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The Consequences of DOJ Control of Litigation Authority on Agency Programs

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INTRODUCTION

In general, when federal agencies find themselves in court, they are represented by attorneys from the Department of Justice (DOJ). Congress has designated DOJ as the litigator for the United States and its administrative agencies. Agencies may not employ outside counsel for litigation; they must refer all matters to DOJ. DOJ then decides whether the case should

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1. See 5 U.S.C. § 3106 (1994) (“Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.”); see also 28 U.S.C. § 516 (1994) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer
be litigated and, if it decides to proceed, DOJ handles the lawyering.

Legal academics and government lawyers alike take for granted that DOJ ought to speak the government’s voice in court. Thus, while the literature is replete with discussions of the appropriate scope of agency independence from or control by other governmental actors, DOJ’s monopoly over government litigation is unquestioned. DOJ’s status is justified on the grounds that a single, highly talented “law firm” will ensure quality representation, consistency, efficiency, and responsiveness to presidential preferences. This argument asserts the absolute necessity—for reasons of governmental integrity, effective litigation, and fairness—that the government speak with one voice in the courts, a consistency that can only be achieved by centralizing litigation authority. In addition, because the Attorney General sees the big picture—and sees it with the same eyes as the President—centralization ensures that the lawyering is consistent with the broader policy concerns of the Administration. This perspective ensures that the parochial concerns of single-mission agencies do not take precedence over larger policy commitments, and that conflicts between agencies are appropriately resolved. Furthermore, from DOJ’s standpoint, the litigator’s expertise is litigation; DOJ lawyers have what agency lawyers may lack: courtroom skills and familiarity with recurrent non-agency-specific legal questions.

These arguments should not be accepted uncritically. Our task in this article, however, is not to evaluate the claimed benefits of centralized litigating authority, but to consider a possible cost: the effect of such an arrangement on the agency’s substantive program. Allowing DOJ to control agency litigation might have such an effect in three ways. First, and most obviously, it might reduce the scope and effectiveness of agency enforcement. Second, it might lead to avoidable courtroom losses—for example, setting aside a regulation—through which the judiciary creates obstacles to the agency’s program. Third, it might encourage DOJ to adopt an aggressive stance toward its “client” agencies, directly influencing or interfering with the agencies’ substantive decisions.

Despite its general commitment to DOJ as the agencies’ litigator, Congress occasionally has removed control of litigation from DOJ because of the foregoing concerns, in particular the first. In the extreme example, the litigator’s role is taken out of the hands of government attorneys altogether.

thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”); 28 U.S.C. § 519 (1994) (“Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.”).
For example, the False Claims Act, first adopted during the Civil War, imposes civil liability on any person who defrauds the U.S. government. The Act provides that any private person, as a self-designated *qui tam* relator, may bring an action "in the name of the Government" "for the person and for the United States Government." The False Claims Act clearly proceeds on the assumption that the government, whether for reasons of cronyism or lack of resources, will fail to pursue some fraud cases that in fact ought to be pursued. Similarly, Congress has concluded that the many instances in which private citizens can bring enforcement actions as "private attorneys general" are settings in which relying on DOJ alone to bring enforcement actions will lead to underenforcement.

Shy of these examples, Congress has also, in many instances, allowed individual agencies to litigate some or all of their cases without relying on DOJ. One searches in vain for an organizing principle to explain when and to what extent agencies are granted independent litigating authority. Explanations for this haphazard arrangement will be found more in case-by-case political pressures and circumstances than in a unified vision of inde-

3. 31 U.S.C. § 3730(b)(1) (1994); see id. § 3730(c)(2)(A) (stating that government can—though it rarely does—move to dismiss even meritorious suits over relator’s objection); id. § 3730(c)(3) (stating that government may join suit or decline intervention and allow relator to continue litigating claims); see also United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1144 (9th Cir. 1998) (noting that government "has the right to track the litigation and to intervene at a later date upon a showing of good cause" and holding that government has authority to dismiss qui tam suits "if the relator is afforded notice and a hearing").
4. The private plaintiff is truly litigating on behalf of the government—she recovers a bounty, but the fee is only triggered by the harm the government suffers. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 120 S. Ct. 1858, 1862-65 (2000) (holding that relator has Article III standing). The Court rejected the notion that a private plaintiff’s reliance on the bounty she may recover is the source of the constitutionally required concrete stake in the controversy. Instead, the Court reasoned that the relator is the assignee of government’s claim. *Id.*
5. For a general discussion of citizen suits, see Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179 (Winter 1998). The erstwhile Independent Counsel statute provides one further example of Congress removing litigating authority from DOJ. While the Independent Counsel was a governmental employee, in practice she functioned as a private attorney, retained precisely because government lawyers cannot be relied on to pursue certain claims with sufficient vigor. (Recent events, of course, have prompted a reconsideration of that theory. For many, the Independent Counsel now stands as a glaring reminder of what goes wrong when enforcement is removed from DOJ.)
dependent litigating authority. Furthermore, part of the explanation lies in Congress' perception of how litigating arrangements will maximize its own authority and influence. Nonetheless, one consideration is the same concern reflected in Congress' occasional decision to place litigating authority outside the federal government altogether: namely, that DOJ interferes with rather than advances substantive agency programs, primarily, though not exclusively, by diluting effective enforcement.

Thus, the instances in which Congress has reallocated litigation authority generally involve perceived failures, usually of enforcement, by a specific agency that are brought to Congress' attention, usually by dismayed interest groups. For example, the 1975 Federal Trade Commission Improvements Act, which granted independent litigating authority to the Federal Trade Commission (FTC), was a direct response to the perceived failure of DOJ to adequately represent the FTC. At the time of the Act's passage, the question of enforcement, and therefore, the locus of litigation authority itself, had become an acute problem.

Consider also the situation of the Federal Election Commission (FEC). The political delicacy of the FEC's mission and the need for avoiding the appearance of favoritism led Congress to give the FEC independent litigating authority in the lower courts. The same underlying concerns are

7. See Neal Devins & Michael Herz, The Battle That Never Was: Congress, The White House, and Agency Litigation Authority, 61 LAW & CONTEMP. PROBS. 205, 220-22 (Winter 1998) (arguing that Judiciary Committees have been, relatively speaking, more enthusiastic about DOJ control of litigation because such arrangement enhances their own influence).

8. In Part II, infra, we describe some congressional battles arising out of these concerns.


10. See Devins, supra note 6, at 269-77.

11. See id. at 270 (noting that "on matters referred by the FTC to the Department of Justice, significant delays in filing, unfavorable settlements, and the refusal to file cases became common practice;" furthermore, DOJ successfully fought off FTC attempts to enforce its own subpoenas).

12. See 2 U.S.C. §§ 437c(f)(4), 437d(a)(5), 437d(b) (1994); 26 U.S.C. §§ 9010(a), 9040(a) (1994); George F. Fraley, III, Comment, Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General, 9 ADMIN. L.J. 1215, 1272 (1996) (concluding that FEC should have complete litigation authority so as to avoid conflict of interest that undermines the integrity of election process); see also FEC v. NRA Political Victory Fund, 513 U.S. 88, 97-99 (1994) (holding that FEC's general authority to represent itself does not extend to litigation in Supreme Court, in which FEC must be represented by Solicitor General); Alane Tempchin, Note, Fall from Grace: Federal Election Commission v. NRA Political Victory Fund and the Demise of the FEC's Inde-
reflected in the FEC’s unusual even number of commissioners. The standard independent agency has a bipartisan requirement, with an odd number of commissioners, allowing for some measure of political advantage by one party over the other. In contrast, the FEC must be bipartisan and has an even number of commissioners. The same sort of concerns that militate in favor of this agency’s independence, and for its unique apolitical structure, also support independent litigating authority. Influence or control by the DOJ or the White House would compromise the agency’s ability to do its job.

In this Article, we explore, in preliminary fashion, whether Congress’ reallocation of litigating authority ought to be broader than is generally believed. That is, even though most agencies do not have the sort of mandate that characterizes the FEC, could other agencies be hampered in their substantive program by having to rely on the DOJ for representation in court?

Part I describes some of the instances in which Congress has considered shifting control of litigation from the DOJ to an agency because of serious doubts as to the DOJ’s effectiveness in representing the agency. In Part II, we consider whether these concerns are, as a general matter, justified. We conclude that the DOJ’s control of litigation is not inconsequential, but its effects are hard to quantify and are generally influenced by other factors.

We should stress at the outset that our inquiry is quite limited. A full review of the pluses and minuses of DOJ control of agency litigation is beyond the scope of this Article. Here we examine only one piece of the puzzle: What effect, if any, does DOJ control have on the way agencies carry out their substantive programs and the effectiveness with which they do so?

I. SOME HISTORY

Over the three decades of the EPA’s existence, the question of whether the effective implementation of EPA’s substantive programs has been hampered by DOJ has been recurrent. In this section, we consider three instances—one from the 70’s, one from the 80’s, and one from the 90’s—where Congress’ concerns became so acute that it gave serious consideration to limiting DOJ control of EPA litigation.

\[\text{pendent Litigating Authority, 10 Admin. L.J. Am. U. 385, 413 (1996) (arguing that Victory Fund makes FEC dependent on Executive branch and undermines public confidence in American electoral system).}\]

\[\text{13. Our focus is on the Environmental Protection Agency (EPA).}\]

\[\text{14. We are, however, engaged on such a project with the working title of The Uneasy Case for Justice Department Control of Agency Litigation.}\]
1. The 1970 Act

In July 1970, President Nixon invoked his reorganization authority to establish an Environmental Protection Agency. The EPA was formed by merging programs and authority from fifteen different agencies, including the Departments of Agriculture, Interior, and Health, Education, and Welfare. Since neither the Senate nor the House took action to oppose the plan, the reorganization became effective in September 1970.

Under the White House reorganization, the Attorney General remained in charge of federal environmental litigation. However, environmental groups, their congressional allies, and the EPA itself sought to limit this hierarchical structure. The earliest and most direct attack on Attorney General control came almost immediately when Congress enacted the first of the major federal pollution control laws, the Clean Air Act of 1970 (CAA). The Senate bill provided authority for the EPA to represent itself in court.\(^\text{15}\) In the view of the Committee on Public Works, “full time legal assistance” and “the development of competence and expertise” within the agency were necessary for the Act to be implemented effectively.\(^\text{16}\) The Nixon Administration opposed this call for specialist environmental litigators, defending “the sound administrative practice of relying on the Justice Department’s established legal expertise and resources.” In the end, a compromise was reached. The EPA could represent itself, but only if the “Administrator determines that the Attorney General will not act, or will not act soon enough.”\(^\text{17}\) The same arrangement was included in the 1972 Clean Water Act\(^\text{18}\) and the 1974 Safe Drinking Water Act.\(^\text{19}\)

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\(^\text{16.}\) id.


\(^\text{18.}\) H.R. CONF. REP. No. 91-1783, at 56 (1970). The specific provision provided: The Administrator shall request the Attorney General to appear and represent him in any civil action instituted under this Act to which the Administrator is a party. Unless the Attorney General notifies the Administrator that he will appear in such action within a reasonable time, attorneys appointed by the Administrator shall appear and represent him.

Clean Air Amendments of 1970, Pub. L. No. 91-604, § 305, 84 Stat. 1676, 1707. The provision has since been amended.

\(^\text{19.}\) See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 889 (codified at 33 U.S.C. § 1366 (1994)). The Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this Act to which the Administrator is a party. Unless the Attorney General notifies the Administrator...
In practice, this arrangement meant that DOJ represented the agency in court in all cases. However, the possibility of EPA going to court without DOJ was a significant factor in discussions between the EPA and DOJ and affected DOJ's willingness to pursue litigation. The Attorney General could not turn his back on the agency without risking his control of environmental litigation. The EPA, therefore, had more leverage and greater autonomy than most executive agencies. Of equal significance, Congress signaled its expectation that the federal government would vigorously enforce environmental laws. Specifically, through its power to oversee the EPA, Congress' environmental subcommittees could make sure that the executive branch satisfied legislative priorities by pressuring the EPA to strike out against DOJ. Moreover, Senator Muskie and other pro-environmental Senators made use of the Senate's confirmation power to press EPA appointees about their willingness to resist White House pressures and make independent decisions.21 In short, the CAA compromise was rooted in the belief that, like independent regulatory agencies who could opt out of Attorney General representation, the EPA would be willing to disagree with DOJ.22

2. The 1977 Amendments

DOJ representation of the EPA came under sharp congressional attack in the post-Watergate period. From 1975 to 1977, when the CAA was undergoing a major legislative overhaul, environmentalists and their allies in Congress sought to transfer litigation authority from DOJ to the EPA and

within a reasonable time, that he will appear in a civil action, attorneys who are officers or employees of the Environmental Protection Agency shall appear and represent the United States in such action.

Id.

20. See Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(f) (1994). The Administrator shall request the Attorney General to appear and represent him in any civil action instituted under this subchapter to which the Administrator is a party. Unless, within a reasonable time, the Attorney General notifies the Administrator that he will appear in such action, attorneys appointed by the Administrator shall appear and represent him.

Id.


22. At that time, the EPA believed that it should speak its own voice in court. See generally United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (noting that the EPA had sought to submit its own brief to the Supreme Court). While Solicitor General Robert Bork rejected this request, the EPA letter making the request (which set forth the agency's view of the case) was submitted to the Court by way of a supplemental brief filed by Students Challenging Regulatory Agency Procedures.
came close to doing so. This effort reflected a political setting in which the White House and DOJ were quite weak.

Watergate prompted Congress to limit the concentration of power within the executive branch, including DOJ’s control of government litigation. At roughly the same time, Congress was limiting White House authority in fiscal policymaking through the 1974 Budget Act, considering making DOJ an independent agency, and debating legislation to further insulate independent agencies from executive influence. Although efforts to remove DOJ from the executive branch were rejected, DOJ was hit particularly hard by Watergate. Thus, Congress created an Office of Senate Legal Counsel to defend its interests in court, Attorney General control over executive branch misconduct was constrained by the Ethics in Government Act, and independent litigating authority was granted to the FEC, Federal Energy Regulatory Commission (FERC), FTC, and the Commodity Futures Trading Commission (CFTC).

The White House was limited in its ability to fend off the legislative assault on DOJ control. With Watergate making the Attorney General appear too much like a political crony of the president and too little like an evenhanded enforcer of the nation’s laws, the Ford Administration could hardly demand that government litigation be centralized in DOJ. For this reason, the Ford Administration did little to resist legislative proposals to limit DOJ authority. The Carter Administration, which came to office on an anti-


24. For example, in support of granting such authority to the CFTC, it was argued that doing so would avoid “partisan political pressures” that were introduced when DOJ had a “veto” over litigation. See Commodity Futures Trading Commission Act: Hearings Before Senate Comm. on Agric. and Forestry, 93d Cong. 209 (1974) (statement of Rep. Smith); see also id. at 229 (statement of Richard Feltner, Asst. Secretary for Marketing & Consumer Services, Dep’t of Agriculture) (stating that granting the commission authority to seek injunctions will “facilitate enforcement of the act”). In a lengthy description of the genesis and legislative battles surrounding the creation of the CFTC, Professor Romano describes the grant of independent litigating authority as one of a variety of measures to insulate the new agency from executive branch control. See Roberta Romano, The Political Dynamics of Derivative Securities Regulation, 14 Yale J. on Reg. 279, 352 (1997).

Watergate platform, likewise largely accepted statutory exceptions to DOJ control. 26

At the same time, Congress and environmental interests were unhappy with the pace of CAA enforcement. During its first five years, the EPA had established itself as a quasi-independent enterprise, distancing itself from the White House and DOJ on, among other things, enforcement. 27 With Congress rapidly expanding the EPA’s mission through the enactment of several significant pieces of environmental legislation, 28 the EPA was determined to make itself more powerful and more independent. In particular, dissatisfaction with DOJ by the EPA and environmental interests resulted in congressional efforts to restructure federal environmental litigation. Pointing to formal letters of complaint from the EPA to DOJ, in 1976 the House Energy and Commerce Committee proposed granting the Administrator “exclusive authority to commence or defend . . . in his own name and by any attorney of the EPA” any civil action in the lower federal courts brought under the Act. 29 For the Committee, DOJ had proven itself a poor advocate for the EPA. By either failing to consult with the EPA or dragging its feet in filing cases, DOJ had both slowed down enforcement and created bad case law. 30 Furthermore, because it represented both federal polluters and the EPA, DOJ was often beset by conflict of interests. 31 In contrast to its low opinion of DOJ, the Committee applauded the EPA attorneys for their “special expertise and background in fields such as meteorology, topography, health effects, research photochemistry, and detailed familiarity with environmental legislation,” a background necessary to successfully litigate “often complex, highly technical” environmental cases. 32 In short, the backers of this provision were concerned about two recurrent issues: (1) they felt that poor DOJ representation was resulting in

26. See infra note 36 and accompanying text (discussing President Carter’s Reorganization Project and noting that when running for president Jimmy Carter had said DOJ should be an independent agency).
31. See id. at 274 (noting that DOJ finds itself in a conflict of interest when it tries to represent both the Administrator and other Federal agencies).
32. Id. at 273.
court losses, and (2) they felt that a lack of sufficient enforcement enthusiasm was resulting in important, winnable cases simply not being brought. 33

Saddled by Watergate, the Ford Administration did little to resist this proposed transfer of litigation authority; instead, resistance came from the Senate Judiciary Committee, which did not want to reduce its oversight responsibilities by narrowing DOJ control of litigation. 34 The Senate prevailed, convincing the House to drop this provision. Congress, however, did not vote on clean air legislation in 1976.

When the Clean Air amendments resurfaced in 1977, the Carter White House joined the Senate in opposing the restructuring of EPA litigation authority. 35 Unlike Ford’s Administration, the Carter White House sought to use Watergate to its advantage. Through its reorganization project and executive order on government litigation, the Carter administration emphasized DOJ independence from White House controls, 36 recasting DOJ as a committed advocate for its agency clients. DOJ assisted in this effort by entering into “memorandums of understanding” (MOUs) with government agencies to ensure DOJ responsiveness to agency needs. The July 13, 1977 EPA/DOJ MOU gives the Attorney General “control over all cases” to which the EPA is a party, but provides for some involvement by agency attorneys in the actual litigation; it gives the department 150 days to act on a referral from the agency, after which time the agency’s power to represent itself is triggered. 37

The Carter Administration’s embrace of MOUs, along with the Senate Judiciary Committee support, proved critical to the Carter DOJ’s successful resistance to proposed limits on its litigation authority. In the end, the 1977 Clean Air Act Amendments essentially wrote the MOU into the Act. Congress left intact the 1970 provision, under which the Administrator could in theory go to court represented by agency attorneys and added a provision


34. See Devins & Herz, supra note 7, at 220-22 (discussing reasons that Judiciary Committee has strong interest in DOJ litigation control); see also infra notes 47-48 and accompanying text.


36. See generally Griffin B. Bell, The Attorney General: The Federal Government’s Chief Lawyer and Chief Litigator, or One Among Many?, 46 FORDHAM L. REV. 1049, 1058-59 (1978) (insisting that DOJ should represent regulatory agencies while acknowledging the importance of autonomy).

stating that if DOJ did represent the agency it was to do so in accordance with the MOU.\textsuperscript{38}

\textbf{B. Resource Conservation and Recovery Act—1980s}

The next major congressional threat to DOJ control of EPA litigation arose in the mid-1980s during consideration of the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA). Pointing to DOJ’s failure to act on an EPA referral and file a lawsuit against a trailer park situated on top of an asbestos site, the House Energy and Commerce Committee proposed allowing the EPA to go to court on its own whenever DOJ did not file an action within 150 days of the referral.\textsuperscript{39} This was a more modest approach than the 1976 proposal to transfer clean air litigation authority altogether. The Committee portrayed its proposal as anything but revolutionary, claiming that “litigation expertise is not the sole province of the Justice Department” and pointing to identical time limits in the EPA/DOJ MOU.\textsuperscript{40}

The circumstances surrounding the RCRA proposal were far different than those that led to the 1977 MOU. In 1984, when the battle over RCRA took place, it was the EPA—not DOJ—that was under attack. As EPA officials Bruce Adler and Walter Mugdan put it: “[B]etween 1980 and 1983, Congress came to perceive EPA as an agency unwilling or unable to fulfill its mandate of environmental protection. Almost every section of the RCRA Amendments might be read as expressing a sense of frustration . . . .”\textsuperscript{41} The principal sources of this frustration were Reagan EPA appointees, especially administrator Anne Burford and Assistant Administrator for Solid Waste and Emergency Response Rita Lavelle. Appointed to transform the quasi-independent EPA into an agent of the White House, Reagan’s EPA appointees prompted a firestorm of criticism and much more. Congressional Republicans and Democrats alike accused them of “poor performance . . . from a lack of expertise, inexperience, incompetence and mismanagement . . . .”\textsuperscript{42} Indeed, legislation was introduced in the House in 1982 and in the Senate in 1983 to make the EPA an independ-


\textsuperscript{40} Id. at 51.


ent regulatory commission and thereby free it from White House control. While this effort was principally symbolic, bad blood between the Congress and the EPA helped force Burford, Lavelle, and twenty other Reagan appointees to leave the EPA in disgrace. 43

DOJ, however, faced no comparable pressures. For starters, DOJ officials in charge of EPA litigation were barely burned by the Congress-EPA fires. While DOJ may have been slow in pursuing the trailer park case, it had previously pursued sixty-four of seventy-two RCRA referrals. 44 DOJ authority was also bolstered by the Reagan White House. A strong believer in centralized authority, the Reagan administration vigorously and consistently opposed congressional efforts to grant litigation authority outside DOJ. The 1984 EPA litigation dispute was no exception to this pattern, and DOJ spoke out against this proposal, testifying that "[o]nly unitary litigation authority can ensure" that the government speak one voice in court. 45 These sentiments, moreover, were echoed by the EPA. When William Ruckelshaus replaced Anne Burford, EPA lined up behind DOJ control. Indeed, Ruckelshaus (who had held the number two spot at Justice earlier in his career) testified before and wrote to Congress that EPA had "greatly benefited by centralized and coordinated litigation by the Department of Justice." 46

Ruckelshaus’s defense of DOJ centralization, DOJ’s willingness to pursue most RCRA referrals, and "an astonishing two years of mismanagement at EPA" figured prominently in House Judiciary Committee efforts to defeat the Energy and Commerce Committee proposal. 47 Self-interest may also have motivated the Judiciary Committee, whose authority over the EPA is indirect, via its oversight authority over DOJ, and hinges on DOJ control of litigation. It is therefore not surprising to find "[t]he merits of centralizing litigating authority" extolled by the Judiciary Committee, while Energy and Commerce, which has broader oversight authority over the EPA than over DOJ, supports some decentralization of litigation authority. 48

One other factor surely underlies the Energy and Commerce proposal: a desire to punish DOJ for compelling the EPA to claim executive privilege

43. See Edward J. Markey, Congress to Administrative Agencies: Creator, Overseer, and Partner, 1990 DUKE L.J. 967, 969 (giving one lawmaker’s (partisan) account of Congress-EPA relations).
45. Id. (alteration in original) (citation omitted).
46. Id.
47. Id. at 6 (citation omitted).
48. Id. at 4; see Devins & Herz, supra note 7, at 220-22.
and refuse to turn over documents to Committee investigators. 49 This dispute, which led to a contempt of Congress citation against EPA Administrator Burford and acrimonious litigation between DOJ and Congress, was rooted in DOJ’s belief that “the Attorney General’s obligation to represent and advocate the ‘client’ agency’s position must yield to a higher obligation to [serve the President’s interests and] take care that the laws be executed faithfully.” 50 Energy and Commerce strongly resented its oversight authority being limited by this DOJ appeal to the principle of the “unitary executive.” It struck back with its RCRA proposal. In the end, however, the House Judiciary view prevailed and the RCRA amendments did not provide for EPA litigation authority.

C. Criminal Prosecutions—1990s

Early in 1992, Congressman John Dingell’s Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce began an investigation into the prosecution of environmental crimes. The Subcommittee’s concern, in the words of staffer Reid Stuntz, was “that management personnel in the Environment and Natural Resources Division of the Department of Justice were seriously undermining the environmental criminal enforcement program . . . [having] second-guessed, and in some cases even stymied, the prosecutorial decisions of local U.S. Attorneys’ offices and line attorneys.” 51 The subcommittee’s essential concern was that political pressures to go easy on polluters were being applied to officials in Main Justice, who in turn were undermining the enforcement efforts of line attorneys and the U.S. Attorneys’ Offices. Dingell’s position was that the U.S. Attorneys’ Offices should be allowed to make their own decisions, without approval from Main Justice, as to whether to proceed with criminal prosecutions, and that in handling cases they should be able to use their own lawyers and those from EPA rather than bringing in lawyers from the Environmental Crimes Section of the Environment Division. 52


52. The subcommittee’s concerns over effective enforcement and skepticism about centralized control are set out at length in a June 27, 1994 letter from Congressmen John Dingell and Dan Schaefer (then the ranking Republican) to Attorney General Reno. Drawing from testimony given by former prosecutors at committee hearings, the letter com-
There followed almost three years of hearings, investigatory interviews, exchanges of letters, reports, subpoenas, threats, and bluster. Since the driving force here was an investigation by an oversight committee, the struggle not surprisingly did not lead to proposed or enacted legislation. Nor is there any consensus as to whether the problems were real or only perceived.

In the end, DOJ did revise the U.S. Attorneys' Manual to decentralize prosecutorial decisionmaking in environmental cases more along the lines of the subcommittee's preferences. But at least as important in bringing the controversy to a close was the outcome of the 1994 elections, which put

explained that:

(1) The requirement, imposed by a 1993 amendment to the U.S. Attorneys' Manual, that the Assistant Attorney General in Washington approve environmental criminal prosecutions had led to inappropriate interference and usurpation of local prosecutorial authority, pursued a misguided goal of national consistency, and produced the appearance, if not the reality, of ad hoc, politically motivated decisions.

(2) At most, there should be a limited number of clearly defined situations in which consultation between the U.S. Attorneys' Offices and the Main Justice is required; Main Justice's role should not go beyond that. It is not the reality of such consultation.

(3) The Assistant Attorney General should not be meeting with defense counsel.

(4) The U.S. Attorneys' Offices should not be forced to involve lawyers from the Environmental Crimes Section (ECS) and should instead be able to rely on EPA attorneys and local and state prosecutors. Lawyers from Main Justice are less available, less familiar with individual cases, and less knowledgeable about the environmental laws and the EPA's regulations. Moreover, involving ECS lawyers "invites Headquarters interference and results in a ceding of control over the direction of the litigation to managerial personnel at the ECS and ENRD, whose involvement often has been viewed as counterproductive."


54. See Richard J. Lazarus, Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law, 83 GEO. L.J. 2407, 2496-507 (1995) (reviewing circumstances of six cases that gave rise to investigation and concluding that in fact decisions not to prosecute were, if ad hoc and intuitive, nonetheless reasonable).

55. See Memorandum from Janet Reno, Attorney General, to Holders of the United States Attorneys' Manual, Title 5, at 2-8 (Aug. 23, 1994) (replacing section 5-11.000 of the U.S. ATTORNEYS' MANUAL and, among other things, abolishing previously required "case initiation report" that the U.S. Attorney's Office had had to file with the Environment and Natural Resources Division); see also Galacatos, supra note 53, at 625-26 (describing revisions to manual).
republicans in control of the House generally and the Subcommittee on Oversight and Operations in particular.\footnote{See Galacatos, \textit{supra} note 53, at 627-28.}

This controversy is somewhat different from those described above in that it was not fundamentally about the respective roles of DOJ and EPA. However, that was part of the issue; Representative Dingell complained that EPA’s regional criminal counsels were being displaced by attorneys from Main Justice. In addition, the overall themes are very much the same. The essential concern was that by allowing Main Justice to control litigation, deciding both whether and how cases are litigated, the enforcement effort will suffer as a result of: (a) a lack of commitment to a substantive program, (b) a lack of expertise, and (c) a susceptibility to political pressures.

II. RELIANCE ON DOJ AND THE IMPACT ON AGENCY ENFORCEMENT

Let us start with a strong hypothesis: DOJ representation actually does harm to the agency’s program. DOJ attorneys will decline to pursue winnable cases, will make litigating errors, and will disrupt agency decision-making in ways that will predictably weaken and dilute agency initiatives.

Consider DOJ’s now relatively calm, but historically often stormy, relationship with the EPA. Except for the Carter and Clinton Administrations, the EPA has for its entire history been implementing essentially Democratic statutes for a Republican president. All of our intuitions about DOJ/EPA relations are shaped by this fact. From the point of view of the environmental community and many in the EPA itself, the threat has come from DOJ and the White House; help has come from Congress. From the point of view of the regulated community, the roles were reversed. In this setting, the stronger pro-environment position is to shift authority to the EPA; DOJ has a broader agenda that can only dilute or conflict with environmental protection goals. As described in Part I, proposals to limit DOJ control of EPA litigation have been advanced by Democrats in Congress in response to the supposedly lax enforcement efforts of Republican administrations.

In theory, one could imagine the roles reversed: a lax President and an uninterested Congress, coupled with an agency captured by regulatory interests and/or taking its cues from the President and Congress. Here, reliance on a DOJ committed to legality might produce greater enforcement than leaving the agency to its own devices. At least one statutory provision actually rests on such a premise: namely, the requirement that DOJ approve all Superfund cost-recovery settlements of over $500,000.\footnote{42 U.S.C. § 9622(h)(1) (1994).} The unusual
provision can only be understood in the context of Reagan-era EPA-DOJ-Congress relations. Congress no longer trusted the EPA after its gross mismanagement of Superfund under Reagan appointees Rita Lavelle and Anne Burford. In particular, Congress was outraged by the “sweetheart deals” that the EPA negotiated with potentially responsible parties. With the non- and mis-feasance of Burford/Lavelle fresh in mind, Congress amended the Superfund to include a lengthy and detailed section on settlements, a subject that the original statute had not mentioned. To check the EPA abuses of authority and to help “ensure that settlements of significant claims by diverse agencies and regional offices will be consistent nationally,” the Superfund amendments require Attorney General approval of proposed EPA settlements. In other words, Congress bought into DOJ’s usual arguments for centralization precisely because of the same concerns about the integrity of the agency’s program that in other instances had moved it to consider eliminating DOJ control.

This provision, like the array of political forces that produced it, is very much the exception. In the real world, DOJ will only support or undermine, but never expand, the agency’s programmatic undertakings. Indeed, even if DOJ was more committed to environmental protection than was the EPA, there is little it could do to force the EPA in that direction. DOJ does not formally initiate any legal action other than criminal prosecutions; it, therefore, would be dependent on EPA referrals (which would dry up) and be put in the position of defending EPA regulations that it had no hand in drafting.

There is thus every reason to be concerned about the substantive consequences for particular agencies’ programs that flow from granting DOJ litigation authority. By definition, DOJ will never be as committed to the agency’s program as will the agency itself. However enthusiastic DOJ is about the agenda of a particular agency, it will never have the single-minded focus on that agenda that the agency itself has. As one former head of the then-Lands Division put it:

There is a built-in tension between the Justice Department and the agencies it represents. The primary role of the Justice Department is to advance the policies that are adopted by the governmental agencies. But the second role of the department is to protect the Constitution, the judicial system, and the rule of law. It is in that role that I sometimes found myself at odds with the governmental agencies that we repre-

sented as clients, including EPA. People urged us to take positions that were inconsistent with, for example, the property rights provisions of the fourth and fifth amendments to the Constitution. They attempted to skew justice in favor of good programs that simply were not constitutionally or judicially appropriate.\footnote{In the Hotseat at Justice, ENVT. F 40, 42 (Jan./Feb. 1994) (statement of Roger Marzulla).}

As a result, placing the decision whether to litigate with DOJ, and then granting DOJ control over any litigation that occurs, necessarily threatens to undermine the agency’s efforts. Not only is this true of enforcement litigation (where DOJ screens agency requests), it might also be true of actions in which the agency is the defendant or respondent in a challenge to a particular regulation or other undertaking (where DOJ might refuse to defend agency decisionmaking or do so poorly).

In this Part we attempt to evaluate how serious and systemic a problem this theoretical concern actually is in the real world.

A. Adequacy of Representation

It is a longstanding and predictable complaint of agency lawyers that DOJ simply lacks sufficient knowledge of the particulars of agency programs and the underlying statutes to defend them adequately in court.\footnote{The following statement of FDA General Counsel Richard Cooper is typical: [A]n agency lawyer who has worked on a regulation since its inception or has worked on a program for a number of years simply knows more about it and knows more about the needs that gave rise to it, the policies that it reflects, and the practical problems that arise in its implementation, than does his counterpart in the Department of Justice. Because successful advocacy in a regulatory case depends very much on presenting to the court the practical reasons for the regulation or decision, and a thorough understanding of the real world context that it addresses, the lawyers for the agency, I would argue, have a significant advantage over the lawyers from the Department of Justice. Proceedings of the Fortieth Annual Judicial Conference of the District of Columbia Circuit, 85 F.R.D. 155, 172 (1979) (statement of Richard Cooper, General Counsel, Food & Drug Administration). The 1977 EPA/DOJ MOU also nods to this concern, with phrasing that rings of careful negotiation of language that began with the EPA, noting that “most challenges to and enforcement of regulatory standards and procedures adopted by the Environmental Protection Agency involve scientific, technical, and policy issues and determinations developed in lengthy rulemaking proceedings in which the Agency’s attorneys have been involved and can provide the necessary expertise.” Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48,942, 48,942-43 (1977).}
Civil Division lawyer’s exchange with the court and offered a different version of the point.\textsuperscript{63}

If the attorneys from DOJ lack the technical familiarity with the agency’s legal issues, the result may be poor lawyering and more losses. But are the agencies losing cases they should not be? In fact, probably not. After all, DOJ attorneys are pretty good and the government wins most of its cases.\textsuperscript{64} And while DOJ may not seek the help of agency attorneys as often as it should, it can and does seek such assistance. Indications of a problem are only anecdotal. When an agency loses, it is very difficult to know whether to attribute the loss to poor lawyering; harder still to know whether lawyers could have avoided what turned out to have been mistakes in hindsight; and, in most cases, impossible to evaluate whether agency lawyers would have been more likely than DOJ lawyers to avoid the mistakes.

Our own concededly impressionistic sense is that agency losses, when they occur, are rarely the consequence of a lawyer’s error of a sort that a DOJ lawyer would make and an agency lawyer would avoid. In the much-discussed \textit{American Trucking} case,\textsuperscript{65} for example, the D.C. Circuit set aside the EPA’s new ambient air quality standards on the ground that the CAA, as interpreted by the agency, was an unconstitutional delegation of legislative authority. This was a major loss for the EPA by any definition, but hardly one that one would think would have been avoided if agency lawyers had played a more prominent role. Rather, the case ended up turning on general legal issues far removed from the technical niceties of air pollution control regulation.

With regard to the adequacy of DOJ’s lawyering, enforcement cases should be considered separately from defensive cases. Enforcement cases

\begin{footnotes}
\item[64] One oddity is that were the government to lose more cases, that might indicate that DOJ was being more accommodating to its clients rather than less. DOJ’s win-loss record will improve if it is risk averse and frequently declines to pursue a referral or defend an agency action. If it automatically does what the agency wishes, thereby running greater litigation risks, it will lose more cases.
\item[65] \textit{American Trucking Ass’ns v. EPA}, 175 F.3d 1027, \textit{modified on reh’g}, 195 F.3d 4 (D.C. Cir. 1999), \textit{and cert. granted}, 120 S. Ct. 2193 (2000).
\item[66] Two other significant recent EPA losses in the D.C. Circuit are similarly hard to attribute to the shortcomings of DOJ lawyers. See Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside an EPA guidance document because of agency’s failure to follow Clean Air Act notice and comment rulemaking requirements); Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047 (D.C. Cir. 2000) (setting aside EPA designation of certain secondary materials as “wastes” that are subject to disposal restrictions). Note that in the second of these cases, attorneys from the EPA and DOJ divided the oral argument.
\end{footnotes}
are less likely to involve highly technical questions that DOJ lawyers are not equipped to deal with and more likely to reward litigation experience that agency lawyers lack. An on-the-administrative-record review of an agency rule, in contrast, is more likely to involve complex legal questions requiring familiarity with the agency’s programs and the history of the rule, and less likely to turn on knowing the tricks of the litigation trade. Indeed, there is a continuum here, with criminal prosecutions at one end. As one of us has written elsewhere, the argument for DOJ lawyering is at its strongest with regard to criminal prosecutions:

In a petition for review of an agency regulation, the agency lawyer’s familiarity with the details and history of the statute, regulation, and overall regulatory scheme are an important advantage, not much outweighed by less litigating experience. In the criminal setting, however, the situation is just the opposite. There are separate litigation skills, wholly independent of the particular substantive law violated, in criminal prosecutions—more so than in any other area of litigation. As many have noted, environmental attorneys learned this the hard way in the early 1980s. Technical environmental expertise is much less important. Indeed, if one really needs the highly specialized understanding of the statutes found only in EPA and not in the Environment Division or the U.S. Attorney’s Office to prosecute a case effectively, it is a case that should not have been brought as a criminal prosecution in the first place.... [I]t does not sit well to insist that an effective criminal prosecution requires the extraordinary specialized expertise of an EPA attorney because it is beyond the ken of other government lawyers (and so also, presumably, generalist judges and lay juries). 67

But this argument for DOJ representation in criminal prosecutions is far more attenuated in the case of civil judicial enforcement actions, and may cut the other way in a challenge to agency regulations brought in the court of appeals, on the administrative record, on a legally and factually complex and technical point.

B. Legal Grounds Presented

From the agency’s point of view, adequacy of representation is a function not just of whether the agency wins the case, but on what grounds. Many have pointed out that DOJ is more likely than the agency to rely on procedural defenses. 68 Along the same lines, studies of DOJ representation

of the FTC reveal that DOJ lawyers paid far more attention to whether there was sufficient admissible evidence to win a case rather than to the substantive grounds of relative economic harm. 69 This can be a source of frustration for agencies, because it forestalls resolution of important questions on the merits. 70

Again, it is hard to quantify the actual effect on agency enforcement and

(footnotes omitted). Judge Patricia Wald has been quite critical of government reliance on "technical" defenses: The temptation on the agency’s part is sometimes to get the court to duck some of the issues at stake, usually via heavy deployment of ripeness and waiver doctrines. By doing so the agency delays review and potential reversal for another day, knowing that petitioners may drop their challenges in the meantime and that the issue may then come up for review in the context of an adjudication, where the chances of affirmance are higher. Obviously, there are some occasions when an issue is not adequately presented for review, but my sense is that agencies often try to exploit these avoidance doctrines even in complex track cases beyond what is necessary... The cost of postponement is that when judicial review of the issue does occur, it may lack the overall perspective and familiarity with subject matter that the complex track procedure provides.

Overworked agencies tend to raise threshold jurisdiction issues whenever they pass the snicker test: last year [i.e. 1995] such issues were litigated in sixty-nine, or 51%, of the 135 cases in my survey. Since success with a jurisdictional challenge precludes review on the merits—making the case, at least temporarily, disappear—it is not surprising that agencies jump to take advantage of structural barriers to review.

Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 TULSA L.J. 221, 240, 248 (1996) (footnotes omitted). She attributes this tendency to the agencies; the responsibility surely lies more with DOJ.
programmatic initiatives here. In a certain number of cases, DOJ’s reliance on non-merits arguments will result in avoiding a harmful loss; in a certain number it will preclude a useful victory. Nevertheless, in some, probably small, number of cases, DOJ’s proclivity for non-merits arguments will deprive the agency of a helpful decision.

C. Refusal to Bring Cases

In general, an agency cannot go to court without DOJ agreeing to represent it. By definition, this means a weaker enforcement effort in that the DOJ tends to roll over in some cases. However, in some cases, DOJ’s conduct may be improper or unlawful. Thus, there is a need for the agency to have a mechanism to bring suits when DOJ will not.

71. Taking the EPA as an example, the referral process works as follows. Under the 1977 Memorandum of Understanding, the Attorney General (AG) “shall have control over all cases” to which the agency is a party. Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48,942, 48,943 (1977). EPA is entitled to designate an attorney to participate in the conduct of the litigation, although that attorney “shall be subject to the supervision and control of the AG.” Agency attorneys cannot make any filings without the AG’s approval. See id. Disagreements as to the conduct of the case can be bumped upstairs for resolution by the AG after consultation with the Administrator. See id. Requests for litigation are submitted by the General Counsel or the Assistant Administrator for Enforcement to the Assistant Attorney General for the Environment and Natural Resources Division and must be accompanied by a litigation report. See id. DOJ must either file a complaint or explain why it has not done so within 60 days of the referral. See id. One hundred twenty days after the referral, the EPA can request that the complaint be filed within 30 days; if DOJ still has not done so after the 30-day period, the EPA is free to go ahead on its own under those provisions that authorize it to do so. See id.

DOJ will not proceed without its “client.” In the words of the U.S. Attorneys’ Manual, “[a]s a matter of policy and practice, civil prosecutions are initiated at the request of the” EPA Administrator or other relevant agency head. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 5-12.111(A) (2000). Indeed, the most plausible reading of the statutes is that DOJ could not proceed in a civil case without the EPA even if it wanted to. Should DOJ learn of possible violations warranting investigation, it will forward the information to the EPA; an actual civil prosecution will not go forward unless and until the EPA refers the case to DOJ. See id. § 5-12.111(B). This is not the case with regard to criminal prosecutions, as to which DOJ can and does proceed without an EPA referral. See id.

If the EPA decides that it wishes to pursue a case civilly, the Regional Counsel’s office prepares a formal referral package that it submits simultaneously to the Environment and Natural Resources Division at DOJ and to the Office of Enforcement at EPA headquarters. Over the years, the referral package has become more and more complex and complete. Where once it was a memo of a few pages, prepared in anticipation of working up the case, it is now a lengthy memo (approximately 20 single-spaced pages) including all relevant information about the case. Over the years, the EPA has made greater or lesser efforts at centralized control of referrals. Thus, in the 1970s the referral package would be first sent to the Office of Enforcement and Compliance Monitoring in EPA headquarters; in the 1980s, the package tended to go straight to DOJ; now it goes through headquarters again.
permit it to do so. Assuming that the agency would have prevailed in at least some of these cases, then its substantive program has been reduced as a result. 72 To an extent that varies significantly over time, from agency to agency, and from administration to administration, DOJ refusal to pursue referrals is a recurrent source of complaint from federal agencies. 73

This problem seems more theoretical than real. First, DOJ does bring or defend most of the cases it is asked to. Defense is virtually automatic for all of DOJ’s client agencies. 74 As a result, for example, the EPA lawyers perceive the Environmental Defense Section as having the strongest sense of the EPA as a client of any of the sections in the Environment Division. 75 On the affirmative litigation side, DOJ support is less automatic. For example, comparing DOJ’s reports of its case filings with the EPA’s reports of its case referrals shows an acceptance rate of 92.5% in 1989, 82.7% in 1990, 91.2% in 1991, and 72.7% in 1992. 76 This gap is not insignificant.

Second, while there is no control group (so it is impossible to know what would have happened in unlitigated cases), the agency undoubtedly would have lost some—perhaps even many—of the cases DOJ refuses to bring, and thus is benefited rather than harmed by DOJ’s restraint. Not all the declined cases should be brought. 77 Moreover, not all the declined cases

72. The baseline problem recurs here—that there is less enforcement does not mean that there is too little enforcement. A priori, it is impossible to say with any confidence that the amount of enforcement an agency would pursue on its own is any more optimal than the amount it pursues with the assistance of DOJ.

73. To pick one example at random, the Department of Housing and Urban Development (HUD) has objected that DOJ decided not to pursue certain housing discrimination cases “simply because DOJ does not agree with HUD’s . . . determination [that a violation has occurred] or HUD’s substantive policy position.” UNITED STATES COMM’N ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS ACT OF 1988: THE ENFORCEMENT REPORT 231 (1994). The Civil Rights Commission has recommended that “[i]f DOJ disagrees with the substantive issues of a HUD charge such that it cannot litigate the charge in good faith, DOJ should authorize HUD attorneys to pursue the charge.” id.

74. See HOROWITZ, supra note 68, at 40 (“[T]he first-instance defense is routinely and sympathetically accorded the agencies.”). See generally id. at 39-44.


76. David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and their Citizens?, 54 Mo. L. REV. 1552, 1613-14 n.348 (1995). Neither the EPA nor DOJ reports how many case referrals DOJ declines to pursue.

77. At the EPA, for example, enforcement success is measured in terms of referrals; this creates an incentive to refer cases that may not be worth bringing. Consistently, referrals skyrocket at the end of the Fiscal Year—what has been called the “lump in the snake”—to pad the statistics. Judson W. Starr, Too Many Cooks . . . , ENVTL. F., Jan.-Feb. 1989, at 9,
would be brought if the EPA controlled its own litigation. The fact that the EPA is not always as careful or workmanlike in its referrals as it might be can be offered as a reason for DOJ supervision and control of litigation; stated in the extreme, the EPA has shown that it lacks the self-discipline and professionalism to litigate on its own. Yet even if this is true, it is a reality that results at least in part from the current allocation of tasks, not from inherent characteristics of DOJ and the EPA. If the EPA represented itself, it could not rely on DOJ to say no, insist on fuller referral packages, or tighten up a proposed complaint. Instead, the EPA would perform those tasks and therefore behave more like DOJ. At the least, it would develop its own screening process, in some measure replicating the current regime except within the agency.  

Finally, these forgone enforcement opportunities are a drop in the bucket of the overall enforcement effort. For most agencies, the bulk of enforcement work is administrative rather than judicial. DOJ has virtually no role in administrative enforcement. Consider the EPA again. When the EPA determines that a person is in violation of one of the environmental laws or the regulations issued thereunder, it has a number of enforcement alterna-

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10 (1989) (noting that when DOJ "is deluged with referrals" in the fourth quarter of the fiscal year, "a number of these cases are dogs, and are being referred only to obtain a bean"); Interview with Roger Clegg, former head of the Environment Division, U.S. Dep't of Justice, in Washington, D.C. (Nov. 15, 1994) (Clegg held that position from July 1991 until January 1993). It would be highly unlikely that this lump consisted of nothing but excellent cases presented in polished referral packages that for some reason the EPA just forgot to send over until the end of the year.  

78. Consider, for example, the Department of Labor, an Executive branch agency that has unqualified litigating authority under various statutes. See, e.g., Family and Medical Leave Act, 29 U.S.C. § 2617(e) (1994); Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 921a (1994). In implementing these statutes, the Department makes use of a screening process to determine whether it should appeal a lower court defeat. According to officials in the Solicitor's office (Marshall Breger, former Solicitor, as well as Seth Zinman and Steve Mandell, the lawyers who were in charge of this screening process in 1995), this screening process created tensions within the Department of Labor. Interview by Neil Devins with Seth Zinman and Steve Mandell, at Department of Labor, Washington, D.C. (Mar. 7, 1995); Interview by Neil Devins with Marshall Breger, at the Heritage Foundation, Washington, D.C. Specifically, trial court lawyers who wanted to appeal any and all defeats were often disappointed by appellate court lawyers who exercised great caution in screening appeals.  

Similarly, to some extent such an arrangement already exists within the EPA. One former head of the EPA's Enforcement and Compliance Monitoring Office has written that the EPA's own internal screening has weeded out poor quality referrals from the regional program office enforcement personnel and Regional Counsels. He reports that in the mid-1980s, the EPA headquarters returned 10% to 15% of civil judicial enforcement referrals to the regional offices, because they were insufficiently prepared. See Richard H. Mays, The Multiheaded Tortuous Enforcement Assembly Line Machine, ENVTL. F., Nov.-Dec. 1988, at 14, 17 (1988).
tives. The basic choice is between administrative, civil judicial, and criminal, though administrative enforcement in turn includes several different types of severity and procedural complexity. The EPA perceives these alternatives as arranged in a pyramid, with administrative enforcement at the base, civil judicial in the middle, and criminal at the top. Only the most dramatic of these—referral to DOJ as either a civil or a criminal action—involves DOJ. For FY 1997, the respective numbers were:

- Administrative enforcement actions (total): 3427
- Administrative penalty actions: 1313
- Civil Referrals to DOJ: 426
- Criminal Referrals to DOJ: 278

While possible monetary penalties are comparable in all three regimes, in practice penalties actually imposed are, not surprisingly, smaller in administrative cases than in judicial cases, reflecting the fact that the EPA turns to these different mechanisms according to the seriousness of the underlying violation. The huge majority of enforcement matters are handled administratively through actions ranging from a warning letter or a notice of violation, with a view to informal discussion and resolution, through an order requiring compliance, to agency imposed penalties. The huge majority of administrative enforcement proceedings settle; in these cases, there

79. One other EPA enforcement tool bears mentioning but is really outside the scope of the concerns of the present study. The EPA maintains a List of Violating Facilities pursuant to provisions in the Clean Water and Clean Air Acts that forbid federal agencies to contract with persons convicted of violating either statute until the EPA certifies that the underlying condition has been corrected. See Clean Air Act, 42 U.S.C. § 7606 (1994); Federal Water Pollution Control Act, 33 U.S.C. § 1368 (1994); see also Exec. Order No. 11,738, 3 C.F.R. 799 (1971-1975). Listing is mandatory in the case of facilities whose violations result in a criminal conviction; it is discretionary in the case of facilities with violations that have led to civil or administrative determinations of noncompliance. See generally 40 C.F.R. pt. 15 (1993).

80. See EPA, FY 1997 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 2-2, Fig. 2-1 (1998).


82. See, e.g., Clean Air Act, 42 U.S.C. § 7413(d)(1) (1994) (providing for both civil judicial penalties and administrative penalties of up to $25,000 per day per violation, although the latter cannot exceed a total of $200,000).

83. Thus, for FY 1994, the 166 civil defendants were assessed almost $65.7 million in penalties while the 1596 administrative penalty orders totaled $48 million. See EPA, FY 1994 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 4-6 tbl. 4-2, 4-9 tbl. 4-3. Average criminal fines were somewhat less than average civil fines but were handed out on top of prison sentences. In FY 1994, the 250 criminal defendants were assessed $36.8 million in fines and 99 years in prison. See id. at 4-4 fig. 4-2.

84. See, e.g., Samuel L. Silverman, Federal Enforcement of Environmental Laws, 75 MASS. L. REV. 95, 97 (1990) (reporting that "well over ninety percent of Region I's ad-
is no formal hearing and no possibility of judicial review—and thus, no courtroom lawyering.

The EPA thus has two quite independent enforcement regimes operating simultaneously. The administrative enforcement regime is a “compliance system,” aimed at preventing violations and remedying underlying problems; the judicial enforcement regime is a “deterrence system,” more visible, legalistic, and formal. DOJ refusal to bring cases affects only the deterrence system, and as long as DOJ does accept most referrals, the fact that it does not accept all will not significantly undermine the system. Viewed in light of the overall enforcement regime, then DOJ acceptance rates of seventy-five percent to ninety percent on EPA referrals are no doubt frustrating but cannot be seen as a significant, systemic problem for the agency.

D. Skewing Enforcement Decisions

Of course, one might still ask whether agencies rely too much on administrative enforcement, and whether one reason for this is a desire to avoid the gauntlet of DOJ referral.

Again, we take the EPA as an example. As already discussed, the EPA overwhelmingly opts for administrative over judicial enforcement. There are a number of reasons for this disparity. First, the regions want to avoid interference not only by DOJ but also by the EPA headquarters. Administrative enforcement is left largely to the regions, although the familiar battles about centralization have been played out between headquarters and the regions. Second, administrative enforcement is quicker than judicial enforcement.
and would be regardless of the increased layers of review and DOJ involvement in the latter. 89 To be sure, a full-fledged administrative proceeding, complete with a trial-type hearing before an Administrative Law Judge, can take as long as a trial, and longer than settling a judicial case, so the speed point is easily overstated. Still, by and large, the administrative route is quicker. Third, there is a clear correspondence, understood by the EPA and by the members of the regulated community, between the seriousness and flagrane of the violation and the mechanism used to penalize and correct it. With any violator it makes sense to start small, with some measure of cooperative spirit, and get tougher as necessary. As long as everyone understands that administrative enforcement is less “serious” than judicial, then it provides for a more nuanced enforcement response and allows resolution of most matters with relatively less acrimony, stigma, fuss and expense on both sides. Fourth, more can go wrong in court.

In addition to these four factors, however, it is also true that an additional perceived advantage of administrative enforcement is that it can be done without DOJ. 90 David Buente, head of the Enforcement Section in the Environment Division for over six years in the 1980s, recalls:

[T]here were always a couple of Regions which seemed to try to avoid having to do anything they could, where it was a civil judicial enforcement matter. They would try to use administrative enforcement no matter what. And even where they had to, if they were to do any enforcement, do civil judicial enforcement, there was just a constant tension in it. This was just systematic and it never stopped. 91

Even in the 1970s, in part to limit DOJ authority, the agency emphasized

89. See Interview with Jonesi, supra note 75; Interview with Walter E. Mugdan, Deputy Regional Counsel, Region II, EPA, in New York, N.Y. (Apr. 4, 1995) [hereinafter Interview with Mugdan].

90. See Interview with Jonesi, supra note 75; Interview with Mugdan, supra note 89;
Kevin A. Gaynor, The Growing Environmental Enforcement Effect—Case Selection and Management, 1 ALL-ABA COURSE OF STUDY: ENVIRONMENTAL LITIGATION 243, 245 (1988) (noting that “[t]hose factors tilting toward the case being handled administratively are [that] it is typically less resource intensive since it can be handled by the regional office with little involvement from EPA headquarters and no involvement by DOJ; and [that] it may be less time consuming”); Hodas, supra note 76, at 1613 (stating that “to get to court, EPA must refer cases to DOJ, which means convincing another agency to pursue the case, a time consuming and unpleasant process”); 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 287 (1992) (explaining that “government . . . requires a variety of bureaucratic concurrences” before going to court and “[f]or many staffers, the prospect of clearing these hurdles is reason enough to settle for the administrative remedies”).

EPA-controlled administrative enforcement over DOJ-controlled judicial enforcement. 92

The reluctance to go to DOJ would be more serious but for the existence of the administrative alternatives. For example, in the early 1980s, when administrative enforcement alternatives under the Clean Water Act were far skimpier than they are now, it was a common complaint that the EPA relied too much on voluntary compliance and waited too long before finally initiating a civil enforcement action. To the extent that hesitation resulted from a disinclination to get DOJ involved, either because of the time or the hassle involved, the enforcement effort was the victim of the institutional arrangements. 93

It is easy to overstate the foregoing, however, in two ways. First, none of this is an insurmountable obstacle. It is a disincentive, not a prohibition. Second, the real question is not whether DOJ involvement is a disincentive to judicial enforcement, but rather, how much more of a disincentive it is as compared to whatever would replace it. Were the EPA to handle its own litigation, there would still be some sort of internal screening process. It might be smoother, faster, and more cooperative, but it would surely replicate at least some of the problems that now characterize the referral process.

III. COUNSELING

The focus thus far has been on litigation, which is misleading. Much of the lawyering tasks of the federal government are not centralized. Consider the following lament, written in 1977 by then-Attorney General Griffin Bell:

Shortly after I took office, the President asked me to determine the total number of lawyers in the government and their functions. . . . We discovered 19,479 lawyers [of whom only 3,806 are in DOJ] who are performing “lawyer-like” functions—litigating, preparing legal memoranda, giving legal advice, and drafting statutes, rules, and regulations. These lawyers are distributed throughout the departments and agencies, and practically no agency is too small to have its own “General Counsel.”

92. See Mintz, supra note 28, at 700 (noting that throughout the mid-1970s “the EPA preferred to proceed on the basis of administrative, as opposed to judicial, enforcement of air and water Act violations”).

Although I am the chief legal officer in the executive branch, I have learned that I have virtually no control or direction over the lawyers outside the Department of Justice, except indirectly in connection with pending litigation.\textsuperscript{94}

Note the somewhat petulant disappointment, the assumption that by rights the AG ought to dominate federal legal activities, and the dismissive quotation marks around “General Counsel.” Perhaps Bell’s dismay reflected an understanding that the greatest impact on an agency’s substantive program that a lawyer can have is not in court long after the basic policy decisions have been made, but as part of the process of policy formulation.

For example, rulemaking. Lawyers are in the thick of the rulemaking process for three reasons. First, a regulation must be consistent with and within the scope of the authority granted by the relevant statute. Second, the rulemaking process operates in the shadow of numerous judicial decisions; many rulemakings are taking place on remand from judicial review, and all take place within an overall context colored by a large body of judicial decisions.\textsuperscript{95} Third, final regulations are frequently challenged in court.\textsuperscript{96} Knowing this, the agency must be especially careful to craft a rule that will withstand judicial scrutiny. As a result, rulemakings tend to be fraught with a multitude of complex legal questions, and lawyers are central players.\textsuperscript{97} This is not to say that lawyers dictate all decisions or even that they have an absolute veto power. It is to say that they play a central and critical role.

\textsuperscript{94} Bell, \textit{supra} note 36, at 1050.
\textsuperscript{96} Former EPA Administrator William Ruckelshaus once stated that 80\% of EPA regulations are challenged in court. This number, although frequently invoked, is almost certainly an overstatement. The genesis of this estimate, the frequency with which it is invoked, and doubts as to its validity are fully discussed in Cary Coglianese, \textit{Assessing Consensus: The Promise and Performance of Negotiated Rulemaking}, 46 DUKE L.J. 1255, 1296-1301 nn.180-202 & app. (1997). Whatever the number, it is significant. Moreover, it would be higher, and the results of such litigation more disappointing to the agency, but for careful lawyering at the rulemaking stage.
\textsuperscript{97} \textit{See} MELNICK, \textit{supra} note 95, at 141-44, 278-80, 314-32 (explaining influential roles of agency lawyers in specific rulemakings); Michael Herz, \textit{The Attorney Particular: Governmental Role of the Agency General Counsel, in GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS} 143, 150-56 (Cornell W. Clayton ed., 1995) (using the promulgation of regulations under Title V of Clean Air Act Amendments of 1990 as a case study for complex rulemaking); \textit{see also} ROSEMARY O'LEARY, \textsc{ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA} 164-65 (1993) (describing how in EPA, as in any organization that is involved in frequent litigation, attorneys gain power and influence).
The lawyers in question are almost never from DOJ. Rather, they are from the agency’s Office of General Counsel. On occasion, DOJ attorneys will advise the agency on the implementation of or compliance with a specific decision when a court has remanded a rulemaking to the agency for further action. These occurrences are limited in scope and frequency. Similarly, from time to time DOJ will attend a meeting or be informally consulted by the agency. In general, however, agency lawyers advise the agency in rulemakings. If the rule is challenged in court, DOJ lawyers must defend the product of agency lawyers’ advice.

The exception to this overall pattern occurs when someone else in the Executive branch—in the White House or another agency—is interested in or affected by an agency action, or when the agency itself approaches DOJ for advice. By statute, any executive department head “may require the opinion of the Attorney General on questions of law arising in the administration of his department.” The AG has delegated this opinion-writing authority to the Office of Legal Counsel (OLC). DOJ has always taken the position that these opinions are binding on the agency that requests them, and they are accepted as such by the agencies.

The picture changes slightly when there is a dispute between agencies rather than just uncertainty within an agency. The President has sought submission of such disputes to the Attorney General for resolution. Executive Order 12,146, issued by President Carter in July 1979, “encour-

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98. The Office of General Counsel is not involved in enforcement, except in an occasional advisory capacity with regard to background substantive requirements. Rather, enforcement is handled primarily by attorneys in the offices of the Regional General Counsels and secondarily by attorneys in the Office of Enforcement and Compliance Assurance at EPA headquarters. See 2 ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW 12-80 to 12-83 (Michael B. Gerrard ed., 1995).
101. See 28 C.F.R. § 0.25(a) (1999) (assigning OLC duties of preparing formal and informal opinions and giving legal advice to governmental agencies).
102. Whether they are binding as a theoretical matter can be disputed. See ALBERT J. LANGELUTTIG, THE DEPARTMENT OF JUSTICE OF THE UNITED STATES 147 (1927); Michael Herz, Imposing Unified Executive Branch Statutory Interpretation, 15 CARDOZO L. REV. 219, 227-29 (1993). However, in practice they are universally treated as such. See, e.g., Clean Air Act Implementation (Part I): Hearings Before the Subcomm. on Health and the Envt of the House Comm. on Energy & Commerce, 102d Cong., 1st Sess. 254 (1994) (testimony of EPA General Counsel E. Donald Elliott) (“We get to give a final legal ruling and if that final legal ruling by me and my office is made, it is going to stand unless and until it is appealed to the Department of Justice and somebody over there says I am wrong. ....”).
ages" executive agencies to submit legal disputes to the AG. Moreover, before one part of the government takes another to court, agency heads who serve at the pleasure of the President, such as the EPA, must submit such disputes to the AG. Although somewhat ambiguous, the order is understood to establish the AG as the ultimate arbiter of interagency legal disputes.

Notwithstanding the occasional binding legal opinion from DOJ, ultimately the agency itself handles legal advice-giving. Even if DOJ had the resources to weigh in on every question of law facing every agency, which it does not, it lacks the opportunity, because the agency must come to it. Because the agency itself must initiate the process, either the legal issue will be one outside its area of interest and expertise, or it will have perceived some strategic advantage in having DOJ render an opinion.

In short, DOJ "has never succeeded in gaining anything close to a monopoly over the provision of legal advice within the government." The general invisibility of DOJ as a counseling institution is enormously important for the present topic. Were DOJ to control both counseling and litigation, all the foregoing objections and concerns would be tremendously heightened. But because it does not, DOJ has only so much maneuvering room. Put differently, from the point of view of the agency, it can only do so much damage. As the agency's litigator, but only it's litigator, DOJ is confronted with a fait accompli.

CONCLUSION

These considerations prove inconclusive. They certainly do not add up to a compelling case for removing litigation authority from DOJ and letting

104. See id.
105. See, e.g., Memorandum of the Office of Legal Counsel, Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (July 16, 1997) <www.usdoj.gov/olc/1997opinions.htm> (resolving a dispute between EPA and the Department of Defense by concluding that the Clean Air Act authorizes, and the Constitution does not prohibit, EPA to impose civil administrative penalties on other federal agencies).
106. Even in the case of interagency disputes, the Executive Order does not flatly require submission of the dispute to the Attorney General, it only states that the agencies must go to the AG before going to court—presumably if they are not planning to go to court, they need not go to the AG. See Exec. Order 12,146, 3 C.F.R. 409, 411 (1980).
107. See, e.g., Herz, supra note 102, at 227; Nelson Lund, Rational Choice at the Office of Legal Counsel, 15 CARDOZO L. REV. 437, 492-95 (1993) (including in strategic motives situations where the agency head may request OLC opinion on issue he is opposed to in hopes of a negative opinion, shift of blame for inaction away from himself, or to insulate the agency from criticism on a legally questionable issue).
108. Lund, supra note 107, at 488.
each agency handle its own lawsuits. They do point toward two things: a careful consideration of context and the importance of effective and mutually considerate working relationships.

With regard to the first consideration, context, consider five categories of lawyering on behalf of agencies: criminal enforcement, civil judicial enforcement, administrative enforcement, defense (primarily of regulations, but also of adjudicatory decisions), and counseling. The programmatic effect of having an outside lawyer will vary from one situation to another. As described above, the greatest potential for such an effect lies in counseling, where, wisely, agencies have largely been left to their own devices. Next comes litigation challenging substantive regulatory decisions, whether in the form of individual adjudicatory determinations or the promulgation of regulations. In these settings, agency lawyers may possess three things that DOJ lawyers lack: expertise in a particular substantive area, intense familiarity with the details of a regulatory program, and enthusiasm for the agency’s actions. In other contexts, however, DOJ lawyers have more relevant expertise than agency lawyers. Most notably, in the criminal setting, the litigator’s expertise—knowing one’s way around the courtroom, understanding juries, knowing the rules of evidence, mastering strategy, being familiar with individual judges—are at a premium, the environmental lawyer’s expertise—understanding the exact nature, history, and meaning of every subdivision and cross-reference of the sub-sub-sections of the relevant regulations—should be irrelevant.

With regard to the second consideration, the nature of the working relationship, the foregoing suggests that harms to an agency’s substantive program are a legitimate concern but not so striking or profound as to justify a fundamental restructuring. The potential for such an effect, however, does argue for DOJ taking seriously its role as lawyer for a client, one with many of the prerogatives and power of independent decisionmaking that private lawyers’ clients have.

A full consideration of the nature of that relationship and of the other costs and benefits of the current regime must await another day. Focusing just on the issues examined in this article, however, suggests that (a) a fundamental restructuring is unwarranted, but that (b) there may be room for greater agency lawyer involvement in defending regulations and (c) DOJ must operate as the lawyer for a client, not as the client’s board of directors.