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## United States v. United States: When Can the Federal Government Sue Itself?

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# UNITED STATES v. UNITED STATES: WHEN CAN THE FEDERAL GOVERNMENT SUE ITSELF?

MICHAEL HERZ\*

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## I. INTRODUCTION

The concept of the "divided self" is a staple of college literature courses, psychiatry, and daily conversation. But it is not a concept that the judiciary readily acknowledges. However divided you may be, you may not, in general, sue yourself.<sup>1</sup> Ambivalence does not create a justiciable controversy, even if you are your own worst enemy.

That a lawsuit, by definition, requires at least two parties has always been clear to common law courts. Federal courts have

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1. See, e.g., *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892). In *Amador Medean*, the majority control of the plaintiff and defendant corporations had come into the hands of the same group of people by the time the case reached the Supreme Court. The Court therefore refused to consider the merits, but reversed and remanded for further proceedings to protect the interests of the minority stockholders. *Id.* at 301-02.

found the same principle in the Constitution's case-or-controversy requirement.<sup>2</sup> The talismanic "a person cannot sue herself" collapses, however, when the "person" is the United States government. In practice, different parts of the government often end up on opposing sides of the same lawsuit. Although a caption as frank as *United States v. United States*<sup>3</sup> is uncommon, courts have rarely hesitated to hear intragovernmental disputes. The United States has sued the Interstate Commerce Commission (ICC) for approving railroad rates charged to the federal government<sup>4</sup> and the Federal Communications Commission (FCC) for setting long distance telephone rates that were too high.<sup>5</sup> The Department of Justice (DOJ) has challenged mergers and rate agreements that other federal agencies explicitly approved and defended in court.<sup>6</sup> The Federal Labor Relations Authority (FLRA) is in constant litigation with other agencies over labor practices.<sup>7</sup> The Secretary of the Interior has sued the Federal Power Commission (FPC) for licensing a dam,<sup>8</sup> and the Secretary of Commerce has gone after the Federal Energy Regulatory Commission (FERC) for not preparing an environmental impact statement.<sup>9</sup> The Secretary of

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2. U.S. CONST. art. III, § 2, cl. 1.

3. 417 F. Supp. 851 (D.D.C. 1976) (three-judge district court), *aff'd sub nom.* National Classification Comm. v. United States, 430 U.S. 961 (1977) (Department of Defense (DOD) challenge to Interstate Commerce Commission order increasing the cost of transporting automobiles by truck).

4. *United States v. ICC*, 337 U.S. 426 (1949); *see also* *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1159 (D.C. Cir. 1983) (DOD's petition for review of the ICC's refusal to award reparations for alleged overcharges by "market dominant" railroads).

5. *See* *United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983).

6. *E.g.*, *United States v. Marine Bancorp., Inc.*, 418 U.S. 602 (1974) (challenge to bank merger approved by Comptroller of the Currency); *United States v. ICC*, 396 U.S. 491 (1970) (challenge to ICC approval of railroad mergers); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) (challenge to Federal Maritime Commission approval of rate-fixing agreement among ocean carriers); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (challenge to FCC order allowing Comsat/IBM joint venture to construct communications satellites; FTC filed an amicus brief); *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315 (D.C. Cir. 1975) (challenge to Civil Aeronautics Board (CAB) approval of airlines' capacity reduction agreements).

7. *E.g.*, *Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043 (1990); *Department of the Treasury v. FLRA*, 110 S. Ct. 1623 (1990); *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988) (*per curiam*); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983); *United States Dept't of the Interior v. FLRA*, 887 F.2d 172 (9th Cir. 1989); *Department of the Navy v. FLRA*, 815 F.2d 797 (1st Cir. 1987).

8. *See* *Udall v. FPC*, 387 U.S. 428 (1967); *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953); *see also* *Escondido Mut. Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. 1983) (dispute among the Secretary of the Interior, FERC, and several bands of Mission Indians over the licensing of hydroelectric facilities on Indian land), *aff'd in part and rev'd in part sub nom.* *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

9. *See* *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

Agriculture has sued both the Administrator of the Environmental Protection Agency (EPA) for suspending the registration of pesticides for certain uses<sup>10</sup> and the ICC for approving special rates for the unloading of fruits and vegetables.<sup>11</sup> In fact, the Supreme Court has *never* dismissed an action as nonjusticiable because it could be characterized as *United States v. United States*.<sup>12</sup> Almost as consistently, the lower courts have upheld their power to decide disputes between parts of the government.<sup>13</sup>

Given the judiciary's receptiveness to intragovernmental lawsuits, the more important bar to such litigation has come from DOJ. Because DOJ controls most agency litigation,<sup>14</sup> it is able to keep numerous potential interagency suits from reaching the

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10. See *Environmental Defense Fund v. EPA*, 548 F.2d 998 (D.C. Cir.), *cert. denied*, 431 U.S. 925 (1977); *Environmental Defense Fund v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975).

11. See *Secretary of Agric. v. United States*, 347 U.S. 645 (1954); see also *Secretary of Agric. v. ICC*, 551 F.2d 1329 (D.C. Cir. 1977) (challenge to the ICC's decision not to grant general refund upon cancellation of tariff under which railroads charged shippers for in-transit grain inspections).

12. The one possible exception of which I am aware is *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). This decision is best known as the Court's earliest statement that judicial decisions must be final and unreviewable. It is also notable because five of the six Justices (while riding Circuit, not together as the Supreme Court) had refused to implement what they deemed an unconstitutional statute, in a sense exercising the power of judicial review usually dated to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), more than a decade later. But the case also involved a question about proper parties.

The original parties in the Supreme Court were Attorney General Randolph and the Circuit Court for the District of Pennsylvania. Randolph sought a writ of mandamus directing the Court to proceed on applications filed with it for veterans' benefits. Without a statement of reasons, and apparently evenly divided, the circuit court refused to allow the Attorney General to proceed *ex officio*. Randolph then painlessly produced a client, Hayburn, and the Supreme Court allowed him to proceed on the merits. Before it became Hayburn's case, *Hayburn's Case* was thus the government litigating with itself. The Court's insistence that the Attorney General represent a private client is more readily understood as a decision about standing than one about the justiciability of intragovernmental litigation.

13. The two cases usually cited as holding that the government cannot sue itself are *Defense Supplies Corp. v. United States Lines*, 148 F.2d 311 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945), and *United States v. An Easement and Right of Way*, 204 F. Supp. 837 (E.D. Tenn. 1962). I am aware of only three other decisions dismissing an intragovernmental action as nonjusticiable. See *Employees Welfare Comm. v. Daws*, 599 F.2d 1375 (5th Cir. 1979); *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774 (2d Cir.), *cert. denied*, 257 U.S. 643 (1921); *Juliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990). In at least two cases, district courts hesitated about, but managed to avoid, having the government on both sides. See *Quaker State Corp. v. United States Coast Guard*, 681 F. Supp. 280, 286 (W.D. Pa. 1988) (apparently assuming that the Coast Guard could not sue the Forest Service); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1079-81 (D. Colo. 1985) (refusing to join the Army as a defendant in an action brought by the United States for costs of cleanup of hazardous waste for which the Army was allegedly partially responsible).

14. See 28 U.S.C. §§ 516, 518, 519 (1988).

courts. Especially in recent years, the limits on intragovernmental litigation have been defined less by the judiciary's closing the courtroom door than by DOJ's refusal to knock on it. Although courts have heard all of the intragovernmental suits presented to them, then, the potential class of such suits is far larger than the number of cases actually litigated.

Two powerful arguments counsel against intragovernmental litigation. First, the United States is a single entity, yet article III's case-or-controversy requirement forbids one person from being both plaintiff and defendant.<sup>15</sup> Second, judicial resolution of disputes between *agencies* may trench on the President's authority, if not obligation, to resolve such disputes as Chief Executive.<sup>16</sup> This separation of powers concern is underlined by the Framers' adoption of a unitary executive, with a single, accountable head—a structure that seems inconsistent with allowing agencies to turn to courts to settle their disputes. These arguments are linked. First, the more unified and hierarchical the executive branch appears under article II, the less likely an article III case or controversy can exist within it. Second, lodging the executive power in the President could be “a textual commitment” of decisionmaking authority to a branch other than the judiciary.<sup>17</sup>

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15. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1318 (2d ed. 1973) [hereinafter *HART & WECHSLER*]; *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 668, 675 (1987) [hereinafter *Federal Environmental Compliance Hearing*] (memorandum from John Harmon, Ass't Att'y Gen., Office of Legal Counsel, to Michael J. Egan, Assoc. Att'y Gen. (June 23, 1978)) (allowing EPA to sue another agency would violate the established principle that “no man can create a justiciable controversy against himself”).

16. *E.g.*, Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988) [hereinafter *Memorandum*] (explaining pocket veto, because of constitutional objections, of legislation that would have authorized special counsel within the Merit Systems Protection Board to sue other federal agencies for retaliation against whistleblowers). The memorandum succinctly states the basic argument:

The litigation of intra-Executive branch disputes conflicts with the constitutional grant of the Executive power to the President, which includes the authority to supervise and resolve disputes between his subordinates. In addition, permitting the Executive branch to litigate against itself conflicts with constitutional limitations on the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests.

*Id.* at 1378.

17. This phrase is usually found in political question cases. Prominent in the standard

The shortest answer to this problem is a functional one: if an intragovernmental dispute has actually reached the courts, that very fact indicates that there is concrete adversity sufficient to satisfy article III and that the President is not in fact in control and capable of resolving the dispute, thus belying the unitary executive notion. As a statement of the practical realities of intragovernmental litigation, this is a compelling argument for justiciability. It is, however, a practical rather than a theoretical or systemic response. If parts of the government are not supposed to square off in court, then courts should not endorse and participate in the derailment of the constitutionally appropriate functioning of the government. Although the very existence of the litigation is revealing, intragovernmental suits cannot be self-justifying.

This Article attempts to define which intragovernmental disputes are justiciable, focusing particularly on litigation between agencies.<sup>18</sup> It begins by dismissing the simple answers: Part I rejects application of the no-person-can-sue-herself idea to the federal government; Part II rejects any easy reliance on the unitary executive theory. Both the executive branch and the government as a whole are too divided and replete with competing interests for either of these slogans to create a *per se* bar to intragovernmental litigation.

Indeed, once one has abandoned these not very meaningful formal constraints, intragovernmental litigation does not appear so peculiar. Part III examines the statutory background and sets out some general considerations in favor of intragovernmental litigation. Part IV then analyzes the requirements for justiciable interagency litigation. Interagency lawsuits can be divided into

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litany of political questions are those involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The issue of the justiciability of interagency litigation is the flip-side of the normal political question inquiry. Under the political question doctrine, the *issue*, the "question," is what matters; the particular parties are irrelevant. Here, the identity of the parties (the pun is intentional) is all that counts. Interagency litigation generally raises *issues* that would be clearly justiciable, the furthest things from "political questions," if only a different plaintiff had brought the suit. Some overlap may exist—that is, intragovernmental litigation over a political question, for example, *Goldwater v. Carter*, 444 U.S. 996, 1002-06 (1979) (plurality opinion)—but the two types of litigation are entirely distinct.

18. Intragovernmental litigation falls into three categories of increasing proximity of the parties: litigation between the branches, litigation between executive agencies, and litigation between parts of a single agency. I argue that the first is generally justiciable, the second is sometimes justiciable, and the third is rarely justiciable. Part II.C discusses interbranch litigation; Part VI considers intra-agency litigation.

various subcategories. One might plausibly distinguish those involving at least one independent agency from those involving only executive agencies; those with only governmental parties from those in which private parties are also present; or those in which the agencies have separate representation from those in which DOJ represents all parties. Each of these factors may be relevant to justiciability. The most useful categorization, however, depends upon the governmental roles that the litigants fill. There are critical differences among (1) disputes in which one agency, like a private party, is subject to the regulatory authority of the other; (2) disputes over turf; and (3) disputes arising out of a disagreement over regulatory policy, when both agencies are acting in their regulatory capacities.

A justiciable controversy clearly exists if one of the governmental parties appears as a regulator and the other as a member of the regulated community, as in the case of compliance litigation by one agency against another. Disputes between two regulators within the government—for example, a Department of Energy (DOE) challenge to an Occupational Health and Safety Administration (OSHA) regulation that does not apply to DOE, but which DOE considers bad policy—pose a harder question. Although the divergent interests and agendas of separate agencies suggest that these qualify as article III controversies, courts should not resolve interagency disputes that arise out of disagreements over policy. Although the term “unitary executive” is a misnomer, the Constitution does require unitary execution of the laws. The executive branch must at some point adopt a regulatory bottom line; that is its constitutionally assigned task.

This approach would preclude judicial resolution of many disputes that courts have in fact entertained. On the other hand, it would permit litigation of interagency compliance disputes that in recent years have not made it to the courts because of concerns over justiciability. The two primary examples are the proposed special counsel to litigate against agencies alleged to have retaliated unlawfully against whistleblowers<sup>19</sup> and EPA suits against federal facilities for failure to comply with pollution statutes.<sup>20</sup>

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19. See *supra* note 16; *infra* note 99.

20. See *supra* note 15; *infra* note 99. Through somewhat different reasoning, one commentator has reached the same conclusion with regard to the justiciability of EPA enforcement actions against federal facilities. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 *ECOLOGY L.Q.* 317 (1990).



## II. INTRAGOVERNMENTAL CASES AND CONTROVERSIES

A person cannot sue herself.<sup>21</sup> This principle rests on our basic assumptions about what a lawsuit is. For a judge, it is in the nature of things that a lawsuit requires two adverse parties. Some courts and commentators have concluded that intragovernmental litigation is nonjusticiable because the United States is "one person."<sup>22</sup> This contention is uselessly conclusory.

### A. *The Requirement of Adverse Parties*

Article III of the United States Constitution limits the judicial power to cases and controversies.<sup>23</sup> Courts and commentators have spilled a good deal of ink trying to define these essentially contentless terms.<sup>24</sup> To say that courts can decide only cases or controversies raises the question of what these are. The standard judicial response is tautological: cases and controversies are the things that courts decide.<sup>25</sup> Looking outside article III to determine what things courts decide leads to two possible sources. The first is tradition,<sup>26</sup> which is not much of a restraint given its uncertainty and malleability.<sup>27</sup> The common law model does little

21. *United States v. ICC*, 337 U.S. 426, 431 (1949) (referring to "the established principle that a person cannot create a justiciable controversy against himself"). The Lawyers Cooperative Publishing Company offers the following statement of the common law rule: "Without adversary parties before it, a court is without jurisdiction to render a judgment, and it therefore follows that one person cannot be both plaintiff and defendant in the same action." 59 AM. JUR. 2D *Parties* § 6 (1987).

22. *E.g.*, *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774 (2d Cir.), *cert. denied*, 257 U.S. 643 (1921); *United States v. An Easement and Right of Way*, 204 F. Supp. 837 (E.D. Tenn. 1962); *United States v. ICC*, 78 F. Supp. 580 (D.D.C. 1948), *rev'd*, 337 U.S. 426 (1949); 6 Op. Off. Legal Counsel 188 n.11 (1982); *Federal Environmental Compliance Hearing*, *supra* note 15; J. RADCLIFFE, *THE CASE-OR-CONTROVERSY PROVISION* 58 (1978).

23. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Cases . . . [and] Controversies . . .").

24. For a thorough examination of the difficulty of this task and the continuing failure of courts and commentators to meet it, see Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 230-58 (1990).

25. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 696 (1974) ("In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve.").

26. *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (endorsing the "ultimate circularity" of the case or controversy requirement, which has "virtually no meaning except by reference to . . . tradition").

27. Professor Winter thus criticizes the standing doctrine first because of its historical basis (specifically, that it defers too much to a private rights model that grows from continual reference to common law adjudication and the premise of self-interested parties) and second because it rests on incorrect history. Winter, *The Metaphor of Standing and*

more than suggest a need for adverse parties. The second source of illumination as to the nature of cases and controversies is the remainder of the Constitution. Courts can settle disputes only when doing so is consistent with their role in the overall constitutional structure.<sup>28</sup> Such limits are not actually part of the case-or-controversy requirement except in that courts have chosen to say, redundantly, that certain disputes rendered nonjusticiable by other parts of the Constitution are also not cases or controversies.<sup>29</sup> These are actually external rather than internal limits on the authority of the courts.<sup>30</sup> We should be honest about what we read into this sparse text.

We can say at least that federal courts, like common law courts, require actual adverse parties.<sup>31</sup> The clearest, though not the only,<sup>32</sup> example of a lack of adversity is a case in which one person sues herself.<sup>33</sup> Adversity would seem to require at least two people.<sup>34</sup>

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*the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988). It is undisputed that contemporary readings of the case-or-controversy clause have never been exactly congruent with historical practice. *See* *Flast v. Cohen*, 392 U.S. 83, 95-96 (1968); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 303-04 (1979). Indeed, the Court has at times seemed to reject the historical approach altogether, or at least to view pedigree as a necessary but not sufficient condition for a case or controversy. *See* *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-72 (1982).

28. *See Flast*, 392 U.S. at 94-95.

29. In a tradition whose rhetoric (as opposed to, at times, its practice) was less preoccupied with judicial restraint, the case-or-controversy requirement might have done more to shape separation of powers principles rather than being merely the repository of separation of powers ideas drawn from other parts of the Constitution. Then we would be referring to "the case or controversy authority" rather than "the case or controversy requirement." *Cf.* Bandes, *supra* note 24, at 259 (noting and criticizing the view of "article III solely as a limitation on the courts, and not as an exhortation to perform certain tasks").

30. For a brief discussion of the difference between internal (for example, is this commerce?) and external limits (for example, is this protected first amendment activity?) on Congress' power, see G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *CONSTITUTIONAL LAW* 126 (1986).

31. *E.g.*, *United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

32. Adversity is lacking if the parties have come to agree on the proper result during the litigation, *e.g.*, *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971); *League of Women Voters v. FCC*, 489 F. Supp. 517, 520 (C.D. Cal. 1980), if one person controls both parties, *e.g.*, *United States v. Johnson*, 319 U.S. 302 (1943); *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892), or if the suit is collusive, as in cases in which the parties attempt to obtain a judgment that will benefit both as against a third party, *e.g.*, *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850) (brothers-in-law seeking to quiet title as against a third party).

33. *See supra* note 21.

34. Professor Jaffe was thus precise, not redundant, in stating that the case-or-

Members of other professions might quarrel with the lawyer's confidence that adversity cannot exist within one person. Yet plainly I cannot sue myself for being consistently late to work and so getting myself fired. Even though very real adversity may exist, a judicial proceeding can provide it neither effective expression<sup>35</sup> nor an adequate remedy; monetary relief would be meaningless and injunctive relief unworkable and unenforceable. My being of two minds does not place two parties before the court; two entire bodies are necessary. The bar on litigation by one person against herself is thus a (meta)physical necessity when the person is an individual human being.<sup>36</sup>

controversy provision requires "the presence before the court of *two or more* adverse parties." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 99 (1965) (emphasis added).

35. A number of practical difficulties immediately arise. Would I hire two lawyers? If I did not, could the court designate a lawyer, whom I would be obliged to pay, to represent me as a defendant? If I called myself to the stand, would I be deemed a hostile witness for purposes of defining the scope of appropriate direct examination?

36. In a suit with multiple plaintiffs and/or defendants, among whom one person appears on both sides, the dual representation problem disappears and meaningful relief is possible. Under the traditional rule, however, the whole suit would still be nonjusticiable. See *Faulkner v. Faulkner*, 73 Mo. 327, 339-40 (1880). This result has been attributed to the common law rule that the court can grant only a single monetary judgment which is enforceable against any defendant and satisfied by payment to any plaintiff. Note, *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 HARV. L. REV. 1050, 1055 (1949) (citing 1 A. SCOTT, *TRUSTS* § 99.1 (1939)). The judgment would be meaningless if satisfied by a single person paying it to herself. Modern flexibility with regard to remedies avoids this problem without having to declare the entire litigation nonjusticiable. See, e.g., *Perlman v. Feldmann*, 219 F.2d 173, 178 (2d Cir.) (minority shareholder plaintiffs in derivative action must recover in their own right because payment to corporation would mean that defendants would share in the judgment), *cert. denied*, 349 U.S. 952 (1955); cf. Fed. R. Civ. P. 54(b) (court's authority to grant relief to fewer than all parties).

A lawsuit between a single person and herself is also meaningful if she appears in different capacities. See *Wyllly v. McCarl*, 2 F.2d 897 (D. Mass. 1924), *aff'd*, 5 F.2d 964 (1st Cir. 1925); *Haberly v. Haberly*, 27 Cal. App. 139, 149 P. 53 (1915); *Cooper v. Nelson*, 38 Iowa 440 (1874). In *Wyllly*, Judge Lowell milked the "comic opera" incongruities of the case's posture for all they were worth. The suit was

brought by a disbursing officer directed to himself to prevent himself from deducting from his own salary a sum which he had been ordered by the Comptroller General so to deduct, so that he may be ordered to command himself to pay himself the amount which he himself considers to be due himself.

*Wyllly*, 2 F.2d at 897. Nonetheless, he had no difficulty concluding that this was a justiciable controversy. See also *American State Sav. Bank v. American State Sav. Bank*, 288 Mich. 78, 284 N.W. 652 (1939) (represented by separate counsel, bank in capacity as trustee sued itself in capacity as bank). But see *Swoope v. Swoope*, 173 Ala. 157, 55 So. 418 (1911) (next friend of infant ward cannot sue himself as administrator and guardian); *Redevelopment Agency v. City of Berkeley*, 80 Cal. App. 3d 158, 143 Cal. Rptr. 633 (1978) (city council, acting in the capacity of the city's redevelopment agency, cannot sue itself); *Barber v. Barber*, 32 R.I. 266, 79 A. 482 (1911) (town treasurer cannot sue himself officially on a claim against the town).

A different explanation is required when the person is a group or a corporation. Such organizations have component parts that are fully capable of appearing on both sides of a lawsuit. These parts often submit their disputes to an arbiter, usually their superior in the corporate hierarchy. Nothing inherent in their disputes makes judicial resolution peculiar or inappropriate. Nonetheless, the black letter rule is that a corporation, for example, cannot sue itself.<sup>37</sup> The explanation must be found in the purposes underlying the adversity requirement.

The purposes usually identified are instrumental rather than normative.<sup>38</sup> Adversity—that is, a clash of interests combined with desires for different results—is supposed to ensure effective advocacy and full presentation of all relevant information.<sup>39</sup> Its actual success in doing so is dubious. Like much of what courts have read into the case-or-controversy requirement with similar aims—the bar on advisory opinions, the ripeness and mootness doctrines, the requirement of an injury in fact caused by the challenged conduct and redressable by a ruling for the plaintiff—adversity is the roughest sort of proxy.<sup>40</sup>

Clearly, adversity is not a *sufficient* condition for effective advocacy; lawyers fail for many reasons independent of what is at stake for their clients. Nor is adversity a *necessary* condition for effective advocacy. At most, its absence might raise a question about the thoroughness with which the parties will litigate. If both sides seek the same result, we have every reason to doubt how well one party will present its case. If our only concern was the quality of judicial decisionmaking, however, it would be

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37. See *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301-02 (1892); *Boller v. National Mediation Bd.*, 647 F. Supp. 1060, 1062 (S.D. Tex. 1986); *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 382 (D. Del. 1983).

38. See E. CHEMERINSKY, *FEDERAL JURISDICTION* 39-40 (1989); Bades, *supra* note 24, at 261, 290.

39. *E.g.*, J. RADCLIFFE, *supra* note 22, at 47-48. The Supreme Court frequently refers to "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204 (1962); see, *e.g.*, *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *United States v. Nixon*, 418 U.S. 683, 697 (1974).

40. All justiciability requirements are justified in part as a guarantee of concrete adverseness and therefore of effective advocacy. They can be extremely imprecise indicators. It is not hard to find cases in which a direct examination of a party's actual commitment and capacity to litigate would suggest the opposite conclusion as to standing than the court reaches through its indirect safeguards. The usual comparison is between *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), and *Sierra Club v. Morton*, 405 U.S. 727 (1972). *E.g.*, Chayes, *The Supreme Court 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 24-26 (1982).

sufficient to examine actual disagreement directly. Instead, the case law requires that a constitutional case or controversy grow out of what one might term "situational adversity."<sup>41</sup> For example, the Court requires advocacy organizations to identify and sue on behalf of a member who has suffered a constitutionally sufficient injury, even if the litigation is over matters central to the organization's mission. Finding a member who will lend her name, though nothing else, to the lawsuit does absolutely nothing to further strenuous advocacy.<sup>42</sup> Numerous suits in which there can be no doubt about the quality of the advocacy present no case or controversy because they lack divergence between the parties other than their sincere disagreement.<sup>43</sup>

Normative considerations, therefore, must also be at work. In part, the adversity requirement reflects a belief in a limited judicial role, restricting judicial involvement to circumstances that require resolution by an outsider. Parties not actually in conflict have no need for external resolution. Indeed, courts often refuse to settle disputes unless their involvement is "necessary," thus serving the goal of judicial economy and the view that courts are decisionmakers of last resort.<sup>44</sup> In addition, the requirement of situational adversity reflects a belief that those with common interests should settle their own disputes. Adversity both arises out of and requires divergent *interests*.<sup>45</sup>

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41. Professor Tushnet argues that because courts should be deciding cases on the merits, standing doctrine should "be stripped to the barebones . . . [requiring only] real adversity between plaintiff and defendant, and a plaintiff capable of generating a reasonably good, 'concrete' record for decision." Tushnet, *The Sociology of Article III: A Response to Professor Bickmayer*, 93 HARV. L. REV. 1698, 1706 (1980) (footnote omitted). Whether he means "real adversity" as something more than sincere and committed disagreement is unclear.

42. Chayes, *supra* note 40, at 24.

43. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond*, 476 U.S. at 62.

44. *E.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:19, at 286 (2d ed. 1983).

Strictly speaking, judicial resolution is never necessary. The world might not work as well, but it would not come to an end without a system of courts. First, other referees are available. Second, even if they were not, disputes would ultimately end through compromise, inducement, trickery, surrender, or attrition. When courts speak of the necessity of judicial resolution, they mean that no one internal to the dispute can dictate a resolution and that the parties must therefore turn to a stranger to the conflict, such as a court.

45. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). Scholars with a communitarian bent have criticized the Court's standing jurisprudence for being so firmly centered on self-interest and so intolerant of *jus tertii*. *E.g.*, Tushnet, *supra* note 41, at 1708-21; Winter, *supra* note 27, at 1481-91. The refusal to hear litigation between persons

Several factors explain the refusal of courts to hear intracorporate lawsuits. First, because the same authority governs nominally different parties, one party may not present its side effectively. A court also may reasonably suspect that the litigation is collusive and serves some ulterior motive, such as obtaining a precedent that will stand both sides in good stead against third parties. Moreover, a court's participation is at best unnecessary in that the corporation's chief executive officer can dictate a resolution.<sup>46</sup> In this sense, the officer's authority renders corporate subordinates one person; these subordinates are not adverse because their dispute does not require an outside arbiter.<sup>47</sup> Finally, intracorporate disputants share more than a boss; they also share a single interest. Like an individual, the law deems the corporation to have only one goal, namely, its own welfare. In fact, the nonjusticiability rule overlooks enormous divergences within a large corporation over turf, allocation of resources, and the corporation's best interests. The rule can do so because of the corporation's artificiality. Because the corporation is an invented creature of contract and statute, we can give it any characteristics we choose.<sup>48</sup> In effect, the law makes it a condition of adopting the corporate form that the corporation cannot sue

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with shared interests could be seen as a counterexample, an instance in which the Court respects a community sufficiently to stay out of its affairs and insist that it resolve its disputes internally. In cases in which courts have been explicit about such a rationale, however, their restraint has done little to further these concerns and perhaps has done more harm than good. For example, intrafamilial tort immunities are said to rest on respect for the family unit and the need to preserve domestic harmony. Yet it is difficult to take this rationale seriously. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 902-03 (5th ed. 1984). On the steady decline but not yet complete abandonment of intrafamilial tort immunities, see generally Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parents' Negligence—Modern Cases*, 6 A.L.R.4TH 1066 (1981); Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3D 901 (1979) [hereinafter Annotation, *Modern Status*].

46. This view depends upon a managerial theory of corporations that some view as obsolete. See generally Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1474-82 (1989) (describing competing theories of the firm). Under the "new economic theory of the firm," *id.* at 1471, with its emphasis on the contractual relations of the corporation's components rather than the firm's hierarchical structure, intracorporate litigation might make perfect sense. After all, if the firm "is contract," *id.* at 1480, then at times it "is breach" and therefore might "be adjudication." The theory's proponents, however, would probably view intracorporate litigation as an unlikely and inappropriate instance of excessive transaction costs.

47. One way of articulating the question addressed by this Article is whether the President is part of or external to the agencies.

48. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

itself. In defining what a corporation is, we define its parts to be inherently nonadverse because a corporation can and ought to resolve its disputes internally and because its parts all share the same ultimate interest.<sup>49</sup> We could define their relations otherwise—in which case precious little intracorporate litigation still might result—but in either case, the corporation's ability to sue itself is ultimately a function of corporate law and the corporation's charter.

In considering the justiciability of intragovernmental suits, the Constitution serves as the law and charter. The question is whether the Constitution creates a governmental scheme possessing any of the three unities that preclude article III adversity: unity of desired outcome, unity of interest, and unity of control. First, and least controversially, does concrete adversity exist within the government? Second, should courts treat the government as having the same unity of purpose, goals, and interests that they deem an individual or a corporation to have? Third, does the government, or part of it, have a firm, single hand on the tiller?

### *B. The Federal Government as One Person*

Given this understanding of adversity, the usual bar on litigation by one person against herself does not apply to the federal government. Monolithic though the United States can appear, to deem it one person as a litigant is absurdly formalistic.

To begin with, what is "the United States" for these purposes? Are the fifty states one legal person? The fact that together they are the *United States* does not mean the states cannot sue each other because in doing so they would be suing themselves. Article III, of course, expressly puts cases between two or more states within the judicial power;<sup>50</sup> this provision would be mean-

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49. Historically, common law courts did exactly the same thing with another fictional person: the marital unit. See generally Annotation, *Modern Status*, *supra* note 45. In part, courts based the conception of husband and wife as one person, unable to sue one another, on the general refusal to acknowledge a married woman as a legal person. With the passage of Married Women's Property Acts, this rationale disappeared. Yet in many states, interspousal immunity was or is maintained long after married women were recognized as legal persons in other respects. The rationale, such as it is, rests on concerns over marital harmony and the threat of collusion. *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980). These three rationales—a general doctrine about legal status, belief in the possibility or importance of resolving disputes internally, and fear of collusion—underlie both interspousal immunity and the principle that a corporation cannot sue itself.

50. U.S. CONST. art. III, § 2, cl. 1.

ingless if there could be no such case. Even without this broad hint, however, forbidding interstate litigation by resort to the a-person-cannot-sue-herself shibboleth would be ludicrous. The states have independent interests and representation; they have fierce, self-interested disagreements; and they do not answer to the same authority—or to the extent they do, litigation in the federal courts is the means of submitting their disputes to that authority. The bizarreness of forbidding interstate litigation on the theory that the states are parts of one person cautions against overconceptualizing the idea of a person in this context.

Consider, then, merely the United States government as one person. The idea of a unitary federal government, its parts joined by “one indissoluble bond of unity and amity,”<sup>51</sup> is an attractive one. The Supreme Court’s opinion in *United States v. Providence Journal Co.*<sup>52</sup> recently illustrated just how attractive it is. In that case, the Court refused to allow the Solicitor General to relinquish his role as lawyer for the United States even though the governmental interest concerned the judicial rather than the executive branch. Operating from a conception of a unified government, the Court rejected as “startling” the suggestion that “there is more than one ‘United States’ that may appear before this Court.”<sup>53</sup> As a matter of statutory interpretation, the holding in *Providence Journal* is unobjectionable. The Court’s image of a unified federal government, however, is unrealistic.

First, the idea of the United States as a single litigant is extraordinarily abstract. After all, the government is composed of millions of actual persons who are frequently at odds with one another. The government’s wide range of interests, enforcement responsibilities, benefits programs, landholdings, and activities also means that it is constantly in court. The United States is

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51. THE FEDERALIST No. 47, at 304 (J. Madison) (C. Rossiter ed. 1961) (quoting the New Hampshire Constitution).

52. 485 U.S. 693 (1988). The case arose out of a suit against DOJ and the Providence Journal to enjoin dissemination of information about the plaintiffs contained in Federal Bureau of Investigation (FBI) files. *Id.* at 695. When the newspaper violated a temporary restraining order, the judge appointed a special prosecutor to bring criminal contempt charges. *Id.* at 696-97. The district court found the newspaper in criminal contempt; the court of appeals reversed; and the special prosecutor successfully petitioned for certiorari. *Id.* at 697-98. The Supreme Court held that under 28 U.S.C. § 518(a), which gives the Attorney General and the Solicitor General exclusive authority to “conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested,” only the Solicitor General can represent the United States before the Court. *Id.* at 707. The Court thus dismissed the petition for certiorari it had previously granted. *Id.* at 707-08.

53. *Id.* at 701.



like no other litigant; it is a party to more than a third of all litigation in the federal courts. It would be extraordinary, then, if the government avoided ever facing itself on opposite sides of a lawsuit.

Second, when the United States appears on more than one side of a lawsuit, the assumptions about control, collusion, and effective advocacy that underlie the adverse parties requirement may be utterly implausible. If a dispute between component parts of the federal government actually reaches a court, a court has little or no reason to be concerned about collusion. Relations between the three branches, and to a lesser extent within each branch, are adversarial, often by design. Litigation between them, therefore, is likely to involve fiercely held, self-interested positions taken by separate individuals who represent different interests. DOJ usually represents the government,<sup>54</sup> which can raise a significant practical obstacle to intragovernmental litigation. DOJ representation is in no way a theoretical objection to intragovernmental suits, however, and Congress can easily cure the conflict by giving parts of the government the authority to represent themselves.<sup>55</sup> Moreover, the practical and logical obstacles to hearing one individual on both sides, and to awarding relief both to and against an actual person, are absent when the person is the government. Parts of the government frequently do submit disputes to arbiters, such as the Office of Management and Budget (OMB)<sup>56</sup> or the Attorney General.<sup>57</sup> Courts face no obstacles in determining a winner and fashioning a meaningful remedy in fights between two parts of the government. Injunctive relief redresses the victor's injury and alters the status quo. Monetary relief looks somewhat peculiar, perhaps pointless, for it involves merely shifting funds from one government account

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54. 28 U.S.C. §§ 516, 518, 519 (1988).

55. Congress has granted independent litigating authority to the Senate, 2 U.S.C. § 288 (1988), and to many agencies, usually the independent commissions, in specific circumstances, *e.g.*, 12 U.S.C. § 1828(c)(7)(D) (1988) (Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corp.); 15 U.S.C. § 56(a)(1)-(2) (1988) (Federal Trade Commission); 28 U.S.C. § 2323 (ICC); *id.* § 2348 (1988) (Federal Communications Commission, Federal Maritime Commission, Nuclear Regulatory Commission); 29 U.S.C. § 663 (1988) (Solicitor General of Department of Labor in OSHA actions); 33 U.S.C. § 1366 (1988) (EPA under Clean Water Act); 42 U.S.C. § 7413 (1988) (EPA under Clean Air Act); 49 U.S.C. § 11702 (1988) (ICC).

56. For example, under Executive Order 12,088, OMB is to resolve conflicts between EPA and other agencies over compliance with pollution control standards. Exec. Order No. 12,088, 3 C.F.R. 243 (1979).

57. Executive Order 12,146 requires executive agencies to submit legal disputes to the Attorney General. Exec. Order No. 12,146, 3 C.F.R. 409 (1980).

to another. Yet as a practical matter monetary relief is also meaningful. The federal budget is not one big pot. Each agency has its own budget, strenuously sought and jealously guarded. Agency personnel are hardly indifferent to monetary judgments merely because the money goes from and to the federal treasury.<sup>58</sup> In addition, even if the agency is financially unconcerned by the penalty, the fine is not just a monetary sanction. It symbolizes a determination that the agency has seriously misbehaved—a determination that will hurt the agency in its dealings with Congress, the President, and the public.<sup>59</sup> Indeed, fine or no fine, such a judicial determination will matter to both parties; a declaratory judgment is itself meaningful relief.

Finally, in many respects the government litigates under different rules than private parties.<sup>60</sup> For example, it enjoys uniquely

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58. Witness the pitched battle over EPA's effort to fine the Department of Energy for environmental noncompliance at its Fernald, Ohio nuclear facility. See 21 Env't Rep. (BNA) 2223 (Apr. 12, 1991). See generally Axline, Bonine, Barnett, Oates, & Skillman, *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. LIT. 1, 41-44 (1987) (making agencies pay fines to the United States for violations of environmental laws would enhance compliance). At least one court has assessed civil penalties, payable to the United States Treasury, against a federal agency under the Clean Water Act. *Sierra Club v. Interior Dep't*, 30 Env't Rep. Cas. (BNA) 1841 (D. Colo. 1990); see also *Ohio v. Energy Dep't*, 31 Env't Rep. Cas. (BNA) 1448, 1453-54 (6th Cir. 1990) (state can sue federal government under the Resource Conservation and Recovery Act for civil penalties payable to United States Treasury). But see *id.* at 1458 n.4 (Guy, J., dissenting) (objecting that such a payment would be illogical).

In *Juliano v. Federal Asset Disposition Association*, 736 F. Supp. 348 (D.D.C. 1990), the court stated broadly that a case or controversy does not exist when the government seeks to recover a money judgment from itself. See *id.* at 351-53. This unusual case was a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729 (1988), which creates a cause of action for private citizens to bring suit on behalf of the United States against any entity that knowingly submits a fraudulent claim to the government. The alleged defrauder here was itself a government-owned corporation, the Federal Asset Disposition Association. The court dismissed the case because any judgment would both come from and go to the federal treasury (except for the significant cut that the *qui tam* plaintiff would receive for bringing the suit). Whether the holding was statutory or constitutional is unclear. Compare *Juliano*, 736 F. Supp. at 351 (government's argument that no case or controversy existed "proper") with *id.* at 352-53 ("nothing in the Act" allows this action, which would be an unprecedented "expansion of the Act"). At any rate, the result makes perfect sense under either view, particularly because (1) the action would have done nothing to further the statutory goals, but simply made the *qui tam* plaintiff wealthy, and (2) in a suit that purported to be by and against the United States, no governmental parties were actually in disagreement. Nothing in *Juliano* is inconsistent with the proposition that having to pay a fine to the federal treasury can have the same deterrent and other salutary effects for a transgressing federal agency that it has for private entities.

59. Cf. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1469-70 (1982) (noting similar benefits that would flow from criminal prosecutions by DOJ against federal entities).

60. *Nevada v. United States*, 463 U.S. 110, 141 (1983).

loose standards of issue preclusion.<sup>61</sup> These different rules reflect important practical differences between the government and private litigants. The courts should not and do not blindly treat the federal government like any other individual litigant.

The case-or-controversy provision should be read in light of its underlying purposes, without overconceptual gameplaying about what counts and what does not. The rule that one person cannot be both plaintiff and defendant poses a risk of the emptiest sort of formalism.<sup>62</sup> Courts may easily misapply the rule if they lose sight of the fact that it is primarily a shorthand description for brass-tacks considerations about adversity and the need for judicial resolution. Invoking the no-person-may-sue-herself rule abandons analysis in favor of a slogan. That slogan collapses entirely when the person is as abstract, compartmentalized, and full of competing interests as the United States government.

### C. *Litigation Between the Branches*

Litigation between the branches clearly illustrates the possibility of justiciable controversies within the government and the impossibility of deeming the government "one person." How courts should handle interbranch litigation is potentially a highly complex problem, but to keep it simple, consider this narrow question: Does the mere fact that both litigants are part of the United States government in itself preclude interbranch litigation? Clearly it does not.

Courts regularly permit interbranch litigation.<sup>63</sup> For example, the Supreme Court repeatedly has allowed Congress to defend

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61. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173-74 (1984); *United States v. Mendoza*, 464 U.S. 154, 159-64 (1984).

62. Few would deny, for example, that form triumphed over substance in *Globe & Rutgers Fire Insurance Co. v. Hines*, 273 F. 774 (2d Cir.), *cert. denied*, 257 U.S. 643 (1921), an admiralty action arising out of a collision between vessels owned by two different railroads. At the time of the collision, the United States, by presidential order, had taken over all the railroads in the country. *Id.* at 776. The plaintiff was one railroad's insurance company; the named defendant was the former federal official who had been Director General of the railroads at the time of the collision. *Id.* at 775. The court dismissed the action because the two railroads were actually the same person (namely, the United States), and the insurance companies were subrogated to the rights of the insureds. *Id.* at 776-77, 784. Thus, even though (1) no governmental party existed because the railroads had returned to private hands; (2) the actual adversity was profound because the insurance companies were doing the litigating and fighting over money; and (3) there was no way that the nominal single party, the United States government, could have resolved the dispute without resort to the courts, the court determined that the suit was nonjusticiable because the United States was suing itself.

63. *See, e.g., United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976). In that case, DOJ

statutes that the executive branch, along with the private party to which the executive is nominally opposed, argues are unconstitutional.<sup>64</sup> In *INS v. Chadha*,<sup>65</sup> for example, in which the named adversaries agreed that the legislative veto was unconstitutional, the Court specifically pointed to Congress' formal intervention as rendering "concrete adverseness . . . beyond doubt."<sup>66</sup>

The judicial and executive branches also litigate against each other. A contempt ruling against a government official is in essence an action by the judiciary against another branch. Likewise, an executive branch request for a writ of mandamus issued to a judge is interbranch litigation.<sup>67</sup> We might similarly characterize the famous case of *Evans v. Gore*.<sup>68</sup> In *Evans*, a federal judge successfully challenged the income tax under article III's diminution-in-salary clause.<sup>69</sup> Although the judge sued as an individual, his legal argument was that his official position gave him immunity and the two other branches could not act against a member of the judiciary in this way.

Even DOJ, which denies the justiciability of many intragovernmental disputes, seems to accept litigation between the

sued AT&T to enjoin it from complying with a congressional subpoena. The House of Representatives authorized the chairperson of the subcommittee that had issued the subpoena to intervene on its behalf. The district court issued the injunction, AT&T did not appeal, and the Court of Appeals for the District of Columbia permitted the congressman to appeal. See also *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986) (Senate, House, and disappointed bidder for government contract sued Army, represented by DOJ, and the successful bidder), *cert. dismissed*, 488 U.S. 918 (1988); *Consumers Union of United States, Inc. v. FTC*, 691 F.2d 575, 577 (D.C. Cir. 1982) (*per curiam*) (FTC sued Senate and House over constitutionality of legislative veto), *aff'd mem.*, 463 U.S. 1216 (1983).

64. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *United States v. Lovett*, 328 U.S. 303 (1946).

65. 462 U.S. 919 (1983).

66. *Id.* at 939. The companion cases that ensured *Chadha's* justiciability were thus *United States Senate v. INS* and *United States House of Representatives v. INS*. See *id.* at 919.

The federal courts have also properly heard disputes between the branches of other governments. See, e.g., *Government of the Virgin Islands v. Eleventh Legislature*, 536 F.2d 34 (3d Cir. 1976) (governor sued legislature over validity of its override of his line item veto).

67. E.g., *In re NLRB*, 304 U.S. 486 (1938) (NLRB sought, and the Supreme Court issued, a writ of mandamus to the court of appeals that had improperly assumed jurisdiction of a dispute still before the Board). Executive agency petitions for writs of mandamus to a court are common. See, e.g., *United States v. United States Dist. Court*, 858 F.2d 534 (9th Cir. 1988); *United States v. United States Dist. Court*, 717 F.2d 478 (9th Cir. 1983); cf. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (refusing to hear Attorney General's petition for mandamus to the circuit court); *supra* note 12 (discussing *Hayburn's Case*).

68. 253 U.S. 245 (1920).

69. U.S. CONST. art. III, § 1 ("Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

branches. In 1982, for example, it sued the House, seeking a declaratory judgment as to the scope of Congress' subpoena power in the face of asserted executive privilege.<sup>70</sup> This suit exemplified an interbranch battle in its rawest form. The plaintiff presumably considered the case justiciable. Similarly, DOJ's position in the cases brought by members of Congress challenging the President's use of the pocket veto has been that Congress as a body *can* bring such a suit, although individual members cannot.<sup>71</sup> This view was also implicit in the Department's position in *Providence Journal*.<sup>72</sup> In *Providence Journal*, the Solicitor General's emphasis was entirely on his role as the representative of the President; the statutes granting the Attorney General control over litigation "appl[y] to cases in which the United States is 'interested' by virtue of the constitutional and statutory responsibilities of the Executive Branch."<sup>73</sup> Although the Solicitor General's argument was still a step away from saying that the branches can litigate *against* each other, it did clearly mean that they should not be litigating *with* each other. The diversity of interests thought to justify that position could equally support the existence of a justiciable controversy.

In light of the article III concerns of unity of interest, shared control, and adversity, interbranch litigation clearly can present a case or controversy. Although the different branches are part of the same government, they function independently. By definition, they have different bosses. The essential separation of powers idea is that they are coequal branches sharing the top rung. The authority the branches have in common is the law; thus, it is constitutionally appropriate for them to submit their legal disputes to the branch that says what the law is.<sup>74</sup> In

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70. *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). The Civil Division sought a declaration that EPA Administrator Anne Gorsuch was within her rights in refusing to provide subpoenaed documents to a House subcommittee. Without addressing the parties' arguments regarding the existence of an article III controversy, the court dismissed on the ground that the legality of Gorsuch's action was more appropriately tested in the context of a contempt proceeding. *See id.* at 152-53.

71. *Barnes v. Kline*, 759 F.2d 21, 28-29 & 29 n.16 (D.C. Cir. 1985), *vacated as moot*, 479 U.S. 361 (1987); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974).

72. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988); *see supra* note 52.

73. *Id.* at 716 (Stevens, J., dissenting) (quoting Brief for United States as Amicus Curiae at 13).

74. Dean Choper argues that courts should never settle fights over the respective authorities of the political branches. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980). This proposal, however, is not constitutionally based. Rather, Choper advocates judgemade rules akin to the prudential limits on

addition, situations clearly will arise in which the branches are adverse by any standard—for example, the executive branch's assertion of a privilege against Congress.<sup>75</sup> Indeed, the basic Madisonian theory of the separation of powers is that the branches are to have "opposite and rival interests," with "[a]mbition . . . made to counteract ambition."<sup>76</sup>

This does not mean that such litigation contains no article III difficulties or that litigation is the most appropriate way to resolve interbranch disputes. In some circumstances, the Constitution may require the unhappy branch to take a nonjudicial route. For example, if Congress disagrees with an OSHA regulation, it probably cannot bring a judicial challenge arguing that the regulation is inconsistent with the authorizing statute;<sup>77</sup> rather, it must correct the agency error legislatively.<sup>78</sup> I suggest only,

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standing. As a matter of constitutional authority, he does not seem to dispute the courts' ability to hear cases between two parts of the federal government. *E.g., id.* at 334 (notwithstanding existence of "a genuine case or controversy," court should abstain).

Furthermore, Dean Choper's position is both broader and narrower than the *United States v. United States* problem. On the one hand, it is the *issue* of respective authority that is important to Choper. He would forbid such suits even if, as is usually the case, the branches themselves are not the two litigants. *E.g., id.* at 330-32. Conversely, Choper might allow interbranch litigation over issues other than the branches' constitutional duties and powers. For example, Choper's proposal presents no necessary bar to a Clean Air Act enforcement action by the executive against Congress to enjoin excessive emissions from the Capitol power plant. Indeed, Choper might endorse such litigation. His basic argument is that the branches can and should protect themselves without resort to the courts to define the scope of their powers. *E.g., id.* at 275. One way they can do so is by suing each other over other issues. *But see id.* at 263 (determination of the branches' respective powers "to be remitted to the interplay of the national *political process*") (emphasis added).

On the other hand, Choper's position poses no obstacle to intrabranch litigation. That is what poses the hard justiciability problem. *See infra* Part IV.

75. *See United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

76. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961). One of the combatants aptly describes relations between Congress and the Executive as "the Two Hundred Year War." Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C.L. REV. 901 (1987).

These realities were reflected in Congress' establishment of the Office of Senate Legal Counsel in 1978 to "intervene or appear as amicus curiae in the name of the Senate . . . in any legal action . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." 2 U.S.C. § 288e(a) (1988). The underlying rationale for creation of the office was that an inherent conflict of interest arose when DOJ represented Congress, because it "is a part of the executive branch and its first and foremost responsibility is to represent the interests of the President and the executive branch." S. REP. NO. 170, 95th Cong., 2nd Sess. 11-12 (1977).

77. The standing doctrine provides the most obvious but not necessarily the only doctrinal peg for a finding of nonjusticiability.

78. In holding the legislative veto unconstitutional, for example, the Court seemed to assume, without discussion, that new legislation is Congress' only remedy for administra-

in line with almost all available authority,<sup>79</sup> that article III creates no obstacle to a lawsuit between two branches merely because they are both part of the federal government.

### III. INTERAGENCY LITIGATION AND THE UNITARY EXECUTIVE

Although the government as a whole is not a single person, viewing the executive branch that way is more plausible. Such a conception has consequences for both constitutional concerns about the justiciability of interagency suits. First, a unified executive might be the sort of single "person" incapable of having a case or controversy with itself. More precisely, the President's control over the potential litigants and their shared assignment to execute the laws would negate adversity. Second, if article II places the President in complete control of a unified and hierarchical branch, allowing courts to give orders in the President's place might be inconsistent with that article specifically and the principle of separation of powers generally.

DOJ's concerted emphasis on presidential authority and centralized administration over the last decade has given new prominence to the principle of the "unitary executive."<sup>80</sup> Because any

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tive action of which it disapproves. *INS v. Chadha*, 462 U.S. 919, 954-55 (1983).

Whether Congress could seek judicial review of a regulation that applied directly to it raises a different question. Although Congress would then have standing, the fact that it has a remedy through legislation might foreclose the judicial route. This legislative remedy, however, is inadequate given the possibility of a presidential veto. Suppose the original legislation had passed during a prior administration, and both the current President and the regulating agency are of one mind. The original legislation would have required only a congressional majority, whereas the correction of its misinterpretation would now require a supermajority, even though the President's view would lack the strength to pass Congress. When a regulation applies to private parties, this exceptional circumstance is not worth worrying about and is subject to judicial correction in a suit by such a private party. Congress should not be allowed to sue to protect the integrity of its statutes from executive misconstruction. If the regulation applies to Congress itself, however, Congress should be allowed to challenge it. First, no one else may be willing to do so. Second, the possibility of bad motive suggests that Congress should be able to defend itself. Third, this situation falls within the category of disputes between a governmental regulator and a regulated governmental party which, as I discuss below, should always be justiciable. Similarly, Congress could clearly obtain judicial review of an administrative order directed to it.

79. *But see Barnes v. Kline*, 759 F.2d 21, 42 n.1 (D.C. Cir.) (Bork, J., dissenting) (arguing that neither Congress nor either House individually may sue to challenge the President's exercise of pocket veto), *vacated as moot*, 479 U.S. 361 (1987).

80. This overall agenda receives a highly critical review in Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628-34 (1989). On the unitary executive generally, see *Agency Autonomy and the Unitary Executive*, 68 WASH. U.L.Q. 495 (1990) (panel discussion).

growth in presidential authority means a decline in congressional authority, Congress has greeted the unitary executive objection to interagency litigation with suspicion and derision.<sup>81</sup> As ambition counteracts ambition in this battle, both sides overstate their case. The unitary executive model has an important and valid idea at its core, but it does not painlessly resolve the justiciability question. To be sure, under a strong view of the unitary executive, judicial resolution would interfere with presidential authority. Yet the President does not enjoy complete control over federal agencies either in theory or in fact. The unitary executive argument rests on a faulty premise.

#### A. *Presidential Control of the Executive Branch*

The Constitution places executive authority in one person, the President,<sup>82</sup> who is politically accountable and charged with the faithful execution of the laws.<sup>83</sup> As Chief Justice Taft lectured in *Myers v. United States*,<sup>84</sup> the President must be free to run the executive branch to ensure the “unity and coordination in executive administration [that is] essential to effective action.”<sup>85</sup> Litigation between disagreeing agencies may undermine the President’s “general administrative control over those executing the laws”<sup>86</sup> and prevent him from fulfilling his obligation to “supervise and guide [executive officers] construction of the statutes under which they act in order to secure . . . unitary and uniform execution of the laws.”<sup>87</sup>

This view of the presidency rests, in particular, on the Framers’ adoption of a unitary executive.<sup>88</sup> The delegates to the 1787

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81. See, e.g., *Federal Environmental Compliance Hearing*, *supra* note 15, at 285 (statement of Rep. Sikorski); *id.* at 347 (statement of Rep. Cooper); 135 CONG. REC. H751 (daily ed. Mar. 21, 1989) (statement of Rep. Schroeder) (DOJ’s constitutional objections to interagency litigation are “legal window dressing on an essentially ideological argument”).

82. U.S. CONST. art. II, § 1, cl. 1.

83. *Id.* § 3.

84. 272 U.S. 52 (1926).

85. *Id.* at 134.

86. *Id.* at 164.

87. *Id.* at 135. Besides Taft’s opinion in *Myers*, the other prominent early example of this argument is the criticism of the “headless ‘fourth branch’ ” formed by the independent regulatory commissions in the report of President Franklin Roosevelt’s special committee to study the administrative state. See THE PRESIDENT’S COMM. ON ADMIN. MGT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937), *reprinted in part in* SENATE COMM. ON THE JUDICIARY, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. NO. 49, 91st Cong., 1st Sess. 343, 345-48 (1969) [hereinafter REPORT OF THE COMMITTEE].

88. For an example of reliance on the Framers’ choice of the unitary executive, see



Constitutional Convention seriously debated the choice between a unitary and a plural executive. The former would ensure efficiency and accountability; the latter thoroughness, independence, and a check against monarchy.<sup>89</sup> In *The Federalist*, Hamilton echoed the arguments presented at the Convention. To make the executive consist of several persons would create too great a danger of disagreement and dissension, thus weakening the ex-

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*Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, And Delegations of Rulemaking Authority*, 68 WASH. U.L.Q. 533, 544 (1990) (panel discussion) (remarks of Theodore Olson) (particularly in light of existence of independent agencies, "without a constitutional amendment or even a direct Supreme Court decision, the vote of the delegates on June 4, 1787, has been overridden and eroded so that we now have precisely the plural executive rejected in Philadelphia").

Commentators generally view the choice of the unitary executive as one of the Convention's central decisions. Professor Peter Strauss has written that "[o]f the decisions [concerning the role of the executive] clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President." Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599 (1984); see also Pritchett, *The President's Constitutional Position*, in *THE PRESIDENCY REAPPRAISED* 12, 14 (R. Tugwell & T. Cronin eds. 1974) (adoption of unitary executive was "[t]he one decision about the executive that was basic to all others").

89. The delegates debated the issue without resolution on Friday, June 1. They agreed that there should be an executive, but disagreed as to whether it should consist of more than one person. On the one hand, it was argued that a single person would be more efficient and responsible; on the other, a plural executive seemed to offer greater protection against monarchical tyranny and greater assurance of independence—although not everyone agreed the latter was a good thing. See generally 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65-73 (M. Farrand ed. 1937) [hereinafter *CONVENTION RECORDS*]. The following Monday, after further debate, the delegates agreed to a single executive by a vote of seven states to three. *Id.* at 93, 96-97, 101-02; see also *id.* at 119 (James Madison noted that "[a] principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.").

Despite the vote, proponents of the plural executive continued to press their case. On June 15, William Patterson offered the New Jersey Plan, which called for an executive consisting of "[blank] persons." *Id.* at 244. The following day's debate rehearsed the plural executive issue. *Id.* at 254, 261, 266-67. The convention set aside the New Jersey Plan on June 18. *Id.* at 282. Even then, Hugh Williamson of North Carolina renewed the argument for a plural executive during debate on how the executive was to be elected. 2 *CONVENTION RECORDS*, *supra*, at 100-01 (debates of July 24). Among the features of the proposal to which George Mason remained unreconciled, prompting him to refuse to sign the final document, was the failure to provide the President with a "constitutional council," consisting of six geographically diverse members serving rotating six-year terms. *Id.* at 638-39; see also *SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 249, item 7 & n.1 (J. Hutson ed. 1987).

As Madison later wrote to Jefferson, however, "The plurality of co-ordinate members had finally but few advocates." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in *THE ORIGINS OF THE AMERICAN CONSTITUTION* 65, 66 (M. Kammen ed. 1986). The states unanimously approved making the executive a single person on July 17 and August 24, 2 *CONVENTION RECORDS*, *supra*, at 22, 401, and, of course, in approving the final document.

executive's authority, distracting its attention, and perhaps paralyzing its operation. Most important, having a single executive assured responsibility. An individual could not hide behind group deliberations or palm off blame.<sup>90</sup> Harry Truman thus echoed the sentiments of the delegates in stating where the buck should stop.<sup>91</sup>

Present-day supporters of strong presidential control also rely on Madison's arguments during the First Congress' debate over the President's removal authority:<sup>92</sup>

Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.<sup>93</sup>

This view of the executive branch clearly argues against intraexecutive litigation. Requiring the President rather than the courts to resolve interagency disputes enhances efficiency, accountability, and consistency. Indeed, perhaps the executive branch cannot have these characteristics unless the President runs the show. Only if the President supervises and resolves disputes between his subordinates will executive policy be effective, coherent, and known to the public.<sup>94</sup> In contrast, if courts are drawn into the resolution of interagency conflicts, the result is likely to be delay and inconsistency rather than the "[d]ecision, activity,

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90. THE FEDERALIST No. 70, at 426-29 (A. Hamilton) (C. Rossiter ed. 1961).

91. J. BARTLETT, FAMILIAR QUOTATIONS 788 (15th ed. 1980) (quoting Harry Truman).

92. *E.g.*, *Cleanup at Federal Facilities, Hearings before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy & Commerce*, 100th Cong., 1st Sess. 448 (1988) (statement of Roger Marzulla, Acting Ass't Att'y Gen.).

93. 1 ANNALS OF CONG. 499 (J. Gales ed. 1789).

94. OFFICE OF MGT. AND BUDGET, REGULATORY PROGRAM OF THE U.S. GOV'T 10-12 (Apr. 1, 1988-Mar. 31, 1989). See generally *Federal Environmental Compliance Hearing*, *supra* note 15, at 207-11 (statement of F. Henry Habicht II, Ass't Att'y Gen.); *Whistleblower Protection Act of 1987: Hearings on S.508 before the Subcomm. on Federal Services, Post Office, and Civil Service of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 452-53 (1987) (statement of Stuart Schiffer, Deputy Ass't Att'y Gen.) [hereinafter *Whistleblower Hearings*].

secrecy, and dispatch"<sup>95</sup> that unity in the executive branch is supposed to ensure.

These concerns can explain the best known example of inter-agency litigation, *United States v. ICC*.<sup>96</sup> The Army asked the ICC to order a refund of certain charges the Army paid to railroads. The ICC refused, and the Army petitioned for judicial review; the Supreme Court found the suit justiciable.<sup>97</sup> Although this was not the Court's rationale, we might conclude that the judiciary could resolve this dispute because the President could not. First, because the proceeding before the ICC was an adjudication, the President could not dictate its outcome. Second, the ICC is an independent agency and thus, to an uncertain degree, beyond presidential control. Under this view, the dispute would not have been justiciable if the President could simply have dictated the outcome. Because Congress had already removed the ICC's decision from presidential influence, however, permitting judicial review constituted no further intrusion on executive authority.<sup>98</sup> In contrast, in situations in which the President retains control—which, under this approach, is most of the time—the principle of a unitary executive forbids judicial intrusion.<sup>99</sup>

95. THE FEDERALIST No. 70, at 424 (A. Hamilton) (C. Rossiter ed. 1961).

96. 337 U.S. 426 (1949); see *infra* notes 174-83 and accompanying text (discussing this decision in much greater detail).

97. *United States v. ICC*, 337 U.S. at 430-31.

98. This is only half of an explanation, of course. One could still argue that the same imperative of presidential authority that forbids judicial resolution of intraexecutive disputes in which the President controls the litigants also forbids insulating the ICC's decision from presidential review in this way. Compare *Myers v. United States*, 272 U.S. 52 (1926) with *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The true believer in the unitary executive should be more troubled than reassured to have *United States v. ICC* explained in terms of the *absence* of presidential authority over one of the agencies.

99. The most sustained presentation of this argument is in 1987 congressional testimony by then-Assistant Attorney General Henry Habicht. He argued that article II bars EPA enforcement actions against federal facilities for violations of the environmental laws. *Federal Environmental Compliance Hearing*, *supra* note 15, at 179, 206-13 (statement of F. Henry Habicht II, Ass't Att'y Gen.). Mr. Habicht backed off ever so slightly from his hard line during the hearings for confirmation to his present post, Deputy Administrator of EPA. See *Nomination of F. Henry Habicht II: Hearings Before the Senate Comm. on Environment & Public Works*, 101st Cong., 1st Sess. 9 (1989) (EPA lawsuit against another agency was not "inconceivable").

Similar reasoning appears in a 1982 Office of Legal Counsel (OLC) memorandum concluding that the President can remove members of the Advisory Council on Historic Preservation at will. 6 Op. Off. Legal Counsel 180 (1982). One possible indication that Congress had intended to limit the President's removal authority was that the statute arguably authorized the Council to litigate against other federal agencies. OLC concluded that the statute did not give the Council such authority, reading the statute to avoid what it considered the dubious constitutionality of such a scheme. "If both the Council

This argument is powerful. However, it significantly overstates the cohesiveness of the executive branch.

### *B. The Disunited Executive*

The term "unitary executive" has two meanings. First, it can refer to a specific attribute of the executive branch, namely, that it has one person at its head rather than a group. Second, it can refer to a more general characteristic of the branch, namely, its cohesiveness. The first of these tells us next to nothing about how the executive branch should run in general or whether agencies can sue each other in particular. The second idea seems inconsistent, in the abstract, with interagency litigation. Yet an examination of how the executive branch actually functions shows that interagency litigation presents no incongruity.

#### *1. Placement of the Executive Power in a President*

The assumed attributes of the unitary executive should inform our understanding of presidential authority and responsibility. But to conclude that the existence of a single officer at the top means that the *other* members of the executive branch cannot litigate against each other requires some rather heroic inferences. After all, having a unitary executive does *not* mean that the entire executive branch consists of a single individual who alone makes all decisions. As soon as one accepts that officers other than the President will crowd the executive branch, the fact that only one person is President is not much help in determining how these additional elements of the branch should operate.

Indeed, the choice of a unitary rather than a plural executive is not directly relevant to this issue. Suppose that advocates of the plural executive had prevailed in Philadelphia. A three-

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and the agency alleged to have violated the Act are within the Executive Branch, then the President has both the power and duty to resolve any dispute between them as to whether a violation of the Act has occurred." *Id.* at 188 n.11.

DOJ also emphasized presidential authority in arguing against the constitutionality of a Special Counsel charged with litigating against federal agencies for illegal reprisals against whistleblowers. *See Whistleblower Hearings, supra* note 94, at 452-53 (statement of Stuart Schiffer, Deputy Ass't Att'y Gen.); Memorandum, *supra* note 16. In light of DOJ's objections and President Reagan's veto, the legislation ultimately enacted does not authorize the Special Counsel to go to court against federal agencies. Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989); *see* 135 CONG. REC. S2779 (daily ed. Mar. 16, 1989) (statement of Sen. Levin) (describing negotiations with DOJ and decision to abandon troublesome provision).

member council runs the executive branch. Its members are irreconcilably divided<sup>100</sup> as to whether a DOD facility should upgrade a leaking hazardous waste dump. One member thinks that the site violates the Resource Conservation and Recovery Act (RCRA)<sup>101</sup> and that DOD should clean it up; the second thinks that the site is in compliance; and the third thinks that the site should continue as presently operated because national security concerns outweigh environmental ones. Would this disagreement be a justiciable controversy? If the unitary executive is the telling argument as to why such a suit *cannot* be brought if the characters are EPA, DOD, and OMB, then the existence of a plural executive should be the telling argument as to why it *can* be brought when the characters are joint heads of the branch. Because the Constitution failed to identify a single decisionmaker within the executive branch, the disputants can turn to the courts to settle their controversy.<sup>102</sup> Yet the existence of a three-member council is unlikely to appease those opposed to interagency litigation; an argument based on respect for the council's authority would be no weaker than an argument based on respect for the President's authority.

Consider also another branch that is headed by a council of sorts, the judiciary. Of the three branches, the judiciary has the most hierarchical structure and the most powerful head. In theory, the Supreme Court's decisions bind the entire judiciary in the most compelling way. In practice, individual judges clearly

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100. As James Wilson pointed out at the convention, an odd number of members of an executive council does not ensure resolution of all disputes:

Among three equal members, he foresaw nothing but uncontroled, continued, & violent animosities. . . . [T]he making them an odd number would not be a remedy. In Courts of Justice there are two sides only to a question. In the Legislative & Executive departments, questions have commonly many sides. Each member therefore might espouse a separate one & no two agree.

1 CONVENTION RECORDS, *supra* note 89, at 96.

101. 42 U.S.C. §§ 6901-6992k (1988). As with most federal environmental statutes, RCRA's substantive requirements apply equally to private and governmental facilities. *Id.* § 6961.

102. The hypothetical would raise only slightly different questions if the council had in advance, while still behind a pre-RCRA Rawlsian veil of ignorance, determined that someone within the branch would have the final say in such disputes. Assuming all of the players stick to the arrangement, then the controversy would stay out of the courts. Of course, that may be a large assumption. The question whether the players can be held to their agreement—by the courts? by threat of removal? by the voters?—raises all of the same issues about justiciability and control that are involved in the initial problem. The fight over the agreed-upon procedures for resolution would be one more intraexecutive dispute, and its resolution would be no different than the substantive dispute that provoked it.

have more freedom of movement than the theory would admit. Nonetheless, the occasional, truly renegade judge notwithstanding, the Court's general pronouncements do bind and control the lower courts effectively. And in any individual case, theory equals practice: any lower court decision is subject to review by a higher court, and when a higher court dictates an outcome on remand the lower court follows its instructions.

Imagining a judicial system in which judges sue one another is possible. For example, two courts could litigate over which has jurisdiction to review a particular agency action; or one court might petition for a writ of mandamus to compel another to abstain in light of related proceedings pending in the first. Stretching further, an overruled district judge, or a dissenter on the appellate panel, might petition for certiorari.<sup>103</sup> A judge who presided over a criminal conviction might sue a later judge for granting the defendant's habeas motion on the ground that the first judge made an error. Many such possibilities are conceivable, but our system does not use litigation to resolve disagreements among judges.

In short, the judiciary thus has the attributes associated with a strong version of the unitary executive: hierarchical structure, a clear boss, and no intrabran­ch litigation. The Court, however, is obviously plural; it is a council. The judicial branch thus demonstrates that the choice of a unitary executive does not determine dispositively the branch head's scope of control. The model of the judicial branch does not *disprove* the unitary executive approach, but it does suggest that this approach is incomplete. Necessarily, factors *other than* the unitariness of the branch's head stand in the way of intrabran­ch litigation.

Consider also fights within Congress, which could not be more different from the executive in structure. This is a collective rather than a unitary body. All of the ideas of individual responsibility, efficiency, and accountability thought to make intraexecutive disputes nonjusticiable are absent in the congressional setting. Just the opposite model prevails. A single identifiable hero or villain is not supposed to exist; the process is not supposed to be swift and sure.<sup>104</sup> The constitutional scheme for

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103. See *Barnes v. Kline*, 759 F.2d 21, 47 (D.C. Cir. 1985) (Bork, J., dissenting) (raising and decrying the possibility of such scenarios), *vacated as moot*, 479 U.S. 879 (1986).

104. Upon the principles of a free government, inconveniences from [infighting within the branch] must necessarily be submitted to in the formation of the legislature . . . . In the legislature, promptitude of decision is oftener an

congressional decisionmaking often promotes deadlock and inaction. Yet many disputes between members of Congress are clearly inappropriate for judicial resolution.<sup>105</sup> It would be surprising if DOJ, for one, had a much broader view of the appropriateness of litigation within Congress than it takes with regard to litigation with the executive branch.

What Congress, the judiciary, and the executive share is that they all operate under a model, a partly explicit, partly implicit constitutional mechanism for the resolution of internal disagreements. The models vary, but each places limits on external resolution of disputes. Courts cannot supplant the constitutionally defined mechanisms for decisionmaking. Simply invoking the unitary executive as the mechanism for executive branch decision-

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evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department.

THE FEDERALIST No. 70, at 426-27 (A. Hamilton) (C. Rossiter ed. 1961).

105. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 242-43, 263 (1981). As Hamilton says in the preceding quotation, *supra* note 104, once Congress does finally act, "the opposition must be at an end." For examples of refusals to hear internal congressional battles, see *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (refusing to consider whether statute was passed in violation of House of Representatives rules); *Reuss v. Balles*, 584 F.2d 461, 468 (D.C. Cir.) (refusing to consider member's assertion that composition of Federal Open Market Committee of Federal Reserve System was unconstitutional), *cert. denied*, 439 U.S. 997 (1978); *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977) (refusing to review one member's challenge to House's method of appropriating CIA funds, even though the named defendant was the CIA director, because to do so would be to meddle in an internal House matter). Courts have assumed jurisdiction in some such cases, but without actually deciding them. Instead, recognizing that discretion may be the better part of valor, they have announced that they could hear the case and then declined to do so. *E.g.*, *Gregg v. Barrett*, 771 F.2d 539, 544 (D.C. Cir. 1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1176-77 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

The best known example of litigation between members of Congress is *Powell v. McCormack*, 395 U.S. 486 (1969). Although sometimes cited as an example of the courts resolving an intra-Congress dispute, *see, e.g.*, Steinberg, *supra* note 20, at 334, this was actually a case in which the plaintiff sued in his individual capacity, essentially like a dismissed employee, and should not be viewed as intrabranch litigation at all. An even more famous intraexecutive counterpart to *Powell*, of course, is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See also* *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (action for back pay by estate of dismissed member of the Federal Trade Commission). These suits are not true examples of intrabranch litigation; in each, the plaintiff was an individual trying to keep his job, not an official trying to perform it.

making and a complete bar on interagency litigation, however, is as incomplete as saying that intragovernmental litigation is nonjusticiable because one cannot have a justiciable controversy with oneself.

## 2. *Centralized Presidential Control*

Although the existence of a President tells us little about the constitutionality of intrabranched litigation, the more general sense in which the executive is unitary may. Interagency litigation does seem inconsistent with a model of centralized, hierarchical, and self-contained decisionmaking. We infer this model in part from the presence of one President and the perceived advantages of having only one. More importantly, this model arises from the implicit hierarchical structure of the executive branch, with its clear boss charged with the ultimate responsibility to "take [c]are that the laws [are] faithfully executed."<sup>106</sup> If this model is correct, it would seem also to eliminate the possibility of article III adversity within the branch. Someone internal to the dispute—failing all else, the President—could always resolve it. The model, however, is purely theoretical. A brief examination of the President's actual control over the executive branch shows that the "unitary executive" is an oxymoron.

### a. *Constitutional Assignment of Authority*

The Constitution itself does not establish a purely unitary executive. Although it calls for one President, it also anticipates the development of "executive Departments"<sup>107</sup> and untold numbers of "other Officers of the United States"<sup>108</sup> and grants Congress the power to create their offices.<sup>109</sup> The Constitution does not explicitly give the executive departments and officers of the United States any duties.<sup>110</sup> It does so implicitly, however, by

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106. U.S. CONST. art. II, § 3, cl. 4.

107. *Id.* § 2, cl. 1.

108. *Id.* cl. 2.

109. *Id.*

110. It does anticipate that the heads of departments will, if asked, give written opinions to the President, *id.* cl. 1, and, if so authorized by Congress, appoint inferior officers, *id.* cl. 2. The opinions-in-writing provision also assumes that the heads of departments will have "duties"; that is what they are to give their opinions in writing about.



referring to its having "vested" certain "[p]owers" in them<sup>111</sup> and by using the passive voice in the "take care" clause.<sup>112</sup>

*b. The Realities of Modern Government*

In a famous memorandum to his cabinet, President Jefferson described the President's supervisory role during the Washington administration, in which Jefferson had been Secretary of State:

Letters of business came addressed sometimes to the President, but most frequently to the heads of departments. If addressed to himself, he referred them to the proper department to be acted on: if to one of the secretaries, the letter, if it required no answer, was communicated to the President, simply for his information. If an answer was requisite, the secretary of the department communicated the letter and his proposed answer to the President. Generally they were simply sent back after perusal, which signified his approbation. Sometimes he returned them with an informal note, suggesting an alteration or a query. If a doubt of any importance arose, he reserved it for conference. By this means, he was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever department they related; he formed a central point for the different branches; preserved an unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent on him; and met himself the due responsibility for whatever was done.<sup>113</sup>

Jefferson's description sounds like make-believe. Perhaps it was once so, but nothing could be further from present-day realities.<sup>114</sup> The President's theoretical oversight extends to sev-

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111. *Id.* art. I, § 8, cl. 18 (granting Congress power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof"). This language may be a holdover from prior drafts that had more fully specified the role of executive departments. Strauss, *supra* note 88, at 600-01 & 601 n.108.

112. U.S. CONST. art. II, § 3 (President "shall take Care that the Laws be faithfully executed"). This phrasing implies that the bureaucracy is to execute the laws and the President is to supervise—that is, take care that the laws are faithfully executed as opposed to faithfully executing them himself.

113. Memorandum from Thomas Jefferson (Nov. 6, 1801), *quoted in* L. WHITE, *THE FEDERALISTS* 35 (1956).

114. Compare the reminiscences of an aide to President Kennedy:

JFK used to receive about an 80-page compilation of weekly reports from the various departments and agencies to brief him on controversies or trouble

eral million employees, spread over hundreds of departments, agencies, bureaus, and commissions, many of whom are career civil servants<sup>115</sup> with policymaking and regulatory authority of which the Framers never dreamed. To insist that the Framers' conception of how the executive branch would operate—to the extent such a thing can be determined or ever existed—should control two centuries later is blindly unrealistic.<sup>116</sup>

The most conspicuous effort to ensure presidential control of the bureaucracy has been the gradual establishment—culminating in President Reagan's Executive Orders 12,291<sup>117</sup> and 12,498<sup>118</sup>—of a mechanism for presidential review of agency rulemaking. Although many of the specifics have been controversial,<sup>119</sup> there is striking support for presidential oversight of the far-flung federal rulemaking apparatus.<sup>120</sup> The primary reason for this

spots (for example, on the Billie Sol Estes affair); essentially these were progress reports—but not much follow-through occurred. Kennedy basically felt that the people he appointed would do the coordination and implementation of his policies.

Cronin, *Presidents as Chief Executives*, in *THE PRESIDENCY REAPPRAISED*, *supra* note 88, at 238.

115. The permanent bureaucratic staff precedes and succeeds any individual President and his appointees and has expertise, institutional memory, and day-to-day authority that newly elected or appointed officials cannot match. As a result, in practice instructions and control do not flow only from the top down. Eizenstat, *The State of the Modern Presidency: Can It Meet Our Expectations?* 11 (1990) (U. Chi. L. School Occasional Paper No. 26).

116. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493-94 (1987).

117. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

118. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

119. For criticisms of OMB's obstructionism under Executive Order No. 12,291, see Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write A Regulation*, 99 HARV. L. REV. 1059 (1986); Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984).

120. See, e.g., Administrative Conf. of the U.S., *Recommendation 88-9*, in RECOMMENDATIONS AND REPORTS 42, 42 (1988) ("An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress."); Bruff, *Presidential Management of Agency Rulemaking*, in Administrative Conf. of the U.S., *supra*, at 527; Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986); Sunstein, *supra* note 116, at 455-56; Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (endorsing White House influence on policy decisions in both rulemaking and adjudicatory settings); see also *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981).

This view is not unanimous. For hesitations about the value and appropriateness of presidential involvement in agency decisionmaking, see McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U.L. REV. 443 (1987).

widespread support, however, is the general *absence* of effective presidential control over the administrative apparatus. The Executive Orders are still far from direct presidential control of agency rulemaking and are themselves symptoms of the lack of presidential control.

*c. Absence of Presidential Involvement*

Efforts to enforce the unitary executive model do not even pretend to involve the President himself in the oversight process. At best, it is "the White House" that oversees agency activities;<sup>121</sup> more often, it is OMB.<sup>122</sup> Although we recognize OMB as being full of "the President's men," it is not the President. Equating OMB with the President for most purposes of agency oversight is already a big step away from the pure unitary executive model. As item b, above, suggests, this step has to be taken; but it is important to recognize that even in its purest modern form, this type of executive oversight is a far cry from George Washington's involvement in the details of government. When advocates of a strong version of the unitary executive speak of the necessity for the President to have the final say, what they mean as a practical matter is that the President's inner circle—that is, a group perhaps the size of George Washington's entire administration—must have the final say.

*d. Interagency Control*

Agencies often take orders not from the President, not from the White House, and not even from OMB, but from other agencies. The striking extent to which agencies are subject to each other's control further undercuts the unitary executive model. For example, one agency must often obtain a permit from another in order to construct or operate some type of facility.<sup>123</sup>

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121. As a former DOJ official has put it, "'the White House is calling' is a far more common telephone message than 'the President is calling.'" D. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 2 (1980); see also *id.* at 27-36 (President unable to manage DOJ; neither the President nor the White House can address a significant number of specific cases).

122. For example, Executive Order No. 12,291, 3 C.F.R. 127 (1982), requires agencies to submit proposed regulations to OMB for review, and under Executive Order No. 12,088, 3 C.F.R. 323 (1986), OMB resolves conflicts between EPA and other agencies over compliance with pollution control standards.

123. For example, RCRA requires that all hazardous waste disposal facilities obtain a permit from EPA. 42 U.S.C. § 6925 (1988). This obligation applies to federal as well as private facilities. See *id.* § 6961; *Federal Environmental Compliance Hearing*, *supra* note 15, at 203 (statement of F. Henry Habicht, II, Ass't Att'y Gen.).

such permits will not merely grant permission to proceed, but impose a number of binding conditions. These requirements are, in essence, orders from one agency directly to another without a trace of presidential involvement. Second, agencies are frequently bound by the regulations of other agencies. Although OMB may have some input into a regulation, neither it nor the President has the final say as to its content.<sup>124</sup> Third, the executive may subject agencies to more direct interagency control, as the Court's decision in *United States v. ICC*<sup>125</sup> illustrates. The ICC required the Army to pay the full amount charged by the railroads—or, to be completely precise, refused to require the railroads to pay any of it back.<sup>126</sup> Fourth, under various schemes, one agency has initial decisionmaking responsibility, but another agency can overrule it.<sup>127</sup>

In short, components of the executive branch—broadly understood to include independent agencies—order each other around in a hundred different ways without the President's involvement. The conception of the executive branch as dominated by the President, with its component agencies operating only on his orders in a tidy hierarchical pyramid, is false.

*e. Placement of Responsibility with the Agency*

Giving added significance to the prior items, Congress may, and usually does, place decisionmaking power in an agency head rather than in the President. If Congress does so, the President may influence the decision indirectly, but the decision remains that of the department head.<sup>128</sup> Even the Supreme Court opinion

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124. By its terms, Executive Order No. 12,291, 3 C.F.R. 127 (1982), requires only that an agency submit proposed rules and accompanying regulatory impact analyses to OMB for review; hold off on publication until OMB has completed its review; respond to OMB's views, if any; and include those views and the agency's response in the rulemaking file. Exec. Order No. 12,291 § 3(c), (e), 3 C.F.R. 127 (1982). OMB review does not even apply to independent agencies. *Id.* § 1(d). To be sure, OMB's actual influence over agency regulations is significantly greater than these provisions imply.

125. 337 U.S. 426 (1949); see *supra* notes 96-99 and accompanying text; *infra* notes 174-83 and accompanying text.

126. 337 U.S. at 428.

127. For example, the discharge of dredged or fill material into the waters of the United States requires a permit from the Army Corps of Engineers. 33 U.S.C. § 1344 (1988). Although the Corps has the basic permitting responsibility, EPA can veto a Corps permit. *Id.* § 1344(c). On several occasions the Corps has issued a permit to a private applicant, only to have EPA step in and revoke it. See, e.g., *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, *Bersani v. EPA*, 489 U.S. 1089 (1989).

128. E.g., R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 111

that most insistently protects the President's administrative prerogatives, *Myers v. United States*,<sup>129</sup> endorses this scheme. Although the opinion is for the most part a paean to presidential authority, it acknowledges that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."<sup>130</sup>

Placing final decisionmaking authority in an agency head rather than in the President may not look so meaningful if the former serves at the latter's pleasure.<sup>131</sup> What official will ignore the President's wishes if doing so is just going to get her fired? In practice, however, the removal power does not undermine placement of decisionmaking authority with the subordinate.<sup>132</sup> Removal is an atom bomb. Although it serves some of the deterrent functions thought to be served by nuclear weapons, its very power means it will be used only rarely. Removal is disruptive, uncertain (given the Senate's advice and consent role with regard to the supposedly more amenable replacement), and at best a slow and roundabout way of reversing the offending decision.<sup>133</sup>

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(1985) [hereinafter R. PIERCE]; Harter, *Executive Oversight of Rulemaking: The President is No Stranger*, 36 AM. U.L. REV. 557, 563 (1987); McGarity, *supra* note 120, at 465-72; Strauss, *supra* note 88, at 649-50; Strauss & Sunstein, *supra* note 120, at 200-01; Verkuil, *supra* note 120, at 957. But see Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 58-59.

129. 272 U.S. 52 (1926) (Taft, C.J.).

130. *Id.* at 135. Between his tenure as President and that as Chief Justice, William Howard Taft wrote:

[C]onsider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer.

W. TAFT, *THE PRESIDENT AND HIS POWERS* 81 (Columbia Paperback ed. 1967).

131. See R. PIERCE, *supra* note 128, at 111 ("Attorneys General have long advised their Presidents to acquiesce in the congressional decision to locate authority in subordinates. After the fact, the President can always exercise his executive will by ordering the offending official to be fired . . .") (footnote omitted).

132. *E.g.*, Strauss & Sunstein, *supra* note 120, at 201 n.56.

133. The fact that the agency took action against the President's wishes, leading to the dismissal of the agency head, in no way affects the validity of that action. A successor more congenial to the President's point of view can of course revoke or amend the now-removed officer's action, but the action is effective unless and until that happens. Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 208 (1981).

Additionally, it can carry an enormous political price. Giving the final decision to an agency head who serves at the President's pleasure, therefore, is not the functional equivalent of giving the decision directly to the President.

Further eroding the President's theoretical ability to run the executive branch is the fact that the President also lacks legal authority to supervise directly subordinate officers within executive departments. Only the department heads may exercise such control.<sup>134</sup>

#### *f. Adjudications*

When an agency adjudicates, the President is not free even to influence, much less direct, the result. The Administrative Procedure Act's<sup>135</sup> requirement that the agency decision rest exclusively on the record of the hearing<sup>136</sup> and statutory and constitutional prohibitions on ex parte contacts<sup>137</sup> preclude presidential control.

#### *g. Removal*

The existence of the civil service,<sup>138</sup> the independent counsel,<sup>139</sup> and independent agencies<sup>140</sup> underline the incompleteness of presidential control of the executive branch. Each of these examples of Congress' ability to insulate executive officers from removal—and thus some degree of control—by the President would violate a strong version of the unitary executive theory.

#### *h. Summary*

These considerations are not exhaustive. They are sufficient to indicate that presidential control over agencies is hampered

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134. 1 J. STEIN, G. MITCHELL, & B. MEZINES, *ADMINISTRATIVE LAW* § 4.02[2] (1988) (citing 10 Op. Att'y Gen. 527-29 (1863)).

135. 5 U.S.C. §§ 555-706 (1988).

136. *Id.* § 556(e).

137. *Id.* §§ 554(d)(1), 557(d)(1); *Sierra Club v. Costle*, 657 F.2d 298, 406-07 (D.C. Cir. 1981) (noting that due process may limit presidential interference in adjudications and that "there is no inherent executive power to control the rights of individuals in such settings"); see also *Wiener v. United States*, 357 U.S. 349 (1958) (inferring limits on President's removal authority in adjudicatory setting despite statutory silence).

138. See *United States v. Perkins*, 116 U.S. 483 (1886).

139. See *Morrison v. Olson*, 487 U.S. 654 (1988); 28 U.S.C. § 596(a) (1988) (independent counsel may be removed only by the Attorney General and only for cause).

140. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). But see *infra* Part V.A.2.

in many ways and that agencies constantly interact without presidential supervision. Government agencies necessarily have a life of their own; they are not merely the eyes and ears of the President. The pristine model of the unitary executive has no relation to political or constitutional reality.<sup>141</sup> Interagency litigation is not inherently or per se inconsistent with the functioning of the executive branch.

In short, the choice of a unitary rather than a plural executive reveals little about the constitutionality of intraexecutive litigation. To observe that nominally one person sits at the top is only the beginning, not the end, of the analysis. The principles underlying the choice of the unitary executive may inform our understanding of the operation of the executive branch. The view that interagency litigation is per se inconsistent with the proper functioning of the executive branch is, however, untenable. Neither in itself nor via article III does the unity of the branch automatically close the door to interagency litigation.

### C. *Resolution of Interagency Disputes as Advisory Opinions*

We may quickly reject one other argument that rests on the President's authority as Chief Executive. At first blush, a decision in a suit between executive branch agencies might appear to be an advisory opinion<sup>142</sup> because the President, who controls both parties, would be able to accept or ignore the ruling.<sup>143</sup> This concern does not withstand analysis.

141. To return to the corporate analogy, whatever the merits of the "new economic theory of the firm" as applied to *corporations*, it seems to me a much more accurate model of the executive branch than its managerialist competitor. See *supra* note 46.

142. A lawsuit is a nonjusticiable request for an advisory opinion if there is not a substantial likelihood that the court's decision will bring about some change or have some effect. E. CHEMERINSKY, *supra* note 38, at 45. The classic example is a case in which the executive or legislative branch can choose to accept or reject a court's conclusion. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

143. See Note, *supra* note 36, at 1054 (raising but dismissing the advisory opinion concern). DOJ has so argued on at least one occasion. See *Whistleblower Protection Act of 1986: Hearings on H.R. 4033 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 99th Cong., 2d Sess. 87 (1986) (statement of Stuart Schiffer, Deputy Ass't Att'y Gen.) (citing *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.(a)). Its confidence in this argument seems slight. Mr. Schiffer did not repeat the advisory opinion argument in giving otherwise essentially identical testimony at two subsequent hearings on the same legislation. Compare *id.* with *Whistleblower Hearings, supra* note 94, at 453, and *Whistleblower Protection Act of 1987: Hearing on H.R. 25 Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 3 (1987).

Such dual control, to the extent it in fact exists,<sup>144</sup> does not reduce a court's ruling to an advisory opinion. As the loser, the President is not free to ignore a court ruling in this setting any more than when he controls *only* the losing party. In either case, a court's declaration of the law and any mandated relief are binding. The President's discretion to resolve disputes between subordinate agencies operates only within judicially determined limits of legality.

Conversely, as the winner, the President is indeed free to forgo the fruits of victory, in which case the decision would have no effect; but this too is no more or less true than when the opponent is a private party. The government, like any litigant, can always let the loser off the hook or consent to its wishes; that possibility has nothing to do with whether the loser is also a governmental party. The fact that the President is on both the winning and losing sides thus does not diminish the binding effect of the court's ruling.

#### IV. INTERAGENCY LITIGATION: PREREQUISITES AND PRESUMPTIONS

In light of the foregoing, blithely invoking principles of the unity of a single person or of the executive branch cannot determine the justiciability of intragovernmental litigation. In fact, the surface appeal of these principles is insufficient even to establish a presumption against such litigation. This Part proposes that, assuming Congress has authorized interagency suits, the presumption should be in favor of justiciability.

##### A. *Statutory Authorization of Litigation*

Whatever the constitutional rule, an agency cannot go to court—against another agency or anyone else—without statutory authority to do so. Congress could have foreclosed judicial resolution of all of the cases discussed herein. In the *United States v. ICC*<sup>145</sup> setting, for example, Congress could have placed agencies outside the ICC's jurisdiction altogether, leaving resolution of wharfage charges to negotiation and lawsuits between the government and the railroads. Alternatively, it could have given other agencies some special role or authority within the ICC proceedings or

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144. See *supra* notes 106-41 and accompanying text.

145. 337 U.S. 426 (1949).



forbidden governmental petitions for review of the ICC's orders, making the ICC's decision conclusive as to any other federal agency. Any of these statutory schemes would have eliminated the possibility of the case of *United States v. ICC*.<sup>146</sup>

I do not raise this point to reassure those concerned about weakening presidential power. We cannot rely on Congress to preserve presidential authority by foreclosing interagency litigation; the opposite is more likely. Rather, I mean only to point out that in any given case, a court must determine that the agencies involved are properly before it as a statutory matter before turning to the Constitution.

Whether a cause of action exists will, in general, turn on the judicial review provision of the particular substantive statute. The two primary default statutes, the Administrative Procedure Act (APA)<sup>147</sup> and the Hobbs Act,<sup>148</sup> differ. By its terms, the APA does not create a cause of action for one agency to sue another. It authorizes an aggrieved person to seek judicial review<sup>149</sup> and explicitly defines "person" to exclude agencies.<sup>150</sup> However aggrieved an agency might be, it has no cause of action under the APA to challenge another agency's action. In contrast, the Hobbs Act, which applies to review of decisions by five specific agencies,<sup>151</sup> permits any party to the administrative proceedings, without limitation, to seek judicial review. The Hobbs Act contains no indication that it excludes other agencies from the category of parties who can seek judicial review, nor have courts so read it.<sup>152</sup>

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146. For an example of a setting in which interagency litigation would be appropriate under the standards proposed in this Article but has not been permitted by Congress, consider the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988). The Council on Environmental Quality is charged with overall implementation of the Act. *Id.* § 4344. It has issued regulations, 40 C.F.R. pts. 1500-17 (1990), and is responsible, for example, for resolving interagency disagreements over proposed projects with possible adverse environmental effects. *Id.* pt. 1504. It has no authority, however, to challenge the adequacy of an impact statement in court, and it has never attempted to do so. Such an action would fall neatly within the category of justiciable interagency disputes set out in this Article.

147. 5 U.S.C. §§ 551-706 (1988).

148. 28 U.S.C. §§ 2341-2351 (1988).

149. 5 U.S.C. § 702.

150. *Id.* § 701(b)(2) (for purposes of provisions on judicial review, definition of "person" in § 551 applies); *id.* § 551 ("person" is "an individual, partnership, corporation, association, or public or private organization *other than* an agency") (emphasis added).

151. The Hobbs Act covers petitions for judicial review of decisions by the FCC, the Federal Maritime Commission, the Department of Agriculture, the Nuclear Regulatory Commission, and the ICC. 28 U.S.C. § 2342.

152. *See United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980).

Courts should interpret statutory authority to litigate to apply to interagency litigation unless Congress clearly has indicated the contrary. This was the Court's approach in *United States v. ICC*.<sup>153</sup> As shall become clearer below, there is no reason to interpret the statute otherwise.<sup>154</sup>

### B. *A Presumption of Justiciability*

For several reasons, I begin with a presumption in favor of justiciability of interagency disputes. First, a nonjusticiability rule would be an exception to the general principle that courts have the authority to give orders to the other branches (to the extent such orders rest on legal grounds, of course). As a result, arbitrary, capricious, or otherwise illegal agency actions would stand.<sup>155</sup> In intragovernmental suits, the judiciary fills its normal role of policing other governmental actors, a function it is, by hypothesis, free to perform if only someone else would ask it to do so. Judicial review of agency action is critical to the legitimacy of the administrative state;<sup>156</sup> immunizing a class of agency decisions from review undermines that legitimacy. Moreover, another agency may be uniquely able to inform the court of the

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153. 337 U.S. 426, 430 (1949) ("Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection.").

154. For example, the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988), has never been the basis of interagency litigation, but should be. The Act forbids any federal agency to harm any member of a species designated as endangered by the Department of the Interior (DOI). *Id.* § 1536(a). The Act also authorizes DOI to assess an administrative penalty on "any person" who violates the Act and to request DOJ to bring a civil action to enforce the penalty. *Id.* § 1540(a). "Person" is defined to include "any officer, employee, agency, department, or instrumentality of the Federal Government." *Id.* § 1532(13). The statute's plain words thus authorize DOI enforcement, including a civil action, against sister agencies. They should be read to mean what they say.

In practice, this has not occurred. For example, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the famous snail darter case, DOI had told the Tennessee Valley Authority (TVA) that the TVA would violate the Act were it to complete Tellico Dam. DOI was powerless to prevent the TVA from pressing ahead, so private citizens brought the lawsuit. DOI did not participate. When the case reached the Supreme Court, the Solicitor General represented the TVA, taking a position at odds with DOI's.

155. It is easy to overemphasize the harmful consequences of precluding such litigation. In most cases, a private litigant will challenge the agency action. A no-intragovernmental-litigation rule is therefore hardly a prescription for open lawlessness. In addition, allowing intragovernmental suits could mean that reasonable and legal actions also will be challenged, with attendant delay, disruption, and expense.

156. Sunstein, *supra* note 116, at 463-78. The presumption in favor of the justiciability of interagency litigation thus reflects many of the same concerns that underlie the usual "presumption of reviewability" of agency action. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

reasonableness and consequences of the challenged agency action.

These concerns would easily be outweighed if interagency litigation was fundamentally inconsistent with the overall constitutional scheme. It is not. The general objections to judicial resolution of intraexecutive disputes draw on two prominent strands of separation of powers analysis. One is the basic idea that each branch must stay off the others' turf; each must do only its job except to the extent the Constitution explicitly authorizes officious intermeddling.<sup>157</sup> The second is that the Court will set aside the actions of one branch (usually Congress) if its actions so interfere with another branch's (usually the President's) functioning that the latter cannot fulfill its constitutionally assigned role.<sup>158</sup>

Judicial resolution of interagency disputes neither trespasses nor interferes. First, the real interference by courts in executive affairs is in telling officers within that branch what to do. Yet this authority has been settled since *Marbury v. Madison*,<sup>159</sup> and courts exercise it all the time. Indeed, by hypothesis, courts can boss the executive around in these cases; the argument is only that an outsider must invoke that authority. To say that courts can tell the executive branch what to do only if it is at the request, and for the benefit, of someone *outside* the branch is incongruous.

Second, not only do the courts frequently tell the executive what to do, the executive often, if not quite as frequently, presents multiple and conflicting views to the courts. Although the executive aims for a consistent litigating position,<sup>160</sup> it does not always achieve it. At times, DOJ alerts a court to conflicting agency positions,<sup>161</sup> or an agency that is not a party participates

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157. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986); *INS v. Chadha*, 462 U.S. 919, 956-58 (1983).

158. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685-86 (1988); *Nixon v. General Servs. Admin.*, 433 U.S. 425, 443 (1977).

159. 5 U.S. (1 Cranch) 137 (1803).

160. See Exec. Order No. 12,146, 3 C.F.R. 310 (1979); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1459, 1464 (1969).

161. For example, *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), concerned a company's refusal to provide the FTC with copies of reports it filed with the Census Bureau. The Solicitor General's brief informed the Court that the Department of Commerce, the Census Bureau, and the Bureau of the Budget believed that the reports were not subject to compulsory production, whereas the FTC and the Antitrust Division of DOJ held the contrary view. The Solicitor General himself, "fully recognizing the delicate balance of opposing considerations," ultimately sided with the first three and against the Antitrust Division. *Id.* at 217. He lost. *Id.* at 217-18.

as an amicus, taking a position in conflict with another agency that is a party.<sup>162</sup> The article III problem does not arise in such cases because they involve a single governmental party. The article II concerns might still be present, although the President can be deemed to have consented to presentations of these disparate positions.<sup>163</sup> If, as no one seems to deny, the Constitution permits two governmental nonparty participants to present conflicting positions to a court, then one would expect it to be equally acceptable for two governmental *parties* to do so as well. The practical differences between these two situations are virtually nil.<sup>164</sup>

Third, the reason that judicial involvement in executive matters is not a per se violation of separation of powers is that the courts' scope of review is limited. Courts cannot make the executive's decisions or supplant the executive's discretionary authority; all they can do is ensure that the executive acted within the law.<sup>165</sup> A court's review, at one agency's request, of the legality of another agency's action therefore is the most limited sort of interference with the President's authority. Indeed, especially since the Court's decision in *Chevron U.S.A. Inc. v.*

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162. See *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537 (7th Cir. 1989), cert. denied, *Investment Co. Inst. v. SEC*, 110 S. Ct. 3214 (1990). In this case, the court had to determine whether an "index participation" was a security, and so within the jurisdiction of the SEC, or a futures contract, and so within the jurisdiction of the Commodities Futures Trading Commission (CFTC). *Id.* at 539. Deeming index participations to be securities, the SEC had authorized stock exchanges to trade them. *Id.* at 540-41. Three futures markets filed petitions for review. *Id.* The CFTC filed an amicus brief, siding with the petitioners. *Id.* at 538. In effect, both agencies were before the court.

163. The President's concurrence in the presentation of conflicting positions cannot salvage the practice if, as a strong version of the unitary executive would have it, the President is constitutionally obligated to hammer his subordinates into a single position.

164. Two responses are possible. First, perhaps the government should not be permitted to present conflicting views to a court even when there is only one governmental party. Such a rule would have little to recommend it. On the value of presenting multiple government positions to a court, see Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759, 768-69 (1951); Note, *supra* note 160, at 1466-67.

Second, one might distinguish the two situations on the ground that if the disagreeing agencies are not both parties, the case necessarily arose between the government and a private party. Only a court can resolve that dispute. And in resolving it, knowing the range of views within the executive branch is valuable to the court. If this distinction is valid, it becomes an argument for allowing an agency to intervene in pending litigation against another agency but not to bring such a suit itself. Such a rule is discussed *infra* Part V.D.

165. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In principle, therefore, judicial resolution of a dispute cannot, by definition, conflict with the President's obligation to execute the laws faithfully. The court does no more than determine what the law requires.

*Natural Resources Defense Council*,<sup>166</sup> the constraints on judicial review of agency decisions are generally far greater than those that limit the decisionmaking agency in the first place. To say that interagency litigation requires courts to resolve disputes over regulatory policy is also misleading. Such a judicial role would be unseemly at best. Although the policy disagreement—for example, should this hydroelectric project go ahead?—may be what got the case into court in the first place, it is not the issue that the court will resolve. Rather, the court will decide legal issues, fulfilling a judicial rather than an executive function, exactly as it does in litigation between the government and a private party. I do not mean to overstate this point. If courts truly exercised only “judgment” and never “will,”<sup>167</sup> then interagency litigation could never trespass on the President’s authority. In this sense, interagency litigation is a concern at all because judicial decisionmaking inescapably does involve so much policymaking.<sup>168</sup>

Fourth, courts often will decide intragovernmental legal disputes in the end because a private party sues. Allowing an executive agency to influence or prevent such litigation by bringing its own lawsuit may enhance rather than reduce presidential control,<sup>169</sup> particularly if the agencies settle the case, thereby

166. 467 U.S. 837 (1984) (unless congressional intent is clear, court must accept an agency’s interpretation of statute it administers if the interpretation is not wholly unreasonable); see also 5 U.S.C. § 706(2)(A) (1988) (court to set aside agency action that is arbitrary, capricious, or an abuse of discretion).

167. *THE FEDERALIST* No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

168. Judicial resolution of interagency disputes thus becomes increasingly dubious as they involve more policy and less law. For a court, at the request of one agency, to set aside another agency’s decision as arbitrary and capricious would be more problematic than for it to determine that the challenged agency lacked jurisdiction under the statute. I argue below that agency turf wars are justiciable; courts should enforce statutory allocations of responsibility. Such interagency litigation threatens the proper functioning of the executive branch and requires the judiciary to do the executive’s job far less than if, for example, the Surgeon General, concerned over public health, had brought the air bags case. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (setting aside as arbitrary and capricious decision of the National Highway Transportation Safety Administration to withdraw requirement that new cars be equipped with passive restraints).

169. EPA has noted its particular concern over the fact that others could sue federal facilities whereas it could not:

[Federal facilities] will be sued whether or not EPA is allowed to sue them, and the courts will have to decide those cases. In such circumstances, to deny that EPA could also bring such actions would be to deny the agency that is supposed to shape enforcement policy under the statute the full right to shape it in this significant class of cases through the pattern of law suits

protecting themselves against future litigation by entry of a consent decree.<sup>170</sup> In addition, the possibility of later litigation means, for example, that the Attorney General's resolution of an interagency legal dispute may be only temporary because it is subject to judicial reversal. Dispositive judicial resolution earlier rather than later would further consistent and predictable administration.<sup>171</sup>

Fifth, if one accepts the unitary executive model, under which the President has close control over agency actions,<sup>172</sup> then the President will always be able to keep a dispute out of the courts either by ordering a resolution himself or by forbidding litigation. Only if the President is too busy, too unconcerned, or too uncertain to resolve an interagency dispute, or if he affirmatively desires judicial resolution, will a dispute reach the courts. If one assumes that the President *can* prevent the litigation if he so desires, interagency litigation by definition does not interfere with his authority. The response would be that the point is not that the President must be *allowed* to settle interagency disputes; he *must* settle them as a matter of constitutional obligation. Merely keeping the matter out of the courts, however, will not force the President to decide such disputes; often it will only

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it brought and did not bring, any [sic] arguments it made [in] cases at trial. In addition, it would deprive EPA of the most effective means in many cases of educating such facilities to their responsibilities under the statute.

1 Op. EPA General Counsel 297, 311 (1973).

The argument goes beyond merely the value of EPA's participation in the overall enforcement process. Under the pollution statutes, an enforcement action by EPA precludes a citizens' suit. *E.g.*, Clean Air Act of 1970, § 304, 42 U.S.C. § 7604(b)(1)(B) (1988). Were EPA to sue DOD, private citizens could not. Of course, to the extent that this argument is that EPA enforcement fosters presidential authority because the President could influence both sides of the litigation, it raises significant article III concerns.

170. *Review of Hazardous Waste Disposal Practices at Federal Facilities: Hearing Before Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. 260 (1983) (memorandum from M. Durning, EPA Ass't Adm'r for Enforcement, to EPA Dep. Adm'r (Mar. 12, 1979)) (lamenting that DOJ's refusal, on justiciability grounds, to file a consent decree between EPA and DOD would only subject the Army to greater uncertainty and the threat of additional litigation).

171. Note, *Judicial Resolution of Interagency Legal Disputes*, 89 YALE L.J. 1595, 1604-06 (1980). These considerations, however, cut both ways. If the overall issue actually matters, the fact that a private party will sue might also mean that interagency litigation is not necessary. Furthermore, the possibility that private parties might *not* sue suggests that interagency litigation would be not merely unnecessary but mistaken. If the directly affected private parties are not sufficiently concerned to sue, then the federal agencies should not rock the boat. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1736 (1975). The scheme proposed in Part V obviates many of these concerns.

172. As discussed above, this model is in many ways inaccurate. See *supra* Part III.B.

allow the existing dispute to fester. In addition, in many situations, the decision is not the President's to make because Congress has granted decisionmaking authority to an agency head.

In sum, intragovernmental litigation hardly means the end of constitutional government as we know it. In addition, turning to the courts rather than to the President for resolution of interagency disputes has several practical advantages. Litigation will put the matter to rest. It may settle a tricky legal issue as to which the President is uncertain. It will keep the government's hand in litigation that is likely to occur anyway at the insistence of private parties. Lastly, an injunction may improve the executive's ability to get money from Congress to perform the action—now clearly legally mandated. These goals raise article III questions, although none are unanswerable.<sup>173</sup> They do not, however, raise concerns about undermining the President's authority.

## V. THREE MODELS OF INTERAGENCY LITIGATION

Interagency litigation falls into three categories according to the capacity in which the litigants appear. First, one agency may challenge a decision that applies directly to it. Second, agencies may disagree over actions that affect private parties. Third, agencies may have disputes over regulatory authority, such as disagreements over jurisdiction. Courts have heard interagency

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173. For example, if the President wants to go to court merely because he is uncertain of the legal rules, would judicial resolution be an advisory opinion? It would not. The motivation for bringing a lawsuit has nothing to do with the fact that the result is advisory. As decades of test cases have shown, the fact that a lawsuit is brought more for the sake of obtaining a legal ruling than to resolve a particular dispute does not in itself render the suit nonjusticiable.

Similarly, the fact that both parties may welcome judicial resolution of the legal issue does not mean they are not adverse. Adversity is lacking only if the respondent agency *wants* to be reversed. The situation is akin to that in which the Solicitor General responds to a certiorari petition by stating that the decision, though correctly decided below, is sufficiently important to merit review. That petitioner and respondent agree the Court should take the case does not mean that they are not adverse.

A harder question is whether the executive branch's desire to support a later appropriations request with a judicial decree renders the suit collusive. The shared desire of the litigants to obtain a judgment that will be useful against a third party is a classic example of collusion. *See, e.g.,* *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850). The adversity requirement, however, is flexible, and courts have allowed plenty of suits that appeared more suspicious than this example. The *possibility* of collusion of this sort does not justify a *per se* prophylactic bar on interagency litigation. Rather, it means that the court must be alert for the possibility, dismissing the suit if it concludes that the litigation is a joint effort to make it look as if the courts are forcing the agency to do something it in fact wants to do but could not otherwise fund. *See United States v. Nixon*, 418 U.S. 683, 696-97 (1974).

lawsuits of all three types, usually without discussing justiciability. This Part argues that cases in the first and third categories are justiciable and those in the middle category are not. To reach that conclusion, however, we must first consider possibly relevant factors other than the roles of the litigants.

A. *United States v. ICC and Interagency Regulation*

The best known and most often cited example of interagency litigation is *United States v. ICC*.<sup>174</sup> The Army ran up a substantial bill by using railroads for the shipment of goods during World War II. The railroads' rates included a charge for wharfage, the unloading of goods from the railroad car to the pier. During the War, the Army had unloaded the trains itself. It accordingly asked the railroads to refund the wharfage portion of its bill. When the railroads refused, the Army, represented by DOJ, filed a complaint with the ICC for reparations. The ICC denied relief, and DOJ sought judicial review. Because the authorizing statute stated explicitly that the action for review was "against the United States,"<sup>175</sup> the three-judge district court dismissed the complaint on the theory that a person may not sue himself.<sup>176</sup>

The Supreme Court reversed.<sup>177</sup> Admonishing that "courts must look behind the names that symbolize the parties to determine whether a justiciable case or controversy is present,"<sup>178</sup> it found that the government, like any shipper, could invoke the usual administrative and judicial apparatus to determine who was en-

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174. 337 U.S. 426 (1949). Two other Supreme Court decisions bear this caption. See *United States v. ICC*, 396 U.S. 491 (1970) ("Northern Lines Merger Case") (DOJ challenge to the ICC approval of a railroad merger); *United States v. ICC*, 352 U.S. 158 (1956) (Army challenge to ICC denial of its request for reparations from private railroads). Only the 1949 opinion discussed justiciability.

For cases with an essentially identical arrangement of parties and similar issues, see *Ford Motor Co. v. ICC*, 714 F.2d 1157 (D.C. Cir. 1983), and *United States v. United States*, 417 F. Supp. 851 (D.D.C. 1976), *aff'd sub nom.* *National Classification Comm'n v. United States*, 430 U.S. 961 (1977).

175. *United States v. ICC*, 78 F. Supp. 580, 582 (D.D.C. 1948) (quoting 28 U.S.C. § 46 (1946)).

176. *Id.* at 583. The incongruity of the suit being both by and against the United States was underlined by the fact, specifically pointed out by the court, that the same Assistant Attorney General signed the pleadings for both the petitioner and the respondent.

177. *United States v. ICC*, 337 U.S. at 426. DOJ had by now settled on representation of the United States alone; the ICC had its own counsel, though the "surface anomaly" of the "formal appearance of the Attorney General for the Government as statutory defendant" remained. *Id.* at 432.

178. *Id.* at 430.



titled to the alleged overpayment.<sup>179</sup> Even though "this case is *United States v. United States*,"<sup>180</sup> it presented a justiciable controversy.<sup>181</sup>

The Court's discussion is incomplete. It gives little hint of the exact limits of justiciability for interagency litigation. The Court looked behind the names that symbolized the parties,<sup>182</sup> but did not say what it found there that ensured justiciability. It observed that the issue to be resolved was of a normally justiciable sort and that both sides were ably and separately represented. Neither of these factors, important though they may be in general, is responsive to the *United States v. United States* problem.

The result in *United States v. ICC* makes intuitive sense.<sup>183</sup> A more complete analysis of why the decision seems right is necessary, however, to determine what other intragovernmental battles are appropriate for judicial resolution.

### 1. *The Presence of a Nongovernmental Real Party in Interest*

Under one view, *United States v. ICC* was first and foremost a dispute between the United States and the railroads. After all, the government and the railroads were fighting over money.<sup>184</sup>

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179. *Id.*

180. *Id.*

181. *Id.*

182. Its justification for doing so was an analogy to a hypothetical suit by John Smith against John Smith. That there might be two different John Smiths, said the Court, "illustrates" the need to look behind the names in the caption. *Id.* at 430. Of course, the Court would not look behind the names of *John Smith v. John Smith* if it knew there was only one John Smith in all the world; the possibility of two John Smiths does not in itself justify looking behind "the United States." The Court did not explain why or to what extent there can be two United States.

183. Most commentators seem to accept *United States v. ICC* as rightly decided. But see J. RADCLIFFE, *supra* note 22, at 56-58; *Agency Autonomy and the Unitary Executive*, *supra* note 80, at 502, 517 (remarks of Judge Silberman).

184. See also *Ishverlal Madanlal & Co. v. SS Vishva Mangal*, 358 F. Supp. 386 (S.D.N.Y. 1973). The Indian Supply Mission, an arm of the President of India, owned cargo lost in a fire aboard a ship owned by the Indian government. It brought a negligence action against the vessel. *Id.* at 387-88. The defendants argued that no case or controversy could exist between the government of India as shipper, on the one hand, and the government as owner of the vessel, on the other. *Id.* at 388. The court allowed the action to proceed for two reasons. First, the vessel was owned by a quasi-public corporation somewhat separate from and certainly not managed by the Indian government. *Id.* at 390-91. Second, and immediately relevant to this reading of *United States v. ICC*, the court relied on the fact that the true defendant was the insurer of the cargo. *Id.* The insurance company was doing the actual litigating and would be liable for any judgment. *Id.* at 387-88. A justiciable controversy existed because the action was in essence between the Indian government and a private company. *Id.* at 391.

In the absence of the ICC and the attendant regulatory scheme, this dispute would be a garden-variety contract action that clearly would be justiciable.<sup>185</sup> The fact that Congress had created a federal agency to resolve such quarrels in the first instance should not have precluded ultimate judicial resolution. The railroads themselves, intensely interested in holding onto their money, appeared before the Court to argue their cause. Indeed, the Court at one point referred to the railroads as "real parties in interest," although in a section of the opinion dealing not with justiciability but with congressional intent to authorize judicial review of the ICC's order.<sup>186</sup> The government may well be unable to sue itself, then, but that is not what it was doing in this case.<sup>187</sup>

Although a nongovernmental-real-party-in-interest test provides a tidy rationale for *United States v. ICC*,<sup>188</sup> it does not

185. In fact, under the statutory scheme as it then existed, the Army could have sued the railroads directly in district court without going first to the ICC. 49 U.S.C. § 9 (1946). The principal holding of the case was that Congress did not intend, in offering this choice of remedies, to preclude judicial review of an adverse determination by the ICC. *United States v. ICC*, 337 U.S. at 432-40.

186. 377 U.S. at 432.

187. See HART & WECHSLER, *supra* note 15, at 1318 (asking whether interagency litigation presents a case or controversy "[i]f no private parties, such as the railroads [in *United States v. ICC*], have a real interest in the result").

DOJ's Office of Legal Counsel (OLC) concluded that an interested private party is indispensable to the justiciability of interagency disputes. 1 Op. Off. Legal Counsel 79 (1977). The question arose during a dispute between the Postal Service and the IRS. *Id.* at 79. The IRS had assessed the Postal Service \$10 million under a transportation tax payable by all shippers of goods by air. *Id.* at 80. Had the Postal Service been a private party, it would have had to pay the tax, claim a refund, and then sue the IRS. *Id.* OLC concluded, however, that a suit between the IRS and the Postal Service would be nonjusticiable because the litigants were both federal agencies. *Id.* at 81. The memorandum distinguished *United States v. ICC* on the ground that it involved private real parties in interest, namely, the railroads. *Id.* at 80-84. In contrast, the fight between the Postal Service and the IRS was a purely intragovernmental disagreement over which of two governmental entities was entitled to money that Congress appropriated. *Id.* at 81. The opinion acknowledged that the Postal Service enjoys "a degree of independence from the executive branch," *id.* at 83, and so real adverseness might exist between the parties. The absence of a private real party in interest, however, was fatal.

OLC's memo predates DOJ's infatuation with the unitary executive idea, and its rationale is completely unresponsive to concerns about presidential authority. DOJ has not abandoned this approach, however, although it has shifted its emphasis from article III to article II. DOJ thus has repeated the nongovernmental-real-party-in-interest rule in arguing that EPA cannot bring an enforcement against another agency that is violating the environmental laws. See *Federal Environmental Compliance Hearing*, *supra* note 15 (memorandum from John Harmon to Michael J. Egan); see also 6 Op. Off. Legal Counsel 180 (1982).

188. The same is true for other intragovernmental suits. For example, the many suits between the FLRA and federal agencies lend themselves to such an explanation. See, e.g., cases cited *supra* note 7. Such litigation is actually between the employing agency and its employees or their union; the FLRA is merely the regulatory intermediary.

magically explain all the cases. First, the test is at odds with the few decisions dismissing interagency litigation as nonjusticiable. The two cases DOJ cited as important examples of appropriate judicial self-restraint both involved private parties. In *Defense Supplies Corp. v. United States Lines*,<sup>189</sup> the United States Court of Appeals for the Second Circuit dismissed a suit by a government corporation against the United States for damages to wool carried on a government-owned ship.<sup>190</sup> In a short opinion by Judge Frank, the court reasoned that the parties were one and the same, and the plaintiff could not sue itself.<sup>191</sup> Private insurers, however, were out \$22,000; they would be reimbursed to the extent that the plaintiff recovered. A clearer example of private real parties in interest is difficult to imagine.<sup>192</sup> Similarly, in *United States v. An Easement and Right of Way*,<sup>193</sup> the United States District Court for the Eastern District of Tennessee dismissed a condemnation action brought by the Tennessee Valley Authority (TVA), a governmental corporation, because one of the defendants was the Farmers Home Administration, which held a security interest in the property. Another of the defendants, however, was a private party—the actual owner of the land over which the TVA sought an easement. The primary dispute was between the TVA and this private party.<sup>194</sup>

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189. 148 F.2d 311 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945).

190. *Id.* at 311-13.

191. In fact, *Defense Supplies* is not about the constitutional limits on intragovernmental litigation. The court held only that the suit did not lie under the Suits in Admiralty Act. *Id.* at 313. It expressly reserved the question whether "such an action," "i.e., a dispute about the proper allocation of government funds between different parts of the government, . . . would be justiciable" if authorized by statute. *Id.* at 313 n.5.

192. Indeed, the court stated that "the real parties in interest are the insurance companies." *Id.* at 312; *see also* *Ishverlal Madanlal & Co. v. SS Vishva Mangal*, 358 F. Supp. 386 (S.D.N.Y. 1973) (largely identical case held justiciable on nongovernmental-real-party-in-interest rationale).

193. 204 F. Supp. 837 (E.D. Tenn. 1962).

194. DOJ's approach is equally inconsistent with other cases, which the OLC memo does not cite, that dismissed intragovernmental litigation as nonjusticiable. Private parties abound, for example, in *Globe & Rutgers Fire Insurance Co. v. Hines*, 273 F. 774 (2d Cir.), *cert. denied*, 257 U.S. 643 (1921). The actual litigants—an insurance company on one side and a former government official and a railroad (presumably with another insurance company behind them) on the other—were private, interested, and wholly adverse. *Id.* at 775-76. The court dismissed because the insurance companies were subrogated to the rights of the insureds, *id.* at 776-77, and the insureds, who were *also* private parties, were deemed to be the United States government because the federal government had taken over the railroads at the time of the collision. *Id.* at 784. This litigation meets any conceivable test for the presence of a nongovernmental real party in interest.

A private party was also present in *Employees Welfare Committee v. Daws*, 599 F.2d

Second, a nongovernmental-real-party-in-interest test must be massaged a fair amount to explain those cases in which the government is not in a financial dispute with a private party. For example, in *United States ex rel. Chapman v. Federal Power Commission*,<sup>195</sup> the Supreme Court allowed the Secretary of the Interior to challenge a license that the Federal Power Commission (FPC) had granted to a private company for construction of a hydroelectric dam. Undeniably, one of the defendants was an immediately interested private party—the utility that would be unable to build the dam if the Department of the Interior (DOI) succeeded. At this level, however, there will almost always be an interested private party. The range of private parties that may challenge governmental action<sup>196</sup> illustrates the extent to which almost anything the government does affects private interests. Conceiving of a government action that would not affect some private party sufficiently to permit that person to go to court is difficult. If that is the test, then the nongovernmental-real-party-in-interest test is meaningless. On the other hand, drawing lines based on the directness or substantiality of the effect is probably doomed.<sup>197</sup> At the very least, this rationale for *United States v. ICC* loses its simple elegance when stretched to cover cases in which the private party, albeit interested indeed,

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1375 (5th Cir. 1979). The court held that a group of Postal Service employees was an instrumentality of the Postal Service and therefore could not sue the regional postmaster for removing vending machines that the employees had maintained in the post office. *Id.* at 1378. Because the suit concerned income from the vending machines that went to the employees, it was arguable that the group was actually private. But even assuming that it was part of the government, then the vending machine company, which also lost money because of the postmaster's decision, was a private real party in interest for purposes of DOJ's test. In fact, in litigation arising on similar facts at another post office, the vending machine company itself sued over the elimination of its machines. *Automatic Retailers of Am., Inc. v. Ruppert*, 269 F. Supp. 588 (S.D. Iowa 1967) (dismissing suit for want of jurisdiction because employees were instrumentality of United States and plaintiffs could not bring a contract suit against the United States for more than \$10,000 in district court).

Finally, in *Juliano v. Federal Asset Disposition Association*, 736 F. Supp. 348 (D.D.C. 1990), a private party brought the suit.

195. 345 U.S. 153 (1953).

196. See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973) (ad hoc group of law students allowed to challenge ICC across-the-board rate increase on allegations that higher transportation costs would give virgin materials a comparative advantage over secondary materials, in turn causing less recycling, in turn leading to more garbage and fewer trees, which would harm the plaintiffs).

197. As Professor Stewart has pointed out, "[T]he rippling effects of a governmental decision on interests throughout the economic and social universe have no limits definable a priori." Stewart, *supra* note 171, at 1735.

and the petitioning agency have a dispute only because of the action of the respondent agency.<sup>198</sup>

Regardless of whether the nongovernmental-real-party-in-interest test is consistent with the case law, it does not make sense in its own right. First, it rests uneasily on the sleight of hand of simply overlooking the very real dispute within the government. The fact that *United States v. ICC*, for example, was an intragovernmental suit is difficult to ignore. The Army had the choice of suing the railroads or seeking relief from the ICC; inescapably, it did the second. As far as the Army was concerned, the ICC had caused the problem, and the Army sought an order to the ICC. In the words of the Administrative Procedure Act, the ICC's action, not the railroads', was what "adversely affected or aggrieved" the Army.<sup>199</sup> Indeed, this is a basic premise of modern administrative law. A well-known example illustrates the point. To prevent the Walt Disney Corporation from despoiling a pristine wilderness, the Sierra Club sued not Disney but the agency that had given Disney permission.<sup>200</sup> That is how public litigation works in the modern administrative state.

Second, even accepting that the railroads, or the utility in *Chapman*, are also parties in interest, it is difficult to see in what meaningful way they are the *real* or only party in interest. In *United States v. ICC*, the Department of the Army had a disagreement with the railroads, but it also had a huge disagreement with the ICC. Similarly, the Secretary of the Interior in *Chapman* had no dealings with the utility and no dispute with it except to the extent that the FPC's license created one. If we must set out in search of a private party because the government cannot sue itself, finding a private party does not mean that the government is no longer suing itself and so does not remedy the initial problem. It does not explain why a suit like this is any *less* a bona fide dispute within the government for being *also* a dispute between part of the government and a private party.<sup>201</sup>

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198. Because I argue below that cases such as *Chapman*, 345 U.S. 153 (1953), were in fact wrongly decided, I do not see their inconsistency with the nongovernmental-real-party-in-interest test as proof that the test is wrong. DOJ, however, derives its test from the decided cases and defends it on the ground that it explains the cases. 1 Op. Off. Legal Counsel 79, 81 (1977). For the reasons I give in the text, it does not.

199. 5 U.S.C. § 702 (1988).

200. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

201. The logical implication of requiring a private party to render the dispute justiciable is that the governmental respondent should not actually participate in the litigation. To the extent the two agencies are at odds, they have a nonjusticiable controversy; to the

Indeed, reliance on the private-real-party-in-interest rationale only underlines the inherent difficulties with these lawsuits. If the United States actually has a dispute with a private party, then perhaps the Constitution requires it to litigate against that party rather than against itself. The fact that the underlying dispute is supposedly between the government and the private party shows that Congress could create a regulatory scheme to allow such litigation.<sup>202</sup> Saying that agencies can litigate against each other only in those settings in which the participation of both is not necessary to settle the dispute is somewhat perverse.

On the other hand, only part of the government has a dispute with the private party. In *United States v. ICC*, the ICC had no dispute with the railroads; indeed, it believed the railroads were correct. There is no reason that it should have been the Army's dispute with the railroads and not the *absence* of any dispute between the ICC and the railroads that counted. Indeed, if the view of any one agency should count, that agency must be the ICC. If it is enough that *any* part of the government has a real controversy with a private party, then we have moved far away from the premise that the government is too much a single entity to fight with itself in court. Yet that premise is what required the presence of a nongovernmental party in the first place. Seeing the Army and the ICC as wholly disconnected acknowledges a degree of separateness between the agencies that would seem to make the private-real-party-in-interest requirement unnecessary in the first place.

Third, the private-real-party-in-interest test does not escape the empty formalism of viewing governmental agencies as the same person, a formalism the Court properly rejected in *United States v. ICC*. This approach looks behind the caption to see who is actually litigating against whom, but is itself merely another sort of formalism.<sup>203</sup> The existence of an interested private party

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extent the petitioning agency is at odds with the private party, that party can litigate on its own behalf. The nongovernmental-real-party-in-interest approach thus becomes an argument *against* intragovernmental litigation by allowing it precisely in the one setting in which it is unnecessary.

202. In fact, Congress did so in *United States v. ICC*, 337 U.S. 426 (1949). The Army, like any shipper, had the option of either filing suit against the railroads or filing a complaint with the ICC. *Id.* at 433.

203. This defect characterizes the OLC memo, for example. It accepts, without analysis, that the bar on litigation by a person against herself forbids interagency litigation; it is because the Army and the ICC are the same person that another party must be found. Then, implicitly recognizing that this rule is silly, OLC finds a silly, formalistic way around it. It does not explain why the silly, formalistic rule should apply in the first place or why an equally formal exception solves the underlying problem with that rule.

does not alter the nature of the dispute between the governmental parties.

Finally, no sensible justification for this role exists. From an article II standpoint, if litigation between federal agencies indicates a breakdown of executive branch decisionmaking, the involvement of a private party hardly remedies the situation.<sup>205</sup> There is an article III argument for a nongovernmental-real-party-in-interest test: the presence of an outsider may ensure concrete adversity, divergent interests, and effective advocacy. Yet such adversity can easily exist even absent an interested private party.<sup>204</sup> More important, so justified a nongovernmental-real-party-in-interest rule ultimately dissolves into absurdity. As a case-or-controversy requirement, this rule makes sense only if the private party is also before the court. The mere existence of a directly affected private party out there somewhere in no way furthers case-or-controversy policies; that party must be before the court if its existence is to ensure effective advocacy and guard against collusion. Indeed, if a private party has a unique interest in the outcome of the lawsuit, then we should be especially concerned if two other, nominally identical parties are doing the actual litigating. Yet requiring not merely the existence but also the participation of a nongovernmental party completely undoes the test. Such a requirement would mean, for example, that the railroads in *United States v. ICC* could have avoided the litigation completely merely by *not intervening*. If the railroads had to be present for the case to be justiciable, then their lawyers surely committed gross malpractice by intervening and so allowing the suit to proceed.<sup>206</sup>

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205. One possible argument in favor of the nongovernmental-real-party-in-interest litmus test is that courts must be involved when the government has a dispute with a private party in order to protect the private party's interests. When the Post Office and the IRS are fighting, courts are not necessary to protect private interests; they are when the Army is at odds with the railroads.

The protection of private interests requires a judicial forum, however, only when the private party seeks to challenge the agency action. That forum is available even if intragovernmental litigation is wholly nonjusticiable; had the railroads lost before the ICC, they could have obtained judicial review of the ICC's decision. For just such a suit, see *Consolidated Rail Corp. v. ICC*, 685 F.2d 687 (D.C. Cir. 1982) (DOJ and ICC attorneys collaborated on a single brief defending an ICC order granting refunds to the United States for overcharges for the transport of spent nuclear fuel). An *aggrieved* private party can challenge the agency action itself. The role of courts as protectors of private interests against governmental power cannot justify interagency litigation if it is otherwise nonjusticiable.

204. See *infra* notes 281-302 and accompanying text.

206. Similarly, on a technical level, insisting on the presence of private parties creates

## 2. *The Presence of an Independent Agency*

A second possible explanation of *United States v. ICC* is that one party was an executive agency and the other an independent agency. Indeed, most interagency litigation to date has been between an executive agency and an independent agency.<sup>207</sup> This is not a surprise; if nothing else, DOJ's control over the litigation of all executive agencies makes it unlikely, if not impossible, that two executive agencies will appear on opposite sides of a lawsuit. The decisions themselves have attached no significance to the independence of one of the parties; yet if one litigant is wholly free of presidential authority, both article II and article III concerns about interagency litigation are substantially eliminated. Perhaps, then, interagency litigation is constitutionally permissible if, but only if, at least one of the parties is an independent agency.<sup>208</sup>

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a Catch-22. A justiciable controversy exists only if a private real party in interest has intervened; before such a party intervenes, there is no justiciable controversy before the court and so nothing in which it can intervene. Without the private party, no case or controversy exists; because no case or controversy exists, the private party cannot be added.

These problems do not exist if the second governmental party joins an existing suit between the government and a private party. For consideration of this variation, see *infra* Part V.D.

207. The prominent exceptions are *United States v. Marine Bancorporation*, 418 U.S. 602 (1974) (DOJ and Comptroller of the Currency); *United States v. Connecticut National Bank*, 418 U.S. 656 (1974) (same); and *Environmental Defense Fund, Inc. v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975) (Department of Agriculture and EPA).

208. See Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. REV. 68, 72 (1974) (speculating that "an administrative [*i.e.*, independent?] agency in conflict with the executive may ask for resolution of that controversy by the judiciary [because] an administrative agency is not within the chain of command that leads to the President"); Note, *Res Judicata and Intra-Governmental Inconsistencies*, 49 COLUM. L. REV. 640, 644-46 (1949); see also HART & WECHSLER, *supra* note 15, at 94 n.2 (raising the question).

In concluding that EPA can litigate against the Tennessee Valley Authority, EPA General Counsel stressed the TVA's freedom from presidential control. Although the TVA directors technically serve at the President's pleasure, they are functionally wholly independent—indeed in many ways more independent than the "independent" regulatory agencies. 1 Op. EPA General Counsel 297, 312-13 (1973).

DOJ has argued both for and against an independent/executive agency distinction. In a 1985 letter to Congressman John Dingell, Assistant Attorney General John Bolton argued that EPA could not sue the Department of Energy for violations of environmental standards. Letter from John Bolton to John Dingell (Dec. 20, 1985), reprinted in *Federal Environmental Compliance Hearing*, *supra* note 15, at 709. He divided the cases allowing interagency litigation into three categories. The largest

consists of suits brought by or against one of the so-called "independent regulatory agencies." . . . In none [of these cases] was the court asked to decide, nor did it decide, a legal controversy between two agencies both of



a. *Arguments for Allowing Interagency Litigation Involving Only Independent Agencies*

At first blush, the constitutional concerns about interagency litigation apply with far less force when an independent agency is a party. First, such litigation is perhaps not intrabranch at all. If independent agencies are part of the legislative branch,<sup>209</sup> then litigation between an independent agency and an executive agency would fall into the category of interbranch litigation and so be justiciable under the criteria discussed in Part I.C.<sup>210</sup> This view is extreme. More accurately, independent agencies are independent of political forces generally.<sup>211</sup> The usual view of the inde-

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whose heads serve at the pleasure of the President, as do the heads of EPA and DOE.

*Id.* at 710-11. The 1977 OLC opinion concerning the Post Office and the IRS, on the other hand, placed no emphasis on the prominence of independent agencies in the case law and expressly rejected an argument that the Postal Service's independence made the dispute justiciable. 1 Op. Off. Legal Counsel 79, 83 (1977). In 1987 congressional testimony, DOJ also seemed to reject any distinction between executive and independent agencies, at least with regard to law enforcement. See *Federal Environmental Compliance Hearing*, *supra* note 15, at 269 (response of F. Henry Habicht II, Ass't Att'y Gen.) ("it would be unconstitutional for legislation to authorize a federal [independent] regulatory agency to assume a core executive function such as law enforcement and to carry out that activity against other elements of the federal government in a manner which in any way hindered the President's ability to resolve disputes within the Executive Branch"); see also *id.* at 265-69 (questions and answers regarding the constitutionality of an agency's actions against other federal agencies).

209. In sparring with Assistant Attorney General Henry Habicht, Congressman Swift contended that the unitary executive theory was at least inapplicable with regard to "an independent regulatory agency such as FERC or the SEC" because "[t]he independent agencies are creatures of the Congress, not of the President." *Federal Environmental Compliance Hearing*, *supra* note 15, at 266 (statement of Congressman Swift). Similarly, House Speaker Sam Rayburn is reported to have told the Chairman of the FCC that "'your agency is an arm of the Congress; you belong to us,'" Minow, Book Review, 68 COLUM. L. REV. 383, 384 (1968) (reviewing W. CAREY, *POLITICS AND THE REGULATORY AGENCIES* (1967)), and Senator Hart once stated that "[t]he commissions, if I may risk oversimplification, are ours." 5 SENATE COMM. ON GOV'T AFFAIRS, STUDY OF FEDERAL REGULATION, S. DOC. NO. 91, 95th Cong., 1st Sess. 31 (1977); see also *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935) (FTC a "legislative agency"); Cushman, *The Problem of the Independent Regulatory Commissions*, reprinted in REPORT OF THE COMMITTEE, *supra* note 87, at 364 (independent commissions "are 'agents' of Congress.>").

210. In arguing that a dispute between the President and the Special Prosecutor was a nonjusticiable intrabranch dispute, Richard Nixon's attorneys distinguished *United States v. ICC* on the ground that, because the ICC was an independent agency, "that dispute was plainly inter-branch in nature, and therefore within the Court's jurisdiction to resolve controversies arising among the various branches." Brief for Respondent & Cross-Petitioner, *United States v. Nixon*, 418 U.S. 683 (1974), reprinted in *UNITED STATES v. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT* 343 (L. Friedman ed. 1974).

211. This was of course the original model. James Landis perceived the independent agency as a body of politically neutral, objective experts. See J. LANDIS, *THE ADMINIS-*

pendent agencies is of a "headless fourth branch,"<sup>212</sup> composed of free-floating, self-confined bodies that both the President and Congress can influence, but neither can control.<sup>213</sup> This form of quasi-independence is still enough for present purposes, however. Independent agencies need not be part of the legislative branch to avoid the intrabranch problem. As long as such agencies are outside the presidential family, then litigation in which they participate does not resemble a single person suing herself.

Second, we do not perceive independent agencies as subordinate to the President. Pinning down the difference between their relation to the President and that of the executive agencies has never been possible, but everyone understands that the President is in some way the boss of the executive agencies but not the independent agencies.<sup>214</sup> In regard to article III, if the President cannot resolve a dispute involving an independent agency merely by telling it what to do, then a case or controversy may exist in a way that one does not exist between two executive agencies. Similarly, in regard to article II, an "independent" agency does not fit within the unitary executive model, in which the components of the executive branch are arrayed hierarchically beneath the President, who not only can, but must, make all ultimate decisions and can impose his determination on any of the agencies. If it is permissible to free an agency from presidential supervision in the first place, then allowing it to fight with other agencies in court is no further intrusion on presidential authority.

*b. The Same Standards of Justiciability Should Apply to Both Independent and Executive Agencies*

Although superficially plausible, this reasoning rests on an understanding of the differences between executive and inde-

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TRATIVE PROCESS (1938); see also *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.) (per curiam) (three-judge court), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986). In an opinion universally assumed to have been written by then Judge, now Justice, Scalia, *Synar* described the New Deal theory as involving "genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress." *Id.* at 1398. Such a conception places the independent agencies in neither the legislative nor executive branch.

212. Report of the Committee, *supra* note 87, at 30.

213. *Id.* at 592.

214. See, e.g., *FTC v. American Nat'l Cellular, Inc.*, 810 F.2d 1511, 1513 (9th Cir. 1987).

pendent agencies that is more theoretical than real. The independent agencies are not truly in a different branch than executive agencies; they are not significantly more adverse than executive agencies simply because they need not answer to the President; and presidential authority is intruded upon comparably regardless of whether the litigants are independent or executive agencies. Independent agencies indisputably enjoy more freedom from presidential control than do executive agencies. But the difference is generally overstated and rests more on political accommodation than on legal requirements. Independent agencies are not sufficiently different from executive agencies to justify different standards for justiciability for the two.

(1) *The Interbranch Argument*

The argument that independent agencies are part of the legislative branch is hard to take seriously. Off Capitol Hill, the view of independent agencies as arms of Congress is quickly dismissed, and for good reason.<sup>215</sup> Indeed, one inescapable lesson from *Bowsher v. Synar*<sup>216</sup>—in which the Court struck down a statute that gave executive tasks to an independent *legislative* agency although purporting not to cast doubt on the constitutional status of other independent agencies<sup>217</sup>—is that independent agencies are not part of the legislative branch.

If independent agencies are not part of the legislative branch, the obvious place for them is in the executive branch. Independent agencies seem to be executing the law; in any event, their functions do not differ in any essential respect from agencies everyone views as indisputably part of the executive branch. If independent agencies must be part of the executive branch,<sup>218</sup> then the general principle that interbranch litigation is justiciable cannot be the justification for allowing suits in which one party is an independent agency, but not suits between two executive agencies.

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215. *E.g.*, L. JAFFE, *supra* note 34, at 21 (*Humphrey's* description of FTC as "an 'agency' of the legislature[ ] is baffling and contradictory") (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)); Miller, *supra* note 128, at 63-64; Strauss, *supra* note 88, at 592.

216. 478 U.S. 714 (1986).

217. *Id.* at 732-34.

218. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, 424-25 n.85 (5th ed. 1984) ("all nonjudicial agencies for carrying out the law [are] 'executive' in the sense of the Constitution"); Miller, *supra* note 128, at 65-67 (arguing that "independent" agencies belong within the executive branch).

Even if independent agencies occupy their own headless fourth branch, that does not automatically make a case like *United States v. ICC*<sup>219</sup> justiciable because it is interbranch. The Constitution contains no safe harbor provision for interbranch litigation. Suits between the "big three" branches are justiciable not because the litigants are separate branches, but because the suits themselves meet the necessary requirements for justiciability. The question here is not whether Congress can make agencies independent of the executive branch. Rather, the question is whether independent agencies, wherever they fit in the constitutional structure, are sufficiently different from executive agencies to give them greater freedom in interagency litigation.

Suppose independence is the critical factor. Then the Department of Agriculture could sue the ICC over the establishment of transportation rates that it considers injurious to farmers,<sup>220</sup> but it could not sue EPA, whose administrator serves at the President's pleasure, for canceling registration of a pesticide.<sup>221</sup> The ICC action and EPA action, however, are essentially identical instances of execution of the laws *cum* policymaking. In both, the Department of Agriculture disagrees with, but is not subject to, the regulatory decision. Its governmental role, in short, is the same as both EPA's and the ICC's. Emphasizing that fact in one setting<sup>222</sup> and denying it by resort to a meaningless formality<sup>223</sup> in the other makes no sense. Both are intragovernmental disputes about *executing* the law. Even if the fact that this is execution is not clear, the essential point is that both agencies are trying to do the same thing; they simply disagree about how to do it. Such a disagreement is a far cry from litigation between the President and Congress and is difficult to perceive as interbranch regardless of the degree of independence of one of the parties.

(2) *Disputes Involving Independent Agencies do not in any Meaningful Way Involve Greater Adversity than Disputes Involving Only Executive Agencies*

Independent agencies do enjoy a measure of freedom from presidential control that executive agencies do not. Scholars have

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219. 337 U.S. 426 (1949).

220. *See* Secretary of Agric. v. United States, 347 U.S. 645 (1954).

221. *See* Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292 (D.C. Cir. 1975).

222. EPA and the Department of Agriculture are both part of the executive branch and therefore cannot litigate against each other.

223. The fight between the Department of Agriculture and the ICC is interbranch and thus justiciable.

invested many hours trying to identify the essential differences between independent and executive agencies. The most common rule of thumb is that an agency is independent if the President can remove its head or heads only for cause.<sup>224</sup> The tenure of independent commissioners contrasts with the "Damocles' sword of removal"<sup>225</sup> that hangs over and theoretically so constrains the head of an executive agency. Although additional characteristics tend to distinguish the independent agencies,<sup>226</sup> the limitation on the President's removal authority is the essential basis for classifying them as independent<sup>227</sup> and therefore the essential basis for the claim that independent agencies can litigate against other agencies when executive agencies cannot.

This difference looks bigger than it is.<sup>228</sup> A large body of scholarship details the numerous ways in which the President cannot actually control executive agencies and can actually control independent agencies.<sup>229</sup> Even without an unfettered removal power, the President retains the critical power of appointment—limited, to be sure, by bipartisanship requirements and the need for a vacancy—extensive control over budget proposals, the au-

224. *E.g.*, K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 1.09 (1976); Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 216-17. For example, Executive Order Number 12,146 requires "Executive agencies whose heads serve at the pleasure of the President" to submit legal disputes to the Attorney General, but only "encourages" other "Executive agencies" to do so. Exec. Order No. 12,146, §§ 1-4, 3 C.F.R. 310 (1979).

225. *Wiener v. United States*, 357 U.S. 349, 356 (1958).

226. Independent agencies are usually headed by multimember panels, with no more than a simple majority thereof from the same political party, and simultaneously possess broad rulemaking, adjudicatory, investigative, and enforcement authority. Miller, *supra* note 224, at 216-17 n.5. These characteristics are more fully described in Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259-63.

227. Two other typical characteristics also lend independence: political criteria for appointment—that is, the requirement of a bipartisan commission—and staggered, fixed terms of office that do not correspond to the presidential term. *See* K. DAVIS, *supra* note 224, § 1.09.

228. In fact, it may be no difference at all. Professor Miller makes a compelling case that "cause" may include refusal to obey an order from the President to take an action that is within the agency's authority. Miller, *supra* note 224, at 217 n.12. If the President thus is free either to dictate agency policy or to remove agency officials for failure to follow his orders, then the agency no longer looks so independent. More precisely, its degree of independence is not meaningfully different from that of the so-called executive agencies.

229. *E.g.*, S. BREYER & R. STEWART, *ADMINISTRATIVE LAW & REGULATORY POLICY* 123-26 (2d ed. 1985); Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223, 232-36; Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982); Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238; Strauss, *supra* note 88, at 583-96.

thority to review and alter the agency's proposals for legislation, the power to select or demote the chair, an uncertain amount of moral suasion, and control over the lawyers who represent the independent agency in court.<sup>230</sup>

On the other hand, even in regard to executive agencies, (1) the basic policy decisions remain Congress' rather than the President's;<sup>231</sup> (2) the President must obtain the consent of the Senate for important appointments;<sup>232</sup> (3) actual decisionmaking responsibility generally lies with the agency head rather than the President;<sup>233</sup> (4) litigating decisions are made by the Attorney General rather than by the President, and sometimes not even by him;<sup>234</sup> (5) a politically oriented generalist will have difficulty controlling the actions of technically oriented experts and career bureaucrats;<sup>235</sup> and, last but not least, (6) the cherished power of removal is often simply not available.<sup>236</sup>

230. One of the strongest statements of presidential control over independent agencies came from DOJ in arguing that the President could, if he wanted, apply Executive Order 12,291 to independent agencies. *Role of OMB in Regulation: Hearings Before the Subcomm. of Oversight & Investigations of the House Comm. on Energy & Commerce*, 97th Cong., 1st Sess. 152, 160-62 (1981) (memorandum from L. Sims, Acting Ass't Att'y Gen., OLC, to D. Stockman, Dir., Off. of Mgt. and Budget (Feb. 12, 1981)).

231. *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838).

232. U.S. CONST. art. 2, § 2, cl. 1.

233. See *supra* notes 128-34 and accompanying text. An agency so charged is in much the same position, vis-à-vis the President, as an independent agency—especially if Professor Miller is correct that ignoring a presidential order to do something within the agency's power constitutes "cause" for dismissal. In both cases, the President cannot decide himself and cannot directly veto the decision of the agency, but can fire the offending official after the fact.

234. For example, the Solicitor of Labor can represent the Secretary of Labor in OSHA actions, 29 U.S.C. § 663 (1988), and EPA attorneys can represent EPA in any Clean Water Act suit if the Attorney General declines to do so. 33 U.S.C. § 1366 (1988).

235. *Eizenstat*, *supra* note 115; *Robinson*, *supra* note 229, at 246-48. As a former Johnson aide said, "[T]he White House stands precariously atop . . . a bottom-heavy administrative system, consisting of departments and agencies equipped with resources, clientele and historical baggage that continually threatens to out-think and out-run the tenuous policy management capabilities of the White House." Cronin, *Presidents as Chief Executives*, in *THE PRESIDENCY REAPPRAISED*, *supra* note 88, at 238-39.

236. First, the President can use removal only so many times; it is hardly a daily remedy for the irritations of recalcitrant agency heads. See *supra* notes 132-33 and accompanying text. In addition, there are times when it simply cannot be exercised, as when Ronald Reagan turned to squeaky-clean William Ruckelshaus—first EPA Administrator and noted Saturday Night Massacre victim—to restore credibility to EPA after the resignation of Anne Burford. *N.Y. Times*, Jan. 31, 1984, at A19, col. 6. Upon his arrival, Ruckelshaus was outspoken in his criticism of EPA's lax enforcement (including a much-publicized comment that he had expected to find "tigers in the tank" but it turned out there were only "pussycats"). *Id.* It is fair to assume that Ruckelshaus was not serving "at the President's pleasure" during this period; however, Ruckelshaus could have been far bolder than he was, and the President could have done nothing about it, least of all fire him.

The view of independent agencies as free of presidential control is especially inappropriate in regard to *litigation*. As a practical matter, the President has identical control over litigation by independent and executive agencies. By and large, both must be represented by DOJ, must obtain approval of the Solicitor General to appeal an adverse ruling, and must be represented by the Solicitor General before the Supreme Court.<sup>237</sup> This is not universally the case;<sup>238</sup> however, the fact that it is mostly so—indeed the fact that it is *ever* the case—shows that, at least in regard to litigation, viewing independent agencies as different from executive agencies is a mistake.<sup>239</sup>

In short, the supposed independence of the independent agencies does not distinguish them sufficiently from executive agencies to justify treating the two differently as litigants against other agencies. The President has comparable authority and responsibility to settle interagency disputes in either setting. The article III adversity that exists when an independent agency is involved is not significantly different from that present in litigation between executive agencies.<sup>240</sup>

(3) *The Independent/Executive Agency Distinction is at War with Itself*

Assume that, notwithstanding the foregoing, real differences do exist between executive and independent agencies. The independent/executive agency distinction still proves too much and produces nonsensical results. It means that Congress can allow interagency litigation as long as it removes at least one agency from presidential control. This is hardly a step forward for the unitary executive and presidential authority.

For example, the unitary executive argument is that EPA cannot bring an enforcement action against DOD. Because the President controls both agencies, they cannot have a justiciable controversy, and allowing courts to resolve this dispute would interfere with the President's management of the executive

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237. 28 U.S.C. §§ 516, 518(a), 519 (1988).

238. See *supra* note 55.

239. See *infra* Part V.A.3 (discussing whether a grant of independent litigating authority is sufficient in itself to justify interagency litigation).

240. L. JAFFE, *supra* note 34, at 541 (justiciability of suit between DOI and the FPC did not turn on the latter's independence); Steinberg, *supra* note 20, at 337 ("tension and animosity" between EPA and executive agency in violation of environmental statutes is no less real than adversity between executive agency and independent agency).

branch. The President must either tell DOD to mend its ways, if he believes they actually need mending, or tell EPA to lay off.<sup>241</sup>

If the underlying concern is one of presidential authority and accountability, it is no improvement if Congress makes EPA an independent agency. With EPA beyond presidential control, its litigating authority seems a much greater threat to the unitary executive. EPA is still executing the laws, but now without presidential involvement. This scheme serves no principle of executive authority or separation of powers. If Congress can create an agency that is shielded from presidential supervision and allow it to litigate against other agencies, then surely it can create an agency *subject* to presidential supervision and allow it to litigate against other agencies. The latter arrangement is truer to the unitary executive vision.

The response would be that if both disputants are subject to presidential supervision, litigation is unnecessary. Such a response is logically sound, but one must question logic that leads directly in what should be the wrong direction.

(4) *The Independent/Executive Agency Distinction is Unworkable*

If the rule were that at least one party had to be an independent agency for interagency litigation to be justiciable, determining just what makes an agency adequately independent would be necessary. This determination is not straightforward, as efforts to grapple with the nature of independent agencies in general<sup>242</sup> and the requisite independence for justiciability in particular<sup>243</sup> have amply demonstrated. Indeed, saying that an agency can litigate against other agencies if it is independent makes no sense. To quote John Hart Ely out of context, it "mistake[s] a definition for a syllogism."<sup>244</sup> One could say equally

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241. See *Federal Environmental Compliance Hearing*, *supra* note 15, at 211-13 (statement of F. Henry Habicht II, Ass't Att'y Gen.).

242. On the problem of figuring out what is an independent agency, see S. BREYER & R. STEWART, *supra* note 229, at 123-26.

243. See 1 Op. Off. Legal Counsel 79, 83 (1977) (Postal Service "has a degree of independence from the executive branch," but not enough to render its dispute with the IRS justiciable); 1 Op. EPA General Counsel 297, 312-13 (1973) (TVA directors are removable at will but nonetheless are more independent than Commissioners of many independent agencies); *id.* at 307 n.5 (FPC Commissioners are removable at will, but are recognized as independent).

244. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).



well that an agency is independent because it can litigate against other agencies. The more appropriate inquiry is to the specific authorities and freedoms that Congress has granted to any given agency.<sup>245</sup> An agency's independence is nothing more or less than its freedom of movement in each particular setting.

### *c. Summary*

An agency's independence from presidential control is indisputably related to its constitutional capacity to litigate against other agencies. Imagining a setting in which independent agencies would lack adversity merely because they are both agencies of the United States government is difficult. It seems like a far smaller intrusion on executive authority for independent agencies to slug it out in court than for the "eyes and arms of the President" to do so. Nonetheless, independence should not be the critical factor in deciding the justiciability of interagency disputes. If agencies should not be litigating against each other, the fact that at least one is independent is not enough to overcome the objections to such litigation. On the other hand, if such litigation is acceptable, independence is not necessary.<sup>246</sup>

### *3. Independent Litigating Authority*

If the ICC's status as an independent agency cannot explain *United States v. ICC*,<sup>247</sup> a related but more specific factor may do so: the Army and the ICC had separate counsel and full statutory authority to litigate. Indeed, although the district court had tripped over the fact that the same lawyer represented both sides,<sup>248</sup> the Supreme Court was careful to point out that the Attorney General's appearance on behalf of the Army "does not in any way prevent a full defense of the Commission's order."<sup>249</sup>

If we are to look to specific powers and freedoms given to an agency by Congress rather than its label as independent,<sup>250</sup> then the logical place to begin for present purposes would be the

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245. *E.g.*, Miller, *supra* note 128, at 43-44.

246. If I were to draw a different line than the one proposed herein, however, I would say that intragovernmental litigation involving at least one independent agency is justiciable, whereas litigation between two executive agencies is justiciable only when one regulates the other or they are fighting over turf, as discussed in the following parts.

247. 337 U.S. 426 (1949).

248. *United States v. ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948), *rev'd*, 337 U.S. 426 (1949).

249. 337 U.S. at 432.

250. *See supra* note 245 and accompanying text.

agency's litigating authority. Perhaps if Congress has said that an agency can litigate against sister agencies—a necessary premise for this entire discussion—then it has made the agency independent to that extent, and that fact suffices for justiciability.

For example, the Clean Air Act<sup>251</sup> authorizes EPA to bring enforcement actions against federal facilities violating federally enforceable emissions standards.<sup>252</sup> Perhaps such litigation is justiciable precisely because Congress authorized it. Agencies have the characteristics Congress gives them pursuant to the necessary and proper clause.<sup>253</sup> By permitting EPA to bring the action—represented, if necessary, by its own attorneys rather than DOJ—Congress has simultaneously given EPA the constitutionally requisite independence, created the necessary adversity, and removed the unitary executive impediment. Likewise, by arranging for separate representation of the Army and the ICC, Congress created sufficient distinctness to permit litigation.

DOJ probably cannot represent both agencies in the same suit.<sup>254</sup> Congress has a free hand in vesting litigating authority in agencies other than DOJ<sup>255</sup> and has done so frequently.<sup>256</sup> Having a lawyer empowered and willing to bring the lawsuit, however, is necessary but not sufficient. For one thing, the decision whether to litigate is subject to just as much presidential control as other decisions. More important, the practical ability to litigate cannot amount to the constitutional authority to do so. Congress could not ensure justiciability by immunizing that decision from presidential control.

We can isolate the second concern by hypothesizing an environmental independent counsel, nominally within EPA but removable only for cause, charged with bringing environmental enforcement actions against the federal government.<sup>257</sup> Once Congress had created such a position, the argument would run, justiciability problems disappear because presidential control also

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251. 42 U.S.C. §§ 7401-7642 (1988).

252. *Id.* § 7413.

253. U.S. CONST. art. I, § 8, cl. 18.

254. *See supra* notes 176-77.

255. Miller, *supra* note 128, at 97.

256. *See supra* note 55.

257. Proposals to create such an office are pending. *See* H.R. 2135, 101st Cong., 1st Sess. (1989). DOJ vehemently challenged the constitutionality of a comparable scheme for protecting whistleblowers under which a special counsel could have sued federal agencies by obtaining judicial review of decisions of the Merit Systems Protection Board. *See supra* notes 16, 99.

has disappeared.<sup>258</sup> This is certainly the easiest way out of the problem. The constitutional inquiry exactly duplicates the statutory inquiry. The freedom to decide whether to bring an action itself creates the separation needed for a justiciable controversy.

This logic is flawed, however. First, it contains the same problems as the independent agency approach generally: independence is hard to define and the extent to which Congress can immunize the litigating decision from presidential control, either practically or constitutionally, is unclear. Moreover, although this exception purports to be responsive to concerns about presidential control, it hardly represents an important blow for presidential authority. Assume that at present EPA cannot sue DOD, even though the President probably could urge a lawsuit forward or call it off. If Congress created an independent environmental counsel, thereby eliminating presidential control over the litigating decision, EPA *could* sue. This logic is backwards.

More importantly, this argument answers the wrong question. Even if an agency was utterly free to make its own litigating decisions, it would not be able to sue another agency in the absence of a justiciable controversy. The existence of such a controversy is a function of the agency's position in every respect *other* than its litigating decisions. The argument for nonjusticiability is that the President should decide which agency is correct and then make an order accordingly. The President must decide whether DOD should clean up its hazardous waste site and whether EPA should allow the disputed pesticide to remain on the market. Immunizing the agency's *litigating* decision from presidential control in no way affects the President's authority over the *substantive* decision, nor does it magically create divergent interests or concrete adversity if such elements otherwise would be lacking.<sup>259</sup>

This is one reason why *Morrison v. Olson*, which upheld the independent counsel,<sup>260</sup> says little about the justiciability of in-

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258. The argument assumes the constitutionality of placing an enforcement official, responsible for litigation, beyond direct presidential control. See *Morrison v. Olson*, 487 U.S. 654 (1988).

259. This analysis ducks the question of the constitutionality of such litigation in which one party is solely a litigating agency. For example, suppose there was an independent environmental counsel wholly separate from EPA. Or, to put the question more broadly, could there be a Federal Office of the Public Advocate, charged with suing on behalf of the public interest? I think the answer is no. By definition, the litigation brought by the Public Advocate would arise out of a pure regulatory disagreement; the Public Advocate would sue in the belief that the challenged action was a mistake. I argue below that such regulatory disputes are nonjusticiable.

260. *Morrison*, 487 U.S. at 696-97.

teragency lawsuits in general or the constitutionality of other independent counsels in particular.<sup>261</sup> The statute upheld in *Morrison* empowered the independent counsel to bring criminal charges against individuals. The justiciability of such litigation is well established,<sup>262</sup> and DOJ itself could have brought the action had the President permitted it. The justiciability of such actions in no way depends upon the independence of the prosecutor, although their likelihood obviously does. By the same token, creation of an independent counsel to litigate against other parts of the government, or an explicit congressional statement that an agency be able to litigate against other agencies—with or without presidential input—cannot create justiciability in cases in which it would not otherwise exist.<sup>263</sup>

In short, it is important that separate governmental parties have separate representation, as in *United States v. ICC*. That alone does not guarantee justiciability, however, even if Congress purports to give an agency not only its own lawyer, but also a free hand in deciding when to use her.

#### 4. *The Presence of Multiple Governmental Capacities*

The critical factor in *United States v. ICC* was neither the presence of the railroads nor the presence of an independent agency; it was the presence of a nongovernmental interest on the part of the United States. The Army operated within the ICC's jurisdiction exactly as a private party would. It was part of the regulated community or, more precisely, a beneficiary of the regulatory scheme. The case was a run-of-the-mill dispute under that scheme. The point is not that the respondent was not actually the ICC; it is that the petitioner was not actually the United States. The petitioner was, in the words of the Supreme

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261. The other reason *Morrison* does not tell us much about this problem is that it was not an intragovernmental suit. As a criminal prosecution, it involved no division within the government; rather, the United States was pursuing an individual. The decision held merely that Congress can remove control of the prosecutorial apparatus from the President. That conclusion does not tell us what sort of separation is permissible or sufficient to allow intragovernmental suits.

262. Viewing such an action as an intrabranched dispute is a mistake. The suit is a garden-variety criminal prosecution against a defendant who happens to be an employee of the government. The defendant appears in his personal capacity.

263. I argue below that if one agency is subject to the regulatory authority of another, its disputes are justiciable. An independent environmental counsel, therefore, would be litigating justiciable controversies. My only point here is that if EPA is presently unable to bring an enforcement action against a federal facility, the establishment of an independent counsel would not solve that defect.

Court, like "any other shipper,"<sup>264</sup> the government with a small "g."<sup>265</sup>

In *United States v. ICC*, the ICC administered the regulatory scheme; the Army operated within that scheme. These distinct and opposing capacities obviated any article III concerns. The setting is identical to a petition for judicial review brought by a private party.<sup>266</sup> Although both petitioner and respondent are parts of the United States government, their different capacities mean that they have different interests, different lawyers, different aims, and different views of the law. These disagreements surely are enough to satisfy any concern with effective, full-fledged advocacy and with the less clearly articulated normative goals of the case-or-controversy requirement. For article III purposes, the parties are adverse; they are different persons.

Furthermore, the Court is not trenching on the President's authority to execute the laws. At the very least, article II permits interagency litigation in disputes in which one agency regulates the other. Such litigation does not interfere with the requirement of an internally determined executive branch bottom line. Only one agency is executing the laws. Because the regulated agency that challenges the regulating agency's decision is not executing

264. *United States v. ICC*, 337 U.S. 426, 430 (1949).

265. The government has appeared in its regulated capacity in many interagency suits. In *Western Air Lines v. Civil Aeronautics Board*, 347 U.S. 67 (1954), for example, the Postmaster General challenged the CAB's determination of the rates the Post Office had to pay to airlines it hired to transport mail. In the Supreme Court, the Solicitor General represented the Postmaster General and the United States; the CAB had its own counsel. The governmental party was the CAB; the United States was merely a member of the regulated community. The same relation of governmental interests arises in litigation between an agency (as a regulated employer) and the Federal Labor Relations Authority. See, e.g., *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983); *supra* note 7; see also *United States v. ICC*, 352 U.S. 158 (1956) (facts almost identical to those of *United States v. ICC*, 337 U.S. 426, discussed in the text); *Ford Motor Co. v. ICC*, 714 F.2d 1157 (D.C. Cir. 1983) (DOD challenge to ICC refusal to order reparation of alleged railroad overcharges); *United States v. FCC*, 707 F.2d 610, 612 n.2 (D.C. Cir. 1983) (challenge to long distance rates set by FCC; "United States represents the consumer interests of the Department of Defense, the General Services Administration, and other federal executive agencies"); *Secretary of the Army v. Federal Power Comm'n*, 425 F.2d 496 (D.C. Cir. 1969) (challenge to the FPC's refusal to regulate natural gas supplied to military base); *United States v. United States*, 417 F. Supp. 851 (D.D.C. 1976) (per curiam) (DOD challenge to ICC order resulting in higher costs for shipping automobiles), *aff'd*, 430 U.S. 961 (1977).

266. *United States v. ICC* and similar cases "merely confirm that when the United States or one of its agencies is placed in the position of a private person burdened by administrative action, it may take advantage of statutory procedures for judicial review like any other private litigant." *United States v. Doherty*, 786 F.2d 491, 503 (2d Cir. 1986) (Friendly, J.).

or enforcing the law,<sup>267</sup> the executive branch is executing with one voice.

This distinction is similar, but not identical, to that between official and individual capacity.<sup>268</sup> One could characterize any federal criminal prosecution against an executive branch employee as an intrabranch dispute. Doing so never crosses one's mind, however, because the defendant is participating not as part of the government, but as a member of the regulated community. Indeed, some cases that have the look of intrabranch disputes are best explained as being between the government and an individual.<sup>269</sup> Just as these suits are clearly justiciable, so are suits in which part of the government appears in a private capacity.<sup>270</sup>

Distinguishing the government as regulator from the government as member of the regulated community or beneficiary of the regulatory scheme also looks similar, perhaps uncomfortably so, to a distinction between proprietary and governmental capacities. The Supreme Court frequently has attempted such a distinction.<sup>271</sup> In some settings, its efforts have been notoriously unsuccessful, at times belittled by the Court itself.<sup>272</sup> Yet govern-

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267. One might say that anything an agency does is, by definition, executing the laws. If so, then in shipping material, paying the railroads, and asking the ICC to order a refund, the Army, which is an executive agency, could only have been executing the laws. Not everything an agency does is execution, however, any more than everything a law school does is education. (The relative percentages can be left for another day.) An agency enforcing statutory requirements is distinct from an agency subject to such requirements.

268. Indeed, the no-person-can-sue-herself principle has on occasion yielded even in regard to a single individual who appears in two capacities. *See supra* note 36.

269. For example, *Powell v. McCormack*, 395 U.S. 486 (1969), in which Adam Clayton Powell, Jr., challenged his exclusion from the House of Representatives, was an action by Powell in his individual capacity. *See supra* note 105.

270. Returning to the model of intracorporate litigation, *see supra* notes 37-49 and accompanying text, the equivalent justiciable controversy is a shareholders' derivative suit. In such suits, the corporation, via the shareholders, is suing the officers in their private capacities. The basic premise of the litigation is that the officers have acted in their own interest rather than in the corporation's.

271. For a thorough litany of the many settings in which the governmental/proprietary distinction is invoked, see Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1073-74 n.9 (1980).

272. For harsh judicial criticism, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 541-47 (1985) (criticizing governmental/proprietary distinction and abandoning a related effort to identify governmental functions that are "integral" or "traditional"); *Employees of the Dep't of Health v. Missouri Dep't of Health*, 411 U.S. 279, 297 n.11 (1973) (Marshall, J., concurring) ("I had thought we had escaped such unenlightening characterizations of States' activities."); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (rejecting the governmental/proprietary distinction as a test for

ments *do* sometimes act like private parties and sometimes act like something quite different. The distinction continually resurfaces.<sup>273</sup>

The governmental/proprietary distinction has two basic flaws that have made its application troublesome. Neither is present here. First, the distinction attempts to keep separate two categories that blend and overlap. The concrete line drawing difficulties that plague its application are a symptom of this conceptual difficulty. The regulating/regulated distinction, in contrast, does not suffer from that basic incoherence. To distinguish the government's regulatory from its regulated capacity, one need look no farther than the governing statute. To the extent the statute imposes substantive requirements on federal entities, it places the government in the position of a member of the regulated community. To the extent the statute charges federal entities with formulating, implementing, and enforcing such requirements, it places the government in a regulatory capacity.

The second shortcoming of the governmental/proprietary distinction is the absence of an adequate theoretical explanation for just why we should *ever* view the state as a private party.<sup>274</sup> The

government liability under the Federal Tort Claims Act); *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (describing the governmental/proprietary distinction as a "quagmire" that is "inherently unsound").

273. The distinction is well entrenched, for example, in the market participant doctrine, which permits some state actions that flatly discriminate against out-of-state parties. See *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984); Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

The market participant doctrine offers a close analogy to the regulating/regulated distinction. In *United States v. ICC*, the government sought to recover charges that it had paid for the unloading of trains; the Army was a market participant. In contrast, when the Secretary of Agriculture challenged the ICC's approval of special charges for unloading fruits and vegetables from trains, see *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), he was a market regulator (albeit a failed one). The Agriculture Department was not subject to the ICC's order because it did not unload vegetables or pay to have them unloaded. The Secretary viewed the charges as a mistaken policy because of their harm to agricultural interests.

274. This tension is apparent, for example, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), which upheld a municipality's refusal to accept political advertising on its buses. Justice Blackmun relied, confusingly, on the fact that the city was engaged in a commercial venture. *Id.* at 303-04 (plurality opinion). This fact did not eliminate constitutional requirements altogether. "Because state action exists," the refusal to accept such advertisements could not be arbitrary. *Id.* at 303. It did drastically water down, if not eliminate, first amendment protections, however. Just like a private venture, the City did not have to make available "its vehicles" for any advertising proffered by the general public. *Id.*

To the dissenters, on the other hand, what mattered was not that the activity was

government may be doing something that we ordinarily expect private actors to do, but it is still the government. As such, it may not be subject to the same practical, marketplace constraints as private actors, and it is at least presumptively subject to constitutional constraints that do not apply to private actors. The regulating/regulated distinction, in contrast, does not require closing one's eyes to the fact that the parties are governmental. The government can be and often is sued as the United States in each of these capacities. Viewing the government as subject to statutory requirements just like a private party is perfectly coherent.

Any of the foregoing rationales supports the result in *United States v. ICC*. Many cases will arise in which these rationales point in opposite directions, however. Take the fight between the IRS and the Postal Service over the Postal Service's alleged failure to pay taxes.<sup>275</sup> Under the nongovernmental-real-party-in-interest or independent agency tests, this controversy is nonjusticiable.<sup>276</sup> I would argue, however, that it is justiciable because, in this situation, the Postal Service is like any other taxpayer. Similarly, those tests would find no jurisdiction in *Dean v. Her- rington*,<sup>277</sup> in which the TVA sought payment from DOE under electric power contracts. No private party was directly involved in the dispute,<sup>278</sup> and the TVA directors were removable at will.<sup>279</sup> Under the rationale offered here, the case was clearly justiciable because neither party was acting in a regulatory capacity; they were *both* like private parties.<sup>280</sup>

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commercial, but that the City of Shaker Heights was engaged in it. *Id.* at 314 n.6 (Brennan, J., dissenting). The dissenters rejected the comparison to private billboards and newspapers precisely because the government owned the buses. *Id.*; see also *South-eastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (municipal theater a public forum); *id.* at 573 (Rehnquist, J., dissenting) ("A municipal theater may not be run by municipal authorities as if it were a private theater, free to judge on a content basis alone which plays it wishes to have performed and which it does not.").

275. See 1 Op. Off. Legal Counsel 79 (1977).

276. *Id.* at 83-84.

277. 668 F. Supp. 646 (E.D. Tenn. 1987).

278. In a consolidated action, other users of TVA power asserted claims against DOE, arguing that if DOE escaped liability, the TVA would eventually shift those costs to them. *Id.* at 648-49. The court dismissed the action for lack of standing. *Id.* at 653-54. For the very reason that the connection to the dispute was too tenuous to support standing, the presence of these plaintiffs would not be enough to salvage the suit under OLC's nongovernmental-real-party-in-interest test. In any event, DOJ represented DOE and argued that this was a nonjusticiable, intragovernmental dispute; it apparently did not think that the other TVA users qualified. *Id.* at 652-54.

279. But see 1 Op. EPA General Counsel 297, 313 (1973) (stressing the TVA's independence).

280. In *Dean*, the court found that the legal issue—essentially a breach of contract



## B. Regulatory Disputes

Disputes between an agency as regulator and an agency as a regulated party are, then, justiciable. Perhaps the more common type of interagency disagreement, however, is over regulatory policy, in which both agencies act in their regulatory capacities. For example, suppose it is not the Army that is paying the railroads' ICC-approved wharfage charges, but shippers of agricultural produce. The Secretary of Agriculture believes that the railroads' rates for unloading fruits and vegetables are too high. Unlike the Army in *United States v. ICC*, here the Secretary of Agriculture has a regulatory disagreement with the ICC. The dispute is over what the government should require in certain private transactions. Can the Secretary challenge the ICC decision?<sup>281</sup>

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claim—was of a type traditionally justiciable and that it arose in a setting that ensured concrete adversariness, an adversariness that would only be enhanced by the TVA's independence. *Dean*, 668 F. Supp. at 655. The court also held that Executive Order Number 12,146, requiring federal agencies to submit legal disputes to the Attorney General for resolution, did not apply to the TVA. *Id.* at 652-53 (citing Exec. Order No. 12,146, 3 C.F.R. § 409 (1979)).

Having concluded that the case could proceed, the district court transferred the action to the court of claims. That court agreed with the justiciability holding, but concluded that the Executive Order did require submission of the dispute to the Attorney General. *TVA v. United States*, 13 Cl. Ct. 692, 697-702 (1987). It suspended the case to allow resolution by the Attorney General. *Id.* at 703.

281. He did so in *Secretary of Agriculture v. ICC*, 347 U.S. 645 (1954). *See also* *Chicago, Milwaukee, St. Paul & Pacific R.R. v. United States*, 366 U.S. 745 (1961) (challenge to ICC route decision); *Secretary of Agric. v. United States*, 350 U.S. 162 (1956) (challenge to ICC order limiting railroads' liability for eggshells broken during shipment); *ICC v. Mechling*, 330 U.S. 567 (1947) (Secretary of Agriculture, among others, challenged ICC decision regarding railroad rates for grain shipments); *Secretary of Agric. v. ICC*, 551 F.2d 1329 (D.C. Cir. 1977) (Secretary of Agriculture challenged ICC decision not to order railroads to refund portion of tariffs); *Environmental Defense Fund v. EPA*, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977) (Secretary of Agriculture challenged an EPA pesticide registration decision); *Environmental Defense Fund v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975) (Secretary of Agriculture challenged an EPA withdrawal of pesticide registration).

The Secretary of Agriculture is a relatively frequent participant in interagency litigation in part because of specific statutory authorization to intervene in ICC proceedings and to seek judicial review of ICC decisions relating to the transportation of farm products. 7 U.S.C. § 1291 (1988). Litigation between agencies in which the underlying dispute involved not the application of one agency's authority to the other but a conflict over the assertion of governmental authority upon private parties has not been limited to suits involving the Secretary of Agriculture, however. *See, e.g., United States v. ICC*, 396 U.S. 491 (1970) ("Northern Lines Merger Cases") (DOJ challenge to ICC approval of railroad merger); *American Commercial Lines v. Louisville & Nashville R.R.*, 392 U.S. 571 (1968) (the United States, that is, DOJ, although a statutory defendant, argued on behalf of railroads challenging the ICC's denial of their petition for a rate decrease);

One could draw the justiciability line for such disputes in any of four places. In order of increasingly tangible divergence of interests, they are as follows. First, any agency could challenge any governmental decision. Not only the Department of Agriculture, but also the Securities and Exchange Commission (SEC) could challenge the vegetable unloading tariff. Second, an agency could challenge any governmental decision adversely affecting private interests that it regulates or protects. Thus, the Secretary of Agriculture could challenge the vegetable tariff because it is "bad for agriculture," but the SEC, which carries no particular brief for agricultural interests, could not. Third, an agency could challenge another agency's action if it affected not merely private interests within the challenging agency's jurisdiction, but that agency's regulatory program itself. Under this approach, the Department of Agriculture could not challenge the tariff merely because it was bad for agriculture; it could get to court only if the tariff hampered the Department's own regulatory efforts—for example, if varying rates for different vegetables undercut a set of price supports it had established. Finally, perhaps none of these are justiciable, and one agency can sue another only when subject to the other agency's authority, as in *United States v. ICC*.

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Udall v. Federal Power Comm'n, 387 U.S. 428 (1967) (Secretary of the Interior challenged FPC's grant of an exclusive license for hydroelectric dam); *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953) (Secretary of the Interior challenged FPC's grant of a license for hydroelectric generating plant); *Far East Conference v. United States*, 342 U.S. 570 (1952) (DOJ challenged, under the Sherman Antitrust Act, freight rates approved by the Federal Maritime Board); *Levinson v. Spector Motor Serv.*, 330 U.S. 649 (1947) (ICC versus the Wage & Hour Administration); *ICC v. City of Jersey City*, 322 U.S. 503 (1944) (Office of Price Administration, represented by the Solicitor General, challenged the ICC's approval of a railroad rate increase); *ICC v. Inland Waterways Corp.*, 319 U.S. 671 (1943); *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984) (National Marine Fisheries Service challenged the license granted for a hydroelectric dam on the ground that the impact on fish populations was inadequately taken into account), *cert. denied*, 471 U.S. 1116 (1985); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) (challenge by Antitrust Division of DOJ to the FMC's approval of a shipping rate agreement among six ocean carriers); *United States v. Federal Maritime Comm'n*, 655 F.2d 247 (D.C. Cir. 1980) (same); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (en banc) (DOJ challenged the FCC's grant of a license to a private corporation to construct and operate satellites as a common carrier); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980) (DOJ represented the United States as a nominal respondent, but argued that the FCC rulemaking was arbitrary and capricious), *cert. denied*, 451 U.S. 920 (1981); *United States v. Civil Aeronautics Bd.*, 511 F.2d 1315 (D.C. Cir. 1979) (DOJ challenged the CAB's approval of multilateral capacity reduction agreements among air carriers in response to fuel shortage); *American Mail Line v. Federal Maritime Comm'n*, 503 F.2d 157 (D.C. Cir.) (DOJ challenged FMC approval of shipping agreement), *cert. denied*, 419 U.S. 1070 (1974).

### 1. *Regulatory Disputes and Article III*

The first of the above categories is clearly nonjusticiable. Messy though standing principles are, one can safely say that an agency unrelated to the challenged decision or the parties it affects has not suffered a constitutionally adequate injury-in-fact.<sup>282</sup> Standing concerns aside, the required situational adversity is, not coincidentally, absent here. The two agencies do not have a concrete dispute.

In the other three situations, however, standing and situational adversity may well exist. Plainly, a constitutionally adequate injury exists if the agency itself is directly aggrieved or if a regulatory program it is charged with administering is harmed.<sup>283</sup> Whether standing exists is less clear if the injury is to private interests that the agency is charged with protecting. Principles of associational standing,<sup>284</sup> however, could reach this situation. Just as an ideological or advocacy interest is not enough to create standing for a public interest organization but specific harm to its members is enough,<sup>285</sup> so the advocacy interest of, for example, the Department of Agriculture may be insufficient to give it standing to challenge actions that harm its constituency, but the constituents' injury does create standing.

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282. Because an agency is part of the same government, it automatically may have a stake in any and every governmental decision. The same argument holds, however, for any citizen; yet such ideological or emotional injury flowing from an individual's compelled support or association with governmental practices that she deems unwise or illegal are inadequate to create standing. *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986); *McKinney v. Department of the Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986). Moreover, if the idea of the government as one person has any substance, government agencies should be less, not more, free than private citizens to challenge governmental actions that do not directly affect them.

283. *United States v. FMC*, 694 F.2d 793, 802 (D.C. Cir. 1982); see also *Coleman v. Miller*, 307 U.S. 433, 441-42 (1939) (administrative commissions have a "legitimate interest" in resisting attempts to prevent enforcement of statutes). Although the courts did not discuss standing directly in those cases cited *supra* note 281, their decisions must have rested on that basis.

The distinction between a harm to an agency's regulatory program and a harm to the agency's constituency is not crystal-clear. A regulatory program consists of ways in which the agency imposes certain requirements and ways in which it chooses to leave private parties alone. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824); *id.* at 227 (Johnson, J., concurring). Regulation by another agency that does not directly conflict with the first agency's requirements may nonetheless disrupt the overall regulatory scheme. The same idea surfaces in preemption analysis. See, e.g., *Pacific Gas & Elec. v. State Energy Resources Conservation Comm'n*, 461 U.S. 190 (1983).

284. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

285. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Perhaps, however, notwithstanding satisfaction of the usual standing requirements, the fact that both of the potential litigants are part of the executive branch operating in the same capacity creates a unity of interests that renders their dispute nonjusticiable. After all, if the government's litigating role is "to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare,"<sup>286</sup> then allowing two governmental parties to litigate against each other is a logical impossibility—except, of course, when one of them is the alleged wrongdoer who has harmed the general welfare and the other one of those whose welfare has been harmed. This view is, however, wholly unrealistic. Twenty-five years ago, Professor Jaffe pointed out that conflicting private interests are not reconciled in a unitary "public interest" served by every agency individually and the government as a whole:

The public interest no longer can be limited to one mask worn by the Attorney General. The United States may incestuously sue itself. It may, in the carnival of the public interest, appear in many guises in which if one looks he may see—without too much effort—twitching behind the august lineaments of the ICC, the Department of Agriculture, and the Secretary of the Interior, the eager grimaces of railroad, farmer, and rural electrifier. All of these interests are represented in this mode on the Congressional and administrative stage; it has come to be thought appropriate that they be so represented in the courts of law when a legal issue is relevant to the exercise of power.<sup>287</sup>

Jaffe thus suggests that a justiciable controversy arises in situations in which one agency challenges another even if it is not subject to a decision of that agency. This view recognizes that there is no unitary governmental or public interest separate and apart from diverse private interests.<sup>288</sup> The pluralist battle

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286. *In re Debs*, 158 U.S. 564, 584 (1895).

287. L. JAFFE, *supra* note 34, at 541-42 (footnote omitted). In the immediately preceding passage, Jaffe explicitly denies that the justiciability of such interagency litigation as has occurred—in particular, *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953)—hinged on the presence of an independent agency. His point is that justiciability is the result of the agencies' divergent interests.

288. A slightly different view of the nature of the public interest, though one which also argues for justiciability of interagency disputes, is evident in the establishment of an agency specifically charged with representation of the public interest. New Jersey, for example, has created a Department of the Public Advocate, N.J. STAT. ANN. § 52:27E-

does not cease inside the halls of government. Each agency has a mission and a constituency that will conflict with the interests and constituencies of other agencies.<sup>289</sup> Any rule about justiciability must come to grips with the fact that the government itself represents different interests and is therefore composed of conflicting entities with different goals and views. In furthering the interests of American agriculture, for example, the Secretary of Agriculture might quite sensibly go to court to cure an injury to the particular facet of the public interest that she represents. Even apart from any personal interest in the development and maintenance of a coherent and effective agricultural policy, the Secretary is the single-minded proxy for a particular segment of the public. Either or both of these interests provides her with a sufficient stake in the controversy to satisfy any concerns about adversity and collusion. To the Secretary of Agriculture, an ICC ruling that raises farmers' expenses hits home in something of the same way as an ICC ruling that raises the expenses of the Department of Agriculture. One could argue, as Jaffe seems to, that as long as the challenging agency regulates or represents a directly affected interest, or implements a statutory scheme that will be affected, even if indirectly, by the challenged action, it can go to court.<sup>290</sup>

This liberal view of article III requirements is evident, for example, in various cases in which courts have heard DOJ challenges to allegedly anticompetitive agreements that another

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1 (West 1990), containing a Division of Public Interest Advocacy. *Id.* § 52:27E-28. The director of this Division may in her discretion commence or intervene in any administrative or judicial proceeding in furtherance of "the public interest," *id.* § 52:27E-29, which is "an interest or right . . . inhering in the citizens of this State or in a broad class of such citizens." *Id.* § 52:27E-30. If the director perceives conflicting public interests, she may represent none, one, or more than one through lawyers from outside the Division or the Department. *Id.* § 52:27E-31.

The underlying premise of such an office appears to be that the twin evils of "agency capture" and "tunnel vision" are so pervasive as to require a separate agency charged exclusively with the representation of the public interest. Similar concerns argue for allowing those within the government to challenge agency action. For present purposes, the key question is not the theoretical one of whether such a thing as "the" public interest exists, as the New Jersey statute for the most part assumes, but the practical one of whether single-mission agencies represent it. Jaffe and the New Jersey legislature agree that they do not.

Creating a Division of Public Interest Advocacy *within* the government to litigate *against* the government is comparable to permitting litigation of interagency regulatory disputes. The challenging agency, although not directly affected, invokes a broader interest.

289. Eizenstat, *supra* note 115 ("Each department has its own constituencies to serve based on its mission and mandate. This is the essence of a representative democracy.").

290. L. JAFFE, *supra* note 34, at 537-43.

agency has approved. Consider a DOJ challenge to the Federal Maritime Commission's (FMC) approval of a price-fixing agreement among shippers. The FMC's approval exempts such agreements from the antitrust laws.<sup>291</sup> The Court of Appeals for the District of Columbia has held that a justiciable controversy exists if DOJ seeks review of the FMC's order.<sup>292</sup> Invoking a two-part test drawn from *United States v. Nixon*,<sup>293</sup> the court found an article III controversy because (1) the issues were of the sort that are traditionally justiciable and (2) the setting assured concrete adverseness.<sup>294</sup> The test was in part inadequate and in part misapplied.

Looking at the legal *issue* misses the point. The problem of intragovernmental litigation turns on the identity of the *parties*.<sup>295</sup> For that matter, a court always has to determine whether the

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291. 46 U.S.C. § 814 (1988). The FMC should approve an agreement if it is not unjustly discriminatory or unfair, will not be detrimental to commerce, and is not contrary to the public interest.

292. *United States v. FMC*, 694 F.2d 793, 794-95 (D.C. Cir. 1982); *United States v. FMC*, 655 F.2d 247, 252 (D.C. Cir. 1980); *American Mail Line v. FMC*, 503 F.2d 157, 159-60 (D.C. Cir.), *cert. denied*, 419 U.S. 1070 (1974).

293. 418 U.S. 683 (1974). *Nixon* involved a motion by the Special Prosecutor, in the name of the United States, for a subpoena duces tecum directed to the President, countered by the President's motion to quash on the ground of executive privilege. *Id.* at 686. Nixon argued that this was a nonjusticiable intrabranch dispute. *Id.* at 693-94. Relying on *United States v. ICC* for the proposition that the court must look behind the caption, the Court disagreed. *Id.* at 693. The particular issue was of a sort courts traditionally resolve, the setting ensured concrete adverseness, and, as it arose out of a criminal prosecution, the matter was within the traditional scope of the article III power. *Id.* at 696-97.

294. *United States v. FMC*, 694 F.2d at 810 (citing *Nixon*, 418 U.S. 683). The government argued that the case was justiciable because the true parties in interest were itself and the ocean carriers. *Id.* The court neither accepted nor rejected this argument, *id.*, but its application in this setting shows how little the nongovernmental-real-party-in-interest test actually means. This is a far cry from *United States v. ICC*, in which the Army and the railroads were contesting a sum of money. DOJ's quarrel was with the commission for authorizing the carriers to do something that it considered illegal, but that had no direct effect on DOJ. The Department had to challenge the FMC order because, given the FMC's approval, it had no dispute with the carriers. Indeed, in holding that the Department had standing, the court identified the Department's injury as being the FMC's interference with the Department's discharge of its statutory duties. *Id.* at 802. If that is the injury, then the dispute can only be described as being between DOJ and the FMC.

295. As Professor Van Alstyne wrote about the *Nixon* decision soon after it came down, "of course the *issue* was justiciable, but only if one abstracts 'the' issue as though it were but an ordinary case" involving a dispute over discovery. Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 132 (1974); see also *supra* note 17 (distinguishing the problem of interagency litigation, which turns on the parties litigating, from that of political questions, which turns on the issue litigated).

issue is justiciable. The first prong thus has nothing to do with intrabranch litigation as such.<sup>296</sup>

As for the second prong of the test, there is no question that DOJ and the FMC were adverse in fact. They fundamentally disagreed over the legal issues involved and the wisdom of the order; they had disagreed during the administrative proceedings; and they gave no indication that this disagreement was feigned or halfhearted. Yet fierce disputes occur within the giant bureaucratic machine that is the United States government or even the smaller machine that is an individual agency. If the rule is merely that bureaucrats holding conflicting views must do so with sincerity and perseverance, then almost *any* intragovernmental conflict—at least any that actually ends up in court—would be an article III case or controversy.

Quoting *United States v. Nixon*, the court in *United States v. FMC* found that the “setting” assured “concrete adverseness.”<sup>297</sup> Yet the “setting” merely involved two agencies that disagreed, each invoking the “public interest.”<sup>298</sup> The only thing about the setting that indicated adverseness was the fact that both agencies were before the court and in disagreement.

Article III requires more.<sup>299</sup> At the least, it demands that governmental litigants not merely disagree, but also represent

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296. The Court's application of this prong of its test was indisputably correct, however. The Department had contended that the FMC order was invalid because it was not limited to agreements pertaining solely to ocean carriage, it violated the basic antitrust public interest standard, and the FMC's procedures were incomplete. *United States v. FMC*, 694 F.2d at 796, 809-10. If the inquiry is merely whether these are the sorts of issues that courts traditionally decide, the answer is plainly yes, and one can imagine a garden-variety petition for review brought by a private party making precisely those arguments.

297. *Id.* at 810 (quoting *Nixon*, 418 U.S. at 697).

298. *Id.* The Court could only say that DOJ “is the authorized and traditional advocate of antitrust policies in agency litigation, . . . which policies are implicated by the ‘public interest’ standard of section 15 of the Shipping Act, and the Commission obviously has a role before this court as an advocate of its own perception of the public interest.” *Id.* (citation omitted). Such a divergence does not seem to extend beyond the fact of disagreement.

299. *See supra* notes 41-45 and accompanying text (sincere disagreement alone does not create justiciable controversy). The Court in *Nixon* noted that its “starting point is the nature of the proceeding for which the evidence is sought,” *Nixon*, 418 U.S. at 694; it cautioned that “controversy means more than disagreement and conflict[]; rather it means the kind of controversy courts traditionally resolve,” *id.* at 696; and it concluded its substantive discussion by noting that “since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power,” *id.* at 697. Taken together, these statements indicate that not only must the dispute involve a legal issue and concrete adversariness, but the judicial resolution must be appropriate given the role of the courts in the constitutional scheme. The opinion is not much help in identifying just what this role is.

different interests or appear in different capacities. In this litigation, DOJ and the FMC did not appear in different capacities; they both appeared as antitrust enforcers. Arguably, however, they represented different interests; they at least were pursuing different regulatory agendas. By immunizing this agreement from the otherwise-to-be-expected DOJ challenge, the FMC order stood in the way of DOJ's enforcement program. Because the dispute involved not only mere disagreement but also direct interference, the two agencies' interests were sufficiently divergent to satisfy article III.

So where does that leave us? The strong position would be that such generally divergent interests are still not enough to satisfy the adversity requirement and that article III requires the specific conflict that exists in situations in which one agency asserts its authority over another.<sup>300</sup> Requiring that one agency assert regulatory authority over the other would render antitrust litigation between DOJ and the FMC nonjusticiable,<sup>301</sup> unless, of course, the United States as a shipper was forced to pay higher rates as a result of the challenged agreement.<sup>302</sup>

In the article III context, however, the regulating/regulated distinction rests as much on intuition as argument, a feeling that two agencies truly are part of the same person when both are acting in their regulatory capacities. Intuition counts, but given

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300. The regulating/regulated distinction is in fact lurking just beneath the surface in the *Nixon* opinion. The Court tended to view President Nixon as a nongovernmental entity. It was not because Nixon appeared in his personal capacity; plainly his defense, executive privilege, was available only in his official capacity. As President, however, Nixon was a member of the regulated community, subject to the ordinary evidence-gathering regime of the criminal law.

301. In another DOJ challenge to an FMC-approved rate agreement, Judge Markey unsuccessfully argued, in essence, that the case was nonjusticiable because both agencies were trying to regulate. *United States v. FMC*, 655 F.2d 247, 256-57 (D.C. Cir. 1980) (Markey, J., concurring). Markey acknowledged that the same challenge to the FMC's order, if brought by a private party with a pecuniary interest, would present a case or controversy. *Id.* at 257 (Markey, J., concurring). "The true issue presented however, is whether the DOJ view of antitrust law and the public interest, or that of FMC, shall be applied." *Id.* I argue below that this issue is indeed nonjusticiable, not because no case or controversy exists, but because this issue presents larger separation of powers concerns.

302. Such circumstances have arisen. In *Far East Conference v. United States*, 342 U.S. 570 (1952), DOJ brought an action seeking to enjoin a dual rate system employed by carriers to the Far East. The Court ordered DOJ to initiate its challenge before the Federal Maritime Board. In response to DOJ's suggestion that perhaps it could not appear before a sister agency, the Court observed: "We ought not to dally longer with this objection, considering the fact that the United States, as a matter of common knowledge, is today one of the largest shippers in the Far East trade." *Id.* at 576 (citing *United States v. ICC*, 337 U.S. 426 (1949)).



the conflicting goals and interests within the government, a rule limiting suits to those in which one agency is regulating the other is hard to base on article III alone. Viewed strictly in terms of article III, the received notions of adverse parties, and the purposes adversity is thought to serve, no per se rule bars litigation of interagency disputes as long as one agency has in fact harmed the other agency, its regulatory program, or the interests it represents.

## 2. *Unitary Execution*

Administrative agencies are in a variety of ways largely independent actors. As Part III shows, the objection that permitting agencies to square off in court would violate the unitary executive principle does not ring true.<sup>303</sup>

Notwithstanding the many defects of the unitary executive model, however, the goals of efficiency, consistency, and accountability do argue against interagency litigation. Although the term unitary executive is a misnomer and the President is not the person who does or should make all executive branch decisions, the Constitution does in a sense require the *unitary execution* of the laws.

The Constitution creates an executive branch. It assigns to that branch the task—admittedly ill-defined—of executing the laws. That is not a task that the branch can pass on to others. As a result, a dispute arising within the branch as to how best to execute a law must be resolved within the branch. Congress can involve any number of agencies in the decisionmaking process, but ultimately one has to make the final decision. Except to the extent that an agency is itself affected by that decision or contends that it was slighted in the decisionmaking process, it has no judicial remedy. If execution of the laws is to reside in the executive branch, then this must be so.

In part this limitation reflects respect for the allocation of regulatory authority. In a sense, once the decisionmaking agency has made its decision, the dispute no longer exists: the govern-

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303. Some commentators conclude that therefore anything goes with regard to interagency litigation. See, e.g., *Amending and Extending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund): Hearings Before the Senate Environment and Public Works Comm.*, 98th Cong., 2d Sess. 461-63 (1984) (statement of Kenneth Kamlet, National Wildlife Federation) (DOJ's unitary executive theory "exalt[s] the fiction of a monolithic Executive Branch over the realities of everyday life"); Rosenberg, *supra* note 80, at 684-88.

ment has spoken through the office charged with making the final determination; that ends the matter insofar as the United States is concerned. By placing a decision in the hands of a particular agency, Congress has implied that it does not want other agencies to gum up the works. This implication is obvious at the intra-agency level. Take the example of a Housing and Urban Development (HUD) Under Secretary challenging a HUD grant. One adequate reason for dismissing such an action would be that Congress did not authorize it. By placing the final decision with the Secretary, Congress indicated that it did not want the Under Secretary to stand in the way. Similarly, by placing grant-making authority with the HUD Secretary, Congress has made all other agencies subordinate with regard to that decision.<sup>304</sup> We can infer from Congress' decision to place the final determination with the Secretary that it does not want other persons or agencies, to which it chose not to give this authority, to interfere with the Secretary's execution of that responsibility.

If whoever allocated the authority—usually Congress—also endorsed interagency litigation, however, then respect for that allocation is not enough to compel a court to stay its hand. Stay its hand it should, however. The strictness of antitrust enforcement, for example, is not something for the enforcers to fight about in court. Their *constitutionally assigned* task is to figure out enforcement policy on their own. A private party with standing can of course attack the government's determination in the normal course, but the government cannot attack itself.

An extreme example illustrates the point. Suppose that the Department of Labor adopts workplace safety regulations over OMB's objections. OMB complains to the President, who is dismayed with the content of the regulations. The President can fire the Secretary of Labor, trusting a more sympathetic replacement to revoke the regulations. That, however, seems like the long way around, so the President challenges the regulations in court. Such a suit looks bizarre; I would say it is also unconstitutional. The executive branch cannot litigate about how to execute the laws; it must execute them. This principle of unitary execution rests not so much on the inviolability of presidential authority as it does on a scheme of separate powers and the relations between the government and the governed.<sup>305</sup>

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304. This is also an article III argument.

305. The same principle therefore applies whether the agency is independent or executive. Unitary execution has nothing to do with freedom from presidential control; rather, it concerns the respect one executor of the laws must accord another.

The question is how far this requirement of unitary execution should go. It might suggest that the Court's decision in *United States v. ICC*, for example, was wrong because the ICC should have had the final, unreviewable say. If Congress and the President want the advantages of an expert administrative agency within the federal government to regulate interstate commerce, they must live with the decision to place decisionmaking authority in such an agency—especially if submission of a claim to the ICC is voluntary. Congress need not have placed the United States within the ICC's jurisdiction. By doing so, however, Congress determined who in the government would make decisions about railroad regulation. However unhappy others in the government may be with the decisionmaking agency, they have no legal recourse.

To the extent this argument relies on congressional intent to give the ICC the final say, the short answer is that Congress gave the ICC the final say *subject to judicial review*. The separation of powers question—whether courts can review an agency's execution of the laws—is easily answered in the affirmative and is not altered by the fact that the aggrieved party is governmental. To the extent this argument rests instead on an understanding of unitary execution, it is equally misplaced. In disputes in which one governmental party acts in its regulatory capacity and the other appears as a member of the regulated community or as a beneficiary of the regulatory scheme, each of the litigants, and the court, is doing exactly what it ordinarily does. Only one agency, the ICC, is executing the laws. The different capacities of the two governmental parties ensure unitary execution.

The *United States v. ICC* situation contrasts with cases in which DOJ challenges a merger that another agency has approved. For example, the Comptroller of the Currency must approve any merger involving a national or a district bank.<sup>306</sup> The Comptroller must withhold approval if the merger would violate the antitrust laws and must notify the Attorney General before granting approval.<sup>307</sup> If the Attorney General deems a Comptroller-approved merger improper, he can bring an antitrust action. The reviewing court must apply "standards . . . identical with those that the [Comptroller of the Currency is] directed to

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306. 12 U.S.C. § 1828(c)(2) (1988).

307. *Id.* § 1828(c)(5).

apply."<sup>308</sup> The Comptroller is entitled to intervene as of right in any such action, represented by its own counsel.<sup>309</sup>

One might view this litigation as a garden-variety antitrust prosecution in which the defendants rely on the Comptroller's approval either as (1) *res judicata*, (2) an administrative determination to which the court must defer, or (3) a complete defense on the merits. This is more or less how the Court viewed the *United States v. Marine Bancorporation*<sup>310</sup> and *United States v. Connecticut National Bank*<sup>311</sup> cases.<sup>312</sup> The disputes were between the antitrust division and the banks; the Department was operating exactly as it was supposed to; the Comptroller's prior determination did not alter the basic nature of the lawsuits; and the issues, to use, anachronistically, the Court's language in *United States v. Nixon*, were of a sort traditionally justiciable and arose in a setting that assured concrete adverseness.<sup>313</sup>

This view of the litigation does not hold up because all three versions are inconsistent with the statute. First, the banks cannot argue that the Comptroller's decision is *res judicata* on the question of antitrust liability for the simple reason that Congress said it is not. Congress is wholly free to define the scope of *res judicata* with regard to administrative determinations.<sup>314</sup> Second, the banks might point to the Comptroller's decision as an administrative interpretation of the antitrust laws to which the court must accord deference. Given the absence of specific congressional guidance, deference to the agency could be pivotal if the court takes a hands-off approach.<sup>315</sup> The disagreement between DOJ and the Comptroller raises some thorny problems about deference.<sup>316</sup> In any event, the statute's specific requirement that

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308. *Id.* § 1828(c)(7)(B).

309. *Id.* § 1828(c)(7)(D).

DOJ and the Comptroller of the Currency have frequently litigated against each other under this scheme. See *United States v. Connecticut Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968); *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967). None of these decisions addressed justiciability. In *United States v. Nixon*, 418 U.S. 683 (1974), however, the Court relied on the 1974 decisions in holding that *Nixon* was not a nonjusticiable intrabranch dispute. *Id.* at 693.

310. 418 U.S. 602.

311. 418 U.S. 656.

312. See *supra* note 309 and text accompanying notes 303-09.

313. 418 U.S. 683, 697 (1974).

314. RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982).

315. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

316. For example, the Comptroller has primary responsibility for regulating bank mergers; DOJ has primary responsibility for administering the antitrust laws. To which

the court apply standards identical to those the Comptroller is directed to apply suggests that Congress sought essentially *de novo* rather than deferential review. Third, the very fact that the statute expressly authorizes the DOJ lawsuit makes clear that Congress did not intend the Comptroller's approval, in itself, to be a defense on the merits.

The second reason one cannot view these cases as ordinary antitrust actions, with the Comptroller's prior approval just a minor wrinkle meriting some undetermined weight, is that opposing governmental parties are actually before the court. By allowing the Comptroller to intervene as of right, Congress has acknowledged—indeed, anticipated—the possibility of regulatory disagreement between two executive agencies without giving either the final say. The litigation resolves a breakdown within the executive branch, which was unable to determine how best to execute the antitrust laws. Behind the named parties is the executive branch, divided against itself. DOJ is not subject to the Comptroller's order; nor is it directly affected by the alleged anticompetitive effects of the merger; nor was its role in the decisionmaking process overlooked. Rather, it simply disagrees with the Comptroller's execution of the antitrust laws.<sup>317</sup>

In short, two agencies disagree over the execution of the laws, and the matter passes to the judiciary, which is charged with applying the same standards as the agency. If the idea of unitary execution or an executive branch bottom line is valid, this arrangement is impermissible.

Congress had available other mechanisms short of litigation to involve DOJ in the decisionmaking. First, Congress could have

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agency do courts owe deference? *Cf.* *General Elec. Co. v. Gilbert*, 429 U.S. 125, 144-45 (1976) (deference not useful in cases in which two agencies charged with implementation of statute had opposing views).

317. Presumably DOJ, which was the plaintiff and as far as we know did not challenge the Comptroller's participation, considered the suit justiciable. *See also* *United States v. FMC*, 694 F.2d 793, 799 (D.C. Cir. 1982). Under DOJ's article III analysis, the merged bank constituted a nongovernmental real party in interest and DOJ's quarrel was actually with the bank for merging. As discussed above, this setting is a stretch from the *United States v. ICC* model, for the bank did not hurt DOJ except to the extent its existence undermined DOJ's regulatory program and its efforts on behalf of the public interest. Although the distinction is a stretch that DOJ was willing to make under article III, reconciling its litigation against the Comptroller of the Currency with its unitary executive theory is difficult—all the more so because (1) the Comptroller is not an independent agency and (2) in other settings DOJ represents the Comptroller, suing as the *United States*. *See, e.g., United States v. Federal Deposit Ins. Corp.*, 881 F.2d 207 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990).

required the Comptroller to solicit the views of other agencies. Indeed, it did so; the Comptroller must consult DOJ about the antitrust issues of a merger before approving it.<sup>318</sup> If, as was evidently the case, Congress deemed mere consultation insufficient, the answer was to give DOJ the final say.<sup>319</sup> Such an allocation of responsibility would be perfectly sensible and consistent with Congress' authority to assign decisionmaking responsibility within the executive branch. In a way, that is all that Congress has done here. The Comptroller makes the initial decision, but DOJ can disagree by bringing an enforcement action against the merged banks. The form of the disagreement, however, makes all the difference. If DOJ had veto authority, then by the time the matter reached the courts, the executive branch would have taken a single position. Under the statutory scheme Congress has in fact chosen, the opposite is true; the litigation hinges on the disagreement within the branch and assumes the participation of two agencies. The relevant statute directs the judiciary to resolve their dispute by applying exactly the same standards as the agencies.<sup>320</sup> In other words, the courts are supposed to do the agencies' job for them.

### C. Turf Wars

A third type of case falls between the two categories discussed above. It is a challenge on the ground that the decisionmaking agency slighted the challenger's role in the decisionmaking process. In *ICC v. City of Jersey City*,<sup>321</sup> for example, the Price Administrator of the Office of Price Administration (OPA) unsuccessfully challenged the ICC's approval of a rate increase on a

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318. 12 U.S.C. § 1828(C)(5) (1988). If the Comptroller failed to consult DOJ, DOJ could challenge the Comptroller's decision on that basis. See *infra* notes 321-34 and accompanying text.

319. The Clean Water Act's permit program for the discharge of dredged and fill material is an example of such a scheme. 33 U.S.C. § 1344 (1988). The Act requires a permit from the Army Corps of Engineers for such discharges. *Id.* EPA can review and veto a Corps permit. *Id.* § 1344(c). If EPA does so, the unsuccessful applicant must sue EPA, and the Corps does not participate. For an example of such litigation, see *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989). During oral argument before the court of appeals in that case, Judge Timbers wondered where the Corps was, implying that they should have been represented separately. Counsel for the government assured the court that he represented both the Corps and EPA. The Corps may well have been rooting for the developer to win and EPA to lose, but it was not permitted, correctly, to take that position in court.

320. 12 U.S.C. § 1828(c)(7)(B).

321. 322 U.S. 503 (1944).

commuter railway. Represented by DOJ, he contended that his opposition to the increase was entitled to special, perhaps dispositive, weight.<sup>322</sup>

Such a dispute does not arise merely out of a disagreement over the merits of the challenged action. Rather, the petitioning agency argues that *it* had a role in the decisionmaking process that the respondent agency ignored.<sup>323</sup> As the Court put it in an earlier OPA case, "[T]he controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances."<sup>324</sup> In its extreme form, this sort of fight is over jurisdiction; that is, two agencies disagree as to which has authority over a particular matter. These disagreements are generally resolved within the executive branch, although the legal issue may well ultimately reach the courts in litigation brought by private parties.<sup>325</sup>

Under the regulating/regulated rule, these cases are nonjusticiable. The OPA was plainly not a regulated party in the sense that the Army was in *United States v. ICC*.<sup>326</sup> The OPA and the ICC were both participating in the suit in their regulatory capacities; indeed, the OPA sought to vindicate its regulatory authority.<sup>327</sup>

322. In a decision that was clearly correct under the statute, the Court held that Congress could have given the OPA such power but did not. Because the OPA had no special role and had received a full hearing, no error resulted. *Id.* at 514-24. The Court did not discuss justiciability.

*ICC v. City of Jersey City* was one of a series of interagency suits in which the courts rebuked the OPA's efforts to carve out special authority over economic regulation. See also *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944) (objection to rate increase authorized by the Public Utilities Commission of Washington, D.C., a federal instrumentality); *North Carolina v. United States*, 56 F. Supp. 606 (D.N.C. 1944), *rev'd on other grounds*, 325 U.S. 507 (1945); *Alabama v. United States*, 56 F. Supp. 478 (W.D. Ky. 1944) (three-judge Court), *rev'd on other grounds*, 325 U.S. 535 (1945) (OPA challenge to ICC decision). In the *Alabama* case, the OPA and the ICC were each represented by their own attorneys; the local United States Attorney appeared on behalf of the United States and adopted a neutral position. *Alabama*, 56 F. Supp. at 478.

323. For another example of litigation over turf, see *Northwest Airlines v. CAB*, 539 F.2d 748 (D.C. Cir. 1976). The United States, represented by DOJ, successfully argued that the CAB had exceeded its authority to permit "temporary" changes in international airline routes without, as is normally required, obtaining presidential approval, by allowing such temporary changes to remain in effect for two years. *Id.* at 752-53. This case is a straightforward example of the President suing to protect his regulatory authority.

324. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 497 (1944).

325. See generally Note, *supra* note 171 (advocating judicial resolution of disputes between executive departments and agencies over congressional allocations of regulatory power).

326. 337 U.S. 426 (1949).

327. One might argue that the OPA was regulated because it was invoking a particular

Nonetheless, such a case should be justiciable. Plainly, no article III concerns are present. The petitioning agency is making a claim specific to it, that it was denied its legally mandated role in the decisionmaking process. Rather than asserting merely a general interest in the integrity of its programs or the facet of the public interest it represents, the agency challenges a direct attack on its authority. The injury is immediate, personal, and direct. No concerns over adversity or collusion are present.<sup>328</sup> Nor need we worry about interfering with presidential authority. The fight is over not what the government says, but who says it, a decision that is not solely the President's to make.

Ultimately the executive branch must take one position in its regulatory capacity. Parts of the executive branch cannot fight over what that decision should be in court. Yet precisely because a bottom line must exist, with one agency having the final say, allowing the slighted agency to protect its statutory decision-making prerogatives through the courts is appropriate. Under the principle of unitary execution, the OPA should stick to its tasks and not interfere with other agencies' fulfillment of theirs, but that is exactly why judicial enforcement of those respective roles should be available. By definition, Congress cannot give one agency the final say in a dispute that is about who gets the final say. Even if the President opts for one or the other, his determination is reviewable.<sup>329</sup>

Respect for Congress' authority and the rule of law counsel for judicial resolution of the disagreement. The courts' central function in the administrative state is to delineate and enforce

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statutory provision that, it claimed, gave it certain responsibility or authority that had been slighted. Regulators themselves are inevitably regulated in this sense, however. Agencies are always controlled by statute; the question is whether they are controlled by another agency.

328. See Note, *supra* note 171, at 1613-16.

329. The President (that is, OMB or DOJ) should, and often does, resolve such fights among his subordinates. Executive Order 12,146 requires executive agencies whose heads serve at the pleasure of the President to submit interagency legal disputes to the Attorney General "prior to proceeding in any court" and encourages other executive agencies to do the same. Exec. Order No. 12,146 §§ 1-401, 1-402, 3 C.F.R. §§ 409, 411 (1979). There are limits, however, to the President's ability to settle such jurisdictional battles, some imposed by Congress, some self-imposed. When a turf war involves binding, judicially cognizable standards, then the President cannot make an unreviewable determination of which agency decides. As long as there is, in the administrative law sense, "law to apply," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971); see *Heckler v. Chaney*, 470 U.S. 821 (1985), courts must apply it. To view turf wars as nonjusticiable merely because the President should run the branch is an invitation for the President to ignore the limits that Congress, or he himself, has established. See *United States v. Nixon*, 418 U.S. 683 (1974) (relying on regulation making independent prosecutor removable only for cause).



congressionally assigned agency responsibilities. Perhaps the competing agencies should sort out these battles internally, and they generally do. Perhaps cases will arise in which Congress did not assign tasks, leaving their assignment to the executive branch, in which case the court will play no role as long as the executive branch sticks to its own rules.<sup>330</sup> As long as the court enforces the legally mandated division of responsibility, however, then it is not intruding on presidential authority. To the contrary, it is in essence enforcing the unitariness of the executive.<sup>331</sup>

Consider judicial resolutions of fights within Congress. Resort to the courts by members of Congress looks immediately like sour grapes; having failed to convince their colleagues on the merits, the losers attack the outcome in court.<sup>332</sup> Their objections to the legislation or its harm to their constituents should not provide access to the courts; the forum for those objections is Congress itself. Suppose, however, that the democratically controlled House of Representatives refused to count the votes of Republican members.<sup>333</sup> Such an action would be justiciable. To

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330. Courts should and do enforce executive orders and agency regulations that allocate administrative responsibilities. See *Nixon*, 418 U.S. at 694-96.

331. An example is *Escondido Mutual Water Co. v. FERC*, 692 F.2d 1223 (9th Cir. 1983), *aff'd in part and rev'd in part sub nom. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). One part of this complex case was a DOI challenge to a FERC license for an enormous water project on and affecting several Indian reservations. *Id.* at 1229. FERC had rejected permit conditions proposed by DOI. *Id.* at 1228. DOI argued, and the court held, that the relevant statute required FERC to accept any conditions DOI proposed. *Id.* at 1229, 1234-36. The court did not discuss justiciability. This interagency litigation clearly was justiciable, however, because DOI went to court to vindicate its own congressionally established authority. The court was performing its appropriate role of ensuring that the various agencies adhered to Congress' allocation of authority.

This case also is an example of the regulating/regulated distinction. Congress had designated DOI as a trustee for the tribes. *Id.* at 1234-35. As such, DOI stepped into their shoes in the litigation. As trustee, DOI was a member of the regulated community; once completely identified with the tribes, it could challenge regulatory actions of the government that applied to them and thus to it.

332. McGowan, *supra* note 105.

333. For a less extreme example of such a controversy, see *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). In that case, 14 members of the House sued the majority leader, among other members, contending that the Democrats had systematically discriminated against them by providing them with fewer seats on committees than they were due. *Id.* at 1167. Devoting its justiciability analysis to the question of standing, the court found the case justiciable, *id.* at 1168-71, but withheld all relief and dismissed the action in the exercise of its discretion, citing separation of powers concerns. *Id.* at 1175-77. The court took the same approach in *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985) (dismissing a complaint filed by members of Congress seeking an injunction against improper preparation of the Congressional Record). Compare cases cited in *supra* note 105.

the extent members of Congress represent constituents, they must do so by participating in Congress, not by bringing lawsuits. Because that is the limit of the members' authority, however, they must be able to go outside Congress to defend their full participation in Congress' activities.

DOJ's challenges to FMC-approved rate-setting agreements further illustrate this point. Cases in which DOJ argues merely that the agreement is so contrary to the public interest that the FMC's action was an abuse of discretion or contrary to the statute present a pure regulatory dispute. If, on the other hand, DOJ argues that the type of agreement at issue is not in fact the type that should even be before the FMC to approve or disapprove—and is therefore subject to DOJ's ordinary responsibility as antitrust enforcer—such an action would be justiciable.<sup>334</sup>

#### *D. Interagency Litigation Accompanied by Private Litigation*

One other type of interagency litigation merits separate consideration. Arguably, as long as litigation is already taking place between a private party and the government, other governmental parties should be able to join or file companion suits. In practice, most interagency litigation occurs alongside companion suits by private parties; an agency seeking judicial review usually has some private co-petitioners. Perhaps their participation is what makes these cases justiciable.<sup>335</sup>

In part, this suggestion rests on the same justifications as the nongovernmental-real-party-in-interest test discussed above.<sup>336</sup> The

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334. For an example of such litigation, see *American Mail Line v. FMC*, 503 F.2d 157 (D.C. Cir.), cert. denied, 419 U.S. 1070 (1974) (on petitions for review from, among others, DOJ, the court set aside FMC approval of an agreement, under which two shippers were to become subsidiaries of the same corporate parent, as beyond the FMC's jurisdiction).

*United States v. Nixon*, 418 U.S. 683 (1974), also supports such a distinction. The President's attorneys contended that disagreement over what to do with the tapes was a jurisdictional dispute over whether the President or the Special Prosecutor had the final decision over the use of evidence in criminal proceedings. *Id.* at 693. This characterization would not render the dispute nonjusticiable; the Court would still be free to determine which had jurisdiction. In essence, that is what it did.

335. See *United States v. FMC*, 694 F.2d 793, 800 nn.22-23 (D.C. Cir. 1982) (suggesting, without deciding, that DOJ may be more free to challenge another agency's decision if it is not the only petitioner).

336. See *supra* notes 184-206 and accompanying text. Note, however, that the two are quite distinct. The former was an abstract, case-or-controversy argument that rested on the idea that the suit in essence was not actually between two parts of the government, but between the government and a private real party in interest. In contrast, the present suggestion is a practical argument that looks less to the presence of private parties than to the existence of their lawsuit.

fight between one part of the government and private parties ensures that the court has before it a justiciable controversy between truly adverse parties who are pursuing divergent interests, are not subject to mutual control, and will provide effective advocacy. Adding another governmental party does not eliminate that justiciable controversy and could be justified under some sort of pendent party theory. Furthermore, allowing agencies to intervene against the government in litigation already commenced between the government and a private party, but not to initiate litigation against other agencies, makes sense to the extent that the concern is with unnecessary judicial involvement in intragovernmental disputes. As long as affected private parties have brought the case to court, nothing will be lost and a good deal may be gained from greater agency participation. The executive branch is not turning to the courts to resolve its disputes; the court will be doing so in any event, and the question is whether all parts of the executive branch will have the opportunity to present their views. For the reasons discussed below, however, the existence of a private suit should not affect the justiciability of its interagency equivalent in either direction.

### 1. *Article III Concerns*

If the argument up to this point is correct, then the presence or absence of private litigants does not matter under article III. I have argued that article III generally permits intragovernmental litigation, even in cases in which no private litigants are involved; therefore, determining whether their existence renders a suit *more* justiciable is not necessary. Even if this analysis is wrong, however, accompanying private litigation still makes no difference to the article III analysis.<sup>337</sup>

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337. If any accompanying private litigation should matter, it can only be in cases brought by private parties. First, the idea that private parties have forced judicial resolution of the dispute applies only if, in fact, the private parties have brought the litigation. In DOJ challenges to bank mergers approved by the Comptroller of the Currency, see *supra* note 309 and accompanying text, the presence of the bank as a party thus cannot justify the litigation between DOJ and the Comptroller; no private party upset with the government's decision forced judicial review. If, on the other hand, private parties—for example, rival banks—first sought review of the Comptroller's merger, then *their* presence might justify the participation of DOJ and/or the Comptroller in the banks' lawsuit.

Second, allowing interagency suits as long as they began as litigation between the government and a private party, even if they were brought by the government, would create a large and unjustifiable loophole if the general rule is one of nonjusticiability.

If the private and intragovernmental suits are separate, the pendency of private litigation should make no difference. It would be bizarre and almost aggressively sloppy if a nonjusticiable suit were saved because someone else has filed a justiciable one. The same is not true, however, of agency intervention in an existing, justiciable suit or of consolidated actions.<sup>338</sup> The question then is how broad a suit that has an undeniably justiciable core can become. The usual pendent party/ancillary jurisdiction rationale is that in the interests of efficiency and judicial economy, a court having jurisdiction over part of a case ought to be able to decide all of the issues rather than having another court later resolve some tiny corner of the dispute.<sup>339</sup> If that corner is not justiciable at all, however, the same considerations argue *against* appending it to the justiciable core. One thus cannot invoke the usual pendent party rationale to let an agency that could not proceed directly against another agency into a case brought by a private party.

A line of cases holds, however, that an intervenor *as of right* need not have a justiciable controversy with the opposing party. The lower courts are divided; the Supreme Court has noted but not resolved the conflict.<sup>340</sup> The majority rule is that an intervenor as of right need not have been able to bring the suit itself.<sup>341</sup> Under this approach, a court would allow any governmental party to intervene as long as some statute gave it the right to do so, regardless of whether that party could have been an original party. This rule would justify, for example, litigation between DOJ and the Comptroller of the Currency which began as a suit between DOJ and a merged bank.<sup>342</sup>

The DOJ/Comptroller example illustrates the shortcoming of the rule that allows intervention without an independent juris-

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Congress can set up any regulatory scheme in such a way that if an agency is unhappy with another's decision it sues an affected private party. If naming a private party as the respondent is all it takes to get an interagency dispute into the courts, then a purported bar on such litigation amounts to nothing. A DOJ challenge to the merged bank is not meaningfully different from a DOJ challenge to FMC-approved rate agreements, even though in one DOJ formally sues the bank and in the other it formally sues the FMC.

338. Although many instances of interagency litigation have resulted from the consolidation of private and intragovernmental suits, few, if any, have involved formal agency petitions to intervene.

339. See, e.g., *Bowers v. Moreno*, 520 F.2d 843, 846-48 (1st Cir. 1975); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

340. *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21 (1986).

341. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 553 (3d ed. 1985).

342. See *supra* notes 306-09 and accompanying text.

dictional basis.<sup>343</sup> Irrespective of how the case began, in determining whether the Comptroller can intervene, the court must face the basic problem of whether DOJ and the Comptroller can square off in court. The case is in no essential way different from the suits over FMC-approved rate agreements that began as suits filed by DOJ against the FMC. Regardless of the caption, two federal agencies were fighting out their disagreements in court. The fact that the Comptroller joined the suit after it had started did not alter its underlying nature. Whatever the merits in general of allowing intervention by a party that could not have brought suit in the first place, this seems, therefore, an inappropriate setting in which to apply that rule.

In cases in which the second governmental party joining the litigation seeks *permissive* intervention, the argument fails because the intervenor must satisfy the same jurisdictional requirements as an original party.<sup>344</sup>

Ultimately, this approach proves too much, for it is in no way limited to intragovernmental lawsuits. The same rationale would apply to anyone who wanted to join an existing lawsuit. That is a conceivable system, but it is not the one we have. In short, allowing intragovernmental litigation as long as private parties initiated and are pursuing the litigation is responsive to article III concerns about adversity and the necessity for judicial resolution. Nonetheless, the existence of parallel litigation between an agency and private parties should not open the article III door to other agencies if such litigation is not independently justiciable.

## 2. *Article II/Separation of Powers Concerns*

The presence of private parties in the litigation does not significantly affect separation of powers/article II concerns. To be sure, in this setting the courts are, by definition, not deciding issues they should not be or unnecessarily meddling in executive affairs. The unitary execution, or unitary executive, arguments, however, remain as strong, or weak, as ever: if allowing agencies

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343. The general appropriateness of this rule is beyond the scope of this Article. Commentators have in general endorsed it. *See, e.g.*, 3 J. MOORE & J. KENNEDY, *MOORE'S FEDERAL PRACTICE* ¶ 24.18[1] (2d ed. 1987); C. WRIGHT, *THE LAW OF FEDERAL COURTS* 507 (4th ed. 1983).

344. *Stewart v. Dunham*, 115 U.S. 61 (1885); *FED. R. CIV. P.* 24(b); F. JAMES & G. HAZARD, *supra* note 341, at 554.

to appear on different sides of a lawsuit is an abdication of presidential authority, the fact that at least one of the agencies appears alongside private parties changes nothing; the agencies are still out of control.

### 3. *Practical Considerations*

The benefits of making an exception to any general rule of nonjusticiability in cases in which the courts will review an agency's action in any event are not obvious. The court can achieve all of the advantages of having multiple agency views before it by accepting amicus briefs without making the intervening agency a party. Although an amicus does not enjoy all the rights of participation of an actual party, most cases of interagency litigation rest on stipulated facts or a preexisting record. As a result, there is little in which to participate other than brief-writing. The key right an intervenor would have is the ability to appeal an adverse decision. Even if intervention can occur without an independent jurisdictional basis, however, such an intervenor cannot appeal on its own.<sup>345</sup> If the presence of private parties is necessary to allow a second agency into existing litigation, and those parties choose not to appeal, the agency would not be allowed to do so on its own. The difference, therefore, between amicus and party status is insubstantial.

Finally, a rule that looks to the presence of private parties in the case would have to require not merely that private parties be present, but that they raise the particular claim the latecoming governmental party seeks to make. For example, if private parties challenge an agency decision as too stringent, an agency could not intervene to argue that it was too lax. The underlying justification for the rule—that a court must decide the issue anyway and might as well be fully informed—does not apply in that circumstance.<sup>346</sup> Yet once one limits the latecoming govern-

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345. *Diamond v. Charles*, 476 U.S. 54 (1986).

346. Even if we accepted this rule, it would not render justiciable a case like *Environmental Defense Fund v. EPA*, 510 F.2d 1292 (D.C. Cir. 1975). This case was a challenge to EPA's decision to suspend registration of a pesticide while allowing the depletion of current stocks. *Id.* at 1295-96. The private parties argued that EPA should have forbidden any future use. *Id.* at 1296. The Secretary of Agriculture argued that the registration should not have been suspended. *Id.* The environmentalist's challenge cannot justify hearing the Secretary's challenge if the latter would be otherwise nonjusticiable.

mental party to those claims the original party already made, then little justification remains for allowing the governmental party into the case at all. Again, agency participation as an amicus is just as valuable.

Ultimately, then, the existence of a lawsuit between and agency and a private party cannot justify otherwise nonjusticiable inter-agency litigation.

## VI. LITIGATION BETWEEN PARTS OF THE SAME AGENCY

Against this background, consider briefly one last type of intragovernmental litigation—that arising between parts of a single agency. Such litigation looks nonjusticiable.<sup>347</sup> Suppose an Under Secretary of HUD seeks judicial review of the HUD Secretary's decision to award a particular grant. Such a suit has the indicia of justiciability that the Court identified in *United States v. Nixon*<sup>348</sup> and that the Court of Appeals for the District of Columbia applied in *United States v. FMC*.<sup>349</sup> First, there is concrete adverseness; if the Secretary prevails, HUD will award the grant, whereas if the Under Secretary prevails, it will not. Second, a justiciable issue could easily exist. For example, the Under Secretary might claim that the recipients of the grant do not meet certain statutory criteria—a completely run-of-the-mill, judicially manageable question of the sort that courts resolve every day.

The example of litigation within an agency shows the poverty of this analysis, however. Surely the HUD Under Secretary could not challenge the Secretary's grant decision. Entirely apart from whether the Under Secretary would have a cause of action<sup>350</sup> or standing,<sup>351</sup> the identity of the parties forecloses the litigation.

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347. Note, *supra* note 208, at 643. Professor Jaffe, for example, seemed to assume that litigation within an agency is nonjusticiable. See *supra* text accompanying note 34.

348. 418 U.S. 683, 697 (1974).

349. 694 F.2d 793, 810 (D.C. Cir. 1982).

350. To my knowledge, no federal statute gives subordinate decisionmakers the right to challenge their superiors' decisions. Such a scheme would certainly be surprising. Implicit in giving the final decision to the Secretary of an agency is a determination that the Under Secretary should not interfere. Moreover, the subordinate would not be "adversely affected or aggrieved" under the Administrative Procedure Act, 5 U.S.C. § 702 (1988), because she would have no personal interest at stake. See, e.g., *Smuck v. Hobson*, 408 F.2d 175, 177-78 (D.C. Cir. 1969) (en banc).

351. The Under Secretary would seem neither to have suffered an injury-in-fact nor to be within the statute's zone of interests. See, e.g., *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (school board member lacks standing to seek judicial review of

Two parties who share a boss cannot sue each other over a matter the boss can resolve.<sup>352</sup> A necessary corollary to this principle is that an employee cannot sue her own boss over a matter that the boss can resolve; for that reason alone, the HUD dispute does not pose a case or controversy. In addition, the Secretary and the Under Secretary do not represent divergent interests. They merely disagree on the merits. On a continuum, just as the underlying interests in *United States v. ICC*<sup>353</sup> were more distinct than those of the Secretary of Agriculture in challenging an ICC ratemaking policy that affected farmers, so that setting involved greater divergence than is found here. That the individuals disagree is not enough.<sup>354</sup>

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board's decision).

Similar reasoning is found in a District of Columbia Circuit decision holding that the Administrator of the CAB could not seek judicial review of the Board's dismissal of complaints that the Administrator had filed. *Lee v. CAB*, 225 F.2d 950 (D.C. Cir. 1955). The court reasoned that the Administrator had not been aggrieved. *Id.* at 951. The dissenting judge argued that the Administrator, who brings complaints in his own name, had an adequate interest in the proceeding to support a petition for judicial review. *Id.* at 952 (Prettyman, J., dissenting). Whether the majority or dissent was correct as to the nature of the Administrator's status is not important here. The opinion suggests, correctly, that an agency employee who contributes to or participates in the agency decisionmaking cannot then attack the decision in court. In contrast, an official external to the decision-making process is akin to a private party and can. *See also Mortenson v. Pyramid Sav. & Loan Ass'n*, 53 Wis. 2d 81, 191 N.W.2d 730 (1971) (state savings and loan commissioner cannot obtain judicial review of Savings and Loan Review Board decision contrary to his recommendation).

352. *See supra* notes 46-47 and accompanying text.

353. 337 U.S. 426 (1949).

354. In *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D.C. Colo. 1985), the court refused to place the Army on both sides of the lawsuit. The United States brought a Superfund action to recover \$48 million in costs incurred by the Army for cleaning up contamination allegedly caused by Shell. *See* 42 U.S.C. §§ 9604, 9607 (1988). Shell moved to join the Army as a defendant, arguing that it was partially responsible for the contamination and that the United States had to seek recovery from both responsible parties. The court correctly denied the motion, even though the Army could legitimately be both a plaintiff and a liable party under the statute. *Shell Oil*, 605 F. Supp. at 1083-84. Analogizing to comparative negligence cases, the court stated that the proper approach was for Shell to counterclaim and for the court to apportion liability. *Id.*

This result was clearly correct. The United States had an undivided interest in this litigation. It wanted to get as much money from Shell as possible to cover cleanup costs. One might portray the government as both regulating—pursuant to its response authority under 42 U.S.C. § 9604—and regulated—as a responsible party under 42 U.S.C. § 9607. The closer analogy, however, is to a case like *Dean v. Harrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (contract action between Department of Energy and the TVA). *See supra* notes 277-80 and accompanying text. Under Superfund, *anyone* can clean up a contaminated site and sue those responsible for the contamination for the costs. 42 U.S.C. § 9607(a)(4)(B). If the plaintiff is partially liable itself, the court will reduce its award accordingly. *Id.* § 9613(f). The statute places federal facilities in exactly the same position. *Id.* § 9620. In



Separate agency offices can, however, represent different interests and have divergent goals. For example, within the Department of the Interior, both the Fish and Wildlife Service (FWS) and the Bureau of Land Management (BLM) are in constant disagreement in pursuit of their entirely distinct agendas. Their disagreements are indistinguishable in nature from those between, for example, DOI and the Federal Power Commission in the dam cases.<sup>355</sup> Can the FWS and the BLM litigate against one another even though they are part of the same agency? Two branches of a single agency that represent different interests and have different missions present a stronger claim for justiciability. Yet in most settings, the shared boss will eliminate adversity. The Secretary of the Interior controls both the FWS and the BLM; hence, these two agencies cannot engage in a justiciable controversy. Significantly, litigation between parts of an agency in which the agency head did indeed run the show has, to my knowledge, never occurred.

Not all parts of every agency, however, are directly controlled by the agency head. Numerous examples exist of independent bodies nominally placed within an agency. The Occupational Safety and Health Review Commission (OSHRC), for example, is nominally within the Department of Labor, but is in no respect subject to the control of the Secretary of Labor. In enforcing the Occupational Safety and Health Act (OSHA), the Secretary of Labor inspects work sites and issues citations. If an employer contests the citation, the Secretary must file a complaint with the Commission, which determines the validity of the citation. The Secretary or "[a]ny person adversely affected or aggrieved" by the Commission's decision may seek review thereof in the court of appeals.<sup>356</sup>

Does the Constitution permit the Secretary of Labor to go to court to challenge a decision of a Commission within the Department of Labor? The short answer is clearly yes: because the

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this sense the government appears wholly in its regulated capacity—in contrast, for example, to the situation (so far hypothetical) in which EPA *orders* the Army to clean up a site, *see id.* § 9607, and the Army refuses to do so.

In any event, the critical point is that the Army, or the United States, as the court implicitly recognized, has only a single interest in this litigation. There simply is no dispute within the government over which to litigate.

355. *See* *Udall v. FPC*, 387 U.S. 428 (1967); *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

356. 29 U.S.C. §§ 660(a), (b) (1988).

Commission itself is not a party in the court of appeals,<sup>357</sup> the intragovernmental litigation problem does not even arise. Suppose, however, as at least two courts have held,<sup>358</sup> that the Commission can defend its action. In such a setting, the constitutional objection does not arise from the fact that the two parties have the same boss or that one is subordinate to the other; although OSHRC is nominally within the Department of Labor, the Secretary of Labor has no control over it whatsoever. Rather, the objection would be that OSHRC and the Department of Labor lack sufficiently divergent interests. In particular, they both appear in their regulatory capacities. OSHRC is enforcing the law in a manner that the Secretary does not like, but it is not enforcing the law against the Secretary. Under the regulating/regulated rule, such an action would not be justiciable. This status has nothing to do with the fact that the two parties are part of the same department. The same defect would exist if they were wholly separate.

One might try to save litigation by the Secretary of Labor against OSHRC by distinguishing two regulators squaring off in court from an enforcer and an adjudicator squaring off. As a party before OSHRC—indeed, the complainant—and as the person charged with enforcement of the statute, the Secretary arguably has a personal interest much like that of the Army in *United States v. ICC*, for example. I would reject the distinction, but it does point to an interesting answer to the dispute in the circuits as to whether OSHRC can appear to defend its decision. The courts have concluded that if OSHRC is a purely adjudicatory body, it *lacks* standing to appear as a party in the courts; if it is a policymaking body, it has standing.<sup>359</sup> The rule should be just the opposite. If OSHRC is a neutral adjudicator, then one might portray the Secretary of Labor as equivalent to a private party subject to OSHRC's regulatory authority; that difference in capacity would save the intragovernmental suit. If, on the

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357. The exact position of the Commission has been a matter of dispute. The majority view, however, is that the Commission serves a purely adjudicative function and cannot appear before the court of appeals to defend its decisions. "The commission, like a district court, has no duty or interest in defending its decision on appeal. As a purely adjudicative entity, it has no stake in the outcome of the litigation." *Oil, Chem. & Atomic Workers Int'l Union v. OSHRC*, 671 F.2d 643, 652 (D.C. Cir.) (per curiam), *cert. denied*, 459 U.S. 905 (1982).

358. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1266-67 (4th Cir. 1974).

359. See *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989), and cases cited therein.

other hand, OSHRC and the Secretary are both policymaking entities that disagree over OSHA's implementation, then they should not be able to fight out their disagreement in court.

## VII. CONCLUSION

The question whether the United States can sue itself raises fundamental issues as to how the government is supposed to operate. Neither a per se bar on such litigation, based on a misplaced abstract conception of the government as one person, nor its complete acceptance comports with the constitutional scheme.

One might posit a multifactor analysis, taking into account the independence of the litigants, the presence and role of private parties, congressional authorization of the litigation, and/or the capacities in which the agencies appear. Almost all of these factors come together to make the granddaddy intragovernmental litigation case, *United States v. ICC*,<sup>360</sup> appear justiciable. Of this welter of considerations, however, the critical one is the capacity in which the litigating agencies appear.

The conflicting interests within the government frequently suffice to establish a case or controversy under article III. In particular, in situations in which one part of the government enforces or implements a statutory scheme and another part either is regulated by or is a beneficiary of that scheme, the two clearly are adequately adverse to support judicial resolution of their dispute. The same is true if two agencies fight over turf. If the two agencies disagree instead over how to regulate private parties, the requisite adverseness is less apparent. The range of interests and divergent agendas and constituencies of federal agencies are sufficient, however, to preclude an article III objection to interagency litigation even in this setting.

The President's constitutional prerogative to manage the executive branch raises perhaps more difficult justiciability questions. Judicial resolution of the first two types of cases, however, does not interfere with presidential article II authority. On the other hand, to permit two agencies that disagree, as regulators, as to the merits of a decision to bring their disagreement to the courts is inconsistent with the proper functioning of the executive branch.

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360. 337 U.S. 426 (1949).

The dispute over intragovernmental litigation recently has been most active with regard to enforcement of the environmental laws against federal facilities and litigation by a proposed Special Counsel against federal agencies for allegedly illegal reprisals against whistleblowers. Because of DOJ's belief that it would be unconstitutional, no such litigation has ever occurred. Each, however, fits tidily into the category of justiciable intragovernmental litigation described herein. Enforcement actions by one part of the government against another are justiciable.