justice, unsettled and evolving legal doctrines in environmental law, widespread institutional inexperience in enforcing environmental crimes, and historic congressional antagonism toward the EPA as contributing factors. In addition, the Review reproached the Energy and Commerce Subcommittee for being a propagator of unsubstantiated claims.

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We have found no evidence substantiating the allegations that Justice Department officials or employees relied on improper criteria in prosecuting or declining to prosecute environmental crimes cases. Id. at 12; see also id. at 17 (“Based on interviews and an examination of the underlying prosecutive documents, we conclude that the ultimate prosecutive decision in each of [the six cases examined] was reasonable.”).

166. The Internal Review stated that:

[T]he program has suffered from a frequent absence of teamwork and mutual respect among . . . individuals [working in the Department of Justice’s environmental crimes program], which has led to accusations that prosecution decisions have been made on an improper basis. We have found that those accusations are unfounded and that they arise primarily from innuendo and unsubstantiated suspicions.

Id. at 11-12.

167. See Jim McGee, Internal Justice Report Rejects Impropriety At Environmental Unit, Hits House Inquiry, Wash. Post, Mar. 15, 1994, at A8. The Washington Post reported that, in response to the Internal Review, Rep. Dingell stated: “It should come as no surprise to anyone familiar with bureaucratic behavior that an internal agency review . . . found little wrong within the agency. . . . The subcommittee’s inquiry continues, and the omissions and errors apparent in the internal review will be addressed at the appropriate time.” Id.

168. Corcoran, Internal Review, supra note 6, at 94. The authors surmised that the pervasive distrust sprung from individual and institutional differences over how environmental crimes should be enforced. Id. at 96. Disagreements over the scope, nature, and operation of the environmental protection program intensified in the 1980s with the expansion of criminal sanctions. Id. (noting that “absence of agreement was particularly problematic because the Environment Division was accustomed to exercising broad control over environmental cases, while the United States Attorneys were accustomed to exercising broad control over criminal cases . . . [resulting in] inevitable[e] clash[es] over the ultimate responsibility for environmental crime prosecutions”).

169. Id. at 96-97.

170. See id. at 109. The Internal Review chastened the Subcommittee, noting that “ad hominem criticisms are especially destructive, because they . . . personalize[ ]
2. Summary of Recommendations of Internal Review

The independent investigators made recommendations relating to the mission of the ECS, case oversight, and the Section’s internal and external relations. Regarding internal relations, the Review first emphasized the need for the DOJ to clarify the Section’s mission—to formulate policy, provide legal advice and training, and prosecute environmental crimes. Second, the authors stressed the importance for the ECS to establish and maintain effective partnerships with key agencies such as the USAOs, the EPA, other DOJ environmental litigation sections, and other local and federal agencies involved in environmental enforcement activities.

The Internal Review also examined the Section’s internal management. The Review recommended that the DOJ restructure ECS management and organization in light of a rearticulated mission, and immediately dispel the acrimonious tension within the Section, if necessary, through voluntary transfers of disgruntled personnel. In
addition to the *Internal Review*, the other significant steps taken by Attorney General Reno regarding the ECS controversy involved case management policy and procedures. The following section describes the evolution of case management at the ECS, especially in light of the controversial policies adopted under the Bush administration and the Clinton administration’s response.

D. The Bluesheet Controversy: Case Oversight and Allocation of Decision Making Between United States Attorneys Offices and ECS

Disagreements over how the DOJ should structure case oversight and delegate prosecutive decision making comprised another important aspect of the ECS controversy. Between 1984 and the present, DOJ policy on case management—and in particular the allocation of decision-making authority to prosecute cases between USAOs and ECS—changed three times.\(^{180}\) This subpart provides an overview of the ECS’s case oversight policies and procedures as set out in the *USAM*.\(^{181}\)

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The Justice Department must take steps to ensure that the individuals involved in the program work together cooperatively. The Justice Department management should determine the roles that each Department component will play in the process, and it should also make clear that any individual who is unwilling to perform his or her assigned role and respect the assigned role of others should not expect to continue his or her involvement in the environmental crimes program. *Id.* at 127.

180. See Corcoran, *Internal Review*, supra note 6, at 25-26 (referring to two changes between 1984 and 1988); *Revised Bluesheet*, supra note 20, at 1 (referring to a third change in 1994).

181. The *USAM* contains a comprehensive compilation of the policies and procedures that govern the USAOs and their relations to DOJ Divisions, federal investigative agencies, and other governmental entities. Corcoran, *Internal Review*, supra note 6, at 37. The *USAM* first set out the procedures governing the Environment Division in 1984. *Id.* at 6. The Attorney General’s Advisory Committee (“AGAC”), which is comprised of a representative group of U.S. attorneys, develops policy and issues guidelines in the *USAM*. *Id.* The DOJ first revised the procedures that applied to the ECS in 1988 and then again in 1993. *Id.* The DOJ last amended the *USAM* as it applies to the ECS on August 23, 1994. *Revised Bluesheet*, supra note 20, at 1.

Moreover, the DOJ announces departmental policy changes through Bluesheets. Corcoran, *Internal Review*, supra note 6, at 37-38. The procedures for policy changes in the *USAM* require that the AGAC review Bluesheets prior to their becoming part of the Manual. *Id.* at 38. If the AGAC objects to a Bluesheet, the committee negotiates directly with the assistant attorney general for the Division that proposed the change. *Id.* If the AGAC and the assistant attorney general fail to reach an agreement, they consult the associate attorney general. *Id.* Bluesheets remain valid for five months from the date of issuance unless the DOJ incorporates the Bluesheet into the text of the Manual or reissues the Bluesheet. *Id.*
1. Case Procedures Prior to the 1993 Bluesheet Changes

The issuance of a Bluesheet in 1988 and a Bluesheet amendment in 1993 created continued controversy, which plagued the ECS throughout the Bush administration. Prior to the Bush administration, the DOJ and USAOs managed a relatively small caseload of federal environmental cases in an informal manner. The USAM reflected this arrangement in its procedures, which stated that "[t]here are no precise rules for determining how responsibility for a criminal environmental case is to be divided between the [USAOs] and [ECS]." The USAM further stated that primary responsibility for a case could rest entirely with a USAO, with ECS, or with both on a "shared basis," and that this responsibility would be determined on a "case-by-case basis.

Despite these provisions, which intimated an unstructured power-sharing arrangement, the USAM explicitly placed ultimate supervisory authority over all federal environmental criminal cases with the Assistant Attorney General for the Land and Natural Resources Division. This express grant of supervisory authority created controversy and confusion among federal prosecutors. Although the USAM expressly granted the Assistant Attorney General the ultimate authority to make prosecutive decisions, a requirement that Main Justice also consult with United States attorneys qualified this grant of

182. See supra note 181 (providing an explanation of Bluesheets).
183. Corcoran, Internal Review, supra note 6, at 25-26, 302-19 (providing an in-depth history of the Bluesheet controversy over a ten-year period, starting in 1984 and, in particular, during the Bush administration).
184. Id. at 62 n.73, 63 (reporting that 226 referrals between fiscal years 1983 and 1986 led to 211 conviction or pleas of environmental cases and that Main Justice had established "informal working relationships" with EPA personnel and the USAOs).
185. USAM 1988, supra note 32, § 5-11.110.A.
186. Id. § 5-11.110.A. Additional evidence of shared responsibilities involved case initiation. The USAM indicated that case initiation under the federal criminal environmental statutes would ordinarily occur by "simultaneous referral" to both Main Justice and USAOs. Id. § 5-11.302.
187. Id. § 5-11.303 ("The Assistant Attorney General for the Land and Natural Resources Division has supervisory responsibility over all criminal proceedings arising under the statutes [applicable to the ECS]."). The USAM further stated that the assistant attorney general held the "final authority regarding the prosecution or declination" as well as the "authority to assume primary responsibility" of environmental criminal cases. Id. §§ 5-11.303.A to 5-11.303.B. Furthermore, the assistant attorney general could require that a USAO refrain from undertaking a prosecution. Id. § 5-11.303.C. Prior to 1988, the USAM had made the assistant attorney general's final authority implicit. See Corcoran, Internal Review, supra note 6, at 305-06.

In addition, under the 1988 USAM, Main Justice retained extensive oversight over cases for which USAOs exercised primary responsibility. See, e.g., USAM 1988, supra note 32, § 5-11.304 (prescribing the information to be furnished to the ECS by the USAOs); id. §§ 5-11.330 to 5.11.343 (outlining requirements relating to coordination between the ECS and USAOs for cases in which USAOs have primary responsibility).
188. Corcoran, Internal Review, supra note 6, at 26 (explaining that members of AGAC opposed the 1988 USAM amendments and "mistakenly interpreted [them] as imposing a new 'prior approval' requirement").
decision-making power. Additionally, following the proper notification and referral of a case from the local office to Main Justice, so long as the Assistant Attorney General did not object, USAOs were free to pursue a prosecution of a criminal environmental case.

2. Case Procedures Subsequent to the 1993 Bluesheet

On January 12, 1993, the DOJ issued Bluesheet 5.004, which set out significant changes in federal environmental criminal case initiation and development procedures, and further centralized prosecutorial power in Main Justice at the expense of USAOs. The 1993 Bluesheet contained an express "prior approval" requirement for "priority" cases, but no requirement for other cases. The drafters of Bluesheet 5.004 claimed that input from United States attorneys, Assistant United States attorneys, and Environment and Natural Resources Division attorneys helped fashion the policy reforms outlined in the document. Moreover, the Bluesheet purported to seek enhanced cooperation between ECS and USAOs, and "more efficient and effective handling of environmental prosecutions."

Specifically, Bluesheet 5.004 shifted prosecutorial decision making to Main Justice for a newly-created set of "priority categories."

189. USAM 1988, supra note 32, § 5-11.110.B (stating that "[t]he decision for a given case will be made ultimately by the Assistant Attorney General of the Land and Natural Resources Division in consultation with the U.S. Attorney").
190. Id. § 5-11.304 (stating that a U.S. attorney could commence prosecution within 14 days of receipt of the referral of the case to Main Justice).
193. Bluesheet 5.004, supra note 191 (cover memorandum).
194. Id.
195. Id. at 1.
196. Id. at 3. The Bluesheet noted that "some USAO investigations/cases [would] necessarily be more significant in scope, complexity or issues and thus subject to a need for greater review and control." Id. at 2. According to the Bluesheet, the Environment Division would identify those cases requiring greater oversight. Id. Initially, ten types of cases comprised the new "priority categories" that the Division would scrutinize heavily: (1) RCRA violations; (2) wetlands violations; (3) Clean Air Act Amendment violations (except for asbestos cases); (4) knowing endangerment charges; (5) charges based on a negligence or (6) strict liability theory (unless part of a plea agreement); (7) all charges based on the responsible corporate officer doctrine; (8) all cases involving federal facilities; and, (9) all cases involving evidence derived from self-auditing and implicating the DOJ's voluntary disclosure program. Id. at 2-3. The list also included a tenth catch-all category that involved "any matter of national interest." Id. at 3. The Bluesheet cited as an example of such a matter the initial prosecution under a new statute or regulation or the prosecution of a "regulation the validity of which is significantly in doubt." Id. Bluesheet 5.004 further explained that the ECS would identify in writing to the USAOs the specific factors that would determine whether a case involved a matter of national interest. Id. at 3 n.1.
Bluesheet also spelled out case initiation procedures in greater detail. Finally, under the new policy, the ECS had twenty-one days from the date a USAO referred a case to establish whether the referral fell under a priority category, in which case Main Justice could exercise greater oversight of the case. Bluesheet 5.004, like the 1988 USAM amendment, created a stir among prosecutors at Main Justice and USAOs.

3. Case Procedures Adopted by the Clinton Administration

On August 23, 1994, in response to intense internal pressure from ECS line attorneys, AUSAs, and Congress, Attorney General Reno issued a Bluesheet revision (the "Revised Bluesheet"), which decentralized prosecutorial decision making and shifted authority from the ECS back to local USAOs. Notably, in a cover memorandum of the Revised Bluesheet directed to United States attorneys and the ECS, Attorney General Reno expressed her hope that DOJ attorneys would put the past behind them. As with Bluesheet 5.004, the Revised Bluesheet once again emphasized the Department's goal of promoting cooperative efforts between Main Justice and local USAOs.

The Revised Bluesheet retained the distinction between priority and nonpriority cases. Under the new policy, USAOs would hold responsibility for the approval, investigation, and prosecution of all nonpriority environmental crimes. The Revised Bluesheet further defined priority cases (or "cases of national interest") as those that present a novel issue of law, require simultaneous investigations in multiple districts, implicate international or foreign policy, or raise an urgent or sensitive issue. In such an instance, the Revised

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197. Id. at 4-5.
198. Id. at 5.
199. Environmental Crimes Bluesheet Revised, 4 DOJ Alert (P-H) No. 16, at 9, *1 (Sept. 5-19, 1994) (stating that the 1993 Bluesheet elicited "months of intense pressure from congressional Democrats and some U.S. attorneys who claimed that, by centralizing control over cases in ECS, the 1993 [B]luesheet undercut the ability of local prosecutors to vigorously pursue environmental crimes"). But see Corcoran, Internal Review, supra note 6, at 323-24 (characterizing the reactions to the Revised Bluesheet as "remarkably varied" and indicating that following its issuance "the matter [did] not appear to be a continuing source of significant controversy").
202. Revised Bluesheet, supra note 20, at 1.
203. Id. at 3 (setting out USAM § 5.11.104) (stating the USAOs would take lead responsibility "except in cases of national interest"). This Bluesheet provision indicated that the ECS could participate—either as co-counsel or lead—in such non-priority litigation. Id. The Revised Bluesheet carefully noted, however, that in such instances the allocation of case responsibility between Main Justice and the USAOs would need to be clearly demarcated. Id.
204. Id. (setting out USAM § 5.11.105).
Bluesheet guaranteed USAOs the opportunity to litigate the case "jointly as co-counsel."205

In addition to the Bluesheet revision issued by Attorney General Reno, the final chapters of the ECS controversy involved the resignation of the ECS chief and the decision to allow documents to be turned over to, and line attorneys to be interviewed by, the congressional subcommittee. The subparts below describe these events.

E. The Resignation of Neil Cartusciello

Late in the Bush administration and during the early Clinton years, ECS Chief Neil Cartusciello figured prominently in the ECS controversy. Opponents of the Section's prosecutive policies made Mr. Cartusciello a primary target of disapproval.206 The DOJ's Internal Review failed to stave off further congressional scrutiny of the ECS and, in fact, renewed tensions between a Democratic Congress and a Democratic executive branch.207 Citing an inability to secure respite from media coverage and continued congressional probes, Mr. Cartusciello resigned as chief of the ECS on April 1, 1994. Along with Mr. Cartusciello's resignation, the DOJ's eventual compliance with congressional requests for information, as described below, probably helped resolve the dispute.

205. Id.

206. For example, Professor Turley's Preliminary Report leveled a number of charges against Mr. Cartusciello. First, the Report charged that Mr. Cartusciello demonstrated a "limited environmental background[.]" and a reluctance to enforce federal environmental crimes. Turley, Preliminary Report, supra note 3, at 9-10 (charging that Mr. Cartusciello "refused to prosecute cases where there ha[d] been strong support from U.S. Attorneys' offices and objectively strong evidentiary foundations"); see also id. at 18 ("Mr. Cartusciello's selection was controversial with ECS members and local AUSAs [because he] came to the ECS with no environmental experience from his previous work as an AUSA and . . . has [shown] a marked reluctance to prosecute in a number of cases. . . .")

The Turley Preliminary Report's most serious accusation leveled against Mr. Cartusciello dealt with case management. The Report asserted:

There is . . . widespread belief among prosecutors that the ECS has been intentionally "micromanaged" by Justice officials to slow down prosecutions. Since its formation, the ECS has been subject to a remarkable level of control and interference from high-officials at Main Justice. Prosecutors interviewed for this Report have suggested that both White House and high-level Justice officials have attempted to force AUSAs to submit cases to the ECS in order to delay and discourage prosecutions.

Id. at 31.

207. McGee, Environmental Crimes Controversy Lingers, supra note 5, at A25. Tension between a Democratic Congress and a Democratic Executive continued unabated following the release of the Internal Review. Id.

F. Short-Term Resolution of ECS Conflict with Congress

As in the Gorsuch Burford case in the early 1980s, Attorney General Reno skirted further conflict with Congress by accommodating Representative Dingell’s requests for information.²⁰⁹ In fact, Attorney General Reno turned over all the documents dealing with the DOJ’s internal investigation into the disputed ECS cases, documents which the Dingell subcommittee subpoenaed on March 11, 1994.²¹⁰ In addition, Attorney General Reno also agreed to permit subcommittee investigators to interview staff prosecutors regarding the handling of ECS cases.²¹¹

Attorney General Reno’s directives elicited sharp criticism from prosecutors and commentators across the country who warned that the DOJ’s action set a dangerous precedent that chilled prosecutorial discretion, and improperly encroached on core executive functions.²¹² As the subpart below notes, however, criticism has abated and the ECS dispute no longer troubles the Clinton administration.

G. The ECS Out of the Spotlight: The Aftermath of the ECS Controversy

Today, this chapter of legislative-executive branch tension over environmental policy appears to have concluded. Observers, including Representative Dingell, responded favorably to the appointment of a career environmental crimes prosecutor, Ronald Sarachan, to succeed Neil Cartusciello.²¹³ More importantly, the congressional elections of 1994 radically shifted partisan control of the legislative branch and, in particular, of congressional oversight of the federal environmental program from the Democrats to the Republicans.²¹⁴ This political shift, more than any other factor, may be responsible for bestowing


²¹¹. See Seper, supra note 161, at A4 (noting that Attorney General Reno reversed a “long-standing policy of protecting career prosecutors from outside scrutiny” and ordered line attorneys to “submit to interviews voluntarily”).

²¹². See, e.g., Cartusciello Resignation Unlikely to Stem Dispute, 4 DOJ Alert (P-H) No. 7, at 2, *3 (Apr. 18, 1994) (“That Reno complied with both Dingell subpoenas dismayed supporters of prosecutorial autonomy throughout DOJ.”); Hansen, Smear at Justice, supra note 5, at A21 (characterizing DOJ’s decision to “require its line prosecutors to answer for their decisions directly to Dingell” as “an astonishing abdication”). But see Abas, Dingell’s Justice Probe is Justified, supra note 5, at A15 (arguing that Rep. Dingell’s probe was reasonable).


upon the ECS diminished scrutiny by Representative Dingell.\textsuperscript{215} In fact, management reforms under the new ECS Chief have elicited little scrutiny from commentators\textsuperscript{216} and even a final report by Representative Dingell's former staff, which alleged a whitewash of the ECS controversy by the Internal Review, aroused minimal interest.\textsuperscript{217}

Thus, the ECS controversy arose at the time of the Turley Preliminary Report; gained momentum with congressional hearings on the Section, the DOJ's Internal Review, and frequent adjustments to ECS's case management procedures; and finally died down with an electoral shift in political power. The interbranch and intrabranch tensions sketched above, however, implicate far-reaching separation of powers, prosecutorial, and environmental policy concerns. Moreover, the marked antagonism the ECS dispute created among institutions of the executive and legislative branches lingers. In fact, the very accounts of the controversy reveal that the branches cannot immunize themselves against institutional bias and even betray political (if not partisan) influences.\textsuperscript{218}

In the remaining parts, this Note focuses on two inquiries. Part III reflects on the proper balance of power between the executive and legislative branches in the federal criminal environmental arena—in particular, the interbranch conflict over congressional oversight of the ECS. Part IV contemplates intrabranch (as well as interbranch) feuding over the proper allocation of federal environmental prosecutive authority within the DOJ.

III. Interbranch Conflict over Congressional Oversight of the ECS

This part further explores the ECS debacle and examines the doctrinal stances adopted by the executive and legislative branches regarding Congress's power to investigate the Section's prosecutive record. This part concludes with a discussion of the importance of political compromise and institutional accommodation in resolving interbranch conflicts such as the one sparked by the ECS controversy.

A. The Executive Doctrine of Congressional Oversight of the ECS

As previously noted, the DOJ initially resisted congressional investigation of the ECS.\textsuperscript{219} Unlike the Gorsuch Burford scandal (which

\textsuperscript{215} Cf. id. at *3 ("It's likely that . . . the Department of Justice Environmental Crimes Section will have a respite from the close scrutiny of Energy and Commerce Committee Chairman John Dingell . . . ").

\textsuperscript{216} ECS Restructures Smoothly, With One Exception, 4 DOJ Alert (P-H) No. 18, at 9, *1 (Oct. 17, 1994).


\textsuperscript{218} See supra notes 167, 170 and accompanying text.

\textsuperscript{219} See supra note 59 and discussion infra part III.A.1.
involved President Reagan issuing an Executive Memorandum proscribing the disclosure of open investigatory files to Congress), the ECS dispute generated no such presidential response. The executive branch’s legal stance can only be discerned from DOJ officials’ public statements, congressional replies to DOJ correspondence, and, to a lesser degree, observers’ commentary—responses which the subparts below discuss.

1. DOJ Officials’ Resistance to Congressional Oversight of Prosecutorial Decision Making

DOJ officials offered both legal and public policy reasons for constraining Congress’s power to compel testimony from line attorneys and to subpoena documents relating to open cases. For example, in an in-depth interview in October, 1992, Deputy Assistant Attorney General Roger Clegg cited Federal Rule of Criminal Procedure 6(e), which prohibits prosecutors from making public grand jury deliberations, as embodying similar confidentiality concerns to those debated during the ECS dispute. Mr. Clegg, along with ECS Chief Neil Cartusciello, also offered public policy rationales to explain ECS’s resistance to congressional scrutiny of prosecutorial decision making. The two officials stated that, while they would personally testify before the subcommittee, they strongly opposed congressional interviewing of line attorneys. They argued that direct congressional scrutiny of individual line attorneys would exert a “chilling effect” on prosecutors’ conduct of their deliberations. In addition, Mr. Clegg feared that

220. Shane, Executive Privilege Claims Against Congress, supra note 82, at 511; Claveloux, supra note 64, at 1337.
221. Text of Interview with Clegg and Cartusciello, supra note 61, at *2.
222. Id.; see also Fed. R. Crim. P. 6(e)(2) (stating that an attorney for the government “shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules”).
223. Text of Interview with Clegg and Cartusciello, supra note 61, at *2 (stating that “[they] ha[d] repeatedly offered to make [them]selves available to the subcommittee”); see also id. at *1 (noting that “[they] ha[d] tried repeatedly to present the facts to the subcommittee staff and were rebuffed at every step”). According to Mr. Clegg, the DOJ would even have agreed to subcommittee questioning of line attorneys so long as the Department and the subcommittee agreed on the “ground rules” of the interviews. Id. at *2. Mr. Clegg further stressed that a policy of requiring previously agreed upon parameters whenever Congress interviews line attorneys “ha[d] to be honored across the board.” Id.
224. Id. Mr. Clegg explained that “the Department [wa]s reluctant to have its line attorneys turned into political footballs every four years.” Id. Mr. Clegg further noted:

We don’t think that our prosecutors should have in the backs of their minds, when they make tough prosecutorial calls, that if they make a politically unpopular decision to indict or not to indict, then a congressman can haul them up into the public arena and grill them about the reason they made those very tough decisions.

Id.; see supra note 61.
explicit public discussions of cases, which the DOJ had declined to prosecute, would be unfair to former targets of investigations.225

Mr. Clegg’s and Mr. Cartusciello’s comments intimated a paradigm of prosecutorial decision making that shields prosecutors from congressional and, in particular, politically motivated second-guessing. This model envisioned prosecutorial decision making—generally and during the ECS dispute—that would rely almost exclusively on legal considerations.226 According to the interviewees, the Section’s declination decisions depended solely on whether prosecutors believed sufficient evidence existed to bring a criminal charge.227 Moreover, Mr. Clegg charged that Congress had politicized and tainted with suspicion those declination decisions that “basically boil[ed] down to a good faith disagreement between career prosecutors and career investigators.”228 Nonetheless, Mr. Clegg admitted that the DOJ does not make completely apolitical prosecutive decisions and that political appointees in supervisory positions do, in fact, participate in prosecutorial decision making.229

225. Id. at *2; see supra notes 113-14 and accompanying text (discussing additional public policy concerns associated with congressional investigations of open criminal cases).

226. Text of Interview with Clegg and Cartusciello, supra note 61, at *4-6. Mr. Cartusciello categorically denied that political considerations influenced prosecutorial decisions at the ECS. Id. at *6 (“There was no political pressure whatsoever—not a bit, not a hint, not a sniff, not a smidgen, not a scintilla.”); Interview: Cartusciello Defends DOJ Enviro Crimes Work, Am. Pol. Network, Inc. Greenwire, at 1 (Apr. 28, 1994); see discussion infra part IV.B.3 (discussing executive branch conceptions of depoliticized prosecutorial decision making).

Throughout this part, this Note refers to the terms “political” and “partisan.” “Partisan” is defined as either an “adherent to a party, faction, [or] cause” or “composed of, based upon, or controlled by a single political party or group.” Webster’s Third New International Dictionary, supra note 8, at 1647. By contrast, although “political” also has the narrow meaning of “relating to, or involved in party politics,” the term can also mean “of or relating to government . . . or the conduct of governmental affairs . . . as distinguished from matters of law.” Id. at 1755. Thus, the two terms can clearly be used synonymously. The term “political” (as defined above), however, can also refer to broader concerns involving the making of governmental policy, while the meaning of “partisan” is restricted to the influence of party considerations. In other words, the former term “political” can be employed when examining macroscopic issues—such as the development of prosecutorial policy nationwide, while the latter term “partisan” may be more appropriately used in case-by-case determinations of party influence over government actions. This Note treats both words synonymously unless otherwise indicated.

227. Text of Interview with Clegg and Cartusciello, supra note 61, at *1.

228. Id. (characterizing the subcommittee’s conduct as “election year politics”). Mr. Cartusciello also viewed as commonplace disagreements between ECS line attorneys and supervisory prosecutors regarding declination decisions. Id. at *4. Mr. Cartusciello, however, maintained that federal policy mandates and requires supervisory review of prosecutions. Id.

229. Id. at *6. Mr. Clegg stated that:
The prime movers [making prosecutorial decisions] were career lawyers. What the political leadership did was to approve the case to begin with and then approve dismissing the case too.

. . . .
2. Commentaries Critical of Congressional Oversight of Prosecutorial Decision Making

Many critics less directly linked to the ECS or the executive branch similarly expressed outrage at Representative Dingell's actions. These critics considered Representative Dingell's demands for information to be motivated by base political considerations and to constitute unconstitutional encroachments by Congress on a sacrosanct area—prosecutorial discretion. For example, in addition to a series of caustic editorials in newspapers such as *The Wall Street Journal,* two Washington organizations issued papers condemning Congress's attempts to investigate individual ECS prosecutors. As described below, both these commentators advocated a model of prosecutorial discretion (in particular regarding career attorneys) similar to the one suggested by DOJ officials. This ideal embraced entirely depoliticized prosecutorial decision making.

The Heritage Foundation published in 1993 an address by former Attorney General Benjamin R. Civiletti entitled *Justice Unbalanced: Congress and Prosecutorial Discretion.* Mr. Civiletti raised separation of powers and policy concerns regarding the Clinton administration's decision to permit congressional personnel to interview ECS line attorneys. First, while acknowledging the constitutionality of Congress's investigative prerogative, Mr. Civiletti asserted that "it is now well settled that the prosecutorial function lies exclusively with the Executive Branch, and it has the absolute discretion to prosecute, or not prosecute, a case." Mr. Civiletti characterized the conflict as a question of "where to draw the line between Congress's right to know and the Executive's duty to preserve the prosecutorial process in an atmosphere as untainted by partisan politics as is possible in our system." According to Mr. Civiletti, the civil liberties of individuals underlie the rationale of shielding prosecutors from political scrutiny.

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We've made a point that the principal decision was at the career level. I am not going to apologize for the fact that in any case political appointees have input. This is a democratic republic, and the executive branch is staffed by people who are put there by a president who is elected. So there is nothing sinister about those people having input into decisionmaking. See supra note 226.

Id. Mr. Clegg most likely intended the broader meaning of "political," rather than the narrower meaning of "partisan." See supra note 226.

230. See supra note 12 and accompanying text.


232. Id. at 1. Mr. Civiletti carefully noted that the Clinton administration agreed to interviews that would not be conducted under oath or in public. Id.

233. Id. at 3.


235. Address by Benjamin R. Civiletti Before The Heritage Foundation, supra note 231, at 3.
and the decision whether to prosecute a case should rest exclusively with the executive branch. Legislators because of their susceptibility to political pressures should have no voice in such deliberations.\textsuperscript{236} Additionally, he argued that public policy compelled the executive branch to exercise exclusive control over prosecutions.\textsuperscript{237} Attorney General Civiletti concluded that, while Congress can legitimately investigate law enforcement matters,\textsuperscript{238} the line should be drawn at questioning line attorneys about specific cases to avoid the "substantial danger that . . . congressional pressure" might influence prosecutorial decisions.\textsuperscript{239}

The Washington Legal Foundation expressed concerns similar to those voiced by Attorney General Civiletti in a paper entitled The Legislative Politicization of the United States Department of Justice.\textsuperscript{240}

The author, Stuart Gerson, discussed separation of powers concerns

\textsuperscript{236} Id. at 5-6.

\textsuperscript{237} Id. at 6. Mr. Civiletti argued that prosecutors, given their intimate understanding of the criminal justice system and the evidence uncovered in investigations, are best able to determine whether a case should be prosecuted. \textit{Id.} Citing Attorney General Robert Jackson, Mr. Civiletti further advanced the following three reasons for withholding information from Congress: (1) violators would benefit from knowing the extent of the government's information, the nature of the evidence collected, and the witnesses identified; (2) law enforcement depends on the ongoing receipt of information from confidential informants, whose identity must remain secret; and, (3) disclosure would work grave injustices on innocent individuals who were initially suspected but ultimately exonerated of wrongdoing. \textit{Id.; see supra} notes 113-14.

\textsuperscript{238} Id. at 3, 7. Mr. Civiletti wrote:

\begin{quote}
Congress may legitimately be displeased with the general enforcement of a particular law, and Congress's oversight powers certainly enable it to inquire into such matters. Congress is entitled to know the facts and figures regarding the number of prosecutions brought or pending, the number of convictions, and the length of sentences and amount of fines collected. Congress would also be entitled to know the amount of time spent prosecuting various types of cases, the standards for prosecution, the basis on which the prosecutor weighs certain factors in deciding to prosecute, and the cost of prosecution. Finally, Congress is entitled to learn about difficulties encountered in prosecution—for example—ambiguity in the language of a statute.
\end{quote}

\textit{Id.} at 7.

\textsuperscript{239} Address by Benjamin R. Civiletti Before The Heritage Foundation, supra note 231, at 7 (citation omitted); see also \textit{id.} at 8 (stating also that "Congress can collect all the information it needs to carry out its legislative function without questioning line attorneys or inquiring into specific cases"). Mr. Civiletti further stated:

Congressional inquiry into applicable prosecution standards and statistics is appropriate. Furthermore, congressional inquiry directed to supervisory presidential appointees regarding major closed cases may be appropriate, where there is a showing of substantial reason to believe wrongdoing occurred. But the line should be drawn to shield line attorneys, who make the day-to-day prosecutorial decisions on behalf of the Attorney General, from outside influence, political or otherwise.

\textit{Id.} at 3.

\textsuperscript{240} Gerson, supra note 12, at 1. Mr. Gerson served as assistant attorney general in charge of the Civil Division during the Bush administration and as acting attorney general of the United States during the first months of the Clinton administration. See id.
related to Congress's exercise of subpoena power over law enforcement personnel, and the risk that undue congressional (i.e. political) pressure would influence prosecutorial decisions. Mr. Gerson, however, like Mr. Clegg, also acknowledged the political nature of the executive branch. Nonetheless, Mr. Gerson, like Attorney General Civiletti, drew the line at congressional questioning of line attorneys, suggesting that the executive branch must resist such a practice and protect "the independence of non-political staff" against encroachment by the most political branch—Congress.

3. The Independent, Apolitical Prosecutor: The Executive's Ideal

Critics of congressional oversight of the ECS—in particular of investigations that delve into open cases and question line attorneys—presented a uniform ideal of prosecutorial discretion. Although conceding that Congress can legitimately oversee law enforcement, these prosecutors and commentators strenuously opposed congressional second-guessing of front-line prosecutors' decisions, compulsion of document production in open investigations, and public hearings relating to pending cases. In addition, while acknowledging that the executive branch is a political branch and that political appointees hold top DOJ supervisory positions, these observers maintained that such line attorneys should nonetheless aspire to discharge their duties in as wholly disinterested and objective a manner as possible. Under this ideal, separation of powers insulates the prototypical prosecutor from congressional political interference—in fact, from any political influence at all. This paradigm dictates that the career attorney determine whether a case merits litigation by considering legal

241. Id. at 1 (describing such congressional investigations as "posing a long-term constitutional threat by impinging upon the core, judicially-unreviewable, [executive branch function of rendering independent decisions concerning the undertaking or forbearance of criminal prosecutions]"). Mr. Gerson also indicated that "[i]f congressional committees are able to reverse decisions and prosecutive policies, the legislature will be performing an executive function." Id. at 2.

242. Id. at 4 ("The [executive branch is, after all, a political branch, and it is responsible ultimately to the people.").

243. Id. at 4. Mr. Gerson wrote:

While the Executive is answerable politically, the thing that it is answerable for is fidelity to the law and independence of judgment. The Executive may disclose its reasons for prosecutorial action or inaction, but it must do so on its own terms, not those of a coordinate political branch. If such disclosures are called for and the public interest requires them to be made, the Executive should undertake them through its appointed policy makers, i.e., through those who are politically responsible, and not by sacrificing the potential independence of non-political staff.

Id. Mr. Gerson further noted that the Supreme Court has never squarely addressed the question whether Congress can compel a DOJ line attorney to testify nor conclusively resolved the issue of document production in such an interbranch conflict. Id. at 3.

244. See supra notes 221-24 and accompanying text.

245. See supra notes 226-28 and accompanying text.
and law enforcement criteria alone. This viewpoint, however, contrasts sharply with the perspective espoused by the legislative branch. The following subpart examines Congress's legal posture during the ECS interbranch conflict.

B. Congressional Doctrine of its Investigative Prerogative over ECS's Enforcement Record

Observers of interbranch conflicts have few sources from which to divine Congress's legal understanding of its constitutional powers. Like the executive branch, and unlike the judiciary, the legislative branch does not possess institutional means conducive for developing a legal opinion. Nonetheless, Congress makes law by legislating, and expresses legal opinion in hearings and reports. Congress's legal justification for its investigative prerogative can best be discerned from the congressional record. For example, Representative Dingell's subcommittee introduced into the record a memorandum prepared by the American Law Division of the Congressional Research Service ("Congressional Research Service") (a part of the Library of Congress), which responded to Attorney General Civiletti's address. The memorandum, as reviewed below, revealed Con-
gress's view that it has more frequently pursued investigation of serious ethical lapses within the executive branch than the DOJ and the White House have.

1. Congressional Interpretation of Supreme Court Precedent Regarding Congressional Oversight of Law Enforcement

Not surprisingly, the memorandum by the Congressional Research Service, which relied on congressional custom and its own interpretation of Supreme Court precedent, adopted a view entirely contrary to that of Mr. Civiletti. The authors chronicled a history spanning 70 years of congressional inquiry into DOJ activities, including compulsion of testimony from line attorneys regarding declination decisions. The memorandum asserted that Congress's constitutionally based investigative power reached law enforcement decisions and included the power to interview line attorneys and inspect pending investigative files. To support its case, the Congressional Research Service cited Supreme Court cases as well as anecdotal evidence.

The authors' analysis debunked the view that, constitutionally, law enforcement constitutes a core executive branch function. Relying

251. Id. at 15, 24-41. The memorandum reviewed cases such as the ECS's, which involved congressional scrutiny of DOJ prosecutorial decisions between 1920 and 1992. Id. at 16 ("In the majority of instances reviewed, the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, was taken formally or informally, and included detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases.").

252. Id. at 14 ("Our review... indicates that the numerous pertinent Supreme Court precedent... support a broad and encompassing power in the Congress to engage in oversight and investigation of the administration of executive agencies that would reach all sources of information that would enable it to carry out its legislative function."). The memorandum described a low legal threshold for a subcommittee to investigate validly the executive. Id. The authors wrote:

We are aware of no court precedent that imposes a threshold burden on committees to demonstrate a “substantial reason to believe wrongdoing occurred” before they may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.

Id. (paraphrasing Barenblatt v. United States, 360 U.S. 109, 117 (1959)). Moreover, the memorandum expressly concluded that the congressional investigatory prerogative extends to pending criminal cases. Id. at 16 ("[T]hose having evidence in their possession, including officers and employees of the Justice Department, cannot lawfully assert that because lawsuits are pending involving the government, 'the authority of [the Congress], directly or through its committees, to require pertinent disclosures' is somehow 'abridged.' ")

253. See, e.g., Hearing 1993, supra note 4, at 13-23 (surveying Supreme Court case law with regard to Congress's constitutionally based investigatory powers).

254. Id. at 20-23. The congressional researchers cited Morrison v. Olson for the proposition that the Supreme Court has "rejected the notion that prosecutorial discretion in criminal matters is an inherent or core Executive function." Id. at 20. According to the memorandum, the Morrison Court held the exercise of prosecutive
in part on *Nixon v. Administrator of General Services*.

The memorandum asserted that the constitutionality of an investigative action depends on a balancing of the burdened executive function against the claimed legislative objective. The Congressional Research Service concluded that, on the whole, prosecutorial discretion alone will not trump Congress’s legitimate investigative power. Once the authors ascertained the legal basis for the legislative investigative prerogative, the memorandum explored case studies (summarized below), which revealed public policy rationales for exercise of this power.

2. Congressional Perspective: The Threat of a Politicized and/or Compromised DOJ

The Congressional Research Service conducted a historical survey of congressional investigations into DOJ wrongdoing during the period of 1920 to 1992. This compilation highlighted serious lapses of integrity by top DOJ officials that severely compromised the Department’s credibility. These case studies implicitly underscored discretion to constitute a “typical[,]” but not “central,” executive branch function. *(Id. (citing Morrison v. Olson, 487 U.S. 654, 691-92 (1968))).* For additional commentary supporting this view, see the works of Susan Low Bloch and Stephanie A.J. Dangel. *(Bloch, supra note 92, at 635 (asserting that “history does suggest that law enforcement was not as ‘core’ a presidential function as foreign affairs and war” and that “early legislators did not explicitly require presidential control of the Attorney General”); Dangel, supra note 92, at 1070 (same)).*


256. *Hearing 1993, supra note 4, at 22.*

257. *(Id. (“Given the legitimacy of Congressional oversight and investigation of the law enforcement agencies of government, and the need for access to information pursuant to such activities, a claim of prosecutorial discretion by itself would not seem to be sufficient to defeat a Congressional need for information.”)).*

258. *Id. at 24-41.*

259. For example, the memorandum described the Teapot Dome Scandal. During the mid-1920s, legislators convened a Senate select committee to investigate the conduct of Department of the Interior (“DOI”) personnel in connection with the leasing of naval oil reserves. *(Id. at 24-26. In particular, the committee inquired into charges that the DOJ failed to prosecute the wrongdoers in the DOI scandal. Id. at 24. Again, during the 1950s, Congress investigated numerous allegations of prosecutorial misconduct within the DOJ. Id. at 26-28. For example, one investigation focused on allegations of prosecutorial misconduct—specifically in grand jury proceedings—in federal tax fraud cases. Id. at 27 (stating that the subcommittee questioned grand jurors regarding pressure by DOJ attorneys to prevent grand jurors from conducting a thorough investigation and efforts by DOJ attorneys to induce the jurors to absolve the DOJ of impropriety in its handling of tax fraud cases).* Congressional investigations into allegations of DOJ malfeasance or misfeasance continued throughout the 1970s and 1980s. For example, from 1974 to 1978, Senate and House committees studied the intelligence operations of federal agencies, including units within the DOJ. *(Id. at 30. In addition, in 1979, Congress investigated charges of fraudulent pricing of fuel in the oil industry and the DOJ’s failure to effectively investigate and prosecute the alleged crimes. Id. at 32.*
gress's interest in investigating allegations of prosecutorial misconduct on the part of DOJ personnel, and in particular political appointees.

C. The Need for Interbranch Accommodation and Political Compromise

On the one hand, executive privilege validly checks improper overreaching by the legislature, especially where partisan goals account for legislative motives and where subcommittee subpoenas of documents and line attorneys jeopardize law enforcement efforts. Critics voice their outcry most compellingly when representatives betray naked attempts to embarrass their rival political party by leveling particularly weak charges of prosecutorial misconduct against the DOJ. Unprincipled and undisciplined congressional oversight can lead to disastrous results: subcommittee investigations motivated by partisan ends can cripple a section of the DOJ, result in massive expenditures of scarce governmental resources, and disable law enforcement efforts. Protests against congressional overreaching, however, ring hollow when the executive branch's credibility has been blemished by meaningful evidence of wrongdoing.

A particularly politicized incident involved an inquiry focused on Billy Carter, President Carter's brother, and his activities on behalf of the Libyan government. Id. at 33. According to the Congressional Research Service:

A significant portion of this inquiry concerned the Department's handling of its investigation of the Billy Carter matter, in particular whether Attorney General Benjamin R. Civiletti had acted improperly in withholding certain intelligence information about Billy Carter's contacts with Libya from the attorneys in the Criminal Division responsible for the investigation, or had otherwise sought to influence the disposition of the case.

... [W]itnesses [before the congressional subcommittee] testified about the general structure of decisionmaking in the Department, the nature of the investigation of Billy Carter's Libyan ties, the Attorney General's failure to immediately communicate intelligence information concerning Billy Carter to the Criminal Division attorneys conducting the investigation, the decision to proceed civilly and not criminally against Carter, and the effect of various actions of the Attorney General and the White House on that prosecutorial decision.

Id. at 33.

260. See, e.g., Enforcement: Report Alleges Justice Department Failure to Prosecute Environmental Crimes Vigorously, supra note 3, at *1710-11 (DOJ official Clegg stating that the Turley Preliminary Report was a "political hatchet job," commissioned by a Democratic congressman ... to make the Bush administration look bad days before the 1992 election").

261. See, e.g., Text of Interview with Clegg and Cartusciello, supra note 61, at *1 (Clegg stating that the subcommittee had selected six cases out of a thousand and asserted a pattern of lax enforcement). As noted previously, this Note does not attempt to judge the merits of the DOJ's decisions to decline prosecution in the six case studies featured by the Turley Preliminary Report.

262. See, e.g., Shane, Executive Privilege Claims Against Congress, supra note 82, at 514 (arguing that strains on the Reagan administration's credibility brought about by the James Watt imbroglio and growing allegations of EPA wrongdoing undermined the executive branch's legitimate case for nondisclosure in the Gorsuch Burford affair).
On the other hand, Congress legitimately polices prosecutorial misconduct and other law enforcement wrongdoing within the executive branch by means of its investigative prerogative. History has demonstrated that DOJ political appointees may fall susceptible to political pressures.\textsuperscript{263} Questions abound regarding when and how political appointees can properly consider political factors in setting prosecutorial policies or in supervising prosecutorial decision making.\textsuperscript{264} Moreover, if some degree of politicized decision making and supervision inevitably occurs among DOJ political appointees, the question remains how career attorneys both stay in control of front-line criminal enforcement and remain shielded from external partisan pressures.\textsuperscript{265} At bottom, Congress's access to information serves a critical function in ensuring governmental accountability.\textsuperscript{266}

The subparts above described the polarized legal postures of the executive and legislative branches during the ECS dispute. As with the Gorsuch Burford case,\textsuperscript{267} each branch assumed an all-or-nothing position: Congress asserted that its investigative prerogative was all-embracing while the executive branch regarded executive privilege as a complete shield.\textsuperscript{268} Clearly, framing the question in absolute terms contributes to its insolubility. One commentator has suggested that the legal questions raised by interbranch conflicts over information sharing may not require conclusive resolution.\textsuperscript{269}

\textsuperscript{263} See, e.g., \textit{Hearing 1993}, supra note 4, at 16-17 ("The consequences of these historic [congressional] inquiries have been profound and far-reaching, directly leading to important remedial legislation and the resignations (Harry M. Daugherty, J. Howard McGrath) and convictions (Richard Kleindienst, John Mitchell) of four attorneys general.").

\textsuperscript{264} See discussion \textit{infra} part IV.

\textsuperscript{265} See discussion \textit{infra} part IV.

\textsuperscript{266} See Shane, \textit{Executive Privilege Claims Against Congress}, supra note 82, at 462.

\textsuperscript{267} See \textit{discussion supra} part I.C.3.

\textsuperscript{268} Compare Gerson, supra note 12, at 4 ("The Executive may disclose its reasons for prosecutorial action or inaction, but it must do so on its own terms, not those of a coordinate political branch.") with \textit{Hearing 1993}, supra note 4, at 20 (stating that, irrespective of the consequences, Congress possesses the sole discretion to choose between the "[c]ongressionally generated publicity [that] may result in harming the prosecutorial effort of the Executive" and "access to information under secure conditions [that] can fulfill the [c]ongressional power of investigation and at the same time need not be inconsistent with the authority of the Executive to pursue its case").

\textsuperscript{269} Shane, \textit{Executive Privilege Claims Against Congress}, supra note 82, at 484 ("[G]overnment lawyers facing separation of powers issues ... should adopt the view that each branch, within its particular jurisdiction, is entitled to interpret the Constitution for itself."); see also \textit{id.} at 519 ("As long as the two political branches can reach resolutions of immediate disputes, there should be no ... institutional obstacle to their 'agreeing to disagree' about the law.").
Rather, separation of powers disputes require political compromise, institutional accommodation, and partisan self-restraint. Many interbranch conflicts have been resolved, more or less successfully, through mediated settlements. Sensitivity on the part of the congressional subcommittees to law enforcement concerns, for example, may require receiving sensitive information in executive session (i.e., in nonpublic hearings). Similarly, reasonable acquiescence on the part of the DOJ to document requests can ameliorate unnecessary interbranch antagonism. Finally, only self-restrained and principled conduct—which restricts partisan antics to a minimum—on the part of both executive and legislative branch officials can prevent protracted interbranch conflicts from occurring. As one commentator noted:

270. Id. at 493-94. Professor Shane wrote:

The Constitution builds into each branch's relationship to the others a necessary tension. On one hand, the branches' interrelationships have competitive aspects, which to some extent would obviously be legitimated by recognizing as law each political branch's independent assertion of legal interpretation. In the abstract, this competition is beneficial because it fulfills what the founding generation foresaw as an important check on the power of each branch. . . .

On the other hand, the competition among the branches must be sufficiently restrained to ensure a government that is workable and responsible. The branches must attune themselves to long-term, as well as short-term, institutional interests.

Id.; see also Claveloux, supra note 64, at 1350 (stating that "[m]ost disputes are susceptible to compromise, and [that] this is the preferred method of resolution" (footnote omitted)).

271. Cf. Claveloux, supra note 64, at 1354 ("Congress must be undertaking a legitimate legislative function and the executive branch must be correct that the information is of a type traditionally considered to be privileged.").

272. Shane, Executive Privilege Claims Against Congress, supra note 82, at 524 (listing strategies whereby the branches reconciled their interests, including, for example, executive release of information but under protective conditions, with redactions, and in summary form). The Congressional Research Service also discussed exemplary instances of interbranch cooperation over information sharing. One case, for example, involved the 1979 House investigation of fraudulent pricing of fuel. The memorandum noted that "[t]he hearing record evidenced the sensitivity of the subcommittees to the due process implications of their inquiry and the acquiescence of the Department in the manner in which the subcommittees received and handled the open-case criminal and civil materials." Hearing 1993, supra note 4, at 32. In that instance, the subcommittee heard testimony and received evidence regarding pending criminal cases in closed hearings. Id. In addition, the DOJ agreed not only to turn over documents (which discussed the Department's declination decisions), but also to allow the documents to be made public if Congress determined a compelling need to do so. Id.

A second example pertained to subcommittee hearings of the Abscam scandal during the early 1980s. In that instance, the DOJ and Congress entered into an "elaborate access agreement." Id. at 34. The agreement allowed "considerable give and take" between the two branches and contributed to establishing smooth working relations between legislative and executive branch officials. Id. at 35.

273. Shane, Executive Privilege Claims Against Congress, supra note 82, at 480 ("[P]ublic policy concerns such as national security] may obligate a congressional subcommittee . . . to respect a good faith executive branch demand that it receive sensitive information only in 'executive session.' ").
If it is true not only that law is a form of politics, but that law for Congress and for the President is only politics in the narrowest and most partisan sense, a great part of our professed constitutionalism is an illusion and much government lawyering is merely an expensive fraud upon the public.\footnote{274}{Id. at 500-01. Shane advances a model termed a “government of laws,” id. at 485, which emphasizes accountability and “constraint on individual whim” in the processes of governance. Id. at 490.}

The need for self-restraint, self-scrutiny, and self-discipline by officials within both the executive and legislative branches cannot be overstated. The exercise of such restraint presents the only answer to the constant threat of unresolvable, broadly political and narrowly partisan interbranch tensions.

Thus, both congressional oversight of, and executive privilege regarding, law enforcement constitute legitimate prerogatives by the legislative and executive branches. Both serve critical constitutional functions and contribute to the proper governance of our nation. Incidents like the ECS dispute and the Gorsuch Burford controversy, however, reveal that interbranch disputes inevitably occur and that our nation’s system of governance functions imperfectly. These imperfections, inherent in any tripartite system, stem from interbranch contests over institutional prerogatives. The challenge facing the legislative and executive branches (and to a lesser extent the judiciary) involves striking a proper balance in such interbranch disputes. Unfortunately, in interbranch disputes, many officials instead succumb to the lure of consolidating institutional power.\footnote{275}{Cf. Shane, \textit{Negotiating for Knowledge}, supra note 57, at 223 (discussing “political” and “institutional competition” between the legislative and executive branches, which may involve partisanship and which is inherent to the constitutional design).}

Questions remain, of course, regarding the reach of these legitimate powers and the manner in which the branches may properly exercise them. Balancing the two prerogatives may require determining: (1) which branch can more faithfully remain self-disciplined and exercise self-restraint from partisanship—the executive or the legislative; (2) what threshold level of congressional oversight of environmental law enforcement should be sought; (3) to what degree can the executive branch effectively police itself, and what indicators reveal intrabranch infractions sufficiently serious to warrant targeted congressional investigation. The principle of self-restraint, moreover, must undergird all these inquiries.

This part examined the level of oversight that Congress appropriately applied to prosecutorial decision making. The ECS dispute raised concerns of autonomy and accountability in another context as well. Distinct viewpoints emerged concerning the wisdom of centralizing environmental prosecutive decision making at Main Justice. The
next part explores legislative and executive branch perspectives on the advantages and drawbacks of centralization.

IV. Inter- and Intrabranch Differences over Allocation of Prosecutorial Decision-Making Authority Within the Executive Branch

This part examines a second central aspect of the ECS dispute: inter- and intrabranch tensions became even more strained over the allocation of prosecutorial decision-making authority between Main Justice and local USAOs in the federal criminal environmental program. As previously noted, both congressional subcommittees, as well as executive branch officials, found fault with Bush administration policies, which they viewed as improperly centralizing prosecutorial authority at Main Justice.276 The first subpart reviews the debate over prosecutors' enhanced discretion and power, in particular prosecutorial autonomy from external checks by entities such as the legislature and the judiciary. The second subpart briefly summarizes the congressional and DOJ positions regarding the centralization of prosecutorial discretion over federal environmental crimes at Main Justice.

A. Background on Prosecutive Authority277

During the late 1960s and 1970s, academics and criminal justice experts examined prosecutorial discretion and, in particular, focused attention on the development of prosecutorial standards related to charging decisions.278 The broad debate that ensued explored the tension between the countervailing policy goals inherent in prosecutorial discretion: the goal of ensuring that prosecutors charge in a uniform, consistent, and non-arbitrary manner must be balanced against the need for sufficient latitude, flexibility, and sensitivity in adjusting charging decisions to individual circumstances.279 Whether the tension between these competing policy goals of flexibility and consistency can ever be conclusively resolved remains in doubt.280

276. See e.g., Hearing 1993, supra note 4, at 197-208 (conducting leading questioning by Rep. Dingell of former Associate Attorney General Hubbell strongly suggestive of Rep. Dingell's opposition to centralizing prosecutive authority at Main Justice); Corcoran, Internal Review, supra note 6, at 4 app. E (characterizing the DOJ's purported rationales behind centralizing prosecutive authority (e.g., maintaining accurate statistics and uniform application of environmental laws) as a "sham").
277. See discussion supra part I.B.1.
278. See, e.g., Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 188, 214 (1969) (stating that prosecutors wield enormous power, through both positive and negative charging decisions, and that this broad discretionary power calls for a comprehensive review and analysis).
280. See Miller, supra note 42, at 172. One commentator has described this quandary as follows:
Twenty years after the onset of the debate, prosecutorial discretion has expanded rather than contracted. Today in the United States, commentators typically view prosecutors—both on the federal and local level—as possessing broad discretionary powers regarding investigatory and charging decisions. Similarly, experts deem even the federal system, which consists of appointed (rather than publicly elected) local prosecutors, to be a decentralized system of case oversight within which local USAOs operate with a great deal of autonomy from Main Justice. The debate raises two questions. First, to what degree should prosecutorial discretion be restrained, if at all, by internal checks (such as guidelines) or external checks (such as the judiciary or legislature)? Second, within the executive branch, how centralized should prosecutorial discretion be? The subparts below briefly discuss these questions, in turn.

Whether a reasonable compromise can be reached between the necessity for discretion and flexibility which usually justifies a relatively uncontrolled administrative process and the desirability of affording the citizenry the kind of protection against arbitrary action usually associated in the minds of lawyers and laymen alike... is by no means clear.

Id. See Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 393 (1992) (stating that "prosecutors wield vastly more power than ever before"); Kenneth J. Melilli, Prosectorial Discretion in an Adversary System, 1992 B.Y.U. L. Rev. 669, 672 (discussing the broad discretion of prosecutors in exercising the charging function); Ellen S. Podgor & Jeffrey S. Weiner, Prosecutorial Misconduct: Alive and Well, and Living in Indiana?, 3 Geo. J. Legal Ethics 657, 659 (1990) ("It is without doubt that prosecutors have broad discretion in deciding which cases to prosecute."); Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 SMU L. Rev. 965, 966 (1984) (suggesting that problems have resulted because "prosecutors... have developed a sense of insulation from the ethical standards of other lawyers"); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 58 (1991) (maintaining that "[t]he prosecutor's freedom from client control gives rise to vast discretion").

282. See, e.g., Dennis, supra note 41, at 465 (stating that the federal prosecutor's "decision to bring criminal charges is beyond review").

283. Id. at 465-66. Moreover, this commentator also perceived U.S. prosecutors to be cautious with regard to charging decisions, particularly with respect to complicated white collar crimes. Id. at 466.

284. The degree of prosecutorial autonomy (from external checks) that is most appropriate constitutes a major topic for research. This Note addresses this question cursorily in order to examine a second related issue: the degree of prosecutorial autonomy (from internal checks) that most efficiently, equitably, and effectively advances environmental law enforcement efforts. During the ECS dispute, the parties framed this issue in terms of the proper extent of centralized prosecutorial decision-making in Main Justice. See supra note 276; see also Text of Interview with Clegg and Cartusciello, supra note 61, at *5 (discussing Main Justice's "rationale for central control of environmental crimes").
1. Internal and External Constraints that Restrict the Scope of Prosecutorial Discretion

Internal controls include formal guidelines, official memoranda, and public or nonpublic policy statements. For example, the USAM provides government attorneys with some guidelines concerning charging decisions; however, where the USAM provides such guidelines, it nonetheless allows for broad prosecutorial discretion. The DOJ's Principles of Federal Prosecution ("PFP" or "Principles") also provide broad guidelines that prosecutors should follow when making charging decisions. According to the PFP, each United States Attorney and responsible Assistant Attorney General should establish internal office procedures regarding prosecutorial decision making. The Principles also address the criteria prosecutors should consider when initiating or declining prosecution, and expressly prohibit government attorneys from considering political factors in making such determination.

Regarding external controls, neither statutory provisions nor judicial decisions have enunciated detailed standards to guide in the exercise of charging discretion. In particular, the case law reveals an extraordinarily pronounced and deep-rooted reluctance by the courts

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285. Vorenberg, supra note 40, at 1543-45. In theory, the grand jury and preliminary hearing function to buffer ordinary citizens from prosecutorial abuse; however, neither process presents a formidable barrier to prosecutorial autonomy. Id. at 1537-38.

286. Beck, supra note 40, at 322.

287. U.S. Dep't of Justice, Principles of Federal Prosecution (1980) (on file with the Fordham Law Review). Attorney General Civiletti issued the PFP in order to "ensure the fair and effective exercise of prosecutorial responsibility by attorneys for the government" and to "promote confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case." Id. at i-ii.

288. Id. ¶ 3, at 2 (stating that internal office procedures would ensure "that prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles" and "that serious, unjustified departures from the principles set forth herein are followed by ... remedial action"). The PFP further advised that U.S. attorneys or assistant attorneys general establish internal procedures for review and documentation of prosecutive decisions. Id. ¶ 3 cmt., at 3. The PFP, however, cautioned against a rigid application of internal guidelines, which would jeopardize fair prosecution of criminal cases. Id. ¶ 4 cmt., at 3.

289. Id. pt. B, at 5-15. According to the Principles, a government attorney should prosecute a target if she believes his conduct constitutes a federal offense and the admissible evidence would probably sustain a conviction. Id. ¶ 2, at 5-6. A government attorney may properly decline to commence a criminal case, however, when no substantial federal interest would be served by prosecution; when the target is subject to effective prosecution in another jurisdiction; or, when an adequate noncriminal alternative to prosecution can be pursued. Id. ¶ 2 cmt., at 7.

290. Id. ¶ 6, at 14 (stating that "[i]n determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by ... political association, activities, or beliefs").

291. Miller, supra note 42, at 5.
to review prosecutive decisions. Most commonly, the courts reason that charging decisions are not amenable to judicial review because the court can never be as intimate with the facts of a case and parties as the prosecutor. In addition, one commentator has argued that judicial participation in charging decisions would jeopardize the judge's passive and neutral role in the adversary system. Finally, both case law and commentators justify judicial deference to the exercise of prosecutorial discretion on grounds of separation of powers.

2. Proponents of the Status Quo

Proponents of the status quo view the exercise of prosecutorial discretion as deeply rooted in the American political tradition. Further, they reason that prosecutors require broad discretion to carry out their law enforcement duties effectively. Some advocates value prosecutorial detachment and argue that political considerations ought not enter into the calculus of charging decisions. Others assert that, while prosecutorial discretion ought to remain broad, political pressures inevitably play a role and may even benefit the public by forcing prosecutors to be accountable.

292. Writing about prosecutorial authority, the Supreme Court in Wayte v. United States noted:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

470 U.S. 598, 607 (1985); see also Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise [of prosecutorial] discretion . . . ."); Gershman, supra note 281, at 435 ("One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion."); P.S. Kane, Comment, Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution, 67 Tul. L. Rev. 2293, 2295 (1993) ("The courts' continued deference to the prosecutor's virtually unchecked discretion to render 'individualized justice' serves only to increase the risk that abuse of such discretion will occur undetected.").

293. See Dennis, supra note 41, at 467; Beck, supra note 40, at 319.


296. Pizzi, supra note 15, at 1328.

297. See, e.g., Lance M. Africk, Prosecutorial Discretion: Striking a Balance, 36 La. B.J. 17, *4 (1988) ("The . . . political association . . . of an offender [is an] example[ ] of [an] impermissible consideration[ .]"); Miller, supra note 42, at 297 (stating that "the prosecutor is selected to exercise his personal judgment unimpaired by personal interest or bias").

298. See, e.g., Pizzi, supra note 15, at 1344 (stating that "the indirect political controls that exist over American prosecutors are . . . not meaningless").
a. **External Controls**

As a general rule, advocates for broad prosecutorial discretion maintain that legislative and judicial oversight of the prosecutor's decisions should be restricted for a number of reasons. First, as described previously, some commentators fear that judicial and legislative second-guessing will chill the prosecutorial decision-making process. Champions of broad discretion assert that political accountability and the public's opportunity to express its choices at the ballot box serve as a sufficient external check on excessive prosecutorial discretion—at the local level with publicly elected prosecutors and even at the national level with appointed United States attorneys. Such commentators, while acknowledging the advantages and disadvantages that political pressures present, also view political controls as a hallmark of our nation's democratic governance. Finally, this position points to the adversarial trial system itself as a check on prosecutorial abuses.

b. **Internal Controls**

Proponents of the current system argue that guidelines, which reformers tout as a panacea for prosecutorial abuses, present several disadvantages. First, making guidelines public creates law enforcement concerns. For example, if guidelines offer some leniency to offenders, prosecutors fear that the guidelines will undermine the

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299. Cothran, supra note 43, at 771 ("Courts recognize a prosecutor's broad discretion to initiate and conduct criminal prosecutions ... in part because the decision to prosecute is particularly ill-suited to judicial review.").

300. As described in part III, this argument asserts that prosecutors will be reluctant to document the rationales behind their charging decisions in any significant way, because they will fear legislative reprimands. In addition, fear of legislative second-guessing may improperly sway prosecutors' judgment. This argument further claimed that the prosecutor, the person most intimately familiar with the case, is in the best position to make the charging decision (which will entail at a minimum evaluating the evidence and learning about the potential defendant). Proponents for the status quo also point out that law enforcement necessarily involves investigations and accumulation of data that is confidential. Thus, public airing of law enforcement strategies and techniques will seriously hamper effective enforcement of the law. Finally, if the legislature investigates declination decisions, targets of investigations (whose cases prosecutors ultimately decide not to prosecute) may be unfairly maligned in the process. See supra notes 113-14 and accompanying text.

301. Gerson, supra note 12, at 4; Pizzi, supra note 15, at 1338, 1342-44.

302. Pizzi, supra note 15, at 1338. This commentator remarks that the national tradition tends to hold prosecutors politically accountable, id., particularly because the public has politicized crime, id. at 1341. Additionally, the U.S. has traditionally favored local public oversight over state bureaucratic controls of public officials. Id. at 1337.

303. Id. at 1349. Thus, as one proponent for the status quo maintains, the adversarial system requires screening of weak cases, and forces prosecutors to think in terms of winnable cases—not probable cause. Id. at 1349-50.

304. Id. at 1364-67.
deterrent value of the penal law. Second, guidelines can never be sufficiently comprehensive; inevitably, unanticipated cases will confront prosecutors and necessarily demand the exercise of discretion.

In sum, commentators who advocate broad prosecutorial discretion support limits on both internal and external checks on that power. By contrast, critics of prosecutorial autonomy, as described below, argue that prosecutorial abuses can be curbed only by strengthening constraints on prosecutors' power.

3. Proponents for Change

Critics of the current system present a wide range of arguments for reform. For example, some commentators fear that prosecutors wield far too much power, without adequate checks on abuse; that courts have allowed prosecutorial power to grow in recent years; and that sentencing guideline reforms have expanded such power even more. This view maintains that excessively broad prosecutorial discretion runs counter to traditional ideals of fair and effective criminal administration. Moreover, many observers of the criminal justice system suspect that significant numbers of prosecutors abuse their discretion and allow political considerations to influence improperly their prosecutive decisions. Advocates for reform reason that, because such pressures are inevitable, prosecutorial excesses may be checked only by strengthening internal and external controls.

305. Id.
307. Vorenberg, supra note 40, at 1521. Professor Vorenberg defines prosecutorial discretion as "the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action, including judicial review, generally imposed on other public officials making decisions of comparable import." Id. at 1523-24; see also Gershman, supra note 281, at 431-48 (maintaining that judicial constraints over prosecutorial excesses have been rolled back significantly and that the judiciary has failed to provide meaningful guidelines with respect to prosecutorial decision making).
308. Vorenberg, supra note 40, at 1523 ("If accumulation of power is success, prosecutors have done well in recent years."); Gershman, supra note 281, at 393 ("[P]rosecutors wield vastly more power than ever before.").
309. Gershman, supra note 281, at 418-23 (arguing that narrowing the range of possible sentences that judges may impose has given prosecutors greater power through their charging discretion); Vorenberg, supra note 40, at 1525 (same).
310. Vorenberg, supra note 40, at 1545. Professor Vorenberg asserts that "[t]he existence and exercise of prosecutorial discretion are inconsistent with the most fundamental principles of our system of justice and our basic notions of fair play and efficient criminal administration." Id. at 1554.
311. Kane, supra note 292, at 2295-300 (citing empirical studies on selective prosecution and proposing reforms); Vorenberg, supra note 40, at 1555 ("Prosecutors can and do accord different treatment... on grounds that are... [neither] rational, consistent, [n]or discoverable... ").
312. Vorenberg, supra note 40, at 1558.
a. **External Controls**

Critics of the status quo espouse strengthened external controls, including judicial, legislative, and political checks on prosecutorial abuses. This group acknowledges that the judiciary will be unwilling to second-guess prosecutorial charging decisions, unless such decisions constitute constitutional violations and reveal selective and discriminatory conduct.

Legislative oversight might be more effective in constraining prosecutorial abuses. This view asserts that the legislature has an affirmative obligation to ensure that the laws it enacts are enforced, and that such a goal can be achieved both by enacting more detailed legislation that curbs prosecutorial discretion and by requesting more frequent information sharing regarding law enforcement strategies and the development of prosecutorial criteria. Advocates of such reforms further argue that vigorous oversight can accommodate concerns for confidentiality of sensitive information regarding targets and pending cases and the need to keep law enforcement strategies secret. Finally, even among proponents for change, one commentator recommended that the exercise of prosecutorial discretion be as depoliticized as possible, and, specifically, that Congress even depoliticize the appointment process for positions within the DOJ.

b. **Internal Controls**

Regarding internal controls, critics most frequently advocate the development of detailed guidelines and policy statements to define charging criteria with greater precision. As previously mentioned,

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317. *Id.*
319. *Id.*
320. *Id.* at 314-16 (discussing internal controls). Arguably, policies, guidelines, and directives comprise various forms of internal control. According to Beck, policies set out the broadest statements of an agency's position toward various subjects, *id.* at 314, guidelines consist of more specific texts than policies and usually enumerate specific prosecutorial criteria, *id.* at 315, and directives are even more specific and usually mandatory, *id.* at 316-17. While policies and guidelines have been developed to govern prosecutorial discretion, directives usually address procedural issues of criminal prosecution. *Id.* at 317.
321. Abrams, *supra* note 279, at 57; see Vorenberg, *supra* note 40, at 1562-63; see also Lazarus, *Problem with Environmental Crime*, *supra* note 1, at 888 (recommending that "[w]orking together, the Department [of Justice] and the EPA need to establish guidelines" regarding, among other matters, criminal sanctions). The 1971 ABA Standards for Criminal Justice recommended that prosecutors' offices develop general policy statements to guide prosecutorial decision making. Maleng, *supra* note
commentators have debated extensively the advantages and limits to guidelines. Guidelines enable the legislature to evaluate prosecutorial discretion,\textsuperscript{322} likewise, written policy statements offer a means to increase the accountability of prosecutors.\textsuperscript{323} In addition, some experts believe that guidelines result in more consistent charging as well as declination decisions, and facilitate prioritizing of criminal cases.\textsuperscript{324} Finally, one commentator has suggested that establishing formal oversight procedures over charging and dispositional decisions (in particular by documenting the factual bases for the prosecutive decisions) may more effectively rein in prosecutorial indiscretions.\textsuperscript{325}

This subpart has outlined, in broad strokes, major issues present in the debate over prosecutorial discretion. As described, prosecutorial autonomy raises questions about the nature and extent of internal and external checks needed to prevent prosecutorial misconduct. The subpart below examines a related concern—the degree to which the federal government should centralize prosecutorial decision making in the environmental criminal enforcement program in Main Justice.

B. Congressional and Executive Preferences Regarding the Centralization of Prosecutorial Authority over Federal Environmental Crimes

This subpart examines the allocation of decision-making authority between Main Justice and the USAOs in the enforcement of federal environmental laws. This determination presents an especially difficult policy judgment.\textsuperscript{326} The first section briefly considers models that centralize prosecutorial authority, and the second contemplates decentralized systems of prosecutorial decision making. The third section describes the interbranch controversy over this issue during the ECS dispute. Finally, this part concludes by proposing that the DOJ shift prosecutorial authority to USAOs gradually as they gain expertise and experience in enforcing environmental laws.

1. Centralized Models

At one extreme, complete centralization minimizes the risk of prosecutorial abuse by transferring the authority for charging decisions to one locus.\textsuperscript{327} A less extreme model requires prior approval
before prosecutors institute charges.\textsuperscript{328} For example, the State of New Jersey has created a centralized model for the enforcement of its environmental protection laws.\textsuperscript{329} New Jersey's "central command" model has concentrated the responsibility for enforcing environmental laws in a State Environmental Prosecutor.\textsuperscript{330} The purported policy rationales for doing so include maximizing the effectiveness of resources devoted to enforcement efforts, and coordinating and integrating enforcement in such a way as to further a comprehensive statewide agenda.\textsuperscript{331} This centralized model is also characterized by virtually "unfettered" discretion to coordinate all aspects of the enforcement of New Jersey's environmental protection model.\textsuperscript{332} Finally, centralized prosecutorial decision making also requires "institutionalized lines of communication and protocols of operation."\textsuperscript{333} Proponents of this model argue that centralizing prosecutorial functions has replaced uncoordinated, unsuccessful efforts with "[r]easoned, diligent, and effective prosecution."\textsuperscript{334}

A centralized model of prosecutorial discretion, however, presents a number of drawbacks. The ultimate decision maker will probably not have as intimate an understanding of the facts of the case, the available evidence, or the character of the targeted parties as a person locally investigating and developing the criminal case.\textsuperscript{335} In addition, centralization—and the inevitable supervision from afar—may dampen morale at the local level by undermining the line attorneys' sense of responsibility and investment in their work.\textsuperscript{336} Moreover, although centralization may foster greater consistency and internal accountability, discretion is not really eliminated. Rather, discretion is simply "pushed upward, vesting [higher officials] with the power to make unreviewable decisions about [how the law is enforced]."\textsuperscript{337}

2. Decentralized Models

The decentralized model also offers both advantages and disadvantages. Undoubtedly, on the local level, prosecutors face political pres-

\textsuperscript{328} Abrams, supra note 279, at 54-55.
\textsuperscript{330} Id.
\textsuperscript{331} Id. at *1, *12.
\textsuperscript{332} Madonna, supra note 329, at *2.
\textsuperscript{333} Id. at *13.
\textsuperscript{334} Id. at *12-13.
\textsuperscript{335} Abrams, supra note 279, at 56.
\textsuperscript{336} Id. at 56.
\textsuperscript{337} Vorenberg, supra note 40, at 1545.
sures when exercising their charging discretion. One commentator has argued that it is not necessarily disadvantageous for prosecutors (for example as with publicly elected officials) to be susceptible to local political pressures because they are forced to be more responsive to community attitudes.

The greatest disadvantage to a decentralized model for the federal environmental protection program stems from the complexity of environmental law. Because environmental law continually evolves, centralized approval procedures foster more uniform federal enforcement of federal environmental laws. The DOJ has also adopted centralized models for prosecutorial decision making in two other particularly complex areas of the law: enforcement of federal tax and antitrust laws. Given these competing advantages and drawbacks, the next question concerns the degree to which prosecutorial authority in the environmental arena should be centralized.

3. Congressional and Executive Perspectives on Centralization of Prosecutorial Authority in the Enforcement of Environmental Laws During the ECS Controversy

During the ECS dispute, Representative Dingell strongly recommended decentralizing prosecutorial authority and shifting decision-making power away from Main Justice to the local USAOs. Witnesses invited to testify before the subcommittee expressed similar views. The prosecutors offered a number of rationales for the proposed policy change.

338. Mark S. Pollack, Local Prosecution of Environmental Crime, 22 Envtl. L. 1405, 1406 (1992). Local prosecution of environmental crimes presents unique issues. For example, the prosecutor may personally know both the victim and the perpetrator. In addition, potential defendants frequently employ citizens in the community. Most importantly, however, the prosecutor, as a publicly elected official, is especially susceptible to local political pressures. Id.

339. Miller, supra note 42, at 10, 342. Local political pressures, thus, may more likely compel local and state prosecutors (rather than federal prosecutors) to be accountable to the public.

340. See discussion supra part I.B.2.


342. Id. at 9-10.


344. Hearing 1993, supra note 4, at 3-4 (statement of Rep. Dingell); see also id. at 117 (testimony of Richard T. Nixon, Director of the National Crime Prosecution Center, that “[m]uch of the authority currently within the [Environment Division] must be distributed among the U.S. Attorneys”). See supra note 159 and accompanying text.

345. Id. at 100-21, 134-67 (testimony of Mr. Nixon and former U.S. Attorneys Breckinridge L. Willcox, Dennis C. Vacco, and Robert J. Wortham).
First, according to the testimony of a former prosecutor, the Bush administration's "command and control policy" had dampened morale among prosecutors enforcing environmental crimes. Second, a survey revealed that environmental prosecutors believed that legal experts were exaggerating the complexity of environmental law. Third, many local prosecutors had succeeded in gaining the expertise necessary to enforce effectively environmental laws. Fourth, the trend in other law enforcement areas had been to decentralize decision making to the field without sacrificing uniform application of the law. Finally, former United States Attorney Breckinridge L. Willcox asserted that the level of detailed review demanded by the DOJ over ECS cases had reached unprecedented heights; the DOJ's oversight of federal environmental criminal cases exceeded that of even major RICO or racketeering cases.

The Bush administration responded to its critics by arguing that all career attorneys necessarily experience some level of supervision; that the criminal enforcement program required some degree of centralized prosecutorial authority in Main Justice; and that the DOJ had traditionally vested supervisors with ultimate authority over the prosecution of environmental cases. Admittedly, observers of federal prosecutive policy will have difficulty reconciling these two diver-

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346. Id. at 103 (testimony of Mr. Nixon that "[u]nder no circumstance . . . should [ECS's] leadership role be confused with the review and control that has had the apparent effect of stifling prosecutors rather than encouraging them").

347. Id. at 114 (testimony of Mr. Nixon that "[t]here is great concern among local prosecutors, in particular, that many attorneys attempt to complicate environmental crime"); see also id. (testimony of Mr. Nixon that "district attorneys assert that [environmental law] is simply another area of criminal prosecution where basic law enforcement and prosecution techniques should be employed").

348. Hearing 1993, supra note 4, at 115 (testimony of Mr. Nixon that "[o]ne very interesting finding . . . was the self-sufficiency of local environmental crime prosecution units."); see also id. at 136 (testimony of Mr. Willcox that "[t]here exists in many U.S. attorneys' offices across the country a cadre of prosecutors experienced in the field of environmental crimes").

349. Id. at 135 (testimony of Mr. Willcox, former U.S. Attorney for the District of Maryland).

350. Id. at 137 (stating that "no other broad area of Federal criminal enforcement (except tax and antitrust . . . ) is subjected to the kind of homogenization [that ECS is]"). Mr. Willcox distinguished enforcement of tax laws from environmental laws, and intended to distinguish antitrust laws from environmental but did not do so at the hearing. Mr. Willcox argued that, since the federal government applies the tax laws to each and every taxpayer, a greater imperative exists for uniform application of federal tax policy than for environmental law. Id. at 138.

351. Id. at 138.

352. Text of Interview with Clegg and Cartusciello, supra note 61, at *4 (noting that tension always exists between line attorneys and their supervisors and that the DOJ vests final decision in supervisors).

353. Id. at *5 (statement by Mr. Clegg that "[e]nvironmental criminal prosecutions are relatively new," present "novel" issues, and require care so that "precedent and case law" develop carefully).

354. Id. at *4 (suggesting that the necessity for supervisory review of prosecutions has support in the USAM and the Principles of Federal Prosecution).
gent views. A number of prosecutorial models may be considered; a
dynamic model, however, which borrows from both views and is de-
scribed below, may provide a compromise solution.

In sum, centralized and decentralized models of prosecutorial dis-
cretion each offer both benefits and drawbacks. This part examined
the inherent trade-offs in the two systems, such as between autonomy
and accountability. For example, centralizing authority builds in
greater supervisory mechanisms, but does so at the expense of
USAOs' ability to take charge of and become invested in their
caseload. Moreover, centralizing prosecutive discretion also ensures
more uniformity in the application of environmental laws—and hence
greater equity for potential defendants—but disfavors developing the
expertise of local offices and tapping into regional resources and
know-how. The next part develops an analytic framework for evaluat-
ing models of prosecutorial discretion and examines four alternative
possibilities.

V. A Dynamic Model of Prosecutorial Authority over
Environmental Crimes

This Note concludes by recommending that the DOJ should adopt a
dynamic model of prosecutorial authority over environmental crimes.
This model accommodates legitimately motivated congressional con-
cerns and incrementally shifts prosecutive power from Main Justice to
USAOs as those offices gain the necessary expertise and experience to
enforce federal environmental laws. This part reaches this conclusion
by undertaking an analysis of the ECS dispute and (1) rearticulating
the critical problems underlying the controversy; (2) recommending
an objective that legislative and executive officials should seek to ob-
tain regarding inter- and intrabranch tensions over enforcement of en-
vironmental laws; (3) suggesting criteria to guide the analysis; (4)
evaluating the available alternatives and their trade-offs against these
criteria; and, finally, (5) offering recommendations for future
improvements.355

A. The Rearticulated Problem Underlying the ECS Controversy

At bottom, the threat of undue partisanship356 over both congres-
sional oversight as well as prosecutorial decision making underlies the
ECS controversy. Arguably, the risk that partisan considerations dic-
tate congressional oversight of the DOJ presents a formidable inter-
ference with interbranch functioning and, in particular, with the

355. The framework for this analysis has been adapted from a model of public pol-
icy analysis developed under the auspices of the Rand Corporation. See E.S. Quade,
as consisting of objectives, alternatives, impacts, criteria, and models).

356. The term "partisanship" here is intended in its narrow sense. See supra note
226.
proper operation of law enforcement.\textsuperscript{357} Similarly, the threat of party-influenced prosecutorial declination decisions—however remote—raises a serious intrabranch concern of constitutional dimensions. This danger of improper partisan interference in governance, in both instances, places party interests ahead of the public interest and constitutes illegitimate decision making. Such partisanship, however, must be distinguished from legitimate political debate, which seeks expression of the public will through elected officials in the executive and legislative branches and results in government accountability. Elected and appointed officials should thus seek, as their overriding objective, to conduct congressional oversight of the ECS and to exercise prosecutorial authority over environmental criminal cases in a manner that maximizes their accountability to the public and constrains partisan arbitrariness "in the processes of governance."\textsuperscript{358}

B. \textit{Suggested Criteria for Evaluating Models for Congressional Oversight of and Executive Branch Exercise of Prosecutorial Decision Making}

A number of considerations emerge as paramount in evaluating recommendations for improvements to congressional oversight of and executive branch exercise of prosecutorial decision making. The criteria\textsuperscript{359} include:

(1) the efficient utilization of executive branch law enforcement resources, or minimizing cost;
(2) the efficient utilization of scarce legislative branch oversight resources, or minimizing cost;
(3) the effective administration of the federal environmental criminal enforcement program, or maximizing the executive branch's capability to carry out its congressional mandate;
(4) maximizing government accountability and effective (and legitimate) congressional oversight over the ECS, or minimizing the threat of undue partisanship in congressional investigations into the federal criminal environmental arena;
(5) workability and robustness, or political and operational feasibility; and

\textsuperscript{357} See Shane, \textit{Executive Privilege Claims Against Congress}, supra note 82, at 462 ("The more Congress's access to information about the executive branch seems subject to vagaries of politics, rather than to processes of law, the greater the apparent gap between our ideals of government accountability and the reality of government practice."); see also \textit{id.} at 496 (stating that "Congress . . . likewise invites political risk and obligates itself to discipline those members who compromise information that should be withheld").

\textsuperscript{358} See \textit{id.} at 484 (describing the "'government of laws' ideal" as emphasizing accountability and minimizing individual caprice).

\textsuperscript{359} See Quade, \textit{supra} 355, at 47 (defining a criterion as a "standard by which to rank the [available] alternatives in the extent to which they achieve one or more objectives" and a means by which to "relate objectives, alternatives, and impacts").
(6) ensuring the equitable administration of environmental law enforcement, treating similarly situated individuals the same under the law, or minimizing the possibility of improper exercise of prosecutorial discretion.

These six criteria can thus be summarized as focusing on cost and efficiency, effectiveness, feasibility, accountability, and equity.

C. Alternative Models Available for Interbranch and Intrabranch Oversight of ECS Prosecutorial Decision Making

Broadly speaking, commentators may consider four alternative models of interbranch and intrabranch oversight of ECS prosecutorial decision making. The first model would centralize prosecutive authority in Main Justice and would greatly restrict congressional probes into ECS prosecutorial decisions (e.g., prohibit investigation into pending criminal cases and interviews by subcommittee staff of frontline government attorneys). The second model would also centralize prosecutive authority in Main Justice, but would allow extensive congressional oversight of ECS, including investigation of pending cases and interviewing of line attorneys (justified by evidence demonstrating prosecutorial misconduct). The third model would decentralize prosecutive authority and shift decision-making power to the USAOs; additionally, this model would allow liberal congressional oversight of the ECS's enforcement of the criminal environmental laws. Finally, the fourth model would also decentralize prosecutorial decision making, but would limit Congress's power to investigate the ECS's charging and declination decisions.

These four models, however, contemplate federal governance in a highly abstract and artificial manner: for example, the models entertain broad categories such as "centralization of prosecutorial authority" and "liberal congressional oversight." These simplified and stark characterizations fail to capture the subtleties and complexities inherent in federal governance, especially in environmental policy and prosecutorial practice. In truth, future analyses of disputes such as the ECS's should undertake a more sophisticated approach and aim to locate the center of gravity between the two antipodes—centralization versus decentralization and liberal versus constrained congressional oversight—rather than choosing between the two.

360. Centralization of prosecutive authority in Main Justice would probably entail not only placing supervisory authority over all charging decisions involving environmental criminal cases with the ECS, but also creating case oversight procedures whereby the ECS would monitor cases closely—from initiation to investigation and throughout litigation.
D. Evaluation of the Four Models of Prosecutorial Discretion

The following subpart evaluates the four models against the six criteria set out above. The analyses focus, in particular, on the trade-offs and tensions inherent in each of the four alternatives considered.

1. Analysis of the First Model

The first model, which contemplates centralized prosecutive authority and constrained congressional oversight of the ECS, would likely conserve legislative branch resources. Whether this model would be efficient regarding executive branch resources, however, presents a more difficult question. One commentator has suggested that centralizing prosecutive authority (at least at the state level) streamlines decision making and thus saves funding. Centralizing discretion may present serious morale problems with USAOs, however, which are accustomed to exercising broad discretion and enjoying substantial autonomy from Main Justice. Thus, additional data must be collected in order to determine the efficiency outcome of centralizing prosecution power within the executive branch.

Similarly, additional information must be collected to determine whether this first model would advance the federal government’s environmental criminal enforcement program. While some USAOs presumably lack the expertise to prosecute federal environmental crimes in their states effectively, others have acquired experience in this area. The DOJ, through its Revised Bluesheet, appears to be aiming for a flexible system that allows for the ECS to take the lead when a USAO needs assistance and, conversely, to step back and provide ancillary support when a USAO can undertake the case.

The effectiveness of a centralized prosecutorial model also depends on the degree to which environmental law constitutes a specialized law enforcement area, such as antitrust and tax, which warrants greater Main Justice supervision and control. Notably, observers and federal prosecutors disagree over whether the enforcement of environmental laws presents unique prosecutorial concerns, such as unsettled legal doctrines, highly technical statutes, constantly evolving...

361. See Shimberg, supra note 57, at 218-21 (describing the expansion of congressional oversight); see, e.g., id. at 221 n.88 (characterizing Congress’s increasing use of police patrol oversight as “resource-intensive”).
362. See supra note 331 and accompanying text.
363. See supra notes 335-37 and accompanying text.
364. See Corcoran, Internal Review, supra note 6, at 63-64 n.76 (noting for example that, initially, prosecutors at USAOs—and not at the ECS—litigated criminal environmental cases).
365. See Revised Bluesheet, supra note 201, at 3 (revised USAM § 5-11.104).
366. See Corcoran, Internal Review, supra note 6, at 75 n.98 (stating that the “specialized litigation Divisions—Antitrust, Tax, and Civil Rights—exercise considerable review authority over criminal matters within their jurisdiction”).
law, or an especially acute need for uniform application of the law.\textsuperscript{367} If environmental law does not constitute a "sensitive area," but instead shares similarities with traditional criminal laws, then a centralized prosecutorial model would reduce the effectiveness of the DOJ's criminal environmental enforcement program. On the other hand, centralized prosecutorial decision making—so long as it is exercised in a principled manner—offers defendants and targets the greatest assurance that environmental laws will be enforced uniformly.

A comprehensive analysis must also consider whether centralizing prosecutorial discretion increases the risk of illegitimate partisan influence on charging decisions. During the ECS dispute, Representative Dingell asserted that centralizing prosecution at Main Justice increased opportunities for undue partisan compromise at the DOJ.\textsuperscript{368} Yet, if the risk of partisanship in prosecutorial decision making exists in Washington, political appointees in local USAOs will be equally likely to be susceptible to partisan pressures.\textsuperscript{369} Thus, at first glance, the problem of politicization of charging decisions does not appear to be simply fixed by decentralizing prosecutorial authority. In sum, centralized prosecutorial decision making—if federal environmental law in fact presents sensitive prosecutorial issues—may or may not reduce executive branch costs, would probably augment efficiency by vesting control of the program in Main Justice, and would ensure a more equitable administration of environmental criminal law by increasing the probability that the DOJ will prosecute similarly situated defendants uniformly.

Most likely, restrained congressional oversight over the DOJ will minimize the threat of illegitimate subcommittee investigations into the ECS. Moreover, such tempered congressional conduct will suit constituents who support the executive branch's environmental policies, but alienate those constituents who desire that Congress act as a watchdog over the DOJ and the EPA. Thus, if the DOJ's or the EPA's credibility has been tarnished by scandal, restraint may be perceived as an abdication of Congress's constitutional oversight function. In short, restricted congressional oversight will likely preserve legislative resources, prevent disruptive intrusion into the smooth

\textsuperscript{367} Compare Corcoran, \textit{Internal Review}, supra note 6, at 46-47 (casting federal environmental statutes as special and describing them as "pos[ing] enormous interpretive difficulties" and "pos[ing] special enforcement problems with respect to uniform application of the law") with \textit{Hearing 1993}, supra note 4, at 114 (witness suggesting that attorneys unnecessarily exaggerate the complexity of environmental law and that prosecutors believe enforcement of environmental laws can occur as with any other area of criminal prosecution).

\textsuperscript{368} \textit{Hearing 1993}, supra note 4, at 208 (Rep. Dingell referring to the problem of the "perception that centralizing decision-making on environmental cases in Washington, D.C., opens the door to special preference, influence peddling, and invites the use of pressures and special privilege... on behalf of the rich and powerful").

\textsuperscript{369} \textit{Id.} at 208 (testimony by former Assoc. Att'y Gen. Hubbell that "political pressure is [not] limited to Washington, D.C.").
working of law enforcement, and protect targets from unfair public scrutiny. On the other hand, reining in congressional subcommittees may leave the executive branch open to unchecked prosecutorial abuses. In conclusion, this first model offers potential benefits in efficiency and the uniform application of the law, but may present a drawback in unnecessarily restraining Congress—resulting in Congress's shirking its constitutional duties to oversee the Executive and reducing its accountability to constituents.

2. Analysis of the Second Model

The second model would also centralize prosecutive authority in Main Justice, but would allow extensive congressional oversight of ECS. Thus, the analysis conducted above regarding centralization would also apply to this scenario. Expansive congressional investigation into the ECS, however, could result in stifling law enforcement efforts and expenditures of tremendous resources. Moreover, if subcommittee oversight becomes adversarial and antagonistic, such activities could virtually paralyze an executive branch unit, as it did in the ECS's case. Thus, unrestrained congressional investigation of prosecutorial discretion could waste limited government efforts both in the legislative and in the executive branches, and hamper environmental protection effectiveness. In sum, adoption of liberal congressional oversight of the DOJ would likely create high costs and reduce the effectiveness of executive branch efforts.

Regarding government accountability, liberal congressional oversight—so long as it is principled (for better or worse)—makes the executive and legislative branches more responsive to the electorate. As the ECS dispute demonstrated, however, party-motivated considerations pose a great threat in subcommittee investigations. The more expansive the scope of congressional oversight activities, the greater the risk that an undisciplined representative could further party interests at the expense of law enforcement goals. Moreover, as discussed previously, congressional scrutiny into the DOJ poses serious obstacles to the fair and effective administration of law enforcement. This second model, however, presents a benefit of greater government accountability (if representatives conduct principled investigations).

In sum, although the cost effectiveness of centralizing prosecutorial authority remains uncertain, liberalizing congressional oversight will probably escalate the costs of subcommittee investigations. In addi-

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370. See supra notes 361-69 and accompanying text.
371. See supra notes 113-14 and accompanying text.
372. On the other hand, if congressional subcommittees selectively investigate prosecutorial decisions—supported by ample evidence warranting the inquiry—then their probe could both uncover prosecutorial misfeasance within the DOJ as well as act as a deterrence to such impropriety.
373. See supra notes 113-14 and accompanying text.
tion, expanded congressional probes into the DOJ, while augmenting accountability, may not only jeopardize individual targets' civil liberties, but may also undermine law enforcement efforts. Thus, this second model offers a trade-off between efficiency, equity, and effectiveness on the one hand and greater government accountability on the other.

3. Analysis of the Third Model

The third model would decentralize prosecutive authority and shift decision-making power to the USAOs, while also permitting extensive congressional oversight of the ECS's prosecutive discretion. The advantages and disadvantages of liberal congressional investigation into DOJ, which applied to the second model, also apply to this third model. Thus, the third model would likely increase legislative costs, disturb law enforcement efforts, and create a greater risk that defendants do not receive uniform treatment. These disadvantages, however, must be balanced against increased government accountability and the potential efficiency gains brought about by decentralizing decision making, by investing USAOs with the authority to carry out cases, and perhaps by reducing bureaucratic oversight.

4. Analysis of Fourth Model

Finally, the fourth model would decentralize prosecutorial decision making, but would limit Congress's power to investigate the ECS's charging and declination decisions. Such an approach would favor USAOs' control over and investment in criminal environmental enforcement above Main Justice's close supervision in the environmental criminal enforcement arena. As noted previously, determining the cost effectiveness of decentralization cannot be ascertained without gathering additional data and determining whether environmental law constitutes, in fact, a specialized area of the law similar to antitrust and tax. Given the foregoing analysis, this fourth model would likely generate uncertain costs, reduce government accountability, and hinder the uniform application of the law.

5. Recommended Dynamic Model

As environmental law continues to evolve and local USAOs gain expertise, policymakers will calibrate appropriate levels of centralized prosecutive discretion with great difficulty. Moreover, policymakers unlikely will predict accurately the effect of expanded or restrained congressional oversight on centralized versus decentralized systems of prosecutive authority. Nonetheless, legislative and executive officials must engage in these sophisticated analyses.

To that end, the recommended dynamic model requires that government officials consider such varied factors as the region in which
the local USAOs reside and the particular federal statute being en-forced. Policymakers—in Congress and at Main Justice—must moni-
tor continuously the degree to which USAOs (and their state and local
counterparts) gain competency in environmental enforcement. In ad-
dition, policymakers should consider ways in which the integrity of
charging decisions can be best protected: correspondingly, DOJ and
congressional officials must identify the weak spots that make prose-
cutors and representatives most susceptible to undue partisan
pressures.

As the analyses above demonstrates, a tripartite system of govern-
ment contains built-in tensions such as between autonomy and ac-
countability. Moreover, efficiency can only be gained at the expense
of effectiveness; and, the uniform application of laws can only be at-
tained by centralizing prosecutive authority and limiting congressional
oversight. As both branches seek to minimize the threat of partisan-
ship in both congressional monitoring of DOJ and DOJ's exercise of
prosecutorial decision making, they must continually attempt to strike
a balance between competing goals and accommodate the built-in ten-
sions. This Note recommends a dynamic approach to the congres-
sional oversight as well as executive branch exercise of prosecutorial
discretion over federal environmental crimes. This approach envi-
sions gradual increases in prosecutive authority by USAOs as they de-
velop greater expertise and allows principled legislative oversight of
law enforcement when warranted.

**Conclusion**

As this Note describes, understanding the maelstrom surrounding
the exercise of prosecutorial discretion at the ECS requires an exami-
nation of the historical and legal contexts of the dispute. Environ-
mental law is a new field with developing doctrines; environmental
criminal law is an even newer field with unsettled prosecutorial crite-
dia. Given the long-standing historical antagonism between Congress
and the Executive, as well as partisan divisions over the EPA's envi-
ronmental protection program, this rancor has inevitably spilled over
to the DOJ as Congress has criminalized the federal environmental
laws.

The institutional, political, and legal forces that create this dynamic
overwhelmed past ECS officials. Nonetheless, the DOJ can take steps
to ameliorate the situation. Clearly, Attorney General Reno's deci-
sion to decentralize case procedures has appeased many critics. A
great many practitioners, however, still worry about the degree to
which and the manner in which Congress can properly oversee the
enforcement of the federal environmental protection program. More-
over, Attorney General Reno still needs to implement managerial re-
forms and take steps to improve coordination between the EPA and
USAOs.
The DOJ should develop policy statements that elaborate on prosecutorial criteria regarding the enforcement of environmental crimes. Although guidelines can be revised to be more detailed and can be further developed with input from USAOs and the regulated community, they cannot be considered the beginning and end of controls on prosecutorial improprieties. Similarly, legislative oversight over the DOJ has a necessary place so long as it is not so intrusive that it compromises law enforcement strategies unnecessarily or unfairly maligns prospective defendants.

The principled and ethical exercise of prosecutorial discretion is of paramount importance to the healthy governance of our democracy. Even in the complex and evolving arena of environmental criminal enforcement, external controls from the legislature can supplement vigorous internal checks to ensure that the executive branch enforces both the spirit and the letter of the environmental law. Such accommodation can most likely be attained through a dynamic model that grants gradual prosecutive authority to USAOs as they gain expertise and allows disciplined congressional oversight of law enforcement when warranted.