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## POLITICAL WILL AND THE UNITARY EXECUTIVE: WHAT MAKES AN INDEPENDENT AGENCY INDEPENDENT?

*Neal Devins\**

The government does not speak a unitary voice in court. The exercise of independent litigating authority by governmental entities connotes the absence of White House authority and, with it, disunity in interpretation. Sometimes Congress encourages such disunity through statutory grants of independent litigating authority. Sometimes the executive accommodates the desires of governmental entities to speak their own voice in particular cases. At other times the executive acknowledges an implicit claim of right for an independent agency or governmental corporation to control its litigation.

What then defines the line which separates that which is within the President's control from spheres of authority independent of the President's will? In a sense, this question puts the cart before the horse. It assumes that the power to implement the laws can be parcelled out between the President and independent policy makers. This assumption is an anathema to and rejected by supporters of a unitary executive.<sup>1</sup> Nonetheless it is appropriate. The Supreme Court has never accepted and the Solicitor General has never advanced the strict unitariness claim.<sup>2</sup> Unitariness is not simply a theoretical construct, the figment of someone's imagination. Quite the contrary, perceptions about unitariness define White House control of the administrative state. The more the President constructively asserts

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<sup>1</sup> See generally TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 161 (1992); DOUGLAS W. KMEC, *THE ATTORNEY GENERAL'S LAWYER* 47-68 (1992); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1166-69 (1992).

<sup>2</sup> See CHARLES FRIED, *ORDER AND LAW* 154-60 (1991); Bernard Schwartz, *An Administrative Law "Might Have Been"*—Chief Justice Burger's *Bowsher v. Synar* Draft, 42 ADMIN. L. REV. 221 (1990) (Justices' conference and draft opinions in *Bowsher v. Synar* reveal overwhelming support for structural restraints on President's power—so long as the execution of the law is not vested in another branch of government).

his Chief Executive status, the greater his power. Along the same lines, the more Congress or independent agencies perceive the President as the unitary head of government, the greater the President's power to control the administrative state.

The above proposition seems little more than a restatement of the obvious. For the most part, however, analysis—at least by legal scholars—of the breadth and limitations of White House control over the administrative state has focused on whether or not Congress has imposed formal structural limits on executive control.<sup>3</sup> In particular, multimember agencies headed by commissioners who serve staggered terms and who are not removable at the executive's will are perceived as having the power to exert an independent voice which may run afoul of executive wishes. Examination of particular agencies, however, indicates that this analysis is overly simplistic.

This Article suggests an alternative paradigm of agency independence. The focus of agency analysis should encompass interbranch power and expectations as well as agency structure. Through an assessment of the Federal Communications Commission ("FCC"), the United States Postal Service, and, in particular, the Equal Employment Opportunity Commission ("EEOC"), this paper argues that the traditional structural paradigm for determining an agency's independent power is inadequate. Examine the case of the EEOC: Despite staggered term Commissioners, for-cause removal, lead agency status in coordinating federal employment antidiscrimination efforts, and independent litigating authority, the Department of Justice—with White House backing—has successfully exerted extraordinary control over the EEOC. For example, in a controversial affirmative action case, the EEOC withdrew from filing an amicus brief counter to the Justice Department's position.<sup>4</sup>

The EEOC example, as will be shown, does not suggest that structure is irrelevant. Structural limitations are significant, but not controlling. The willfulness of the President, the Congress, and the agency itself are equally as important. In the case of the EEOC, the executive forcefully exerted control over the agency while Congress, standing on the sidelines, acquiesced to this power grab. In contrast, the example of the FCC reveals how executive power can be delimited

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<sup>3</sup> See generally Symposium, *Separation of Powers and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO. WASH. L. REV. 401 (1989); Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987). Cf. EASTLAND, *supra* note 1, at 383-84 (advancing political strategies for unitariness).

<sup>4</sup> See *Williams v. City of New Orleans*, 729 F.2d 1554, 1571 n.1 (5th Cir. 1984). For further discussion, see *infra* part II.A.1.

by congressional and agency assertions of power.<sup>5</sup> Finally, the Postal Service calls attention to the necessity of strategic planning for the executive to effectively expand its power.<sup>6</sup>

This Article examines the paramount role of political actors in defining the unitariness of executive branch interpretations. Its specific focus is on Department of Justice control of independent agency litigation. This issue is of great symbolic and practical importance to the unitary executive debate. Clearly, "those who control the agenda will have great opportunity for manipulating the social choice."<sup>7</sup> If the White House, through the Department of Justice, controls an agency's access to courts, it therefore controls the court's agenda for policy making; if an agency controls litigation, it will set its own agenda.

This Article will examine the question of executive control over litigation in three phases. Part I will consider structural and political limitations to Department of Justice control of government litigation. Part II will examine the intersection between politics and structure through three case studies. Part II will first assess the Department of Justice's success in politically overcoming structural limitations to its authority by neutralizing EEOC independence. In making this assessment, the role of Congress and the EEOC itself, in facilitating this Department of Justice initiative, will also be considered. Part II will then examine "turf wars" between the Department of Justice and two other independent agencies, the Postal Service and the FCC. This examination will provide insight into the ways in which structure and politics intersect when defining the line between executive unitariness and agency independence. Finally, part III will synthesize these case studies. This synthesis will highlight the limits of the structural paradigm and the centrality of politics.

### I. THE DISUNITARY EXECUTIVE BRANCH

Executive branch centralization is more illusory than real. The administrative state is far too immense for the White House, the Office of Management and Budget ("OMB"), and the Department of Justice to comprehensively coordinate policy making. In the area of civil rights, for example, every government agency, department, and

<sup>5</sup> See *infra* part II.B.1.

<sup>6</sup> See *infra* part II.B.3.

<sup>7</sup> DAVID L. WEIMER & AIDAN VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* 115-16 (1992) (discussing policy implications of Arrow's General Possibility Theorem). For an insightful article on Justice Department control of litigation, see Susan M. Olson, *Challenges to the Gatekeeper: The Debate Over Federal Litigation Authority*, 68 JUDICATURE 71 (1984).

commission is involved in enforcement.<sup>8</sup> Nondiscrimination in federal assistance requirements are enforced by all government agencies distributing federal largess; EEOC regulations call for sensitivity by all government entities to numerical equality objectives in their own hiring. Moreover, freestanding civil rights enforcement projects exist within the EEOC, FCC, Small Business Administration, Civil Rights Commission, Legal Services Corporation, and the Departments of Treasury, Labor, Education, Commerce, Transportation, and Justice. Given the pervasiveness of civil rights enforcement, centralization can occur only if the White House both makes coordination a primary objective and is extremely diligent in appointing to key government posts individuals who agree with the President's views on civil rights enforcement. Otherwise, competing regulatory goals will take priority to civil rights enforcement and, correlatively, external pressures from oversight committees and constituency interests will dilute the White House agenda.<sup>9</sup>

The apparent impossibility of centralization should not be equated with government run amok. An "energetic" President can place his imprimatur on governmental operations through both the appointment of like-minded individuals and the endorsement of hierarchical Justice Department control of litigation, OMB control of regulation, and White House control of legislative initiatives.<sup>10</sup> Congress, however, can erect roadblocks to centralization efforts. Threatened funding prohibitions have hampered aggressive OMB oversight.<sup>11</sup> Statutory exceptions to Department of Justice litigation authority have likewise impeded Attorney General efforts to advocate a unitary executive voice.

#### A. *Structural Limits on Attorney General Control*

The authority of the Attorney General to manage government litigation is certainly the norm. When Congress established the Department of Justice in 1870, it sought to secure "a unity of decision, a unity of jurisprudence . . . in the executive law of the United States."<sup>12</sup>

<sup>8</sup> Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1753 (1991).

<sup>9</sup> This is precisely what occurred in the battle over race preferences between the FCC and the Justice Department. See *infra* part II.B.

<sup>10</sup> For an analysis of the energetic President, see EASTLAND, *supra* note 1, at 277-89; KMIEC, *supra* note 1, at 47-48. On the pitfalls of an energetic President, see GEORGE C. EADS & MICHAEL FIX, *RELIEF OR REFORM?* (1984); *THE REAGAN EXPERIMENT: AN EXAMINATION OF ECONOMIC AND SOCIAL POLICIES UNDER THE REAGAN ADMINISTRATION* (John L. Palmer & Isabel V. Sawhill eds., 1982).

<sup>11</sup> See Judith Havermann, "Defunding" OMB's Rule Reviewers; Hill Panel Deletes \$5.4 Million Budget, WASH. POST, July 18, 1986, at A17.

<sup>12</sup> CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870). See generally Olson, *supra* note 7. See



The legislation authorizing the Justice Department set the stage for massive centralization of government litigation, specifying that "[e]xcept as otherwise authorized by law, the conduct of [government] litigation . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."<sup>13</sup> Nevertheless, the initial caveat of this legislation ("[e]xcept as otherwise authorized by law") provided enough room for agency empowerment to keep alive the debate over the appropriate level of Department of Justice control. Indeed, Congress's power to make exceptions to Department of Justice control has severely infringed upon the Attorney General's role as chief litigator for the United States. That Congress would make such exceptions should come as no surprise. When Department of Justice centralization frustrates legislative desires, Congress may protect its prerogatives by transferring litigating authority to an agency or department that is more likely to endorse its preferences.

Furthermore, legislative grants of independent litigating authority result in a significant number of intragovernmental disputes that are publicly aired before federal courts, including the Supreme Court. Congressional exceptions to Department of Justice control, moreover, lack a coherent pattern.<sup>14</sup> Some entities have independent litigating authority on all matters before all courts (e.g., the Federal Election Commission, the Senate's Office of Legal Counsel, and special prosecutors appointed under the Ethics in Government Act); others have independent litigating authority on some matters before all courts (e.g., the Department of Agriculture and the Federal Trade Commission). Moreover, some entities have independent litigating authority on some matters before some courts (e.g., the Environmental Protection Agency and the Department of Health and Human Services); some have independent litigating authority on all matters before some courts (e.g., the Securities and Exchange Commission, the Equal Employment Opportunity Commission, the Federal Energy Regulatory Commission, and the Internal Revenue Service); still others have independent litigating authority on some matters before all courts and on other matters before some courts (e.g., the Federal Communica-

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also *The Attorney General's Role as Chief Litigator for the United States* [hereinafter *Attorney General as Chief Litigator*], 6 Op. Off. Legal Counsel 47 (1982); Neal Devins, *Unitariness and Independence: Solicitor General Control of Independent Agency Litigation*, 81 CAL. L. REV. (forthcoming Dec. 1993).

<sup>13</sup> 28 U.S.C. § 516 (1988).

<sup>14</sup> See Olson, *supra* note 7; Devins, *supra* note 12; THE OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MULTI-MEMBER INDEPENDENT REGULATORY AGENCIES: A PRELIMINARY SURVEY OF THEIR ORGANIZATION [hereinafter *PRELIMINARY SURVEY*] (rev. ed. May 1992).

tions Commission and the Federal Maritime Commission). Intragovernmental conflict therefore manifests itself in countless forms depending on the issue and the court.

Independent litigating authority is not the death knell of Attorney General control, however. Despite significant statutory exceptions, the vast majority of government litigation is conducted by the Department of Justice. The Justice Department remains dominant because of the presumed benefits in the quality of representation, the cohesiveness of governmental arguments, and the bringing of a greater objectivity to representing the public interest. Grants of independent litigation authority nonetheless pose a severe structural barrier to Attorney General control, especially when litigating authority is vested in independent agency heads—that is, officials who may only be dismissed by the President “for cause.” Intuitively, administrators and commissioners, secure in their offices, are better able to defy Executive wishes and assert independent authority. For-cause removal is controversial for precisely this reason; it envisions and thereby encourages agency heads to, at least occasionally, engage in policy disputes with the White House. At a most fundamental level, immunity from removal grants administrators the freedom to speak with an independent voice.<sup>15</sup>

Focusing on these structural characteristics, however, places a heavy emphasis on the role of the executive in shaping agency decision making. The structural paradigm assumes executive control of federal agencies, and carves out exceptions for agencies with the procedural ability to ward off the executive. Moreover, the structural paradigm implies that agency independence can be determined by consulting a checklist of structural characteristics.

The line separating agency independence from Department of Justice control, of course, is too murky for a checklist. Political institutions transcend their structural characteristics. Political will and varying circumstances play a critical role in determining whether government presents itself in court as a unitary voice or multiheaded hydra.

### B. *The Problem of Political Will*

Fundamentally, the question of whether, and to what extent,

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<sup>15</sup> As early as 1937, political commentators warned of the threat posed to the unitary executive by independent agencies; the Brownlow Commission described the independent agency as a “headless ‘fourth branch’ of Government, a haphazard deposit of irresponsible agencies and uncoordinate powers.” PRESIDENT’S COMM. ON ADMIN. MANAGEMENT, REPORT WITH SPECIAL STUDIES 37 (1937).

government will speak as a unitary voice in court is a question of representation—namely, do government lawyers litigate on behalf of Congress, the affected agency or department, or the President. The most prevalent model, the so-called bureaucratic theory of representation, envisions the affected agent or department as the policy-making client, and agency counsel or the Justice Department as the dutiful advocate.<sup>16</sup> Proponents of the unitary executive reject bureaucratic theories of representation and instead argue that the obligation of government attorneys “is most reasonably seen as running to the executive branch as a whole and to the President as its head.”<sup>17</sup> Finally, to the extent that some governmental entities are viewed as “arms of the Congress,” the desires of oversight committees may figure prominently in government representation.<sup>18</sup>

The choice of the representation model is a function of independent litigation authority, removal authority, and other structural attributes. However, political will is the most significant factor in determining which representation model will predominate. Political will may manifest itself in several ways. The existence or nonexistence of structural barriers to Justice Department control of litigation is a by-product of political will. On the one hand, the Nixon and Carter administrations signed off on the creation of independent litigating authority in the Postal Service, the Federal Trade Commission, and the Federal Energy Regulatory Commission.<sup>19</sup> For these administrations, independent litigating authority outside the President’s direct control was of little consequence. The Reagan and Bush administrations, on the other hand, fought off congressional efforts to create new repositories of independent litigating authority.<sup>20</sup> Reagan pocket vetoed the Whistleblower Protection Act of 1988 because it

<sup>16</sup> According to Susan Olson, the official position of the Justice Department “is that the Department does not make policy—that is the responsibility and right of the client agencies.” Olson, *supra* note 7, at 82. For a detailed assessment of bureaucratic theory and its pitfalls, see John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992).

<sup>17</sup> Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1298 (1987).

<sup>18</sup> For case studies involving House Energy and Commerce Committee oversight of the FCC, see Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. (forthcoming 1993). See also Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees* (unpublished manuscript, on file with author).

<sup>19</sup> See Olson, *supra* note 7; SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, S. DOC. NO. 95-91, 95th Cong., 2d Sess. 61-62, 261-307 (1977).

<sup>20</sup> See generally KMIEC, *supra* note 1. Reagan, however, did sign legislation delegating executive branch power to the Comptroller General as part of the Gramm-Rudman-Hollings Budget Deficit Act and to the independent counsel as part of the Ethics in Government Act. See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 142-60 (1992).



empowered a special counsel to obtain judicial review of Merit Systems Protection Board decisions, thereby undermining the President's "authority to supervise and resolve disputes between his subordinates."<sup>21</sup> The Bush administration followed suit by objecting to a proposed Office of Federal Housing Enterprise Oversight with independent litigating authority to be established within the Department of Housing and Urban Development.<sup>22</sup>

Political will also figures prominently in the President's management of existing decentralization arrangements. Grants of independent litigating authority to departments and agencies within the executive may be subject to Justice Department supervision. Some of these entities have voluntarily ceded this litigation authority to the Attorney General; others may be directed to do so by the President. Plainly, independent litigation authority does not bar a President from conditioning employment within the executive to those who follow the Attorney General's lead on litigation matters. Nonstatutory decentralization arrangements are also subject to presidential influence. No formal statutory limitation impedes the President's repeal of either tacit understandings, such as those between the Tennessee Valley Authority and the Federal Deposit Insurance Corporations,<sup>23</sup> or explicit arrangements formalized in "memorandums of understanding" between the Justice Department and the Environmental Protection Agency ("EPA") or the Departments of Energy and Labor.<sup>24</sup>

The likelihood of the President's exercising such political muscle is quite another thing. The Bush and Reagan administrations, especially in challenging EPA authority to sue federal facilities, took issue with some preexisting decentralization arrangements.<sup>25</sup> These arrangements were challenged as improper limitations on executive branch policy coordination and, with it, the President's constitutional prerogative to secure the faithful implementation of the laws. Other administrations, most notably the Carter and Nixon administrations,

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<sup>21</sup> Memorandum of Disapproval for the Whistle-blower Protection Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1377 (Oct. 26, 1988).

<sup>22</sup> See Memorandum from American Law Division, The Library of Congress, Congressional Research Service, to Senate Committee on Banking, Housing, and Urban Affairs, May 4, 1992 (discussing Department of Justice objections to establishing an Office of Federal Housing Enterprise Oversight).

<sup>23</sup> See Attorney General as Chief Litigator, *supra* note 12, at 47 n.1.

<sup>24</sup> See Olson, *supra* note 7, at 77-78.

<sup>25</sup> See *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. 182, 206-13 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division); *id.* at 678-84 (letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs).

supported the use of memorandums of understanding which limited Department of Justice control.

Finally, the political will of the executive plays a critical role in defining what weight will be accorded agency and departmental perspectives when litigation authority remains in the Department of Justice. Again, different administrations subscribe to different visions of Attorney General control. The Carter and Reagan administrations offer a useful point of contrast. Carter's Attorney General Griffin Bell embraced the bureaucratic vision, emphasizing that Justice Department lawyers "must take care not to interfere with the policy prerogatives of our agency clients. An agency's views should be presented to a court unless they are inconsistent with overall governmental interests, or cannot fairly be argued."<sup>26</sup> Consistent with this view, Bell directed the Justice Department's Office of Legal Counsel ("OLC") to prepare a memorandum opinion advocating the insulation of the Solicitor General's office from White House influence.<sup>27</sup> The Reagan administration advocated a far different view of the Attorney General's role when "faced with conflicting demands, e.g., where a 'client' agency . . . dissociate[s] itself from legal or policy judgments to which the Executive subscribes [or] where a 'client' agency attempts to litigate against another agency or department . . ."<sup>28</sup> In those instances, according to an OLC opinion, signed by its office head Theodore Olson, "the Attorney General's obligation to represent and advocate the 'client' agency's position must yield to a higher obligation to [follow the President's lead and] take care that the laws be executed faithfully."<sup>29</sup> Admittedly, Olson, like Bell, refers to agencies as clients. In contrast to Bell, Olson's disdain for this characterization is revealed in his repeated insertion of quotation marks around "client."

Not surprisingly, Carter and Reagan administration practices varied substantially. The Carter administration openly aired disputes before the Supreme Court, between the Department of Justice and numerous executive departments and agencies, including the Departments of Defense, Interior, and Labor.<sup>30</sup> Disputes between the Justice Department and independent agencies were also aired before the

<sup>26</sup> Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1061 (1978).

<sup>27</sup> Role of the Solicitor General, 1 *Op. Off. Legal Counsel* 228 (1977).

<sup>28</sup> Attorney General as Chief Litigator, *supra* note 12, at 62.

<sup>29</sup> *Id.*

<sup>30</sup> The Department of Interior's separate views were attached in an appendix to the Brief for the Solicitor General, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (No. 76-1701). The Departments of Defense and Labor, along with the Office of Personnel Management and the EEOC, filed an amicus brief at odds with the Solicitor's amicus brief. Brief for the Departments of Defense and Labor, the Office of Personnel Management and the EEOC, Personnel

Supreme Court—even in cases where the Attorney General (through the Solicitor General) had plenary control over the litigation.<sup>31</sup> Reagan's Department of Justice was far less willing to acknowledge intragovernmental disputes. However, the Reagan Justice Department missed the unitariness mark by quite a bit. During Reagan's first term, Solicitor General Rex Lee sometimes resolved conflicts between the Justice Department and independent agencies by either noting disagreements between his office and the agency in Solicitor General filings or by allowing the agency to represent itself.<sup>32</sup> During Reagan's second term, Solicitor General Charles Fried, with one significant exception, refused to note intragovernmental disputes.<sup>33</sup> Fried, however, did not see himself as an executive branch subordinate; instead, he viewed himself as a representative of his own interests before the Supreme Court.<sup>34</sup> The repudiation of the unitary executive model by the words and deeds of the Carter administration and—perhaps more telling—the variable commitment to unitariness by the supposedly ideological Reagan administration suggests that intraexecutive as well as outside forces place political obstacles in the way of unitary legal interpretations.<sup>35</sup>

Proponents of a unitary executive cannot discount these outside forces. For example, the White House has strong incentive to be cognizant of congressional preferences. Congress, among other things, possesses the power of the purse and the power to confine delegated authority to the executive through the crafting of more specific legislation. Congress also possesses significant power over Department of Justice control of litigation. Congress, on occasion, makes use of this power. Threats to remove the EPA from Justice Department control prompted a "memorandum of understanding" designed to protect EPA prerogatives.<sup>36</sup> More striking, Congress, prompted by the lobbying efforts of the Federal Trade Commission ("FTC"), statutorily

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*Adm'r of Mass. v. Feeny*, 442 U.S. 256 (1979) (No. 78-233); Brief for the Solicitor General, *Feeny* (No. 78-233).

<sup>31</sup> See generally Devins, *supra* note 12. See also John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734 (1983).

<sup>32</sup> See Devins, *supra* note 12 (discussing such cases as *Dirks v. SEC*, 463 U.S. 646 (1983), *Connecticut v. Teal*, 457 U.S. 44 (1982), and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)); see also *infra* note 69 and accompanying text.

<sup>33</sup> See generally Devins, *supra* note 12. The exception is a case involving the constitutionality of the U.S. Sentencing Commission, see *Mistretta v. United States*, 488 U.S. 361 (1989). Fried's handling of *Mistretta* is discussed in FRIED, *supra* note 2.

<sup>34</sup> See McGinnis, *supra* note 16.

<sup>35</sup> The term "intraexecutive forces" simply refers to the divergent constituencies existing within the executive, even among the President's political appointees. The terms "outside forces" or "external forces" refer to interest groups, Congress, etc..

<sup>36</sup> See MEMORANDUM OF UNDERSTANDING ON CIVIL ENFORCEMENT BETWEEN THE

responded to Solicitor General and Antitrust Division efforts to undermine FTC litigation authority. Finding that "the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority,"<sup>37</sup> Congress enacted legislation protecting the Commission's independent litigating authority in enforcement actions.<sup>38</sup>

The prospect of congressional intervention cannot be dismissed. It is nonetheless true, as former OLC head Douglas Kmiec argued, that "presidential power is often best defined by the strength of presidential will."<sup>39</sup> A President who believes in hierarchical government must work at preserving the authority of his office. The FTC legislation, for example, was signed by President Nixon in exchange for congressional support of the Alaska Pipeline.<sup>40</sup> A President who believed in the unitary executive would not have engaged in such a bargain. Aside from refusing to accede to such legislative initiatives, a President can protect executive branch prerogatives in the face of intraexecutive disputes by demanding that his political appointees (including the Attorney General) acquiesce to a unitary governmental position in court.

The practices of modern administrations suggest that presidents are unlikely to consistently advance the unitary executive model. Some administrations simply prefer the bureaucratic model to the unitary model, and others place different values ahead of unitariness. The Clinton administration, by its own admission, places "the need to showcase the ethnic, racial and gender variety of [the Democratic] party [ahead of] any ideological litmus tests, [or] concerns about internal policy cohesion."<sup>41</sup> Finally, even those administrations ostensibly committed to the unitary model are ultimately unwilling to consistently demand unitariness in the face of divergent interests both within the executive and on Capitol Hill.<sup>42</sup> Ronald Reagan, for example, voluntarily ceded executive power by approving Comptroller General budget authority in Gramm-Rudman and independent coun-

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JUSTICE DEPARTMENT AND THE ENVIRONMENTAL PROTECTION AGENCY (June 13, 1977), reprinted in *Env't Rep.-Fed. Laws (BNA)* at 41:0101 (Oct. 30, 1992).

<sup>37</sup> Pub. L. No. 93-153, § 408(a)(1), 87 Stat. 591 (1973).

<sup>38</sup> *Id.*

<sup>39</sup> KMIEC, *supra* note 1, at 47.

<sup>40</sup> See Devins, *supra* note 12.

<sup>41</sup> David S. Broder, *Diversity was Paramount in Building the Cabinet*, WASH. POST, Dec. 25, 1992, at A1.

<sup>42</sup> This explains disunitariness in the Reagan administration's policy on civil rights. See Devins, *supra* note 8, at 1749-63; HERMAN BELZ, *EQUALITY TRANSFORMED* 181-209 (1991). See generally Jeremy Rabkin, *Reagan's Secret Quotas*, NEW REPUBLIC, Aug. 5, 1985, at 15.



sel prosecutions under the Ethics in Government Act.<sup>43</sup>

Indisputably, political will plays an extraordinary role, moderating the vigor of the executive's pursuit of hierarchical control of government litigation. The Reagan and Bush administrations, for example, advanced unitariness concerns with far greater regularity than either the Nixon or Carter administration. Political will also plays a large role in fostering resistance to this unitary model by either Congress or affected governmental agencies. The question remains whether structural constraints on presidential power diminish the role of political will in defining the unitariness of the government in court. Departments and agencies technically under the President's control cannot escape an energetic Executive. Are independent agencies without independent litigating authority equally subject to such presidential control? Finally, what about cases where the agency possesses independent litigating authority and its head cannot be fired by the President? Do these structural constraints determine whether an independent agency will speak its own voice in court or does political will still play a paramount role? The remainder of this Article will speak to these questions.

## II. UNITARINESS AND INDEPENDENCE

The structural paradigm of agency independence anticipates that an independent agency will assert its own views when confronted with a conflicting executive branch interpretation. Otherwise, it would be senseless to prevent the President from dismissing independent agency heads at will. The structural paradigm likewise assumes that independent litigating authority and other constraints on the President's power are necessary to provide independent agencies with a podium from which they can speak their own voice. If the agencies were not granted independent litigating authority, for example, the Department of Justice would not sublimate its views thereby enabling the independent agency to act as the government's mouthpiece.

The structural trappings of independence define much of the dialogue between the executive branch and independent agencies. The political willfulness of various governmental actors also plays a large role. The EEOC abandoned independence in the face of a willful executive and disinterested Congress. In sharp contrast, the Department of Justice abdicated control to the FCC to accommodate the President's recently named appointees and perhaps the President himself. Finally, the Postal Service withstood executive assertions of

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<sup>43</sup> See *supra* note 20.



power because poor strategic planning severely weakened the White House's power base.

A. *The EEOC, the Department of Justice, and the Congress*

1. *The EEOC v. the Department of Justice*

EEOC litigation in federal district courts is structurally protected from Executive control and its decision making is insulated from direct presidential supervision. The EEOC is a multimember agency headed by five commissioners.<sup>44</sup> Each commissioner serves a five-year term<sup>45</sup> and presumably can only be removed for cause.<sup>46</sup> Barring resignations, no President can appoint a majority of the Commission until the third year of his first term. Partisan controls are further limited by the requirement that no more than three commissioners be of the same political party. This independence figures prominently in litigation decisions, for the EEOC has independent litigating authority before lower federal courts to initiate specified categories of employment discrimination lawsuits.<sup>47</sup> EEOC litigation authority is further insulated from executive control because the EEOC general counsel, while a presidential appointee, serves a fixed four-year term.

The structural independence of the EEOC is far from complete. The EEOC is technically located within the executive branch. More significant, unlike independent regulatory agencies which possess quasi-adjudicatory and quasi-legislative authority, EEOC authority is exclusively executive. For the most part, the EEOC interprets various employment discrimination statutes and applies its interpretation through litigation.<sup>48</sup> The nexus between the EEOC and the executive branch is further heightened by an intermingling of functions that takes place both at the Department of Justice and at the Commission.

The EEOC, through a Carter administration reorganization,

<sup>44</sup> 42 U.S.C. § 2000e-4(a) (1988).

<sup>45</sup> *Id.*

<sup>46</sup> The EEOC statute, like those for the FCC and other independent agencies, is silent on the grounds for removal. It would be senseless, however, for heads of multimember agencies, who serve staggered terms, and who may not belong to the President's political party, to serve at the pleasure of the President. Otherwise, the elaborate statutory structure designed to limit presidential authority would be a farce.

<sup>47</sup> The statute provides that "the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge . . . . [T]he Attorney General . . . may bring a civil action against [a government, governmental agency, or political subdivision] in the appropriate United States district court." 42 U.S.C. § 2000e-5(f) (1988).

<sup>48</sup> See U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT REQUIREMENTS* 10-11 (1987).

took charge of several employment discrimination areas that were previously the responsibility of executive departments and agencies. Under this reorganization, the EEOC assumed Department of Labor and Civil Service Commission authority over the Age Discrimination in Employment Act, the Equal Pay Act, and various federal sector equal employment opportunity requirements.<sup>49</sup> The EEOC was also dubbed the "lead agency" in employment discrimination matters and authorized to coordinate the enforcement strategies of eighteen governmental agencies with Title VII enforcement power.<sup>50</sup> This authority, among other things, included the power to demand that all governmental agencies file affirmative action plans, with goals and timetables, to the EEOC.<sup>51</sup> Through its designated role as lead coordinator as well as its assumption of power from purely executive entities, EEOC operations commingle with executive branch authority.

Direct EEOC involvement with the executive is also a by-product of Department of Justice authority to separately enforce and interpret employment discrimination laws. Suits against state and local government are the exclusive province of the Civil Rights Division.<sup>52</sup> The Civil Division, which represents the government when it is sued in employment discrimination matters, also has the power to independently interpret employment discrimination laws. Finally, at the Supreme Court level, all employment discrimination litigation is handled by the Solicitor General.<sup>53</sup> With three separate offices in the Justice Department litigating employment discrimination cases, the Department has a very strong interest in controlling the government's position in discrimination litigation. Needless to say, the potential for serious conflict between the Justice Department and the Commission is also great. Clearly, this concurrence of authority is combustible. The explosion eventually occurred during the Reagan administration.

The triggering event was an amicus brief supporting race-con-

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<sup>49</sup> Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1979), reprinted in 42 U.S.C. § 2000e-4 (1988 & Supp. III 1992) (printed following the statute on pp. 410-11). See also James W. Singer, *Equal Employment Agencies are Beginning to Shape Up*, 10 NAT'L J. 19 (1978).

<sup>50</sup> While recognizing EEOC "leadership and coordination" responsibilities, Executive Order 12,067 specifies that disputes between EEOC and other federal entities may be referred to the Executive Office of the President. Exec. Order No. 12,067 (1-201), (1-307(c)), 43 Fed. Reg. 28,967 (1987). Additionally, Executive Order 12,250, entitled "Leadership and Coordination of Nondiscrimination Laws," grants the Department of Justice the explicit power to coordinate enforcement of statutory nondiscrimination in federal funding provisions. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

<sup>51</sup> See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 48, at 41.

<sup>52</sup> 42 U.S.C. § 2000e-5(f) (1988).

<sup>53</sup> Solicitor General authority over Supreme Court litigation can only be limited by an explicit statutory exception. EEOC independent litigation authority clearly does not extend to the Supreme Court. See *supra* note 47.

scious affirmative action that the EEOC intended to file before a federal appeals court in *Williams v. City of New Orleans*.<sup>54</sup> The EEOC draft brief flatly contradicted a Department of Justice Civil Rights Division amicus brief that had already been filed in the case.<sup>55</sup> Indeed, the EEOC characterized the Justice Department's failure to consult the EEOC before filing its amicus brief as "deplorable."<sup>56</sup> Rather than permitting the expression of conflicting views, which as the EEOC put it, would be of "considerable public benefit,"<sup>57</sup> the Justice Department saw the EEOC brief as an outrageous challenge to the Civil Rights Division's exclusive authority to manage employment discrimination lawsuits involving state and local government. In the Civil Rights Division's view, the government must speak with a unified voice in state and local cases and that voice is the Civil Rights Division. To prove its point, the Civil Rights Division claimed that it would block the EEOC from filing its amicus brief.<sup>58</sup>

The Civil Rights Division claim is at odds with structural constraints that protect EEOC autonomy. Although the Civil Rights Division has exclusive authority to initiate state and local cases, there are no statutory limits on the EEOC's independent authority to participate in lower court employment discrimination cases. Structural limits on executive control, instead, suggest that the EEOC would defend its stake in independent interpretations of employment discrimination laws through participation in state and local cases. For the EEOC, *Williams* was not simply a state and local case. If accepted, the Justice Department's position in *Williams* would undermine the EEOC's private sector litigation strategy, including several EEOC-initiated private sector consent decrees.<sup>59</sup> The EEOC understood the

<sup>54</sup> 729 F.2d 1554 (5th Cir. 1984).

<sup>55</sup> The Justice Department brief argued that the affirmative action plan infringed on the rights of "innocent nonblack employees." *Brief for the Justice Department Before Fifth Circuit Asking En Banc Rehearing in Williams v. City of New Orleans*, Daily Lab. Rep. (BNA) No. 6, at E-1 (Jan. 10, 1983). The EEOC brief castigated the Department of Justice:

Contrary to this uniform body of case law approving the use of prospective employment goals, however, the Department of Justice asks this Court to hold that judicial relief under Title VII must be limited to restoring actual victims of discrimination . . . . No court has accepted the Justice Department's construction of [this portion of Title VII] . . . .

*Draft EEOC Brief in Williams v. City of New Orleans*, Daily Lab. Rep. (BNA) No. 67, at E-1 (Apr. 6, 1983), available in LEXIS, BNA Library, DLABRT file.

<sup>56</sup> *EEOC Chides Justice for "Deplorable" Action on New Orleans Police Case*, Daily Lab. Rep. (BNA) No. 22, at A-2 (Feb. 1, 1983).

<sup>57</sup> Fred Barbash & Juan Williams, *Administration Prods EEOC on Quotas Brief*, WASH. POST, Apr. 7, 1983, at A1.

<sup>58</sup> See *EEOC Bows to White House Pressure, Says It Won't File New Orleans Brief* [hereinafter *White House Pressure*], Daily Lab. Rep. (BNA) No. 67, at A-6 (Apr. 6, 1983).

<sup>59</sup> According to EEOC Chair Clarence Thomas, "judicial ratification of the Justice Depart-

impact of *Williams* on its litigation strategy; the Commission also recognized that the Justice Department's disregard of the EEOC's role "as the chief interpreter of Title VII" represented "a major . . . change in government's civil rights policy."<sup>60</sup>

The EEOC's strong interest in *Williams*, strengthened by structural constraints on executive authority, suggests that the EEOC would have stood firm in the face of this Civil Rights Division challenge, and filed its amicus brief. In the end, however, the EEOC capitulated to the Justice Department challenge. The turning event was a White House meeting between EEOC chair Clarence Thomas and general counsel David Slate, with presidential counsel Ed Meese, Attorney General William French Smith, and Civil Rights Division head William Bradford Reynolds.<sup>61</sup>

The factors leading to the EEOC's withdrawal in *Williams* are complex; clearly the structural paradigm of agency independence sheds little light upon the situation. The Commission's stated reason was that the "public interest" was not served by the presentation of "conflicting [governmental] views on a legal issue involving a city government where the Justice Department has sole enforcement litigation responsibility."<sup>62</sup> This explanation, of course, flatly contradicts the EEOC's earlier assertion that the presentation of its conflicting views would be of "considerable public benefit." A more likely explanation is that the White House meeting convinced the EEOC heads that it would be politically unwise to do battle with the Justice Department. During the *Williams* controversy, OLC issued an opinion in support of the Civil Rights Division. This opinion went beyond the state and local authority issue to assert that the Carter administration reorganization, by transferring authority from the Department of Labor and the Civil Service Commission to the EEOC, de facto made the EEOC an executive agency "subject to the supervision and control of the President."<sup>63</sup> That the EEOC had earlier participated in public sector cases was irrelevant. OLC viewed such appearances as having "been made with the approval of the attorney general,

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ment's position would undermine the Commission's guidelines, settlements, consent decrees and court orders." U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 48, at 41 n.310.

<sup>60</sup> *White House Pressure*, *supra* note 58 (quoting letter from the EEOC to Attorney General Smith). See also *Federal Agencies Differ Sharply Over New Orleans Affirmative Action Plan*, 21 Gov't Empl. Rel. Rep. (BNA) No. 1004, at 581 (Mar. 14, 1983).

<sup>61</sup> See Barbash & Williams, *supra* note 57.

<sup>62</sup> *White House Pressure*, *supra* note 58.

<sup>63</sup> The OLC opinion is described in *Report by House Committee on Government Operations on EEOC Handling of Sex-Based Wage Discrimination*, reprinted in Daily Lab. Rep. (BNA) No. 102, at D-1 (May 25, 1984).



whether implicit or explicit."<sup>64</sup>

The OLC opinion suggested that the Justice Department was prepared to use *Williams* as a vehicle to neutralize EEOC independence in both public and private sector litigation. EEOC chairman Thomas took the bait, demurely commenting that "[t]his case has clarified our standing. . . . It points out to Congress the chink in our armor . . . [that] we are in the executive branch which has its own opinions."<sup>65</sup> This concession is truly extraordinary. EEOC private sector litigation authority was not before the court in *Williams*. Consequently, rather than risk an adverse court ruling on public sector authority, the EEOC effectively admitted defeat by not creating the opportunity for a favorable court ruling. Ironically, the appellate court in *Williams* made reference to the EEOC's draft brief, a leaked copy of which had been submitted to the court through an amicus brief.<sup>66</sup>

The EEOC did little more than put up a feeble fight in *Williams*. It is difficult to know whether the Justice Department frightened the Commission with its legal arguments or convinced EEOC appointees that their political futures hinged on acquiescence to its position. What is clear is that the EEOC did not seek strength in supposedly empowering structural constraints on executive authority. Instead, the interplay of various political players, their expectations, and their willingness to assert power provides insight into the outcome in *Williams*.

The EEOC not only lost the battle over *Williams*; it lost a much larger battle with the Justice Department as a consequence of *Williams*. The Justice Department, in the wake of *Williams*, relegated the EEOC to the executive branch. Rather than serving as lead agency, the Justice Department views the EEOC as its "whipping boy." For example, the Department has flatly refused to submit an affirmative action plan to the EEOC, prompting the EEOC to maintain that it cannot enforce the requirement.<sup>67</sup> More striking, the Solicitor General refuses to recognize the EEOC as an independent agency. While the EEOC may seek to persuade the Solicitor General of the correctness of its position on a given issue (and indeed may influence Solicitor General decision making), the Solicitor General to-

<sup>64</sup> Ruth Simon, *Future Role of EEOC Questioned; A Shift of Authority*, NAT'L. L.J., May 2, 1983, at 7.

<sup>65</sup> Juan Williams, *Lawmaker Urges EEOC Not to Quit Rights Case*, WASH. POST, Apr. 10, 1983, at A11.

<sup>66</sup> See *Williams v. City of New Orleans*, 729 F.2d 1554, 1571-73 (5th Cir. 1984) (Wisdom, J., et al., concurring in part and dissenting in part).

<sup>67</sup> See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 48, at 41 n.315.



day seems disinclined to allow the EEOC to advance competing arguments before the Supreme Court.

This practice can be linked to the *Williams* controversy. Throughout the Carter administration, the EEOC was allowed to file briefs in direct opposition to Solicitor General positions.<sup>68</sup> During Reagan's first term, Solicitor General Rex Lee noted disagreements between his office and the EEOC.<sup>69</sup> Following the *Williams* dispute, however, the Solicitor General freely disregarded competing EEOC perspectives—even in cases where the EEOC was a party. This is precisely what occurred in *Sheet Metal Workers v. EEOC*.<sup>70</sup>

*Sheet Metal Workers* marked the culmination of the EEOC's transformation into the executive branch (for at least the Department of Justice). Although the EEOC, a party in the case, had successfully defended federal court authority to order affirmative action hiring in an employment discrimination lawsuit,<sup>71</sup> the Solicitor General unilaterally reversed the Commission's position in a brief it filed with the Supreme Court on behalf of the Commission.<sup>72</sup> That the EEOC was a party mattered little to the Solicitor General. In his autobiography, *Order and Law*, Charles Fried did not even mention the EEOC in his extensive accounting of the case.<sup>73</sup> Moreover, when the EEOC explained its position to Solicitor General attorneys, it was told that it was a part of the executive and would have to accept Department of

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<sup>68</sup> See *supra* note 30 (discussing separate filing by EEOC in *Personnel Administrator of Massachusetts v. Feeny*).

<sup>69</sup> See Brief for the United States as Amicus Curiae in Support of Petitioners at 24 n.23, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (No. 82-206) ("The Equal Employment Opportunity Commission disagrees with this interpretation of Section 706(g) and believes that its adoption might call into question numerous extant consent decrees and conciliation agreements to which the EEOC is a party."); Brief for the United States as Amicus Curiae at 1-2 n.1, *Connecticut v. Teal*, 457 U.S. 440 (1982) (No. 80-2147) (noting dispute between Solicitor General and EEOC). Justice Brennan, who rejected the Department of Justice's position, referred to the EEOC's refusal to sign onto the Department of Justice brief in his opinion. *Connecticut v. Teal*, 457 U.S. 440 (1982).

<sup>70</sup> 478 U.S. 421 (1986).

<sup>71</sup> *EEOC v. Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172 (2d Cir. 1985), *aff'd*, *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

<sup>72</sup> See Brief for the Equal Employment Opportunity Commission, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (No. 84-1656). Remarkably, then-Acting EEOC General Counsel Johnny Butler signed this brief. However, Butler claimed in an interview that he and the EEOC vigorously opposed the Solicitor General's position. It is difficult to determine whether Butler sought to win favor with the Reagan administration through his signature or whether he honestly felt obligated to sign the brief. Whatever the explanation, Butler and the EEOC did not alter their views on the permissibility of affirmative action. Telephone Interview with Johnny Butler, former Acting General Counsel of the EEOC (Sept. 16, 1992).

<sup>73</sup> See FRIED, *supra* note 2, at 110-14.

Justice opposition to affirmative action.<sup>74</sup> The only concession the Solicitor General made to the EEOC was that it opposed the grant of certiorari so that the Court could resolve the *Sheet Metal Workers* issue in an analogous case already before the Court.<sup>75</sup> It is unclear whether this concession was rooted in a desire to accord some respect to EEOC positions or whether the Solicitor General feared the repercussions of disregarding EEOC views altogether. Once certiorari was granted, however, EEOC prerogatives played no apparent role in the Solicitor General's handling of the case.

*Sheet Metal Workers* is an extreme example of the Solicitor General's discounting of EEOC autonomy but it is not an anomaly. In *Riverside v. Rivera*,<sup>76</sup> the Solicitor General rejected EEOC efforts to participate as an amicus supporting plaintiffs' claims in an attorney fee case.<sup>77</sup> Instead, the Solicitor General filed an amicus brief in opposition to plaintiffs' claims without mention of the EEOC's conflicting position.<sup>78</sup> Ironically, EEOC arguments were presented to the Court—the NAACP Legal Defense and Education Fund reproduced a leaked draft of the rejected EEOC brief in its amicus filing.<sup>79</sup> Another recent example of Solicitor General unwillingness to recognize EEOC differences is *Price Waterhouse v. Hopkins*.<sup>80</sup> In *Price Waterhouse*, the Solicitor General did not note EEOC disagreement with its view that evidence of sexual stereotyping could be rebutted by a preponderance of the evidence, rather than clear and convincing evidence.<sup>81</sup>

Solicitor General Fried's willingness to heed OLC's opinion on the EEOC's executive branch status is not surprising. The Solicitor General need not defer to voices within the executive that contradict his own conception of executive branch desires.<sup>82</sup> The EEOC's subor-

<sup>74</sup> Telephone Interview with Johnny Butler, former Acting General Counsel of the EEOC (Sept. 16, 1992).

<sup>75</sup> See Brief for the Equal Employment Opportunity Commission at 9, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (No. 84-1656).

<sup>76</sup> 477 U.S. 561 (1986).

<sup>77</sup> See *Justice Department Rejects EEOC Advice, Seeks Limit on Lawyer Fees in Rights Cases*, Daily Lab. Rep. (BNA) No. 6, at A-1 (Jan. 9, 1986).

<sup>78</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners, *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (No. 85-224).

<sup>79</sup> Appendix to Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc. in Support of Respondents, *City of Riverside v. Santos*, 477 U.S. 561 (1986) (No. 85-224).

<sup>80</sup> 490 U.S. 228 (1989).

<sup>81</sup> See Brief for the United States as Amicus Curiae at 23-24 n.10, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167). Respondent's attorney noted this omission in their brief: "The Solicitor General's failure to comment on EEOC's position . . . is curious." Brief for Respondent at 42 n.32, *Price Waterhouse* (No. 87-1167).

<sup>82</sup> See generally Devins, *supra* note 12; McGinnis, *supra* note 16.

dination to the executive branch therefore enhances Solicitor General authority. On an issue as polarizing as affirmative action, where one would expect ideological consistency within the executive, the authority to advance a unitary governmental position is especially important. That affirmative action was the agenda item for the Civil Rights Division also lent support to intradepartmental Solicitor General control. Moreover, without any statutory claim in support of independent litigating authority before the Supreme Court, the EEOC had little leverage to combat this Solicitor General interpretation. In other words, the Solicitor General had the power and was willing to use it. Furthermore, the EEOC's acceptance of Justice Department authority in *Williams* was the functional equivalent of a "kick me" sign to potentially conflicting Justice Department interests.

The battle between the Justice Department and the EEOC was inevitable. The Department of Justice perceived the EEOC as a threat to its own power, to the Department's civil rights agenda, and to the ability of the government to speak with a unified voice. With the Department of Justice prepared to reign over the EEOC and curtail its power, the EEOC was wide open to attack. Thus, the control of government employment discrimination litigation demonstrates the Justice Department's willingness to launch a political broadside against the EEOC and the Commission's concomitant failure to fend off these political advances. Congress's acquiescence to this Justice Department power-play was also of prime importance. Indeed, Congress's inability or unwillingness to create a truly executive or independent EEOC set the stage for the *Williams* controversy.

## 2. *Congressional Indeterminacy and the EEOC*

Congressional expectations regarding the EEOC's power were shaped by the tortuous evolution of the agency, from its creation in 1964 to its ultimate reorganization in 1978. By the time the big showdown between Justice and the EEOC finally came about, Congress understood the EEOC to be principally a weak agency. Moreover, Congress considered the EEOC to be slightly more executive than independent in nature. Thus, although Congress urged the EEOC to resist Department of Justice control, Congress was unwilling to intervene and actively prevent EEOC subjugation to Justice Department authority.

The EEOC had less than auspicious beginnings. In the complex battle over the Civil Rights Act of 1964, the EEOC was the victim of

partisan compromise.<sup>83</sup> The Kennedy administration bill rejected the establishment of any federal enforcement agency in favor of increased funding and statutory recognition of the Vice President's Equal Employment Opportunity Committee.<sup>84</sup> Instead, congressional liberals favored the creation of a full-blown independent regulatory agency with both quasi-judicial and cease-and-desist authority.<sup>85</sup> Moderates and conservatives alike cringed at the prospect of employer "harassment" by "a new mission agency like the EEOC."<sup>86</sup> The solution was a peculiar structural compromise which left the EEOC a "poor enfeebled thing."<sup>87</sup>

While structured like an independent agency with multiple commissioners serving staggered terms, the EEOC had no real power. Its role was limited to complaint processing associated with private enforcement. The 1964 Civil Rights Act also authorized the Justice Department to file "pattern and practice" cases. The placement of litigation authority with the Attorney General rather than the EEOC was less a matter of the executive having control over the issue and more a matter of the substantive implications of Justice Department control. Congressional moderates believed that the Justice Department would only file a small number of high profile cases rather than engage in massive litigation.<sup>88</sup>

The history of the EEOC's establishment demonstrates Congress's low expectations for its authority; without protest, the hopes for a powerful Title VII enforcement agency died. Further complications stemmed from the peculiar blend of Department of Justice litigation authority with an EEOC structured as an independent agency but possessing (at least in 1964) none of its powers. The EEOC, as Wendy Watson put it, "was a duck which could neither waddle nor quack, but it was a duck nonetheless."<sup>89</sup>

The EEOC's structure and authority was again at issue before Congress in 1972. Not surprisingly, the 1964 model accomplished little, and Congress was set to weigh in to ensure more vigorous enforce-

<sup>83</sup> Memorandum from American Law Division, The Library of Congress, Congressional Research Service, to Senate Committee on Government Operations, regarding Status of Equal Employment Opportunity Commission [hereinafter Status of EEOC], Sept. 19, 1977, at 7 (citing legislative history of Title VII and XI of the Civil Rights Act of 1964).

<sup>84</sup> See generally HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* 125-52 (1990).

<sup>85</sup> See *id.* at 83-87.

<sup>86</sup> *Id.* at 146.

<sup>87</sup> Remarks by Alfred W. Blumrosen, Professor, Rutgers Law School on Binding Effect of EEOC Affirmative Action Guidelines, Daily Lab. Rep. (BNA) No. 89, at D-1 (May 8, 1984).

<sup>88</sup> See GRAHAM, *supra* note 84, at 146.

<sup>89</sup> Wendy L. Watson, *The Equal Employment Opportunity Commission: A Less-Loved Stepchild* 21 (1992) (unpublished manuscript, on file with the author).



ment of employment discrimination legislation. Congress was to decide whether it should accomplish this objective by granting the EEOC quasi-adjudicatory "cease-and-desist" authority (administrative enforcement) or by expanding its governmental litigation authority (judicial enforcement). Congress chose the judicial enforcement model as a result of the mismatched lobbying of civil rights interests and the Nixon White House. Civil rights interests, emphasizing the dangers of a regulatory agency becoming "captive" to the regulated industry, argued that a weaker institutional framework (that is, one in which the agency did *not* have cease-and-desist authority) enabled civil rights activists to use federal courts "which are favorable to their demands."<sup>90</sup> The Nixon administration favored judicial enforcement for exactly opposite reasons, namely, "the Republicans' vintage judicial strategy of maximizing the role of adversary proceedings in court so as to minimize the judgmental discretion of New Dealish regulatory agencies."<sup>91</sup>

The 1972 amendments gave the EEOC litigation authority in the private sector and entrusted state and local cases to the Justice Department. The choice of a judicial enforcement model over a traditional regulatory structure is revealing. It suggests a purposeful devaluing of the administrative state and, with it, congressional oversight in shaping the development of employment discrimination protections. With reference to Congress's understanding of the EEOC's status, however, the 1972 amendments contain very little. Although cease-and-desist authority was again rejected, the strange hodgepodge of supporters and rationales did little to define congressional understanding of the EEOC's independent status.

Congress's uncertainty over the EEOC's status is revealed in a 1977 request by one of the EEOC's oversight committees, the Senate Committee on Government Operations, to the Congressional Research Service for clarification of whether the EEOC is an independent agency.<sup>92</sup> The Congressional Research Service's response is equally telling. Noting that although

[t]he precise question of the EEOC's status does not appear to have been directly raised during consideration by the Congress of Title VII of the Civil Rights Act of 1964 . . . [t]he evolution of that title, together with some indirect comments on the matter militate against the conclusion that the EEOC is an independent regulatory

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<sup>90</sup> GRAHAM, *supra* note 84, at 431.

<sup>91</sup> *Id.* at 426-27.

<sup>92</sup> Status of EEOC, *supra* note 83, at 1.



commission.<sup>93</sup>

In 1978, Congress again faced this issue when the Carter administration submitted its reorganization plan to Congress for approval or legislative veto. The reorganization, envisioning a superagency in charge of civil rights, gave the EEOC lead authority to coordinate equal employment opportunity agencies and thereby "strengthen enforcement by coordinating the government's activities and eliminating duplication and waste of effort among the federal enforcement agencies."<sup>94</sup>

The reorganization was the brainchild of then EEOC chair Eleanor Holmes Norton. Frustrated by the EEOC's lack of power, Norton believed that the Commission should formally integrate its operations with executive departments and agencies. Even though Civil Rights Division head Drew Days, and others within the Carter administration, thought that the reorganization might eventually haunt its sponsors by symbolically lifting the EEOC's quasi-independent veneer,<sup>95</sup> Norton persisted because she already considered the EEOC "an agency in the executive branch and not a traditional independent agency."<sup>96</sup>

Whether Congress agreed with Norton is unclear. Without comment, the House and Senate oversight committees allowed the reorganization to take effect.<sup>97</sup> Congress, apparently, did not see any need to structurally protect the EEOC's independence.

The *Williams* controversy occurred in the aftershocks of Congress's 1978 inaction. Relying on Congress's acquiescence to the 1978 reorganization, the Justice Department claimed that only an executive EEOC could coordinate executive policymaking and receive Department of Labor and Civil Service Commission authority by way of an administrative transfer of power. *Williams* thus presented Congress with another opportunity to define both EEOC policymaking and its position within government.

Although it expressed dissatisfaction with the Commission's withdrawal from *Williams*, Congress declined to seize this opportu-

<sup>93</sup> *Id.* at 7 (citing Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission).

<sup>94</sup> Eleanor H. Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 706 n.98 (1988).

<sup>95</sup> Telephone Interview with Drew Days, Assistant Attorney General for Civil Rights during the Carter administration (Sept. 24, 1992). Days has since become the Clinton administration Solicitor General.

<sup>96</sup> Norton, *supra* note 94, at 706.

<sup>97</sup> The reorganization was approved under a one-house legislative veto. After the Supreme Court's invalidation of the legislative veto, Congress enacted legislation approving en masse prior reorganizations.

nity. Instead, Congress cajoled and condemned the Commission for its refusal to challenge the Justice Department. House Judiciary chair Peter Rodino (D-N.J.) asked the Commission to supply Congress with all relevant correspondence with the Reagan administration.<sup>98</sup> Moreover, EEOC chair Clarence Thomas was asked to testify about the *Williams* controversy before the House Judiciary and Labor Committees.<sup>99</sup> Finally, the House Committee on Government Operations issued a report chastising the EEOC for failing to live up to its "obligation to participate in court cases, particularly controversial or precedent setting cases . . . ."<sup>100</sup> At the least, the report continues, the EEOC should "bring the issue of its independence before a court for resolution."<sup>101</sup> In a remarkable bit of doublespeak, the report simultaneously speaks of the "EEOC retain[ing] its independent authority to enforce Title VII[.]"<sup>102</sup> "[d]espite its status as an executive agency, subject to the authority of the President."<sup>103</sup>

Congress, instead of criticizing the EEOC, should have looked at its own blemishes. Rather than protect the EEOC through legislation bolstering Commission autonomy or limiting Department of Justice intervention, Congress did little more than ask the EEOC to fend for itself. In short, Congress offered no genuine assistance. By asking the EEOC to simultaneously recognize presidential authority and independently enforce Title VII, Congress asked for the impossible. Clarence Thomas certainly recognized this dilemma, stating that the EEOC was "created to take the lead responsibility in setting civil rights policy in court but [it is] in the executive branch which has its own opinions. So there is a contradiction."<sup>104</sup> From its establishment of the EEOC in 1964 to its approval of the 1978 reorganization, Congress had consistently left the EEOC in never-never land status of part-executive part-independent agency. That the EEOC landed in the executive branch should have come as no surprise to a Congress that had never seen the EEOC as a strong independent voice.

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<sup>98</sup> See Juan Williams, *Lawmakers Urge EEOC not to Quit Rights Case*, WASH. POST, Apr. 10, 1983, at A11.

<sup>99</sup> *Statements by EEOC Chairman Thomas, Assistant Attorney General Reynolds Before House Judiciary Subcommittee on Civil and Constitutional Rights*, Daily Lab. Rep. (BNA) No. 90, at F-1 (May 9, 1983).

<sup>100</sup> HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, PAY EQUITY: EEOC'S HANDLING OF SEX-BASED WAGE DISCRIMINATION COMPLAINTS, H.R. REP. NO. 796, 98th Cong., 2d Sess. 5 (1984).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.*

<sup>104</sup> Williams, *supra* note 98.

### 3. Summary

The structural trappings of independence did not prevent the EEOC from conceding its independent litigating authority in *Williams*. These structural constraints, moreover, did not prevent the Justice Department from launching a frontal assault against the EEOC. Finally, Congress did not see Justice Department actions as an affront to congressional efforts to structurally protect the EEOC from executive branch intrusions; Congress's opprobrium was little more than rhetorical badgering, directed only at the EEOC.

The interaction between the EEOC, the Justice Department, and the Congress suggests that agency independence is elusive. The structural paradigm must recognize the extraordinary role that political will plays in defining agency independence. With respect to the EEOC, the Justice Department was highly motivated to achieve unitariness on affirmative action. The EEOC, in contrast, did not want to engage in a pitched battle with the Justice Department. Indeed, in the aftermath of *Williams*, EEOC chair Thomas asserted that "EEOC's next four years will be marked by concerted efforts to set forth the Reagan Administration's position on affirmative action."<sup>105</sup> Whether Thomas was driven by ideological consistency, political ambition, or the belief that the EEOC was subject to executive supervision, the EEOC's capitulation in *Williams* was complete.

Supporters of a strong EEOC should not fault Chairman Thomas too much. The EEOC could not simultaneously maintain a strong independent voice and be an executive agency subordinate to the President.<sup>106</sup> While the Justice Department sought to push the EEOC into the executive, Congress placed no competing pressure on the Commission. Indeed, Congress's disinterest in the EEOC's status is significant. Congress paid little attention to the location of the EEOC in both 1964 and 1972 when it bargained away cease-and-desist au-

<sup>105</sup> *Statements Before House Labor Subcommittee on Employment Opportunities on EEOC's Policies on Civil Rights*, Daily Lab. Rep. (BNA) No. 242, at D-1 (Dec. 17, 1984) (statement of Barry Goldstein, assistant counsel, NAACP Legal Defense and Education Fund). Chairman Thomas's willingness to acquiesce to executive will appeared as a permanent mark on his record to civil rights groups. For example, in explaining his organization's opposition to Thomas's Supreme Court nomination, Ralph Neas of the Leadership Conference on Civil Rights stated that "shortly after [Thomas] took that position of independence [in *Williams*], I think Edward Meese and William Bradford Reynolds met with him, and basically explained what the Reagan administration position was going to be on civil rights issues. So again, I think the record has to speak for itself." *News Conference of the Leadership Conference on Civil Rights*, Fed. News Serv. (Aug. 7, 1991).

<sup>106</sup> Eleanor Holmes Norton's suggestion that the EEOC could have it both ways is clearly incorrect. See Norton, *supra* note 94. Officers who serve at the President's pleasure are ultimately subordinate to the White House.

thority for other objectives. Congress's acquiescence to a 1978 reorganization which immersed the EEOC into the executive branch likewise suggests an absence of commitment to a structurally independent EEOC.

These political maneuverings explain the EEOC's curious structure. Without cease-and-desist authority and with the Justice Department's concurrent authority to litigate employment discrimination actions, the EEOC was far from a prototypical independent regulatory agency.<sup>107</sup> The question of whether the numerous structural constraints which limited executive authority over the EEOC indeed placed the EEOC outside the executive, was ultimately a test of political will. The executive asserted its domain and neither Congress nor the EEOC challenged this claim of authority.

B. *The FCC and the Postal Service: Department of Justice Initiatives and Congressional Expectations*

The role of political will in defining agency independence is certainly not limited to the EEOC. The recent experiences of the FCC and the Postal Service likewise make clear that structure is but one ingredient in determining whether the government will speak as a unitary voice in court. In the case of the FCC, the Department of Justice chose to cede some of its litigating authority rather than battle the Congress and the Commission. The Postal Service case, like *Williams*, involved White House and Department of Justice efforts to overcome a statutory grant of independent litigation authority. Contrary to *Williams*, the Postal Service, thanks to greater structural protections and a weakened presidency, successfully fended off this executive initiative.

1. *The FCC*

The FCC is a statutorily designated independent regulatory agency.<sup>108</sup> Similar to the EEOC, it has five members who serve staggered five-year terms, thereby limiting the President's appointment power to one commissioner per year. Like the EEOC, the appointment power is further constrained by the requirement that no more than three Commissioners may be members of the same political party. Finally, as with the EEOC, the President presumably (for the statute is silent) may only remove Commissioners for cause.<sup>109</sup> In contrast to the EEOC, the FCC possesses quasi-adjudicatory and

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<sup>107</sup> See Status of EEOC, *supra* note 83.

<sup>108</sup> 44 U.S.C. § 3502(10) (Supp. III 1992).

<sup>109</sup> See *supra* note 46.



quasi-legislative powers, including cease-and-desist authority. FCC functions, moreover, are not formally intermingled with executive branch operations.

FCC relationships with the Department of Justice are difficult to characterize. This difficulty is a byproduct of an extraordinarily confusing statutory scheme which sometimes allows the FCC to appeal its cases directly to the Supreme Court, sometimes makes the FCC entirely dependent on Department of Justice attorneys throughout the course of litigation, and at times authorizes FCC representation before federal courts of appeals and Solicitor General representation before the Supreme Court. Department of Justice attorneys represent the FCC throughout the course of litigation in actions brought against the Commission to enforce its orders, as well as in employment discrimination and Freedom of Information Act suits filed against the Commission.<sup>110</sup> In sharp contrast to this category of cases are those where the FCC has a statutory right to seek a writ of certiorari before the Supreme Court in appeals of FCC declaratory orders.<sup>111</sup> Finally, licensing decisions, handled by the FCC before federal appeals courts and by the Solicitor General before the Supreme Court, involve a murkier division of responsibility between the Commission and the Justice Department.<sup>112</sup>

Policy disputes between the FCC and Justice Department occur frequently. FCC licensing and regulations often conflict with Justice Department interpretations of antitrust laws, as well as with the Constitution's free speech and equality guarantees. The prospect of these disputes being aired in court depends both on the type of case and the willingness of the Justice Department to exclude the FCC from cases within its control.

The structural paradigm, in many instances, holds true to form with the Justice Department declining to present FCC arguments with which it disagrees. One such dispute involved the League of Women Voters' challenge to a statutory prohibition of editorializing by public television and radio stations, a case controlled by the Justice Department from its inception. The FCC thought the editorial ban was unconstitutional; the Reagan Justice Department did not, however, and unilaterally pursued this case from beginning to end.<sup>113</sup> When the Supreme Court rejected this Department of Justice defense and struck down the amended statute, the FCC rejoiced—calling the

<sup>110</sup> 47 U.S.C. §§ 401, 504 (1988); 28 U.S.C. §§ 516, 519 (1988).

<sup>111</sup> 47 U.S.C. § 402(j) (1988); 28 U.S.C. § 2350 (1988).

<sup>112</sup> 47 U.S.C. § 402(b) (1988).

<sup>113</sup> See Devins, *supra* note 12.



decision "a significant breakthrough."<sup>114</sup> Another case where the Justice Department exercised its authority involved FCC must-carry rules, requiring cable companies to carry local television signals. The Department perceived these rules as unconstitutional and refused, as the FCC had requested, to petition the Supreme Court to review the appellate court decision striking down these rules.<sup>115</sup>

FCC decisions to openly dispute Department of Justice positions with which it disagrees and defend its declaratory orders as a matter of statutory right also match the structural paradigm. *FCC v. Pacifica Foundation*<sup>116</sup> and *FCC v. MCI Telecommunications*<sup>117</sup> typify such cases. In both instances, the FCC and Solicitor General presented their divergent views as statutory respondents before the Supreme Court. In *Pacifica*, the FCC successfully argued that certain words could be kept off the airwaves for most broadcasting hours and thereby withstood the Solicitor General's challenge to the FCC order as overbroad because the Commission did not consider "the context in which the offending words were used."<sup>118</sup> *MCI* concerned an FCC order establishing that AT&T had no obligation to interconnect its facilities with those of MCI. The D.C. Circuit Court of Appeals invalidated this order. The FCC then petitioned for certiorari and the Solicitor General filed a petition in opposition.<sup>119</sup> Certiorari was denied,<sup>120</sup> yet the case is noteworthy because of a biting footnote in the FCC brief "question[ing] exactly what interests of the United States the Solicitor legitimately represents in this case."<sup>121</sup> This statement of outrage is indicative of the power of independent litigating authority.

On several occasions, however, the structural paradigm has given way to the give and take of politics as well as competing visions of the

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<sup>114</sup> Fred Barbash, *High Court Rules for Public TV; Right to Comment Upheld Despite Federal Funding*, WASH. POST, July 3, 1984, at A1 (quoting FCC general counsel Bruce Fein).

<sup>115</sup> See *Government Won't Appeal Must Carry*, BROADCASTING, Mar. 28, 1988, at 37.

<sup>116</sup> 438 U.S. 726 (1978).

<sup>117</sup> 561 F.2d 365 (D.C. Cir. 1977), enforced in 580 F.2d 590 (D.C. Cir. 1978), cert. denied, 439 U.S. 980 (1978).

<sup>118</sup> Brief for the United States at 14, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528). But see Petitioner's Reply Brief at 8, *Pacifica Found.* (No. 77-528) ("The [FCC] order seeks to protect parental and privacy interests . . . to the extent that this Court's constitutional opinions permit.") (footnote omitted).

<sup>119</sup> See Brief for the United States in Opposition, *United States Indep. Tel. Ass'n v. United States and MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (No. 78-216); Petitioner's Reply to "Brief for the United States in Opposition," *FCC v. MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (No. 78-270).

<sup>120</sup> *FCC v. MCI Telecommunications Corp.*, 561 F.2d 365 (D.C. Cir. 1977), enforced in 580 F.2d 590 (D.C. Cir. 1978), cert. denied, 439 U.S. 980 (1978).

<sup>121</sup> Petitioner's Reply to "Brief for the United States in Opposition" at 1 n.1, *FCC v. MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (No. 78-270).

unitary executive. This is especially evident in licensing decisions, cases where the FCC controls litigation in the lower courts and the Solicitor General controls Supreme Court adjudication. This division of litigation responsibility enables the Solicitor General to reverse FCC positions before the Supreme Court. In the EEOC context, where a similar division of responsibility exists, the Solicitor General now views such conflicts as intraexecutive matters appropriately resolved by his office. The Solicitor General did precisely that in *Sheet Metal Workers*.<sup>122</sup> The FCC, indisputably an independent agency, presents a more complicated scenario. Moreover, the FCC is statutorily authorized to present its views before the Supreme Court in declaratory order cases.

Bureaucratic theory would resolve this conflict by having the Solicitor General view the FCC as a client in need of representation. The Carter administration adopted this model to resolve a dispute between the Justice Department and the FCC over Commission rules governing the cross ownership of television stations and newspapers in a single market. Specifically, the FCC represented its own interests before the Court while the Solicitor General filed a separate brief "on behalf of the United States."<sup>123</sup> Proponents of the unitary executive, in contrast, would view the Solicitor General's loyalties and obligations as running exclusively to the White House. Under this view, the independent agency's authority should be set aside in favor of executive branch interests, exercised through the Solicitor General. This is exactly what occurred in *Sheet Metal Workers* and in several other cases involving independent agencies.

The extent to which the Solicitor General will oppose FCC and other independent agency decisions is a question of political will. *Metro Broadcasting v. FCC*,<sup>124</sup> decided by the Supreme Court in 1990, exemplifies the difficulty of the Justice Department's steadfast adherence to unitariness. *Metro Broadcasting* called into question the constitutionality of FCC efforts to increase the number of minority broadcasters through preference and set-aside programs. The case was a political battlefield because Congress had statutorily mandated the FCC to defend its preference policy in the wake of Reagan FCC

<sup>122</sup> See *supra* notes 71-75 and accompanying text.

<sup>123</sup> See Brief for Petitioner, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 755 (1978) (No. 76-1471). The Department of Justice's views were presented in a separate brief. See Brief for the United States, *Nat'l Citizens Comm. for Broadcasting* (No. 76-1471). For further discussion of this conflict, see *FCC Cross-Media Ban Backed*, FACTS ON FILE WORLD NEWS DIGEST, June 23, 1978, at A3.

<sup>124</sup> 497 U.S. 547 (1990).

efforts to reexamine these affirmative action programs.<sup>125</sup> The FCC, therefore, could not argue in its own name that its preference scheme was constitutionally suspect. Further complicating this highly visible litigation was Bush Solicitor General Kenneth Starr's commitment to Reagan administration challenges to affirmative action. The initial resolution was for the FCC and Solicitor General to jointly oppose the grant of certiorari.<sup>126</sup> This effort, as the certiorari petition stated, was designed to throw this political issue back to Congress, where legislation repealing the preference might be enacted, and the D.C. Circuit Court of Appeals, where an apparent intracircuit conflict might resolve itself through new judicial appointees.<sup>127</sup> It would also enable the Solicitor General to avoid the issue of whether to allow the FCC to independently assert its position before the Court.<sup>128</sup> Finally, for supporters of preferences within the FCC and Solicitor General's office, this strategy would keep the Court from placing another nail in the affirmative action coffin.<sup>129</sup>

Certiorari was granted, however. The Solicitor General prepared to file a brief challenging the constitutionality of FCC preferences but the question remained as to whether the FCC should be allowed to file separately. By this time, the Commission, thanks to three pro-preference Commissioners named by President Bush, strongly supported the preference program.<sup>130</sup>

These Commissioners, in fact, sought to strong-arm the Justice Department in *Metro Broadcasting*, arguing that they would file their own brief before the Court with or without the Solicitor's authorization.<sup>131</sup> Bush's appointment of pro-preference Commissioners while he steadfastly encouraged his Justice Department to oppose racial preferences is certainly contradictory and created a great dilemma for a Solicitor General seeking to advance presidential interests. The ultimate resolution allowed the FCC to independently (and successfully) defend its preferences before the Court, with the Solicitor filing an amicus brief setting forth the executive's opposition to the FCC policy.<sup>132</sup> The Solicitor's interest in opposing preferences in *Metro Broadcasting* was as strong as it had been in *Sheet Metal Workers*.

<sup>125</sup> See Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990).

<sup>126</sup> See Brief for the Federal Respondent in Opposition, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (No. 89-453).

<sup>127</sup> See *id.*

<sup>128</sup> Interview with Tom Merrill, former Deputy Solicitor General (Sept. 16, 1992).

<sup>129</sup> *Id.*

<sup>130</sup> See Devins, *supra* note 125, at 152-53.

<sup>131</sup> Interview with Tom Merrill, former Deputy Solicitor General (Sept. 16, 1992).

<sup>132</sup> See Brief for the FCC, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (No. 89-

The FCC's threat to the Solicitor General's statutory authority also raised the symbolic costs of acquiescence. In the end, however, the unitary executive and ideological opposition to race preferences gave way to political reality.

The question of why Bush would create this dilemma through his FCC appointments remains. Against the backdrop of ongoing battles between Reagan FCC appointees and the Congress, Bush's action appears politically expedient.<sup>133</sup> Reagan appointed FCC commissioners who were committed to "unregulation,"<sup>134</sup> caricatured the Commission as one of the "last of the New Deal dinosaurs,"<sup>135</sup> and viewed their jobs "as an important part of carrying out [the Reagan] mandate for a leaner, less intrusive federal presence throughout this country."<sup>136</sup> Congressional overseers, instead, admonished the Commissioners to follow their lead since they "take an oath to regulate, not deregulate."<sup>137</sup> These competing philosophies resulted in an all out war—FCC appointees thought it "[im]possible to carry out the Reagan program and have amicable relations with Congress";<sup>138</sup> oversight committee members thought "there [was] no way to 'overly manage the commission,'" <sup>139</sup> for the FCC was "a renegade agency"<sup>140</sup> that needed Congress to step in as an "active participant"<sup>141</sup> and "bring them back."<sup>142</sup> Congress's bite was as good as its bark: it enacted legislation at odds with Commission policy, including funding bans freezing deregulatory initiatives and blocking Reagan's appointment power by refusing to confirm FCC appointees for Reagan's last two years in office.<sup>143</sup> For its part, the FCC antagonized Congress by, among other things, repealing the fairness doctrine and raising doubts about the propriety of several other congressionally

453); Brief for the United States as Amicus Curiae Supporting Petitioner, *Metro Broadcasting, Inc.* (No. 89-453).

<sup>133</sup> See generally Devins, *supra* note 18.

<sup>134</sup> Mark S. Fowler, *The Federal Communications Commission 1981-1987: What the Chairman Said*, 10 HASTINGS COMM. & ENT. L.J. 409, 414 (1988).

<sup>135</sup> *Id.* at 411.

<sup>136</sup> *Id.* at 410.

<sup>137</sup> *Congress Asserts its Dominion Over FCC*, BROADCASTING, Aug. 7, 1989, at 27 (quoting Commerce Committee Chairman Ernest Hollings).

<sup>138</sup> *Micromanagement of the FCC: Here to Stay?*, BROADCASTING, Dec. 26, 1988, at 56, 57 (quoting FCC Chairman Mark Fowler).

<sup>139</sup> *Id.* at 56 (quoting Larry Irving, Senior Counsel to the House Telecommunications Subcommittee).

<sup>140</sup> *Id.* (quoting David Leach, communications advisor to the House Energy and Commerce Committee Chairman John Dingell).

<sup>141</sup> *Id.* (quoting Congressman Edward Markey, Chairman of the House Telecommunications Subcommittee).

<sup>142</sup> *Id.* (quoting Tom Cohen, Senior Counsel to the Senate Commerce Committee).

<sup>143</sup> See Devins, *supra* note 18.



supported regulatory programs.<sup>144</sup>

The battle over race preference exemplifies the bitterness of FCC-Congress relations. When the Commission launched its reexamination of race preferences, it specifically requested comments on "whether the [FCC] is bound by, or may rely upon[,] Congressional findings of constitutionality."<sup>145</sup> Congress viewed this request as an FCC attempt to "put itself above the Congress."<sup>146</sup> Congress's outrage was dramatically expressed at oversight hearings, subsequent to the announced reexamination. Congressman John Bryant (D-Tex.) characterized working with the Commission as "almost pointless";<sup>147</sup> Congressman Mickey Leland (D-Tex.) referred to the need to draft "FCC proof"<sup>148</sup> legislation as well as the need to "fight this Commission tooth and nail";<sup>149</sup> and Congressman Edward Markey (D-Mass.) labelled the reexamination "a cloudburst in a storm of suspicion and distrust which seems to hover over this commission."<sup>150</sup> To stop the FCC reexamination in its tracks, Congress prohibited the FCC from expending any funds on the reexamination.<sup>151</sup>

## 2. Comparing the FCC to the EEOC

Congress was a formidable opponent of the FCC. In contrast to the EEOC where congressional threats could be dismissed, Congress took a proprietary interest in the FCC. The Commission's independent status was not simply symbolic protection from an aggressive executive; it was a license for Congress to exert its will upon FCC policy making.<sup>152</sup> For the Bush administration, telecommunications policy hinged on the reestablishment of a dialogue between the FCC and Congress. Bush sought to achieve this objective in many ways, including his sacrifice of ideological consistency on affirmative action. The Solicitor General could not ignore Bush administration efforts to normalize relations between Congress and the FCC. With the White

<sup>144</sup> See *id.*

<sup>145</sup> *In re* Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315, 1318 (Dec. 22, 1986).

<sup>146</sup> 133 CONG. REC. S5494 (daily ed. Apr. 24, 1987) (statement of Sen. Lautenberg).

<sup>147</sup> *Minority-Owned Broadcast Stations: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce on H.R. 5373*, 99th Cong., 2d Sess. 31 (1986).

<sup>148</sup> *Id.* at 20.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 22.

<sup>151</sup> Pub. L. No. 100-202, 101 Stat. 1329-1332 (1987).

<sup>152</sup> See Miller, *supra* note 18; Devins, *supra* note 18; Richard E. Wiley, "Political" Influence at the FCC, 1988 DUKE L.J. 280.

House both defending and opposing FCC preferences, it was appropriate that the Solicitor General too would sacrifice unitariness.

Department of Justice-FCC relations stand in dramatic contrast to Department of Justice-EEOC relations. The Justice Department, rather than endeavor to persuade the FCC that the government should speak the unitary voice of the Justice Department, empowered the FCC to speak its own voice. Indeed, not only were there no suggestions of the Justice Department seeking to assume FCC authority, the FCC was the entity that sought to assume power as a matter of right. Since both sets of conflicts involved race preference, the Justice Department's assumption of power in one case, and concession of power in the other, is all the more staggering.

Structural differences provide limited insight in explaining why the FCC fared so much better than the EEOC. Although the FCC is more insulated from the executive than the EEOC, and possesses quasi-legislative and quasi-adjudicatory powers, statutory grants of independent litigating authority favored the EEOC in *Williams* and went against the FCC in *Metro Broadcasting*. The principal difference between the EEOC and FCC, instead, appears to be the political will and culture of political expectations. *Williams* was a severe threat to the Justice Department's authority, with the Civil Rights Division having exclusive control over state and local cases. *Metro Broadcasting* did not directly implicate the Justice Department's authority. Congress's indifference to the EEOC's location in government and unwillingness to protect the EEOC also contributed to Department action in *Williams*. With respect to the FCC, Congress was an extremely active and extraordinarily territorial player. Indeed, it effectively forced the FCC to defend racial preferences through appropriations legislation and political pressures on the Bush White House. Bush's naming of pro-preference Commissioners, moreover, signalled the Justice Department to leave the FCC alone in *Metro Broadcasting*. In sharp contrast, the White House, in *Williams*, set up a meeting to pressure EEOC officials to comply with Department of Justice arguments. That the EEOC complied reveals another difference between *Williams* and *Metro Broadcasting*. The EEOC lacked a strong sense of its institutional identity. It linked itself to the executive in 1978 and could not easily toss aside those shackles in 1983. However, the FCC has always understood itself to be an independent agency.

Politics more than structure explains *Metro Broadcasting* as well as the differences between the FCC and EEOC. The failure of the government to speak a unitary voice in *Metro Broadcasting* also reveals that political compromise makes policy coordination espe-

cially difficult. Opposition to race preference did not lie at the heart of the Bush administration's telecommunications policy and consequently was easily sacrificed. Political tradeoffs, however, are anathema to unitary approaches. To the extent that political tradeoffs are inevitable, unitariness may well prove to be an elusive objective.

### 3. *The Postal Service*

The Postal Service operates as an "independent establishment of the executive branch."<sup>153</sup> The Board of Governors of the Postal Service, whose statutory charge is to "represent the public interest generally . . . not . . . specific interests[.]"<sup>154</sup> controls the Postal Service. Eleven voting governors serve staggered nine-year terms to ensure that no President can appoint more than four in a single term. Governors elect their own chair and appoint two of their own members—the Postmaster General and Deputy Postmaster General. The President's power is further weakened by the statutory requirement that no more than five (of the nine) presidential appointees can be "adherents of the same political party."<sup>155</sup> Most significant, the President can only remove governors "for cause."<sup>156</sup>

The Postal Service has some independent litigating authority, although the statutory division between the Department of Justice and Postal Service is murky. On rate-making disputes, the Postal Service has clear statutory authority to separate itself from the Justice Department and act independently in court.<sup>157</sup> On other matters, the statutory language is less clear. While requiring Attorney General consent to Postal Service litigation,<sup>158</sup> the Department of Justice provides the Postal Service with legal representation as it may require, and legislation requires that such legal representation be "deem[ed] appropriate" by the Service.<sup>159</sup>

Independent litigating authority in rate-making cases is critically important to the Service. Rate-making disputes pit the Postal Service against the Postal Rate Commission, an independent agency whose

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<sup>153</sup> 39 U.S.C. § 201 (1988).

<sup>154</sup> 39 U.S.C. § 202(a) (1988).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> 39 U.S.C. §§ 3625, 3628 (1988); 28 U.S.C. § 2348 (1988).

<sup>158</sup> 39 U.S.C. § 409(d) (1988).

<sup>159</sup> 39 U.S.C. § 411 (1988); 39 U.S.C. § 409(d) (1988). Court interpretations of § 409(d) are in conflict. Some support Postal Service control while others support Department of Justice control. *Compare* Leonard v. United States Postal Serv., 489 F.2d 814 (5th Cir. 1974) (supporting Postal Service authority) with Friedlander v. United States Postal Serv., 658 F. Supp. 95 (D.D.C. 1987) (supporting Justice Department authority).

litigation is entrusted to the Attorney General.<sup>160</sup> Specifically, when the Postal Service disagrees with Rate Commission decision making, it may either reject the decision outright or accept the decision under protest and then challenge it in court.<sup>161</sup> Under this scheme, courts serve as arbitrators of Service-Commission disputes in rate-making cases. Were the Attorney General to control Service representation, he would serve as gatekeeper to such dispute resolution and thereby could rule in favor of the Commission simply by declining to represent the Service in rate-making disputes.<sup>162</sup>

Disputes between the Commission and Service do arise. The question left unanswered is what role the Attorney General should play in inserting executive branch interests into Service-Commission dispute resolution. Bureaucratic theory demands adherence to the statutory design and allows both sides to settle their differences in court. In most instances, this is precisely the course taken by the Justice Department. The Department would either allow both sides to represent themselves or would present the Service's position and attach a memorandum setting forth the Commission's opposing view.<sup>163</sup>

Proponents of the unitary executive would follow a different course. Indeed, the congressionally envisioned scheme of two independent entities resolving their policy disputes through litigation titled *United States Postal Service v. United States Postal Rate Commission* is antithetical to unitary executive branch control. That this scheme also presupposes dutiful Justice Department representation of one of its independent agency clients is doubly offensive. How the Department would exercise its disapproval is a bit more complex. When the disagreement is with the Rate Commission, the Department can simply refuse to defend against the Postal Service action. On the other hand, when the disagreement is with the Service, the Department, aside from suggesting that the case is a nonjusticiable intragovernmental dispute,<sup>164</sup> can apparently do very little.

<sup>160</sup> The Commission, although designated an independent agency under 44 U.S.C. § 3502(10) (1992), has no special statutory litigation authority and therefore must look to the Attorney General for representation.

<sup>161</sup> 39 U.S.C. § 3625 (1988).

<sup>162</sup> The specification of Attorney General control over Rate Commission litigation creates exactly this dilemma. The Attorney General, apparently, can undermine Rate Commission decision making by refusing to defend the Commission against a Service challenge. At the same time, statutory language authorizing Postal Service challenges to Commission rate making arguably grant the Commission a right to independently defend their decision.

<sup>163</sup> See PRELIMINARY SURVEY, *supra* note 14, at 18.

<sup>164</sup> Courts thus far do not seem at all troubled about adjudicating disputes between the Service and the Commission. On the issue of intragovernmental litigation, see generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).



Not so. On September 25, 1992, the Justice Department advised the Postal Service that it could not represent itself in *Governors of the United States Postal Service v. Postal Rate Commission*, an ongoing Service-Commission rate-making dispute.<sup>165</sup> The Department argued that it should broker disputes between the Postal Service and the Rate Commission.<sup>166</sup> The Department of Justice's effort to become the government's unitary voice on postal rule making failed. On November 9, the Service filed its brief for the cases. The Justice Department was undeterred, filing a conflicting brief on behalf of the Postal Service.<sup>167</sup> At this point, the Justice Department sought to judicially challenge the Postal Service's authority to litigate this dispute on its own behalf. Like its efforts to flush the EEOC out of the *Williams* litigation, however, Justice first sought to accomplish its objectives through political means. Specifically, on December 11, 1992, George Bush sent a memorandum to Postmaster General Marvin Runyon "direct[ing]" the Postal Service to withdraw from its ongoing judicial dispute with the Rate Commission.<sup>168</sup> This presidential "directive" was undertaken "pursuant to [his] authority as Chief Executive and [his] obligation to take care that the laws are faithfully executed."<sup>169</sup> On the same day, the Justice Department filed a letter with the D.C. Circuit declaring that "the controversy has been resolved" and that the unauthorized filings of the Postal Service "will be withdrawn."<sup>170</sup> Three weeks later, on the very day that the Board of Governors was to vote on whether to comply with the directive, the President sent a letter to each governor threatening that if his directive was not complied with "[he would] if necessary exercise [his] authority to remove governors of the Postal Service."<sup>171</sup>

<sup>165</sup> See Motion of the United States Postal Service for Leave to Appear as a Party on its Own Behalf at 3, *Mail Order Ass'n of America v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993) (No. 91-1058); *Mail Order Ass'n*, 986 F.2d at 511. The Postal Service dispute with the Commission spawned two separate lawsuits—one suit involved a Postal Service challenge to the Commission, and the second suit concerned a private mailer challenge to the Service's opposition to Commission decision making. The Justice Department brief was filed in the second suit. The two suits were linked in the Postal Service's motion for self-representation.

<sup>166</sup> *Id.*

<sup>167</sup> The Justice Department brief endorsed Rate Commission decision making over Postal Service objections. Technically, the Rate Commission was not a party to the matter briefed by the Justice Department.

<sup>168</sup> Memorandum from President George Bush to Postmaster General Marvin Runyon (Dec. 11, 1992) (on file with the author).

<sup>169</sup> *Id.*

<sup>170</sup> Letter from Jacob M. Lewis, Civil Division Attorney, to Ron Garvin, Clerk, U.S. Court of Appeals for the D.C. Circuit (Dec. 11, 1992) (on file with the author).

<sup>171</sup> Letter from President George Bush to Bert Mackie, Governor, U.S. Postal Service (Jan. 4, 1993) (on file with the author).

These White House and Justice Department maneuverings were truly extraordinary. The President's assertion that he could "direct" Postal Service decision making was squarely grounded in his authority as "Chief Executive" over a unitary government. This bold assertion was the only option available to the President. The acknowledgement of Postal Service independence would have kept the issue in court where the Justice Department and Postal Service were prepared to battle over the Service's litigation authority. This was a dispute that the Justice Department was unlikely to win. The constitutionality of statutory grants of litigating authority to entities outside the President's control appears beyond question.<sup>172</sup> In other words, as was probably the case with *Williams*, the only way for the Executive to win this battle was to place political pressure on the Postal Service.

The Postal Service, however, is far more independent than the EEOC with respect both to structure and political expectations. Issues of concurrent jurisdiction and the intermingling of functions do not beset the Postal Service as they do the EEOC. Unlike the EEOC, moreover, the Postal Service performs quasi-legislative and quasi-judicatory tasks. In fact, the President is more constrained in his control of the Postal Service than of the FCC. The Board of Governors select their chair as well as the Postmaster and Deputy Postmaster Generals, the two officials principally responsible for the Service's day-to-day operations.<sup>173</sup> With the Postmaster and Deputy Postmaster Generals voting on most Board matters,<sup>174</sup> the President's direct influence over the Board is further diminished.

Congressional expectations of Postal Service independence also distinguish the Postal Service from the EEOC. In 1970, the Postal Service was, in the words of then President Richard Nixon, removed from the President's cabinet and made an "independent establishment . . . freed from direct political pressures."<sup>175</sup> To ensure "independen[ce] of ordinary legislative and executive supervision and

<sup>172</sup> See Olson, *supra* note 7; Attorney General as Chief Litigator, *supra* note 12; Devins, *supra* note 12. At the same time, Justice Department claims that the Postal Service was without statutory authority to represent its interests in court—although ultimately unsuccessful—were not without force. See Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 UCLA L. REV. (forthcoming Apr. 1994).

<sup>173</sup> Presidentially appointed governors serve in a part-time capacity, typically only a few days each month.

<sup>174</sup> Rate-making decisions are exclusively within the province of the Board.

<sup>175</sup> The President's Message to the Congress Recommending Postal Reorganization and Pay Legislation, 6 WEEKLY COMP. PRES. DOC. 532, 533 (Apr. 16, 1970).

control,"<sup>176</sup> as the Senate Report put it, the Board of Governors was exempted from "Federal laws . . . which in most instances apply to Government agencies and functions."<sup>177</sup> The House Report likewise noted that the 1970 Reorganization "seals off the Postal Service from political influence . . . by establishing institutional buffers between the President and the Congress . . ."<sup>178</sup> Congress then envisioned a Postal Service with greater independence from outside control than either the EEOC or FCC. The 1970 Postal Reorganization, unlike the executive initiated and legislatively approved 1978 EEOC Reorganization, removed the Postal Service and its functions from partisan influence.

The Postal Service response to the President's directive matched its structure and political expectations. Although nearly breaking in the face of intense White House pressure, the Service ultimately held its own. By a 6-5 vote, the Board of Governors refused to withdraw its self-representation motion.<sup>179</sup> Instead, on January 7, 1993, the noncomplying governors successfully sought a preliminary injunction against the President, blocking their threatened removal.<sup>180</sup> Moreover, before the President could successfully stack the governors in his favor with a questionable recess appointment,<sup>181</sup> the D.C. Circuit heard arguments on Postal Service self-representation (on January 14) and decided (on January 15) that the Postal Service had a right to have its views aired on rate-making matters.<sup>182</sup>

The failure of the White House's unitariness campaign in this instance is due to both structure and politics. Structural limitations on the President's removal authority, the absence of any presidential role in selecting two governors (the Postmaster General and Deputy

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<sup>176</sup> POSTAL REORGANIZATION, S. REP. NO. 912, 91st Cong., 2d Sess. 4 (1970).

<sup>177</sup> *Id.* at 5.

<sup>178</sup> POSTAL REORGANIZATION AND SALARY ADJUSTMENT ACT OF 1970, H.R. REP. NO. 1104, 91st Cong., 2d Sess. 13 (1970).

<sup>179</sup> See Bill McAllister, *Divided Postal Board Seeks to Forestall Firings*, WASH. POST, Jan. 6, 1993, at A15; Michael York, *Bush Blocked from Firing Postal Board*, WASH. POST, Jan. 8, 1993, at A1. The vote was 7-4 but one of the majority Governors changed his vote the day after the original vote.

<sup>180</sup> See York, *supra* note 179.

<sup>181</sup> See Michael York & Stephen Barr, *Bush Appoints Supporter in Postal Board Dispute*, WASH. POST, Jan. 9, 1993, at A1. The suspect nature of this recess appointment is revealed in a letter sent by Senate leaders to President Bush, as well as in papers filed by Postal Service Governors in court. See Letter from George Mitchell et al. to President George Bush (Jan. 12, 1993) (on file with author); Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Temporary Restraining Order, Bert H. Mackie et al. v. George Bush and Thomas Ludlow Ashley, Civ. No. 93-0032-LFO (Jan. 15, 1993). On July 24, 1993, D.C. District Judge John Oberdorfer invalidated the recess appointment. Bill McAllister, *Bush's Recess Appointment Voided*, WASH. POST, July 26, 1993, at A15.

<sup>182</sup> See Bill McAllister, *Appeals Court Rejects Bush's Assertion of Control Over Postal Service*, WASH. POST, Jan. 16, 1993, at A6.

Postmaster General), and a statutory grant of independent litigating authority, bolstered the Postal Service position. The closeness of the governors' vote, however, reveals that the President was nearly successful despite these structural constraints. In fact, a majority of five of the nine presidentially-appointed governors voted to comply with the directive.<sup>183</sup> A majority of six of the eleven governors, moreover, would have voted to follow the directive had the President filled a vacancy on the Board of Governors in a timely fashion.<sup>184</sup>

The Bush administration's failure to succeed in the Postal Service dispute is largely attributable to poor political judgment. The President should not have waited until a crisis emerged before he sought to fill a Board vacancy. This sluggishness certainly limited his influence over the governors. Even more striking was the horrendous timing of the President's directive. Rather than lay the foundation for its opposition to independent Postal Service advocacy at roughly the time that the Service filed its claim, the administration waited almost twenty months before launching its offensive. The D.C. Circuit expressed disapproval of this foot dragging in an order on December 8, 1992, and it is unlikely that these stall tactics enamored the Service's Board of Governors.<sup>185</sup>

The Bush directive also came a month after his electoral defeat. The brevity of his remaining time in office certainly cabined the President's ability to work his political will. For example, if the President had more time, he could have engaged the governors in some type of dialogue before resorting to the threat of removal. By threatening removal and naming a recess appointee in his last days in office, the White House action was the subject of sharp attack in the press and in Congress.<sup>186</sup> Whether this political firestorm enhanced Postal Service resistance or made the D.C. Circuit skeptical of Department of Justice arguments is hard to know; what is clear is that this political firestorm did not help the President.

The Postal Service dispute, like the EEOC and FCC disputes, is one of politics. Structure, undoubtedly, also played a tremendous role in shaping the tugs and pulls between the Postal Service and the

<sup>183</sup> A fifth governor, Tirso Del Junco, voted to follow the directive on January 7, 1993. McAllister, *supra* note 179.

<sup>184</sup> This assertion assumes that in the fall of 1992, the President would have appointed and the Senate confirmed a governor willing to comply with the directive.

<sup>185</sup> *Mail Order Assoc. of Amer. v. Postal Serv.*, 986 F.2d 509, 512 (D.C. Cir. 1993).

<sup>186</sup> See Letter to the President from George Mitchell et al. (Jan. 12, 1993) (on file with author); Anthony Lewis, *Abroad at Home: Two Cents Plain*, N.Y. TIMES, Jan. 11, 1993, at A17; *Tempest in an Envelope*, WASH. POST, Jan. 9, 1993, at A20.



White House. Yet, the story of Postal Service independence turns on the effective exercise of political will—or its absence.

### III. CONCLUSION

The paradigm of agency independence which naturally follows from these case studies holds interesting implications for all types of federal agencies. It suggests that agency independence is necessarily qualified. Independence from the executive may mean dependence upon the Congress. Furthermore, independence from the executive, may be temporal—depending on shifting White House attitudes towards unitariness or competing policy demands that yield disunitariness in interpretation.

The EEOC example should serve as a warning to independent federal agencies that their ability to assert their independence is by no means secure. While few agencies will face the identity crisis that the EEOC did, the EEOC case suggests that even those agencies that feel generally secure in their independent status may on occasion be unable to voice that independence if faced with an executive assertion of power and a congressional failure to act.

The FCC and Postal Service examples, in contrast, point to limits on the executive's ability to speak a unitary voice. The FCC overcame structural limitations and asserted its own position in *Metro Broadcasting* thanks to competing policy agendas within the Bush White House. The Postal Service withstood a furious White House effort to sap its independent litigating authority because the President's plan was unsystematic in design and frantic in its execution.

The sagas of the EEOC, FCC, and Postal Service indicate that agency independence is a fluid and slippery thing. Certainly, structural analysis of federal agencies fails to do justice to the power of politics and the politics of power. These studies suggest a model of agency analysis which emphasizes the complex dynamics that characterize the administrative state.